

Reaching the public good by applying environmental norms to the military sector
Draft (with footnotes) by
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Military Related Environmental Concerns (MREC)¹

Last spring, VLS hosted a Solutions speech that recounted a young man's story of his experience in a refugee camp following violence in his homeland, Darfur. It was miraculous that he made it to the US, especially considering the vulnerability he recalled from the refugee camps. While the war is disturbing in any light, what may be most harrowing is the toil and devastation survivors face after a conflict has passed, such as those horrors recounted in the vagina monologues describing the legacy of gender violence in Kosovo. Similarly, Viet Nam was traumatic for US soldiers and Vietnamese civilians, but perhaps even more disturbing is the continued dioxin poisoning of new generations in Viet Nam, nearly 40 years after the US employed a variety of defoliants.² Some of the most important environmental problems facing the world today are not only tied to past conflicts, but to military activities; sometimes their solutions are as well.

In the Republic of Congo, local sources describe the legacy of conflicts in Rwanda, Burundi, and Sudan.³ The influx of soldiers and refugees into sensitive areas after these conflicts is leading farming communities to exhaust the soil and harvest wood for charcoal, resulting in increased deforestation (AR 42-3). A 2004 report for the Institut Congolais Pour Conservation de la Nature (ICCN) describes how national park officials saw refugees occupy 80% of Kahuzi-Biega, and estimated that poachers in the ivory trade reduced a pre-war population of about 20,000 hippopotami in Virunga to about 1,300 individuals (AR 53). Deforestation has been the direct result of military actions in Uganda (AR 58, 64), the Philippines, Myanmar, and Viet Nam, among others.⁴ Some other legacies include the mines and cluster bombs that have been the subject of considerable controversy even recently.⁵

While national and international efforts have sought to prevent harm by banning specific weapons (chemical weapons, landmines, and some are working on removing the threat of cluster bombs), for affected communities this is only a partial answer. To meet this opportunity the United Nations Environment Programme (UNEP) has been working to facilitate states creating

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² According to the Viet Nam Agent Orange Relief & Responsibility Campaign, more than 3 million Vietnamese people have suffered from the effects of Agent Orange exposure over 30 years after the Vietnam War (<http://www.vn-agentorange.org/aboutus.html>). One particularly interesting source is the country report provided by the Vietnamese government in 1995, available at <http://sba.vermontlaw.edu/groups/ils/UNEP%20Documents/>.

³ See the report for the United Nations Environment Programme (UNEP) Africa regional meeting (Africa Report - AR), at 38, 42-3, and 52. The text is available at http://www.unep.org/civil_society/recommendations/index2.asp.

⁴ Regarding the Philippines, see their 1995 report at 1, <http://sba.vermontlaw.edu/groups/ils/UNEP%20Documents/>, regarding Myanmar, see its report at 37-8, Sub-Regional Meeting on Military Activities and the Environment- June 1996 (UNEP/MIL/SEA/1) on our homepage: http://sba.vermontlaw.edu/groups/ils/ILS_website_files/page0005.htm.

⁵ See, for example the impact and removal effort underway in Lebanon without cooperation from the Israeli government in, "LEBANON: Deminers find new cluster bomb sites without Israeli data" is available from the UN Office for the Coordination of Humanitarian Affairs at <http://www.irinnews.org/Report.aspx?ReportId=76358>.

an international framework for resolving and realizing the environmental potential of military activities during peacetime, with an international conference planned for next year.⁶ We are working to support this effort by helping civil society participate.⁷ Specifically we are looking for current concerns from past wars (ex. deforestation in Africa, chemical pollution in Viet Nam), from past activity (ex. past base closures, levee failures, remnants from arms training, weapons disposal), current activity (ex. training, policing, monitoring), and planned activities (ex. base openings, closings, future training, constructions, permitting). Severe problems appear from our sources, but so do important opportunities.

We have seen a surge in ethnic strife in Kenya, but before the Dec 27th elections,⁸ that government presented a vision of hope. In Kenya, the homeland of the 2004 Nobel Peace Prize Laureate, Dr. Wangari Maathai and the green belt movement, Kenyan military forces competed in tree planting and other exercises for the prestige of winning an environmental soldier award.⁹ Some of our sources would like to see the soldiers that manage refugee camps and other areas receive this kind of environmental training, and perhaps start their public institutions on the road to a more sustainable future. You can see this challenge and potential in Burundi (AR 36), Cameroon (75), and Uganda as well (58, 64), but not only African militaries reveal this potential for improved military training. In the US, Secretary of State Condoleezza Rice is seeking funding for more civilian oriented forces in Iraq.¹⁰

Not only the US can improve its performance abroad. In Kenya, training activities of the British military left unexploded ordnance (UXO) on the fringes of pastoral communities. Journalists reported in 2001 how children of these villages have been maimed on discovering these bombs, and the situation has prompted a lawsuit and investigations about how well the munitions were cleaned up after training activities (AR 16, 17, 20). While UXO and munitions cleanup is a problem in the US, is it plainly not only a problem in the US. For example, old munitions stockpiles in South Africa are still a source of concern (AR 25-7), as are munitions left

⁶ Specifically, the UNEP is working “to review environmental problems related to military establishments, as well as their contribution to enhance the environment, with a particular focus on their activities during peace time and to identify a way forward for the application of environmental norms.” UNEP/GC/24/9 at 44, available at www.unep.org/GC/GC24/download.asp?ID=240.

⁷ So far our work has chiefly involved collection information for the UNEP. Much of our information comes from our report to the UNEP regional meeting for Africa last October. We sent another civil society report to January’s Asia-Pacific regional meeting and the UNEP Global Civil Society Forum (GCSF) on February 18th, 2008. These regional meetings are part of a UNEP global survey, an effort to develop law for military activities and the environment. Kaori Sunagawa, myself, and members of the ILS Subcommittee on Military Related Environmental Concerns (MREC) have developed a questionnaire to help civil society participate in this effort, conveying the responses of 13 (now 20) sources from 10 countries to the Africa meeting, 14 from 5 countries to the Asia Pacific meeting, and an additional 5 from 3 countries to the GCSF. Each time the senior legal officer at the UNEP has welcomed our reports and circulated them among attending national officials in defense or environmental ministries.

⁸ For more information on the conflict, see “Ethnic Violence in Rift Valley Is Tearing Kenya Apart,” by Jeffrey Gettleman in the NY Times (January 27, 2008), on gender violence, see “Rape being used as weapon in Kenya’s ethnic violence, hospitals and clinics report” by the AP in the International Herald Tribune (February 13, 2008), and for recent developments, see “Deal to Share Power in Kenya Appears in Reach,” by Jeffrey Gettleman in the NY Times (February 22, 2008).

⁹ See “The Kenya Army Environment Soldier Programme” webpage: http://www.mod.go.ke/army/?page_link=environment. See also the AR 2, where Maina Muniafu states deforestation is a major challenge for the Kenyan government and “increasing the country’s tree cover from less than 2% to over 10%” is something the military can facilitate because it is present “in all parts of the country.”

¹⁰ See “Rice Grilled on Extra Funding Sought for Iraq, Afghanistan” in the Washington Post (Feb 17 2008).

over after US facilities have closed in Okinawa, Japan.¹¹ These concerns with visiting forces, military forces that appear to act outside of the civil jurisdiction of any country, suggest an international framework may be the best measure to address these problems that have escaped bilateral negotiations and remain to harm hosting communities. Some of the most disturbing and frustrating examples are found in the Philippines,¹² but a report from Djibouti reveals this is only the tip of the iceberg (AR 34).

Unlike in Viet Nam, the US caused environmental damage in the Philippines by basing pacific operations there shortly after the colony changed hands following the Spanish American War. In 1946 the colony obtained its independence but the US retained control over Clark and Subic bases through a 1947 agreement, becoming a Status of Forces Agreement (SOFA) in 1990 that expired in 1991.¹³ As a result the US forces pulled out of Clark in 1991 and Subic shortly thereafter (APR 61). The national government did not negotiate to have the US address pollution left on the bases, or address it consistent with the Philippine Constitution.¹⁴

In 1991, Mt. Pinatubo erupted, spewing lava and ash over a wide radius and forcing mountain dwelling communities down-slope. Over a thousand families were relocated to the former Clark US Air Base where they dug shallow wells into what used to be a motor pool. Over the next couple years, mothers and children drank from these wells. After observers noticed a high incidence of skin diseases, miscarriages, stillbirths, birth defects, cancers, heart ailments and leukemia, a community leader of 1072 families surveyed 500 people, and found 144 of them were ill with related ailments.¹⁵ By 1995 reporters and experts presented this situation to the world, with stories about the 1992 GAO report that documented contamination, health studies that confirmed local concerns, and an award winning film.¹⁶ In 1995, the UNEP began a survey of environmental impacts of military activities, particularly focused on hazardous waste concerns, but neither the Philippine or US governments reported these issues to the UNEP.

While Sweden and the US produced guidelines for nations developing environmental policy for the military,¹⁷ problems like childhood leukemia in the Philippines persist. One count estimates over 2000 people have been documented sick from the pollution on Clark and Subic, and nearly half had passed on as of 2002, many of them children.¹⁸ After political efforts to secure relief failed, residents and Arc Ecology brought a suit in 2002 to force the US to assess the pollution on the base, critical to establishing CERCLA liability. See *Arc Ecology v. US Dept.*

¹¹ See "Pointing out the necessity for legal arrangement for land use at former US military bases (in Okinawa) - the symposium on US base realignment in Kadena Town" (rough translation) *Okinawa Times*, December 2nd, 2007, available as of December 8th at http://www.okinawatimes.co.jp/day/200712021300_03.html. (Japanese text).

¹² Much of the following information on the Philippines is presented in the report we submitted to the UNEP regional meeting for Asia and the Pacific (Asia-Pacific report – APR), especially at 61-3 and 64-5. The full text will soon be available at http://sba.vermontlaw.edu/groups/ils/ILS_website_files/page0007.htm.

¹³ See Raphael A. Porrata-Doria, Jr.'s "The Philippine Bases and Status of Forces Agreement: Lessons for the Future." 137 Mil. L. Rev. 67 (1992).

¹⁴ "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." quoting § 16, art II. See also article 21 of the 1972 Stockholm declaration against inflicting environmental harm on other states at APR 63.

¹⁵ See the Philippine Senate Committee Report No. 237, On Toxic Contamination in the former U.S. Bases in the Philippines (2000) at <http://www.yonip.com/main/PTFBC/senate.html>. According to that report, half of those reported sick had passed on as of 2000.

¹⁶ See the FACES timeline available at <http://faccessolidarity.org/legacy/>.

¹⁷ Unfortunately only a partial copy of this report is available on our home page.

¹⁸ Referring to statistics quoted in "Environmental Impact of US Military Installations in the Philippines," a presentation to the 2002 Asian Civil Society Forum by the People's Task Force for Bases Cleanup, soon to be available on our website.

of the Air Force, 411 F.3d 1092, 1097 (9th Cir. 2005). While that court did not find CERCLA leant no support to plaintiff's claim, it found the claim barred because any legal connection between the US and the Philippines over these bases had expired years before the plaintiffs brought suit. As a result of this case, it is difficult to assert that US law requires addressing pollution left by the US military while it was operating overseas, so this remains a matter resolved through bilateral negotiations between the US and each host state. This causes some communities to resent the treaty relationship between national governments, because the matters they decide are felt locally, whatever the political clout of the affected community. US training and plans in Okinawa-Japan, Australia, and the Republic of Korea, present prime examples.

While flight training in the US has been controversial,¹⁹ it is particularly controversial in Japan. That country is made of 47 state-like prefectures, but 75% of US military facilities are located in Okinawa prefecture,²⁰ and a local government estimate suggests as many as 38% of the local population regularly endures noise pollution from US flights exceeding Japanese legal standards, with associated social costs.²¹ Similar concerns are reported from communities hosting US activities in the Republic of Korea (APR 68). While the US has programs, like Air Installation Compatible Use Zoning, to adjust land use planning and military training, it is not being applied in Okinawa, perhaps in part because the "encroachment" of the community on the land abutting bases like Futenma could drastically reduce the scope of flight training permitted.

Crashes and crime connected with the military in the surrounding community have led the US to propose closing the base,²² and relocating training operations by expanding the more isolated Camp Schwab.²³ Unlike Futenma, this is controversial because the plan will fill in sea grass beds that support the endangered and culturally significant Okinawa dugong (APR 102-6). Fewer than 50 individuals are estimated to make up this isolated population. Only the Japanese government has considered the impact of the base on the species, but a US court recently found the US Department of Defense (DOD) has an obligation to consider these impacts as well, based on § 402 of the US National Historic Preservation Act. This section implements the World Heritage Convention. Under similar "take into account" language in § 106, the DOD may consult with affected Okinawans to supplement the environmental impact assessment process required under Japanese law.²⁴

If the UNEP process we are working on produces a viable legal framework for addressing these issues internationally, or even nationally, perhaps we will see similar access measures to

¹⁹ For example at Miramar Marine Corp Air Station in San Diego, California.

²⁰ An interesting issue in this is the environmental injustice involved. Okinawans are a minority with a distinct culture within Japan, being the descendents of the Ryukyu Kingdom conquered in the 17th century by imperial Japan. Their conquerors destroyed their historical records, only now recoverable because of Ryukyu's historical ties to China (it exported gun powder). Atrocities after World War II left Okinawan elders reluctant to rejoin Japan during US occupation of the islands, until persuaded there would be no more war because of Article 9 in the Japanese Constitution. Under this article, Japan can only support defense forces, and the US continues to occupy Okinawa for the benefit of national and regional security, though largely to the detriment of Okinawans.

²¹ The Ginowan City Government, Okinawa Prefecture, Japan estimate appears on APR 77 and 85. The section on Japan also discusses the impact of weapons testing on the island, including the deforestation and erosion problems, resulting in heavy silt loads upstream from coral reefs, see pages 107-111.

²² After the Philippines experience, the return of facilities to communities in Okinawa, and in the Republic of Korea may be a mixed blessing considering liabilities these communities may inherit. See especially APR at 70.

²³ New facilities replacing capacity at Futenma are also planned for Guam, see APR at 45, 47, and 50-52.

²⁴ See the Center for Biological Diversity press release concerning *Okinawa Dugong v. Gates* litigation at http://www.biologicaldiversity.org/news/press_releases/2008/dugong-01-24-2008.html.

protect affected communities like the ones discussed above.²⁵ Perhaps we could see an outgrowth of the precautionary principle, as suggested in Dr. Svitlana Kravchenko's presentation on the right to a healthy environment this weekend, or increased protection for species like the dugong.²⁶ Protections may even occur with the support of military forces, trained in policing marine protected areas or parks, in better serving communities hosting refugees, or in restoring hazardous areas to beneficial use.

If you are interested in any of the issues in this project, or would like to support our work, feel free to visit our webpage and either sign our petition, or join our team. Our petition aims to persuade states to include the public as it develops environmental policies for the military. By seeking support from the UNEP we hope to make this process more accessible. We have 117 signatures thus far, and it can be fun just to read the variety of issues and perspectives that people have expressed.²⁷

Finally, if you would like to join in this project, we are building a network of organizations, experts, and concerned individuals to contribute, factual, scientific, and legal analysis to help this policy work go forward. We are looking for people that can help us contact and network, analyze responses we receive, follow up with sources, and improve the reports we are submitting to the United Nations Environment Programme (UNEP). Our project is missing key input from civil society in Latin America and the Caribbean, North American, Europe, and West Asia, but we are also in need of more insight from sources in Asia-Pacific and Africa. If we can offer any additional information or interest you in a conversation on this topic, feel free to send me an email at wwatts@vermontlaw.edu, or email Kaori Sunagawa at ksunagawa@vermontlaw.edu.

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MREC Co-Chair

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²⁵ Maybe language favoring measures relating to visiting forces and characteristic of the Aarhus Convention (rights to notice, information, access to decision-making; rights enforceable through access to justice).

²⁶ Impacts of military sonar use has come under scrutiny in US and abroad, see for example, recent developments in the case, *NRDC v. Gutierrez*, at <http://www.nrdc.org/wildlife/marine/sonar.asp>, and AR 5 where visiting NATO forces policing the horn of Africa have been known to use similar controversial sonar, and dugongs, whales, dolphins, and other sirenians have been found stranded on the beaches. Similar concerns frustrate work in Australia to protect dugong populations, such as training activities of the US and Australia planned for Australia's Shoalwater and Corio Bays with risks to the habitat of migratory birds, and potential direct harm to sea turtles, dugong, and corals. See APR 4, 8-10. See also this article alluding to implications regarding the UN Law of the Sea Treaty;

²⁷ The petition is available at <http://www.thepetitionsite.com/takeaction/454164146>