CORRESPONDENCE

TO THE CO-EDITORS IN CHIEF:

In the July 1995 issue of this *Journal*, Hans-Peter Gasser presented a proposal for action for better protection of the environment in armed conflict (89 AJIL 637 (1995)). The initiative taken by the International Committee of the Red Cross to promote the application of international law relating to the protection of the environment in times of armed conflict is, as a matter of principle, a meritorious one. As certain states are opposed to any new development of international law by treaties, other means of achieving a better policy for protecting the environment have to be thought of. Guidelines that may be included in military manuals are a good instrument for that purpose.

That being so, the text of the proposed guidelines matters. Therefore, attention has to be drawn to certain flaws they contain, which states indeed should not adopt.

No. 5 of the guidelines proposes that peacetime rules concerning the protection of the environment continue to apply, with a certain difference as to their application between the parties to the conflict and vis-à-vis third states, "to the extent that they are not inconsistent with the applicable law of armed conflict." This formulation is either meaningless or false. If taken literally, it is meaningless. To refrain from any destruction because of its unlawful environmental consequences can never be "inconsistent" with the laws of armed conflict. It is also inconceivable that a rule of environmental law would require an activity that could be unlawful under the law of armed conflict.

If, however, the proposed guideline is to be understood as meaning that any destruction permitted under the laws of war could not be considered unlawful under the law relating to environmental protection, then the statement is false, at least as far as the relationship between the parties to the conflict and third states is concerned. The traditional rule that this relationship is governed by the law of peace and that treaties are not suspended between belligerents and neutrals would thus be rendered obsolete. The peacetime law relating to the protection of the environment applicable between belligerents and neutrals would become entirely subject to whatever the law of war permits, between the parties to the conflict, as means of injuring the enemy. This is wrong as a matter of positive law and unacceptable as a matter of policy.

The second major flaw of the guidelines really goes to the heart of international humanitarian law. Guideline No. 9 refers to "[t]he general prohibition to destroy civilian objects, unless such destruction is justified by military necessity." This seems to imply that the destruction of civilian objects is legal if justified by military necessity. Fortunately, it is not as simple as that to justify destruction: civilian objects may not be destroyed by attacks directed against them and collateral damage to them caused by attacks directed against military objectives is strictly limited by the principle of proportionality. Indiscriminate attacks are prohibited altogether. Although these rules are mentioned elsewhere in the guidelines (No. 4), it is hard to understand why they are neglected in the formulation of No. 9. If military requirements are relevant to the definition of military objectives and the application of the principle of proportionality, they do not necessarily prevail as suggested by guideline No. 9. Guidelines must be correct and should not, by ill-taken simplification, invite any doubt concerning rules as fundamental as those relating to the protection of the civilian population.

MICHAEL BOTHE
University of Frankfurt

Dr. Gasser replies:

Professor Bothe's second comment relates to what he perceives as a major flaw in the Guidelines for Military Manuals and Instructions on the Protection of the Environment

in Times of Armed Conflict. It would be distressing if such an important issue remained unsettled.

Rule 9 of the guidelines reads: "The general prohibition to destroy civilian objects, unless such destruction is justified by military necessity, also protects the environment." While I recognize that this wording is not perfect, there cannot be any doubt about its significance. The reference to "military necessity" does not mean that military requirements necessarily prevail over other considerations. The *Commentary* on the 1977 Additional Protocols, co-authored by Professor Bothe, has the following to say about the meaning of "military necessity": "The principle of necessity justifies those measures of military violence, and only those measures, not *forbidden by international law* which are relevant and proportionate to securing the prompt submission of the enemy with the least possible expenditure of economic or human resources."[†]

That means that military necessity never justifies any breach of the laws of war. Therefore, the reference in Rule 9 to military necessity cannot, under any acceptable interpretation, be taken to imply that the destruction of civilian objects by way of direct attack may be legal. Rather, it says two things: first, that military considerations play a role in the definition of what is a (lawful) military objective; and, second, that destruction of civilian objects must be accepted as a proportionate side effect of a (lawful) attack directed against a military objective, i.e., collateral damage. Contrary to what Professor Bothe seems to fear, the proposed guidelines do not open the Pandora's box of *Kriegsräson*.

TO THE CO-EDITORS IN CHIEF:

I am writing in response to my friend Louis Fisher's piece (89 AJIL 21 (1995)) on the legality of President Truman's commitment of troops to hostilities in Korea without specific statutory authorization. He makes a persuasive case; however, I believe there is at least equally compelling evidence for a very different conclusion. My full response will soon appear elsewhere,[1] but a few brief observations may be of interest to your readers.

The relationship between U.S. participation in UN peacekeeping operations and the power of Congress "to declare war" was dealt with in various ways in the 1945 UN debates. A very small group argued against passage on the theory that the Charter obligation constituted an unconstitutional delegation of legislative war power to the President. A few others—most prominently, Senator J. William Fulbright—argued that the power of Congress "to declare war" had "never been very important" and was particularly meaningless in the modern era.

The majority view appears to have been that the provisions of the Charter did not conflict with the legislative power "to declare war." Thus, the unanimous report of the Senate Foreign Relations Committee argued that "[p]reventive or enforcement action" by U.S. forces made available to the Security Council "would not be an act of war but would be international action for the preservation of the peace and for the purpose of preventing war. Consequently, the provisions of the Charter do not affect the exclusive power of the Congress to declare war." The committee argued further that reserving a congressional veto over troop deployments to uphold the Charter "would also violate the spirit of the United States Constitution under which the President has well-established powers and obligations to use our armed forces without specific approval of Congress." In recommending passage of the United Nations Participation Act (UNPA), the unanimous report of the House Foreign Affairs Committee quoted this Senate language with favor—adding that "the ratification of the Charter resulted in the vesting in *the executive branch* of the power and obligation to fulfill the commitments assumed by the United States thereunder" (emphasis added).

[†] MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 194–95 (1982) (footnote omitted).

[1] Tentatively entitled "Truman, Korea, and the Constitution: Debunking the 'Imperial President' Myth," the article is scheduled to appear in the *Harvard Journal of Law and Public Policy* in early 1996.

The issue of reserving a veto over using U.S. forces for specific UN peacekeeping operations was addressed when Senator Wheeler's amendment, requiring specific statutory approval before U.S. troops could participate in chapter VII UN peace operations, was overwhelmingly rejected, receiving only nine votes. In this context, Dr. Fisher's quotation (*id.* at 28) of Senator Wheeler's views on this issue, at least implying that he spoke for the Senate, is highly unpersuasive.

The ongoing debate over President Clinton's authority to send troops to Bosnia brings to mind a relevant discussion from the 1945 floor debate on the Charter. Senator Scott Lucas, a member of the Foreign Relations Committee who would later serve as Majority Leader at the time of the Korea decision, explained that, in addition to the broad power to use military force abroad (without specific legislative sanction) to protect American property and citizens, which he said the President already possessed under the Constitution, ratification of the Charter would empower him to "send troops for the purpose of quelling" such things as "a dispute . . . between Bulgaria and Rumania which threatens the peace of Europe."

Finally, the record is clear that Truman did not ignore Congress following the invasion of South Korea. On the contrary, he promptly telephoned Foreign Relations Committee Chairman Tom Connally (who had helped draft the UN Charter and led the Senate debates on these issues five years earlier) and asked whether he should "ask Congress for a declaration of war if I decide to send American forces into Korea." According to his autobiography, Connally responded: "You have the right to do it as commander-in-chief and under the U.N. Charter," and he cautioned *against* involving Congress because of the delay it would entail in responding quickly to the aggression.

Truman repeatedly expressed a desire to address a joint session of Congress and had Secretary Acheson draft a congressional resolution of approval, but Majority Leader Lucas finally persuaded him to "keep away" from Congress and to make the speech as a "fireside chat" to the American people. Overwhelming support was voiced on the Hill for the President's actions; and while a few members—like Senator Robert Taft—did argue that Congress should be asked to approve the decision, even Taft announced that he would support such a resolution if offered, and his constitutional objections were promptly challenged by several other senior members.

The metaphor that Korea was a "police action" was in widespread use in Congress well before Truman embraced it; and some of the Republicans who a year later, in an act of partisan legerdemain, ridiculed Truman for the term, had argued in June 1950 that Truman's response was not an action that would require "a declaration of war" by the Congress, but was "police action" under the Charter.

Louis Fisher is a very able scholar, and I understand that he believes President Truman acted unlawfully in 1950. But it strikes me as significant that Truman's actions were fully in accord with the consistent advice he received during several meetings with the bipartisan congressional leadership, and that this advice was itself fully consistent with the interpretations of the Charter and the Constitution made by these same congressional leaders during floor debates on the Charter and UNPA five years earlier.

In recent years, the Senate has officially taken the view that the meaning of treaties is to be determined "in light of what the Senate understands the treaty to mean when it gives its advice and consent."[2] I do not believe Dr. Fisher's conclusions can withstand that test, and I would commend the original 1945 *Congressional Record* debates to readers who wish to explore this issue further.

ROBERT F. TURNER
Associate Director, Center for National Security Law
University of Virginia School of Law

[2] S. Res. 167, 100th Cong., 1st Sess. (1987). In my view, the principle underlying this resolution is unsound. *See* Robert F. Turner, *Beware the Tyranny of the Senate,* WALL ST. J., Feb. 22, 1988, at 20.