

Chapter XXXI

The Debate to Assess the Need for New International Accords

Dr. Hans-Peter Gasser*

New Treaty Law or Guidelines for Ensuring Compliance with Existing Legal Standards?

Before entering into a debate on the need for a new treaty, we have to assess the protection which current international law affords to the natural environment in times of armed conflict. I shall, therefore, first recall the present state of the law and review the response by military and civilian authorities to the recent development of these rules, and I shall then put forward some considerations on whether the protection of the natural environment in armed conflict is better served by a new initiative to develop the law, or by alternative and more modest means of strengthening respect for existing legal obligations.

My remarks are confined to damage to the natural environment which may occur during armed conflict, *i.e.*, situations where international humanitarian law applies, in particular the 1949 Geneva Conventions for the protection of war victims,¹ their two 1977 Additional Protocols² and relevant rules of international customary law.³

A. The Premise

Modern technology has produced weapons with an enormous potential to destroy not only legitimate targets but also the surrounding environment. While it is true that warfare inevitably and often very seriously affects the natural environment, even though it may not be targeted as such, threats to the environment have now assumed apocalyptic proportions. The dirty clouds over the blackened desert sand and the oilslick on the waters of the Persian Gulf at the close of the Gulf War of 1990/91 have brought home the message of the vulnerability of the natural environment to all those ready to recognize new dangers for mankind. Emphasizing the inevitable link between serious damage to the natural environment and development, the 1992 Rio Declaration on Environment and Development goes a step further and declares: "Warfare is inherently destructive of sustainable development."⁴

In recent years, there has been a major change of opinion on how to evaluate the impact of war on the natural environment and on the conclusions to be drawn

for the conduct of military operations. To my knowledge, damage to the environment was not much of an issue before and after the destruction of Hiroshima and Nagasaki by nuclear bombs. It started to attract attention in the debates on the involvement of U.S. forces in Vietnam and became a major concern during the two recent wars in the Persian Gulf area. The latest chapter may well have been written by the withdrawal of the Red Army from its bases in Central and Eastern Europe, a peaceful and positive event but for the indescribable military garbage and the environmental destruction left behind. Today, the potential destructive impact of military action on the natural environment can no longer be denied, either in peacetime or in war.

A great leap forward has also been made in the thinking of those responsible for advising the armed forces on the law of war. As an example let me cite some statements made in American legal and military publications. In his elaborate and sometimes biased critique of Additional Protocol I,⁵ Roberts chose to oppose the new provisions on the protection of the natural environment against the effects of military operations by saying without any hesitation that oil tankers and ships carrying hazardous chemical cargoes were "important and legitimate military targets."⁶ Yet only a few years later, in its Final Report on the Conduct of the Persian Gulf War, the U.S. Department of Defense spoke about "environmental terrorism" (hardly a positive statement for American ears) when commenting on the destruction of the Kuwaiti oil installations by Iraq.⁷ In 1995, the Operational Law Handbook of the U.S. Army recognized that "[p]rotecting the environment has become steadily more important during the past several decades," and that "[f]ailure to comply with environmental law can jeopardize current and future operations, generate international and domestic criticism . . ."⁸ In the same vein, The Commander's Handbook on the Law of Naval Operations enjoins the U.S. Navy to take environmental considerations into account.⁹

I have no doubt that similar developments have taken place in the armed forces of other countries as well. Suffice it to say that environmental concerns have found an adequate place in the new Law of War Manual issued by the German Ministry of Defence.¹⁰

There is yet another favorable development to be mentioned: the armed forces of many States have in recent years adopted standards for the protection of the natural environment during their peacetime activities, such as military training and maneuvers. It may well be hoped that a growing awareness of ecological considerations in normal times will strengthen the resolve to respect such standards in armed conflict as well.

A brief look will now be taken at the international legal rules which protect the natural environment in time of armed conflict. This will lead to a few more preliminary conclusions.

Ever since codification of the law of war began, general principles and rules of law have provided some legal protection for the natural environment, such as the prohibition on attacking or destroying objects which are not lawful military targets,¹¹ the rule of proportionality or the Martens Clause.¹² As part of the general framework of international law, they continue to provide guidance for those who have to plan, decide or execute military operations. Only the most recent round of codification of the laws of war has resulted in separate provisions to address the specific problems raised by the vulnerability of the natural environment in armed conflict. According to Articles 35 (3) and 55 of Additional Protocol I, the natural environment must be protected against “widespread, long-term and severe damage.” The commentary on Additional Protocols I and II, published by the ICRC, explains in the following terms why two provisions on the same subject were deemed necessary to achieve the desired end:

While Article 35 (*Basic rules*) broaches the problem from the point of view of methods of warfare, Article 55 concentrates on the survival of the population, so that even though the two provisions overlap to some extent . . . they do not duplicate each other.¹³

Furthermore, several other provisions of the new treaty, dealing with specific categories of persons or objects, are also relevant for limiting damage to the natural environment. One example is Article 56 of Additional Protocol I which prohibits attacks against “works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations.”

With its Article 35 on methods and means of warfare, and Article 55 strengthening the protection of the natural environment for the sake of the civilian population, Additional Protocol I has now set reasonable and manageable standards. Their rather high threshold of application shows beyond any doubt that military considerations have been taken into account. The new definition of what constitutes acceptable collateral damage gives additional guidance to those who have to plan, decide or execute military operations.¹⁴ The new law of 1977 can be respected in armed conflicts of our time, and fears of its being too restrictive for the lawful conduct of military operations are certainly unfounded. As treaty law, Additional Protocol I is today binding on 140 States,¹⁵ *i.e.*, a clear majority among the community of nations, and thus commands a degree of international legitimacy which should lead to general observance of its standards.

Other international treaties also have an impact on the protection of the natural environment in armed conflict. The most important ones are the 1977 ENMOD Convention¹⁶ and the 1980 Conventional Weapons Convention.¹⁷

Additional Protocol II, relating to non-international armed conflicts¹⁸, has no specific rule on the protection of the natural environment in civil war. However, its provisions on the protection of objects indispensable to the survival of the

civilian population (Article 14) and on the protection of works and installations containing dangerous forces (Article 15) set standards which implicitly oblige parties to a non-international armed conflict to prevent excessive damage to the natural environment. Furthermore, obligations arising out of general (peacetime) international environmental law continue to be applicable under conditions of armed conflict, be it of an international character or not, though much remains to be done to clarify the extent to which such rules remain applicable after the outbreak of hostilities.

Having examined the status of the international rules on the protection of the natural environment in armed conflict, I should now like to outline some possible conclusions.

B. What ought to be done

1. A New International Treaty?

In terms of time, energy and resources, the cost of drafting, negotiating and adopting a new international multilateral convention is today very high indeed, whatever the issue being dealt with. There is also a risk that a new treaty will not be ratified by a significant number of States. A failed codification attempt may in the end be more harmful to the cause than leaving the law as it is.

In the wake of the 1990/91 Gulf War, a proposal has been circulated to draft a Fifth Geneva Convention specifically designed to protect the environment in time of armed conflict.¹⁹ The author of the draft has commendably identified many issues that would arise in such an endeavor and has suggested concrete answers. His initiative has not, however, received much support. Furthermore, a recently published draft for a comprehensive "International Covenant on Environment and Development" includes a provision specifically dealing with "Military and other hostile activities."²⁰

Admittedly, the international rules on the protection of the natural environment are not perfect, and the law could be improved in many respects. In particular, the protection of the environment in non-international armed conflicts should be strengthened, whilst serious damage to the natural environment should be considered as an international crime. In my view, however, there are at the present stage no compelling reasons to advocate the drafting of a new and comprehensive separate convention on the protection of the natural environment during armed conflict. Lack of compliance with existing international standards is the main problem of our time. Measures to increase compliance with the law are urgently needed.

2. Guidelines for Military Manuals and Instructions

Between 1991 and 1993, the ICRC organized three private meetings of experts to discuss possible action to strengthen respect for the natural environment in

armed conflict.²¹ While identifying several gaps in the law, their principal conclusion was that, above all, compliance with the existing international rules must be assured. To achieve that goal it was suggested that guidelines be drawn up and incorporated in domestic military manuals and other instructions for members of the armed forces. It goes without saying that obligations to be respected in times of armed conflict must first and foremost be known, understood and accepted by those who actually have to behave accordingly, *i.e.*, primarily the members of the armed forces.²²

The ICRC accepted the experts' conclusions and in particular the low priority to be given to new codification. Following their advice and on the basis of an initial draft that some of them had prepared, the ICRC had guidelines compiled. The text thereof was subsequently submitted to the United Nations for inclusion in a program under the "United Nations Decade of International Law."²³ During its 1994 session, the General Assembly adopted resolution 49/50, entitled "United Nations Decade," which invited, *inter alia*, all member States to disseminate widely the (revised) Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict and to incorporate them into their military manuals and instructions.²⁴ The text of the Guidelines, which is given in an appendix to this paper, has of course been sent to all member States as an official U.N. document. Together with a short introduction, the Guidelines have also been published by the American Journal of International Law.²⁵

There is no need for an elaborate commentary on the Guidelines. They are self-explanatory. It is enough to point out that they do not distinguish between international and non-international armed conflicts. In line with an emerging trend, they invite governments and armed forces to respect the same standards in all circumstances of armed conflict, irrespective of its legal qualification.²⁶

The ICRC firmly believes in the usefulness and the eventual success of such a "soft" approach to reinforcing respect for international obligations by members of armed forces. The Guidelines will no doubt become part of a more comprehensive project: the drafting of a new model manual on the law of war.

3. Preventive Action: Evaluating the Conformity of Weapons with International Obligations on Environmental Protection

States are under an obligation to ensure that weapons and any other means and methods of warfare they develop, acquire or adopt are compatible with their commitments under international law, including the international rules protecting the natural environment in armed conflict.²⁷ Such an obligation has been codified by Article 36 of Additional Protocol I. To include environmental concerns in (peacetime) evaluation procedures of weapon systems will help prevent destruction of the natural environment during wartime military operations.

4. International Responsibility of States

After the Gulf War, the U.N. Security Council established the responsibility of Iraq for the damage done, *inter alia*, to the natural environment in Kuwait, in violation of international law and in particular the U.N. Charter's prohibition of aggression against another State.²⁸ Article 91 of Additional Protocol I reiterates the general obligation to pay compensation for damage done in violation of international humanitarian law. The applicability of this rule to unlawful damage done to the natural environment in the course of military operations is beyond doubt.

5. Individual Criminal Responsibility

Although violation of new rules regarding the protection of the natural environment does not come within the category of "grave breaches" for which States party to the Geneva Conventions must prosecute or extradite an alleged offender, it should not be forgotten that any violation of international humanitarian law entails criminal responsibility, at least at the domestic level.²⁹ However, wanton and extensive destruction of property not justified by military necessity is a grave breach of the Fourth Geneva Convention; it is thus an international crime.³⁰ All States party to the Geneva Conventions have jurisdiction to prosecute an alleged offender. Moreover, the *ad hoc* international tribunals set up to prosecute crimes committed in the wars in the former-Yugoslavia³¹ and in Rwanda³² have the jurisdiction to try persons accused of having violated international obligations relating to the protection of the natural environment.³³ The same applies to the proposed permanent International Criminal Tribunal.³⁴ Criminal prosecution of serious offenders either by a domestic or an international court will unmistakably convey the message that the natural environment is a precious gift which requires respect and protection in time of armed conflict as well.

C. Final Remarks

The legal infrastructure to protect the natural environment in armed conflict is in place. The relevant rules are not ideal but they represent a workable compromise between military requirements and environmental concerns. The first step is to achieve universal acceptance of Additional Protocol I, with its specific rules on the natural environment. The main task is, however, to ensure that the existing rules are implemented and respected in all circumstances. Full respect for environmental concerns in armed conflict demands careful preparation and training of persons whose task it is to plan, decide or execute military operations, both in peacetime and in war. The proposed Guidelines pursue that goal, and seminars such as this are a valuable contribution to raising awareness of environmental values.

Notes

*Senior Legal Adviser, International Committee of the Red Cross (ICRC), Geneva.

1. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, of 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977); and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *reprinted in* 16 I.L.M. 1442 (1977).

3. See Meron, *The Geneva Conventions as Customary Law*, 81 A.J.I.L. 348 (1987).

4. Rio Declaration on Environment and Development, U.N. Doc. A/Conf.151/5/Rev.1, *reprinted in* 31 I.L.M. 874 (1992), Principle 24.

5. *Supra* n. 2.

6. Roberts, *The New Rules for Waging War: the Case Against Ratification of Additional Protocol I*, 26 Va. J. Int'l L., (1985) 109-170, at 148. While I do not deny that such a vessel can be a legitimate target for military action, the pertinence of environmental concerns for the decision to destroy and sink it, or to choose alternative ways to stop its course, can no longer be denied.

7. U.S. Department of Defense, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS, 1992, App. O. at 624. Yet the report concluded that, even if applicable, the new provisions of Additional Protocol I would "in all likelihood" not have been an obstacle to Iraq's actions. *Id.* at 625. That conclusion was probably premature. See now the Legal Adviser of the State Department Conrad Harper, in his opening address to the Symposium: "We have yet completely to fathom the consequences of this massive, reckless poisoning of the environment, but they are plainly serious. The Gulf's ecosystem has been disrupted for years to come - for as long as twenty years according to some experts." *Supra* Chap. II at 9.

8. U.S. Department of the Army, *Operational Law Handbook* (1995), at 5-1.

9. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M (1995), para. 8.1.3.

10. German Federal Ministry of Defence, *Humanitarian Law in Armed Conflict - Manual* (1992). See the Commentary to the Manual, edited by Fleck, to be published by Oxford University Press.

11. Regulations Respecting the Laws and Customs of War on Land, of 18 October 1907 (Hague Regulations), Art. 23(g), annexed to Hague Convention No. IV, Respecting the Laws and Customs of War on Land, 1907, 36 stat. 2227; T.S. 539; and Convention Relative to the Protection of Civilian Persons in Time of War, Arts. 53 & 147, *supra* n. 1. For the definition of what is a lawful military objective see Additional Protocol I, Art. 52, para. 2, *supra* n. 2.

12. Preamble to the 1899 and 1907 Hague Conventions; see also Additional Protocol I, Art. 51, para. 5, *supra* n. 2.

13. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, (Sandoz, Swinarski, & Zimmermann, eds. 1987) at 663. See also BOTHE, PARTSCH, & SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS, COMMENTARY ON THE TWO 1977 ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 1949 (1982).

14. Additional Protocol I, Art. 51, para. 5, *supra* n. 2.

15. As of 30 September 1995.

16. Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, of 18 May 1977, *reprinted in* 1108 U.N.T.S. 151; 16 I.L.M. 88 (1977).

17. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, of 10 October 1980, *reprinted in* 19 I.L.M. 1524 (1980). Its Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices (Protocol II) is of particular interest insofar as the use of anti-personnel landmines is concerned.

18. *Supra* n. 2.

19. 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).

20. Formulated and published by the Commission on Environmental Law of I.U.C.N. - The World Conservation Union, in cooperation with the International Council of Environmental Law, March 1995. See in particular draft Article 32.

21. For references see Gasser, *For Better Protection of the Natural Environment in Armed Conflict: A Proposal for Action*, 89 A.J.I.L. 637 (1995), at 640.

22. The four Geneva Conventions and both Additional Protocols explicitly oblige parties to these treaties to disseminate knowledge of international humanitarian law among their armed forces. See e.g. Protocol I, Art. 83, and Protocol II, Art. 19, *supra* n. 2.

528 Protection of the Environment During Armed Conflict

23. The ICRC's reports were published as part of U.N. Doc. A/48/269 (1993) and U.N. Doc. A/49/323 (1994).
24. U.N. General Assembly Resolution 49/50, 9 Dec. 1994, para. 11. For the text of the (revised) *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, see the Annex to U.N. Doc. A/49/323 (1994) 49-53, and *supra* n. 21. (The *Guidelines* are appended to this volume as Appendix A.)
25. *Supra* n. 21.
26. *Guidelines*, *supra* n. 24, II. (6).
27. Some standards have been specified by the 1980 Conventional Weapons Convention, *supra* n. 17.
28. U.N. Security Council Resolution 687 (1991), 3 Apr. 1991, para. 16.
29. See the relevant provisions in the four Geneva Conventions and Additional Protocol I on penal sanctions.
30. Fourth Geneva Convention, *supra* n. 1, Art. 147.
31. U.N. Doc. S.25704, annex (1993).
32. U.N. Doc. S/RES/955 (1994).
33. To my knowledge, no indictment has (yet) included environmental matters.
34. U.N. Doc. A/49/10 (1994).