

CRIMES AGAINST THE ENVIRONMENT – A ROLE FOR THE INTERNATIONAL CRIMINAL COURT?

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If there must be war, there must be environmental law.¹

I INTRODUCTION

History has been witness to many deliberate acts aimed at destroying the natural environment in order to achieve strategic goals. Herodotus described how, in the Fifth century BC, the retreating Scythians scorched the earth and poisoned the water wells in an effort to slow the advancing Persian army led by Darius. In a similar vein, 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. Over the following 10 years, the Saddam Hussein regime, in retaliation for what it saw as the support by the *Ma'dan*, or Marsh Arabs, for an uprising against the regime shortly after that conflict, built barriers and levees to drain the al-Hawizeh and al-Hammar marshes in southern Iraq, an area some

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1 Klaus Toepfer, Executive Director of the United Nations Environment Programme (UNEP), speaking on the second International Day for Preventing Exploitation of the Environment in War and Armed Conflict: "UN Appeals for International Wartime Eco-Protection Law" (6 November 2003) Terra Daily <<http://terraily.com>> (last accessed 9 November 2003).

believe is the site of the biblical Garden of Eden.² This effectively destroyed the livelihood of the 500,000 Marsh Arabs who had inhabited the area of this unique ecosystem.³ Saddam Hussein and eleven other members of his former regime have recently been indicted by an Iraqi Special Tribunal to face various charges that, in part, relate to these acts of environmental destruction.⁴

Other more recent acts of significant and deliberate environmental destruction and contamination have not yet been the subject of a determination in a court of law. 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 two million munitions – causing very significant human and environmental damage. At this moment, 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 installations⁵ as part of a deliberate government-supported strategy by the Arab Janjaweed

2 David Blair "Toll of Infamy: Regime Killed 2 Million" (16 December 2003) *The Sydney Morning Herald* Sydney 8.

3 Only 40,000 of the *Ma'dan* were left in what remained of the wetlands on the eve of the March 2003 invasion of Iraq: "UN to Help Iraq Restore Its Devastated Marshlands" (27 July 2004) PlanetArk World Environment News <www.planetark.com> (last accessed 27 July 2004).

4 The Iraqi Special Tribunal has jurisdiction over "any Iraqi national or resident" accused of committing the crimes of genocide, war crimes, crimes against humanity or violations of certain Iraqi laws between 17 July 1968 and 1 May 2003: Statute of the Iraqi Special Tribunal 2003 (10 December 2003), art 10; The Coalition Provisional Authority <<http://www.cpa-iraq.org/humanrights/Statute.htm>> (last accessed 18 July 2004). The definition of the crimes of genocide, war crimes and crimes against humanity in the Statute of the Iraqi Special Tribunal (arts 11-13) are similar to those that appear in the Rome Statute of the International Criminal Court (Rome Statute) (17 July 1998) 2187 UNTS 3; 37 ILM 999.

5 See UN Commission on Human Rights "Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Situation of Human Rights in Darfur Region of the Sudan" (7 May 2004) E/CN.4/2005/3, paras 50, 73.

militia to eliminate or displace the ethnic black Africans living in that region.⁶

It is clear that the deliberate despoliation of the environment can have catastrophic effects, not only in ecological terms but also on human populations. It may also represent a breach of the fundamental human rights of the targeted individuals.⁷ 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 or livelihoods of those reliant on the natural environment may be jeopardized or even destroyed. As was recognised by the International Court of Justice (ICJ), "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."⁸

The deliberate destruction of the environment as a method of threatening human security has, increasingly, been a tactic employed

6 Over 1.2 million people have been displaced or killed since an armed resistance against the Arab-dominated government was instigated by various indigenous and ethnic minorities in February 2003: "U.S. Warns Sudan Death Toll Could Reach 300,000 To 1 Million" (3 June 2004) UN Wire <<http://cw.groupstone.net>> (last accessed 4 June 2004). At the time of writing, the United Nations Security Council had recently passed a resolution calling upon the government of Sudan to take action to halt the violence and disarm the Janjaweed: UNSC Resolution 1556 (30 July 2004) S/RES/1556/2004. The terms of the Resolution avoid the use of the word "sanctions" and, in response to opposition by some Security Council members, instead refer to possible future action under art 41 of the Charter of the United Nations (26 June 1945) 15 UNCIO 335: see UNSC Resolution 1556, para 6. Under art 41, the Security Council may take measures "not involving the use of armed force."

7 For example, Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 1 provides that: "[m]an has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being."

8 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 242, para 29.

in conflict⁹ and has given rise to terms such as "ecocide" in circumstances where the destruction has been on a massive scale, specifically through the use of defoliants as a tactic of various conflicts in south-east Asia.¹⁰ Other commentators have argued for the emergence of the crime of "genocide" in cases of deliberate destruction of a part of the global ecosystem, involving the killing of members of a particular animal or plant species.¹¹

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 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.¹²

Inevitably, during the course of conflict, there is an additional "knock-on" effect as further environmental destruction, with resultant human casualties, will take place.¹³ 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,

9 See Commission on Human Security *Human Security Now* (New York, 2003) 16-18.

10 Ludwik A Teclaff "Beyond Restoration – the Case of Ecocide" (1994) 34 Nat Res J 933.

11 See Lynn Berat "Defending the Right to a Healthy Environment: Toward a Crime of Genocide in International Law" (1993) 11 Bos U Int LJ 327.

12 Alister Doyle "UN Aims to Study Link Between Environment, Wars" (14 January 2004) PlanetArk World Environment News <www.planetark.com> (last accessed 15 January 2004).

13 See Stephanie Nebehay "Dirty Water Provokes Hepatitis Outbreak in Darfur" (11 August 2004) PlanetArk World Environment News <www.planetark.com> (last accessed 11 August 2004), who describes how the refugee camps that have been set up in Darfur as a result of the conflict in that region are struggling with additional problems from the lack of safe drinking water.

the logic of some form of connection appears to be undeniable. This was recognised by the United Nations Security Council (Security Council), which in January 1992 concluded that:¹⁴

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.

The following section of this paper argues that significant environmental destruction during the course of armed conflict should attract criminal responsibility, particularly where the damage threatens the lives of specifically targeted populations. The paper then discusses a previous situation where the issue of international criminal responsibility for environmental damage was considered (though eventually not initiated) and explains how, at least under current international law principles as reflected by state practice, any criminal responsibility is limited to individuals. It proposes that a new crime, "crimes against the environment", should be included within the competence of the recently established International Criminal Court (ICC) and sets out a preliminary working definition of the crime. However, since this may not be politically acceptable, at least within the short-medium term, the paper then considers whether, and to what extent, environmental crimes may fall within the existing competence of the ICC.

II THE CASE FOR INTERNATIONAL CRIMINAL ENFORCEMENT OF ENVIRONMENTAL CRIMES

Deliberate actions intended to cause significant environmental destruction and which significantly affect particular groups of people

14 UNSC "Note by the President of the Security Council" (31 January 1992) Presidential Statement S/23500 in Catherine Tinker "'Environmental Security' in The United Nations: Not a Matter for the Security Council" (1992) 59 *Tenn L Rev* 787, 787 (emphasis added).

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 appropriate enforcement measures in response to deliberate environmental destruction are applicable where the destruction has occurred either in times of peace or where there has been some form of international or internal armed conflict.¹⁵

In an era where morality, ethics and international law now recognise the rights of individuals, and notions of environmental or ecological rights are becoming increasingly accepted, it is only natural that the deliberate destruction of the environment could *and should* give rise to individual criminal responsibility at the international level. Further, if such destruction is carried out in such a manner as to cause severe destruction and consequent human suffering, there is every reason to assert that 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.

Yet, even though it is clear that individuals do bear a responsibility towards the environment,¹⁶ the concept of environmental crime has not, until quite recently, been the subject of specific focus in the otherwise rapid expansion of international criminal law. It is true that various international environmental instruments do specify the need

15 Myron N Nordquist "Panel Discussion on International Environmental Crimes: Problems of Enforceable Norms and Accountability" (1997) 3 ILSA J Intl L 697. The distinction between internal and international conflicts is important in the context of international criminal law since certain international crimes within the jurisdiction of the international criminal tribunals only arise where the conflict is characterized as an international conflict: see, for example, the definition of war crimes in art 8 of the Rome Statute, above n 4, which differentiates between acts that take place in an international armed conflict (arts 8(2)(a) and 8(2)(b)) and those that are committed in armed conflicts "not of an international character" (arts 8(2)(c) and 8(2)(e)). For a discussion on the nature of internal as compared with international conflict, see *The Prosecutor v Duško Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) (2 October 1995) IT-94-1 (Appeals Chamber, ICTY).

16 Patricia W Birnie and Alan E Boyle *International Law and the Environment* (2 ed, Oxford University Press, Oxford, 2002) 282.

for all persons to protect and preserve the environment.¹⁷ Many documents even extend this duty 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:¹⁸

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 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. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ 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."¹⁹

However, the ICJ did not go further and prescribe any criminal responsibility for a breach of this obligation, which instead would attract the principles of state responsibility. In the case of international instruments, few, if any, give rise to specific legally binding criminal sanctions against individuals or states for deliberate degradation of the environment on a significant scale. While issues of deliberate environmental damage are subject to various "non-criminal" legal processes at the international level, this may not be sufficient given the magnitude of the destruction that may result from such actions. To the extent that international instruments deal with the protection of the

17 See Birnie and Boyle, above n 16, 252-267.

18 Declaration of the United Nations Conference on Environment and Development (Rio Declaration) (14 June 1992) UN Doc A/CONF.151/26 (Volume 1); 31 ILM 874, principle 24.

19 *Legality of the Threat or Use of Nuclear Weapons*, above n 8, para 29.

environment through reference to criminal responsibility and enforcement, they generally prescribe that this is to be undertaken at the domestic level based on traditional national jurisdictional principles.²⁰

Reliance on this domestic law approach may not reflect adequately the extent of the potential environmental consequences of conflict. In addition, the criminal sanctions expressly relating to the environment in several national jurisdictions are neither consistent nor universal. The importance of the environment demands that protection is enhanced at the international level with sufficient and effective deterrent and enforcement mechanisms. It is necessary and appropriate to develop rules giving rise to criminal sanctions at the international level, to be imposed on those who are responsible for such actions. Yet, though the need to create a general regime of international environmental criminal law may be appropriate and timely, the notion of *new* "supranational" environmental regulation in this way will undoubtedly still encounter significant political opposition.²¹

In this context, this paper seeks to explore whether, and in what circumstances, actions designed to deliberately destroy the environment may fall within the jurisdiction of the ICC, by reference to the terms of the 1998 Rome Statute of the International Criminal Court (Rome Statute).²² It is suggested that this accountability may be possible in one of two ways – either by the inclusion of a "new" crime – "crimes against the environment"²³ – within the jurisdictional

20 See the United Nations Convention on the Law of the Sea (UNCLOS) (10 December 1982) 1833 UNTS 3; 21 ILM 1261, arts 213-222. These provisions specify that the appropriate jurisdictional state (which will depend on the precise circumstances) shall enforce its laws and regulations with respect to pollution of the marine environment.

21 Byung-Sun Cho "Emergence of an International Environmental Criminal Law?" (2001) 19 UCLA J Envtl L & Pol 11, 24.

22 Rome Statute, above n 4.

23 This expression itself is not, however, a new one: see for example Stephen C McCaffrey "Crimes Against the Environment" (1986) 1 Int Crim LJ 541.

competence of the ICC or, alternately, by interpreting the existing crimes in the Rome Statute to apply to actions intended to cause significant environmental harm.

The first of these options – the addition of a new crime within the terms of the Rome Statute – would in any event only be possible at the very earliest after the Review Conference to be held in 2009,²⁴ and would of course require agreement as to the appropriate definition of the crime. Despite the formidable hurdles that exist, from this author's viewpoint, this is the preferred, though (at least at this time) less politically acceptable option. The need to promote environmental justice and strengthen the reach of international criminal law necessitates that a specific crime, "crimes against the environment", should be considered for inclusion within the terms of the Rome Statute and thus within the jurisdiction of the ICC. In doing so, however, it is clear that great care needs to be taken in formulating the scope of the crime. The formal creation of a new crime is not a simple exercise. It can be illustrated by the difficulty in reaching agreement concerning the definition of the crime of aggression, which is included in Article 5 of the Rome Statute as a crime with respect to which the ICC has jurisdiction but which has not yet been legally defined.²⁵ With this in mind, this paper provides a preliminary working definition of what in general terms would constitute an environmental crime of sufficient magnitude so as to justify its classification as an international crime.

24 The Rome Statute provides for a Review Conference, seven years after the instrument enters into force, to consider any proposed amendments: Rome Statute, above n 4, art 123(1).

25 Rome Statute, above n 4, art 5(2) provides:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

The alternative approach – that acts of deliberate and significant environmental destruction may themselves constitute and, therefore, be prosecuted as crimes already within the mandate of the ICC – appears at this stage to be a more realistic possibility. Consequently, this paper also discusses each of the existing core crimes within the Rome Statute (with the exception of the crime of aggression) to determine the extent to which they might be applicable. This paper concludes that, although there is only minimal reference to the environment within the Rome Statute, there are a number of potential options for the ICC Prosecutor to "pigeon-hole" environmental crimes within the definition of those crimes set out in Part 2 of the Rome Statute.

This is not to say that we will see an indictment in the short term focusing on environmental destruction – the priorities of the Prosecutor and current *realpolitik* dictate otherwise – but the potential for such prosecutions does exist. Indeed, the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) did consider the possibility of investigating actions by personnel of the North Atlantic Treaty Organization (NATO) alliance in the aftermath of the Kosovo bombing campaign that, among other things, generated significant negative environmental effects.

III ENVIRONMENTAL CRIMES BY NATO PERSONNEL – A PRECEDENT?

A consideration of what might amount to environmental crimes, at least in the context of an international criminal tribunal, is not unprecedented. Following the bombing of Serbia and Kosovo by NATO forces during "Operation Allied Force" (March – June 1999), the OTP of the 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.²⁶

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 1977 Additional Protocol I to the 1949 Geneva Conventions²⁷ 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.²⁸ The Committee also referred to the ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* to reaffirm an even wider general obligation to protect the environment against widespread long-term and severe environmental damage.²⁹

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

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

27 Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3; 16 ILM 1391, adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

28 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, above n 26, para 23.

29 In the context of an internal armed conflict, see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609; 16 ILM 1442, art 14, which stipulates that it is prohibited "to attack, destroy, remove or render useless" objects indispensable to the survival of the civilian population and specifically prohibits attacks on foodstuffs, agricultural areas, crops, livestock and drinking water installations. See also UN Commission on Human Rights "Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Situation of Human Rights in Darfur Region of the Sudan", above n 5, para 73.

NATO personnel breached the standard. 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 in the opinion of this author would have been totally warranted.³⁰

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 – assuming that the jurisdiction *ratione temporis* and other preconditions to the exercise of jurisdiction specified in the Rome Statute are satisfied³¹ – also fall within the mandate of the ICC in certain circumstances.

IV PARTICIPATION BY THE STATE – CRIMINAL RESPONSIBILITY OR STATE RESPONSIBILITY?

Before examining whether and how the commission of a crime against the environment may fall within the jurisdiction of the ICC, 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?

If one focuses on the Rome Statute, the answer is quite clear. The ICC is empowered to exercise jurisdiction over "natural persons" but

30 For a detailed discussion of the findings of the Committee as set out in the Report, see Michael Cottier "Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor's report of 13 June 2000" in Horst Fischer, Claus Kress and Sascha Rold Luder (eds) *International and National Prosecution of Crimes Under International Law: Current Developments* (Verlag, Berlin, 2001) 505. See also Steven Freeland "The Bombing of Kosovo and the Milosevic Trial: Reflections on Some Legal Issues" [2002] *Aus Int LJ* 150.

31 Rome Statute, above n 4, arts 11-12.

not states.³² To repeat the oft-quoted words of the Nuremberg International Military Tribunal:³³

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 bodies are generally not designed to investigate and prosecute actions taken by non-natural entities, particularly states. There is currently no clear 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 responsibility³⁴ or blame might be imputed to a

32 Rome Statute, above n 4, art 25(1).

33 "International Military Tribunal (Nuremberg) Judgment and Sentences" (1947) 41 Am J Int'l L 172, 221.

34 For example, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Yugoslavia)* currently before the International Court of Justice, it is alleged by Croatia that Yugoslavia "has breached its legal obligations" to Croatia under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (9 December 1948) 78 UNTS 277, and that

[B]y directly controlling the activity of its armed forces, intelligence agents, and various paramilitary detachments, on the territory of ... Croatia, in the Knin region, eastern and western Slavonia, and Dalmatia, [Yugoslavia] is liable [for] the "ethnic cleansing" of Croatian citizens from these areas ... as well as extensive property destruction – and is required to provide reparation for the resulting damage.

See International Court of Justice "Croatia Institutes Proceedings Against Yugoslavia for Violations of the Genocide Convention" (2 July 1999) Press

state as a result of the commission of an international crime by one of its officials.³⁵ 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.³⁶

Yet, it was not long ago that the notion of a crime capable of having been 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,³⁷ 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.

Release 99/38; International Court of Justice <<http://www.icj-cij.org>> (last accessed 11 August 2004).

35 See *The Prosecutor v Anto Furundžija* (Judgment) (10 December 1998) IT-95-17/1-T para 142 (Trial Chamber, ICTY), where the Trial Chamber confirms that under international humanitarian law principles, state responsibility "may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers."

36 For example, The Four Geneva Conventions (12 August 1949) 75 UNTS 31, 85, 135, 287 specify the scope of what now amount to the international crimes associated with the "grave breaches" of the treaties by individuals and, at the same time, provide for "state responsibility" for parties in the case of commission of those crimes by individuals: see Antonio Cassese *International Criminal Law* (Oxford University Press, Oxford, 2003) 19, note 4.

37 UNGA Resolution 799 (VIII) (7 December 1953).

Within the definition of an international crime,³⁸ draft Article 19(3) included actions from which such a crime may result, including:³⁹

- (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
- (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.⁴⁰

38 International Law Commission "Report of the International Law Commission on the Work of its Forty-Eighth Session" (6 May – 26 July 1996) A/51/10, 131, draft art 19(2):

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 constitutes an international crime.

39 International Law Commission "Report of the International Law Commission on the Work of its Forty-Eighth Session", above n 38, 131, draft arts 19(3)(c) and 19(c)(d).

40 International Law Commission "Report of the International Law Commission on the Work of its Forty-Eighth Session", above n 38, 146, draft art 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.

International Law Commission "Report of the International Law Commission on the Work of its Forty-Eighth Session", above n 38, 146, draft art 53 provided:

The question of whether states could be criminally responsible had been raised some time ago by various commentators⁴¹ and draft Article 19 gained partial support at the time of its introduction, mainly from developing and eastern European states.⁴² In its commentary on draft Article 19, the ILC commented that:⁴³

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 ... [T]hese 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.⁴⁴ In the end, draft Article 19 (and its associated draft

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 measures designed to eliminate the consequences of the crime.

41 See Ian Brownlie *International Law and the Use of Force by States* (Clarendon Press, Oxford, 1963) 154.

42 David J Harris *Cases and Materials on International Law* (5 ed, Sweet & Maxwell, London, 1998) 489.

43 (1976) 2 (Part Two) YB ILC 109.

44 See the comments of the United States member of the International Law Commission, Robert B Rosenstock "The Forty-Sixth Session of the International Law Commission" (1995) 89 Am J Int'l L 390, 393.

Articles 52 and 53) was not included in the version of the Articles adopted by the ILC in 2001 and subsequently noted by the General Assembly.⁴⁵ 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.

However, recent multilateral efforts to address the issue of environmental damage generally continue to 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.⁴⁶ Even then, important but unresolved questions relating to state responsibility for the environment are often not fully addressed.⁴⁷ Nevertheless, states are bound by their obligations under customary international law as they relate to the environment, as well as any international environmental agreements (IEAs) to which they are party. A breach of these principles will clearly also invoke the principles of state responsibility.⁴⁸

This is relevant since many acts by states do impact adversely on the environment. Military or government actions are all too frequently planned and implemented to damage or destroy the environment – for example, through the use of toxic munitions and depleted uranium shells, destruction of forest systems, diversion or contamination of

45 UNGA Resolution 56/83 (12 December 2001) A/RES/56/83.

46 See Francisco Orrego Vicuna, Rapporteur on the Subject of Environmental Responsibility and Liability "Final Report Prepared for the Eighth Committee of the *Institut de Droit International*: Responsibility and Liability for Environmental Damage Under International Law: Issues and Trends" (1998) 10 *Geo Int'l Envtl L Rev* 279.

47 Tullio Scovazzi "State Responsibility for Environmental Harm" (2001) 12 *YB Int Env L* 43, 43.

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

essential natural food resources (water, agriculture), destruction of oil refineries, deliberate oil spills and the proliferation of land mines rendering land unusable.

In this regard, there have been various enforcement mechanisms instituted at the international level 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 Security Council passed Resolution 687 which, in part, provided that Iraq was⁴⁹

[L]iable 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.

Despite the language used, under traditional principles of international law,⁵⁰ a resolution of the Security Council is not to be regarded as a statement of law, although it is binding upon member states of the United Nations.⁵¹ In the case of Iraq, a compensation fund was established to be administered by a United Nations Compensation Commission (UNCC),⁵² which dealt with claims that could arise and determined the legal liability for the damage caused. In a recent report and recommendation made by the Panel of Commissioners of the UNCC, the state of Iraq was found liable for contamination of the Raudhatain and Umm Al-Aish aquifers in

49 UNSC Resolution 687 (3 April 1991) S/RES/687/1991, para 16.

50 See art 38(1) of the Statute of the International Court of Justice (26 June 1945) 15 UNCTAD 335 and the discussion on the "sources" of law in Harris, above n 42, 22-58 and Malcolm N Shaw *International Law* (5 ed, Cambridge University Press, Cambridge, 2003) 65-119. See generally *North Sea Continental Shelf Cases (Germany v Denmark; Germany v The Netherlands)* (Merits) [1969] ICJ Rep 3.

51 Charter of the United Nations, above n 6, art 25. Decisions of the Security Council can also be regarded as being binding upon non-member states of the United Nations: Harris, above n 42, 58.

52 UNSC Resolution 687, above n 49, para 18.

Kuwait and for environmental damage from oil contamination to the shoreline in Saudi Arabia.

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 in relation to these types of actions that the ICC may play a role.

**V CRIMES AGAINST THE ENVIRONMENT
– A PRELIMINARY DEFINITION**

The Rome Statute is intended to address "the most serious crimes of concern to the international community as a whole."⁵³ For these crimes to attain the "status" of an international crime, it is seen as necessary that they are regarded as an affront to us all. In this sense, it is the international community that determines the notion and general scope of international crimes, including the creation of "new" crimes in the relevant constituent document of an international criminal tribunal, in addition to the traditional development of customary international law crimes through state practice.

A tangible consequence of this, at least over the past decade, has been the creation of international criminal tribunals such as the ICC and the ad hoc international criminal tribunals – the ICTY and the International Criminal Tribunal for Rwanda (ICTR). Following arguments – which were inconclusively dealt with by the judges – put by the defendants at the Nuremberg trials that the *ex post facto*

53 Rome Statute, above n 4, preamble.

punishment of "new" crimes in the Charter of that Tribunal⁵⁴ offended the *nullum crimen sine lege* principle,⁵⁵ the ICTY was established with the aim of prosecuting only those crimes that were "doubtless part of customary international law."⁵⁶ However, this may not always be the case⁵⁷ as the definition of the crime specified in one of the statutes of the international criminal tribunals may differ from the crime as it existed at the relevant time under customary international law.⁵⁸

The international criminal judicial bodies are given a specific jurisdiction over particular international crimes in accordance with the terms of their respective constituent documents. Given the presumption that international crimes are those crimes that represent an affront to the community as a whole, it is possible to envisage certain actions that deliberately target the environment (and thus populations who depend on the environment) as meeting this level of abhorrence. The fact that states have not yet invoked a specific international criminal responsibility for environmental destruction is not a sufficient reason to prevent an elaboration and development of

54 Charter of the Nuremberg International Military Tribunal, annexed to the 1945 London Agreement for the Establishment of an International Military Tribunal (8 August 1945) 82 UNTS 279, 282, art 6.

55 For example, the concept of "crimes against humanity" was first introduced into the Charter of the Nuremberg International Military Tribunal (art 6(c)) and then applied to actions that took place at an earlier time. It is unclear whether such a crime existed coincidentally under customary international law. See *Polyukhovich v Commonwealth and Another* (1991) 172 CLR 501, 587-590 Brennan J; 664-677 Toohey J.

56 UNSC "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808" (3 May 1993) S/25704, paras 33-35.

57 One commentator has recently suggested that this is not the case with regard to the ICTR: Kenneth S Gallant "Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts" (2003) 48 Vill L Rev 764, 783.

58 For example, it has been observed that the definition of crimes against humanity in art 7 of the Rome Statute, above n 4, is in certain aspects narrower and in other aspects broader than customary international law: see Cassese, above n 36, 91-94.

the rules of international criminal law in this way.⁵⁹ The inclusion, within the jurisdiction of tribunals created by the international community, of a specific crime directed towards this type of action may, therefore, represent an appropriate law-making role for the international community which, as one commentator notes, it should undertake "in light of the latest developments in law, morality, and the sense of criminal justice at the time."⁶⁰

Seen in this context, it is argued that the creation of a discrete international environmental crime – crimes against the environment – is a necessary and appropriate step at this point, even though there may not (yet) exist strict customary law supporting the notion that significant environmental damage should attract international criminal prosecution.⁶¹ The imperative is more immediate, particularly bearing in mind the potential for significant environmental damage arising from modern technology.⁶² Given the status of the ICC as the first permanent international criminal court, it is the appropriate judicial body to have jurisdiction over such crimes. What this would require is the crafting of a clear definition of the crime, to be included within the mandate of the Rome Statute at the time of the Review Conference, although it is acknowledged that this will require a shift of political will on the side of states party to the Rome Statute.

59 See Scovazzi, above n 47, 67.

60 Kriangsak Kittichaisaree *International Criminal Law* (Oxford University Press, Oxford, 2001) 3.

61 Cho, above n 21, 26.

62 The ILC observed in its Commentary to Draft Article 19 (1976) 2 (Part Two) YB ILC 108:

[T]he astounding progress of modern science, although it has produced and continues to produce marvellous achievements of great benefit to mankind, nevertheless imparts a capacity to inflict kinds of damage which would be fearfully destructive not only of man's potential for economic and social development but also of his health and of the very possibility of survival for the present and future generations.

Any definition of an environmental crime should be restricted only to actions of such magnitude so as to be regarded as an affront to humanity and as such constituting an international crime. These will be actions that are intended to achieve very significant deleterious effects on the natural environment with severe impact on human populations, and which succeed in doing so. In essence, it is the "massiveness" of the environmental destruction – with its concordant impact on human populations – that would attract the stigma of an international crime. In an era where there is the real possibility of significant environmental terrorism, criminal justice demands that such actions are addressed through international condemnation and criminal sanction.

By contrast, the proposed concept of crimes against the environment would not specifically deal with acts that constitute a "mere" violation of the over 200 IEAs that exist, although of course actions that are in breach of an IEA will often have significant consequences. These will often be in the form of an obligation to make compensation rather than any criminal responsibility, even though such actions may in themselves fall within the scope of any definition of the crime. Nor is the concept of a crime against the environment necessarily intended to apply to a breach of domestic legislation that regulates the environment in various jurisdictions,⁶³

63 There are, of course, other international instruments that are also relevant to the conducts that would constitute this type of crime. For example, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954) 249 UNTS 240 imposes obligations on states to refrain from any act of hostility directed against cultural property and abstain from using this property for military purposes. This instrument does not provide for international criminal responsibility for acts constituting a breach, although art 28 does provide:

The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

See also Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999) 38 ILM 769, art 15, which provides for

though violations of this type may be classified as ordinary (non-international) environmental crimes, and may even attract criminal sanctions under the relevant domestic law.⁶⁴

Yet, having noted that there are regulations at both the international and domestic level, it is clear that domestic laws have generally not adequately regulated international environmental misconduct.⁶⁵ In addition, the response of the international community to grave environmental crimes has been "slow, gradual and not very effective."⁶⁶ There is a need to develop and apply an international crime involving significant destruction of the environment precisely because those legal sanctions that do exist, particularly at the international level, are inadequate and haphazard in the case of environmental destruction, sometimes failing to reflect the gravity of some of the deliberate actions that are undertaken.

For these reasons, it is suggested that the starting point for a definition of "crimes against the environment", the breach of which

individual criminal responsibility – to be prosecuted under the domestic law of the relevant party – for serious violations as follows:

- a. Making cultural property under enhanced protection the object of attack;
- b. Using cultural property under enhanced protection or its immediate surroundings in support of military action;
- c. Extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
- d. Making cultural property protected under the Convention and this Protocol the object of attack;
- e. Theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

64 For a recent discussion on the position the United States, see Rachel Glickman, Rose Standifer, Lory Stone and Jeremiah Sullivan "Environmental Crimes" (2003) 40 Am Crim L Rev 413.

65 Cho, above n 21.

66 Teclaff, above n 10, 939.

would potentially give rise to international criminal responsibility, could in broad terms be as follows:

A deliberate action committed with intent to cause significant harm to the environment, including ecological, biological and natural resource systems, in order to promote a particular military, strategic, political or other aim, and which does in fact cause such damage.

Of course, there will be many who will quite justifiably seek to improve and refine this suggested working definition. Indeed, the author is conscious that it may not cover every eventuality and may give rise to some questions of interpretation. It must also meet the test of legal certainty and avoid being "overtly broad and ambiguous."⁶⁷ The final version of the definition could meet these criticisms by including some specific forms of acts, as is the case with the definitions of each of the core crimes in the Rome Statute. This should be done without, however, producing a definition that is too precise, that details only very specific types of environmental damage or unduly limits the purposes for which they must be undertaken, with the result that culpable actions would still fall outside the scope of the crime.

The definition proposed above is proffered simply to confirm that the notion of criminal responsibility arising from deliberate environmental damage should be limited to the most serious of actions, but that, at the same time, it also represents the type of act that should be the subject of prosecution under international criminal law. In the event that the crimes within the jurisdiction of the ICC are expanded to include such a definition, this would open the way for the prosecution of a crime against the environment. However, in the

67 M Cherif Bassiouni described in these terms the suggested crime of "wilful and severe damage to the environment" as it appeared in the Draft Code of Crimes Against the Peace and Security of Mankind, International Law Commission "Report of the International Law Commission on the Work of its Forty-Third Session" (29 April – 19 July 1991) A/46/10, para 60: M Cherif Bassiouni *Crimes Against Humanity in International Criminal Law* (2 ed, Kluwer Law International, The Hague, 1999) 190.

interim, there remains the possibility of using the existing core crimes within the Rome Statute to address such behaviour.

VI EXISTING INTERNATIONAL CRIMES – INDIVIDUAL CRIMINAL RESPONSIBILITY FOR ENVIRONMENTAL DESTRUCTION?

The Rome Statute came into force on 1 July 2002, following the 60th ratification of the Treaty.⁶⁸ Although it currently faces strong opposition from the United States, which has undertaken a number of steps to limit its effectiveness to pursue perpetrators of international crimes,⁶⁹ the ICC reflects the desire that "the most serious crimes of concern to the international community as a whole must not go unpunished."⁷⁰ The ICC has jurisdiction with respect to the following crimes committed after 1 July 2002:⁷¹

- (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 Institute⁷² concluded that the ICC was unlikely

68 At the time of writing, 99 states had ratified the Rome Statute.

69 For a discussion of the actions taken by the United States, see Steven Freeland and Michael Blissenden "The International Criminal Court: Politics, Justice and Impunity" in Treasa Dunworth (ed) *Australian and New Zealand Society of International Law 11th Annual Meeting – International Governance and Institution: What Significance for International Law?* (ANZSIL, Sydney, 2003) 319-325.

70 Rome Statute, above n 4, preamble.

71 Rome Statute, above n 4, art 5(1).

72 Joe Sills, Jerome C Glenn, Elizabeth Florescu and Theodore J Gordon "Environmental Crimes in Military Actions and the International Criminal Court (ICC) – United Nations Perspectives" (United States Army Environmental Policy Institute, 2001) <<http://www.acunu.org>> (last accessed 8 May 2005).

to be called upon to determine responsibility for environmental crimes arising from military actions, at least in relation to international peacekeeping operations.⁷³ The study focused only on the definition of war crimes in the Rome Statute,⁷⁴ and then only on the specific provision in the instrument that expressly refers to the environment (discussed below).⁷⁵

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 cause 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.

A 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),⁷⁶ as well as the Statutes for both the ICTY⁷⁷ and the

73 UNSC Resolution 1422 (12 July 2002) S/RES/1422/2002 and UNSC Resolution 1487 (12 June 2003) S/RES/1487/2003 exempted officials or personnel (principally peacekeepers) from states not party to the Rome Statute from the jurisdiction of the ICC in relation to acts or omissions undertaken in United Nations operations. Following the recent revelations regarding the treatment of Iraqi prisoners by United States forces in Iraq, the United States was not able to garner sufficient support in the Security Council for a further renewal of these immunity provisions.

74 Rome Statute, above n 4, art 8.

75 Rome Statute, above n 4, art 8(2)(b)(iv).

76 Genocide Convention, above n 34.

77 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY Statute) (25 May 1993) 32 ILM 1159.

ICTR.⁷⁸ Genocide has been referred to as the "crime of crimes"⁷⁹ 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. The characterization of a relevant group is restricted to one based on "national, ethnical, racial or religious" criteria.⁸⁰

Despite the significance surrounding the Genocide Convention and the formalization of this definition, it was not, for many years, considered at the international level. Whilst there were a small number of domestic cases that looked at the scope of the crime,⁸¹ widespread political will in relation to the enforcement of the crime was lacking at the national level.⁸² In addition, no "international penal tribunal" was established by states party to the Genocide Convention under Article VI.⁸³ Indeed, it was not until 1998 – exactly 50 years after the

78 Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (ICTR Statute) UNSC Resolution 955 (8 November 1994) S/RES/944/1994; 33 ILM 1598.

79 *The Prosecutor v Akayesu* (Judgment) (2 September 1998) ICTR-96-4-T para 16 (Trial Chamber, ICTR).

80 Genocide Convention, above n 34, art II; ICTY Statute, above n 77, art 4(2); ICTR Statute, above n 78, art 2(2); Rome Statute, above n 4, art 6.

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

82 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.

83 Genocide Convention, above note 34, art VI provides:

Persons charged with genocide or any other acts enumerated in Article III [conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide,

adoption of the Genocide Convention by the United Nations General Assembly – that an international criminal tribunal (the ICTR) first looked at the meaning of the definition in any detail and we have only recently witnessed the first convictions for the crime.⁸⁴

At the outset, it must be noted that the definition of the crime 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 the crime could be found to have been committed.

Putting this aside for one moment, however, one could certainly envisage situations involving the deliberate degradation of the environment which are intended to destroy a group (or part of) by damaging its ability to carry on with its way of life, effectively destroying its culture. Indeed, the Rome Statute specifies that "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction"⁸⁵ would fall within the type of acts that constitute genocide, assuming that the other elements of the crime are also present. The draining of the marshes in southern Iraq or the destruction of rainforests upon which local indigenous groups depend would seem to fall within this set of circumstances. Even so, it may be that the targeted group does not fall within one of the established groupings within the definition. It appears, at first sight,

complicity in genocide] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

⁸⁴ See *The Prosecutor v Akayesu*, above n 79.

⁸⁵ Rome Statute, above n 4, art 6(c).

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, *The Prosecutor v Akayesu*,⁸⁶ the Tribunal was faced with the prosecution of a *bourgmestre* of a local commune who had been charged with genocide. The facts indicated that the accused had 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 in relation to their persecution by the Hutus in Rwanda during 1994. Instead, the Court proceeded to extend the meaning of Article 2 of the ICTR Statute to apply to a "stable" and "permanent" group⁸⁷ 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 Tribunal clearly read the express terms of the definition beyond their ordinary meaning.⁸⁸

Indeed, this approach was not followed in *The Prosecutor v Sikirica and Others*,⁸⁹ 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 definition of genocide means the *physical* destruction of the relevant group.⁹⁰ Of course, there may be questions as to whether the

86 *The Prosecutor v Akayesu*, above n 79.

87 *The Prosecutor v Akayesu*, above n 79, para 511.

88 See Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, art 31(1).

89 *The Prosecutor v Sikirica, Dosen and Kolundzija* (Motions to Acquit) (2 September 2001) IT-95-8 (Trial Chamber, ICTY).

90 *The Prosecutor v Jelesić* (Judgment) (14 December 1999) IT-95-10-I paras 78-83 (Trial Chamber, ICTY); *The Prosecutor v Krstić* (Judgment) (19 April 2004) IT-

customary international law crime of genocide may be different – indeed wider – than the treaty based crime specified in the statutes of the ad hoc international criminal tribunals and the ICC.⁹¹

Nevertheless, the expansive approach taken by the ICTR in *The Prosecutor v Akayesu* highlights a number of issues that may be relevant to the issue of environmental crimes. If an extension of the relevant groupings was eventually to be accepted, the definition of genocide 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, the approach in *The Prosecutor v Akayesu* 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 acts should be "upgraded" to apply to modern (and not-so-modern) day events.

In the absence of this, however, it is unlikely that the destruction of a natural habitat would per se be prosecuted as an act of genocide. This is more so given the need for the Prosecutor, and the ICC itself, to develop strategies to further encourage universal acceptance among the broader spectrum of the international community, including the United States. To attempt at this early stage in the life of the ICC to broaden the scope of the crime of genocide – with its unique stigma as the "ultimate" international crime – would, unfortunately, have political implications that may adversely affect the ability of the Court to take action in respect of other, more "acceptable" notions of international crime. In this regard, the discussion now moves to the crime of "crimes against humanity" as it is defined in the Rome Statute.

98-33-A paras 29-38 (Appeals Chamber, ICTY). See also a commentary by Elies van Sliedregt in Andre Klip and Goran Sluiter (eds) *Annotated Leading Cases of International Criminal Tribunals* (Volume VII: The International Criminal Tribunal for the former Yugoslavia) (copy of commentary with author).

91 See Cassese, above n 36, 107-108.

B Environmental Crimes as Crimes against Humanity?

The term "crimes against humanity" was first used to describe the Turkish massacre of the Armenian population in 1915. It was also used in the 1919 Report of the Commission on the Responsibilities of the Authors of War and Enforcement of Penalties for Violations of the Laws and Customs of War.⁹² The international crime of "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,⁹³ and its scope has evolved over time through its formalization 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.⁹⁴

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 open for use in this regard would be acts falling within Articles 7(1)(h) and 7(1)(k) of the

92 Kai Ambos "Current Issues in International Criminal Law" (2003) 14 Crim L F 225, 228.

93 A Charter created the International Military Tribunal for the Far East whose terms were included in a Special Proclamation issued by General MacArthur, the Supreme Commander for the Allied Powers: (19 January 1946) 1589 TIAS 3.

94 For example, the Rome Statute 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. Are included under art 7(g) of the Rome Statute "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 and ICTR Statutes. See Cassese, above n 36, 91-94.

Rome Statute. Article 7(1)(h) identifies "[p]ersecution against any identifiable group or collectively on political, racial, ethnic, *cultural*, religious, gender ... *or other grounds* ... recognized as impermissible under international law" (emphasis added). The characterization of the targeted groups is wider than for the crime of genocide. "Persecution" is defined as meaning "the intentional and severe deprivation of fundamental rights contrary to international law."⁹⁵

The deliberate destruction of habitat or 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"⁹⁶ and customary international law confirm these as representing fundamental individual rights.

Another aspect of crimes against humanity that may be useful in prosecuting environmental crimes is the "catch all" Article 7(1)(k), which refers to "[o]ther 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 crime 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 also be proven

⁹⁵ Rome Statute, above n 4, art 7(2)(g).

⁹⁶ These are the Universal Declaration of Human Rights (10 December 1948) UNGA Resolution 217(A) (III), the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 and the International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3. In art 11(1) of the latter instrument, for example, is recognised the right of individuals to "an adequate standard of living ... including adequate food."

before a conviction can stand.⁹⁷ Certainly there is a greater possibility that this crime, rather than genocide, would be used to bring such a prosecution, at least under current definitions, 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 (discussed below), given that the former is generally thought of as the more heinous crime of the two.⁹⁸

C War Crimes and the Environment

As mentioned above, the environment is expressly referred to in relation to one aspect of the definition of war crimes in the Rome Statute. Article 8(2)(b)(iv) reflects the basic approach of the ILC in its Code of Offences Against the Peace and Security of Mankind adopted in 1996.⁹⁹ That Article 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 natural 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 is sufficient to fall within the crime. Indeed, a comparison of this provision and Article 55(1) of Additional Protocol

97 Rome Statute, above n 4, art 7(1).

98 This is evidenced by the fact that the Rome Statute, above n 4, allows for a seven-year "transition" period during which parties to the treaty can "opt out" of the war crimes provisions (art 124), but no such provision applies to the crimes of genocide or crimes against humanity.

99 International Law Commission "Report of the International Law Commission on the Work of its Forty-Eighth Session", above n 38. See also Birnie and Boyle, above n 16, 285.

I to the Geneva Conventions 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. As Professor Cassese points out, Article 8(2)(b)(iv) includes the need for damage that is "clearly excessive" in the context.¹⁰⁰ 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. It seems, therefore, that there is a real risk that, on a strict reading, the conditions applying to Article 8(2)(b)(iv) would be almost impossible to satisfy. It is, therefore, to be hoped that when faced with a prosecution based on this provision, the ICC will take a more robust and practical approach compared with that of the Committee looking at the NATO actions during Operation Allied Force.

It can thus be seen that, though 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 and should at least be considered. In the "grave breaches" provisions, which relate to the 1949 Geneva Conventions and apply in the case of international armed conflicts,¹⁰¹ Articles 8(2)(a)(iii)¹⁰² and 8(2)(a)(iv)¹⁰³ of the Rome Statute may be applicable.

100 See Cassese, above n 36, 61.

101 See *The Prosecutor v Duško Tadić*, above n 15, paras 79-84.

102 "Wilfully causing great suffering, or serious injury to body or health."

In addition, again within the context of an international armed conflict, Articles 8(2)(b)(v),¹⁰⁴ 8(2)(b)(xvii)¹⁰⁵ and 8(2)(b)(xviii)¹⁰⁶ 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).¹⁰⁷ 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.

Nevertheless, while there are various legal thresholds to satisfy in order to justify a conviction of war crimes, this crime appears 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 Prosecutor and the ICC itself are certainly not limited only to the

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

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

105 "Employing poison or poisoned weapons."

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

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

provision in the Rome Statute that makes express reference to the environment.

VII CONCLUDING REMARKS

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."¹⁰⁸ In this regard, the ICC represents another important step in a process of "internationalization of justice" that saw its formal beginnings in the Nuremberg and Tokyo Tribunals following the conclusion of the Second World War. The fact that it is a *permanent* international criminal court represents a landmark achievement that at least raises the possibility that these goals can be more effectively realised over time.

However, the jurisdiction of the ICC is limited to the specific crimes as defined in the Rome Statute. It is important that the ICC and the Prosecutor proceed in such a way as to avoid any claims that they are overreaching the boundaries of their respective powers, even more so given the highly political nature of the opposition to the ICC by countries like the United States. This means that as we are faced with further examples of unacceptable and egregious actions taken by human beings against others, we cannot expect the ICC to play its part unless and until those actions can either quite readily be "pigeon-holed" into the existing crimes within the ICC's jurisdiction or – preferably – additional crimes are included in the Rome Statute, thus extending the jurisdiction of the ICC.

The commission of acts intended to render very significant damage to the environment and to seriously affect the livelihood and well-being of a group of people, from a moral viewpoint at least, falls within the nature of actions that the ICC has been created to deal with. Even in the absence of a separate and discrete crime of "crimes against the environment" in the Rome Statute – an inclusion that this

¹⁰⁸ Rome Statute, above n 4, preamble.

author would strongly support – these types of actions can in certain circumstances still be classified as constituting crimes currently within the competence of the ICC. This is so even though the environment was not a major concern of the conference that led to the finalization of the Rome Statute. In the end, express reference to the environment appears only sparingly in the Rome Statute.¹⁰⁹ There were simply too many other crucial issues that had to be dealt with and the crimes that were included in the Rome Statute (with the obvious exception of the crime of aggression) were less uncertain as to their necessity and existence at customary international law.

At this stage, we must deal with the cards that have been handed out. There is no scope for amendment of the Rome Statute until 2009, and it is by no means certain that the jurisdiction of the ICC will be expanded at that time. Hence, the exercise of finding ways of including horrific actions within the current terms of the Rome Statute is very important. The prosecution of environmental crimes within the terms of the existing jurisdiction of the ICC is possible and appropriate where the circumstances so warrant. 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,¹¹⁰ this author believes that 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, particularly when there are so many other horrific acts taking place.

Yet, as this brief analysis indicates, 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 give rise to the potential for prosecution under the Rome Statute.

¹⁰⁹ Rome Statute, above n 4, art 8(2)(b)(iv).

¹¹⁰ See Sills, Glenn, Florescu and Gordon, above n 72.

Whether this will actually happen in relevant circumstances remains to be seen and will, at least in the short-medium term, probably be dictated as much by political as legal considerations.

However, as increasing importance is attached on a global basis to the protection of the environment and the recognition of environmental and local community rights, there will be a greater acceptance by the international community of the need to prosecute environmental crimes. The serious effects of modern conflict on the environment continue to give rise to forceful calls for the enforcement of the environmental rights of the individual and of collective groups. It is to be hoped that this will eventually lead to recognition of the need to include environmental crimes as a discrete crime within the scope of the international criminal law regime of enforcement. This would be another admirable and important step forward on the road towards an end to impunity for those who commit the most serious violations of human rights in complete disregard for human security.