

Chapter 39

The Environment and the Laws of War: The Impact of Desert Storm*

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The Iraqi invasion of Kuwait and the resulting environmental carnage caused by the burning of oil wells and the fouling of Gulf waters have heightened international concern for the adverse environmental effects of armed conflict. The questions which arise relate to the sufficiency of the existing legal regime intended to protect the environment, and to parallel concerns that more extensive strictures could restrict legitimate defensive military operations under the law of armed conflict. This paper examines these issues, and concludes that the current framework of relevant international law, when understood and applied, protects both the environment and the broader interests represented in the law of armed conflict.

The Debate

The Charter of the United Nations both prohibits the unlawful use of force by States and guarantees the right of self-defense against such unlawful coercion. Articles 2(4) and 51 of the Charter, together with Hague and Geneva Conventions limiting methods and means of conducting warfare and protecting combatants, noncombatants, and their environment, and create a comprehensive legal fabric designed to limit destructiveness of international armed conflict. Inherent within the law of armed conflict is the understanding that even the most sophisticated and precise weapon systems will exact a price upon the environment.

Environmentalists contend that that price is too high, and demand that any system destructive of the environment be banned. Those responding explain that only through a military capability such as reflected in the coalition reaction to Iraqi aggression can the environment, in the long term, best be preserved. They further remind the environmentalists that had existing environmental provisions within the law of armed conflict been adhered to by the Iraqis, the destruction of Kuwaiti resources would have been minimal.

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Development of Restrictions on the Use of the Environment

Restrictions on the use of the environment have a long history in both national initiatives and international agreement and custom. The practice and acceptance by States of certain restrictions and limitations on the use of the environment have been observed both with regard to means and methods of warfare and to protection of victims. These two strands have come to be known as The Hague and Geneva law, respectively.

In the United States, for example, the Army's Lieber Code of 1863 restricted means and methods of warfare for Union forces during the Civil War so as to protect property whose destruction was not necessary to the war effort.¹ The 1868 Declaration of St. Petersburg, equally significant, proclaimed that the only legitimate objective of States during war is to weaken the military forces of the enemy.² In the years following, largely as a result of the massive destruction and loss of life occasioned by the American Civil War, the Crimean War, and the Wars of German Unification, an international consensus to limit wars' destructiveness developed and found its expression in the Hague Conventions of 1899 and 1907.

The theme of the peace conferences at The Hague centered on agreement among participants that the right of belligerents in an armed conflict to choose methods or means of warfare is not without limit, and that wanton destruction, superfluous injury, and unnecessary suffering should be eliminated by regulation from warfare. The Regulations Annexed to Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land remain the centerpiece of the two conferences.³ It is important to note that during the Nuremberg Trials following World War II, the International Tribunal found the Annexed Regulations to be "declaratory of the laws and customs of war," and thus applicable to all nations whether parties to Hague Convention IV or not.⁴

The Regulations annexed to Hague Convention IV have application to the environmental depredation which occurred in the recent Gulf conflict. Article 22 provides that "the right of belligerents to adopt means of injuring the enemy is not unlimited." Article 23(g) specifies that it is especially forbidden "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Article 46 adds that "private property cannot be confiscated" by an occupying force, and Article 47 that "pillage is formally forbidden." To further clarify the restrictions upon occupying powers such as Iraq during the conflict with Kuwait, Article 55 states that "the occupying State shall be regarded only as administrator . . . of . . . real estate, forests and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."⁵ Had these strictures been observed

by Iraq, there would have been no significant violation of the Kuwaiti environment.

The Geneva Conventions of 1949 merely built upon the requirements and prohibitions of the 1907 conference at The Hague. Article 50 of Geneva Convention I (Wounded and Sick in the Field), for example, provides that it shall be a grave breach to commit extensive destruction and appropriation of property that is not justified by military necessity and is carried out unlawfully and wantonly. Article 51 of Geneva Convention II (Wounded and Sick at Sea) merely restates this rule. The Fourth Geneva Convention (Civilians Convention), while restating in Article 147 the general protections for the environment seen in the Hague Rules, also places significant requirements upon the occupying power. Article 53 provides that "any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." It can certainly be argued that Kuwait's territorial seas, bays, beaches, and oil fields were subjected to wanton, unlawful destruction unjustified by military necessity.

The importance of the Geneva Conventions of 1949 to preservation of the environment extends far beyond the provisions of the articles themselves. An enforcement regime represented in articles common to each of the four Conventions requires that grave breaches by each of the Contracting Parties be identified and addressed.⁶ Moreover, another article common to each requires penal sanctions.⁷ That article, the cornerstone of the enforcement system, obligates each contracting party to: enact implementing legislation; search for persons alleged to have committed breaches of the Conventions; and bring such persons before its own courts or, if it prefers, hand them over for trial to another State party concerned. Article 146 of Geneva Convention IV provides further that the accused persons shall benefit from proper trial and defense no less favorable than the safeguards provided by Article 105 (and those following) of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. When these provisions addressing violations by individuals are considered in conjunction with the requirement in Article 3 of Hague Convention IV (that violating States are liable to pay compensation to the injured State), a very comprehensive scheme, and one appropriate for addressing recent events in the Gulf, is apparent.⁸

Proscription of Environmental Modification

Although the United States renounced the use of climate modification techniques in July 1972, it was not until the entry into force of the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of

Environmental Modification Techniques (ENMOD Convention) that the use of this weapon was legally proscribed.⁹ In brief, this convention commits each party not to engage in military or any other hostile use of environmental modification techniques that cause widespread, long-lasting, or severe destruction, damage or injury to any other State which is a party.¹⁰ A formal “understanding” among all the participants defines the phrase “widespread, long-lasting or severe.” “Widespread” is defined as “encompassing an area on the scale of several hundred square kilometers”; “long-lasting” is defined as “lasting for a period of months, or approximately a season”; and “severe” is defined as “involving serious or significant disruption or harm to human life, natural or economic resources or other assets.”

Kuwait is a party of long standing to this convention. Iraq is one of seventeen nations that are signatories but (having failed to ratify) are not parties. While under Article 18 of the Vienna Convention on Treaties a signatory is obligated not to “defeat the object and purpose” of the agreement, the ENMOD Convention itself addresses relations specifically between full, ratifying parties; its enforcement mechanisms, accordingly, could not have been brought to bear on Iraq. In light of Security Council Resolution 674 (1990), which makes Iraq “liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq,” a complaint under the ENMOD Convention would not be necessary in any event.

1977 Geneva Protocol

Protocol I Additional to the 1949 Geneva Conventions was negotiated to protect not only the population of countries at war but also the environment as such. Two articles in the Protocol combine to prohibit the use of methods and means of warfare that are intended or “may be expected” to cause widespread, long term, and severe damage to the environment: Articles 35(3) and 55(1) attempt to prevent intended or reasonably predictable excessive environmental damage. Battlefield damage incidental to warfare is not proscribed by these provisions, however.¹¹

Neither Iraq nor the United States is a party to the Protocol. During negotiations in Geneva the United States made clear its understanding that nuclear weapons were not to be included within the scope of Protocol I. During the ratification debate, however, it became clear that many nations took the more expansive view that Articles 35(3) and 55(1) would indeed place limitations upon nuclear weapons. Should the provisions be held to apply to nuclear arms in the future, the careful balance fashioned with the other nuclear powers in existing agreements affecting those weapons could be adversely impacted.¹² It can be persuasively argued, however, that the prohibitions included within the two

articles within Protocol I merely replicate the regime established to protect the environment in the Geneva Convention IV of 1907.

Recent Developments

On 11 March 1991, Japan's parliamentary minister for the environment proposed that the Governing Council of the United Nations Environmental Program adopt a declaration of principles urging that the kind of environmental destruction observed in the Gulf should never again occur as an act of war. That same day, French representatives to the Governing Council proposed two initiatives, prohibiting targeting ecological areas, and protecting world heritage monuments in time of war.

At Nairobi, Kenya, on 20 May 1991, the sixteenth session of the Governing Council of the United Nations Environmental Program was convened. The Japanese and French proposals were raised, as were Canadian and Greenpeace concerns. The two latter announced their intention to host international conferences of legal experts to explore ways of strengthening international law to protect the environment more effectively.

A one-day conference in London on 3 June 1991 sponsored by Greenpeace, the London School of Economics, and Britain's Center for Defence Studies considered a possible "Fifth" Geneva Convention on the Protection of the Environment in Time of Armed Conflict. Greenpeace urged the 120 participants, including twenty-four representatives from government and environmental groups, to create a new convention which would state that the environment may not be used as a weapon, that weapons aimed at the environment must be banned, and that indirect damage to the environment must be forbidden.

This was followed by a July 1991 meeting of legal experts in Ottawa which reviewed the use of the environmental weapon in the Gulf context and examined existing international law regulating such use. U.S. participants at the Ottawa meeting carefully underscored the merits of the existing regulatory regime, which is based on the principles of necessity and proportionality under the law of armed conflict. The U.S. concern regarding more restrictive environmental provisions is that they could be implemented only at the expense of otherwise lawful military operations—such as attacking targets which require fuel-air explosives (FAE) for their destruction.

Observations and Conclusions

Because the environment was ravaged during the recent Gulf conflict, some consider the relevant legal regime inadequate. In point of fact, the international agreements and customary international law to which Iraq is legally bound would

have precluded the carnage had she complied with their terms. Conversely, had a restrictive environmental regime been applied prohibiting the prudent use of modern weapon systems (systems which have some inherent incidental and collateral environmental impact), the effective coalition response to Iraqi aggression may not have been possible.¹³

The legal underpinning for the highly effective United Nations effort in the Gulf was found in the minimum world order provisions (Articles 2(4) and 51 of the U.N. Charter), not in environmental law. The vitality of the law of armed conflict is to be measured not only by the U.N. regime but the Hague and Geneva law as well. Together, they authorize only that necessary and proportional response required to return the parties to the *status quo ante*.

U.N. Security Council Resolutions 674, 678, and 687 require no less. In Resolution 687, the Security Council has reaffirmed Iraqi liability under international law for any direct loss or damage, "including environmental damage and the depletion of natural resources," as a result of the unlawful invasion and occupation of Kuwait. Coalition representatives in the United Nations are working hard to ensure the new compensation fund established under Resolution 687 and drawn from Iraqi oil sales includes payment for the environmental cleanup effort as well as long term damage to Kuwaiti resources.

Actions such as these, which reflect the United Nations' resolve and newfound enforcement capability in the framework of the law of armed conflict, provide greater hope for the environment than a statement of principles or a new Geneva Convention.

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Notes

1. General Order NO. 100 (1863) signed by President Lincoln, in SCHINDLER & TOMAN, *THE LAWS OF ARMED CONFLICT* 3 (1988).

2. GOLDBLAT, *AGREEMENTS FOR ARMS CONTROL: A CRITICAL SURVEY* 120-121 (1982).

3. Regulations Annexed to Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land, 36 Stat. 2259; *Treaties and International Agreement Series (TIAS)* 538; BEVANS, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE U.S.A., 1776-1949* at 619, Dept. of State Publication 8407 (November 1968).

4. International Military Tribunal (Nuremberg), *Judgement and Sentence*, 41 Am. J. Int'l L. 172 (1947).

5. "Usufruct," as used in the Convention, means "the right of one State to enjoy all the advantages derivable from the use of property which belongs to another State."

6. See Art 51, Geneva Convention I (GCI); Art 52, GCII; Art 131, GCIII; and Art 148, GCIV.

7. See Art 49, GCI; Art 50, GCII; Art 129, GCIII; and Art 146, GCIV.

8. U.N. Security Council Resolution 687, requiring Iraqi compensation to Kuwait, has its underpinning in Article 3, Hague Convention IV of 1907.

9. Convention on Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), signed in Geneva, 18 May 1977; entered into force, 5 October 1978; U.S. ratification, 13 December 1979; ratification deposited at New York, 17 January 1980, published in U.S.

Arms Control and Disarmament Agency, *ARMS CONTROL AND DISARMAMENT AGREEMENTS* 214-219 (1990).

10. *Id.*, Article 1.

11. Though both appeared the same year, the ENMOD Convention and 1977 Geneva Protocol are not directly related. The 1977 Geneva Protocol I addresses both means and methods of international armed conflict and protection of victims of international armed conflict. It is therefore a melding of The Hague Law (means and methods) and the Geneva Law (protection of victims of warfare). The ENMOD Convention addresses only restrictions on changes to the environment in a widespread, long-lasting, or severe manner (Article I) by military or any other hostile use of environmental modification techniques. While the Conference of the Committee on Disarmament (C.C.D.), an arm of the U.N., sponsored the ENMOD Convention, the International Committee of the Red Cross (I.C.R.C.) in Geneva sponsored the negotiations on the 1977 Geneva Protocol, just as it had thirty years earlier for the 1949 Geneva Conventions.

Protocol I Article 35(3) (Basic Rules) states, "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-lasting and severe damage to the natural environment." Article 55(1) (Protection of the Natural Environment) provides that "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."

12. *See, e.g.*,

(i) Treaty Banning Nuclear Weapon Tests in the Atmosphere, In Outer Space, and Under Water, 5 August 1963, 14 United States Treaties (UST) 1313; TIAS 5433; 480 United States Treaty Series (UNTS) 43 (1963).

(ii) Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 21 UT 483; TIAS 6839 (1970).

(iii) Additional Protocol II to the treaty for the Prohibition of Nuclear Weapons in Latin America, 14 February 1967, 22 UST 754; TIAS 7137; 634 UNTS 364 (1971).

(iv) Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, 11 February 1971, 23 UST 701; TIAS 7337 (1972).

(v) Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, 26 May 1972, 23 UST 3435; TIAS 7503 (1972).

(vi) Interim Agreement between the Union of Soviet Socialist Republics and the United States of America on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, with Protocol, 26 May 1972, 23 UST 3462; TIAS 7504 (1972).

13. It is recognized that overly restrictive attempts to regulate weaponry and targeting parameters either to protect the environment or to induce disarmament (using environmental protection as the vehicle) raise the danger of bringing the law into disregard and weakening its legal and moral force. It is necessary to seek a realistic threshold of regulation; the present law, if enforced, provides such a threshold. It allows only that level of destruction and choice of targets necessary to restore the right of the nation attacked. Any regime which would preclude exercise of effective self-defense options in favor of environmental projections would be honored in the breach rather than adherence.