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Environmental Warfare [Comment]

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Editor's Note: The following comment by Professor Bernard H. Oxman is based on his statement of July 11, 1991, before the Gulf Pollution Task Force, Committee on the Environment and Public Works, United States Senate. The comment discusses law of war implications of Iraq's environmentally destructive actions during the 1991 gulf war. Included among those actions was the deliberate release of large amounts of oil into the waters of the gulf. Professor Oxman's analysis should therefore be of interest to readers of *Ocean Development and International Law*.

Comment

Environmental Warfare

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One of the questions arising out of Iraq's military occupation of Kuwait and the ensuing armed conflict is whether existing treaties and customary international law regulating armed conflict adequately address and serve as a deterrent to acts of environmental degradation, sometimes styled environmental terrorism. Particular attention has focused on Iraq's decision to release large quantities of oil into the Persian Gulf from Kuwait and to ignite large numbers of Kuwaiti oil wells.

I do not think it likely that any lacunae or deficiencies in the substance of international law contributed to Iraq's decision either to ignite the oil wells in Kuwait or to release their oil into the waters of the gulf. Had they been asked for their candid legal opinion by Iraq officials considering such actions, I believe most international lawyers would have reached the conclusion of the Greenpeace[1] study that such actions are violations of the laws of war. Their reasons of course might differ.[2]

If asked about the consequences of such violations, most lawyers and political observers with knowledge of the outside world probably would have predicted an outraged public opinion, in no small measure because of heightened concern for the environment around the world. Such a reaction would be likely to increase the determination of and support for Iraq's adversaries. The lawyers also would have noted that the UN Security Council had already made clear that it would hold Iraq responsible for damage, and that there was widespread public discussion of war crimes trials.

In brief, if they asked, Iraqi officials probably would have been warned that the fires and spills were illegal, and that there was reason to believe the violations might prove costly both during and after the war.

It is of course possible that such admonitions, if ever given and heard, would have been taken more seriously had the world reacted more sternly to other violations of the

laws of war in the recent past. Be that as it may, the important question is what conclusions we should draw for the future.

The hard questions in considering environmental limitations on the conduct of armed conflict did not arise in Iraq's case. The fact that Iraq was an occupying power in Kuwait placed it under special obligations with respect to property located there.[3] To most observers, both the oil spill and fires would represent precisely the kind of vindictive and wanton destruction that has long been excluded by the laws of war. This basic principle is manifested in many specific rules, such as the prohibition on pillage.[4] Even if one could imagine some military advantages from the smoke and the oil slicks in impeding the adversary, the magnitude of the destruction done by the oil spill and the fires is wholly out of proportion to such military objectives. It violates one of the most fundamental principles of the law of armed conflict, namely the prohibition on damage that is excessive in relation to the military objectives involved.[5]

As the Iraqi case demonstrates, many of the rules governing armed conflict that are designed to protect civilian lives, health, and property also have the collateral effect of protecting the environment. Moreover, increased knowledge of the environmental consequences of particular types of events affects the application of those rules, often broadening their restraining effect. To put it differently, military planners need to consider the effects of their actions on the environment if only because failure to do so may result in unlawful injury to civilians or non-military objects.

I will cite but two examples from Protocol I to the 1949 Geneva Conventions, which was completed in 1977. Article 54 restricts attacks on objects indispensable to the survival of the civilian population, such as crops, livestock, water, and so forth. Article 56 restricts attacks on dams, dikes, and nuclear electric generating stations that may cause the release of dangerous forces and consequent severe losses among the civilian population. The relevance of both articles to environmental protection is clear.

Therefore, perhaps the most important environmental question is whether the protection of civilians and civilian objects, not merely from destruction or injury directed at them, but from so-called collateral destruction or injury, is adequate. I trust the philosophical answer to this question will be "no" as long as wars persist.

The practical question must recognize that rules of protection, to be effective, must be widely accepted by governments and respected by their armed forces precisely when they are engaged in armed conflict, presumably in defense or pursuit of what they consider vital interests. One might put the question as follows: Have we done the best we can for the moment?

I do not believe the United States can credibly answer that question in the affirmative until it has done more to preserve and perpetuate the good that was done in Protocol I, much of it under our leadership. While the good that was done is acknowledged, the executive branch and certain other governments have been of the view that there are serious political and substantive problems with Protocol I that cannot be remedied adequately by unilateral reservations or statements of understanding, and that therefore the protocol cannot be ratified.[6]

It is not enough to acknowledge, as even the critical Greenpeace study seems to do,[7] that United States behavior in the gulf war was consistent with the requirements of Protocol I. Our own official documentation regarding the rules we will obey should incorporate to the maximum feasible extent the precise language of Protocol I, with clarifications and conditions where necessary. It is not essential to await an allied consensus before taking such steps. We could take the lead and, if necessary, modify our internal documents later.

In this regard, I agree that we "need to know what elements of Protocol I still command the support of the United States and other like-minded governments, and therefore hopefully constitute a common foundation for the development and observance of rules which improve upon the 1949 Geneva Conventions and other generally recognized statements of law in this field."[8] I would add that this should be done with precision, and in a way that provides the maximum possible common base between the states that have ratified the protocol and those that refuse to do so. This is especially important if we imagine an expanding role for the UN Security Council and coalitions of armed forces in the future. It is also important so that members of our armed forces know their duty.

This effort constitutes an occasion to review at least some of the textual problems raised with such environmentally relevant provisions of the protocol as Articles 54 and 56 described earlier in this statement. I would hope the United States would rethink its reading of the relevant texts here and adopt the rules with such understandings as may be regarded as necessary concerning, for example, military uses of a reactor itself and integrated electric grids supporting military activities. It should limit its exclusions to the prohibition on reprisals, if that is thought important (primarily for reasons of encouraging others to comply with the rules, I trust).

While there are arguments that Articles 54 and 56 are not comprehensive or strong enough, our practical effort should be to get everyone to go along with the essence of these articles before endeavoring to do more. It is counterproductive at this stage to provide an environmental or humanitarian excuse for refusing to accept at least the essence of what is proscribed in those articles.

In addition to extensive protection for civilians and civilian objects, Protocol I states: "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."[9] The executive branch apparently believes this provision "is too broad and ambiguous and is not a part of customary law."[10]

Both environmentalists and members of the armed forces would be justified in asking if myriad questions regarding the legality of virtually all modern methods or means of warfare should be resolved on the basis of the words *may be expected* and the words *widespread, long-term and severe*. Given the following "legislative history" in the official report on this ambiguous text, one wonders what the fuss is about anyway: "It appeared to be a widely shared assumption that battlefield damage incidental to conventional warfare would not normally be proscribed by this provision." *Long-term* was regarded as being "measured in decades," perhaps "twenty or thirty years . . . being a minimum."[11]

Precisely because armed conflict is always bad for the environment, it would seem that any text attempting to deal with the problem of environmental restraints in a simple and sweeping fashion either would admonish us to think about and try to balance the competing values at stake, at best,[12] or would descend into meaninglessness or hyperbole (undone by deft interpretations), at worst.

It makes more sense to assume the applicability of the general restraints of the laws of war, such as the principle of proportionality, and ask whether there are specific situations, not covered by rules restraining injuries to civilians and property, that require more detailed regulation. The Environmental Modification Convention,[13] to which the United States is party, is an example of such an approach. That convention is regularly reviewed. If appropriate, such a review could become the occasion for discussion of these issues.

Specific rules regarding not only dams, dikes, and nuclear electric generating stations, but regarding the remnants of war, are set forth in Protocol I. Perhaps there is a need for other specific rules. Protocol I itself indicates that there may be other types of installations containing dangerous forces where attack should be closely regulated. Indeed, some installations may be dangerous precisely because they contain biological or chemical weapons, creating a direct collision between environmental and health concerns on the one hand and the traditional distinction between military and civilian targets on the other. Resolution of this conflict requires a risk/benefit analysis implied in the principle of proportionality. Whatever the command structure, one trusts that both operational and supervisory military and civilian officials participate in decisions involving potentially catastrophic targeting.

It is not easy to decide whether new rules are needed or desirable, not to mention negotiable in a helpful form. In this field, perhaps more so than in other fields of law, one must consider perverse effects. The practical impact of a particular protective legal rule may be to increase the likelihood of damage to an installation or site that would not otherwise have been a profitable object of attack.

In many cases, the most we will be able to achieve is some refinement of the principle of proportionality, precisely because we cannot totally eliminate the potential military value of attacking the installation or area.

In some cases, however, it may be useful, before we try to move too much farther, to consider another type of regulation to protect particular areas or installations as well. This type of regulation requires the state in control to avoid militarizing or otherwise making particular objects or sites inviting targets and, in this context, prohibits attack completely. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[14] takes this approach with respect to cultural property. The regulations regarding hospitals, hospital ships, and other medical vehicles provide another analogy.

Why not use the same approach to demilitarize and protect uniquely valuable parts of the natural heritage from destructive attack? If inspection is needed, that may no longer be an insurmountable obstacle. Both the cultural and natural heritage are already protected from "deliberate measures which might damage" them by the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage.[15]

In considering these matters, we should recall that the branch of law being discussed assumes the existence of armed conflict. Its purpose is to minimize harm to civilians and to prevent needless suffering and destruction in the event of war. These goals can easily be undermined if we confuse the objective of controlling the destructiveness of war with the objective of preventing or discouraging war. Both objectives should be pursued vigorously but, in the main, separately.

Notes

1. W. M. Arkin, D. Durrant & M. Cherni, MODERN WARFARE AND THE ENVIRONMENT, A CASE STUDY OF THE GULF WAR 211, 146 (1991) (hereinafter GREENPEACE STUDY). The Greenpeace study, like this essay, uses the word "war" in its ordinary rather than juridical sense.

2. With respect to underlying sources, one should note the expert Overview of Existing Law and Extracts from Relevant Legal Instruments presented by Paul Szasz on April 18, 1991, at the Panel on the Environment and the Gulf War during the Annual Meeting of the American Society of International Law.

3. See, e.g., the principles reflected in Articles 46, 47, and 55 of the Regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct.

18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631, as well as Article 56 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. Iraq is a party to the 1949 Geneva Convention and is also bound by the rules of customary international law, including those reflected in other conventions, in particular the Hague (IV) Convention, supra.

4. See, e.g., the principles reflected in Articles 22, 23(a), 23(e), and 28 of the Hague (IV) Convention, supra note 3; Article 33 of the 1949 Geneva Convention, supra note 3; as well as Articles 35(2), 48, 51, and 57 of the 1977 Protocol I Additional to the Geneva Conventions. Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions, 16 I.L.M. 1391 (hereinafter Protocol I).

5. See, e.g., the principles reflected in Article 23(g) of the 1907 Hague Convention, supra note 3, as well as Article 53 of the 1949 Geneva Convention, supra note 3. Article 147 of the latter convention describes as a "grave breach" of the convention, subjecting the individuals responsible to prosecution, "wilfully causing great suffering or serious injury to body or health, . . . and extensive destruction and appropriation of property, not justified by military necessity and carried out lawfully and wantonly." Article 51, paragraph 5, of Protocol I Additional to the Geneva Conventions provides, as an example of a prohibited indiscriminate attack, "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Protocol I, supra note 4, at 1413. The Charter of the Nuremberg Tribunal included in its list of war crimes, "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, done at London, Aug. 8, 1945, art. 6(b), 82 U.N.T.S. 279.

6. A. D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. UNIV. J. INT'L L. & POLICY 460 (1987); M. J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. UNIV. J. INT'L L. & POLICY 419 (1987). The head of the U.S. delegation to the conference that negotiated the protocols provides substantial perspective and support for the view that "Protocol I is a valuable and long overdue addition" to a "slim and fragile body of international law," and that "[n]one of the defects in the Protocol should deter the United States from ratification, as they are curable by means of understandings or reservations." G. H. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 VA. J. INT'L L. 693, 719 (1986).

7. GREENPEACE STUDY, supra note 1, at 21, 145.

8. Matheson, supra note 6, at 420–421.

9. This language appears in Protocol I first in Article 35 and then is repeated as part of Article 55. Protocol I, supra note 4, at 1409, 1415.

10. Matheson, supra note 6, at 424.

11. International Committee of the Red Cross, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 417 (1987). This might be contrasted with the term *long-lasting*, used for different and more limited purposes in the phrase "widespread, long-lasting, or severe effects" in Article 1 of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, done May 18, 1977, 31 U.S.T. 333, T.I.A.S. No. 9614, 16 I.L.M. 88 (hereinafter Environmental Modification Convention), which was expressly understood to mean "lasting for a period of months, or approximately a season" for purposes of that convention but not any other.

12. This is the approach taken in the first sentence of Article 55, paragraph 1, of Protocol I, supra note 4, at 1415.

13. Environmental Modification Convention, supra note 11.

14. Done May 14, 1954, 249 U.N.T.S. 215.

15. Done Nov. 23, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226, 11 I.L.M. 1358.