

Water and Armed Conflict

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I. Introduction

In his infamous march to the sea General Sherman wreaked havoc upon the citizens of the confederacy.¹ Taking his army of 62,000 with only limited supplies, he forced the men to live off the land.² This was done for the specific purpose of leaving the south unable to continue to support the war effort. It would also leave the south demoralized and it was hoped and latter proven true, that it would lead to a quicker ending of the war.³ Sherman’s famous march ended in the city of Atlanta. Once there to make his final statement to the confederacy, General Sherman burned the city of Atlanta.⁴ General Sherman warned the city of his plans giving them time to get the women, children and elderly out of the city.⁵ However the city leaders were

¹John Bennett Walters, *General William T. Sherman and Total War*, THE JOURNAL OF SOUTHERN HISTORY, VOL. 14, No. 4, 447, 467 (Nov., 1948).

²*Id.* at 475

³*Id.* at 448

⁴*Id.*

⁵Thomas G. Robisch, *General William T. Sherman: Would the Georgia Commander of the Modern Era Comply with Current Law of War Standards?*, EMORY INT’L L. REV.459,483 (1995).

afraid for the lives of some of their citizens. In particular the lives of the sick elderly and the women who were pregnant, the counsel feared that it would be too dangerous for them to be moved, and begged Sherman not to burn the city. General Sherman responded, “War is cruelty, and you cannot refine it; and those who brought war into our country deserve all the curses and maledictions a people can pour out.”⁶

This type of warfare has become known as total warfare.⁷ Since the civil war there have been numerous attempts do precisely what General Sherman said was impossible, “refine war.” The overarching purpose of this paper is to examine how effective the attempts to refine war have been and what needs to be done to make them more effective. In particular the focus will be on the attempts to refine how water is being used during warfare.

The use of water in warfare is as old as warfare itself. Not only has it been a factor but it has played many different roles in armed conflict.⁸ The use of water in conflict has been divided into five categories.⁹ The first and perhaps the most obvious role water plays in armed conflict, especially in regions where the water is scarce is control dispute,¹⁰ where control over water availability is the cause of the conflict. The second category is to use water as a political tool.¹¹ The party will threaten and use the water as a tool to achieve a certain objective. The third category, terrorism, is only its own category because of the groups involved.¹² Terrorist use water in much the same way as political or military groups do, the reason for separating it into an

⁶ Stephen E. Bower, *The Theology of the Battlefield: William Tecumseh Sherman and the U.S. Civil War*, THE JOURNAL OF MILITARY HISTORY, VOL. 64, NO. 4, 1005, 1023 (OCTOBER., 2000).

⁷ Walters, *supra* note 1, at 448

⁸ Faye Anderson, *Security and Water*, <http://74.125.155.132/scholar?q=cache:a6MmKrIncScJ:scholar.google.com/>

⁹ *Id.*

¹⁰ *Id.*

¹¹ Peter H. Gleick, *Water and Conflict: Fresh Water Resources and International Security*, INTERNATIONAL SECURITY, VOL. 18, NO. 1, 79, 86 (SUMMER, 1993) [herein after Water and Conflict].

¹² Anderson, *supra* note 3.

individual category is because these are non-state actors. The fourth way water is used is as a military target and tool.¹³ Terrorists use water in much the same way as do political or military groups. The military will target water resources and facilities and use them as a weapon against the enemy and in some cases it is part of military strategy to specifically target these installations. Peter Glieck separates these last two into two different categories, but they are very similar to one another and go together for the purposes of looking at how international law has attempted to regulate how military groups use water during military conflict.

This paper will focus on the targeting and use of water as a military tool. Part II will discuss the history of the use of water in warfare. It will track the progressive use of water through history up to the creation and implementation of The Hague and Geneva Conventions. Part III will discuss how successful these efforts have been. It will explain why the various treaties have been relatively unsuccessful in creating a protection for water and the environment generally. Included in section III will be a discussion on why internal law in general has not been successful. Part IV will discuss what further efforts are necessary to protect this valuable resource. It will focus on how to counter the typical problems found in internal law in order to provide added protections. Part V will discuss the possibility of creating a human right to water to give the greatest protection possible for water during armed conflict. It is possible the problems associated with water and warfare could be solved if there were a globally recognized human right to water.

I. History of Water in Warfare

A. History pre conventions

¹³ Water and conflict, *supra* note 11 at 86

Using water to military advantage has been an effective means of gaining territory and conquering people. As water is a necessity of life, it is also one of the quickest ways of defeating an enemy. However, it was not only used as an offensive weapon, but it has been used for defensive purposes.¹⁴

Because water is a necessity for all the deprivation of water is a very effective weapon during the conflict. One of the earliest uses of water in armed conflict was to use poison. The adverse force would take the poison and apply it to the wells. This would cause the other force to become sick and would quicken the time it took to conquer a population. It was rumored that Assyrians used poison, but it was not just the Assyrians who engaged in the practice. It has been suspected that during the Peloponnesian war the Spartans poisoned the Athenians cisterns.¹⁵ Athens and Sparta were the two powerful cities with whom all other city states allied. Both Sparta and Athens had their allies and they both had their individual strengths. The Spartans were the superior land force, while the Athenians were the superior navel force.¹⁶ The Athenians could not beat the Spartans in a land war and the Spartans would not engage the Athenians in a navel contest. So the Athenians retreated into the city. The Spartans laid siege to the city. In an attempt to break the siege the Spartans poisoned cisterns.¹⁷

Water has not only been used as an offensive weapon in history. In times of military conquest it has also been used as a defensive weapon to protect against an invading army. In the case of the Babylonian empire, King Nebuchadnezzar wanted to protect his palace.¹⁸ This palace

¹⁴ Water and Conflict, *supra* note 11, at 86.

¹⁵ P. Salway and W. Dell, *Plague at Athens*, Greece & ROME, SECOND SERIES, VOL. 2, NO. 2, 62, 65 (JUN., 1955).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Water and Conflict, *supra* note 11, at 87.

also happened to house his priceless Hanging Gardens.¹⁹ In an attempt to protect then he built huge walls around the city of Nineveh. Still he feared that an enemy army would get around the walls and destroy his castle, so using the waters of the Euphrates, Nebuchadnezzar build canals that were used as a moat around the castle in order to provide protection to the castle.²⁰

There was little disruption to the people and the way they lived their lives by the building of the moat, unfortunately many people are not so lucky when it is determined that water should be used as a defensive weapon against and invading force. Such was the case when the Dutch decided that it was necessary to open the dikes to protect the Dutch from invading French.²¹ In 1672 during the Third Dutch war, the French were going to overrun the Netherlands, in a desperate attempt to stop them the Dutch opened up the dikes and flooded the country side.²² This created what has been called the Holland Water Line.²³ This was done in order to save the country from the French, but it was done over the objections of those who were going to lose their property due to the flooding.²⁴

There was little that prevented the parties involved in military actions from performing acts that would hurt the civilian populous. As a result it was up to the governments or leaders of the various people to develop a way to protect their own self interests. Such was the case with the poisoning or cutting off the water supply of a city. The Bible contains a passage of what King Hezekiah in order to protect his people from an invading force that would lay siege to his city.²⁵ It was said that in order to keep the Assyrians from having water he covered up the wells

¹⁹ *Id.*

²⁰ *Id.*

²¹ Arthur H. Westing, *Environmental Warfare*, 15 ENV'T L. L. 645, 652 (1985).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Chronicles 32:29-32

outside the city, cutting off water into the city as well.²⁶ Hezekiah cut off the water coming into Jerusalem in order to keep the water from being poisoned and cut off by the Assyrians.²⁷

Hezekiah appears to have built a conduit in order to bring water into the city when Sennacherib laid siege to it.²⁸ The burying of the wells outside the city did not allow for a long siege and the city of Jerusalem was saved.

The importance of aqueducts or conduits that would bring water into the city is twofold. First it protects a city's supply of water during a siege. The quickest way to conquer a city is to cut off the basic necessities. The aqueducts ensure a supply of water for a period of time. Secondly aqueducts do a reasonable job of protecting the water supply from poisoning. The water is brought into the city through the pipes; in order for the water supply to become contaminated the water source must be found.

While the focus of this paper has been how water has been used in armed conflict, it is not just the water that has played a role and is being affected by conflict. The environment and people have also suffered substantially from what have been considered military necessities.²⁹ It was in the face of this suffering the European countries began to realize that there needed to be some protections for everyone involved in war. It is a challenge to come up with rules to govern a process that is the result of the violation of rules, but the horrors of the American Civil War and several wars in Europe brought about consensus to try to design some rules to govern armed conflict.

III. The Conventions

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 1, 7 (1997) [Hereinafter Green War].

A. History of the Creation of the Conventions

The idea of “refining” war was started by an unlikely candidate. While traveling Henry Dunant saw thousands of soldiers who were left to die on the battlefield.³⁰ In an attempt to aid them he asked for the local populous to come and help him.³¹ From this experience Mr. Dunant came up with the idea to develop standards that the international community could use that would help with the wounded during times of war. This effort resulted with the creation of the Red Cross.³² However, the creation of the Red Cross was not the ending point for Mr. Dunant. He wanted governments to recognize the Red Cross and ensure the protection of medical services on the battlefield.³³ A convention was held in Geneva in 1864 to address just such recognition and twelve governments ended up signing on to what became the first Geneva Convention.³⁴ It is worth noting that this is the first treaty of international humanitarian law.³⁵

However, the world did not stop inventing new military technologies just because a treaty had been ratified between several states. As the technology continued to be updated so also did the Conventions. The original Convention only protected the soldier’s rights on the battlefield to get care while wounded, but eventually the Convention has spread to become a protection for the citizens during times of armed conflict.³⁶

³⁰ R. Parsons and Giorgio Del Vecchio, *On the History of the Red Cross*, JOURNAL OF THE HISTORY OF IDEAS, VOL. 24, NO. 4, 557, 579 (OCT.- DEC., 1963).

³¹ *Id.*

³² *Id.*

³³ *See generally International Humanitarian Law*, <http://www.redcross.lv/en/conventions.htm> (last visited April 20, 2010).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. October 18, 1907. Available at <http://www.icrc.org/ihl.nsf/FULL/195> [hereinafter Hague].

The Hague Convention respecting the Laws of Customs of War on Land is meant to protect the citizens through regulations of the appropriate methods of warfare.³⁷ The difference between The Hague and the Geneva Convention is then that The Hague “governs the methods and means” of warfare while the Geneva “delineates against what and whom those methods can be used.”³⁸ Also the Geneva and Hague Conventions are applied to different groups the Hague regulations members of the military while the Geneva Convention addresses civilians. The original Hague Convention held in 1899 was not meant to regulate methods of military action, it was meant to place armament restrictions.³⁹ Just as with the Geneva Convention as the world has continued to develop new weapons the Hague convention has need to change in order to achieve the purposes for his it was put in place. On February 8, 1928, after World War I, the Hague convention “permanently banned the use of all forms of chemical and biological warfare.”⁴⁰ This was clearly in response to the use of such weapons in the course of the war.

B. The Conventions

The Conventions were in response to the terrible tragedies that were being forced upon citizenry by warfare. The Hague Convention was inspired for the purpose of “diminish[ing] the evils of war, as far as military requirements permit.”⁴¹ Some countries never signed on the Hague Convention, but by virtue of other states following the Hague Convention it has become customary practice. The Geneva Convention does not make the same statement but it is clear from the full title of the Geneva Convention that it was mean to help diminish the suffering of

³⁷ Green War, *supra* 29, at 65

³⁸ *Id.* at 66

³⁹ *Id.* at 62

⁴⁰ Westing, *supra* note 21, at 645

⁴¹ Hague, *supra* note 36.

people whose nations choose to go to war.⁴² That being the purpose, how do they go about accomplishing that purpose, especially when it comes to the protection of a civilian's access to water?

The Geneva Convention does not specifically mention nor does it grant a protection for water. However, the articles can and in many cases are read so as to protect the water for the use of civilians.⁴³ Article 53 of the Convention states the “any destruction by the occupying power of real or personal property belonging individually or collectively to private persons, or to the State, or the other public authorities, or to the social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”⁴⁴ While this Article does not mention water, it does provide some protection for citizens from the bombing of dams and intentional flooding.⁴⁵ It could also protect the citizens from having their water facilities, aside from dams, being struck by the enemy.⁴⁶ It can be interpreted to protect the supply of water from water facilities, they are property that belongs to the state and as such they are protected by the convention.⁴⁷

The Hague Convention on at least one point is clear in its regard to water. In Article 23 of the Hague Convention IV “it is especially forbidden (a) to employ poison or poisoned weapons... (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.”⁴⁸ While it does not specifically use the words water, it forbids the use of poison. It is clear that it is no longer permissible for an enemy to

⁴² The full title is: Convention (IV) relative to the Protection of Civilian Persons in Time of War.

⁴³ Nikolai Jorgensen, *The Protection of Freshwater in Armed conflict*, 3 J. INT'L L. & INT'L REL. 57, 66 (2007).

⁴⁴ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, August 12, 1949, *available at* <http://www.icrc.org/ihl.nsf/> [hereinafter Geneva].

⁴⁵ *Id.* at Art. 53.

⁴⁶ Jorgensen, *supra* note 43, at 69.

⁴⁷ *Id.*

⁴⁸ Hague, *supra* note 36, Art. 23.

poison another's water source. It expressly forbids the use of poison so it is unnecessary for it to make the addition of the word water. The article also reinforces the point made in the Geneva Convention Article 53 regarding the willful destruction of the property.⁴⁹

There are other rules in the Geneva Convention that depending on the interpretation could help also protect the supply of water to the citizens during war time. It also complies with the recognized human right to food. In order to make sure that the people do not suffer, the army must to "the fullest extent of the means available...ensure the food... of the population; it should, in particular, bring in the necessary food stuffs...The occupying Power may not requisition foodstuffs or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account."⁵⁰ It has been contended that the human right to food naturally extends to water.⁵¹ The argument is that water is an extension of food or a fundamental part of what is food.⁵²

Each of these conventions has at differing points in history been changed. The catalyst for these changes was the development of new technology. As previously stated after World War I, the Hague Convention was changed to prohibit the use of chemical and biological weapons. Changes in the conventions can be tracked by the conflicts in history. After World War II it was determined that the Geneva Convention needed to be changed once again. The Geneva Convention was modified for the fourth time in order to extend the protection to four groups of victims: the sick and wounded, shipwrecked

⁴⁹ *Id.*

⁵⁰ Geneva, *supra* note 44, at Art. 55.

⁵¹ Peter Gleick, *The Human Right to Water*, Water policy 1 (1998) 487, 490 [Hereinafter Human Right]

⁵² *Id.*

sailors, prisoners of war and civilians in territory occupied by an army.⁵³ The fourth Geneva Convention extended protections to civilians that previously were not granted. Article 55 of the Geneva Convention “emphasizes that ... the environment is taken into account not for itself but as a part of the protection of the population.”⁵⁴ The only protections given to the environment are incidental effects. These incidental protections for water and the environment in general have been insufficient.

C. Protocol I

It became clear after the Vietnam War that The Hague and Geneva Conventions had several flaws. Neither the Geneva nor the Hague Conventions make specific mention of nor do they have the intent of protecting the environment. As a result of the oversight great damage was done to the environment in Vietnam and many other parts of the world as well. The spraying of Napalm and Agent Orange in the forests of Vietnam caused an environmental crisis. The vast amount of destruction caused by what the generals at the time called ‘military necessity’ led to a cry for a more development in environmental law in relation to war.⁵⁵ In the years following the war two environmental treaties were purposed.⁵⁶ First the Environmental Modification Convention (ENMOD) which “restrict[ed] use of the environment as a tool or method of warfare” was the first proposed.⁵⁷ Then in 1977 two provisions which would “limit permissible levels of wartime environmental damage” were proposed as protocol I to the Geneva

⁵³ International Humanitarian Law at <http://www.redcross.lv/en/conventions.htm>

⁵⁴ Stephanie N. Simonds, *Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform*, 29 STAN. J. INT’L L. 165, 173 (1992).

⁵⁵ Peter J. Richards & Michael N. Schmitt, *Mars Meets Mother Nature: Protecting the Environment During Armed Conflict*, 28 STETSON L. REV. 1053 (1999). [Hereinafter Mars].

⁵⁶ *Id.* at 1054.

⁵⁷ *Id.*

Convention.⁵⁸ While the United States has not accepted Protocol I, the US is a party to ENMOD.⁵⁹ However, it is in Protocol I that the strongest protections for water are found.

Protocol I is meant specifically to address the problems with regard to the environment. Protocol I uses two different philosophies in its attempt to protect the environment.⁶⁰ First, following along the lines of the 1949 Geneva Convention, the protocol has protection to the civilian population and incidentally it will lead to the protection of the environment.⁶¹ However, it takes the more direct approach and protects the environment.⁶²

The Protocol makes it very clear for the first time that the “methods or means of warfare [are] not unlimited.”⁶³ In particular the Protocol tells us that “weapons, projectiles and materials and methods of warfare of a nature [which] cause superfluous injury or unnecessary suffering” are prohibited.⁶⁴ It more particularly states that any method of warfare “which are intended, or may be expected, to cause widespread, long-term and server damage to the natural environment” are not permitted.⁶⁵ The protocol is perhaps the strongest worded prohibition, but it still has problems with enforcement, which will be discussed in Part IV.

The other provision that has an effect on the environment protects the environment by protecting the civilians. Article 55 of Protocol I prohibits the military from “attack[ing],

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Green War, *supra* note 29, at 172.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079> [hereinafter Protocol]. *Id.* at Art. 35.

⁶⁴ *Id.*

⁶⁵ *Id.*

destroy[ing], remov[ing] or render[ing] useless objects indispensable to the survival of the civilian population, such as food-stuffs... drinking water installations and supplies and irrigation works, for the specific purpose of denying them their sustenance value to the civilian population.”⁶⁶

This article does grant specific protection to the water installations. However, this article like many of the other articles in the Protocol, Geneva, and Hague Conventions has qualified exceptions. Section 3 of Article 54 provides an exception to civilian objects that are being used by the adverse party.⁶⁷ These resources not only have to be used by the adverse party, but the objects must be used “as sustenance solely for the members of its armed forces; or if not as sustenance, then in direct support of military action” so long as the actions don’t leave the population without the necessities, including water.⁶⁸ There is an attempt to limit the destruction that could be done to the civilian population, but without tying the hands of the military.

Protocol I attempts to make a distinction between Civilian and Military objects. For many years civilian objects were interpreted to be anything that is not a military object.⁶⁹ The definition of civilian objects therefore rest upon the definition of a military object.⁷⁰ Protocol I of the Geneva Convention attempts to give some clarity and direction in the defining of military object. It defines military objects as any objects which “by their nature, location, purpose or use make an effective contribution to military neutralization, in the circumstances ruling at the time, [or] offers a definite military advantage.”⁷¹

⁶⁶ *Id.*

⁶⁷ Protocol, *supra* note 63, Art. 54 Sec. 3.

⁶⁸ *Id.*

⁶⁹ Jorgensen, *supra* note 43, at 65.

⁷⁰ *Id.*

⁷¹ Protocol, *supra* note 63, at Art. 52.

In an attempt to give the broadest protection possible to the environment Protocol I limits even permissive environmental damage to that damage that is not “widespread, long-term and severe damage.”⁷² It especially forbids harming the environment for the purpose of hurting the civilian population.⁷³ The intent is to limit the damage that can be done to the environment. It is also meant to protect the civilian population by insuring that they will have the ability to return to their homes without having to wait years for the area to be livable again. This statute does not just spring from the deforestation that took place in the jungles of Vietnam. It also speaks of that “long-term” damage done when a village is flooded on purpose in order to stop the advancement of adverse force. The rule would also apply if instead of using flooding as a defensive tool, the adverse party targets a dam that is built upstream from a village or city. If the dam is breached by some form of weapon and the town is destroyed, this too could be classified as damage that is “widespread, long-term and severe.”⁷⁴

The Hague Regulations and Geneva conventions are the main international laws that make up what is known as humanitarian law or the law of armed conflict. These provisions are meant to ‘refine’ what some have determined to be incapable of reformation. Yet, as the human race has progressed in terms of technologies so has the determination of people to make sure that those technologies are used for good purposes. In the very least people have attempted to make sure that these tools were used to inflict the minimum amount of damage possible, on people as well as on the environment. Yet, even though the international community has made great strides in the attempts to protect

⁷² Protocol, *supra* note 63, at Art. 55.

⁷³ *Id.*

⁷⁴ Westing, *supra* note 21, at 653

people and communities, there is one resource, water that has not been sufficiently protected.⁷⁵

Even when it became clear after Vietnam that the environment needed some protections from the effects of war, there was never a direct focus on the need to protect water.⁷⁶ All of the environmental protections and provisions that were added were vehemently debated by the international community, but the need to provide and protect water, until relatively recently has not received the attention that it requires.⁷⁷ While there are some provisions that in an indirect fashion lead to a type of protection for water.

They do not offer enough specific and direct protection.

D. Why Water Needs to Be Protected.

It is undisputable that water is necessary resource for human life. Humans can survive only a few days without drinking water. Yet, water is not just essential for humans, but “all life on earth.”⁷⁸ Water is necessary for “cooking, hygiene, agricultural and livestock.”⁷⁹ In short water needs to be protected in order to shield life of all sorts.

With water being so essential to the needs of humanity it makes an easy target for adverse armies. As seen throughout history, attacking the water supply of the enemy leads to a quick end to hot conflict and can result in far less loss for the attacking force. That fact alone makes it an easy mark for opposing forces. It has been generally recognized that a direct attack on the opposing side’s water supply is not humane, yet that is not the only way the water is used during war. The damage that is inflicted on the

⁷⁵ Jorgensen, *supra* note 43, at 59

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Amy Hardberger, *Whose Job is it Anyway?: Governmental Obligations Created by the Human Right to Water*, 41 TEX. INT’L L. J. 533, 534 (2006).

⁷⁹ *Id.*

human population by using water as a weapon is huge. The flooding of the Yellow River in China, caused in an attempt to stop the Japanese advancement, killed hundreds of thousands of Chinese along with several thousand Japanese soldiers.⁸⁰ However those are just the number of death cause by the initial act of flooding, this intentional act had other, unintended consequences. The river was not contained again until 1947, nearly a decade after the dikes were destroyed.⁸¹ The flooding destroyed cities, caused farmland to be lost along with the crops and topsoil, leading to more deaths due to the loss of the crops that year and in the years following.⁸²

These are only some of the costs of not protecting and having laws which protect the use of and right to water during the times of conflict. These modern conventions are attempting to do just that and they have provided valuable protections. Yet they remain fundamentally flawed. Not only because they do not make enough mention of water specifically and the environment generally, but also because the Conventions have little enforceability. Perhaps even more important than enforceability or more specifically a flaw that leads to problems with enforcement is the fact that there are exceptions to most of the provisions. Those exceptions are vaguely worded which allow for broad interpretation.

IV. Problems with the Scope of Humanitarian Conventions

It is a huge task to bring rationality into a process which by nature is irrational.⁸³ In many cases the Conventions do a good job of protecting civilians. The international law of armed conflict rests on four principles, military necessity, discrimination,

⁸⁰ Westing, *supra* note 21, at 652.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Mars, *supra* note 55, at 1048

proportionality, and humanity.⁸⁴ It is necessary to keep these principles in mind when attempting to interpret and apply the International Law of Armed Conflict.⁸⁵ Yet even though these are the general principles and they are important, they come into conflict with each other when it comes to the interpretation of the Conventions. When it comes to water and more generally the environment, there are many problems. Those problems lay in the wording of the articles that attempt to bring protection. To explain the flaws it is necessary to look again at the articles granting the protection.

In almost all of the provisions there is an exception to “where such destruction is rendered absolutely necessary by military operations.”⁸⁶ These automatically raise the question what constitutes military necessity. For instance Article 54 of Protocol I does not allow an attack on “drinking water installations and supplies,”⁸⁷ but makes exceptions if the “objects” are being used for “direct support of military action.”⁸⁸ It became clear in the Second World War that both sides were working on new weapons.⁸⁹ Once it was learned experiments were being conducted at dams under the control of the Germans, the dams became military objects.⁹⁰ Several attempts were made to blow up the dams, in order to prevent the Germans from developing weapons.⁹¹ The destruction of the dam could be considered as a military necessity. The Germans were using it to further their military means and therefore would fall under the exception granted in Article 54. This

⁸⁴ Rymn James Parsons, *The Fight to Save the Planet: U.S. Armed Forces, “GreenKeeping,” and Enforcement of the Law Pertaining to Environmental Protection During Armed Conflict*, 10 GEO. INT’L ENVTL. L. REV. 441,451 (1998).

⁸⁵ *Id.*

⁸⁶ Geneva, *supra* note 44, at Art. 53.

⁸⁷ Protocol, *supra* note 63, at 54

⁸⁸ *Id.*

⁸⁹ Westing, *supra* note 21, at 652

⁹⁰ *Id.*

⁹¹

is just one example of the problems with the military necessity exceptions found in the convention.

The problem with military necessity comes with the dilemma regarding how to define it. Protocol I attempts to define military objects, but it fails to make the distinction clear, especially when it comes to distinguishing between military and civilian objects. Military objects are any objects which by their “nature, location, purpose or use make an effective contribution to military action.”⁹² The same World War II scenario could be used here. Even more basic than dams being military objects is the question of whether water or more specifically fresh water should or could be considered a military object.⁹³ Water is used for a military purpose as it is used to support troops in a variety of ways, but it is also used by civilians, in cases such as these where the object is being used by both the objects have been classified as ‘dual-use objects.’⁹⁴ It seems that most scholars and governments attempt to define military objects more narrowly so as to limit what is considered a military object.⁹⁵ Military objects are determined by “whether it is effectively contributing to the conflict and whether it offers a ‘definite’ military advantage.”⁹⁶ Even this more narrow definition of what are military objects is subject to problems of definition. The United States for example, takes a broader approach in determining a ‘definite military advantage’ than would the International Committee of the Red Cross (ICRC).⁹⁷

⁹² Protocol, *supra* note 63, at Art. 52.

⁹³ Jorgensen, *supra* note 43, at 65

⁹⁴ *Id.* at 66

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

The added problem is that in wartime situations choices have to be made quickly. The decision is left to the commanders to seize up the situation, attempt to make sense of it, and determine the best course of action.⁹⁸ Is it reasonable for them to be able to determine in that situation the military necessity or their action? Is it reasonable to expect that a military officer would automatically rule out the easiest and quickest way to defeat the enemy with the least amount of casualties for his troops, just because it might have a negative effect on the civilian population and the environment?⁹⁹ It has been cited that one of the reasons President Truman decided to drop the atomic bomb on Japan was to prevent the half million American casualties that were projected if a military invasion of Japan was necessary. The dropping of the bomb was argued to be a military necessity, yet, it is now known the extent of damage that was done to people and the environment because of the use of that Weapon. There are some limits on what the military can do even when the situation constitutes a necessity. The force used must be reasonably “related to a military objective for which the use [of] force is necessary.”¹⁰⁰ So even while giving permission to act because of military necessity there are still limits to the amount of damage that can be done to that which is proportional to the necessity. It appears that the writers of the Convention and the nations who have signed on understood that there would be times when action was needed, but in an attempt to ameliorate the damage, placed limits on the amount of damage. Protocol I states that the any damage done to the environment cannot be “widespread, long-term [or] severe.”¹⁰¹

⁹⁸ Mars, *supra* note 55, at 1077

⁹⁹ *Id.*

¹⁰⁰ Parsons, *supra* note 84, at 447.

¹⁰¹ Protocol, *supra* note 63, at Art. 55.

As is the case with the drafting of all laws, it is good not to be too specific as it does not allow for differing situations and circumstances. While some of these exceptions for military necessity are good, the hands of the military should not be tied so tight that they would not be able to accomplish their military purpose. Yet, more guidelines and consensus are needed to protect certain life sustaining resources like water.

Not only because they do not make enough mention of water specifically and the environment generally, but also because the Conventions have little enforceability. Perhaps even more important than enforceability or more specifically a flaw that leads to problems with enforcement is the fact that there are exceptions to most of the provisions.

Those exceptions are vaguely worded which allow for broad interpretation.

V. International Law

One of the biggest problems with the Hague Regulations and Geneva Conventions is not vagueness or difficulty in understanding, but that they are international law. International law is considered by many to be softer law than domestic regulations.¹⁰² The reason it is called soft law is because there are severe problems with enforcement of the Conventions. Who is going to punish the party that breaks these rules? What would the punishment be? These are questions that hamper a countries adherence to Conventions as well as to International Law in general. Justice Benjamin Cardozo expressed it best when he said, “international law to-day does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes

¹⁰² Jorgensen, *supra* note 43, at 63

standards, but it does not fetter itself with rules.”¹⁰³ It turns in to a picking and choosing which parts of the convention the party wants to abide by or disregard.

To understand how to fix problems of enforcement of international law and in particular to understand how doing so would help protect water, it helps to understand how international law is formed. The international community is in general agreement that Article 38(1) of the 1946 Statute of the International Court of Justice sets forth the sources of international law. These include (1) international conventions (2) international custom (3) the general principles of the law recognized by civilized nations and (4) such as subsidiary means as judicial decisions and the writings of the most highly qualified scholars.¹⁰⁴ The main way that International law is formed is through the ratification of treaties.¹⁰⁵ This ratification “reflect[s] a state’s consent and intent to be bound.”¹⁰⁶ It is particularly difficult to enforce treaty laws that restrain certain behavior in regards to armed conflict because conflict is a general brake down of agreements between parties.

The other source of international law, arguably the strongest, is customary law. Customary law, especially as it regards armed conflict, predates any treaty law.¹⁰⁷ Customary law is exactly what it says, the customs of the country lead to it being considered law. However, for customary law to become international law there are two requirements. First the action must be “evident in wide spread state practice over time

¹⁰³ Green War, *supra* note 29, at 37 (Citing *Techt v. Hughes* 22 Yale J. Int’l L. 1, 37, Citing *Techt v. Hughes*, 254 U.S. 643).

¹⁰⁴ Statute of the International Court of Justice. Article 38, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

¹⁰⁵ Hardberger, *supra* note 78, at 536.

¹⁰⁶ *Id.*

¹⁰⁷ Green War, *supra* note 29, at 51

and the international community has to exhibit a conviction that the rule is obligatory.”¹⁰⁸ It requires both behavior and perception.¹⁰⁹ It is the strongest form of international law because it has the force of a moral code backing it. The people of the country would in general believe that its armed forces should behave in a certain way and they are applaud and deeply troubled when they do not. There are pros and cons to this form of law, just as there is with the ratification of treaties. The fear is that customs change; this can be a good as well as bad. The other is that the government of the state will not care what the citizenry of the state want and they will ignore the law.

Unfortunately, it often turns out that the winner of a conflict ends up enforcing violations committed by the loser but that no one punishes the winner. There is no better example of this than World War II. While it seems wrong to compare the Allies to the Nazis with the abhorrent atrocities that were committed by the Axis powers, it is naïve to believe that the Allies followed the Geneva and Hague Convention. One only need look to the fire bombings of Tokyo and the carpet bombing of Dresden to understand that military necessity trumps other international principles during armed conflicts. Yet, only the Nazi leaders were put on trial.¹¹⁰ It is important that at least at some point violators of international law are brought to account for their crimes irrespective of who wins given conflicts. Applying international law in an even handed manner would increase its stature around the world.

¹⁰⁸ *Id.* at 52.

¹⁰⁹ *Id.*

¹¹⁰ These comments are in no way trying to make light of the terrible war crimes committed by the Nazi, nor is the author attempting to communicate that the actions of the Allies were on par with the actions of the Nazi. The author is only trying to show a comparison that had German and the Axis powers won the war it would be the Allies that stood trial for a violation of Geneva and Hague Conventions.

There is also the possibility of seeking criminal and civil liability for the party that is said to have been in violation of the treaty. Article 3 of the Hague Convention provides that a party that violates the convention may “be liable to pay compensation,” for the acts committed.¹¹¹ In theory that sounds great, but where would such a case be heard? Some scholars believe that the proper forum for such hearing would be the International Court of Justice (ICJ).¹¹² The problem with the ICJ is that party must consent to the jurisdiction of the Court.¹¹³ It is unlikely that a party is going to allow itself to be hailed in to the jurisdiction of the court when it does not have to suffer the consequences otherwise.

One other idea put forward by scholars is that the Security Council at the United Nations would be a good forum.¹¹⁴ This idea also has its problems. The Security Council is set up with permanent members, leading to concern over the effectiveness of the forum.¹¹⁵ For example, it would be nearly impossible for Afghanistan to bring a successful claim against the United States in the Security Council because the United States is a permanent member of the Council. It would call into question the partiality of the Council and would quite frankly hurt the Council’s ability to function.

It is especially difficult to enforce environmental concerns through international law because each of the nation states has different views in relations to what is best for the environment. Since substantial parts of the law of armed conflict are based on customary law, perhaps the best way to protect the environment and more specifically

¹¹¹ Hague Convention Article 3

¹¹² Simonds, *supra* note 54, at 199

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 200.

water is to recognize protective customary law at the international level. However, that may take a while as customary law must start at the state level with individual states recognizing such rights.

A. Is the Human Right to Water the Solution?

As has been previously noted, through the years there has been little attention paid to the right to water. This is particularly true in terms of armed conflict.¹¹⁶ Yet, it is generally accepted that the right to water is even more basic than some of the other explicit rights generally acknowledged by the international community.¹¹⁷ Yet, this is explained by saying that it is a right that is “envisaged as part and parcel of the right to food or sustenance” or the right to health and even more fundamentally the right to life, since there would be no life without access to water.¹¹⁸ While those might be reasons for the previous oversight of the adoption of a human right to water, many players on the International stage does not view the right to water as a basic and fundamental human right that needs protection. However, it is possible that the problems associated with water and warfare could be solved if there were a globally recognized human right to water. It would be most effective to recognize such a right as a customary international law.

While a human right to water is as basic a notion known to humanity there remains a debate regarding whether water is a human right. Many states do not subscribe to the idea that there is such a right to water. There are some states that recognize the

¹¹⁶ Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 *Geo. Int'l Env't'l. L. Rev.* 1 (1992).

¹¹⁷ Human Right, *supra* note 54, at 488.

¹¹⁸ McCaffrey, *supra* note 116, at 5.

right to water, but even the states that do recognize such right have conditions.¹¹⁹ The world needs to recognize that most of the other human rights are not possible without out a human right to water.¹²⁰ This statement needs to be made by a number of countries so as to show the world and so that the world perceptions in regard to water will change. However, it is not just the world's perception that needs to change; each individual states customs and behaviors need to change. It needs to become customary for the people to have water.

If there is going to be a fundamental human right to water than the responsibilities of the states in relation to water would increase.¹²¹ It would have to be a well defined right, as water is a limited resource world-wide.¹²² While it is not directly stated that the state has the obligation to provide the resource when it is absent, other treaties state that there is an obligation to provide an "economic and social environment" which would lead to the enhancement of the individual to those rights.¹²³

It is likely to take awhile for all the questions regarding a fundamental right to water to be settled. However, that should not stop the adoption of customary law in countries where it is possible to provide at least the basic necessities from adopting the custom. It would be a big step on the way to widely recognizing an international customary law regarding water. In the very least the major countries of the world should adopt a customary law in relation to armed conflict that would cause the use of water in

¹¹⁹ The rights are only recognized as an economic and political right. It is not recognized as a human right and such the state does not have to spend the money, time, effort in an attempt to bring water to the people. It is a nice gesture but it is an empty gesture.

¹²⁰ McCaffrey, *supra* note 116, at 5.

¹²¹ Human Right, *supra* note 54, at 495

¹²² *Id.*

¹²³ *Id.* at 499.

military operations to be taken completely off the table, without absolute proof that it is a military necessity to strike the installations. Even then the powerful nations should adopt a policy of narrowly tailoring the attack so as to cause the least loss of life, infrastructure, and harm to the environment.

Conclusion

War is going to be with us for the foreseeable future. Humans have not evolved enough to avoid armed conflict. However, as the human race has evolved rules have been put into place to refine the process. As has been shown these rules or customs have at times been successful. While they are not always specifically followed it is possible to say that the world has come along why since the time of Rome, in terms of the manner in which they conduct war. There is still room to do more, especially when it comes to the environment and specifically to water and the use of water in combat.

In order for progression to continue people must change their perspectives on their views of human rights. Much of the law of war was originally customary law, only later codified into treaties. The reason the Hague Regulations and the Geneva Conventions have been so successful in comparison to other treaties, perhaps, is because they are based on customary law. The advancement of human rights depends on a change in people's perspective on water as a human right.

Civil society's view on water needs to change in order for a customary law to form, making it unthinkable for warring parties to deprive one another of the basic necessities for living. It is not enough for people to say that the other basic protections of food and life are just off shots of the human right to water. Water in and of itself must be

protected for any of the other rights to have meaning. Water brings life; without it there is nothing. Thus, without protection of water rights there are no other rights.