

Chapter XXIX

Comment: Criminal Responsibilities for Environmental Damage

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I am designated in the program as a commentator and in this paper will restrict myself to comments. I am not going to present any of my own ideas except by way of comment on the two papers of our two presentors—Professor Bothe and Doctor Tanja—apart from one preliminary paragraph. In that preliminary paragraph I wish to point out to you some evidence of the extent that we have progressed in our desire to protect the planet Earth from the depredations of mankind, particularly during armed conflict and other military operations. Contrary to our discussions at this Symposium, you will not even find the word “environment,” or the word “ecology,” in the index to that classic of international law, the seventh edition of the second volume of Lauterpacht’s *Oppenheim’s International Law*, published in 1952¹; nor in the index to the second volume of Schwarzenberger’s work with the same title, published in 1968.²

I have only one problem with Professor Bothe’s presentation. He questions whether there is a duty imposed on States “to punish violations below the level of grave breaches.” The third paragraph of common Articles 49/50/129/146 of the four 1949 Geneva Conventions for the Protection of War Victims obligates the Parties to suppress all violations of those instruments “*other than . . . grave breaches*;³ and Article 85(1) of the 1977 Additional Protocol I refers to the suppression of “*breaches and grave breaches*” of that Protocol.⁴ Accordingly, there is no doubt in my mind that breaches other than “grave breaches” of those international agreements are punishable.

I have no difficulty whatsoever with Dr. Tanja’s initial conclusion that we are fully justified in considering that present-day international law, as most recently set forth in the Statutes of the two International Tribunals established by the United Nations Security Council, the one for the former-Yugoslavia,⁵ the other for Rwanda,⁶ indicates that there is individual criminal responsibility for violations of international humanitarian conventions. However, I do not have the difficulty that he appears to have in operating under present customary and conventional law. It will be recalled that as long ago as shortly after World War II, before a Military Tribunal sitting in Nuremberg in one of the so-called “Subsequent Proceedings,” German General Rendulic was charged with ordering

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.

a far-reaching scorched-earth policy during the retreat of his army from Finland across the Finnmark province of Norway.⁷ Towns were levelled, bridges blown up, water courses diverted, crops and animals were destroyed, etc. His information that the Soviet army was in close pursuit of his troops was incorrect and the destruction that he had ordered did not actually fall within the doctrine of military necessity. The Tribunal held, in effect, that he had acted in good faith, that he had a right to act on the information available to him at the time, that he believed that military necessity required such action, and much to the dismay of the Norwegians, despite the widespread damage to property, crops, and the environment which his army had accomplished, he was acquitted of this charge. However, there is no question but that if the Tribunal had found that he had acted wantonly, he would have been adjudged guilty of a war crime.⁸

I must also agree with Dr. Tanja that regrettably there is nothing in international law protecting the environment from conflicts which are non-international in scope, probably because, until the 1977 Additional Protocol II,⁹ international diplomatic conferences did not concern themselves with such conflicts, considering them to be within the ambit of national laws and a very small area of customary international law (the doctrine of non-interference, etc.).

Unfortunately, I cannot agree with his conclusion that neither the 1907 Hague Regulations,¹⁰ nor the London Charter of the International Military Tribunal (I.M.T.) which sat in Nuremberg,¹¹ contributes to the solution of the problem of the protection of the environment in time of war or other military operations. Even though there was no specific provision in the Hague Regulations making such violations punishable, trials during and after World War I, and after World War II, conducted by many different nations, involved charges of crimes which were, in effect, violations of those Regulations.¹² As for the London Charter, it was drafted by representatives of France, the Soviet Union, the United Kingdom, and the United States, and the Agreement to which it was attached was subsequently adhered to by nineteen other nations.¹³

For that time frame, twenty-three nations, including four of the then most important ones, represented a large part of the existing international community. Moreover, the General Assembly of the United Nations "affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."¹⁴ The International Military Tribunal held that the Hague Regulations were a part of customary international law, binding on all nations, whether or not they were Parties to it. I am of the opinion that even though the Hague Regulations contain no penalty provisions for violations of their prohibitions, punishment for such violations is legally permissible; and that the "Nuremberg episode" was more than a "special, *ad hoc* arrangement." The fact that its basic provisions are to be found in the Statutes of the two International

Tribunals established in recent years by the Security Council of the United Nations demonstrates its lasting importance.

I am afraid that I must also disagree with Dr. Tanja with respect to his rather shabby treatment of Article 147 of the 1949 Fourth Geneva Convention.¹⁵ Each grave breach listed is an offense in and of itself and that is true of the grave breach of “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”. In effect, that provision indicates that not every destruction of property mentioned in Article 53 of the Convention is a grave breach thereof. There may be unintended destruction; there may be minor destruction; and there may be excusable “extensive destruction”, such as that ordered by General Rendulic under a misapprehension and therefore not wanton. Moreover, as Article 146(3) of the Convention indicates, there will be violations of the Convention which are not grave breaches but which will still be offenses that the State has a duty to suppress: unlawful and wanton destruction of property not attaining the status of “extensive” might be such an offense. It is true that unjustifiable destruction of property might not be charged as an offense against the environment *per se*. It was not done in General Rendulic’s case; but what difference does that make? The result is the same. The person who is guilty of extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly, which destruction adversely affects the environment, will be punished for his offense whatever the specific charge may be. Of course, what has just been said with respect to Article 147 of the 1949 Fourth Geneva Convention is equally applicable to Article 85 of the 1977 Additional Protocol I,¹⁶ which contains the relevant grave breaches provisions of that instrument.¹⁷

I heartily agree with Dr. Tanja that there are serious flaws in the extradition provisions of both the 1949 Geneva Conventions and the 1977 Additional Protocol I. Unfortunately, this is not a problem unique to those treaties.

As has been pointed out, the first international convention specifically directed towards the protection of the environment in time of hostilities or other military operations was the so-called ENMOD Convention.¹⁸ It was followed shortly thereafter by Articles 35(3) and 55 of Additional Protocol I.¹⁹ Article 2(4) of Protocol III to the 1980 Conventional Weapons Convention,²⁰ containing restrictions on the use of incendiary weapons against “forests or other plant cover”, may also be considered to be directed towards the protection of the environment. Of course, a number of treaties relating to various aspects of nuclear weapons have an impact on the environment, as do those prohibiting bacteriological and chemical weapons and warfare.²¹ President Clinton has prohibited nuclear testing by the United States — but the same cannot be said for all of the other nuclear Powers. The Chinese testing of nuclear weapons in 1995, and France’s announcement of its intention to initiate eight nuclear tests in the South Pacific,

beginning in September 1995, have caused much concern among the international community. New Zealand, which had brought an action against France on this subject in the International Court of Justice in 1973,²² as did Australia, has again instituted proceedings against France, based upon a 1974 commitment made to it by France and has asked, as a provisional measure, that “France refrain from conducting any further nuclear tests” at the named atolls.²³ Australia has requested permission to intervene in those proceedings.²⁴ (Nevertheless, on 5 September 1995 France exploded a nuclear device on Mururoa Atoll in the South Pacific.)²⁵ Moreover, on 3 September 1993, the World Health Organization (WHO) requested an advisory opinion from the International Court of Justice on the following question:

In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?²⁶

Subsequently, on 15 December 1994, the General Assembly of the United Nations adopted Resolution 49/75 (1994) entitled “Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons.” The question posed by the General Assembly in its request asks:

Is the threat or use of nuclear weapons in any circumstance permitted under international law?²⁷

Both of those matters are presently pending before the Court.

One has but to read the presentation made by Professor Szasz at the 1991 Annual Meeting of the American Society of International Law²⁸ to become aware of the fact that while protecting the environment, particularly from the havoc of war, has become a matter of major concern for many international organs, actual progress in this regard has been minimal. The Gulf War included numerous acts by Iraq aimed directly at the environment, many of which had no military significance—but any suggestions that the person or persons responsible for those acts suffer punishment died on the vine.²⁹

In 1980, the General Assembly of the United Nations adopted a Resolution entitled “Historical responsibility of States for the preservation of nature for present and future generations” in which one of the preambular paragraphs stated:

Noting that the continuation of the arms race, including the testing of various types of weapons, especially nuclear weapons, and the accumulation of toxic chemicals are adversely affecting the human environment and damaging the vegetable and animal world;³⁰

One of the operational paragraphs states:

*Draws the attention of States to the fact that the continuing arms race has pernicious effects on the environment and reduces the prospects for the necessary international co-operation in preserving nature on our planet.*³¹

If the production of armaments and their testing adversely affect the human environment, it is not difficult to envision the effect of warfare itself on the environment.

Concerning Iraqi actions against the environment, the following was found:

The Gulf was fouled when between seven and nine million barrels of oil were discharged into it by Iraq. In the desert, five hundred and ninety oil wellheads were damaged or destroyed: five hundred and eight of them were set on fire, and the remaining eighty-two were damaged in such a manner that twenty-five to fifty million barrels of oil flowed freely from them onto the desert floor. The result was total devastation of the fragile desert ecological system and the pollution of water sources critical to survival.³²

... From 9 to 12 July 1991, the Government of Canada, in concert with the Secretary General of the United Nations, hosted a conference of international experts in Ottawa, Ontario, to consider the law of war implications of the environmental devastation caused by the Iraqis. There was general agreement that the actions cited constitute violations of the law of war, specifically:

- a. Article 23(g) of the Annex to the 1907 Hague Convention IV Respecting the Customs of War on Land of 18 October 1907, forbids the destruction of "enemy property unless ... imperatively demanded by the necessities of war;" and,
- b. Article 147 of the GC [1949 Geneva Civilians Convention], makes the "extensive destruction ... of property, not justified by military necessity and carried out unlawfully and wantonly" a grave breach.

... Review of Iraqi actions makes it clear that the oil well destruction had no military purpose; it was designed to wreck Kuwait's future — a scorched earth policy carried to the extreme.³³

It would appear indisputable that Saddam Hussein and the Iraqis were guilty of violating the provisions of Article 23(g) of the 1907 Hague IV Regulations,³⁴ Regulations which the International Military Tribunal at Nuremberg held to be part of customary international law,³⁵ and Article 147, the grave breaches provision of 1949 Geneva Convention No. IV Relative to the Protection of Civilian Persons in Time of War,³⁶ both of which prohibit the destruction of enemy property not justified by military necessity. They were, therefore, guilty of a war crime for which they should have been tried and, if found guilty by a court of competent jurisdiction, punished. Unfortunately, as so often happens, to have included a provision concerning trials for war crimes in the terms of the cease-fire

would undoubtedly have lengthened the period of hostilities and would eventually have resulted in Saddam Hussein and other high ranking Iraqis seeking refuge in some other renegade country which would have given them asylum and would have found some basis for refusing to try or extradite them as required by the 1949 Geneva Conventions.

Resolution 687 of the Security Council of the United Nations, adopted on 8 April 1991, set forth the conditions which Iraq had to accept in order to have a cease-fire.³⁷ Paragraph 16 of that instrument reaffirmed that "Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources". Unfortunately, that provision referred only to civil, not criminal, liability.

While I have no knowledge of any military activities in the Yugoslav imbroglio which were directed specifically at the environment, I am sure that incidents of that nature have occurred. However, I am pessimistic concerning the possibility of the trial and punishment of the individuals responsible for such offenses by the International Tribunal for the former-Yugoslavia.³⁸ I hope that I will find that my pessimism in this regard is unjustified. Torturing or killing an enemy civilian or a prisoner of war, or raping an enemy woman, are pernicious crimes — but they affect only one victim. Attacks on the environment affect all humanity and can, eventually, make our planet uninhabitable.

I will close with a quotation from a statement made in a Panel at the 1991 Annual Meeting of the American Society of International Law:

. . . I am somewhat inclined to think that now it may be time for us to seriously consider the possibility of establishing an appropriate international mechanism to cope with such situations as environmental terrorism or aggression.³⁹

Notes

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1. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE*, VOL. 2, *DISPUTES, WAR AND NEUTRALITY*, (Lauterpacht ed., 7th ed., 1952).

2. SCHWARZENBERGER, *INTERNATIONAL LAW (AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS)*, Vol. 2 (1968).

3. 1949 Geneva Conventions for the Protection of War Victims, 12 Aug. 1949, 6 U.S.T. 3114-3695, T.I.A.S. 3362-3365; 75 U.N.T.S. 31-417, reprinted in *THE LAWS OF ARMED CONFLICTS* (Schindler & Toman eds., 3d ed., 1988) at 373-594 (hereinafter Schindler & Toman) (emphasis added).

4. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 155 (1978); 72 A.J.I.L. 457 (1977); 16 I.L.M. 1391 (1977); Schindler & Toman, *supra* n. 3, at 621 (emphasis added).

5. United Nations Security Council Resolution 827 (1993), *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former-Yugoslavia Since 1991*, U.N. Doc. S/RES 827 (1993), reprinted in 32 I.L.M. 1203 (1993).

6. United Nations Security Council Resolution 955 (1994), *International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda*, U.N. Doc. S/RES 955 (1994), reprinted in 33 I.L.M. 1600 (1994).

7. *United States v. Wilhelm List et al (The Hostage Case)*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1230 (1950). Dr. Tanja mentions this case in his footnote 22. However, I believe that he misinterprets the meaning of the decision.

8. *Id.*, at 1295-97.

9. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609.

10. 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land (with annexed Regulations), 18 Oct. 1907, 36 Stat. 2277; 100 B.F.S.P. 338; 2 A.J.I.L. (Supp.) 90 (1908); Schindler & Toman, *supra* n. 3, at 63.

11. Charter of the International Military Tribunal Attached to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 Aug. 1945, 59 Stat. 1544; E.A.S. 472; 82 U.N.T.S. 279; 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, (Bevens ed. 1968-1976) at 1238; LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES (1993) at 549 [hereinafter LEVIE, WAR CRIMES]; Schindler & Toman, *supra* n. 3, at 911.

12. In this regard, see Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 Syr. J. Int'l L. & Com. 1, 9 (1995).

13. LEVIE, WAR CRIMES, *supra* n. 11, at 51.

14. U.N.G.A. Res/95/1, 11 Dec. 1946, 1 RESOLUTIONS OF THE UNITED NATIONS (GENERAL ASSEMBLY) (Djonovich ed. 1972) at 175.

15. Convention No. IV Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287; 157 B.F.S.P. 355; Schindler & Toman, *supra* n. 3, at 495.

16. See *supra*, n. 4.

17. The United States has not ratified Additional Protocol I; and Articles 35(3) and 55, the two articles dealing with the environment, are not among those which the United States "supports". See Levie, *The 1977 Protocol I and the United States*, 38 Saint Louis U.L.J. 469, 470 n. 4 (1993-1994).

18. 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; 16 I.L.M. 88 (1977); Schindler & Toman, *supra* n. 3, at 163. The United States is a Party to this Convention, as are most of the major Powers.

19. See *supra*, n. 4.

20. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, Protocol III to the 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, 1980, Schindler & Toman, *supra* n. 3, at 179, 190; 19 I.L.M. 1524, 1534 (1980). In ratifying this Convention, the United States ratified its Protocols I and II, but did not ratify its Protocol III.

21. See Westing, *Proscription of Ecocide: Arms Control and the Environment*, 30 Bull. of Peace Proposals 24 (January 1974), reprinted in THE VIETNAM WAR AND INTERNATIONAL LAW, Vol. 4 (Falk ed. 1976) at 283. In July 1993, the International Court of Justice established a "Chamber for Environmental Matters" consisting of seven of the judges of the Court. I.C.J. Communique No. 93/20.

22. 1974 I.C.J. 457.

23. I.C.J. Communique No. 95/22, 21 Aug. 1995.

24. I.C.J. Communique No. 95/23, 23 Aug. 1995. So, too, have Samoa and the Solomon Islands, (I.C.J. Communique, No. 95/24, 24 Aug. 1995), the Marshall Islands, and the Federated States of Micronesia (I.C.J. Communique No. 95/25, 28 Aug. 1995).

25. The news of the French action resulted in riots in Tahiti, a South Pacific colony of France. A hearing was held by the International Court on the New Zealand application on 11 September 1995. The application was denied by the Court. Of course, so, too, were all the corollary applications.

26. I.C.J. Communique No. 93/26, 3 Sept. 1993.

27. I.C.J. Communique No. 94/24, 23 Dec. 1994.

28. Szasz, *The Gulf War: Environment as a Weapon*, 1991 Proc. A.S.I.L. 215.

29. In ARKIN *et al*, ON IMPACT: MODERN WARFARE AND THE ENVIRONMENT: A CASE STUDY OF THE GULF WAR (1991), the authors state at 23 that:

for political reasons, the Bush Administration, and numerous western allied governments, prefer not to accuse Iraq of breaching any convention or legal principle or humanitarian rule, and instead still accuse Saddam Hussein of "environmental terrorism."

Unfortunately, they do not tell us what the "political reasons" were, nor why Saddam Hussein could not have been tried for "environmental terrorism."

30. U.N.G.A. RES/35/8, 30 Oct. 1980, XIX RESOLUTIONS OF THE GENERAL ASSEMBLY (Djonovich ed. 1985) at 195.

31. *Id.*

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32. The number of Kuwaiti oil wells destroyed by fire or explosives is sometimes placed as high as 732. *See, e.g.,* McNeill, *Protection of the Environment in Times of Armed Conflict: Environmental Protection in Military Practice*, 1993 Hague Y.B. Int'l L. 75.

33. U.S. Department of the Army, War Crimes Documentation Center, International Affairs Division, Office of the Judge Advocate General, *Report on Iraqi War Crimes (Desert Shield/Desert Storm) 1992* [Unclassified Version], at 10-11. An elaboration of this problem will be found in ARKIN, *supra* n. 29, at 21-25, 62-72.

34. *See supra*, n. 10.

35. TRIAL OF THE MAJOR WAR CRIMINALS, Vol. 1 (1947) at 253-254; NAZI CONSPIRACY AND AGGRESSION (1947) at 83.

36. *See supra*, n. 15.

37. United Nations Security Council Res/687 (1991), 8 Apr. 1991, reproduced in 30 I.L.M. 846 (1991).

38. *See supra*, n. 5.

39. Remarks by Shinya Murase in a Panel on "New Developments in International Environmental Law", 1991 Proc. A.S.I.L. 401, 409-10.