

Chapter XXV

Comment: State Responsibility and Civil Liability for Environmental Damage Caused by Military Operations

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It is significant that the title of this panel starts with the words ‘State Responsibility *and* Civil Liability’ (emphasis added), because, as the two speakers have ably pointed out, resort to State claims based on responsibility under public international law is rare in respect of environmental harm occurring even in peacetime, let alone as a result of military operations (including in time of armed conflict), and so resort to civil liability approaches is of potentially greater importance.

In this context I should be quick to point out that I too do not regard the *Trail Smelter Case* as a true environmental case and thus to this extent agree with the quotation cited by Professor Green to the effect that it is more of a model than a precedent for State responsibility in this area. *Trail Smelter* concerned pollution damage, of course, but this resulted in claims concerning harm to property, not harm to the environment *per se*. Since the essence of State responsibility for trans-boundary polluting acts lies in the occurrence of harm, and not the mere occurrence of a wrongful act (unlike in other areas of State responsibility, where harm as such is not a prerequisite), this is of potential significance where damage occurs to elements of the environment *per se* that cannot be characterised as property. Thus, in the State responsibility context, the significance of Professor Adams’ and Professor Greenwood’s point that much environmental damage in the Gulf War was already covered by Hague Law principles, is limited.

I hasten to say I am not a tree hugger; I seek to preserve only the fundamental environmental values I referred to in my intervention yesterday. Do not make the mistake, however, that these values are matters only for the upper echelons of command. Local attacks are quite capable of taking out vital elements of whole species’ habitats, or even entire ecosystems.

The main legal significance of *Trail Smelter*, however weak its legal origins (ably pointed out by Professor Green), was merely its recognition of the emergence, in embryonic form, of this new area of State responsibility. That of the Stockholm Declaration on the Human Environment of 1972, cited in part by Professor Green, is the elaboration, in Principle 21, of the *sic utere tuo* principle in its application to

the environment, extended to include the global commons. It follows that I accept Professor Green's argument that the environment has been an object of protection in wartime since ancient times and that there are some parallels between Biblical and modern texts, but this is, essentially, only in so far as the 'environment' coincides with owned property and, incidentally, only if one takes an anthropocentric view of the environment - *i.e.*, one describes it as merely the environmental elements necessary for man's survival.

I also accept, therefore, that these texts differ in another, fundamental, respect. The Stockholm Declaration, and a number of 'environmental' treaties reflecting Principle 21, as well as State practice, are concerned to an increasing degree with protecting the environment *per se*. They are also, and this is important, increasingly concerned with doing so by prior, preventive action and mechanisms, and not by mere posterior consequence-sorting. Professor Green is entirely correct in this regard to emphasize the role of international supervisory/ negotiation-facilitation mechanisms, and it is in this context that methods such as environmental impact assessment (EIA) and other manifestations of emerging or developed customary law principles of cooperation and precaution (and, indeed, State responsibility principles themselves) should be viewed. I agree with the two speakers that it is not always easy to see how such mechanisms can be applied in relation to military operations. Of course, environmental damage will occur in time of armed conflict. Of course, the military cannot suspend fighting while the Army Board of Environmental Impact Assessors conducts a full-blown (peacetime-type) EIA, but it does not follow that equivalent principles and mechanisms cannot be applied in a suitable, limited manner during military operations.

These can be applied to protect not merely property interests, but also the environment *per se*. Indeed, the law of war has already come expressly to concern itself with the environment *per se*, in so far as Articles 35(3) and 55 of Additional Protocol I to the 1949 Geneva Conventions represent emerging norms. They refer to the 'natural environment', which is to be broadly interpreted, according to the International Committee of the Red Cross (ICRC) Commentary (at p.662), to comprehend not merely objects indispensable to the survival of the human population, but also forests and other vegetation mentioned in Protocol III to the 1980 'Inhumane Weapons' Convention, as well as 'flora, fauna and other biological and climatic elements'. The questions are, 'is the existing protection adequate and what role does State responsibility play in this?' I will try to refer, in answering these, to a number of the speakers' points.

Before I do so, however, I make three more preliminary points. I think any talk of liability for the transboundary injurious consequences of acts not prohibited by international law merely serves to confuse. The International Law Commission (I.L.C.) is misguided in applying this concept to environmental harm, because the 'lawfulness' *vel non* of the act is irrelevant. State responsibility arises from the harm

caused across State boundaries by a polluting act, not from the supposed nature of the act itself. Professor Greenwood is right to say the application of the I.L.C.'s work on this topic to armed conflict would be controversial; fortunately, the I.L.C. was wise enough to exclude armed conflict from its scope.

Second, I think over-emphasis on the existence *vel non* of putative personal and State criminal liability in parallel with State responsibility should be avoided; the international community's seeing fit to criminalize acts is good evidence that the same acts may involve the responsibility of a State, but this is a roundabout way of doing things. The same goes for the concept of *jus cogens*. Either State responsibility arises or it does not; it is simply a matter of examining the relevant State practice and applying the relevant law (including in respect of *erga omnes* obligations). Either State responsibility is a useful primary device to enforce environmental protection or it is merely an important residual method of last resort when other mechanisms of control or redress have failed. It is, in my view, the latter, at least in peacetime contexts.

The usual approach to regulating serious international environmental problems is through framework conventions, later supplemented by optional protocols dealing with specific aspects of the problem. The last protocols to be considered are always those on State liability. Few actual State claims can be traced. No State brought international claims in respect of harm arising out of the Chernobyl nuclear disaster, partly because of the many difficulties surrounding bringing successful claims, outlined by the speakers, and, I suspect, because people who live in glass houses do not throw stones, but it is perhaps significant that Sweden and the U.K. reserved their rights to do so. State claims are also occasionally brought in respect of marine pollution, and Professor Green has mentioned the 'outer space' example of Canada's claim in respect of the nuclear-powered Soviet satellite, Cosmos 954, which crashed on its territory.

There are other reasons why State responsibility has only a residual role. First, certain environmental problems simply cannot be laid at the door of individual States. Enhanced global warming, depletion of the stratospheric ozone layer and, to a large extent, loss of biological diversity, result from the combined actions, or inaction, of all States and require global, co-operative solutions. Even where a single, notorious course of action, such as that of Iraq during the Gulf War, can be identified as significantly contributing to one or more of these phenomena, it is difficult to identify precisely what contribution was made to the complex processes and harmful results involved. This is, happily, no longer true of long-range transboundary air pollution (and I refer to the 1979 E.C.E. Convention and its Protocols cited by Professor Green), as a result of technological developments.

Equally significant, perhaps, is the ineffectiveness of a traditional corollary to State responsibility in cases of breach of multilateral treaties (and international environmental law is mostly contained in treaties or in so-called 'soft law'

instruments—where, of course, there is no question of State responsibility), the exclusion of the Party in breach from the benefits of the treaty. With the exception of a few treaties, such as, at present, the 1973 World Heritage Convention, the 1992 Framework Convention on Climate Change, the 1992 Biological Diversity Convention, and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, under which (essentially developing country) Parties can obtain financial assistance from a fund and/or technical assistance, no environmental treaty provides for Parties benefits that outweigh the burdens to an extent that the environment will not suffer more from the expulsion of a State than that State will from that expulsion. This is equally true in time of armed conflict, whenever such treaties continue to apply.

One of the difficulties, mentioned by the two speakers, surrounding the concept of State responsibility in this field, is the uncertainty concerning the standard of liability to be applied, whether it is in the nature of strict/absolute or, alternatively, fault-based liability. The treaties and other instruments, judgments and State practice are not consistent on this, but it is perhaps significant that, as I have mentioned, States have been most willing to bring international claims in respect of nuclear, marine pollution and outer space-related incidents, all of which can be classified as ‘ultra-hazardous’, and in respect of which the evidence of a standard of strict liability is strongest. On the contrary, there is, in my view, an overwhelming case for a standard of due diligence in relation to ‘non-ultrahazardous’ activities causing transboundary harm. But what relevance has this to military operations?

I think we would agree that many military operations are ‘ultra-hazardous’ in the sense that, while we do not necessarily criticize them, we just do not want to be around when they are happening. I think the treatment of certain activities in peacetime as ‘ultra-hazardous’ in this context is judged less in terms of their ‘ultra-hazardousness’ for the environment *per se* than that for human health and property interests. The same must be true in time of armed conflict, but I can see no good argument, given the nature of armed conflict, for not applying a standard of due diligence, rather than strict liability, to State responsibility for environmental damage at such time. Indeed, a due diligence regime arguably has a greater deterrent effect than a strict liability regime, absent an adequate selection of defenses under the latter, and so leads to higher standards in practice. But any peacetime judgment of what is required of a State by due diligence obligations in peacetime cannot be automatically imported into armed conflict situations. In practice, the application of the standard will lead to different results. What these will be, of course, depends on a proper interpretation of both law of war norms properly speaking and of any general customary or treaty law environmental standards that continue to apply in wartime. And, you will gather, I am not a strict ‘*lex specialis*-merchant’ in this field.

I think, like Professors Meron and Szasz, this last issue is the key one to be taken forward from experts' meetings, such as this, by way of fuller scientific study. For what it is worth, I have obtained a Research Fellowship in the Centre for Environmental Law and Policy (LSE) from the Commission of the European Communities for a Ph.D. student, who, in connection with the preparation of her doctoral thesis, is beginning to examine a long list of 'environmental' treaties (and we are told there are over 900) for evidence of their potential applicability *vel non* in situations of armed conflict or other emergency starting with international armed conflict. This clearly involves examining a number of matters referred to by Professor Meron.

The process is at its early stages, but even a superficial analysis has revealed that some such treaties have been applied in whole or in part (and on a full or an interim basis) in time of armed conflict, including international armed conflict, such as, during the Gulf War, the 1990 Oil Pollution Preparedness and Response Convention and the 1978 Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution. In addition, other treaty provisions, it has been seen, are clearly applicable during international armed conflict. Consider marine pollution, for example. I leave aside the whole question of the relationship between the particularly important environmental protection provisions of the 1982 Law of the Sea Convention and the law of naval warfare, which Professor Walker has discussed in the context of the San Remo Manual, in the drafting of which the two speakers played important roles. All I would say about this is that the choice of 'due regard' and other language (*e.g.*, in its paragraph 11) in preference to 'respect' in relation to means and methods of warfare and environmental protection, is a great advance in terms of helping bring the law of naval warfare up to date in respect of most situations, but perhaps neglects to adequately protect vital environmental elements in particularly sensitive sea areas of special importance, for example because of their biological diversity or significance as ecosystems.

The general treaty aside, it can be said that a number of Antarctic Treaty Consultative Parties' agreements on the Antarctic marine environment and International Maritime Organization (IMO) treaty provisions continue to apply in wartime. The 1972 Regulations for Preventing Collisions at Sea (Colregs), annexed as they are to a treaty, are applied, absent inconsistent national regulations, by English, U.S. and other Courts of Admiralty, in wartime and to warships as well as merchant ships. This is equally true of Rule 10, which governs traffic separation schemes, and new amendments to the Convention for the Safety of Lives at Sea (SOLAS). Regulations permit mandatory ships' routing and ship reporting measures to be prescribed and implemented, with IMO permission, as measures supplementary to the Colregs. I can see no reason, except perhaps that SOLAS 1974 does not apply to warships, why such traffic measures should not

continue to apply in time of armed conflict for the safety of traffic and so environmental protection, and thus why State liability cannot arise from breaches of their provisions.

In truth, however, States prefer to leave issues of compensation for environmental law in peacetime to the vagaries of national law. They confine their roles to merely encouraging the adoption of domestic rules on equal access and non-discrimination for the benefit of foreign environmental claimants in domestic courts, or, in the cases of 'ultra-hazardous' risks, to establishing international joint compensation schemes involving, as I have explained, strict liability. In so far as such 'insurance' schemes are based on treaties, the marine pollution ones, for example, are partly treaty-based and partly derived from industry agreements—I can see no good reason why they should not continue to operate in time of international armed conflict. Be that the case or not, it remains that liability is directed and limitable in a manner not applicable to State liability and that many surrounding issues, such as the calculation and quantification of 'pollution damage' are still left to national law. Despite some attempts to permit meaningful recovery for harm to the environment *per se* in some jurisdictions as in the U.S. *Zoe Colocotroni* and *State of Ohio* Cases (and some downright extravagant efforts in Italy!), in general only token damages are allowable. It follows that, even if international joint compensation schemes apply, as I argue they do, to damage arising from military operations in time of armed conflict, and even if the relevant government or other entity is willing and able to bring a claim *pro bono publico*, this is likely to be of limited value in ensuring that compensation is received for damage to the environment *per se*. In short, I agree with Chris Greenwood about the limited role of compensation mechanisms in facilitating environmental protection against military operations. In fact, I can defuse your fear that I am going to go on and on and on by saying now that I agree with everything not already discussed that Professor Greenwood has said in his paper. I close then, with only a few more questions.

First, is not the speakers' conclusion on the absence of a true *actio popularis* for the benefit of the environment eroded to some limited degree by the recognition by the I.C.J. as early as the *Anglo-Norwegian Fisheries Case* of 1951 that certain States might have enhanced interests and responsibilities by virtue of being a regional ('environmental') Power? In this respect, it is interesting to note that not only has the New Zealand Government recently attempted to re-activate the *Nuclear Tests Case* on environmental grounds, but that, in 1973, it adopted the act of one of its naval captains in offering assistance to protest vessels with which New Zealand had no diplomatic/jurisdictional connection, except perhaps that it was a regional Power with environmental concerns witnessing the seizure (by France) on the high seas of a (foreign) vessel exercising a fundamental global right, the freedom

of navigation, for environmental protest purposes. Before 1995 is out there may be a fresh example of this.

Second, in respect of non-international armed conflict in particular, where 'peace-time' environmental treaty obligations presumptively continue to bind the State Party in question, is it not particularly important to note, as Professor Meron has suggested, that, increasingly, such obligations are not confined to being triggered by third States suffering transboundary harm? Increasingly, environmental treaties are seeking to control State Parties' degradation of their own environments. The Biological Diversity Convention's true significance lies here, to the extent that it is a treaty about conservation (as opposed to exploitation) of natural resources. Assuming that the political will to implement it is there, it is likely to have great significance for warring parties in a non-international armed conflict seeking to minimize their exposure to possible international liability under the treaty or customary international law.

And third, I conclude with a question, which is somewhat inspired by Dr. Fleck's paper and Mr Vest's impressive address. Is it not time for a thorough scientific study of all the issues raised at this Symposium, resulting in more than improvements to military manuals used by military lawyers? Should we not aim to produce a guide for the entire military, the most important constituency here, outlining both the relevant law and best environmental practice?

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