

ARMED CONFLICT AND THE ENVIRONMENT: LEGAL PERSPECTIVES

*Amado S. Tolentino, Jr.**

Armed conflict or wars endanger and damage the environment in ways or forms such as the long-lasting chemical pollution on land, maritime and atmospheric pollution, despoliation of land by mines and other dangerous objects, and threats to water supplies and other necessities of life. As a matter of fact, the devastation brought by wars since time immemorial extended beyond the battlefields and destruction not only of lives but cultures and the land as well. The "scorched earth" policy¹ of destroying fields and poisoning wells was known in antiquity and man's progress over time was not enough to eliminate armed conflict as an aspect of the conduct of human affairs.

Since the inception of modern warfare, multilateral treaties and international organizations have attempted to create and implement legal provisions addressing the growing problem of environmental damage resulting from armed conflict. Unfortunately, international acceptance and enforcement of such provisions has arrived only in incremental responses to the horrors of previous wars.

* Executive Governor (for developing countries), International Council of Environmental Law, a Bonn-based public interest organization with consultative status at the UN. An environmental law pioneer, he was the first Director of the Environmental Management Bureau; Coordinator, Asean Experts Group on the Environment; Vice-Chair (Asia), World Conservation Union Commission on Environmental Law and Environmental Law Consultant to UNEP and UNESCAP. He lectures on International Environmental Law and is an adjunct professor at the Seinan Gakuin University in Fukuoka, Japan. Among his current interests are environmental law education, biodiversity conservation law, wetland law and multilateral environmental agreement implementation and enforcement. He was educated at the University of the Philippines (AA '59, LL.B '63), the Universidad de Madrid (1969) and the Academy of American and International Law in Dallas, Texas (1974). He served as Delegate (Oriental Mindoro) to the 1971 Constitutional Convention and Philippine Ambassador to Papua New Guinea and Qatar.

¹ Wolfgang Burhenne, *The Prohibition of Hostile Military Activities in Protected Areas*, Environmental Policy and Law, ICEL Bonn, 27/4 p. 373 (1997).

This is an attempt at summarizing the international law of war *vis-à-vis* the environment, at the same time exposing the many current deficiencies of the legal framework addressing the environmental consequences of war. Emerging approaches culled from international consultations are likewise covered to invite attention to possibilities at preventing or minimizing damage to the environment in times of armed conflict.

THE EXISTING LAW

From the standpoint of customary law, environmental protection during wartime may be inferred from the general protection of the civilian population and property based on the fundamental rule expressed in the 1868 Declaration of St. Petersburg that military actions by States should be limited to the objective of weakening military force of the enemy. In theory, the general principles of due diligence and the precautionary principle in the field of environmental protection are tempered with the principles applied in the law of war, i.e. principles of necessity, proportionality, discrimination and humanity.²

Briefly, the principle of due diligence in environmental protection says, "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction" while the precautionary principle states "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."³ The principle's

² Protection of the Environment in Time of Armed Conflict, Report Submitted by the International Committee of the Red Cross to the 48th Session of the UN General Assembly, Doc.A/47/328, 31 July 1992.

³ Principles 2 & 15, Rio Declaration on Environment and Development, UN Conference on Environment and Development, Rio de Janeiro, (1992).

objective is to prevent the invention of new and more destructive weapons of war thereby anticipating and preventing damage to the environment.

In addition, Principle 24 of the UN Declaration on Environment and Development states "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary." The UN Conference on Environment and Development (UNCED) which also produced an Action Plan entitled Agenda 21 made explicit reference to armed conflict in paragraph 39.6 which reads "Measures in accordance with international law should be considered to address, in times of armed conflict, large scale destruction of the environment that can not be justified under international law.... The specific competence and role of the International Committee of the Red Cross should be taken into account."

And then of course, there are the principles embedded in the law of war. The principle of necessity asks whether the potential target, weapon or tactic is necessary in order to achieve a legitimate military advantage. The principle of proportionality asks whether, even if an action is necessary, the expected military advantage outweighs the anticipated collateral damage to civilian objects and non-combatants. The principle of discrimination asks whether the chosen weapon or tactic sufficiently discriminates between military and civilian objects or between combatants and non-combatants and the principle of humanity requires that militaries use the minimal force necessary to achieve the enemy's submission.

Together, those principles provide some legal recourse for the protection of the environment against acts of warfare.⁴ Those fundamental rules are now part of customary international law which is binding on the whole community of nations. Furthermore, the famous Martens Clause holds that in cases not covered by 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.⁵ Its validity in the

⁴ Jay Austin & Carl Bruch, *The Greening of Warfare: Developing International Law and Institutions to Limit Environmental Damage During Armed Conflict*, Environmental Law Institute, Washington, D.C. (1999).

⁵ See, Preamble of the 1907 Hague Convention IV, Article 1 of Protocol I of 1977 and Preamble of Protocol II of 1977.

context of the protection of the environment in times of armed conflict is indisputable.

Apart from the general law of war principles, there are two major groups of international conventions which protect the environment during wartime.

The first is the Geneva Conventions, a body of treaties governing the behavior of belligerents and provides varying degrees of protection of combatants, prisoners-of-war, civilians and their property, and cultural property. This body of law limits attacks on non-combatants and non-military objects and most of their environmental law of war protections entail some form of balancing military necessity against collateral damage. Three treaties compose the Geneva Conventions. Those are: the 1976 Convention on the Prohibition of Military or Any other Hostile Use of Environmental Modification Techniques (ENMOD); the 1977 Additional Protocol (on protection of victims) to the Geneva Conventions of 12 August 1949 (Protocol I) both of which applies to international wars; and the 1977 Additional Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), which applies to internal armed conflicts. These later international instruments were the first to explicitly protect the environment⁶ in response to the Vietnam War in which the United States used Agent Orange to conduct a large-scale defoliation campaign, utilizing bulldozers to remove topsoil from thousands of hectares of land, and allegedly seeded clouds over North Vietnam.

Specifically, Protocol I placed greater emphasis on objects necessary to the survival of the civilian population including civilian infrastructures such as power plants and water treatment facilities. ENMOD incorporates language similar to Protocol I except for the latter's focus on collateral environmental damage. It prohibits the use of environmental forces as weapons and addresses instances where the natural environment itself is deliberately manipulated to cause destruction. In so doing, it outlaws damage to the environment resulting from the use of such methods, contemplating techniques like the alteration of atmospheric conditions to alter weather patterns, earthquake modification, and ocean

⁶ Richard Tarasofsky, *Legal Protection of the Environment During International Armed Conflict*, Netherlands Yearbook of International Law, Vol XXIV, pp 17-79 (1993).

current modification (tidal waves, etc.),⁷ not including low technology methods such as river diversion or the destruction of a dam. Take note that during the 1991 Gulf War, oil wells were not considered a natural process, hence, setting them ablaze is not an environmental modification technique within the scope of ENMOD.

The second is the Hague Conventions (governing weapons) so named after the Hague Conventions which first sought to ban weapons that "cause unnecessary suffering" in recognition that "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." In the course of time, restricted or banned weapons have come to include various exploding munitions, poisonous gas, chemical and biological weapons, blinding lasers and land mines.⁸ While most of these weapons are designed to target humans, many bring about environmental consequences. In particular, their chemical contents can persist in the ecosystem and disrupt the food chain. Land mines similarly persist and greatly affect civilian activities as well as land use.

Of late, weapons choice could be said to have humanitarian and environmental concerns. For example, the precision "smart bombs" widely used in the Gulf War have the dual advantage of increasing the likelihood that the bomb will hit its desired target thereby reducing unnecessary collateral damage. The U.S. is reported to have developed laser-guided bombs loaded with concrete rather than explosives to destroy Iraqi anti-aircraft batteries while minimizing collateral damage to civilians close by.⁹ In the same vein, the U.S. expects to make a transition from lead ammunition to bullets made of tungsten and tin or tungsten and nylon, removing a large source of lead pollution in the environment.¹⁰ Mention should also be made of the Kosovo armed conflict which saw the first use of bombs that deploy

⁷ Operational Law Handbook, U.S. Army, Judge Advocate General's School, Center for Law and Military Operations and International Law Division, pp 5-18 (1993).

⁸ Convention IV Respecting the Laws and Customs of War on Land with Annex of Regulations (1907); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases, and of Bacteriological Methods of Warfare (1925); Convention on the Prohibition of the Development, Production and Stockpiling of bacteriological (Biological) and Toxin Weapons and their Destruction (1972); 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 (1980); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993). Also in R. Tarasofsky, *supra* note 6.

⁹ Steven Lee Myers, *Defter Weapon Against Iraqis: Concrete Bomb*, Washington Post, 7 October 1999, p. A1.

¹⁰ Colin Nickerson, *Army Testing a Safer Ammo for Environment*, Boston Globe, 25 July 1999, p. A1.

graphite filaments designed to take a power grid off-line without completely destroying the generation facilities.¹¹ Be that as it may, other weapons such as depleted uranium munitions and cluster bombs remain controversial for their indiscriminate impact on people and the environment.

Among existing positive law on the subject of war and the environment, two others of great significance in terms of coverage should be pointed out. The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict sets up a comprehensive regime including the triple use of the distinctive blue and white emblem for marking cultural property under special protection, something which has not been fully utilized in vast contrast to the Red Cross marking which was extensively used in all recent wars. The other is the 1972 Convention for the Protection of the World's Cultural and Natural Heritage which imposes a duty to refrain from deliberate activities harming designated sites but does not create a regime to protect sites of biological diversity import during armed conflict.

DEFICIENCIES AND CURRENT CHALLENGES

Like the rest of international law, international humanitarian law has been slow in providing the environment with a set of rules of law specific to it. Thus, the word "environment" does not even appear in the Geneva Conventions (1949) and Hague Conventions (1907) mentioned above nor do they address specific environmental issues. And, granting that the rules on war are sufficient, perhaps what is needed is to ensure greater compliance with the rules. But to be able to comply, it is necessary to clarify and interpret the scope and context of some of those rules. For instance, what constitutes "widespread, long-term and severe damage" to the environment? There is a need for the stricter application of the principle of proportionality and a more precise definition of its scope in specific situations. Also, the importance of defining with certainty the threshold of application of the rules, the need for a clear decision regarding the applicability in wartime of provisions of international environmental law, and the advisability of setting up a mechanism to sanction breaches thereof.

¹¹ Dana Priest, *France Balked at NATO Targets*, *Washington Post*, 20 September 1999, p. A1.

The Kosovo conflict is a case in point. According to reports, a fertilizer, oil refinery and petrochemical plant complex in Pancevo, ten miles from Belgrade, was deliberately and repeatedly bombed. NATO claimed that in addition to making products for civilian consumption, the Pancevo complex supplied gasoline and other essential materials to the Serb army and therefore was a legitimate military target. Typically, military commanders balance the military necessity of destroying a target against the undesirable civilian and environmental impact. Other categories of environmental concern during wartime Kosovo were the pollution of the Danube River resulting from the bombing of the industrial facilities; impact of the war on protected natural areas, and the use of depleted uranium shells, land mines and cluster bombs.¹²

Interestingly, at the height of the NATO bombing campaign, Yugoslavia filed a case before the International Court of Justice at The Hague alleging breaches of "the obligation not to cause considerable environmental damage," "the obligation not to cause far-reaching health and environmental damage," and "the obligation not to use prohibited weapons." However, because two NATO countries, the U.S. and Spain, do not recognize the compulsory jurisdiction of the ICJ and had not consented to jurisdiction in the case at hand, the ICJ held that it manifestly lacked jurisdiction against them. Otherwise, the ICJ could have examined the NATO bombing campaign in light of the Protocol I prohibition on indiscriminate attacks. NATO's assertion that the anticipated important military advantage to be gained as a result of the attacks outweighed the incidental human and environmental loss "underscores the highly subjective nature of the assertion as well as the lack of meaningful criteria for evaluating it." NATO's decision could have been reviewed by the ICJ and its rationale called into question. Curiously, even in dismissing the case, the ICJ opined, "the court is profoundly concerned with the use of force in Yugoslavia....under the present circumstances such use raises very serious issues of international law."¹³

Be that as it may, NATO's actions in Kosovo were significantly less expansive and destructive than those of the U.S. and its allies in the 1990-1991 Gulf War. Reports pointed out how the U.S. and coalition forces

¹² United Nations Environment Programme (UNEP) & United Nations Centre for Human Settlements (Habitat), *The Kosovo Conflict: Consequences for the Environment and Human Settlements, Chapter 5* (1999), available at <http://www.grid.unep.ch/btf>

¹³ http://www.icj-cij.org/icjwww/idocket/iyus/iyusapplication/iyus_application_19990428.html

devastated Iraqi factories and refineries, employing the same necessity justification; dropped millions of cluster bombs, leaving an estimated 1.2 to 1.5 million unexploded bomblets in the Persian Gulf and littered the dessert with an estimated 320 tons of depleted uranium.¹⁴ Earlier, the Vietnam War showed what could happen when defoliation was not implemented to destroy forests *per se* but was a strategy used to eliminate cover for enemy fighters in jungle areas.

The experience of many armed conflicts also demonstrates the need for special protection of the cultural environment, such as monuments and other important immovable cultural property, during hostilities. For this reason, there is a provision in the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict for the marking of cultural property with a special emblem. For the purpose, it maintains an International Register of Cultural Property under Special Protection. The first entry in the Register is one monumental complex, the whole of the territory of the Vatican City State. The Convention allows the military to take all the necessary measures in time of peace or during conflict to protect it.

The current deficiency, however, is with regard to the prohibition of hostile military activities in natural sites or protected areas referring to "natural or cultural areas of outstanding international significance from the point of view of ecology, history, art, science, ethnology, anthropology, or natural beauty, which may include, *inter alia*, areas designated under any international agreement or inter-governmental programme which meets the criteria."¹⁵ A listing of such natural and cultural areas of "outstanding international significance" exists under the 1971 Ramsar Convention on Wetlands of International Significance and the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage respectively known as the List of Wetlands of International Importance (Ramsar List) and the World Heritage Sites which has grown to more than 600 listed sites around the world. Their protection in times of armed conflict entails the preparation of detailed maps, elaboration of materials on international heritage protection during armed conflict for dissemination and the formulation of guidelines for military manuals to make protected areas free of weapons. The State involved in the exercise of territorial sovereignty

¹⁴ Dan Egan, *NATO "Duds" Keep Killing in Kosovo*, Washington Post, 19 July 1999, pp. A1, A15.

¹⁵ Art 1 (a) *Draft Convention on the Prohibition of Hostile Military Activities in Internationally Protected Areas*, Environmental Policy and Law, ICEL Bonn 27/4 pp.375-380 (1997).

should not maintain military installations or conduct military activities in the protected area. In short, it means that States can not invoke protection of an area in order to store munitions or even to house military personnel and the like.

In addition to those deficiencies, the Vietnam War, Gulf War and Kosovo Conflict emphasized gaps in the current scientific and economic methodologies for assessing and valuing the environmental consequences of war. For one, the environmental and health impact of an armed conflict is difficult to assess and predict. Baseline environmental conditions are uncertain and it is difficult to discern which contamination is due to wartime transboundary pollution, this because of inadequate or non-existent monitoring facilities. Proof of direct causation is lacking and even if the ecological and health impact can be accurately estimated, the economic value may be difficult to determine for purposes of assessing liability or setting clean-up priorities. Simply said, war introduces many difficulties in applying traditional peacetime valuation methodologies.¹⁶

AN EMERGING NEW APPROACH

Armed conflicts in Iraq and Afghanistan as well as the more recent Israel-Lebanon conflict brought to fore much more information on damage to the environment caused by the armed aggression of a country against another. Some legal quarters point at better and more effective implementation of the existing 1977 Protocol I additional to the Geneva Conventions (1949) where the provision about damage to the environment incidental to military activities could be found. The ENMOD Convention is also mentioned as a possible recourse but it covers environmental modification used as a weapon or a means to cause damage to the enemy, which is a rarity. There is general agreement that much more needs to be done.

Currently in circulation for comments is a Draft Convention on the Prohibition of Hostile Military Activities in Internationally Protected Areas, an initiative of the International Council of Environmental Law (ICEL), a

¹⁶ Jay Austin & Carl Bruch, (eds), *The Environmental Consequences of War: Legal, Economic and Scientific Perspectives*, Cambridge University Press (2000).

public interest organization on environmental law development and implementation with consultative status at the United Nations based in Bonn, Germany and the International Union for the Conservation of Nature's Commission on Environmental Law (IUCN-CEL), a worldwide environmental organization consisting of States and non-governmental organizations (NGOs), among others. Articles worthy of mention are Art. 2 which states, "Each resolution adopted by the Security Council to take action under Chapter VII of the Charter, in response to a situation of armed conflict shall include a list of the relevant internationally protected areas, thereby designated as non-target areas in which all hostile military activities shall not be permitted during the armed conflict in question," and the proposed Art. 3 which says, "Any internationally protected area.....shall cease to enjoy such protection when the State Party in whose territory the area is situated: (a) maintains military installations of any kind within... of the area in question, (b) decides to use the area in question to carry out any military activities during an armed conflict."

Indeed, if an area is interesting to the military for strategic or other reasons, what are the available ways to protect the environment? Art. 3 strives to achieve this by making the protected area uninteresting for the military so as not to be targeted by military operations. The draft convention, however, stopped short of categorizing environmental destruction as a war crime or a crime against humanity considering the potential damage that may be caused by the development of new and more powerful weapons as well as the perceived deprivation of the benefits of natural resources not only for the present but the future generations as well.

At a consultation of senior international legal experts¹⁷ convened by the same ICEL/IUCN-CEL at which the International Red Cross Committee and UNESCO were represented, measures to increase the effectiveness of existing legal norms and proposals to ensure better development of environmental protection in times of armed conflict were recommended. First among the proposals based on current law is that the lists of currently designated cultural and natural sites be reviewed to establish priorities taking into account the need for protection of relevant sites in times of armed conflict. Mapped natural sites used as basis for establishing such priorities should include sites designated in, *inter alia*, the

¹⁷ Meeting of Senior Legal Experts on Protection of Cultural and Natural Sites in Times of Armed Conflict, International Council of Environmental Law (ICEL) and International Union For Conservation of Nature Commission on Environmental Law (IUCN/CEL) Amsterdam, December 1992.

1971 Ramsar Convention on Wetlands of International Importance, the 1972 World Heritage Convention and relevant regional conventions. Areas included in the UN List of Parks and Protected Areas and the UNESCO Biosphere Reserve system should also be considered. Second, sufficiently detailed maps showing specifically the location and extent of designated cultural and natural sites should be prepared for each area and provided to all military and civilian authorities worldwide. Model provisions for military manuals on the protection of designated cultural and natural sites should also be prepared. Third, a distinctive emblem should be used for natural site identification and protection. For this purpose, the blue and white emblem for cultural sites could be extended to designate natural sites as well. Fourth, the UN Secretary General, when bringing matters regarding threats to international peace and security to the attention of the Security Council, should address the need to identify and protect designated cultural and natural sites. As soon as the threat to peace and security is determined, the presence of any designated cultural and natural sites which could be affected should be communicated to members of the Security Council and authorities in the area concerned. UN peace-keeping personnel and other international observers should then be empowered to take the necessary initiatives for the safeguarding of the relevant sites and should be provided with adequate knowledge and means to cooperate with national and local authorities in doing so. Fifth, all designated cultural and natural sites should be considered analogous to demilitarized zones similar to those under Art. 60 of the 1977 Protocol I and such sites should not be used for military activity by either side in an armed conflict. Sixth, States should provide for the continuing education of senior military personnel and senior civilian officials in the field of protection of designated cultural and natural sites in times of armed conflict. Finally, States should be encouraged to enter into bilateral agreements on the establishment of international parks and protected areas in transboundary locations and for the joint protection of habitats, and to enter into other bilateral or regional agreements to enhance protection of such parks and protected areas in times of armed conflict.

More significant are the suggestions of the same group at a previous consultation¹⁸ on protection of the environment in general in times of armed conflict, some of which are: (1) Any new instrument concerning the protection of the environment in times of armed conflict

¹⁸ Legal Experts Consultation on the Law Concerning the Protection of the Environment in Times of Armed Conflict, ICEL/IUCN-CEL, Munich, December 1991.

should be based on the concept that the environment *per se* has to be protected. (2) Further international and national measures to prevent harm to the environment be developed. In particular, two lists should be prepared: (a) A catalogue of human activities with hostile purposes injurious to the environment. Some acts would be prohibited absolutely and others would be permitted conditionally. Conduct involving a prohibited act would constitute a grave breach of State duties to protect the environment. Since the environment itself is the object of a State's duty to provide protection, the list of hostile acts would include; (i) intentional attacks on the environment; (ii) the manipulation of natural processes causing environmental damage; and (iii) significant collateral damage to the environment. (b) A registry of all protected areas should be completed. (3) In the light of advances in scientific understanding of environmental damage, States should revise and update their military procedures in order to ensure protection of the environment to the fullest possible extent in times of armed conflict. This necessitates a reconsideration of traditional targets.¹⁹ Works and installations containing dangerous forces or in which ultra-hazardous activities are carried out include those whose contents, if damaged, could harm human health or the environment. Moreover, sites which although not inherently dangerous, are essential to human health or the environment should not be military targets.²⁰ (5) The UN should establish a system of emergency preparedness to protect the environment in times of armed conflict. States should be invited to such a system by offering appropriate expert personnel, logistics, facilities, equipment and funds.²¹ (6) Damage, actual or potential, and restoration should include all reasonable measures to reinstate or restore damaged or destroyed components of the environment equivalent to those impaired or lost. Compensation in kind shall be required²² when restoration is not physically possible.

¹⁹ For example, sinking of oil tankers which could contaminate marine waters and resources therein should be avoided in favor of other military tactics that could prevent or impede delivery of oil on which an adversary State's military forces depend.

²⁰ Examples are waste treatment plants and water purification facilities.

²¹ Useful precedents for study are the United Nations Environment Programme's (UNEP) 1991 Inter-agency Action Plan for Kuwait and the Persian Gulf and the International Energy Agency's (IEA) programme for response to emergency nuclear accidents which was strengthened after the Chernobyl nuclear plant disaster. Discussions at the UN General Assembly should include establishing stand-by units such as those used to cope with water and air pollution in the Persian Gulf.

²² Restoration in kind could include establishing a fish hatchery where a natural nursery for fish is lost, or planting a new wetland area in lieu of one which can not be restored, or any compatible measure where, for instance, it may not be possible or practical to remove oil that settled on the seabed.

These recommendations clearly suggest that more legal effort is necessary to answer the questions left unresolved by existing law. Again, what constitutes "widespread, long-term and severe environmental damage?" Is depleted uranium an inhumane weapon? Is civilian infrastructure a legitimate target when it contributes to the war effort? To what extent must it contribute to the war effort? Should there be an International Court of the Environment with jurisdiction, among others, over environmental war damage and crimes? What about creating a no-fault international environmental remediation fund that could overcome troublesome gaps in the civil and criminal liability approaches.²³ Above all, however, the need is for a mechanism which, together with the entire body of law protecting the environment in times of armed conflict, can be practically and efficiently implemented.

Actually, the most difficult issue confronting the community of nations in regard to protection of the environment in times of armed conflict is how to apply the law against powerful nations. Examples are: the U.S. in Vietnam; Russia in Afghanistan; the western allied forces (including the U.S., France and U.K.) in the Gulf War and Kosovo; the U.S. in Iraq; Israel in Lebanon. Certainly, the often quoted old Martens Clause which provides that where the law of war does not address a particular case, reference should be to the "rule of the principles of the law of nations, as they result from the usages established among civilized people from the laws of humanity and the dictates of public conscience"²⁴ still expects equal application among nations in the 21st century.

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²³ Austin, *supra* note 4.

²⁴ *Supra* note 5.