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ABSTRACT

Actions taken during the course of armed conflict have, through the ages, led to significant environmental destruction. Until recently this was regarded as an unfortunate but unavoidable consequence of conflict, despite its sometimes disastrous impact on human populations. However, as the nature and extent of environmental rights have come to be more widely recognized, it is no longer the case that the deliberate destruction of the environment to achieve military and strategic goals can be accepted, particularly given the development of weapons capable of widespread and significant damage. This article argues that the deliberate destruction of the environment during wartime should, in appropriate circumstances, be regarded as a 'Crime against the Environment' and should attract international criminal responsibility. It examines the existing international rules that apply to the protection of the environment during armed conflict and explores whether, and to what extent, the International Criminal Court may have competence to deal with acts that significantly damage the environmental rights of targeted populations. [Original article in English.]

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HUMAN RIGHTS, THE ENVIRONMENT AND CONFLICT: ADDRESSING CRIMES AGAINST THE ENVIRONMENT*

Steven Freeland

The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.[1]

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It is well recognized that environmental issues constitute an important element of the fundamental rights of human beings. The 1972 Stockholm Declaration provides for the "fundamental right to ... an environment of a quality that permits a life of dignity and well-being".[2] Sixteen years later the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights affirmed the "right to live in a healthy environment". This right has also been built into the national constitutions of a number of countries. While there remains some debate as to the precise legal scope of current and emerging notions of "environmental rights", there is no doubting the strong relationship between human rights and the environment.

Similarly, it is clear that the deliberate despoliation of the environment can have catastrophic effects, not only in ecological terms but also on human populations. Actions that have been strategically planned to destroy an important part of the environment represent a breach of the basic human rights of the targeted individuals. The relationship between human security and a safe and habitable environment is fundamental, particularly in relation to access to natural resources. If this intricate inter-relationship is significantly affected by the deliberate actions of others, the lives and/or livelihoods of those

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reliant on the natural environment may be jeopardized or even destroyed.

Yet, we have been witness to many deliberate acts aimed at destroying the natural environment in order to achieve strategic goals, particularly in the context of armed conflict. The deliberate destruction of the environment as a method of threatening human security has, increasingly, been a tactic employed in conflict,[3] giving rise to terms such as "ecocide" or "geocide". One of the tragic consequences of conflict is that the natural environment is almost always vulnerable to the aims or weapons of warfare. Few can forget the haunting images of the 736 burning Kuwaiti oil well heads, which had been deliberately ignited by retreating Iraqi forces towards the end of the first Iraq conflict, or the systematic draining of the al-Hawizeh and al-Hammar marshes in southern Iraq by the Saddam regime, which effectively destroyed the livelihood of the 500,000 Marsh Arabs who had inhabited the area of this unique ecosystem.

More recently, it has been estimated by Human Rights Watch that, during the course of the 2003 invasion of Iraq, United States and British forces used almost 13,000 cluster bombs – containing almost 2 million munitions – causing very significant human and environmental damage. There are ongoing reports of the use of depleted uranium shells by coalition forces in Iraq, some of which have a "half-life" of many millions of years. At the time of writing this article, the world is witnessing a humanitarian and environmental catastrophe unfolding in the western region of Darfur in Sudan, which has seen the poisoning of vital water wells and drinking water installations as part of a deliberate Government-supported strategy by the Arab Janjaweed militia to eliminate or displace the ethnic black Africans living in that region.[4]

Moreover, there is another equally significant, but perhaps not yet fully understood, link to be drawn between the environment and human conflict. Access to natural resources – or the lack of such access – can itself be the trigger for conflict. One of the underlying tensions between Israel and Syria is the issue of access to water. In both the Democratic Republic of Congo and Haiti, the United Nations Environment Programme (UNEP) has reported that environmental damage has been a

major cause of political unrest and conflict. While there is work to be done to more accurately determine the nature and extent of the link between environmental degradation, poverty and political and social conflict, the logic of some form of connection appears to be undeniable. This was recognized by the United Nations Security Council, which in January 1992 concluded that:[5] "The absence of war and military conflicts amongst states does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to international peace and security. The United Nations membership as a whole needs to give the highest priority to the solution of these matters" (emphasis added).

Deliberate actions intended to cause significant environmental destruction and which significantly effect particular groups of people represent not only a feature of conflict strategy but also a root cause for the escalation of the conflict itself. It is therefore important that there are appropriate enforcement measures in place to respond to deliberate environmental destruction during armed conflict.

In an era in which morality, ethics and international law now recognize the rights of individuals, and notions of environmental rights and ecological rights are becoming increasingly accepted, it is only natural that the deliberate destruction of the environment during armed conflict should be regulated by strict international legal rules. Moreover, such destruction should, in appropriate circumstances, also give rise to **individual criminal responsibility** at the international level. If the environmental destruction is carried out in such a manner as to cause severe destruction and consequent human suffering, then such actions should be regarded as constituting a crime that offends the international community as a whole and thus be seen as an international crime – properly labeled as a "Crime against the Environment".

In addition, a legal regime that allows for individual criminal responsibility at the international level in cases of significant and deliberate destruction of the environment would cause military and political decision-makers to consider more closely the consequences of their actions. It would elevate the importance of protecting the environment and of environmental rights, even in situations of wartime, by publicly

stigmatizing actions that disregard those rights. In this way, the destruction of the environment could no longer be regarded as collateral consequence of conflict.

In this context, this article has two purposes. Firstly to examine the major existing international law rules that apply to the protection of the environment during wartime and ascertain the extent to which such actions attract criminal responsibility. It will be seen that in this regard, existing international law largely avoids imputing individual criminal responsibility for any large-scale destruction deliberately occasioned. This article will then explore whether, and in what circumstances, actions designed to deliberately destroy the environment may fall within the jurisdiction of the International Criminal Court (ICC) under the terms of the 1998 Rome Statute of the International Criminal Court (Rome Statute). The conclusion reached is that, although there is only minimal reference to the environment within the Rome Statute, there are a number of potential options to "pigeon hole" environmental crimes within the definition of those crimes set out in that instrument.

Individual criminal responsibility or state responsibility?

Before examining whether and how the commission of a crime against the environment may possibly attract individual criminal responsibility, there is a preliminary, but important, question to resolve: who should be held responsible for environmental crimes in circumstances where there is significant state involvement in the destruction – just the appropriate individuals or, in addition, the relevant state?

In relation to the commission of international crimes, the judgment of the Nuremberg International Military Tribunal represents the traditional view. The Tribunal stated that "international law imposes duties and liabilities upon individuals as well as upon states has long been recognized ... Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced ...".

This is reflected in the jurisdictional mandates of all

subsequently established international criminal tribunals, including the ICC. These courts are generally not designed to investigate and prosecute actions taken by non-natural entities, particularly states. The ICC is empowered to exercise jurisdiction over "natural persons" but not states. There is currently no possibility that an international criminal prosecution of a state may be instigated in the ICC for any international crime, including actions that are intended to produce significant environmental degradation. Instead states might have some degree of legal responsibility for the commission of international crimes under the principles of state responsibility, or blame might be imputed to a state as a result of the commission of an international crime by one of its officials.

However, this is quite a different level of culpability from accepting the possibility that a state itself may be **criminally responsible**. This distinction is more than a question of semantics – it carries with it the message that, irrespective of the degree of involvement by the machinery of a state, its culpability for actions that precipitate very serious consequences for humans and the environment is something less than the standards by which we judge individuals.

Yet, it was not long ago that the notion of an international crime committed by a state was contemplated by the International Law Commission (ILC). Having been given the task in 1949 of formulating draft Articles on the Responsibility of States for Internationally Wrongful Acts, the ILC introduced draft Article 19 during the early 1970s. When specifying the form that an internationally wrongful act by a state may take, this draft Article drew a distinction between international delicts and international crimes.

Within the definition of an international crime,[6] the draft Article included actions from which such a crime may result, including:[7] "(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas".

Draft Articles 52 and 53 then provided for the consequences of the commission by a state of an international crime, including the possibility of collective sanctions.[8]

Draft Article 19 gained partial support at the time of its introduction, mainly from developing and eastern European

states. In its commentary on the draft Article, the ILC commented that:[9] "Contemporary international law has reached the point of condemning outright the practice of certain states in ... acting ... gravely to endanger the preservation and conservation of the human environment. ... these acts genuinely constitute 'international crimes', that is to say international wrongs which are more serious than others and which as such, should entail more severe legal consequences".

Despite these views, draft Article 19 gave rise to much controversy among other states as well as commentators and various members of the ILC itself, some of whom argued that it suggested an acceptance of the idea of collective responsibility of the entire population of a state for the actions of their leaders, as well as the notion of collective punishment.[10] In the end, draft Article 19 (and its associated draft Articles 52 and 53) was not included in the version of the Articles that was adopted by the ILC in 2001 and noted by the General Assembly later that year.[11] Indeed, it is unlikely that the notion of international criminal responsibility of a state currently represents the general view and practice of states (and hence customary international law), though the sentiments enunciated in draft Article 19 may reflect an emerging trend in relation to the law on environmental damage resulting from deliberate state policy.

In this regard, there have been various enforcement mechanisms instituted at the international level against a state to deal with some aspects of deliberate destruction of the environment. Following the environmental damage occasioned in both Kuwait and Saudi Arabia by the Iraqi regime in the period during and immediately following the invasion of Kuwait, the United Nations Security Council passed Resolution 687 which, in part, provided that Iraq was "... liable under international law for any direct loss, damage – including environmental damage and the depletion of natural resources – or injury to foreign Governments, nationals and corporations, as a result of its unlawful invasion and occupation of Kuwait".[12] A compensation fund was established to be administered by a United Nations Compensation Commission (UNCC),[13] which also deals with claims currently totaling US$ 350 billion for damage caused by Iraq's invasion and subsequent occupation of Kuwait.

While the award of damages in such a case is an important enforcement mechanism designed to remediate the damage caused to the environment, it may not be an adequate measure to reflect the serious human consequences of the action. Many lives may have been lost or severely affected by those actions. Given that international law is not yet in the position to find the state criminally responsible, it is appropriate to consider how those individuals who orchestrated the environmental damage to suit certain specific purposes can themselves be prosecuted in an international forum.

It is therefore necessary to examine the existing international law rules that apply to the regulation of armed conflict.

The existing law for the protection of the environment during conflict

It is an unfortunate fact that warfare and armed conflict appear to be unavoidable elements of human society. Moreover, it is inevitable that warfare will result in environmental damage, particularly given the rapid advances in weapons technology. There are two main types of international treaties that are relevant in this regard – Multilateral Environmental Agreements (MEAs) and those treaties that form the core of international humanitarian law (*jus in bello*), which regulate the overall conduct of warfare. Within this latter class, there are a small number of treaties that are specifically directed towards the protection of the environment.

Events such as the first Gulf War in 1991 have highlighted the inadequacy of these existing principles, at least in relation to the imposition of criminal responsibility. It is clear that individuals do bear a responsibility towards the environment; however the concept of international environmental crimes has not, until quite recently, been the subject of specific focus in international humanitarian law or in the otherwise rapid expansion of international criminal law, and has largely been ignored by international environmental law.

Various international environmental instruments do specify the general need for all persons to "protect and preserve the environment".[14] This duty also extends to states, particularly in the context of conflict. For example, Principle

24 of the 1992 Declaration of the United Nations Conference on Environment and Development (Rio Declaration) states:[15] "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".

However, the international environmental legal regime that is in place does not adequately take account of the increased danger of massive destruction to the environment occasioned by individuals and states with access to new and potentially devastating weapons or technology. Multilateral efforts to address the issue of environmental damage generally focus instead on the elaboration of legal regimes specifying liability arising from a breach of an international obligation, giving rise to traditional principles of state responsibility. Even then, important but unresolved questions relating to state responsibility for the environment are often not fully addressed.

In addition, states are bound by their obligations under customary international law as they relate to the environment, as well as any MEAs to which they are party. A breach of these principles will also invoke the principles of state responsibility.[16] While issues of deliberate environmental damage are subject to the various "non-criminal" legal processes applicable under the terms of the principal MEAs, this may not be sufficient given the magnitude of the destruction that may result from such actions.

To the extent that MEAs do make reference to criminal responsibility and enforcement, they generally prescribe that this is to be undertaken at the **domestic** level, based on traditional national jurisdiction principles. For example, Articles 213-222 of the 1982 United Nations Convention on the Law of the Sea specifies that the appropriate jurisdictional state (which will depend on the precise circumstances) shall enforce its domestic laws and regulations with respect to pollution of the marine environment. This is also the approach recently proposed by the Council of Europe and the European Commission, which have both drafted instruments that propose the protection of the environment through national criminal law.[17]

Reliance on this domestic law approach may not reflect adequately the extent of the potential environmental

consequences of conflict. In addition, the various criminal sanctions expressly relating to the environment in national jurisdictions are neither consistent nor universal. Political will on the part of states is necessary to introduce and enforce adequate national laws, and this may not always be present. Indeed the United Nations General Assembly has expressed the concern that the existing international law prohibitions of damage and depletion of natural resources "may not be widely disseminated and applied".[18] The importance of the environment therefore demands that protection is enhanced at the international level with sufficient and effective deterrent and enforcement mechanisms, including criminal sanctions, to be imposed on those who are responsible for such actions.

The fundamental principles of international humanitarian law largely stem from the body of law set out in the 1899 and 1907 Hague Conventions and the four 1949 Geneva Conventions. These instruments impose rules that *inter alia* limit the method and means of conducting warfare and also provide for classes of protected persons and protected objects. As an example, the Hague Conventions applied the laws of war to restrict the use of poison or poisoned weapons and asphyxiating gases, which were further extended by the 1925 Geneva Protocol. These instruments, although crucial in the development of rules that regulate the conduct of warfare, did not expressly address the protection of the environment.

A number of other instruments were also relevant to the issue of environmental degradation during conflict. For example, the 1963 Treaty Banning Nuclear Weapons in the Atmosphere, in Outer Space and Under Water, the 1996 Comprehensive Nuclear Test-Ban Treaty and the 1972 Convention on Bacteriological and Toxic Weapons each specify limits as to the proliferation, testing and usage of particular weapons of mass destruction, whose use during conflict would quite obviously cause significant environmental damage. However, instruments such as these were not so much implemented for the purposes of environmental protection but rather more as part of the evolution of the laws of armed conflict, particularly as developments in technology gave rise to the introduction of further weapons capable of causing significant and indiscriminate destruction.

There are a small number of treaties that specifically refer

to the protection of the environment in the context of conflict. The 1977 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD) was the first instrument that dealt with deliberate destruction of the environment during warfare, although it also applies in time of peace. It prohibits "environmental modification techniques having widespread, long-lasting or severe effects", the breach of which allows for a complaint to be made to the United Nations Security Council for action. It does not, however, create a regime for civil or criminal liability in the case of breach.

The most directly relevant instrument for the protection of the environment within those rules regulating the conduct of warfare is Additional Protocol I of the 1949 Geneva Conventions. Article 35(3) prohibits as a "basic rule" conduct intended or expected to cause "widespread, long-term and severe damage to the natural environment". This is a significantly higher threshold than appears in ENMOD, requiring not only that the damage be long-term (meaning a period of years or even decades) but that it be widespread **and** severe.

Additional Protocol I makes express reference to the need to protect the environment and repeats the prohibition in Article 55(1), linking it to "the health or survival of the population". Further, the instrument proceeds to create criminal sanctions in relation to "grave breaches" to the four Geneva Conventions or Additional Protocol I, declaring that such conduct is to be regarded as a war crime.[19] This is a significant step forward in protecting the environment in times of warfare but in practical terms it may be almost impossible to demonstrate the necessary threshold of damage in order to sustain a conviction for a grave breach of these prohibitions.

The high threshold under existing international rules

The scope of Articles 33(3) and 55(1) of Additional Protocol I have been considered both directly and indirectly in a number of forums. In its Advisory Opinion in the Legality of the Threat or Use of Nuclear Weapons Case, the International Court of Justice confirmed the customary international law obligation of states to "ensure that activities within their jurisdiction and

control respect the environment of other states or of areas beyond national control ...".[20]

However, the Court did not prescribe any criminal responsibility for a breach of this obligation, which instead would attract the principles of state responsibility.

The Court considered the provisions of Additional Protocol I and affirmed a general obligation to protect the natural environment against widespread, long-term and severe environmental damage – without providing any guidance as to the meaning of these threshold requirements – and that attacks against the environment by way of reprisals were prohibited.[21] However, it did not regard environmental concerns as representing "obligations of total restraint" during armed conflict. Instead, environmental concerns were to be regarded as an element to be taken into account when assessing what is "necessary and proportionate in the pursuit of legitimate military objectives".[22]

In essence, the International Court of Justice declined to promote the protection of the environment above questions of military necessity. It accepted the inevitability of environmental destruction during warfare and repeated the same high threshold requirement for damage specified in Additional Protocol I before such damage constituted a breach of international law.

It is possible that the Court may have the opportunity to revisit this issue. Following the bombing of Serbia and Kosovo by NATO forces during "Operation Allied Force" (March – June 1999), the Government of Yugoslavia (now Serbia and Montenegro) initiated proceedings in the International Court of Justice against ten NATO member states. The applicant sought an order for provisional measures, pleading that the NATO states had violated their obligation "to protect the environment" and not to cause considerable environmental damage. For example, Yugoslavia claimed: "The bombing of oil refineries and oil storage tanks as well as chemical plants is bound to produce massive pollution of the environment, posing a threat to human life, plants and animals. The use of weapons containing depleted uranium warheads is having far-reaching consequences for human health".[23]

The International Court of Justice declined to grant provisional measures and the cases have thus far proceeded

largely on preliminary questions of jurisdiction. The NATO states are all claiming that the Court does not have, and should not exercise jurisdiction to hear the matter. Already the actions against Spain and the United States have been dismissed on this basis. It is unclear whether the Court will find that it has jurisdiction in relation to the cases brought against the other eight NATO countries. In the event that the Court finds the jurisdictional questions in the applicant's favor, it is then that it will in all likelihood be required to address the obligations of a state to protect the environment in times of conflict.

The actions of NATO during Operation Allied Force have been considered elsewhere. In Bankovic and Others v. Belgium and 16 Other Contracting States,[24] the European Court of Human Rights Grand Chamber ruled that an application brought against all European NATO countries that were a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms by the relatives of individuals killed in the bombing of the Serbian Television and Radio Station was inadmissible due to jurisdictional grounds.

In addition, the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the former Yugoslavia (ICTY) commissioned a committee of experts (the Committee) to determine whether there was evidence justifying an investigation by the OTP into the actions of NATO personnel during that period. In the end, the Report of the Committee concluded that there was insufficient evidence to warrant such an investigation, a recommendation that was accepted in its entirety by the OTP.[25]

During the course of preparing the Report, the Committee considered possible environmental damage caused by the actions of NATO personnel. In this respect, it looked at the requirements of Articles 35(3) and 55 of the Additional Protocol I and confirmed the customary international law obligation to avoid **excessive** long-term damage to the environment, even during the bombing of a legitimate military target.[26] The Report concluded, however that this represented a "very high threshold of application". However, the Committee could not, in the end, clearly define the meaning of "excessive" in the context of long-term damage

to the environment and could not therefore conclude that the actions of NATO personnel breached the standard. Moreover, it reached this conclusion even though it recognized that the actual impact of the NATO bombing campaign was "unknown and difficult to measure" at the time.

Notwithstanding the failure of the Committee to recommend the initiation of a formal investigation into these matters, such an investigation was quite within the powers of the OTP and would have been justified. It was clear that the specific actions considered by the Committee fell within the jurisdiction of the ICTY. It is equally the case that similar actions may, in certain circumstances, also fall within the mandate of the ICC, assuming that the jurisdiction *ratione temporis* and other preconditions to the exercise of jurisdiction specified in the Rome Statute are satisfied.

The applicability of the Rome Statute

The ICC was established to address "the most serious crimes of concern to the international community as a whole".[27] The Rome Statute came into force on 1 July 2002, following the 60th ratification of the treaty, and at the time of writing there are 97 parties to the treaty. The ICC has jurisdiction with respect to the following crimes committed after 1 July 2002:[28]

a. The Crime of Genocide.
b. Crimes against Humanity.
c. War Crimes.
d. The (as yet undefined) Crime of Aggression.

In 2001, a study prepared by the United States Army Environmental Policy Institute[29] concluded that the ICC was unlikely to be called upon to determine responsibility for environmental crimes arising from military actions, at least in relation to international peacekeeping operations. The study focused only on the definition of War Crimes in the Rome Statute, and then only on Article 8(2)(b)(iv), the only provision in the instrument that expressly refers to the environment.

In view of the need to ensure that actions constituting environmental crimes are prosecuted, it is appropriate to consider not only the scope of that one provision, but also

other provisions of the Rome Statute in order to determine whether they could, in certain circumstances, be applied to actions designed to render significant damage to the environment. The following three sections will therefore consider in turn each of the (defined) crimes within the jurisdiction of the ICC.

Environmental crimes as genocide?

The Crime of Genocide is defined in Article 6 of the Rome Statute. It mirrors the definition contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), as well as the Statutes for both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Genocide has been referred to as the "crime of crimes" and requires a very high threshold of intent before a conviction can be upheld – an "intent to destroy, in whole or in part" a particular group based on "national, ethnical, racial or religious" criteria.[30]

Despite the significance of the Genocide Convention, the meaning of this definition was not judicially considered for many years. Whilst there were a small number of domestic cases that looked at its scope,[31] widespread political will in relation to the enforcement of the crime was lacking at the national level.[32] In addition, no "international penal tribunal" was established by the parties to the Genocide Convention under Article VI. Indeed, it was not until 1998 – exactly fifty years after the adoption of the Genocide Convention – that an international criminal tribunal (the ICTR) first looked at the meaning of the definition in any detail and we have only recently seen the first convictions for the crime.[33]

The definition of genocide does not include actions intended to destroy (in part or whole) a group based on their **culture** – there is no concept at international criminal law of cultural genocide, despite the fact that many regard it as necessary. Indeed the notion of cultural genocide was deliberately excluded from the primary deliberations and negotiations leading to the finalization of the definition of genocide in the Genocide Convention. The precise scope of the crime was crafted on the basis that it would be necessary

to categorize the victimized group within one of the four headings referred to above before it could be found to have been committed.

Putting this aside for one moment, however, one could certainly envisage acts of deliberate degradation of the environment that are intended to destroy a group (or part) by damaging its ability to carry on with its way of life and its culture. Indeed, the Rome Statute specifies that "... deliberately inflicting on the group conditions of life calculated to bring about its physical destruction …" would fall within the type of acts that constitute genocide, assuming that the other elements of the crime are also present.[34]

The draining of the marshes in southern Iraq or the destruction of forests upon which local indigenous groups depend, may fall within this description. Even so, it may be that the targeted group does not constitute one of the established groupings within the definition. It appears at first sight that this would defeat the possibility of classifying the actions as constituting genocide (even assuming that all other elements of the crime are present) within the jurisdiction of the ICC.

The categorization into (one of) the four specified groups in the definition of the crime is not, however, as clear-cut as first appears. In a recent case before Trial Chamber I of the ICTR, Prosecutor v. Akayesu,[35] the Court was faced with the prosecution of a burgomaster of a local commune who had been charged with genocide. The accused was shown to have the requisite intention to "destroy" the Tutsis. However, the Trial Chamber felt that it was unable to "label" the Tutsis as falling within any of the established groupings within the definition of the crime. Instead, the Court extended the meaning of Article 2 of the ICTR Statute to apply to a "stable" and "permanent" group[36] and, as a result, found the accused guilty of the Crime of Genocide. Whilst this may have been a laudable result in the circumstances of that case, the Court clearly read the express terms of the definition beyond their ordinary meaning.[37]

Indeed, this approach was not followed in Prosecutor v. Sikirica and Others,[38] which affirmed that, unlike some national jurisdictions, the ICTY has consistently not regarded cultural genocide as falling within the definition of the treaty

Crime of Genocide. Furthermore, case law in the ICTY also confirms that "destroy" in the treaty-based definition of genocide means the **physical** destruction of the relevant group.[39]

Nevertheless, the expansive approach taken by the ICTR in Akayesu highlights a number of aspects that may be relevant to the issue of environmental crimes. If an extension of the relevant groupings was eventually to be accepted, it could quite feasibly be applied to cultural genocide perpetrated through the destruction of the natural habitat or resources upon which indigenous or minority populations are dependent. Moreover, it also demonstrates the inadequacies of the current definition of genocide in relation to the complex nature of actions perpetrated in an attempt to eliminate particular groups. It is clear that a definition coined almost 50 years ago to apply to the most horrendous of human acts should be updated to apply to contemporary events.

In the absence of this, however, it is unlikely that the destruction of the natural environment would *per se* be prosecuted as an act of genocide. This is more so given the need for the Prosecutor and the ICC not to be seen as "creating" crimes, which may inhibit future acceptance of the Court among a broader spectrum of the international community.

Environmental crimes as Crimes against Humanity?

Although the term had been used earlier, "Crimes against Humanity" was not formally classified as a separate category of crime until after the Second World War. It was included in the Nuremberg Charter and the Tokyo Charter, and its scope has evolved over time in the various Statutes of the *ad hoc* international tribunals. The definition of Crimes against Humanity in the Rome Statute is broader than previous formulations and is largely based on existing customary international law, although it differs in a number of respects.[40]

Despite the expansion of its reach, there is no specific mention of the environment in the definition of the crime, although some jurisprudence in the *ad hoc* Tribunals has made reference to environmental damage when discussing the broader aspects of the crime. However, it appears that the definition of the crime in the Rome Statute allows for the

possibility that environmental crimes do fall within its ambit. The most probable options in this regard would be acts falling within Articles 7(1)(h) and 7(1)(k) of the Rome Statute. Article 7(1)(h) identifies "... persecution against any identifiable group or community on political, racial, ethnic, cultural, religious, gender ... or other grounds ... recognized as impermissible under international law ..." (emphasis added). In Article 7(2)(g) the characterization of the targeted groups is wider than for the Crime of Genocide. "Persecution" is defined as "the intentional and severe deprivation of fundamental rights contrary to international law ...".

The deliberate destruction of habitat or of access to clean and safe water or food on a significant scale could represent a breach of the fundamental human rights of the individuals within the targeted group, as would some other acts of environmental destruction. The various instruments that collectively constitute the "International Bill of Rights"[41] and customary international law confirm these as representing fundamental rights of an individual.

Another aspect of Crimes against Humanity that may be relevant is the "catch all" Article 7(1)(k), which refers to "... other inhumane acts ... intentionally causing great suffering or serious injury to body or to mental or physical health". Once again, one could envisage the possibility of acts that constitute environmental crimes falling within this definition.

Consequently, the concept of Crimes against Humanity, even as presently defined in the Rome Statute, represents a possible tool for the prosecution of environmental crimes before the ICC. Of course it will be necessary for the other elements of the crime, including the need for a "widespread or systematic attack directed against any civilian population, with knowledge of the attack" to be proven before a conviction can stand. Certainly there is a greater possibility that this crime, rather than genocide, would be used to bring such a prosecution, particularly given the broader scope of the crime. Indeed, it may well be strategically advantageous and symbolically important for the ICC Prosecutor to indict an act of environmental crime under the heading of Crimes against Humanity in addition (or as an alternative) to War Crimes, given that the former is generally thought of as the more heinous crime of the two.[42]

War Crimes and the environment

As mentioned above, the environment is expressly referred to in one provision of the definition of War Crimes in the Rome Statute. Article 8(2)(b)(iv) specifies that, within the scope of an international armed conflict, the following actions could constitute a war crime: "Intentionally launching an attack in the knowledge that such attack will cause ... widespread, long-term and severe damage to the environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".

This provision requires a balancing of damage as against military advantage, but sets a very high threshold of injury to the environment before the action falls within the scope of the crime. Indeed, a comparison of this provision to Article 55(1) of the Additional Protocol I indicates how the level of culpable action necessary to amount to a crime has been increased. Acts that would contravene Article 55(1) would not necessarily constitute a war crime under this provision, since Article 8(2)(b)(iv) includes the need for damage that is "clearly excessive". The difficulties relating to the requirement of "excessive" damage (let alone "clearly" excessive) have already been canvassed above.

Moreover, the requirement that the anticipated military advantage must be taken into account when looking at the damage to the environment – also not included in Article 55(1) of Additional Protocol I – adds a further element of uncertainty and subjectivity to a consideration of a specific action. In addition, the Committee looking at the NATO actions during Operation Allied Force concluded that, under Article 8(2)(b)(iv), it was also necessary to find actual or constructive knowledge as to the grave environmental effects of a military attack before a crime under that provision could be proven.

It seems therefore that there is a real risk that the conditions applying Article 8(2)(b)(iv) would be almost impossible to satisfy. Although there is clear reference to the environment, it may be very difficult to secure a conviction based on this provision where there is an act constituting an environmental crime, given the extent of damage required to meet the threshold specified. In this regard, other

provisions that fall within the definition of War Crimes in the Rome Statute may be helpful in addressing the issue of environmental crimes. In the "grave breaches" provisions, Articles 8(2)(a)(iii)[43] and 8(2)(a)(iv)[44] of the Rome Statute may be applicable.

Again within the context of international armed conflict, Articles 8(2)(b)(v),[45] 8(2)(b)(xvii)[46] and 8(2)(b)(xviii)[47] of the Rome Statute also appear to be applicable in appropriate circumstances. Unfortunately, there do not appear to be similar possibilities for prosecution of environmental crimes within the context of a non-international armed conflict in the relevant provisions of Article 8 of the Rome Statute, with the possible exception of Article 8(2)(e)(xii).[48] As we have witnessed in the Darfur tragedy, deliberate environmental destruction may well be perpetrated in the context of an internal conflict, particularly in those areas where certain (targeted) groups tend to live. There is no logical reason why the provisions in the Rome Statute dealing with this type of conflict should not also have been drafted so as to more readily include the possibility of covering environmental crimes.

While there are various legal thresholds to satisfy in order to justify a conviction of War Crimes, this crime appears nevertheless to be a potentially fertile area for the prosecution of environmental crimes, at least in the context of international armed conflicts. However, as mentioned above, it is not the only crime that may be applicable. There may be good legal and other reasons why Crimes against Humanity and even (though less likely) Genocide should also be carefully considered in this regard. The important point to note is that the potential for prosecution is not limited only to the one provision in the Rome Statute that makes express reference to the environment.

Concluding remarks

Environmental rights represent an important part of fundamental human rights. Without access to a safe environment, human populations may not be able to exist at even a basic level. The right to live in a safe environment requires protection through proper and enforceable legal

mechanisms. The significance of these rights has meant that the deliberate destruction of the environment, even during the course of conflict, is restricted under environmental law principles and may attract state responsibility and liability. However, the basic requirement for environmental security means that acts intended to severely compromise environmental rights in the course of conflict should also attract criminal responsibility. We must judge very harshly those individuals who initiate strategies intended to render significant environmental damage in order to promote military goals.

Enforcement of this environmental security must fall to the international institutions established according to diplomatic, legal and political processes. The integrity of environmental rights means that their protection must be led by bodies that have been created with the general (ideally universal) acceptance of the international community. The ICC is the first and only **permanent** international criminal court (at least at this stage) and, as such, represents the appropriate judicial "forum" through which to prosecute such acts, despite the resistance that it still faces from the United States and others.

One of the principal goals behind the establishment of the ICC has been the deterrence and punishment of the most serious international crimes, which also "threaten the peace, security and well-being of the world".[49] The deliberate destruction of the environment for strategic and military purposes, with its disastrous consequences for human populations, clearly falls within this description.

However, the jurisdiction of the ICC is limited to specific crimes, as defined in the Rome Statute. It is important that the Court and the ICC Prosecutor proceed in such a way as to avoid any claims that they are overreaching the boundaries of their respective powers, particularly given the highly political nature of the opposition to the Court. This means that as we are faced with further examples of unacceptable action taken by human beings against others, we cannot expect the Court to play a part unless and until those actions can quite readily be classified into the existing crimes within the Court's jurisdiction.

Nevertheless, where the circumstances so warrant, the

prosecution of environmental crimes within the terms of the existing jurisdiction of the Court is possible and appropriate under the provisions of the Rome Statute. There is no legal reason why this should not be the case. To the extent that others have dismissed outright the possibility that the ICC may play a part in relation to environmental crimes, they are not correct. Of course, the environmental damage would, in reality, have to be very serious and the suffering of the targeted group severe to attract the attention of the Prosecutor.

As this brief analysis indicates, however, military personnel and others engaged in armed conflict cannot act without regard to the impact of their actions on the environment. To do so, particularly in circumstances where the environment itself is the subject of the action (either directly or indirectly), could result in prosecution under the Rome Statute.

Whether this will actually happen remains to be seen and will, at least in the short-medium term, probably be dictated as much by political as legal considerations. However, the enforcement of these crimes would be another important step towards an end to impunity for those who commit the most serious violations of human rights in complete disregard for human security.

NOTES

1. "Legality of the Threat or Use of Nuclear Weapons Case", 1996. ICJ Rep. 242, paragraph 29.

2. Principle 1 of the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration). UN Doc A/CONF/48/14/REV.1.

3. See United Nations Commission on Human Security, "Human Security Now". New York 2003, pp. 16-18.

4. See Report of the High Commissioner for Human Rights, "Situation of human rights in Darfur region of the Sudan". 7 May 2004, UN Doc. E/CN.4/2005/3, paragraphs 50 and 73.

5. Note by the President of the Security Council, UN SCOR, 3046th mtg. at 3, UN Doc S/23500 (1992).

6. "An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole ..." Former draft Article 19(2).

7. Former draft Article 19(3)(c) and (d) respectively.

8. Draft Article 52 provided:

Where an internationally wrongful act of a state is an international crime:
a. an injured state's entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of Article 43;
b. an injured state's entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of Article 45.

Draft Article 53 provided:

An international crime committed by a state entails an obligation for every other state:
a. not to recognize as lawful the situation created by the crime;
b. not to render aid or assistance to the state which has committed the crime in maintaining the situation so created;
c. to cooperate with other states in carrying out the obligations under subparagraphs (a) and (b); and
d. to cooperate with other states in the application of measure designed to eliminate the consequences of the crime.

9. *Yearbook of the International Law Commission*, 2, 1976, pp. 109-119.

10. See D.J. Harris, 1998, p. 489, referring to the comments of Mr. Rosenstock, the United States member of the ILC, in *American Journal of International Law*, n. 89, 1995, pp. 390-393.

11. General Assembly Resolution 56/83 "Responsibility of States for Internationally Wrongful Acts". 12 December 2001, UN Doc A/Res/56/83.

12. United Nations Security Council Resolution 687 (1991) 3 April 1991, paragraph 16.

13. Id., paragraph 18.

14. See, for example, paragraph 21 of "The 1994 Draft Declaration of Principles on Human Rights and the Environment".
Available at <http://www1.umn.edu/humanrts/instree/1994-dec.htm>.
Last access on 3 February 2005.

15. UN Doc. A/CONF.151/26/Rev 1, (1992) 31 ILM 874.

16. There may also, of course, be relevant municipal legislation that will regulate the activities of the particular state in relation to the environment.

17. The Council of Europe prepared a framework-decision on this issue in January 2003 in response to the adoption of a Directive on the same question (but in different terms) by the European Commission in 2001. This institutional conflict between the two bodies has not been resolved. See Europa website <http://europa.eu.int/comm/environment/crime/>. Last access on 12 September 2004.

18. United Nations General Assembly Resolution 47/37, UN Doc A/RES/47/37, 25 November 1992.

19. Additional Protocol I, Article 85(5).

20. International Court of Justice, Report 242, 1996, paragraph 29.

21. Id., paragraph 31.

22. Id., paragraph 30.

23. "Legality of the Use of Force" (Serbia and Montenegro v. Belgium). Request for Indication of Provisional Measures, paragraph 3.

24. Application 52207/99, Grand Chamber, 12 December 2001.

25. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 13 June 2000: (2000) 39 ILM 1257.

26. Id., paragraph 23.

27. Rome Statute Preamble, paragraph 4.

28. Rome Statute, Article 5(1).

29. J. Sills et al. "Environmental Crimes in Military Actions and the International Criminal Court". Available at <http://www.acunu.org/millennium/es-icc.html>. Last access on 7 February 2005.

30. Genocide Convention Article II; ICTY Statute Article 4(2); ICTR Statute Article 2(2); Rome Statute Article 6.

31. The most significant of these was Attorney General of the Government of Israel v. Eichmann (1961) 36 ILR 5.

32. Australia, for example, failed to adequately implement the Genocide Convention into its domestic law, with the result that there was no domestic legislation providing for prosecution of genocide claims in Australian courts.

See Nulyarimma v. Thompson (1999) FCA 1192. The position has changed, at least partially, following the enactment of the International Criminal Court (Consequential Amendments) Act 2002 (Cth), which was part of the process of implementation of the Rome Statute into Australian domestic law.

33. See ICTR, Judgement Prosecutor v. Akayesu, Case n. ICTR-96-4-T, 2 September 1998.

34. Rome Statute Article 6(c).

35. Trial Chamber I of the ICTR, Prosecutor v. Akayesu, Case n. ICTR-96-4-T, 2 September 1998.

36. Id., paragraph 511.

37. See 1969 Vienna Convention on the Law of Treaties. 1155 UNTS 331, Article 31(1).

38. ICTY, Judgement on Defence Motions to Acquit, Prosecutor v. Sikirica, Dosen and Kolundzija, Case n. IT-95-8, 3 September 2001.

39. ICTY, Judgement, Prosecutor v. Jelesiæ, Case n. IT-95-10-I, 14 December 1999 at paragraphs 78-83; and ICTY, Judgement (Appeals Chamber) Prosecutor v. Krstic, Case n. IT-98-33-A, 19 April 2004.

40. For example, the ICC includes a much broader range of actions involving sexual violence within the terms of crimes against humanity than either the ICTY Statute or the ICTR Statute. Article 7(g) of the Rome Statute includes "... sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" within the range of acts that may constitute crimes against humanity in addition to "rape", which is the term used in both the ICTY Statute and the ICTR Statute. See A. Cassese, 2003, pp. 91-94.

41. These are the 1948 Universal Declaration of Human Rights (UDHR) UNGA Res 217(A); the 1966 International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171; and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 999 UNTS 3. Article 11(1) of the ICESCR, for example, recognizes the right of individuals to "an adequate standard of living ... including adequate food ...".

42. This is evidenced by the fact that the Rome Statute (Article 124) allows for a seven-year "transition" period, during which Parties to the treaty can "opt out" of the War Crimes provisions; but no such provision applies to the Crimes of Genocide or Crimes against Humanity.

43. "... wilfully causing great suffering, or serious injury to body or health".

44. "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" – for example dams.

45. "Attacking or bombarding ... towns, villages, dwellings or buildings which are undefended and which are not military objectives" – for example chemical factories.

46. "Employing poison or poisoned weapons."

47. "Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices."

48. "Destroying ... the property of an adversary unless such destruction ... be imperatively demanded by the necessities of the conflict."

49. Rome Statute Preamble, paragraph 3.

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