Environmental damage in times of armed conflict — not "really" a matter of criminal responsibility?

by
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1. Having remained a sleeping beauty for some time after the adoption of Additional Protocol I in 1977,[1] the legal rules on the protection of the environment in times of armed conflict reappeared on the agenda with the oil slicks on the waters of the Persian Gulf and burning oil wells, storage tanks and refineries towards the end of the 1990/1991 Gulf War. Since then there has been a lively debate on the interpretation of Articles 35, paragraph 3, and 55 of Additional Protocol I, on their adequacy and on the necessity or desirability of new international accords on the protection of the environment during armed conflict.[2] To date there still is no agreement on these issues — neither in literature, nor in (State) practice. The resulting lack of clarity is not only a matter of academic or political concern. With the establishment of the *ad hoc* international tribunals set up to prosecute crimes committed in the wars in the former Yugoslavia and in Rwanda there is a new dimension to the problem, since both tribunals have the jurisdiction to try persons accused of having violated international obligations relating to the protection of the natural environment.[3] The Rome Statute of

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the International Criminal Court even includes an explicit provision to this end.[4]

In light of these new developments we have to realize that scholarly attention and governmental discussions with regard to the protection of the environment in times of armed conflict have so far failed to adequately address the problems of individual criminal responsibility for wanton destruction and damage to the environment.[5] Bearing in mind that the substantive provisions on the protection of the environment are already susceptible to different interpretations, the question arises as to what to expect from the powers of the above-mentioned tribunals and the future International Criminal Court.

2. The Final Report by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia may give some idea of whether or not environmental damage in times of armed conflict really is a matter of international criminal law in practice. The fact that the Committee Report, in its assessment of the bombing campaign, deals first of all with damage to the

1 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.

2 For an introduction to this subject see K. Hulme, "Armed conflict, wanton ecological devastation and scorched earth policies: How *the 1990-91 Gulf conflict revealed the inadequacies* of the current laws to ensure effective protection and preservation of the natural environment", *Journal of Armed Conflict Law*, 1997, pp. 55-70. More generally on the desirability of new international accords, see G. Plant (ed.), *Environmental Protection and the Law of War: a 'Fifth Geneva' Convention on the Protection of the Environment in Time of Armed Conflict*, 1992, *passim*.

3 There are no specific provisions to this end in the respective Statutes. However, Art. 3 of the Statue of the International Criminal Tribunal for the former Yugoslavia (UN Doc. S/25704, annex (1993)) establishes the power of the Tribunal to prosecute persons violating the laws or customs of war, and Art. 4 of the Statute of the International Criminal Tribunal for Rwanda (UN Doc. S/Res/955 (1994)) refers to violations of Art. 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II. See also H.-P. Gasser, "*The debate to assess the need for new international accords*", in R. J. Grunawalt *et al.* (eds), *Protection of the Environment during Armed Conflict*, International Law Studies, Naval War College, Newport R.I., 1996, p. 526.

4 Rome Statute of the International Criminal Court, 17 July 1998, Art. 8 (b) (iv).

5 But see M. Bothe, "Criminal responsibility for environmental damage in times of armed conflict", in *op. cit.* (note 3), pp. 473-478, and G. J. Tanja, "Individual accountability for environmental damage in times of armed conflict: International and national penal enforcement possibilities", *ibid.*, pp. 479-490.

environment[6] before turning to the more traditional issues related to target selection (in particular, military objectives and the principle of proportionality) is not indicative, for this apparent "priority" is not matched by the content of the relevant paragraphs. While the Report first states that the "NATO bombing campaign did cause some damage to the environment",[7] it finally concludes that the Prosecutor "should not commence an investigation into the collateral environmental damage caused by the NATO bombing campaign".[8] The Committee Report seems to be just another occasion to demonstrate the inefficiency of the rules on the protection of the environment in armed conflict. However, it may also be argued that the Committee has not only failed to follow the International Criminal Tribunal for the former Yugoslavia (ICTY) in one of its main achievements, namely the clarification of controversial rules of humanitarian law, but has added to the already existing ambiguities in interpretation of the applicable rules on the protection of the environment.

3. The Report is neither explicit about the binding character of the prohibition of severe environmental damage nor precise with regard to the substance of the rule(s). As far as the binding character is concerned, the Report quotes Articles 35, paragraph 3, and 55 of Protocol I and then states that Article 55 "*may* ... reflect customary law".[9] Instead of referring in support of this statement to the Advisory Opinion of the International Court of Justice (ICJ) on the legality of nuclear weapons,[10] the Report attributes the contrary view to the Court. This is inexact, since the ICJ in the above-mentioned case explicitly points out that the two provisions "embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage".[11] The Report thus gives the impression that the existence of such a rule is still a matter of major controversy.

6 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, paras 14-25. http://www.un.org/icty/pressreal/nato061300.htm.

7 *Ibid.*, para. 14.

8 *Ibid.*, para. 25.

9 *Ibid.*, para. 15; italics by the author.

10 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, 66.

11 *Ibid.*, p. 242, para. 31.

With regard to the substance of the rule, the Report argues that "the notion of 'long-term' damage in Additional Protocol I would need to be measured in years rather than months ...".[12] This is an interpretation based on what appears to have been a common understanding of the formulation "long-term" at the 1974-1977 Diplomatic Conference when Protocol I was drafted ("long-term" being understood as referring to a period of at least ten years).[13] However, such an interpretation differs from that which States parties have agreed to give to the term "long-lasting" as included in the ENMOD Convention. According to an "understanding" reached at the Conference of the Committee on Disarmament (though not formally attached as an annex to the Convention), "long-lasting" means damage lasting "for a period of several months, or approximately a season"[14] (which obviously is less than "years"). The Committee Report could have taken into account recent tendencies to interpret the term used in the ENMOD Convention and the term used in Articles 35, paragraph 3, and 55 of Protocol I as both meaning a period of several months.[15] Also, the Committee Report fails to clarify the relationship between claims of military necessity and reckless disregard of long-lasting damage to the environment. At very least, the Committee should have stressed that Articles 35, paragraph 3, and 55 of Protocol I go beyond the traditional requirement of "military necessity" and impose an absolute ban on severe environmental damage.[16]

12 *Final Report* (note 6), para. 15.

13 F. Kalshoven, "Reaffirmation and development of international humanitarian law applicable in armed conflicts: the Diplomatic Conference, Geneva, 1974-1977", Part II, *Netherland Yearbook of International Law*, Vol. IX, 1978, p. 130, referring (note 56) to the Report of Committee III (CCDH/215/Rev. 1, para. 27) and to the Rapporteur's Report to Committee III on the work of the Working Group (CDDH/III/275 and Corr. 1).

14 Report of the CCD, Vol. I GAOR, 31st Session, Suppl. No. 27 (UN Doc. A/31/27), p. 91. Reprinted in A. Roberts/R. Guelff, *Documents on the Laws of War*, 3rd ed., Oxford University Press, 2000, p. 407.

15 Hulme, *op. cit.* (note 1), p. 74. This, however, is in contrast to an explicit clause of the understandings "that the interpretation set forth above is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms used in connexion with any other international agreement".

16 S. Oeter, "Methods and means of combat", in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995, p. 117, margin no. 403.

4. Given the thresholds of Articles 35, paragraph 3, and 55 of Protocol I, and in light of the fact that neither the USA nor France have ratified Protocol I, the Committee Report favours an analysis against the background of "the underlying principles of the law of armed conflict such as necessity and proportionality".[17] There is some agreement on the applicable (or underlying) principles of the laws of war. They include the principle of proportionality, the principle of discrimination, the principle of necessity and the principle of humanity.[18] It has been argued that each of these four principles "strongly points to the conclusion that actions resulting in massive environmental destruction, especially where they do not serve a clear and important military purpose, would be questionable on many grounds, even in the absence of specific rules of war addressing environmental matters in detail".[19] Furthermore, it has been suggested that "such a conclusion would seem inescapable", when "the four principles are taken together".[20] However, these principles and the very general conclusion prohibiting massive environmental destruction can hardly form the basis of criminal responsibility. Even less, they would not have the desired cultural or educational effect of criminal law which presupposes clarity of the law.[21]

In contrast to the foregoing criticism of the Committee Report's interpretation of Articles 35, paragraph 3, and 55 of Protocol I, it is remarkable that the Report seeks to develop a more precise rule on the basis of the above-mentioned principles. It points out that even when targeting legitimate military objectives, "there is a need to avoid excessive long-term damage to the ... natural environment with a consequential adverse effect on the civilian population".[22] Referring

17 *Final Report* (note 6), para. 15.

18 A. Roberts, "Environmental issues in international armed conflict: The experience of the 1991 Gulf War", in Grunawalt *et al.*, *op. cit.* (note 2), p. 228. See also R. Falk, "The environmental law of war: An introduction", in Plant, *op. cit.* (note 1), pp. 84-85. Falk adds the principles of neutrality and of intergenerational equity without, however, adding greatly to the existing law.

19 Roberts, *ibid.*, p. 228.

20 *Ibid.*

21 Bothe, *op. cit.*, (note 5), p. 474.

22 *Final Report* (note 6), para. 18.

to A.P.V. Rogers,[23] the Report argues that "military objectives should not be targeted if the attack is likely to cause collateral environmental damage which would be excessive in relation to the direct military advantage which the attack is expected to produce".[24] Thus, the essential question remains: what can be considered as excessive damage?

The Committee Report concludes only that there is an obligation to avoid, or at least minimize, incidental damage; no further specification is given of the term "excessive". Instead of further clarifications, it moves on to consider Article 8 (b) (iv) of the 1998 Rome Statute of the International Criminal Court which requires the intentional launching of an attack causing environmental damage "clearly excessive in relation to the concrete and direct overall military advantage anticipated" for such an act to qualify as a serious violation. While this is not a precise definition, it underscores the fact that there is an important difference between a particular prohibition and criminal prosecution for damage to the environment, and it has rightly been argued that prosecutors would be reluctant to prosecute "unless the proportionality requirement was clearly breached".[25] Thus, with regard to incidental casualties or damage the requirement that they be "clearly" excessive is not unduly onerous. Furthermore, it has long been accepted that a mere inadvertent collateral environmental effect of an attack does not make an attack unlawful: "The effect must have been intended or at least foreseeable".[26]

In view of these considerations, the Committee Report draws a fairly strict conclusion when it argues that "actions resulting in massive environmental destruction, especially where they do not serve a clear and important military purpose, would be questionable".[27] It is all the more surprising that the Committee Report consequently does not consider a further investigation necessary, given that there are

23 A.P.V. Rogers, "Zero-casualty warfare", *IRRC*, No. 837, March 2000, pp. 177-178.

24 *Final Report* (note 6), para. 18.

25 W. J. Fenrick, in O. Triffterer (ed.), *Commentary on the Rome Statute*, 1999, *and* Article 8, margin no. 51.

26 M. Bothe, "War and environment", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Inst. 4, North Holland, 1982, p. 292.

27 Final Report (note 6), para. 22.

obviously some doubts as to whether or not the targeting by NATO of Serbian petrochemical industries has served a clear and important military purpose.

5. Given that the extent of environmental damage is an essential criterion for discussing criminal responsibility, it is not convincing that the Committee Report does not go further into the matter. It simply points to the difficulties involved in an assessment of the damage caused by the oil spills and fires in the 1990/1991 Gulf War. The conclusions of the Balkan Task Force, established by the United Nations Environment Programme (UNEP)[28] should have given rise to concern. While it is true that the Task Force concluded that there was no "environmental catastrophe", it nevertheless noted "serious" pollution posing "a threat to human health" with particular "hot spots" in areas affected by the consequences of the Kosovo conflict. To dispute the UNEP study's qualification as a reliable indicator by referring to an overly restrictive interpretation of "long-term"[29] is not convincing. If "accurate assessments regarding the long-term effects of this contamination may not yet be practicable",[30] the Report should have given different advice.

6. What remains? Articles 35, paragraph 3, and 55 of Protocol I will continue to be of limited relevance in respect of criminal responsibility. While Article 35 with its focus on methods of warfare could have proved relevant with regard to the use of depleted uranium projectiles, it has little bearing on the limitation of environmental damage in conflicts such as the Kosovo conflict. Article 55 of Protocol I "concentrates on the survival of the population".[31] Being

28 UNEP/UNCHS, *The Kosovo Conflict: Consequences for the Environment and Human Settlements*, 1999; also available via http://www.grida.no/inf/news/news99/finalreport.pdf.

29 *Final Report* (note 6), para. 17.

30 *Ibid.*

31 *C. Pilloud/J. de Preux*, "Article 55", in Y. Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, 1987, p. 663, margin no. 2133.

thus rooted in the principle of distinction, it could play a greater part in limiting environmental damage. However, both provisions suffer from the threshold of "widespread, long-term and severe damage", which is quite high. This threshold should be reinterpreted in line with the "understandings" related to the ENMOD Convention. Such an interpretation could contribute to a clearer understanding of the proportionality requirement under general humanitarian law as included in Article 8 of the Rome Statute. However, as long as ambiguities remain, environmental damage in times of armed conflict will not "really" be a matter of criminal responsibility, and the general rule will remain deprived of the deterrent effect of criminal law provisions.

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Résumé

Dommage à l'environnement naturel en conflit armé : pas « vraiment » une affaire de responsabilité pénale ?

par THILO MARAUHN

Le rapport final du Comité chargé d'examiner la campagne de bombardements de l'OTAN contre la République fédérale de Yougoslavie examine également la question de savoir si les forces de l'OTAN ont violé les interdictions qui protègent l'environnement naturel. Il arrive à la conclusion que les faits ne justifieraient en tout cas pas l'ouverture d'une enquête pénale dans le cadre du TPIY. L'auteur analyse cette argumentation et met en exergue ses aspects positifs et négatifs. Les différentes questions restées ouvertes, relatives à l'interprétation des règles internationales protègeant l'environnement naturel en temps de conflit armé, n'ont cependant pas (encore) trouvé leur réponse définitive.