

Chapter XXXIV

The Debate to Assess the Need for New International Accords

Professor Ivan Shearer*

It is logical that the concluding panel of this Symposium should look ahead and ask: “what now?” Although this paper is necessarily being prepared in advance of the Symposium, I should be surprised if there were not a commonly held and broadly identifiable degree of concern for the natural environment (as well as for the human and built environments) in times of armed conflict and other military operations. There will, I am sure, be differences of emphasis in relation to the strategic imperative, in perceptions as to the adequacy of the existing legal framework, and in views about the utility of regimes of civil or criminal liability in respect of environmental harm in times of armed conflict. The issue likely to prove most difficult to resolve is the manner in which the international community - or individual nations - should seek to advance the cause of the protection of the environment in times of armed conflict in effective and practically realizable ways.

I. An Outline of Possible Positions with Respect to the Need for New International Accords

It is difficult to improve upon Dr Glen Plant’s description¹ of the proponents of different points of view on this topic as falling into four “camps,” of which the following is a brief summary:

Camp 1. Holders of this view, who include some influential policymakers of the major military powers, consider that existing customary law forms an adequate basis for the protection of the environment in times of armed conflict. They therefore consider that new binding international instruments are not necessary. The provisions of Additional Protocol I (1977)² are not regarded by them as having achieved the status of customary international law, in particular the provisions of Articles 35(3) and 55 which, in their view, set too precise a threshold of applicability of restraints on actions likely to affect the environment.

Camp 2. This camp differs from Camp 1 in regarding the provisions of Additional Protocol I as having achieved customary international law status. Moreover, adherents to this camp regard Articles 35(3) and 55 as having crystallized customary international law in setting restrictions on the ability of commanders to evaluate subjectively the effects of their actions on the environment. They generally share,

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

however, the views of Camp I that there is a danger in moving towards the adoption of any new instrument in that the dynamic force of customary law, and of existing international instruments, may be overshadowed and thereby weakened. Dr Plant counts the International Committee of the Red Cross (ICRC) as generally inclined to fall into Camp 2.

Camp 3. This camp contains those who consider existing customary and conventional law to be inadequate to protect the environment in times of armed conflict and who seek improvements and clarifications. Not all, it seems, would favor a new convention ("Geneva V") or new specific agreements or protocols; some would favor instead a nonbinding restatement of existing law, but with added emphasis on its application in respect of the environment.

Camp 4. While sharing the views of Camp 3, proponents in this camp would go further and seek to abolish the distinction between times of armed conflict and peace: all State operations should be governed by principles and rules prohibiting destruction of the environment, whether deliberately or collaterally.

All four camps seem to share at least one important concern: ways must be found to increase the effective application and observance of the existing (and future, if any) law.

II. The Essence of the Debate

The debate, it seems, is essentially between those who favor an approach based upon existing customary and conventional law, and those who favor progressive development of the law through new instruments.

A. The present content of customary law respecting the protection of the environment during armed conflict and other military operations.

Much will no doubt have been said already at this Symposium on this question. For my own part, I presently see the issues as follows:

(1) With the sole possible exceptions of Additional Protocol I (1977), Articles 35(3) and 55, and the ENMOD Convention (1977),³ there are no principles or rules of customary international law specifically prohibiting environmental damage in times of armed conflict or other military activity. There are, however, established customary principles of the law of armed conflict which may be regarded as having application to environmental harms, among others. Similarly, there are some broad customary law principles of environmental law capable of application in times of armed conflict or other military activity, as well as in normal times and circumstances. Can these two streams of customary law be brought into conjunction without the artificial construction of a connecting channel?

The most fundamental of all principles of the customary international law of armed conflict is that the right of belligerents to adopt means of injuring the enemy is not unlimited. This statement has been reaffirmed in a number of instruments

548 Protection of the Environment During Armed Conflict

going back to the Brussels Declaration of 1874⁴ and most recently in Additional Protocol I, Article 35(1). From this fundamental principle descend three other principles of major importance: the principles of military necessity, humanity, and chivalry. By a short step in deductive logic from these, one arrives at the principle of distinction between combatants and noncombatants, and between military objectives and civilians and civilian objects. Overarching the particular formulations and applications of these principles in existing conventional international law there is general recognition of the force of the statement in the so-called Martens Clause, which first appeared in the Preamble to Hague Convention II, 1899,⁵ and was restated in Additional Protocol I, Article 1(2):

Until a more complete code of the laws of war is issued . . . populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

It is not difficult to find scope in these broad principles for their application to the destruction of the natural environment. Perhaps the statement that would best sum up the deductive application of these principles to the environment would be one constructed by way of adaptation of part of the definition of “indiscriminate attack” against civilians and civilian objects in Additional Protocol I, Article 51(5)(b) to embrace the environment:

It is prohibited to launch an attack, or engage in other military operations, which may be expected, to cause incidental [collateral] damage to the natural environment which would be excessive in relation to the concrete and direct military advantage anticipated.

If such a proposition is fairly to be regarded as already customary law, the issue becomes that of how it may best be declared. For the adherents of Camp 1, it is no doubt already regarded as express or implicit within national policies and operational rules of engagement. For the adherents of Camp 2, it comes with the additional elements of a more precise indication of the leeways of operational discretion: “widespread, long-term and severe” damage to the natural environment (Additional Protocol I, Article 35(3)). Moreover, that Article is not expressly conditioned by any military advantage anticipated; rather it is assumed that to cross that threshold is in itself to exceed under all circumstances the dictates of military necessity. Thus, the issue between these two camps is whether such a judgment can be made as a matter of principle irrespective of the particular circumstances.

(2) It is also necessary to approach the issue of customary law from the direction of international environmental law.

Probably the only clearly established customary law principle of the natural environment is that no State may conduct activities, or permit the conduct of activities, on its territory that cause harm to the territory of another State, if that harm is of serious consequence and is established by clear and convincing evidence. (*The Trail Smelter Arbitration*⁶; the *Corfu Channel Case*⁷; the *Gut Dam Arbitration*.⁸) This principle descends from general concepts of the rights and duties of States and from the general principle of law *sic utere tuo ut alienum non laedas* ("so use your own property that you do not injure the property of another").

The principle is restricted to cross-boundary harm. No principle has, it seems, emerged with respect to harm directly or indirectly inflicted by a State through activities conducted in, or deliberately directed at, the victim State. The reason is clear: such activities would either be by the consent of the victim State (as, for example, in the carrying out of weapons tests) or would amount to an act of war.

The latter brings us to the direct issue posed. The former is illustrated by a recent dispute between Australia and the United Kingdom. In the 1950's and 1960's, nuclear tests were conducted by Britain in a remote part of Australia with Australia's consent in accordance with the terms of confidential memoranda of understanding. Under these terms, Britain was obliged to clear the site of contamination so far as was possible at the end of the testing program. A further memorandum of understanding was signed in 1967 recording the satisfaction of the two governments that that obligation had been carried out. In 1992, however, following an Australian Royal Commission of Inquiry into the state of the test site and the dangers of its use by aborigines living in traditional ways, Australia claimed that the earlier cleanup had been inadequate and that Britain was liable to make good its earlier promise by conducting, or paying for, extensive new works required in the light of new scientific evidence of the continuing contamination of the area and of the danger to the land's traditional owners and users. The United Kingdom refused to accept legal liability, arguing that it had been given a full discharge by the agreement of 1967. It did, however, later make an *ex gratia* payment of an amount approximately equivalent of half the cost of a full decontamination of the site.⁹

It is not clear that any general principle is revealed by this incident. Had no condition been attached of responsibility for making good the damage, it could have been argued that the consent of the host State extended to the voluntary assumption of risks involved in the activity. It does at least illustrate that what is thought to be not dangerous at the time, or what is thought to be slight harm, may turn out later, in the light of fuller scientific information, to be seriously harmful. This is now recognized in the current literature of environmental law as one of the elements involved in "the precautionary approach." It is to be wondered whether the limits of consent, as in the formulation of Draft Article 29 of the International Law Commission's work on the responsibility of States, could be

regarded as conditioned by the understanding of the time, reviewable in the light of later understanding:

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.¹⁰

The general principle of international environmental law stated above is based on good neighborliness and a duty to avoid harm. Armed conflict is the direct negation of these bases and so would appear, *prima facie*, to suspend the application of that principle. The law of armed conflict is *lex specialis* and prevails over the peacetime *lex generalis*. More limited situations short of armed conflict may be governed by one of the other principles recognized in the International Law Commission's Draft Articles on State Responsibility: *i.e.*, necessity and self-defense.

At present, therefore, I conclude that the two streams of customary law development meet at the same point. It may be otherwise if such developments as intergenerational equity should assume force as a binding legal principle. For then it could be argued that the effects of military operations on the environment cannot be judged only in relation to the circumstances appertaining at the time, but must take into account the future effects of environmental damage on the generations yet unborn. This approach is implicit in arguments raised in 1995 in relation to underground nuclear tests in the French Territory of Polynesia, in so far as they may present their most immediate danger to the local territory and people.

III. The Suggested Need for Clarification of the Law

The law of armed conflict and international environmental law are both especially dynamic bodies of law. Their points of intersection are therefore intrinsically likely to change as times and circumstances change. In principle, therefore, clarification of the law is highly desirable. It is desirable at the national level in the form of national policy, in the drafting of rules of engagement, and in the education and training of members of the armed forces. It is desirable at bilateral and multilateral levels in discussions between allies and like-minded governments. It is desirable at the universal level by way of setting standards for emulation and, if possible, enforcement. Clarification of the law, in whatever form it may take, must be a continuing endeavor.

Clarification of the law cannot consist solely of the formulation of broad principles and deducted rules. The effectiveness of such principles and rules depends upon a concurrent understanding of the kinds of circumstances in which they call for application. There is a need for inductive as well as deductive

reasoning to be applied, where certain vividly recorded or imagined circumstances are widely recognized as requiring that a particular rule be applied, or created if not already in existence. The actions of Iraq of discharging oil into the Gulf just before its expulsion from Kuwait may be counted as the single most important factor impelling consideration of the present topic.

Under what circumstances could military necessity justify the environmental harm of a deliberate release of oil into the sea? How great a harm was intended or foreseen by Iraq? How great was the harm in fact inflicted? To what extent can that harm be quantified and separated into (a) immediate harm to the opposed forces (*i.e.*, concrete and direct military advantage to Iraq), (b) short-term harm to the civilian population, (c) long-term harm to the civilian population and its environment, (d) widespread harm to the victim State and perhaps to third States, or even the international community (the global commons)? Is it a relevant factor that Iraq was a designated aggressor and was the subject of a collective enforcement action under the terms of Security Council resolutions? Is a State which has available to it less sophisticated and discriminatory weapons and means of conducting armed operations under a lower duty to avoid environmental harm than an opponent who has superior technology and is equipped to conduct operations with a higher level of regard for the natural environment?¹¹

The historic process of clarification of international law has been the practice of States crystallizing into custom where accompanied by their *opinio juris*. This process is often found to be too slow and uncertain in the modern world. Normally, the process of crystallization of rules is speeded up through multilateral treaty making (conventional international law). The questions are whether the process of clarification would be aided or impeded by the conclusion of new multilateral instruments, and whether there are alternatives to be considered.

IV. The Advantages of New International Accords

Generally speaking, it is not difficult to see the advantages of conventional law expressed in multilateral conventions enjoying wide adherence by States.¹² Conventional law has the general qualities of relative clarity of expression, authenticity, and ease of invocation and application similar to those of statute law compared with unenacted law in national legal orders.

In the international legal order, which lacks central organs endowed with true legislative, executive and judicial powers, multilateral conventions occupy a prime rank in the sources of international law. In the particular context of the bringing together of the law of armed conflict with international environmental law, it might be thought that the quasi-legislative process of conventional lawmaking would be the most obvious solution to the problem of clarifying and progressively developing the law. Moreover, that process, which necessarily involves the participation of a large number of States in the negotiation and adoption of the

text, itself serves as an exercise in the raising and articulation of concerns, and as an occasion for the exhibitions of *opinio juris* (as well as of opinions as to what the law ought to be), which form part of the material from which at a later stage customary law may begin to flow in a parallel stream. The educative and persuasive (or dissuasive) effects of multilateral conventions are often counted among their chief benefits to the international community. That there is an accepted international standard of conduct, for which chapter and verse may be cited, can be of great political advantage to States, intergovernmental and non-governmental organizations, and individuals, as for example in the field of human rights.

V. The Disadvantages of New International Accords

It is difficult to point to any inherent disadvantage of multilateral instruments in general. The common features and effects of such instruments, however, may work disadvantageously in some circumstances.

In the first place, conventional law tends to take over the field previously held by customary law in relation to the particular subject matter in question and to exclude its further exogenous development. To the extent that the multilateral instrument codifies preexisting customary law it stunts further development of customary law except along a path parallel with the instrument. It is true that there may be exceptions, but these are rare. For example, the International Court of Justice in the *Fisheries Jurisdiction Case* (U.K. and Germany v. Iceland)¹³ recognized that after the conclusion of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone,¹⁴ and the abortive Second United Nations Conference on the Law of the Sea (UNCLOS II) in 1960, State practice proceeded in the direction of recognizing an exclusive right of coastal States to fisheries within 12 miles of their coasts and preferential rights beyond that distance. Neither of these developments were compatible with the express terms of the 1958 Convention. This very example, however, reminds us that the Third United Nations Conference on the Law of the Sea (UNCLOS III) was already under way at the time of the Court's judgment, and that the radically new institution of the exclusive economic zone achieved conventional recognition within a short space of time thereafter. The phenomenon therefore speaks more of strains and stresses on existing conventional law producing demands for changes to that law by way of further conventions, rather than of conventional law happily coexisting with later glosses or developments deriving from a customary law source.

In the second place, conventional international law tends to freeze the law in a particular time frame. It may become out of date before it has long been in force, or even entered into force. It is not as easy to update as national legislation. Time and immense resources are required to assemble a diplomatic conference, which is the only equivalent in the international legal system of a legislature. Political circumstances may sometimes militate against this course. Again, a law of the sea

example is instructive. The 1982 United Nations Convention on the Law of the Sea,¹⁵ did not achieve the 60th ratification required for its entry into force until 16 November 1993. None of those 60 were developed countries. The reason was the inability of the developed countries to accept the provisions of Part XI of the Convention relating to the exploration and exploitation of the natural resources of the deep sea-bed. There was great reluctance to summon a Fourth United Nations Conference on the Law of the Sea in order to deal with this issue alone by reason of the danger of reopening other issues. An ingenious way around the difficulty was found through the negotiation and adoption in 1994 by a U.N. General Assembly Resolution of an Implementing Agreement¹⁶ whereby all parties to that Agreement agreed to apply Part XI of the Convention in accordance with the Agreement, in so far as it differs from the original text of Part XI. Nevertheless, the compulsory element of the linkage between the two instruments essentially depends upon political forbearance, not strictly legal obligation. In 1995, in a more orthodox manner, States adopted a further Agreement regarding high seas fisheries, which considerably expands the law on that topic beyond what is contained in the 1982 Convention.¹⁷ It was certainly by no routine amendment procedure that these remarkable results were achieved. One cannot predict with any confidence that other deficient international instruments will be so successfully remedied or updated.

Thirdly, the creation of law through multilateral instruments tends to be a highly politicized process. Typical negotiation procedures by way of consensus sometimes produce texts of perplexing opaqueness, with the result that some provisions are reduced either to the platitudinous or to the dangerously self-judging. An often cited example of the latter is Additional Protocol I, Article 44(3) relating to the obligation of combatants to carry arms openly.

It is tempting to dwell on the point that the more the drafting of multilateral international instruments is left to the experts, the more workable and durable those instruments are likely to be. For example, little criticism is heard of the four Geneva Conventions of 1949.¹⁸ They were drawn in part from earlier and tried instruments, and from immense preparatory work by the ICRC during and immediately after World War II. The diplomatic conference of 64 States which adopted them was of comparatively short duration (21 April to 12 August 1949). By contrast, the diplomatic conference which adopted Additional Protocols I and II to the 1949 Conventions consisted at various times of up to 124 States and met for a total of some 8 months spread over four years. Another example is in the law of the sea. The Geneva Conventions of 1958 were preceded by exhaustive studies by the United Nations International Law Commission (I.L.C.), made up of 24 international lawyers of proven competence. The diplomatic conference was relatively short (24 February-27 April 1958) and the I.L.C. draft was not greatly changed. By contrast, it took no less than 12 negotiating sessions spread over 10

years to finalize the text of the 1982 United Nations Convention on the Law of the Sea. There was no preparatory work by the I.L.C. or by any other expert body; such specialized bodies as there were came from within the Conference, formed according to the exigencies of “representativeness” and “balance” rather than of expert knowledge.

The considerations outlined above would appear to militate against the desirability of subjecting the topic of the law of armed conflict and the environment to the uncertainties of the international negotiating process. These considerations must, however, be carefully weighed against the advantages of codification and progressive development, which are not the less weighty for having been stated here at lesser length. A combination of two elements might make the prospect of a new international instrument more acceptable:

(a) the preparation of draft texts by an expert and relatively small body, with wide knowledge of international law in general, not merely of the law of armed conflict or of international environmental law; and

(b) the determination in such drafts to codify and reaffirm existing principles of customary law rather than to proceed from new premises and attempt to create new law.

VI. Alternatives to the Adoption of New International Accords

There appear to be two, non-mutually exclusive, alternatives to adopting new international accords.

(a) The preparation of a Restatement of existing customary law principles of the law of armed conflict, and of other military operations, in relation to effects on the natural environment.

The Restatement could be prepared by a group of experts, convened under neutral auspices, perhaps by the ICRC alone or by the ICRC and a nongovernmental environmental body jointly. It would not be designed as an instrument open to adhesion in treaty form, and hence would not require a diplomatic conference to consider its results. It would not commit the sponsoring bodies; responsibility for it would be taken by the experts as individuals, not as representatives of the States of which they are citizens. It might be desirable for the group of experts to publish, at a certain point in the progress of their work, a discussion paper for circulation to governments and interested nongovernmental groups with a view to receiving comments and constructive suggestions. In the end, the Restatement would serve the useful end of clarifying issues and heightening awareness of them among governments and military officers. Like the Oxford Manual¹⁹ of old, and perhaps the newly issued San Remo Manual on the Law of Armed Conflict at Sea,²⁰ such a Restatement would have stature and highly persuasive influence.

(b) The preparation of studies at the national level, with a view to their implementation in national policies and rules of engagement, and to their dissemination abroad.

It is well known that such national manuals as NWP 9—The Commander's Handbook on the Law of Naval Operations²¹—has wide circulation beyond the United States. Less well resourced States look for such a lead and are inclined to follow the practice indicated unless there is perceived to be some compelling national interest to the contrary. Studies incorporating forms of direction similar to NWP 9, rather than those published only in discursive form, are to be preferred if they are to find wider emulation and implementation.

Notes

- *Challis Professor of International Law, University of Sydney, Australia; Captain, Royal Australian Navy Reserve.
1. ENVIRONMENTAL PROTECTION AND THE LAWS OF WAR: A "FIFTH" GENEVA CONVENTION ON THE PROTECTION OF THE ENVIRONMENT IN TIME OF ARMED CONFLICT (Plant ed. 1992).
 2. Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I), with Annexes, 1977, *reprinted in* 16 I.L.M. 1391 (1977).
 3. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977, 31 U.S.T. 333; T.I.A.S. 9614.
 4. Declaration of Brussels, 1874, 65 B.F.S.P. 1005; 1 A.J.I.L. (Supp.) 96 (1907).
 5. Hague Convention No. II with Respect to the Laws and Customs of War on Land, 1899, 32 Stat. 1803; 91 B.F.S.P. 988; 1 A.J.I.L. (Supp.) 129 (1907).
 6. United States v. Canada, 1938 and 1941, 3 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 1905.
 7. United Kingdom v. Albania, INTERNATIONAL COURT OF JUSTICE REPORTS, 1949 I.C.J. 4.
 8. United States v. Canada, 8 I.L.M. 118 (1969).
 9. Note, Australia-UK nuclear test sites rehabilitation settlement, *in Australian Practice in International Law*, 15 Australian Y.B. Int'l L. (1994), 649-50.
 10. United Nations, Y.B. of the I.L.C. (1979), 292.
 11. An issue prompted by analogy from the variable standard of preventive action to be expected of occupiers of land where fire breaks out on their property, as expressed by Lord Wilberforce in the Judicial Committee of the Privy Council on an appeal from Australia: *Goldman v. Hargrave* (1967) 1 AC 645.
 12. *See, e.g., Tärk, The Negotiation of a New Geneva-style Convention - A Government Lawyer's Perspective, in ENVIRONMENTAL PROTECTION AND THE LAWS OF WAR, supra n. 1 at 96-103.*
 13. *Fisheries Jurisdiction Case*, U.K. v. Iceland, 1974 I.C.J. 3.
 14. Geneva Convention on the Territorial Sea and Contiguous Zone, 1958, 15 U.S.T. 1606; T.I.A.S. 5639.
 15. United Nations Convention on the Law of the Sea, 1982, *reprinted in* 21 I.L.M. 1261 (1982).
 16. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, of 10 Dec. 1982, with Annex, 1994, *reprinted in* 33 I.L.M. 1309 (1994).
 17. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995, *reprinted in* 34 I.L.M. 1542 (1995).
 18. Geneva Conventions for the Protection of War Victims, 1949, 6 U.S.T. 3119-3695; T.I.A.S. 3362-3365; 75 U.N.T.S. 31-417.
 19. 1913 Oxford Manual, The Laws of Naval Warfare Governing the Relations between Belligerents, Oxford (1913), *reprinted in* THE LAWS OF ARMED CONFLICT (Schindler & Toman eds. 1981) at 147.
 20. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Doswald-Beck ed. 1994).
 21. U.S. Department of the Navy, The Commander's Handbook on the Law of Naval Operations, NWP 9 (Rev. A)/FMFM 1-10 (1989).