

Chapter XXXVII

Comment: Developing the Environmental Law of Armed Conflict

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My reaction to the excellent papers presented today is quite simple: I agree with much of what was said.

Since Ivan Shearer has helpfully summarized Glen Plant's classifications of the various positions on the issue,¹ let me say that the views I expressed to the United States Senate in 1991 place me mainly in the first camp.² But I am willing to find practical ways to accommodate the objectives of those in the second camp. And I am ready to be persuaded by partisans of the third camp on specific points.

That, I suppose, makes me a partisan of what Lucius Caffisch called the "Goldblat Doctrine," namely "to build upon what exists already and . . . show a certain realism in doing so."³ We should bear in mind that almost 20 years ago, the Stockholm International Peace Research Institute study already warned that military disruption of the environment is exceedingly difficult to limit or control by legal instruments.⁴

In this regard, I am not sure that all of the speakers on the panel would attach as much significance as I do to three points:

1) Because armed conflict is always bad for the environment, any text attempting to deal with the full problem of environmental restraints on armed conflict in a simple and sweeping peremptory fashion is likely to force a choice between the obvious and the fanciful.

2) We must be cautious about perverse effects. The practical impact of a particular protective legal rule may be to increase the likelihood of undesirable damage, for example by encouraging the militarization of a site that would not otherwise have been a profitable object of attack.

3) We should not confuse the *jus in bello* with the *jus ad bellum*. Whatever the intent, I believe the fourth camp cannot easily satisfy these criteria. For example, let me quote from Sebia Hawkins' comments on behalf of the Greenpeace position before the American Society of International Law in 1991:

Greenpeace believes that a Geneva Convention on the Protection of the Environment in Time of Armed Conflict would provide an ideal vehicle for persuading nations that modern warfare exacts too high of a price on the environment . . . ; and that consequently, warfare is an untenable proposition for conflict resolution.⁵

This is clearly the stuff of public education and the *jus ad bellum*, but not the *jus in bello*. To prohibit environmental damage is to prohibit armed conflict, and thus not only to alter the *jus ad bellum* but to contradict the underlying thesis of the United Nations Charter about the means necessary to maintain and restore international peace and security.⁶ If Elisabeth Mann-Borgese is correct that “the worst of all polluters is war,”⁷ then we should be seeking to strengthen the UN Charter system for deterring war, not redrafting the Kellogg-Briand Pact.⁸

As to the second camp, let me distinguish between two issues. The first issue concerns the customary law status of various treaty rules dealing with the law of armed conflict. The debate engages a few controversial provisions of the 1977 Additional Protocols, including Articles 35(3) and 55 of Protocol I.⁹ I think a disservice is done to the credibility of international law when writers conclude that these provisions are declaratory of customary law without considering the impact, for example, of the statements of U.S. Government officials¹⁰ or the French reservation in connection with its signature of the 1981 Conventional Weapons Convention.¹¹ But on the other hand, I can imagine more promising strategies for influencing the interpretation of Additional Protocol I than rejecting the Protocol and relying on a strict consensual view of customary law.

The second issue concerns the effect of environmental treaties that do not deal with the law of armed conflict as such. Here a double leap is sometimes made. First, the treaty rule is stated to be declaratory of a similar or even broader rule of customary law. Second, the principle of environmental law so derived is stated to be applicable without qualification under all circumstances, including armed conflict—and perhaps even to be non-derogable because it is an obligation *erga omnes* that protects a basic public interest of all humanity.

Articles 192 and 194 of the 1982 United Nations Convention on the Law of the Sea are sometimes invoked in this process.¹² Article 192 declares, “States have the obligation to protect and preserve the marine environment.” Article 194 requires States to “take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment.”

Article 192 was the very first, and remains the only, statement of a comprehensive and unqualified environmental duty of States in a widely ratified treaty. The Article 192 that I helped to negotiate was the principled foundation for a much more detailed body of rules that follow it, explicating its meaning and effect. Not one of those rules even mentions armed conflict. Quite to the contrary, Article 236 declares that the environmental provisions of the Convention do not apply to warships or military aircraft, subject to a more flexible duty to “ensure, by the adoption of appropriate measures not impairing operations or operational capabilities . . . , that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this

Convention.” Participants in this Symposium might regard this formulation as a rough peacetime analog of the necessity and proportionality principles.

The Article 192 encountered in some of the literature on the subject of environmental protection during armed conflict (but not the papers presented on this panel) is treated as evidence of an unqualified environmental duty under customary law applicable to all of the environment, not just the marine environment. This is something that neither the Stockholm Conference in 1972 nor the Rio Conference in 1992 achieved even in a non-binding instrument. Article 192 is extracted from its detailed context, and set loose as an autonomous principle inviting a process of deductive reasoning informed by the policy preferences of the author. The principle, as such, is declared to restrain all armed forces in the event of armed conflict, without regard to the necessity or proportionality principles, while Article 192 itself does not have this effect even in time of peace.

The problem here is that the argument is being pressed too far. A basic difficulty with such a move is aptly stated by Justice Feliciano: “invocation of the general principles reflected in Articles 192 and 194 of the 1982 Convention needs to be complemented by reference to applicable principles and norms of the law of war.”¹³

I agree that general environmental law and environmental treaties are relevant to the law of armed conflict. They inform our understanding of the most general rules of the law of armed conflict, such as the Martens Clause.¹⁴ They also inform our understanding of many specific rules such as those designed to protect civilians, civilian objects, and property. But absent a clear indication of a contrary intent, they do not limit the rights and duties of States under Chapter VII of the U.N. Charter or override the basic principles of the law of armed conflict itself, in particular the principles of necessity and proportionality. I think the U.N. General Assembly got it right when it relied on those principles to declare that “destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law.”¹⁵

There are absolute limitations on armed conflict that are not subject to the necessity and proportionality principles, although typically they are in fact influenced by those principles. Such absolute limitations are quite carefully negotiated and circumscribed. That is the explanation for the limited scope of both the ENMOD Convention¹⁶ and Article 35(3) of the 1977 Additional Protocol I, not any general lack of sensitivity to environmental values. It simply stretches credulity to maintain that environmental treaties not negotiated with a view to regulating armed conflict also impose absolute limitations not subject to the necessity and proportionality principles. For similar reasons, I do not think it is quite as easy to transport Article 194 of the Law of the Sea Convention or other environmental rules in unqualified form into the rule declaring neutral territory inviolable as Professor Bothe,¹⁷ Justice Feliciano,¹⁸ and some others seem to believe.

My difficulties with some efforts to apply general environmental law and treaties directly to armed conflict are largely related to my concerns for the integrity and credibility of international law generally, and the law of armed conflict in particular. But there is also another reason for caution. General environmental law is still in its infancy, and needs to grow. It is hard enough to negotiate useful general environmental treaties without inviting the military organizations of the world to worry about the effect of those proposed treaties on the law of armed conflict. Some arguments being advanced about the effect of general environmental treaties on armed conflict are more likely to impede the development of general environmental law than to achieve any significant additional protection for the environment in the event of armed conflict.

This does not mean the law of armed conflict should ignore useful ideas from other branches of international law. Environmental law, including the Law of the Sea Convention, makes clear that the environmental duties of a State include activities in its own territory. Dieter Fleck points out that the venerable and time-tested law of the sea principle of “reasonable regard” or “due regard” for the interests of others influenced the formulation of the rule in Section 44 of the 1994 San Remo Manual that “[m]ethods and means of warfare should be employed with due regard for the natural environment.”¹⁹ John McNeill clearly demonstrated the command and control implications of this principle when he stated that “the world community has every right to expect that concerns for the well-being of the environment will be taken into account by those planning and executing military operations.”²⁰ Implicit in his remarks, and in Conrad Harper’s on Monday, was another important, often respected, but rarely articulated implication of the “due regard” principle: Consult your lawyer early and often.

Just as many substantive maritime rules and treaties build upon the “due regard” principle in order to provide more specific guidance, so we can imagine a similar gradual development in the law of armed conflict rooted in the “due regard” principle. Thus, for example, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict prohibits both militarization and attack.²¹ Why not use a similar approach to protect uniquely valuable parts of the natural heritage from destructive attack? The type of treaty I have in mind would require the State in control to avoid militarizing or otherwise making designated environmentally sensitive sites inviting targets and, in this context, would prohibit attack completely.²²

The very process of thinking about what would be needed to implement this idea would have the felicitous effect of forcing the mind to focus on the practical issues that must inform the law of armed conflict. We would need criteria for choosing sites that emphasize unique environmental values and exclude substantial military implications. We would need strong international review procedures for designating sites and would need to consider according each State

the right to reject designation of a site in a timely fashion. If the object is to prohibit attack entirely on the grounds that there are no activities or facilities at the site that may make it a tempting target, then we need to consider some process of verification.

I have no doubt that some military planners in the room are already worrying about the operational implications of this idea. That is their job. But we may be able to start developing a list of places whose extraordinary environmental sensitivity is such that, even if the place were militarized by an adversary, a decision regarding whether and how to attack would be difficult. In that case, demilitarization of a site may be a more balanced result than unilateral restraint. It helps ensure that both sides bear the burden of protecting the area, and that environmentally sensitive areas are not used as a practical sanctuary for military assets.

I do not suggest that all of this would be easy. We could start, for example, by considering only those areas on land that are already designated parks or refuges where most ordinary peacetime activity is already prohibited or very strictly limited to scientific research and recreation. We might defer dealing with maritime areas because they pose special problems regarding international navigation and communication. In this regard, as in many others, I think the balance of the Antarctic Treaty²³ is a useful source of general inspiration, although what I have in mind are of course very much smaller, less remote and more diverse areas.

Finally, let me add my voice to that of Professor Meron²⁴ and others who are frustrated by the state of the law with respect to non-international armed conflict. Again, I believe that attempts to incorporate general environmental law in unqualified form will not work, and that it is better to look to the law of armed conflict for the necessary qualifications than it is to look to the environmental norms themselves, or to the law of treaties, for those qualifications. But it does seem to me that, at least with respect to the designation of unique environmental sites that may not be made inviting objects of attack, and that accordingly may not be attacked, there may be some possibility for avoiding the distinction based on the type of armed conflict because use of the area would be severely restricted in times of peace as well.

In sum, I believe a consensus can be built around Paul Szasz' aptly stated view that nature is no longer fair game in mankind's conflicts.²⁵ We should seek practical ways to give effect to that principle, including those outlined by Hans-Peter Gasser.²⁶ That, in itself, would be no mean achievement.

Notes

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1. Shearer, *The Debate to Assess the Need for New International Accords*, *supra* Chap. XXXIV at 546.
2. Oxman, *Environmental Warfare*, 22 *Ocean Dev. Int'l L.* 433 (1991) (based on a statement of July 11, 1991 before the Gulf Protection Task Force, Committee on the Environment and Public Works, United States Senate).
3. See Baker, *Legal Protections for the Environment in Times of Armed Conflict*, 33 *Va. J. Int'l L.* 351, 380 n.144 (1993).

4. Stockholm International Peace Research Institute, *Ecological Consequences of the Second Indochina War* 88-9 (1976).
5. Hawkins, *The Gulf War: Environment as a Weapon*, 1991 Proc. 85th Ann. Meeting Am. Soc'y Int'l L. 214, 220-21 (1991).
6. See U.N. CHARTER ch. VII.
7. Mann-Borgese, *The Protection of the Marine Environment in the Case of War*, in *THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT* (Dupuy ed. 1985) at 105, 106 .
8. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 2 Bev. 732; 94 L.N.T.S. 57.
9. Protocol I Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 [hereinafter Additional Protocol I].
10. See Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. Univ. J. Int'l L. & Policy 419 (1987); McNeill, *Protection of the Environment in Times of Armed Conflict: Environmental Protection in Military Practice*, *supra* Chap. XXXIII at 536.
11. ROBERTS & GUELFF, *DOCUMENTS ON THE LAWS OF WAR* (2d ed. 1989) at 488.
12. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, U.N. Sales. No. E.83.V.5 (1983), and Senate Treaty Doc. 103-39 (1994).
13. Feliciano, *Marine Pollution and Spoilation of Natural Resources as War Measures: A Note on Some International Law Problems in the Gulf War*, 14 Hous. J. Int'l L. 483, 498 (1992).
14. The original formulation of the Martens Clause appeared in the Preamble to the 1899 Hague Convention II: Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience.
ROBERTS & GUELFF, *supra* n. 11, at 4. The idea is repeated in the 1907 Hague Convention IV, each of the 1949 Geneva Conventions, both 1977 Additional Protocols, and the 1981 Conventional Weapons Convention.
15. Protection of the Environment in Times of Armed Conflict, G.A. Res. 47/37, U.N. GAOR, 47th Sess., at 2, U.N. Doc.A/RES/47/37 (1992).
16. Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333.
17. Bothe, *The Protection of the Environment in Time of Armed Conflict: Legal Rules, Uncertainty, Deficiencies & Possible Developments*, 34 Germ. Y.B. Int'l L. 54, 59-62 (1991).
18. Feliciano, *supra* n. 13, at 497-98.
19. Fleck, *Protection of the Environment During Armed Conflict and Other Military Operations: The Way Ahead*, *supra*, Chap. XXXII at 530.
20. McNeill, *supra* n. 10.
21. Convention for the Protection of Cultural Property in the Event of Armed Conflict and Protocol, May 14, 1954, 249 U.N.T.S. 215.
22. The idea finds support in article 58(c) of Additional Protocol I, but the procedure contemplated differs from that set forth in Article 60 of that Protocol.
23. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794; 402 U.N.T.S. 71.
24. Meron, *Comments for the Panel on Protection of the Environment During Non-International Armed Conflicts*, Chap. XX, at 353.
25. Szasz, *The Gulf War: Environment as a Weapon*, 1991 Proc. 85th Ann. Meeting Am. Soc'y Int'l L. 214, 217 (1991).
26. Gasser, *supra*, Chap. XXXI at 528-30.