

ENVIRONMENTAL LEGAL PROTECTION AND THE PERSIAN GULF*

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The Special Characteristics of the Persian Gulf

The Persian Gulf ecosystem has a fragile, vulnerable character. It is a semi-enclosed, shallow sea connected to oceanic waters by the Strait of Hormuz.

The fresh water flowing into the Gulf, from major rivers and rainfall, is not sufficient to counterbalance the losses by rapid evaporation. The temperature of the Gulf waters retards rapid absorption of pollutants, nor can they be flushed out quickly. Instead, the water tends to concentrate pollution¹.

In general, the biggest pollution source in the Gulf is the oil industry, although there are some other sources of pollution such as land-based industrial plants (textile, food, chemical, and paper industries). So naturally, the main sources of oil pollution are oil spills discharged from oil wells and oil tankers.

Despite the growth of the oil industry in the Gulf, which is entirely bordered by eight oil-producing states that collectively supply some 60 percent of the oil needed by the west and Japan, there is no coordinated and effective regulatory framework in force to control oil pollution.

Partly because of its fragile characteristics and partly because of the oil industry, the Persian Gulf became one of the most polluted seas in the world even before recent events.

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(1) For a more detailed explanation, see Sayed Hassan Amin: Marine Pollution in International and Middle Eastern Law, Royston Limited, Glasgow, 1986.

That's why the Gulf was designated as a "potential special area"² meaning that discharge of oil will eventually be prohibited by regulation 10 (7) (b) of annex I of the 1973 International Convention for the Prevention of Oil Pollution from Ships.

That is why in 1976 a team of environmentalist experts organized by UNEP (United Nations Environmental Program) has visited the area and concluded that if nothing is done about pollution in the Gulf, the ecological situation would soon become catastrophic.

In recent years the pollution increased, this time because of war-related actions: First because of Iraq's deliberate air attacks on the oil tankers and oil terminals of Iran during the Iran-Iraq War in 1982-1983, and now because of Iraq's deliberate attack on oil wells in Kuwait and the largest oil spill from Iraqi-controlled oil installations on the Kuwait coast, caused by Iraq. (Iraq says the spill resulted from Allied bombing.) I am not going to give you numerical examples about the size of this oil spill, because it changes. (For a while, the slick stretched 100 miles long and 40 miles wide. Then it broke up into patchy strips). But one thing is definite: This is the largest oil spill in the history of the region and probably of the world.

So, we can see the problem is not only one of marine pollution but also of air pollution. These oil fields have been emitting huge smoke clouds that have blocked out the sun like a very dark storm cloud.

Finally, if we take into account the environmental effects of the heavy air attacks of coalition forces in the Gulf (the Allies admit that their attacks may have caused some "small" spills), we can easily conclude that there is a complete environmental disaster in the region.

Effects of the Pollution

There are different effects of the marine and air pollution in the Gulf. Some of them present a clear and immediate threat to ecology. Other may be dangerous only in the long term. Any oil spill, no matter how quickly we respond to it, is going to harm the environment. And the vast majority of the oil will remain in the environment, either in the air from evaporation or burning in the water or on the coastline.

Major areas affected and that could be affected by pollution are fisheries (there is a great diversity of fish such as dolphins and whales

(2) For the exceptionally vulnerable sea areas, see Kari Hakapaa: *Marine Pollution in International Law, Material Obligations and Jurisdictions*, Helsinki, 1981, 250-57.

in the region), other living and non-living resources in the seas, life support systems such as drinking water, human health, and probably in the near future the agriculture.

The crude oil coats the water and prevents air-water interchange. The oil products descent to the bottom and can release toxins over a long period of time. Sinking oil can kill plankton and other marine life under the slick. Some of the finest reefs in the world are now dead with the passage of the slick. Coasts also were damaged.

Scientists believe ordinary fish can survive in oily water but they become inedible. Eating them may increase the risk of some diseases. Heavy contamination, of course, will cause the death of fish directly. The effect of oil pollution on the fisheries will also cause great suffering for several fishing communities which are dependent on fishing to live.

The oil slick also may cause effects on some other economic areas; for example, closing down industrial complexes on the Gulf coasts, especially desalination plants that provide much of the drinking water in the area. Even if they can keep oil spills out of these plants, there is still a risk from toxic chemicals dissolved in the water.

Some publications try to play down some of the deleterious effects of oil pollution by emphasizing the rapid biological recovery of sea water through spreading, evaporation, and dissolution. But even these publications recognize that if the oil slick is on a large scale and if the contamination is heavy, the petroleum can have a serious effect on the area.

Some scientists have predicted that the burning oil fields, which are already blocking the light, go to the upper atmosphere, lower the surface temperature, and bring on a nuclear winter. Others predict that the oily acid soot that is raining on Iran and possibly will rain on Turkey and the southern part of the Soviet Union could affect agriculture.

The Kuwaiti oil fields, which have been emitting toxic wastes (not only carbon monoxide but also other toxic chemicals) into the air, are dangerous to human life. There are some serious examples such as blindness of children. According to the latest reports, oil hazards are cumulative and increase day by day.

The wind spreads these toxic wastes and dark clouds to the other countries. For example, there have been reports of the black clouds

reaching the southeastern part of Turkey. If it rains, all those agricultural parts of several countries will face grave dangers, and so will trade relations.

It is now obvious that the pollution in the Gulf is causing trans-boundary effects. Therefore, the problem has an international dimension and needs an international solution. Having said that, now I will try to give you some idea about the international legal framework of environmental protection and I will try to point out the state's responsibility for environmental protection. I will touch on some international documents without talking about details.

International Legal Framework³

First of all, I should mention that there is no comprehensive international environmental law to be observed in wartime. This is one factor complicating the quick solution of Persian Gulf environmental problems.

As far as the law of armed conflict is concerned, there are some inadequate provisions related to general environmental protection in several conventions.

For example, the 1907 Hague Convention contains protective provisions regarding immunity of some areas such as hospitals and historic monuments, preventing their being attacked. It also obliges the occupying state to safeguard forests and agricultural areas.

The 1949 Geneva Convention and the 1977 Protocol to this Convention more or less confirm the principles of Hague Convention. The 1977 Protocol bans methods which are intended or may be expected to cause "widespread, long-term and severe" damage to the national environment, whatever the weapons used (Article 55 — the U.S. is not a party).

The 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques covers deliberate human manipulation of natural processes (such as to use herbicides, bombing the dams, and attempts at cloud seeding), but

(3) For several international conventions mentioned hier about the environment, see International Agreements to Protect the Environment and Wildlife, United States International Trade Commission, January 1991.

not conventional acts of warfare which might result in adverse effects on the environment.

The 1982 World Charter for Nature states that nature shall be secured against degradation caused by warfare or other hostile activities.

All of these documents include only preventive prohibitions and do not contain any remedial enforcement measures. And actually their importance has been partly swept away by the introduction of the modern weapons of mass destruction. Perhaps it is time to reconsider them in a new context.

Now, after this brief summary of the war-related aspects of environmental protection, let us concentrate on other conventions dealing with pollution problems resulting from the peaceful uses of natural resources, which can be related to the Persian Gulf.

There are two conventions on the law of the sea, one in 1958 and the other in 1982. The former requires every state to draw up regulations and take measures to cooperate with the competent international organizations to prevent pollution of the seas. The 1982 Convention (all states bordering on the Persian Gulf are parties) contains similar provisions, and moreover, it obliges the states to cooperate in the implementation of international rules relating to liability and compensation and asks states to consider measures to protect rare and fragile ecosystems. The language of both conventions is quite general and regulatory. These conventions contain no provisions imposing strict liability on the polluting state.

There are two conventions which establish strict but limited liability for damages from oil spills. They focus especially on the consequences of the damage incurred. These are, the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

But the liability rule of these two conventions apply to the pollution damage caused by vessels and not by states. Actually, Article XI of the 1969 Convention points out that the provisions of this Convention shall not apply to warships owned by a state and used for non-commercial purposes. In addition, they don't provide for settlement of disputes among the parties.

After mentioning these international regulations on oil pollution, now I shall touch on air pollution problems.

The primary convention to air pollution is the 1979 Convention on Long-Range Transboundary Air Pollution*. Like the conventions previously mentioned, this convention deals not with the problems of liability, but with options to prevent air pollution. It does not provide any enforcement provisions. It obliges parties to prevent and gradually reduce air pollution, including long-range transboundary air pollution, and to develop policies and systems to combat the pollution.

Besides the conventions and protocols, some other efforts and achievements in environmental protection have been made at the global level. These are a variety of declarations, resolutions, and recommendations from several international organizations (such as the UN, UNEP, OECD, EC, ILO, ILA) which contain provisions on the duty of states to prevent pollution. Some international judicial decisions have also confirmed the existence of such a duty.⁴

Now I will mention only a few of the most important of these documents.

The 1972 U.N. Conference on the Human Environment, held in Stockholm, was the first meeting to truly address the wider range of environmental problems. At the conclusion of the conference, the delegates presented the Stockholm Declaration on the Human Environment, Action Plan for the Human Environment, and several resolutions.

Article 6 of The Stockholm Declaration summarizes the urgency of the problems of pollution. Articles 21 and 22 attempt to develop principles of international legal responsibility to control transboundary pollution. The most important part of article 21, to which some conventions (the 1979 Convention on Long-Range Transboundary Air Pollution) also referred, is as follows: "States... have 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."

(*) Neither Kuwait nor any other Middle East country is not party to this Convention and its protocols.

(4) For the examples of these decisions, see Alfred Rest: "Responsibility and Liability for Transboundary Air Pollution Damage", in *Transboundary Air Pollution*, eds.: C. Flinterman-B. Kwiatkowska- J.G. Lammers, Martinus Nijhoff, 1986, 309.

Some commentators have said that the language of these principles imposes direct obligations on states. Although the Declaration has no legal significance, it may be cited as a source of customary international law.

Another important aspect of the Stockholm Conference is the establishment of an agency titled UNEP (United Nations Environment Programme). This agency has prepared the 1981 Recommendations of Montevideo, Uruguay. This document represents a milestone in the development of international law in the protection of marine environment. It is the first major document to provide detailed provisions aimed at obliging states to specific duties. Although it is not legally binding and is only advisory in nature, it has implications for customary international law and may serve as a guideline for a future global convention.

Besides the UN, OECD and EC have developed some policies and established some agencies to protect the environment. The most important policy, that created by the OECD and adopted also by the EC, is the principle of "polluter pays" and "prevention is better than repair." The objective is to prevent or minimize, as soon as possible, further environmental deterioration and to restore already deteriorated parts of the environment.

The "polluter pays" principle has become a recognized concept of international customary law and is a useful principle when dealing with transboundary pollution. Its inclusion in UN programs demonstrates the degree of recognition this principle has achieved. However, this principle is not absolute. It has some exceptions stemming from practical difficulties in its application, such as the determination of the costs of a polluting activity. In the case of transfrontier pollution, whose evaluation of cost should be used?

Before moving on to the Kuwait Convention, I would like to say a final word on the international framework of environmental protection.

Although there is still a need for the emergence of strict liability as a principle of public international law, to protect the environment not only in time of peace but also in the case of war, it is widely accepted that states are responsible for damages caused in other countries as a result of their unlawful activities.

This well-known and general principle can be found in the Roman law, such as "use your property so as not to injure your neighbors." We can reach this principle using some general principles of law or the most essential aspects of common law of mankind such as the protection of human rights and *pacta sunt servanda*. (The deliberate destruction of the environment means that there is a violation of the people's right to life.) This principle is also well established in the international case law.

Regional Protection in the Persian Gulf

The 1978 Kuwait Convention and Protocol (Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution) was adopted by all the Gulf states.

This convention recognizes the special ecological characteristics of the marine environment of the region and its particular vulnerability to pollution.

It obliges parties to take "all appropriate measures" to prevent, reduce, and control pollution.* But it does not contain any specific rules of liability. All it did is to oblige parties to cooperate in the formulation of appropriate rules and procedures for the determination of civil liability and compensation for damages resulting from pollution and from violations of obligations. However, it requires that international law relating to those matters be respected.

To achieve its aim the convention has established a regional organization for the protection of the marine environment based in Kuwait.

The Kuwait Protocol established a Marine Emergency Mutual Aid Centre in Bahrain to coordinate action against oil spills in the region.

In 1983, following the huge oil slick caused by Iraqi attacks on Iranian offshore oil facilities, the representatives of the Gulf states met in Kuwait under the auspices of these organizations. But just a few col-

(*) Article III (a): "The Contracting States shall, individually and/or jointly, take all appropriate measures in accordance with the present Convention and those protocols in force to which they are party to prevent, abate and combat pollution of the marine environment in the Sea Area"

lective steps were taken. Neither Iran nor Iraq accepted any liability for oil pollution.

Now I would like to point out a few conclusive remarks.

Conclusion

In spite of the absence of any specific international rule on state responsibility for environmental damage, under general principles of international law, we can conclude that Iraq is responsible for its unlawful activities that cause severe environmental damages.

But the problem is how can this responsibility be enforced. This will be difficult: Because current international law is inefficient for enforcement purposes. But after the last resolution of the United Nations Security Council (April 3, 1991), it seems like there will not be much problem. According to this resolution, a war damages fund drawing from a certain percentage of Iraqi future oil revenues will be created to pay war damages. And Iraq accepted this resolution. However, there are still some difficulties. First of all, this fund will be established mostly to compensate the damages, not specifically to cover the costs of the cleanup efforts.

Second, there are other problems such as assessing the damage and fixing the amount of compensation. This point faces many questions:

— Whose evaluation of damages should be used? There are conflicting reports written by different people from inside and outside the region.

— Which damages should be taken into consideration. If it is actual damage, the problem is easier. But we all know that some harmful effects of environmental pollution can occur over the long term.

Finally, another problem is the financial situation of the Iraqi government. Iraq has very little money to pay war reparations. Iraq's near-empty treasury was probably a major cause of the war. I guess we all remember that on February 15 when Iraq first said it would consider negotiating or withdrawal from Kuwait, one of its conditions was the cancellation of its foreign debts.

Therefore, it would not be a reasonable attitude to wait for getting the money from Iraq to prevent ongoing environmental disaster.

There must be immediate and full steps taken, before the damage becomes irreversible, by the Coalition Forces and the United Nations,

showing the same cooperation and coordination they demonstrated during the war.

So far, the clean up efforts which are currently being undertaken by Gulf states are not enough. There are so many problems on current cleanup efforts such as lack of money, lack of communication, and insufficient equipment. Therefore, only a small percentage of an oil spill is typically recovered. As to the burning oil wells, there have been no effective steps to stop them up to now, and the experts predict it might take two years to control them.

There are several suggestions from some countries and some international organizations to solve the problem. For example, Japan has created a ninebillion-dollar "peace fund" for non-combat purposes in the Gulf crisis. Being one of the most economically affected contry by the Gulf war, Turkey has offered to establish a regional bank which will open credit to the countries involved in the clean-up effort.

To be more successful, strong cooperation and a serious international effort is absolutely necessary. If today, here, we are talking about "peace keeping coalition", and if it really aims to establish peace, this should also cover an "environmental peace." After this collective cleanup operation, or during it, the government of Iraq should be forced to pay the costs of cleanup activities.

With this environmental disaster as an example, we should begin to take some steps to strengthen environmental protection in the global legal context. Today, this is more urgent than yesterday.

It should be our first task to put forward necessary effective regulations such as implementation of the convention prohibiting the use of environmental resources as a weapon, establishment of precise and strict liability and compensation rules, and establishment of an organization (maybe an International Environmental Court) to administer this convention's provisions.

Perhaps these ideas will be taken into consideration at the international environmental conference which will be held in Brazil, 20 years after the Stockholm Conference.