

## Chapter XXXIX

### Concluding Remarks

Professor John Norton Moore

**Professor Jack Grunawalt, Naval War College:** We have now arrived at one of the most significant segments of this program. It is a great privilege to have Professor John Norton Moore address us today. I would also like to take this opportunity to welcome Barbara Moore to Newport. Barbara, I hope we see you up here more often.

John, I have been present on any number of occasions where you have been introduced to gatherings, large and small. I can recall only one set of introductions that came even half-way close to being adequate. Unfortunately, it was half an hour in duration. We do not have quite that much time, so in keeping with the standards that we have been holding to throughout our deliberations, I will keep these remarks short. John is certainly very well known to all of us, but I will quickly mention that he is the Walter L. Brown Professor of Law at the University of Virginia. He is the Director of the Center for Oceans Law and Policy, and of the Center for National Security Law at that institution. John is also the former Director of the Graduate Law Program at Virginia, which he chaired for over twenty years. As you are all fully aware, he has held any number of critical positions within the United States Government, whether in a consultative role, or as chairman or special counsel. The list of his titles, positions and accomplishments over the years, as I was remarking the other day, exceeds in length the credits for the movie "Gone With the Wind." Without further ado, I just want to say it is indeed, John, a distinct pleasure and a great privilege for me to present you to our conferees. Ladies and gentlemen, our concluding speaker, Professor John Norton Moore.

**Professor John Norton Moore, University of Virginia:** Professor Grunawalt and distinguished participants, it is a special pleasure for me to be with you at the Naval War College. This College has a long and distinguished record of contributions to international law and this conference is yet another milestone in that record. I believe Admiral Stark, Dean Wood and Professor Grunawalt can be justly proud of their College on this occasion, and also of their own great personal contribution to that record over the years.

Our task, both at this conference and in its aftermath, is to enhance the rule of law to lessen environmental damage in war. In focusing these concluding

comments, I would like to close the circle and take you back to the opening comments of Conrad Harper, Legal Advisor to the United States Department of State, in his excellent paper, with which I strongly agree. You will recall that Mr. Harper suggested that the principal task before us in enhancing the rule of law in this area is compliance with the existing legal regime, and not in simply further tweaking the normative system.

Now that does not mean that we should not focus on education and on providing guidance to militaries all over the world more effectively than has been done in some countries. Nor does it mean we should not seek to work in every way possible to make the law in this area more visible. But it does suggest that the core issue is not an endless continuing effort to devise new norms, but rather it is to ensure compliance with existing norms.

The genesis of this conference, as well as many others over the past five years, is well known to all of us. It was the shocking and massive oil dump, not spill, in the Persian Gulf by Saddam Hussein, and the torching of oil wells in that conflict. I will not repeat all of the details here of the dumping of oil that was 42 times larger than the *Exxon Valdez* spill off Alaska, or of the torching of over 700 wells that took eight months to extinguish. Let me suggest, however, that when you walk through those burning fields, as I did a few days after the end of the war, it was an altogether different feeling and experience than simply talking about them here. There was the feeling of an extraordinary environmental disaster and an extraordinary and shocking violation of the laws of war.

Rather interestingly, in the aftermath of this conflict, instead of a clarity of voice in the international community that clearly pointed the finger at the perpetrators of this harm and specified with the same clarity which provisions of international law were violated, much of the public debate instead focused on the following two premises:

First was the premise that massive ecocide is simply "inherent in modern warfare." The implication being that there is really no point in trying to fix responsibility. Second, was that a new "Fifth Geneva Convention," or perhaps some more modest changes in the law, would fill the existing lacuna, which presumably had caused this harm, and would deal with the ambiguity that presumably, if closed, would resolve the problem.

In addition to their logical inconsistency with each other, both premises are remarkable for their falsity. There is nothing, if we look at the first premise, inherent in modern warfare that indicates anyone needed to torch the wells in Kuwait or was required to intentionally dump 42 *Exxon Valdez*'s into the Persian Gulf. Anyone who is generally familiar with the development in this area from World War II through the Korean War up to the Gulf War, understands that despite the enormous potential for destruction, especially with the newer weapons that we have in our military arsenals, there actually has been movement toward

greater discrimination in targeting that is unmistakable. The Gulf War was a very good example of precisely that.

Nor were these events in any way the responsibility of the United Nations Security Council-authorized Coalition. The question of legal violation by the Iraqi high command was absolutely clear. We need not get into the debate about the proper interpretation of the ENMOD Convention or Additional Protocol I, to understand that those actions were in clear violation of the Hague Rules and, almost certainly, the Fourth Geneva Convention. There is no real debate about the illegality of what happened.

Indeed, I would argue that the totality of the evidence as to why Saddam Hussein chose to carry out these shocking actions is exactly as Jack McNeill indicated in his paper. This ecocide did not involve serious war-fighting of any kind. This was not about the fighting of a war. It was an effort to hold hostage the environment of the Gulf and the resources of Kuwait in the hope that by doing so, Saddam Hussein would be able to deter the Security Council-authorized defensive response against his aggression.

That is what I think is properly called: “environmental terrorism.” This was not war-fighting. We could go into all the details if you would like. I have seen much of the fascinating and telling evidence of when and where the charges were placed for example—which was very early in the occupation—which corroborates the notion of intentionally blowing the wells below the well head so that they could not be shut off, and a variety of other bits of evidence that this was not war-fighting or something inherent in war. This was environmental terrorism by a person whose principal *modus vivendi* in the world is, in fact, terrorism. It was an effort at a bluff that did not work. Sadly, it had horrific consequences for the Gulf.

Now, let me turn to the second premise. Does anyone believe that a man who intentionally violated the non-aggression provisions of the United Nations Charter, who ignored multiple binding Security Council Resolutions demanding Iraq’s withdrawal from Kuwait, who was violating the Nuclear Non-Proliferation Treaty and the Safeguards Agreement, who was violating the customary international law prohibitions underlying the 1972 Biological Weapons Convention, and who was engaged in multiple, explicit and clear violations of the Third and Fourth Geneva Conventions, among other points, would somehow have been deterred and would have said: “I would not have done these things if you simply had a Fifth Geneva Convention?” Does anyone seriously believe that Saddam Hussein was simply mistaken about the permissibility of his actions; that it was really all a matter of ambiguity in the law, and if only his lawyers would have told him correctly, he would not have undertaken any of these actions?

Those who call for a “Fifth Geneva Convention” as the cure-all for protecting the environment during armed conflict are avoiding responsibility for taking action against Iraq for its absolutely blatant violations of existing law. Sadly, those

false conclusions, paradoxically in opposition to the intention of those that put them forward, have, I believe, severely enhanced the risk of further environmental destruction in these settings, enhanced the risk of additional aggression, and reduced the potential for the guilty parties to shoulder responsibility for those violations.

Let us think about it for a moment. If war itself were responsible, we would have no need to pursue the responsibility of either side for violations of community norms. If war itself were responsible, then those acting in defense, simply by virtue of the fact they are acting under the United Nations Charter to prohibit aggression—to stop the aggression or to defend against the aggression—presumably are as equally responsible for all ensuing damage as those that institute the aggression. If it is ambiguity in the law that is responsible, then there is no basis for pursuing individual responsibility or for developing a compliance policy.

The reality is absolutely in opposition to those premises and the false conclusions drawn from them. As such, those premises have done a great deal of mischief. The Holocaust did not happen because of some kind of legal ambiguity. The genocide perpetrated by Pol Pot in Cambodia did not happen as a result of some kind of legal ambiguity. The series of violations of the Third and Fourth Geneva Conventions, the systematic torture of Coalition POWs, and the systematic torture of men, women and children in the occupied areas of Kuwait did not occur because of some kind of uncertainty about the law.

I would like to paraphrase a statement the current Commander in Chief of the United States made during the presidential election campaign. You will recall that he said: “It is the economy, stupid!” I am going to be a little more diplomatic because my comments are not addressed to the participants in this Symposium who I know fully understand these points. I am going to simply say that the real problem in enhancing the rule of law in this area is “compliance!”

Now a few comments about the problem of compliance; about the compliance side of the equation and where we need to go in enhancing the rule of law. The first relates to this question of what should be done about the norms. Is there a need to further tweak the norms in this area? I think the cautionary statements we have heard from many of the participants in this conference are very apt.

I was struck by the case that Professor Oxman made to the effect that if we do this wrong, it will inhibit the effectiveness of very important defensive responses against aggression. Maintaining the right of our military to effectively defend our Nation and enhance the U.N. Charter principles is important. If we get it wrong in this area, we have the potential to shoot ourselves in the foot. I think Bernie is correct in that.

I have also been struck by some of the debate in the law reviews. Confusion exists between the differences in the ENMOD Convention, which is primarily an arms control treaty, and Additional Protocol I, which is primarily a law of war

treaty. It is entirely appropriate in a setting which is focused on banning new kinds of weapons, to have a fairly low-standard for the impact of those weapons on the environment. On the other hand, where you are dealing with a totality of existing weapons and how they might be affected, with all of the kinds of contextuality that Admiral Doyle indicated, one might want to have a far higher threshold in terms of triggering of the conventions and ultimately proving potential criminal responsibility. And the latter, I think, is very important as well. If we end up with standards that are extremely vague, instead of concentrating on the most important and outrageous violations, I think we would do potential harm to the compliance side. How are we going to embrace the idea of personal criminal responsibility for members of the military, for example, in settings in which the standards are extraordinarily vague and unclear. I think States would rightly resist that. And the result is that if we are too broad in what we write, the “perfect” becomes the enemy of the “good” and the enemy of critically needed compliance.

My second point is that we should not believe that this issue of compliance is unique. This is, sadly, a critical part of the strengthening of international law today, right across the board, and emphatically in the laws of war generally. The notion of systematic violations of the Third Geneva Convention and the systematic torturing of POWs in virtually every war that we have seen in the last 20 years, is something that deserves our attention and suggests that there is something fundamentally wrong; that we need a compliance policy. I personally believe that international law in general, as well as international lawyers, are beginning to understand the compliance side and are prepared to stop the endless debate with the realists in which we have to prove that international law exists. Of course it exists! The rule of law is critically important and we must get on with the task of compliance.

There is a third point to be made about compliance. The reality is that the system that we are in, the system of international affairs, is a decentralized international system that depends primarily on the effectiveness of individual State actions and a network of reciprocities and counter-reciprocities. This is not to argue against efforts that we obviously need to pursue, through time, to strengthen international community mechanisms for enforcement. It is to strongly urge, however, that we not say compliance is impossible now and has to await some kind of international criminal tribunal or some other kind of panacea that presumably is going to arrive tomorrow, but tomorrow never comes.

Another point that is terribly important in dealing with compliance is that we have a great deal of new information today from the War in the Gulf about the causes of war and about where these violations are coming from—both the aggressive attack and in the setting of the violations of the laws of war broadly. I teach a new seminar in this area, and much of the materials I use came out of my work over a period of years trying to set up and run the U.S. Institute of Peace. We

held hearings which included the best people from all over the world, asking what is the state of human knowledge about where wars come from and what can we do about it? Not surprisingly, there is a great deal that we do not know. But there is new information that is beginning to emerge that is very relevant to compliance. It relates to things that came out of the statistical data about something called the "democratic peace:" and something called "demicide." We were shocked when we discovered that totalitarian regimes were slaughtering their own people at a rate that far exceeded total war casualties throughout the 20th Century, including the Holocaust of World War II.

We began to learn a number of things: One is that non-democratic regimes, particularly totalitarian regime élites and vanguard parties, are often out of control aggressors. There is something inherent in the nature of government failure in those systems which suggests a propensity for major violations of community norms. When that happens, external deterrence is the only thing that will ensure compliance, that will deter war in the first place, and, if deterrence fails, curtail violations of the laws of war such as the manner in which we prevented Saddam Hussein from using the biological and chemical weapons that he possessed.

There are two corollaries that have come out of this in terms of our focus on these points. One is that we have to start asking questions about law and the legal system in deterrence terms. To what extent is the existing law serving as a modality to deter those States that are prepared to undertake these activities. That, by the way, has two sides to it. The critical element here is that you have to treat aggression and defense differently. If you had a legal setting that, in its net effect, restrains the law-abiding defensive side, and the aggressor is simply prepared to ignore it all, law actually may be a cipher or it may even be a negative, in terms of really avoiding war or brutalities. This is a serious issue that we as lawyers really have to look at.

The second corollary is equally interesting and perhaps more promising. We are beginning to learn that in the application of deterrence, it is not States as a whole that are aggressors. It is not Iraq as a whole. It is not the Iraqi people as a whole. The Iraqi people as a whole are not somehow uniquely evil in terms of what has been happening in the Gulf any more than the German people were inherently evil as a result of what happened in World War II. Rather, what is going on is the mechanism of government failure. Regime élites are making those decisions and imposing the costs of them on their own populations. In fact, they tend to slaughter their own population as well. Saddam Hussein is slaughtering his own people at a rate after the war that is probably something like one to two times the entire casualties, and maybe considerably higher, than were incurred in the war itself. The Iraqi regime fits the model perfectly that we are beginning to see from a lot of this empirical data. What that suggests is that deterrence modalities that focus

on the regime's elite may, in many respects, be one of the more promising ways to begin to look at compliance.

Now, let me just give you another way to think about this, that comes from an entirely different theoretical perspective, but reaches exactly the same conclusion. That is the recent literature on the question of trying to promote cooperation. How do you generally promote cooperation, in settings economists call the "prisoners dilemma," which sadly is a reasonably good description of much of the international system. There is no centralized Government to effectively require both parties to a dispute to agree to play by certain rules for their best interests. There are incentives to cheat, such as Saddam Hussein's conclusion that he could gain a leg up on the Security Council-authorized Coalition by exploiting the Coalition's environmental concerns. Raising environmental consideration to an important level would, in Saddam Hussein's calculus, prevent the Coalition from doing anything once they saw what he was prepared to do in the Gulf.

Now, what in that setting has some of the work suggested? The most provocative work has been done by Professor Robert Axelrod who, a few years ago, did a book on promoting cooperation in which he suggested to a whole series of social scientists that they participate in a computer game designed to compete one with another to tell us what would work best in promoting cooperation. Some of the country's top economists, game theorists, statisticians, mathematicians and others submitted programs. They went through two iterations. On both occasions, a very simple program won. That program was called: "tit-for-tat." It was very simple. You try to cooperate. You work on it. And when you are met with the first instance of serious non-cooperation, you respond with serious non-cooperation. That obviously does not mean, in terms of what we are talking about that you destroy the environment on the other side. It does mean that deterrence again is the key. If you want to promote compliance with international law, cooperation with the rules, we have to focus on deterrence. That is a central message for the future. Now let me give you one example of that: the dumping of oil by Saddam Hussein into the Gulf, roughly 470 million barrels of oil, was the largest in human history. My estimates, from the top scientists at the National Oceanic and Atmospheric Administration, suggest it was two and a half times larger than anything else in human history. What was the second largest? It involved about 176 million gallons of oil and was a tie between the out of control IXTOC well in the Gulf of Mexico, which was an accident, and Saddam Hussein's air strike on the Iranian oil cargo loading area, during the Tanker War, presumably once again with the intent to cause a massive flood of oil into the Gulf. Now what would have happened if the international community had responded strongly at the time of this first Saddam Hussein action? What "tit-for-tat" theory tells us, indeed the author of the book argues that is what even *evolution* tells us, is that what is successful will be repeated. What I suggest is, of course, not quite that simple. But the point is

that “tit-for-tat” is a terribly powerful mechanism. We have to consider that the key to compliance is deterrence.

Now, let me go on to the final point here which is about process—about how we proceed. Let us set up, within national governments, compliance task forces to look at this question and come up with a range of possible solutions to it. Let us get together with our friends and allies internationally, with those who are serious about the laws of war, and begin to address a range of things that we might do. What are some of those things? One thing that is promising is the focus on regime elites, including not just the leaders but the top echelon right under them that are executing these violations. We need to name them early in the process in ways that will get their attention.

This whole question of criminal responsibility that the United Nations Security Council is beginning to get into, in the Bosnia setting and in the Rwanda setting, is also promising. I think the whole notion of rethinking civil responsibility and individual responsibility is also an interesting possibility. Why should international law have this endless series of reasons why these people cannot be sued? You cannot bring a civil suit against Saddam Hussein in any country in the world in relation to some of these events, even though the Nuremberg principles tell us he is criminally liable in that setting. The Iraqi State’s responsibility for damages and for redress of damages is clear, and here, of course, you do have Resolution 687 that Conrad Harper talked about. I think we should examine de-recognition of regimes by individual States and, possibly, by the United Nations. I think we should be looking at the limits of lawful and appropriate reprisals; not directed at hitting the environment, obviously, or other protected targets. We should look at retorsion. Perhaps we should vary our war aims when these kinds of violations happen. Announce that we will not stop at the border of the country when we force you out of occupied Kuwait. We are going to go all the way to Baghdad if you commit certain kinds of violations. I also think that such violations ought to be taken into account in future normalization of relations, if they can be normalized at all. But the point I am making is that it is time to begin thinking creatively and broadly as to what might be done.

Let me just sum up briefly by saying that the core concept of the rule of law is in controlling government. That is what the real meaning of the rule of law is about. We are finding from the data that there are a variety of out-of-control totalitarian regimes that are the fundamental problem. We need to figure out how we can more effectively control their behavior through the rule of law. It is time once again, to say “Never Again.” But it is not enough to endlessly say, “Never Again.” This time our language must be backed with effective action. And ultimately there is nothing but the rule of law that can serve as the basis for that action.

Thank you.

**Professor Grunawalt:** Thank you John. I know we could not have asked for a more fitting closure point for our deliberations. John, in his usual fashion, has in fact focused the issue where it belongs. We have talked in a variety of situations this past week about the failure of compliance, about the lack of political will to enforce the rule of law. I believe that there is, amongst most of us in this room today, a sense of frustration that, other than raising our voices and being heard, there is not a great deal that we individually can do in the compliance arena in the broader sense. But I would like to take one more minute of your time to pursue some thoughts that have occurred to me in the past two and a half days.

The operational commanders that appeared before us at times displayed a certain amount of “discomfiture,” using Steve Rose’s description, with our deliberations. I would suggest to you, however, that these commanders are indeed comfortable with the fundamentals of the law of armed conflict. They are indeed comfortable with the precepts of military necessity, of humanity, and of proportionality. I believe that they have the requisite understanding, that they have internalized the law of armed conflict. Those of us who work in this field see this across the board from our operational commanders; the internalization of their abiding obligation to minimize collateral damage and incidental injury. It is my surmise that some of the “discomfiture” that we may have seen here is a reflection of their concern with the actual, or perhaps perceived, propensity of some scholars, scientists and lawyers to see protection of the natural environment in terms of absolutes; in terms of absolutes in respect to weaponry, targeting, and areas of special protection. Absolutes are not in the general paradigm that we understand the law of armed conflict to be. And, if that is the case, then I think that we must redirect our rhetoric and make it more comprehensible to those who we are going to call upon to execute these rules in the crucible of combat.

And this calls to mind something else. We heard from Gary Vest yesterday, and some of you have remarked upon his observation, that we have achieved a remarkable peacetime enculturation within our military with respect to the environment. I think that goes without question. And we also heard Gary state that our operational commanders carry that culture with them into combat. They do not go “brain dead” on environmental issues when they go to war.

I suggested on Wednesday that well-framed, comprehensive, and broadly accepted international conventions governing armed conflict are extremely important. There can be no question about that. But I would also suggest that in some respects this importance is eclipsed by the importance of ensuring that the actual behavior of the war fighter is in compliance with these international norms. I suggest that compliance is not so much the function of international instruments as it is the more mundane role of development of responsible, universally accepted military doctrine employed through military manuals, through education and training and, ultimately, through operational planning and rules of engagement.

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We have heard that addressed eloquently by a number of our speakers here today and I think that is worth recalling as we conclude this conference and go our separate ways.

I am parroting Admiral Doyle to some extent, but for those of you who will have occasion to address, in the future, protection of the natural environment during armed conflict, and here I am talking about the whole spectrum of conflict—international armed conflict as well as non-international armed conflict—bear in mind that our purpose is the protection and preservation of the natural environment within the framework of the law of armed conflict. What I am getting at here, is that I think it is critical that as we do our work, as we each play our role, that we bear in mind that whatever rules, whatever international norms that we might devise have to have relevance to the realities of the battlefield, and the realities of the operational commander who finds himself in the crucible of conflict. If not, I would suggest, we may be largely wasting our time.

I would like to join Ash Roach in his admonition to all of us as we leave here and return to our various callings, whether you are an academician, a scientist, a policy advisor, a war fighter, a war planner, an environmentalist, or wherever on that spectrum you care to place yourself, that we all have an obligation to enhance awareness of respect for and compliance with the rule of law and protection of the natural environment. That is a task for us all.

This Symposium on the Protection of the Environment During Armed Conflict and other Military Operations stands adjourned.