

## Chapter XXXII

# Protection of the Environment During Armed Conflict and Other Military Operations: The Way Ahead

Dr. Dieter Fleck\*

**M**ay I express my gratitude for once again being invited to Newport to participate in discussions on a subject of considerable interest to the international legal community. The Naval War College must be congratulated for designing and organizing this forum for decision-makers and experts to jointly develop a new approach.

The word 'environment' does not figure in the classical international instruments that have shaped the existing law of armed conflict during the last 150 years. At the end of this century, however, it became a key word for the survival of mankind. This alone is a good reason for a dynamic interpretation of existing conventional rules. The prohibition of widespread, long-term and severe damage to the environment (Articles 35 (3) and 55 (1) of the Environmental Modification Convention (ENMOD)<sup>1</sup>) reflects the rule of proportionality and damage limitation which remains of high importance for the strategy of the Atlantic Alliance. Severe environmental damage, as in the burning of oil fields in Kuwait and the release by Iraqi forces of large quantities of crude oil into the Persian Gulf, must be considered as being out of proportion to any military purpose; they are in no sense 'collateral.'

### I. Guidelines Reflect Acceptable Policy

The revised Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, prepared for the Sixth Committee of the U.N. General Assembly,<sup>2</sup> reflect existing rules of customary law and/or acceptable policy. It was fully appropriate that the 49th General Assembly has invited all States to disseminate these guidelines widely and to give due consideration to the possibility of incorporating them into their military manuals and other instruction addressed to their military personnel.<sup>3</sup>

The German manual of 1992<sup>4</sup> did not address the subject fully. In its Section 401 it referred to the prohibition on causing widespread, long-term and severe damage to the natural environment. Section 403 explains that 'widespread',

## 530 Protection of the Environment During Armed conflict

'long-term' and 'severe' damage is a major interference with human life or natural resources which considerably exceeds the battlefield damage to be regularly expected in a war. As for armed conflict at sea, Section 1020 underlines the prohibition on employing methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. The commentary to the German manual<sup>5</sup> focuses on definitional problems as far as the limitation of damage to the environment is concerned, and explains that Article 35 (3) of Additional Protocol I<sup>6</sup> hardly allows conclusions as to concrete obligations, nor legal evaluation of specific behavior.

The forthcoming revision of the U.S. Commanders's Handbook on the Law of Naval Operations<sup>7</sup> shows a more general approach by stressing the affirmative obligation of a commander to avoid unnecessary damage to the environment to the extent that it is practicable to do so consistent with mission accomplishment. While it is valuable insofar as it articulates the commander's obligation to consider the environmental damage which will result from an attack on a legitimate military objective, more detailed criteria for balancing military necessity against the interest in protecting the environment could and should be developed in accordance with the Guidelines.

In the preparation of the recent San Remo Manual on International Law Applicable to Armed Conflicts at Sea<sup>8</sup> the conclusion was reached that there does exist a duty upon States during peacetime not to harm the marine environment; but the application of this obligation in armed conflict, beyond the threshold indicated in the ENMOD Convention and in Articles 35 (3) and 55 of Additional Protocol I, was still ambiguous and uncertain. Section 44 of the San Remo Manual states:

Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.

There was considerable discussion as to whether the operative standard for the parties to an armed conflict should be "due regard" or "respect" for the marine environment. The due regard formula, taken from the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention), was eventually accepted as reflecting the balance between operational requirements and the duty to protect and preserve the marine environment.<sup>9</sup>

Hence, I submit that legal sources referred to and policy statements made in the revised Guidelines should be incorporated more fully into military manuals and other instruction in order to stress the importance of environmental protection in all military operations.

This does not mean, however, that the laws of armed conflict are altogether clear today. While there is an increase in conflict situations, international wars, for which the laws of war were developed over centuries, are no longer a normal phenomenon. The term 'operational law,' coined in the U.S. forces some years ago, describes, indeed, a much more realistic concept. In this respect, the role of peacetime rules and the impact of international standards in non-international conflict situations are key issues which require convincing answers.

## II. Peacetime Rules Continue to be Applicable in Armed Conflict

Subject to the application of the laws of war, peacetime obligations in principle also apply in war, and they remain applicable in the relations between belligerents and third parties.<sup>10</sup>

As explained in paragraph 5 of the revised Guidelines, international environmental agreements and relevant rules of customary law may continue to be applicable in times of armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict.

It remains an open question if and how this could apply, *e.g.*, to certain rights of coastal States specified in Articles 25, 192 and 194 of the 1982 LOS Convention or to the 1985 Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol of 1987 on Substances that Deplete the Ozone Layer. There might be no easy answers to be found. Even in such cases where warships were more or less expressly excluded from the application of certain rules, subsequent State practice must be evaluated. It should also be considered that peacetime operations, including U.N. peacekeeping missions, cannot easily be separated from operations in which the law of armed conflict applies.

## III. Armed Forces are also Required to Comply with the Rules Applicable in International Conflicts in Non-international Conflicts

The applicability of the laws of war in non-international conflicts requires a new assessment where longstanding principles of common Article 3 of the 1949 Geneva Conventions<sup>11</sup> and Additional Protocol II<sup>12</sup> prove to be hardly valid and new answers may be given by *opinio juris* and State practice.

Controversies on details of Additional Protocol I are of little relevance given the fact that most of the armed conflicts today are of an internal nature.

Paragraph 6 of the revised Guidelines encourages parties to a non-international armed conflict to apply the same rules that provide protection to the environment as those which prevail in international armed conflict. Accordingly, States are urged to incorporate such rules into their military manuals and instructions on the laws of war in a way that does not discriminate on the basis of how the conflict is characterized.

## 532 Protection of the Environment During Armed conflict

This recommendation is in conformity with the German Manual<sup>13</sup> and with U.S. directives.<sup>14</sup> It clearly deviates from existing conventional law, but policy decisions of this kind may have a greater bearing on the protection of the environment than any legalistic approach.

In this respect, clear principles are more important than detailed controversies or even semantics. In no case could civilized armed forces and their democratic political leadership accept a 'double book mentality' for military operations in international conflicts on the one hand and non-international conflicts on the other.

### IV. New Conventional Law is Neither Necessary nor Desirable

These considerations on the impact of peacetime law on military operations and on applicable standards for non-international conflicts may strongly influence environmental considerations. Not surprisingly, the debate to assess the need to strengthen legal protection of the environment has brought up a variety of proposals for legal action.<sup>15</sup> While some experts have expressed themselves in favor of new international accords to establish additional norms for protection of the environment across the spectrum of military operations involving armed conflict, there is now an emerging consensus that new conventional law is not required, but that there is a need for providing enhanced means to enforce existing rules.<sup>16</sup>

New international instruments, indeed, are not necessary. The revised Guidelines largely rely on existing international norms. New instruments would even be undesirable: they would only increase the existing gap between international legal obligations in force and the readiness for their observance. Thus, work on such new instruments could severely disturb international cooperation on the issue which is so urgently needed.<sup>17</sup> As Legal Adviser Conrad K. Harper has stressed in his Opening Address, we should resist the normal inclination of law makers to embrace discussions of rights rather than to confront sticky, practical, and, indeed, often seemingly intractable questions embedded in issues of compliance and remedies. Hence, the important objective we are facing in this area is not creating new law, but implementing existing rules and enforcing them.

### V. New Efforts Shall be Taken to Implement Existing Rules and Effect Compliance

Implementation of existing law requires enhanced efforts of its dissemination, a dynamic interpretation of its principles and provisions, and a constant readiness of States to strengthen international consensus on common values.

The need for better dissemination of existing rules is the best reason for incorporating the Guidelines referred to above into military manuals and other instructions as recommended by the 49th U.N. General Assembly.

An important example of dynamic interpretation was the decision taken by President Ford in his Executive Order of 8 April 1975<sup>18</sup> that the United States would renounce, as a matter of national policy, first use in war of herbicides and first use of riot control agents except in defensive military modes to save lives. Another good example was reported by the then-Chairman of the Joint Chiefs of Staff, General Colin Powell, in his report to Congress on Coalition operations in the Gulf in 1991, where he explained that the provisions of Additional Protocol I, for the main part, applied as if they constituted customary law.<sup>19</sup>

Enforcement measures also include initiatives towards a broader acceptance of existing conventional law. In this respect, reference shall be made to the successful appeal launched by the 1989 Paris conference on the prohibition of chemical weapons, which had called upon all States which have not done so to accede to the 1925 Geneva Gas Protocol, and to the constant appeals by the U.N. General Assembly 'to consider' ratification of Additional Protocols I and II. Indeed, new efforts are now necessary and timely to make these Protocols truly universal.

Significant efforts for better implementation of legal rules must include improvements of verification. In this respect, existing means of international law, so far, have not been used sufficiently. This is true, *e.g.*, for those cooperative fact-finding activities under Article 90 of Additional Protocol I. But it also applies to existing possibilities of the United Nations. U.N. experts and also U.N. peacekeepers should assist more actively in environmental fact-finding as one of the prerequisites for stable post-conflict peace-building. It would be worthwhile to combine forces from various sources in order to avoid propaganda effects and achieve practical results.

All such efforts could never be achieved except through international co-operation. The International Committee of the Red Cross (ICRC),<sup>20</sup> States and international organizations active in this field deserve our gratitude and respect. It is essential to lend support to these activities also on behalf of governments and armed forces. Without such support, it would remain difficult to ensure compliance with existing law, to improve implementation and to respond in a convincing manner to expectations of the public at large.

## VI. NATO Should Play a Leading Role in Implementing Operational Law and Encouraging Effective Compliance

Until now, there have been no exact criteria for a coherent assessment of environmental damage in military operations. A variety of relevant parameters should be considered in this respect in order to balance measures necessary for an effective defense against the consequences for humankind and the environment.

NATO, as one of the first international organizations to do so, began to systematically deal with environmental problems when establishing the Committee on the Challenges of Modern Society (CCMS) as early as 1969. The

Alliance Science for Stability program has so far supported considerable efforts of technological research on environmental protection in peacetime. The time has come to supplement these activities by developing a cooperative approach to protection of the environment in times of armed conflict.

A proposal for a CCMS Pilot Study on the Protection of the Environment in Military Operations was forwarded by Canadian, German and Norwegian experts in January 1994. Though various delegations have offered their support and expressed their interest in actively participating in this project, certain objections were raised by two delegations which were concerned about negative military implications of such a study. Following a German proposal, discussion in the CCMS was postponed to allow for a reassessment. It shall be taken up again in due time.

The CCMS should, indeed, provide its resources to collect further expertise, influence interpretation and support appropriate activities to implement operational law effectively. Indeed, the Alliance's new Partners in Eastern Europe are looking forward to receiving support and guidance on environmental matters, also as far as military operations are concerned, as was expressly stated by representatives from Croatia, Hungary, Ukraine and other States in the recent United Nations Environmental Program Conference held in Linköping, Sweden in June 1995.<sup>21</sup>

The CCMS provides a unique opportunity for reaching balanced results which are politically and militarily acceptable. In the absence of such activities, this topic would certainly be taken up by other fora in which the same degree of expertise and political-military experience would hardly be available.

The proposed study should focus on problems of application and implementation of the Guidelines mentioned above. Its main objectives could be the preparation of detailed case studies for the protection of the environment in military operations, the elaboration of a code of conduct, and its dissemination by appropriate means. This work could support the work on military manuals and instructions and help to strengthen political and military cooperation, consistent with the Atlantic Alliance's new, broad approach to its fundamental security tasks. It would involve a multidisciplinary effort, embracing lawyers, environmental experts and military officers.

The effort is worthwhile and necessary if protection of the environment is to be taken seriously in security debates.<sup>22</sup> It should certainly be pursued if we wish to face the challenge that environmental disasters must not be caused by military operations.

---

#### Notes

\*Director, International Agreements and Policy, Federal Ministry of Defense, Bonn, Germany. The views expressed in this paper are those of the author and do not necessarily reflect either the policy or the opinion of the German Government.

1. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977, 31 U.S.T. 333; T.I.A.S. 9614.
2. U.N. Doc A/49/323, Nov. 1994, annex, at 49-53; *reprinted in* 89 A.J.I.L. 641-44 (July 1995). [The Guidelines are set out in Appendix A of this volume.]
3. U.N.G.A. Res A/49/737, 9 Dec. 1994; *see* Gasser, *For Better Protection of the Natural Environment in Armed Conflict: A Proposal for Action*, 89 A.J.I.L. 637 (July 1995).
4. German Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts - Manual* (1992).
5. Oeter & Heinegg in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (Fleck, ed. 1995), Secs. 403 & 1020.
6. Protocol Additional to the Geneva Conventions Relative to the Protection of Victims of International Armed Conflicts (Protocol I) with Annexes, 1977, *reprinted in* 16 I.L.M. 1391 (1977).
7. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M (1995), para. 8.1.3.
8. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Doswald-Beck ed. 1995) para. 44.6.
9. *Id.* at para. 44.6.
10. Heinegg & Donner, *New Developments in the Protection of the Natural Environment in Naval Armed Conflicts*, 37 *Germ. Y.B. Int'l L.* 281 (1994), at n. 296.
11. 1949 Geneva Conventions Relative to the Protection of Victims of International Armed Conflicts, 6 U.S.T. 3114, 3217, 3316, 3515; 75 U.N.T.S. 31, 85, 135, 287.
12. Additional Protocol to the Geneva Conventions Relative to the Protection of Victims of Non-international Armed Conflicts (Protocol II), 1977, *reprinted in* 16 I.L.M. 1442 (1977).
13. *Supra*, n. 4, at sec. 211.
14. U.S. Department of Defense Directive 5100.77, *Law of War Program*, 10 July 1979, para. E-1; *The Commander's Handbook, supra*, n. 7 at 21.
15. ENVIRONMENTAL PROTECTION AND THE LAW OF WAR: A 'FIFTH GENEVA' CONVENTION ON THE PROTECTION OF THE ENVIRONMENT IN TIME OF ARMED CONFLICT (Plant ed. 1992).
16. McNeill, *Protection of the Environment in Times of Armed Conflict: Environmental Protection in Military Practice*, *Hague Y.B. Int'l L.* 75-84.
17. *Cf.* Fleck, *Legal and Policy Perspectives for the Protection of the Environment*, in II EFFECTING COMPLIANCE, ARMED CONFLICT AND THE NEW LAW (Fox & Meyer eds. 1993), Chap. 7 at 143-57.
18. Exec. Order No. 11850, 40 Fed.Reg. 16187 (1975).
19. *Cf.* GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (1993), at xv, who made it clear that his book has been written on the same premise.
20. ICRC, Meeting of Experts on the Protection of the Environment in Time of Armed Conflict (Geneva, 27-29 Apr. 1992), Report on the Work of the Meeting (Sept. 1992); Second Meeting of Experts on the Protection of the Environment in Time of Armed Conflict (25-27 Jan. 1993), Report on the Work of the Meeting (Apr. 1993). The Report of the Expert's Third Meeting was submitted to the U.N. Secretary-General for inclusion in his report to the General Assembly [U.N. Doc. A/48/269, ch. II (1993)].
21. United Nations Environment Program (UNEP)/Economic Commission for Europe (ECE), Meeting on Military Activities and the Environment, hosted by the Government of Sweden, Linköping, 27-30 June 1995, Report of the Meeting, U.N.E.P./MIL/3 (7 July 1995), paras. 9, 30, 35.
22. *Cf.* *Environmental Change and Security Project Report* (Simmons ed.), Woodrow Wilson International Center for Scholars, Spring 1995.