

Chapter XX

Comment: Protection of the Environment During Non-international Armed Conflicts

Professor Theodor Meron*

I am most grateful to Captain Jack Grunawalt for inviting me to participate in this Symposium on the Protection of the Environment during Armed Conflict and other Military Operations. The organizers deserve special thanks for bringing together military and civilian experts on international environmental law and the law of war for a discussion of a most important, interesting and timely subject.

Meetings and dialogue of this kind between military and academic lawyers is something that I would like to see more often in the future; academics are often unaware of the important work that is done by military lawyers. The papers presented to our Panel by Admiral Robertson and Colonel Burger exemplify careful research and analysis. Both authors detail constructive, reflective and fresh approaches, which, in my experience, one often finds among military lawyers.

In assessing protection of the environment in non-international armed conflicts, one must keep in mind certain considerations. First, to be effective, protection of the environment must be continuous and ongoing. It cannot be contingent upon whether there is a state of peace, international war or civil war. It is encouraging that there is an emerging consensus that acts prohibited in international wars should not be tolerated in civil wars.

Second, instruments protecting the environment during non-international armed conflicts are considerably weaker than those applicable to international wars. The reason for such weakness is not merely technical. It reflects the reluctance of States to recognize international constraints on the conduct of civil war on their national territories.

The sovereignty of States and their traditional insistence on maintaining maximum discretion in dealing with those who threaten their sovereign authority have combined to limit the reach of the law of war to non-international armed conflicts. Treaty language such as that in Common Article 3(2) to the Geneva Conventions, explicitly stating that certain rules will not affect the legal status of the parties, has not proved to be sufficiently reassuring for governments concerned with legal recognition and political status of rebel groups.

The critical stakes involved in internal conflicts, namely, survival of authorities in power, partition of territory, movements of populations, the challenge of identifying the actors responsible for egregious acts of environmental damage, imputability and responsibility issues, all add to the formidable difficulties confronting the international community in trying to improve the protection of the environment in civil wars. How to bind insurgents to emerging international rules that protect the environment also represents a major problem for the international community.

Of course, quite a few of the present difficulties could be resolved, or at least attenuated, through good faith respect for already existing principles. It is possible that most attacks on the environment in internal conflicts would have occurred whatever the normative provisions. But the normative weakness plays into the hands of those who tend to pay little respect for environmental protection to begin with.

There has nevertheless emerged an encouraging, though still tentative, trend towards the extension of some law of war treaties, and some arms control treaties of major environmental importance, to non-international armed conflicts. Consider, for example, the applicability to civil wars of parts of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the applicability in all circumstances of obligations of States under the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological, Biological, and Toxin Weapons and on their Destruction, and under the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction; and most recently, the proposals before the Review Conference of the States Parties to the 1980 Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons to extend the prohibitions of Protocol II on the Use of Mines, Booby-Traps and other Devices (Protocol II) to non-international armed conflicts.

Although I share Conrad Harper's and John McNeill's skepticism about prospects for a major expansion by treaty of environmental protection in time of war (at the present time, a diplomatic conference is unlikely to agree to a high common denominator), I would not rule out the possibility of further modest, focused expansion by treaty of environmental protections to non-international armed conflicts.

Moreover, as already noted in the papers presented to our panel, the ENMOD Treaty is applicable in all circumstances. The problem with many environmental treaties, however, is that they are silent as to their continued applicability in armed conflicts. Some environmental treaties, such as those protecting endangered species, their habitats and other particularly vulnerable environmental assets, would not serve a useful purpose unless construed to apply in all situations.

In the ICRC Committee of Experts on the Environment and the Law a suggestion was made to study all the major environmental treaties with a view to ascertaining whether they were intended to continue to apply in time of war, including civil war. That suggestion does not appear to have been followed. Future treaties should, whenever possible, contain explicit language ensuring their applicability in time of war, including non-international armed conflicts.

The difficulty in classifying conflicts as either international or internal provides an additional argument for applying to civil wars the broader protective rules applicable in international armed conflicts. Colonel Burger, for example, treats the conflict in the former-Yugoslavia as non-international, although the Security Council appears to regard the conflict as international and the United States in its *amicus* brief submitted to the criminal tribunal for the former-Yugoslavia strongly argues that the conflict is one of an international character.

In attempting to enhance the protection of the environment during non-international armed conflict, there are several approaches which are not mutually exclusive. I already mentioned the *treaty-making or law-making approach*, which while useful in specific areas, does not promise a real panacea, at least in the present circumstances. In any event, Professor Oxman's suggestion that additional treaty protection could be created for objects of special environmental importance deserves careful consideration.

Second, the *strengthening of the national environmental peace-time policy approach*. Strengthening national environmental law, policy and education during periods of peace may in practice contribute to de-legitimizing environmentally disastrous conduct by government and rebel forces as they battle for the hearts and minds of the people.

Third, the *interpretative approach*, *i.e.*, wherever possible construing those environmental treaties which are silent on applicability in time of war as continuing in effect during non-international armed conflicts. As the ICRC 1993 report to the U.N.G.A. noted, "Rules of general or bilateral international treaties remain applicable in principle to a State in which there is an internal conflict." Of course, absent international war, there is no justification for suspending environmental treaties on grounds of war with foreign countries. There remains the possibility, however, of a State trying to suspend such treaties on grounds of national emergency, necessity or *force majeure*. Other States should be skeptical of such justifications for treaty suspension. Ideally, of course, environmental treaties should provide for non-derogability or at least as narrow derogability as possible.

Fourth, the *human rights connection*. As we all know, there is an important school of thought linking protection of the environment in time of war, including civil war, with protection of human rights. The recent decision of the European Court of Human Rights in the case of *Lopez Ostra v. Spain* has given new vitality to the human rights dimension of environmental protections. Of course, respect of

human rights has always suffered from claims of derogability on grounds of national emergency.

Fifth, the *customary law strategy*. I refer here to the Martens Clause which encapsulates the reservoir of general principles and customary law which serve to limit the discretion of military commanders and suggest that military commanders select those tactical solutions that are most beneficial to the protection of the environment. This would include also such general law of war principles as proportionality and the prohibition of causing unnecessary damage or wanton destruction, and outside of the law of war, some principles of State responsibility. Some relevant environmental standards may already be part of customary international law applicable in non-international armed conflicts without being encompassed in the present, standard interpretations of the Martens Clause. Perhaps the most important challenge is to recognize that these principles, rooted in the Hague law, have an undeniable place in internal conflicts. Because of the high threshold of the environmental provisions contained in Additional Protocol I, their usefulness even for international armed conflicts is limited. The customary law principles stated in the Hague Convention No. IV on the Laws and Customs of War on Land (1907) are, therefore, particularly important.

Sixth, establishment of *model rules and model agreements*. I refer here to the development of a model set of essential standards for the protection of the environment in non-international armed conflicts to be followed by parties to internal conflicts. Compliance would be encouraged through strong international pressure. In appropriate circumstances, such model rules might be transformed into agreements to be accepted by conflicting parties. In drafting the model rules and model agreements, efforts should be made toward greater integration of environmental and law of war standards. This could lead to a more significant emphasis in the law of war on such fundamental environmental concerns as the precautionary principle and respect for future generations. This should also be relevant to the drafting of rules of engagement, military manuals and training methods.

Seventh, *mechanisms* should be set in place for ensuring respect for the existing principles—imaginative consideration should be given to the possibility of more efficient scrutiny and monitoring of violations. Such mechanisms could include, as already suggested by John McNeill: (1) requiring violators of existing principles to pay compensation, and (2) prosecuting such violators as war criminals. I would add that such prosecutions should be contemplated only where the existing customary law is sufficiently established to overcome possible *ex post facto* challenges. One would have to be cautious about the applicability of simple compensatory models in the present state of international law on the environment and war.

Problems about the roles of international institutions in non-international armed conflicts are legion, but environmental protection raises further questions. Special expertise is needed in relation to environmental issues if international institutions are to contribute to monitoring, assessment, and protective measures. Some environmental capacity-building is desirable in the OSCE, Western European Union, the United Nations and NATO, especially where they deploy fact finders, observers, or military units. Technical environmental assistance to States involved in internal conflicts may also play a role in helping promote observance of the law of war. Again, this raises questions of environmental consciousness and environmental expertise of military trainers and foreign military advisers.

Eighth, and most important, the *pragmatic-expansive approach*—here I address the readiness to apply to non-international armed conflicts the broader and more protective rules applicable to international armed conflicts. This approach is exemplified by the paper by Admiral Harlow, who speaks of the duty of States involved in combat operations to act, in military operations other than war, within the constraints of the law of armed conflict.

Even more explicitly, Colonel Burger pleads with regard to the conflict in the former-Yugoslavia for respect by U.N. peace-keeping forces and NATO forces for the more extensive environmental protections stated in Additional Protocol I. He notes that the rules of engagement being used by peace-keeping forces in former-Yugoslavia and the rules proposed for NATO forces acting in support of the United Nations, “Do not make a distinction between international and non-international conflicts” and that any peacekeeping force would follow the environmental provisions of Additional Protocol I “no matter how we classify the conflict.” The application of such higher standards, he suggests, would apply not only to non-international armed conflicts but also more broadly to all military operations other than war.

I believe that the incorporation of environmental protections rules of engagement offers a very attractive strategy, as does the inclusion in military manuals of environmental rules which follow, for all armed conflicts, the most protective rules. In addition, the anthropocentric provisions of Additional Protocol II (Articles 14-15) could be broadly interpreted to provide more direct protection to environmental assets.

Most important is the emerging readiness to factor environmental concerns into the calculus of the military commander and, at least as the United States policy is concerned, to apply the more broadly protective rules pertinent to international armed conflicts to non-international armed conflicts as well. Thus, the authoritative Commander’s Handbook on the Law of Naval Operations [NWP 9 (Rev. A), at 6.1.2.] clearly states:

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The obligations of the United States under the law of armed conflict are observed and enforced by the U.S. Navy in the conduct of military operations and related activities in armed conflict, regardless of how such conflicts are characterized.

The 1995 revised edition of this Handbook follows the same approach: “[i]n those circumstances when international armed conflict does not exist (*e.g.*, internal armed conflicts), law of armed conflict principles may nevertheless be applied as a matter of policy” [NWP 1-14M at 6.1.2]. Although the U.S. position on this issue is ahead of the views of most States, it is not unique. Thus, the German Humanitarian Law Manual [DSK VV 207320067 at para. 211] states that “German soldiers, like their Allies are required to comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts however such conflicts are characterized.”

None of the above approaches offers a definite or comprehensive solution. Taken together, they suggest useful strategies for more effective protection of the environment during non-international armed conflicts, and serve to facilitate the development of international law, conventional and customary, in this area of growing concern.

*Professor of International Law, New York University School of Law.