

Protection of the Environment in Wartime: The United Nations General Assembly Considers the Need for a New Convention

During the Gulf War Iraq caused massive environmental damage by deliberately setting fire to hundreds of oil wells in Kuwait and releasing tons of crude oil into the Gulf.¹ In response to the unprecedented environmental consequences of the Gulf War, Jordan proposed a new agenda item entitled "Exploitation of the environment as a weapon in times of armed conflict and the taking of practical measures to prevent such exploitation" for consideration at the forty-sixth session of the General Assembly in 1991.² In proposing this item Jordan expressed the belief that the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques³ (ENMOD Convention) was inadequate due to its vague provisions that were impossible to enforce and

*Codification Division, Office of Legal Affairs, United Nations. The views expressed herein belong solely to the author and do not necessarily represent those of the United Nations Organization. This article is based to a large extent on the statement given by the author at the Annual Spring Meeting of the American Bar Association held in New York in April 1992 as part of a panel discussion entitled "Protecting the Environment through International Law: Lessons Learned from the Persian Gulf War." The text has been updated to reflect the consideration of the topic at the forty-seventh session of the General Assembly in 1992.

1. The United Nations Environment Programme sent a fact-finding team of experts whose report estimated that "perhaps 700 or more wells were alight when the oil field fires were at their maximum" and the massive releases of oil into the sea "amounted to some 10 million barrels of crude oil." *Environmental Assessment of the Persian Gulf Crisis: Report of the Secretary-General of the Conference*, U.N. GAOR, Preparatory Comm. for the U.N. Conference on Env't and Dev., 3d Sess., at 12, 13, U.N. Doc. A/CONF.151/PC/72 (1991).

2. *Request for the Inclusion of an Additional Item in the Provisional Agenda of the Forty-Sixth Session*, U.N. GAOR, 46th Sess., U.N. Doc. A/46/141 (1991) [hereinafter *Request*].

3. G.A. Res. 72, U.N. GAOR, 31st Sess., Supp. No. 39 at 36, U.N. Doc. A/31/39 (1977) [hereinafter ENMOD Convention].

the absence of investigation, prevention, and dispute settlement mechanisms.⁴ Jordan suggested the possibility of elaborating a new legal instrument to provide “an efficient mechanism to combat the exploitation of the environment in times of armed conflict.”⁵

The General Assembly agreed to include the item in its agenda and referred it to the Sixth (Legal) Committee for consideration.⁶ The General Assembly considered allocating Jordan’s item to one of the other Main Committees of the General Assembly, namely, the First (Political and Security) Committee, which handles disarmament and international security matters, or the Second (Economic and Financial) Committee, which deals with environmental questions. However, the General Assembly gave responsibility for the new item to the Sixth Committee because of the legal aspects of the topic as proposed by Jordan, which called for the development of a convention on the subject.

I. The Sixth Committee’s Consideration of the Item at the Forty-Sixth Session of the General Assembly

In introducing the item in the Sixth Committee, the Jordanian representative suggested that the scope of this item should actually encompass “greater environmental protection, in general, in time of armed conflict.”⁷ For this reason the title of the item was later changed to “Protection of the Environment in Times of Armed Conflict.”

The debate in the Sixth Committee⁸ indicated broad agreement that Iraq’s

4. Jordan expressed the following views concerning the inadequacies of the ENMOD Convention, the only existing convention devoted to the subject of environmental destruction as an element of warfare:

We find that the terms of the existing convention are so broad and vague as to be virtually impossible to enforce. We also find no provision for a mechanism capable of the investigation and settlement of any future disputes under the Convention. Furthermore, the Convention does not provide for advanced environmental scientific data to be made available to all States at the initial stages of crisis prevention.

Request, supra note 2, Annex, at 2.

5. Jordan’s request for the inclusion of the item in the agenda of the General Assembly’s forty-sixth session, as well as an explanatory memorandum attached thereto, are contained in *id.* In connection with this item, the Sixth Committee also had before it a letter from Iraq concerning “the appalling environmental damage caused by the coalition forces in Kuwait and Iraq.” U.N. Doc. A/45/358-S/22931 (1991).

6. The Legal Committee, generally referred to as the Sixth Committee, is one of the seven Main Committees of the General Assembly. The Main Committees usually meet in conjunction with the regular session of the General Assembly, which takes place from September to December each year. The Sixth Committee is the primary forum for the consideration of legal questions in the General Assembly. Representatives of every Member State comprise the Committee. Rules 98 and 100, Rules of Procedure of the General Assembly, U.N. Doc. A/520/Rev.15 (1984). As of January 19, 1993, the United Nations had 180 Member States.

7. *Summary Record of the 18th Meeting*, U.N. GAOR 6th Comm., 46th Sess., 18th mtg., at 3, U.N. Doc. A/C.6/46/SR.18 (1991) [hereinafter *Summary*].

8. For the Summary Records of the debate on this item, see *id.*; *Summary Record of the 19th Meeting*, U.N. GAOR 6th Comm., 46th Sess., 19th mtg., U.N. Doc. A/C.6/46/SR.19 (1991); *Summary Record of the 20th Meeting*, U.N. GAOR 6th Comm., 46th Sess., 20th mtg., U.N. Doc. A/C.6/46/SR.20 (1991); *Summary Record of the 43rd Meeting*, U.N. GAOR 6th Comm., 46th Sess., 43d mtg., U.N. Doc. A/C.6/46/SR.43 (1991).

deliberate and massive destruction of the environment by releasing oil into the Gulf and igniting oil wells violated existing international law.⁹ The Sixth Committee debate raised a number of legal arguments supporting the conclusion that this type of deliberate environmental destruction during an armed conflict violated existing international law.

First, parties to an armed conflict are subject to the customary law principle of proportionality that permits only those acts of war "proportional to the lawful objective of a military operation and actually necessary to achieve that objective."¹⁰

Second, the Sixth Committee debate referred to the prohibition of the destruction of property unless required by military necessity, as provided in the Regulations annexed to the Hague Convention on the Laws and Customs of War on Land of 1907¹¹ and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.¹²

Third, some participants in the debate considered the Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts¹³ (Protocol I) and the ENMOD Convention to be particularly important because those conventions contain specific provisions on the protection of the environment in wartime.¹⁴

Fourth, the Sixth Committee debate referred to other international agreements that restrict means or methods of warfare that would be particularly detrimental to the environment, including the 1925 Geneva Protocol for the Prohibition of the

9. The United States believed that Iraq's actions violated international law for the following reasons:

The deliberate release of oil into the Gulf and the burning of Kuwait oil wells had constituted a serious violation of the prohibition of the destruction of property unless required by military necessity contained in the Fourth Geneva Convention and the Regulations annexed to The Hague Convention concerning the Laws and Customs of War on Land (1907). Those acts had also been a violation of the prohibitions under customary international law against any military operation which was not directed against a legitimate military target or which could be expected to cause incidental death, injury or damage to civilians that was clearly excessive in relation to the direct military advantage of the operation.

Summary, supra note 7, at 8, 9.

10. INTERNATIONAL COMMITTEE OF THE RED CROSS, PROTECTION OF THE NATURAL ENVIRONMENT IN TIME OF ARMED CONFLICT: AN OVERVIEW OF THE STATE OF INTERNATIONAL HUMANITARIAN LAW AND OF THE POSITION OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS 2 (1991).

11. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

12. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

13. Articles 35(3) and 55 of Protocol I prohibit the use of methods or means of warfare that are intended or may be expected to cause *widespread, long-term, and severe damage* to the natural environment and require that care be taken in warfare to protect the natural environment against such damage, particularly when this may prejudice the health or survival of the population. Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions, June 8, 1977, 16 I.L.M. 1391, 1408, 1415.

14. The ENMOD Convention, *supra* note 3, prohibits the manipulation of natural processes which may cause *widespread, long-lasting or severe effects*.

Use of Chemical and Bacteriological Weapons¹⁵ and the 1981 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.¹⁶

Fifth, some members of the Sixth Committee also suggested that the rules of international law concerning the protection of the environment may not be suspended in time of war.

Though the reasons varied in certain points of detail, the Sixth Committee generally agreed that the type of deliberate and extensive environmental destruction caused by Iraq during the Gulf War violated existing international law. As further evidence of this conclusion, a number of representatives referred to Security Council Resolution 687 (1991), which reaffirmed that Iraq "is liable under international law for any direct loss, damage, including environmental damage, and the depletion of natural resources . . . as a result of Iraq's unlawful invasion and occupation of Kuwait."¹⁷ This resolution also established a compensation mechanism for such loss or damage.

The Sixth Committee, however, could not agree on the need for a new legal instrument to ensure greater protection of the environment in wartime. Two trends emerged during the debate. On the one hand, several states believed that the existing legal rules were adequate, but greater adherence to and compliance with the relevant treaties was needed. The United States furthermore expressed concern that "[t]here had been no proposals for new rules which took into account the need to maintain the careful balance between limitations on 'means and methods' of warfare and preservation of national self-defence interests under Article 51 of the United Nations Charter."¹⁸

On the other hand, some states believed that the Gulf War had demonstrated the need to enhance the international legal framework for the protection of the environment in wartime. For example, these states cited the need to confirm the continuing application of environmental law during an armed conflict;¹⁹ to establish emergency procedures for monitoring the extent of environmental destruction during a war, as well as procedures for the prevention and the resolution

15. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

16. U.N. Doc. A/CONF/95/15 and Corr. 1, 2, 3, 4, and 5.

17. S.C. Res. 687, to be published in the Security Council official records for its forty-sixth year.

18. *Summary*, *supra* note 7, at 9.

19. Iran expressed the following views concerning the application of environmental law in time of war and the uncertainties relating thereto:

[T]he relationship between a party to the conflict and a neutral State was essentially governed by the law in time of peace and, consequently, belligerent parties had an obligation to respect environmental law *vis-à-vis* non-belligerent States. There was no universally accepted rule concerning the application of international law on the protection of the environment to belligerent parties, and some argued that the relationship was governed by the law of armed conflict, which meant that with the outbreak of war, the application of rules on the protection of the environment was suspended. However, others argued that in such cases, under treaty law and customary law international legal rules protecting the environment were neither suspended or terminated, since the law of armed conflict itself tended to protect the environment in time of war.

Id. at 7.

of disputes; and to elaborate precise rules for the assessment of environmental damage and remedies.

As a preliminary step in determining the future work of the Sixth Committee on the item, some representatives suggested that Member States should be invited to submit their views on the topic and the Secretary-General should then be requested to prepare a report containing those views. They also observed that the International Conference of the Red Cross and Red Crescent was planning to consider the subject at its twenty-sixth conference, which was to be held in Budapest in late November 1991. With this in mind, the Sixth Committee generally agreed that the better approach would be to consider the results of the Budapest conference before deciding on any future work to be undertaken by the Sixth Committee.

As a result, the draft decision adopted by the Sixth Committee at the conclusion of its consideration of the item requested the Secretary-General to report on the results of that conference.²⁰ However, shortly after the Sixth Committee forwarded the draft decision to the General Assembly for action the International Committee of the Red Cross (ICRC) announced that the Budapest conference was canceled "due to the risk that political disagreement between governments on participation could jeopardize its outcome."²¹ The ICRC deplored the inability of the parties concerned "to find a solution to the question of Palestinian participation."²² At the same time, the ICRC indicated that it would continue to consider the urgent humanitarian issues facing the international community.²³ Consequently, the General Assembly adopted an amended decision that requested the Secretary-General to report on "activities undertaken in the framework of the International Red Cross" on the subject.²⁴

II. The Sixth Committee's Consideration of the Item at the Forty-Seventh Session of the General Assembly

In response to the decision of the General Assembly, the ICRC convened a meeting of experts in April 1992 to consider the contents, limitations, and possible shortcomings of the existing rules of law for the protection of the environment in times of armed conflict. The report of the Secretary-General²⁵ reflected the

20. The report of the Sixth Committee on this item contains the draft decision. *Exploitation of the Env't as a Weapon in Times of Armed Conflict and the Taking of Practical Measures to Prevent Such Exploitation*, U.N. GAOR 6th Comm., 46th Sess., Agenda Item 140, ¶ 8, U.N. Doc. A/46/693 (1991).

21. International Committee of the Red Cross, Press Release No. 1694, Nov. 26, 1991.

22. *Id.*

23. *Id.*

24. G.A. Dec. 46/417 (1991). For the amendment to the draft decision, which was submitted by Mozambique, see U.N. Doc. A/45/L.39 (1991).

25. The report of the Secretary-General contains the information provided by the International Committee of the Red Cross following the meeting. *Protection of the Env't in Times of Armed Conflict*, U.N. GAOR, 47th Sess., Provisional Agenda Item 138, at 2-14, U.N. Doc. A/47/328 (1992).

results of this meeting, including the initial conclusions of the participants on six aspects of the topic that they considered to be among the most important matters requiring study.

First, in times of armed conflict the belligerents should consider the general interest of the international community in preserving the natural environment when selecting methods and means of warfare.

Second, the belligerents need to consider environmental protection when assessing the military advantages of an operation. The balance between environmental protection and military necessity should be based on accepted principles concerning the conduct of hostilities, including those principles relating to proportionality, military necessity, and the least harmful means for achieving a military objective.

Third, all participants recognized the importance of customary law in this area, with some believing that those rules prohibited attacks on the environment as such.

Fourth, international environmental law instruments "remained or should remain largely applicable in periods of armed conflict."²⁶ The experts believed that the main environmental treaties should be studied in this regard and any new such agreements should specifically provide for their applicability in times of armed conflict.

Fifth, the Martens clause²⁷ could make a useful contribution to the protection of the environment in times of armed conflict.

Finally, some of the participants believed that the terms used in Protocol I and the ENMOD Convention should be interpreted uniformly, but they could not identify either the legal or procedural means for accomplishing this task.²⁸

While agreeing to a large extent with the initial conclusions of the participants, the ICRC expressed reservations about proposals to undertake a new process of codifying this area of law. The ICRC believed that existing law, if further elaborated and fully implemented, would provide adequate protection of the environment in times of armed conflict. The ICRC emphasized the need for encouraging states to become parties to existing agreements, increasing compliance with existing rules, and improving their implementation. The ICRC decided to continue

26. *Id.* at 2. The participants suggested an analogy between the implementation of human rights and of environmental law in times of armed conflict, which the following report contains: "They thus accepted that the applicability of certain provisions of environmental law could be suspended in times of conflict, but that the most important among them (comparable to the 'hard core' provisions of human rights law) must be complied with in all circumstances." *Id.* at 13.

27. The "Martens clause," which is found in a number of treaties dealing with the laws of war, is described in the report, as follows: "The Martens clause states that in cases not covered by the specific provisions, civilians and combatants remain under the protection and authority of the principles of international law derived from established customs, from the principles of humanity and from the dictates of public conscience." *Id.* For a discussion of the history of this important provision, see 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW *Martens' Clause* at 252 (1982).

28. See *supra* notes 13, 14.

the expert consultations to study unresolved matters and indicated willingness to prepare a handbook of model guidelines for military manuals.

The Sixth Committee debate²⁹ on the item once again indicated broad agreement on some aspects of the topic and differing views on others. The Committee generally agreed that existing rules of international law, including the principles of proportionality and military necessity, imposed an obligation on belligerents to avoid unnecessary damage to the environment in times of armed conflict. Broad agreement also existed on the importance of achieving greater adherence to and compliance with existing legal instruments. Some delegations believed that existing rules were adequate provided that they were implemented. In this regard, the United States reiterated its concern that new rules might disrupt the balance maintained in the existing rules between "prohibitions of certain means and methods of warfare on one hand, and the legitimate right of self-defense on the other."³⁰

Most of the delegations participating in the debate felt that the existing law and implementation mechanisms needed to be strengthened. In the course of the debate some states presented various suggestions to enhance the legal framework for the protection of the environment in times of armed conflict. These suggestions ranged from the clarification, uniform interpretation, or further development of the substantive norms to the creation of more effective implementation machinery such as a fact-finding committee or other mechanism to monitor and supervise serious violations. The Committee debate also referred to the possible establishment of an international criminal court to prosecute alleged perpetrators of environmental war crimes.

As a result of extensive consultations, the proponents of the two views agreed on a consensus draft resolution that was adopted without a vote by the Sixth Committee, and later by the General Assembly as resolution 47/37.³¹ Concerning the present rules of international law, the General Assembly recognizes that existing provisions of international law prohibit environmental damage and depletion of natural resources such as the destruction of oil wells and the release of oil into the sea that occurred during the Gulf War. More specifically, the resolution stresses "that destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law."³² In terms of measures to enhance the protection of the environment in wartime, the

29. For the Summary Records of the debate on this item, see U.N. Doc. A/C.6/47/SR.8, 9 and 19 (1992).

30. U.N. Doc. A/C.6/47/SR.9 (1992). In its statement, the United States also referred to a memorandum submitted by the United States and Jordan that identified "over a dozen provisions of law which outlaw the type of conduct which horrified us all and which provides protection to the environment in wartime." *Id.* The memorandum is contained in *Protection of the Environment in Times of Armed Conflict*, U.N. GAOR 6th Comm., 47th Sess., Annex, U.N. Doc. A/C.6/47/3 (1992).

31. G.A. Res. 47/37 (1992).

32. *Id.*

General Assembly urges states: (1) to take all measures to ensure compliance with the relevant existing international law; (2) to consider becoming parties to the relevant international conventions if they have not yet done so; and (3) to take steps to incorporate the relevant provisions of international law into their military manuals and to ensure that these manuals are effectively disseminated.

Regarding future consideration of the topic, the resolution once again requests the Secretary-General to submit a report on the relevant activities of the ICRC to the forty-eighth session of the General Assembly in 1993. However, the report will be considered under the item relating to the United Nations Decade of International Law and not under a separate agenda item. Some have interpreted this change as an effort to bury the proposal for a new convention. However, in the course of the debate in the Sixth Committee at the forty-seventh session, several delegations expressed strong support for further substantive work on the topic within the Sixth Committee. Furthermore, the clarification and further development of the legal norms that govern the protection of the environment in times of armed conflict, either in the form of a convention or a General Assembly resolution, could be carried out in a working group of the Sixth Committee created under the auspices of the United Nations Decade of International Law and in accordance with one of its primary objectives, namely, to encourage the progressive development of international law and its codification. In any event, the Sixth Committee's consideration of this important and relatively new area of international law serves a useful purpose by highlighting the limitations on environmental destruction in wartime under existing international law and by drawing attention to the aspects of the law that might benefit from further clarification and development.