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Criminal Liability for Environmental Damage Occurring in Times of Non-International Armed Conflict: Rights and Remedies

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CRIMINAL LIABILITY FOR ENVIRONMENTAL DAMAGE OCCURRING IN TIMES OF NON- INTERNATIONAL ARMED CONFLICT: RIGHTS AND REMEDIES

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I. INTRODUCTION

Under the Rome Statute, the International Criminal Court (“ICC”) has jurisdiction over “the most serious crimes of concern to the international community as a whole . . .”¹ committed after the statute entered into force on July 1, 2002. The expression “most serious crimes” encompasses genocide, crimes against humanity, war crimes and the crime of aggression.²

In Article 8(2)(b)(iv), the Rome Statute specifically proscribes and prohibits environmental war crimes, asserting that “[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or 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” constitutes a serious violation of the laws and customs applicable in international armed conflicts.³

At the present time the prosecutor of the International Criminal Court has launched investigations into crimes committed in Northern Uganda, the Democratic Republic of Congo and Darfur, Sudan.⁴

* Aurelie Lopez, LL.M. in International Peace Support Operations, Irish Centre for Human Rights, Galway, Ireland (2006).

1. Rome Statute on the International Criminal Court, art. 5, July 17, 1998, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (entered into force July 1, 2002), [hereinafter Rome Statute on the International Criminal Court].

2. *Id.*

3. *Id.* at art. 8(2)(b)(iv).

4. Amnesty Int’l, *Uganda: First ever Arrest Warrants by International Criminal Court – A First Step Towards Addressing Impunity*, AI Index AFR 59/008/2005, Oct. 14, 2005 [hereinafter Uganda], *available at* <http://web.amnesty.org/library/Index/ENGAFR590082005?open&of=ENG-385>.

Moreover, for the first time, on July 8, 2005 the Pre-Trial Chamber II of the International Criminal Court issued five arrest warrants to prosecute crimes against humanity and war crimes in Northern Uganda.⁵ Yet, despite the abundant literature describing the impact of armed conflicts on the environment and acknowledging that environmental damage is, as a matter of course, intrinsic to armed conflicts,⁶ interestingly, none of the five accused have been charged with environmental war crimes.⁷

The inclusion of a provision in the Rome Statute that recognizes the environment, *per se*, as an object of international protection is praiseworthy. Indeed, Tara Weinstein stresses that “prosecuting individuals for environmental destruction as an independent violation rather than only when committed in conjunction with human rights violations” is the ultimate goal for the protection of the environment.⁸ Nevertheless, some concerns on the content and scope of the provision have been expressed by legal academics and environmentalists. These concerns are principally aimed at the limitation of the scope of the provision to international armed conflicts.

The legal dichotomy between international and non-international armed conflicts is a current and substantial problem. Although classifying an armed conflict under one of these two categories is difficult to establish in practice,⁹ today most armed conflicts appear to be

5. *Id.*

6. For an exhaustive survey of environmental damage resulting from armed conflicts, see JAY E. AUSTIN & CARL E. BRUCH, *THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES* (2000); See also Jeremy Leggett, *The Environmental Impact of War: A Scientific Analysis and Greenpeace's Reaction*, in *ENVIRONMENTAL PROTECTION AND THE LAW OF WAR: A 'FIFTH GENEVA' CONVENTION ON THE PROTECTION OF THE ENVIRONMENT IN TIME OF ARMED CONFLICT* 68 (Glen Plant ed., 1992); Tara Weinstein, *Prosecuting Attacks That Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?*, 17 *GEO. INT'L ENVTL. L. REV.* 698 (2005), (highlighting that the environment is not only a method of warfare but also systematically a casualty of armed conflicts).

7. See Uganda, *supra* note 4, at annex.

8. Weinstein, *supra* note 6, at 698.

9. Andreas Zimmermann, *Comment on Article 8 of the Rome Statute*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE* 262 (O. Triffterer ed., 1999); See also James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 850 *INT'L REV. RED CROSS* 315 (June 2003), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList99/257D44C32005B3A8C1256D7400297427> (last visited Oct. 18, 2005) (critically describing the complicated

non-international in character.¹⁰ Yet, under international law, the protection granted during these non-international conflicts remains scant.

Although the majority of the Rome Statute's provisions reflect the evolution of customary international law and, accordingly, swell the protection afforded in times of non-international armed conflict, some important provisions such as Article 8(2)(b)(iv) are not applied to non-international armed conflicts.¹¹

In addition to characterizing the international/non-international distinction as "arbitrary,"¹² "undesirable,"¹³ and "difficult to justify,"¹⁴ many scholars also call for a single law of armed conflict.¹⁵

theory elaborated by the International Criminal Tribunal for the former Yugoslavia ("ICTY") to distinguish between international and non-international armed conflicts and advocating for a single set of rules applicable in any armed conflicts).

10. MICHAEL RENNER, ENDING VIOLENT CONFLICT 17 (Jane A. Peterson ed., 1999) ("[O]nly six of the 103 armed conflicts between 1989 and 1997 were international."); Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. Rev. 916 (1994), ("[B]y 1994 all of the thirty-five armed conflicts in the world [were] civil, and none [were] international.")

11. Rome Statute on the International Criminal Court, *supra* note 1, art. 8(2)(b). While this paragraph contains a provision including environmental war crimes amongst its enumeration of "other serious violations of the laws and customs applicable in international armed conflicts," nowhere in paragraphs 2(c)-(f) or paragraph 3, which describe "war crimes committed in an armed conflict *not* of an international character," does a provision such as Article 8(2)(b)(iv) exist. *Id.* at paras. 2(c)-(f), 3 (emphasis added).

12. James G. Stewart, *supra* note 9 (quoting R. J. Dupuy, & A. Leonetti, *La Notion de Conflit Armé à Caractère Non International*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 258 (A. Cassese eds., 1971) ("Elle produit une dichotomie arbitraire entre les conflits, puisque la distinction, purement formelle, ne se fonde pas sur une observation objective de la réalité . . .")). See also G. Aldrich, *The Laws on War on Land*, 94 AM. J. INT'L L. 62 (2000) ("Reality can be messy, and armed conflicts in the real world do not always fit neatly into the two categories -international and non-international - into which international humanitarian law is divided.").

13. INGRID DETTER, THE LAW OF WAR 49 (2002) ("It is difficult to lay down legitimate criteria to distinguish international wars and internal wars and it must be undesirable to have discriminatory regulations of the Law of War for the two types of conflicts.").

14. C. Warbrick, and P. Rowe, *The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadic Case*, 45 INT'L & COMP. L. Q. 698 (1996).

15. Stewart, *supra* note 9, at 315.

In relation to the protection of the environment in non-international armed conflicts under international criminal law, one may question whether it is worthwhile seeking the extension of the principles applicable in international armed conflicts to those of a non-international character. Indeed, the potential of Article 8(2)(b)(iv) to protect the environment in times of international armed conflict seems to be limited by prosecutorial hurdles to prove the crime. Furthermore, priority might arguably be given to the prosecution of other atrocities.¹⁶ Certainly, prosecution of individuals who committed “crimes of widespread murder, mutilation, and other atrocities against humans”¹⁷ will almost certainly have a greater impact on public opinion and, consequently, will resonate more to the core of criminal law: namely expressing justice with the hope of deterring future crimes.¹⁸

This article analyses some propositions advanced by legal scholars to foster protection of the natural environment in times of armed conflict and attempts to demonstrate that the criticisms directed toward the International Criminal Court are only partially founded by describing the legal hurdles to prosecution for environmental damage occurring in armed conflicts, in particular non-international armed conflicts.

II. THE LEGAL HURDLES TO PROSECUTION FOR ENVIRONMENTAL DAMAGE OCCURRING IN TIMES OF NON-INTERNATIONAL ARMED CONFLICT

A. *The Blurred Distinction Between International, Internal and Other Non-International Armed Conflicts*

In Article 8(2)(c), the Rome Statute enumerates the provisions applicable to armed conflicts not of an international character. Although it does not define the expression, the Rome Statute specifies that the provision applies “to armed conflicts that take place in the

16. Weinstein, *supra* note 6, at 713 (emphasizing that the international community is not ready to prosecute damages to the environment as such, rather focusing on the humanitarian aspects of the damages to the environment).

17. Carl Bruch, *All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict*, 25 VT. L. REV. 717 (2001).

18. Mark Drumbl, Seminar at the Irish Centre for Human Rights: On Atrocity and Punishment (Oct. 20, 2005). Discussion on whether criminal sentences under the Rome Statute respond adequately to the goal of criminal justice.

territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups,"¹⁹ and concludes that it does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."²⁰

In the commentary on the Rome Statute, Andreas Zimmermann observes that determining the exclusive international character of contemporary armed conflicts proves to be difficult. Accordingly, he acknowledges the need to consider some acts taking place in internal armed conflicts as war crimes punishable under the Rome Statute.

In order to illustrate the maelstrom stemming from the characterization of a conflict, Zimmermann reviews the theory elaborated by the International Criminal Tribunal for the former Yugoslavia ("ICTY") to distinguish between international and non-international armed conflicts. He emphasizes the controversial reference to the standard developed by the International Court of Justice in the *Nicaragua Case*²¹ for purposes of state responsibility, since the ICTY had to determine the character of an armed conflict rather than that of state responsibility. Finally he notes that the Appeals Chamber of

19. Rome Statute on the International Criminal Court, *supra* note 1, art. 8(2)(f).

20. *Id.* at art. 8(2)(d) and 8(2)(f); *See also* Zimmermann, *supra* note 9, at 276. The author argues that the reference to the term "armed conflict" implies that the provision does not apply to acts of "internal disturbances and tensions." Consequently, he infers that the last sentence of article 8(2)(d), reiterated in alinéa (f), has simply a "declaratory or illustrative nature" and does not provide much explanation as for the meaning of "armed conflict not of an international character." Nonetheless, he further stresses that "armed conflicts between several organised armed groups" are also subject to the provisions of the Rome Statute and observes that it is noteworthy since hitherto the Second Additional Protocol to the four Geneva Conventions did not encompass such situations. *See* Second Additional Protocol to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. 17513, (entered into force Dec. 7, 1978), *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Second Additional Protocol to the Geneva Conventions of August 12, 1949].

21. *Military and Paramilitary Activities, (Nicar. v. U.S.)*, 1986 I.C.J. 14, 19 (June 27). From the analysis of United States' involvement and role in Nicaragua's civil war, the Court concluded whether the different activities were internal or international.

the ICTY renounced the Nicaragua test in the *Tadic* case,²² admitting that it was not persuasive.²³

Eventually, in order to be qualified as non-international, an armed conflict requires dissident armed forces to have (1) a command structure, (2) to exert control over part of the territory, and (3) to have activities sufficiently intense so that they cannot be dismissed as isolated and sporadic acts of violence.²⁴ Nonetheless, scholars agree on the fact that it is “complex – if not impossible” to ascertain into which category a particular conflict falls.²⁵

As stated in the introduction, the distinction between international and non-international armed conflicts has been the object of significant discussions and remains controversial.²⁶ Notwithstanding the importance of the distinction, since it entails the application of different sets of rules, it is not the purpose of this article to further examine the issue of determining whether an armed conflict falls within one or the other category. Rather this article will focus on the legal consequences of the distinction, specifically with regard to the protection of the environment.

B. A Common Need to Remedy Environmental Devastation Caused by Armed Forces

Certainly, the issue of environmental concerns in times of armed conflict is contextual and less generalized than the “regular and sustained assault on the environment that is an endemic part of any industrial society.”²⁷

Yet, research on the subject uncovers recent, but nonetheless consequent, materials describing the environmental impact of armed conflicts and calling for remedies to such devastation. Furthermore, there is an emerging and encouraging consensus towards recognizing

22. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement of the Appeals Chamber (July 15, 1999).

23. Zimmermann, *supra* note 9, at 262-69.

24. Bruch, *supra* note 17, at 706.

25. See Zimmermann, *supra* note 9, at 262. See also Stewart, *supra* note 9; Lopez, *supra* note 8; Asbjorn Eide et Al., *Combating Lawlessness in Gray Zone Conflicts though Minimum Humanitarian Standards*, 89 AM. J. INT'L L. 215 (1995).

26. Stewart, *supra* note 9.

27. Guruswamy Lakshman, *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 111, 112 (2002) (BOOK REVIEW).

that “what is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.”²⁸

The environmental impact of war generally fits into one of three categories:²⁹

1. Destruction of the environment for deliberate military purposes

Tara Weinstein illustrates that history abounds with examples of deliberate military destruction of the environment. There were widespread, purposeful modifications of the environment as a tool of war throughout Asia, Europe, and North America. In 512 B.C., the Scythians practiced a scorched-earth policy against the Persians.³⁰ Further examples include “salting of the soils of Carthage; the scorching of Confederate land in the U.S. civil war; the blowing-up of the Huayuankow Dam of the Yellow River by the Chinese, which flooded millions of acres of crops and soil; the destruction of Verdun by poison gas in World War I; and the burning of Norwegian lands during World War II.”³¹ Later on, the United States used Agent Orange to defoliate the jungles of Vietnam.³² “The old Iraqi government ignited oil fields in Kuwait during the 1990-1991 Gulf War” and “destroyed the marshes in southern Iraq following the 1991 Shi’a rebellion.”³³ During the 1999 Kosovo war, the NATO Bomb-

28. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement of the Appeals Chamber, (July 15, 1999) at para. 119; See also Meron, *infra* note 67.

29. For a historical survey of environmental destruction in times of armed conflict, see *supra* note 6.

30. Weinstein, *supra* note 6, at 700. See also Marc A. Ross, *Environmental Warfare and the Persian Gulf War: Possible Remedies to Combat Intentional Destruction of the Environment*, 10 DICK. J. INT’L L. 516 (1992).

31. Weinstein, *supra* note 6, at 700.

32. *Id.*; See also Austin and Bruch, *supra* note 6, at 1-2; Mark Drumbl, *Waging War Against the World: The Need to Move From War Crimes to Environmental Crimes*, 22 FORDHAM INT’L L. J. 123 (1998) (citing Oscar Arias, *Responsibility of Nations to the Environment*, in Proc. of the First Int’l Conf. on Addressing Env’tl. Consequences of War: Legal, Econ. And Sci. Perspectives (June 10-12, 1998)). Drumbl affirms that “it is estimated that one-third of Vietnam is wasteland as a result of extensive defoliation practices.” See also Ross, *supra* note 30, at 518.

33. Weinstein, *supra* note 6, at 700 (quoting Laurent Hourcle, *Environmental Law of War*, 25 VT. L. REV. 654 (2001)); See also Drumbl, *supra* note 32, (referring to the PUBLIC AUTHORITY FOR ASSESSMENT OF COMPENSATION OF DAMAGE RESULTING FROM IRAQI AGGRESSION, OIL AND ENVIRONMENTAL CLAIMS BULLETIN (Aug. 1997), Drumbl alleges that “[i]ndependent of the damage to Kuwait and to the Persian Gulf waters, it is estimated that the oil well fires set by

ings allegedly damaged the environment.³⁴ The list is likely to expand if the international community does not take meaningful steps to address the issue of environmental destruction in times of armed conflict.

2. Destruction of the environment for economic purposes (often involving natural resources)

Several times in the last few years, the Security Council has alleged and condemned the plunder of the Democratic Republic of Congo's natural resources, emphasizing the concerns of the international community that the illegal exploitation of natural resources is fuelling the conflict.³⁵

3. "Collateral damage"

Robert Augst reports for instance that the Coalition used cluster bombs in the recent war in Afghanistan.³⁶ Some of these bombs did not explode on impact and scattered. Since these bombs are sometimes undetectable to the population, they can impact the use of farmland and livestock and "impede access to shelter and water, and delay rehabilitation of essential infrastructure"³⁷ Similarly, Cambodia is sadly infamous for the large amount of landmines left over a widespread area after the withdrawal of armed forces from the region, and the subsequent consequences on everyday conditions of

Iraqi soldiers expelled one to two million tons of carbon dioxide, which in 1991 represented one percent of total global carbon dioxide emissions.").

34. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia 14-25, available at <http://www.un.org/icty/pressreal/nato061300.htm> (last visited Dec. 1, 2005); see also Natalino Ronzitti, *Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia acceptable?*, 840 INT'L REV. RED CROSS 1017-28 (2000); Thilo Marauhn, *Environmental Damage in Times of Armed Conflict – not "really" a matter of criminal responsibility?*, 840 INT'L REV. RED CROSS 1029-36 (2000).

35. S.C. Res. 1457, U.N. Doc. S/RES/1457 (2003); See also U.N. Doc/PressRelease/7642 (Jan. 24, 2003), available at <http://www.un.org/News/Press/docs/2003/sc7642.doc.htm> (last visited Dec. 1, 2005).

36. Robert M. Augst, *Environmental Damage Resulting from Operation Enduring Freedom: Violations of International Law?*, 33 ENVTL. L. REP. NEWS & ANALYSIS 10668, 10668-81 (2003).

37. *Id.*

life as illustrated above.³⁸ Importantly this has resulted in a large number of injured people. More recently, as a consequence of the Rwandan war, national parks were left polluted with landmines and bodies, “endangered species such as the mountain gorillas [were] poached; agricultural lands rendered barren in order to coerce the migration of persecuted peoples; and systemic resettlement exhausted moderate lands, specifically in Eastern Congo, of their agricultural capacities.”³⁹

C. The Persistent Legal Dichotomy Between International and Non-International Armed Conflicts and The Subsequent Unsatisfactory Protection Afforded in Times of Non-International Armed Conflict

The Rome Statute enlarges the set of rules applicable in times of non-international armed conflict by taking into consideration the development of customary international law.⁴⁰ Nevertheless, the statute drafters did not consider the specific prohibition of environmental war crimes, as explicitly enshrined in Article 8(2)(b)(iv), to have a customary law nature and accordingly did not transfer the prohibition over to non-international armed conflicts. This part therefore describes the provisions of the Rome Statute that specifically do not deal with environmental issues, but that still present possible resources available to protect the environment in case of non-international armed conflicts.

Article 8(2)(c) prohibits “serious violations” of Common Article 3 of the 1949 Geneva Conventions.⁴¹ It specifies that the term “seri-

38. *See id.*

39. Drumbl, *supra* note 32, at 145.

40. Lynn Berat, *Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law*, 11 B.U. INT'L L.J. 327, 329-330 (1993). Lynn Berat alleges that:

[A] principle becomes part of customary international law if: 1) it is widely adhered to by a number of States and is acquiesced in by others; and 2) it is engaged in out of a sense of obligation. The Statute of the International Court of Justice (ICJ) requires the Court to apply ‘international custom, as evidence of a general practice accepted as law.’ If the practice is uniform, the period during which such practice is adhered to before it achieves the status of customary international law need not be very long. *Id.*

41. *See* Rome Statute on the International Criminal Court, *supra* note 1, at art. 8(2)(c). First Geneva Convention, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Aug. 12, 1949, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Second Geneva Convention,

ous violations” encompasses a series of acts committed against persons. According to Carl Bruch, legal officer with the Division of Environmental Policy Implementation at the United Nations Environment Programme (“UNEP”), it is possible to address the issue of environmental damage through the underlying principles that forbid attacks on targets that are “taking no active part in hostilities.” Nonetheless he does not imply that the Article applies generally to environmental targets.⁴²

On the other hand, although Article 3 does not specifically protect the environment, some practices and weapons⁴³ may have environmental impacts that represent “acts of physical violence directed against the life or physical integrity of a person.”⁴⁴ The reference to “violence to life and person” under Common Article 3 thereby provides a basis on which to prosecute environmental damages.⁴⁵

In Article 8(2)(e), the Rome Statute expands the list of prohibited acts mentioned in the Second Additional Protocol to the four Geneva Conventions. As for the particular protection of the environment, it reaffirms already existing provisions. Article 8(2)(e)(iv) proscribes attacks against cultural objects, places of worship and similar institu-

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Third Geneva Convention, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Fourth Geneva Convention, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950); *see also* Mark R. Von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the ‘Elementary Dictates of Humanity’*, 22 *BROOK J. INT’L L.* 111, 117 (1996) (noting that “norms provided for under common Article 3 have been generally recognised as jus cogens . . .”). Norms of jus cogens are “basic principles of international law, which States are not allowed to contract out of” or in other words “peremptory norms of general international law”, HENRY J. STEINER AND PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT LAW, POLITICS, MORAL* 77, 133 (2000).

42. Bruch, *supra* note 17, at 710 (quoting Adam Roberts, *The Law of War and Environmental Damage*, in *THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES* 76 (Jay E. Austin & Carl E. Bruch eds., 2000) who notes that “under Common Article 3, parties are ‘bound to apply, as a minimum, certain fundamental humanitarian provisions, but these provisions do not include any that protect property or the environment.’”).

43. For instance, the use of landmines or scorched earth practices.

44. Zimmermann, *supra* note 9, at 272.

45. Bruch, *supra* note 17, at 710.

tions⁴⁶ while Article 8(2)(e)(v) prohibits pillaging,⁴⁷ and Article 8(2)(e)(xii) deals with destruction or seizure of the adversary's property.⁴⁸

46. This article is the counterpart of Article 8(2)(b)(ix), applicable in times of international armed conflict. Similar provisions were developed in the Second Additional Protocol to the Geneva Conventions of Aug. 12, 1949, *supra* note 20, art. 16; in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts done May 14, 1954, 249 U.N.T.S. 215 (entered into force Aug. 7, 1956), as well as in Articles 27 and 56 of the Hague Convention of 1907, Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, , 36 Stat. 2277, U.N.T.S. 539 (entered into force Jan. 26, 1910); articles 19-21 of the First Geneva Convention, *supra* note 41; Articles 22, 23, 34 and 35 of the Second Geneva Convention, *supra* note 21; Articles 14, 18 and 19 of the Fourth Geneva Convention, *supra* note 41; Articles 53 and 85(4) of the First Additional Protocol to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144 Annex I, 1125 U.N.T.S. no. 17512 (entered into force Dec. 7, 1978), *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter First Additional Protocol to the Geneva Conventions of August 12, 1949]. Eventually, article 3(d) of the ICTY Statute contains a similar provision, Statute of the International Criminal Tribunal for the Former Yugoslavia, created by virtue of United Nations Security Council Resolution 808 of Feb. 22, 1993. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).

47. Article 8(2)(e)(v) is the counter part of Article 8(2)(b)(xvi) applicable in times of international armed conflict. The provisions of this article are taken *verbatim* from Article 28 of the Hague Conventions of 1899 and 1907. Hans Boddens Hosang, in his comment on Article 8(2)(b)(xvi) on Pillaging, in THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURES AND EVIDENCE 176 (Roy S. Lee ed., 2001), emphasizes that "Article 47 of the same Conventions repeats the prohibition to commit pillage, albeit without the reference to assault as set forth in Article 28." Similar provisions can also be found in Article 6(b) of the Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis done August 8, 1945, Article 6(b), 58 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Charter of the International Military Tribunal]; in article 15 of the First Geneva Convention, *supra* note 41; in Article 18 of the Second Geneva Convention, *supra* note 41; in Article 18 of Third Geneva Convention, *supra* note 41; in Article 33 of the Fourth Geneva Convention, *supra* note 41; similarly, in Article 4 para. 2(g) of the Second Additional Protocol to the Geneva Conventions of August 12, 1949, *supra* note 20; in Article 4 para. 3 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; in Article 3 of the ICTY Statute; in Article 4 of the ICTR Statute, Statute of the International Criminal Tribunal for Rwanda, created by virtue of United Nations Security Council Resolution 955 of November 8, 1994. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

48. This article is the counter part of Article 8(2)(b)(xiii). Similar provisions can be found in Article 23(g) of the 1907 Hague Convention; in Article 53 of the

1. Attacks Against Protected Objects

Article 8(2)(e)(iv) sets forth that “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives” constitutes a war crime, thereby proscribing attacks on civilian objects of a particular value.⁴⁹ The provision is focused on specific objects and places and accordingly provides a rather limited protection to the environment. Neither the International Criminal Tribunal for Rwanda nor the International Criminal Tribunal for the former Yugoslavia have rendered any decision on this crime and there is not much expectation on the ICC to protect the natural environment through this provision.

2. Pillage and Destruction

The drafters of the Rome Statute agreed to define pillaging as “(1) the appropriation of property; (2) for private or personal use; and (3) without the consent of the owner.”⁵⁰ The definition reflects the position adopted by the ICTY. The tribunal held that pillage is synonymous with plunder⁵¹ and includes “unjustified appropriations both by individual soldiers for their private gain and by the organised seizures within the framework of a systematic exploitation of enemy property.”⁵² Despite the findings in *Prosecutor v. Blaskic* that the accused’ conviction was based upon the large-scale activities of his subordinates over a widespread geographical area,⁵³ there is no requirement of widespread theft to characterize pillage under Article 3(e) of the ICTY Statute. Yet, in *Prosecutor v. Kunarac, Kovac and*

Fourth Geneva Convention; and Article 14 of the Second Additional Protocol to the Geneva Conventions of August 12, 1949.

49. Rome Statute on the International Criminal Court, *supra* note 1, at art. 8(2)(e)(iv).

50. Hosang, *supra* note 47, at 177.

51. The International Committee of the Red Cross Dictionary defines the two terms together.

52. *Prosecutor v. Delalic*, Case No. IT-96-21-T. Decision on Motion By the Accused Zejnir Delalic. Based on Defects in the Form of the Indictment, 2 October 1996. (‘Celibici’) as quoted in *Prosecutor v. Kunarac*, Case No. IT-96-23&23/1-T, Decision on Motion for Acquittal, paras. 15 and 16 (July 3, 2000).

53. *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Trial Chamber I, Judgement para. 101 (Mar. 3, 2000).

Vukovic, the Trial Chamber held that the term pillage – to be characterized as a violation of the laws or customs of war – implies unjustified appropriations of property either from more than a small group of persons or from persons over an identifiable area. An example of such an area would be the Muslim section of a village or town or even a detention center.⁵⁴ Eventually for Article 3 to apply, the condition laid down by the Appeals Chamber in the *Tadic* interlocutory appeal must be satisfied. Consequently, the “breach must involve grave consequences for the victim” to be recognised as a “serious” violation of international humanitarian law.⁵⁵ The definition entails few observations about the extent to which the provision may protect the environment.

Firstly, a footnote to the definition explains that “as indicated by the use of the term “private or personal use,” appropriations justified by military necessity cannot constitute the crime of pillaging.”⁵⁶ As the article develops *infra*, military necessity is a constraining limit to the prosecution of war crimes. Secondly, the reference to the term “property” limits the scope of the provision, as it does not reflect all forms of using an object. Indigenous peoples, for instance, use the land and the objects related to the land according to their own customs, which do not necessarily foresee property as enshrined and understood in European national legislations.⁵⁷ Accordingly, the provision may be difficult to apply in certain circumstances and limits the protection afforded to the natural environment. Thirdly, the requirement that the appropriation be for private or personal use distinguishes pillaging from destroying or seizing property of the adversary.⁵⁸ Although distinct, these provisions are nonetheless very similar in relation to the object protected.

54. Prosecutor v. Kunarac, Kovac, and Vukovic, Case No. IT-96-23&23/1-T, Decision on Motion for Acquittal, paras. 15 and 16 (July 3, 2000).

55. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction by the Appeal Chamber, para. 94 (Oct. 2, 1995).

56. Hosang, *supra* note 47, at 176.

57. See generally A. HARTKAMP ET AL., TOWARDS A EUROPEAN CIVIL CODE (1998); F.H. LAWSON AND B. RUDDEN, THE LAW OF PROPERTY (2002); U. MATTEI, BASIC PRINCIPLES OF PROPERTY LAW, A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION (2000).

58. Rome Statute on the International Criminal Court, *supra* note 1, art. 8(2)(e)(xiii): “Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of war.”

While no charge of pillage was brought before the ICTR, the ICTY punished pillage of property, including principally “homes, outbuildings, barns and livestock in the towns, villages and hamlets.”⁵⁹ Notwithstanding the limited potential of the provision to address the issue of environmental protection in a broad sense, the Security Council recently condemned the plunder of the Democratic Republic of Congo’s (“DRC”) natural resources (which are still taking place and fuelling the conflict) and launched a panel to investigate the issue.⁶⁰ The conflict taking place in the DRC is deemed to be international, yet it is noteworthy to observe that, for the first time, the security council referenced environmental pillage, specifically, in this case, damage to the DRC’s natural resources.

Yet the Security Council Resolution emphasized the need to put an end to the illegal exploitation of these natural resources because it is a source of conflict.⁶¹ Accordingly, the preservation of these natural resources is not a priority, although eventually it would prevent further damage to the environment, due to military activities in general. Thus the Rome Statute may criminalize the plunder of those natural resources. Since the object of the condemnation would not be the protection of the environment, the role of the ICC as an instrument to protect the environment is questionable.

Notwithstanding the international community’s apparent lack of interest on the issue of the preservation of the natural environmental, one may not draw a general conclusion regarding the international community’s unwillingness to protect the environment. Indeed, in the aftermath of the Persian Gulf War, the Security Council adopted Resolution 687.⁶² This Resolution set forth a mechanism of civil liability to adjudicate environmental damage committed by Iraq when it invaded and occupied Kuwait. Eventually, it condemned Iraq for the “direct loss, damage, including environmental damage

59. Prosecutor v. Gotovina, Case No. IT-01-45, para. 21, Amended indictment, (Feb. 24, 2004), available at <http://www.un.org/icty/indictment/english/got-ai040224e.htm>; similarly in Prosecutor v. Delalic, Mucic, Delic and Landzo (‘Celibici’), Case No. IT-96-21-T, Trial Chamber II *quater* (Nov. 16, 1998), (Accused were convicted of plundering several villages and hamlets).

60. S.C. Res. 1457, *supra* note 35.

61. *Id.*

62. S.C. Res. 687, U.N. SCOR, 2981st mtg., at 7, U.N. Doc. S/RES/687 (1991).

and the depletion of natural resources" and compelled Iraq to repair the damage.⁶³

3. Preliminary conclusions

One may conclude that the Rome Statute fails to address the issue of environmental destruction in internal conflicts in a meaningful manner. It seems unlikely that the court will ever prosecute environmental damage occurring in non-international armed conflicts, except if, as suggested by Jean-Marie Henckaerts, legal advisor at the International Committee of the Red Cross Legal Division, the Rome Statute is amended at the review conference of the Rome Statute.⁶⁴ This amendment must be made in order to reflect the underlying aim of prosecution for environmental destruction.

III. PROPOSITIONS AND ARGUMENTS IN RELATION TO CRIMINAL LIABILITY FOR ENVIRONMENTAL DAMAGE OCCURRING IN TIMES OF NON-INTERNATIONAL ARMED CONFLICT

Carl Bruch stresses that existing international law provides only a few environmental protections in times of non-international armed conflict and therefore advocates for further normative and institutional development.⁶⁵ For this purpose, he advances two arguments: the distinction between both kinds of conflict could be removed through the development of customary international law or through

63. The study of the United Nations Compensation Commission is not the subject of this essay. However, for a detailed study, see Sonja Boelaert-Suominen, *Iraqi War Reparations and the Laws of War: A Discussion of the Current Work of the United Nations Compensation Commission with Specific Reference to Environmental Damage During Warfare*, 50 AUSTRIAN J. INT'L L. 225 (1996); John R. Crook, *The United Nations Compensation Commission-A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L L. 144 (1993); Veijo Heiskanen & Robert O'Brien, *UN Compensation Commission Panel Sets Precedents on Government Claims*, 92 AM. J. INT'L L. 339 (1998); Tiffani Y. Lee, *Environmental Liability Provisions Under the U.N. Compensation Commission: Remarkable Achievement with Room for Improved Deterrence*, 11 GEO. INT'L ENVTL. L. REV. 209 (1998).

64. Jean-Marie Henckaerts, *International Legal Mechanisms for Determining Liability for Environmental Damage Under International Humanitarian Law*, in THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES 602, 616 (Jay E. Austin and Carl E. Bruch eds., 2000).

65. Bruch, *supra* note 17, at 695.

new treaties and protocols, or, less radically, that norms applicable during international armed conflicts may be borrowed and applied on a case-by-case basis to internal conflicts.⁶⁶

A. Facing the Conundrum: the Idealistic Proposition to Elaborate a Single Set of Rules Applicable in Any Case of Armed Conflict

The proposition to elaborate a single set of rules applicable in any armed conflict is not new.⁶⁷ Regarding the particular issue of environmental protection, Carl Bruch enumerates sources of law that could form the basis for the expansion of the norms applicable in times of non-international armed conflict and ultimately prompt the harmonization of the rules relevant to the environmental protection.⁶⁸

Firstly, Bruch refers to the principles of international customary law. These principles are a source of norms to prevent, minimize and punish environmental damage during armed conflicts.⁶⁹ Under customary international law, the principle of military necessity “prohibits practices unnecessary to the achievement of military advantage.”⁷⁰ The principle limits damage to the environment by restrict-

66. Bruch, *supra* note 17, at 699.

67. As for international humanitarian laws, see Stewart, *supra* note 9, and the authors quoted in the article. As for the provisions relevant to the environment, see Theodor Meron, *Comment: Protection of the Environment During Non-International Armed Conflicts*, in *PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT* 355, 357 (Richard J. Grunawalt et al. eds., 1996). The author develops a theory of “pragmatic-expansive approach.” Under this theory, “to be effective, protection of the environment must be continuous. It cannot depend on differences between peace, war and civil war.” He further notes that “there is an emerging consensus that what is prohibited for international wars cannot be tolerated in civil wars.” See also James A. Burger, *Environmental Aspects of Non-International Conflicts*, in *PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT* 365 (Richard J. Grunawalt et al. eds., 1996) (stating “environmental rules have to be applied to all conflicts, even those that are non-international or are true humanitarian operations” and further affirms that “[w]e are not unduly concerned with the traditional distinction between various types of conflicts and we are pragmatically prepared to apply the entire law applicable to international armed conflicts across the board.”).

68. Bruch, *supra* note 17, at 739. See also Meron, *supra* note 67, at 355-58.

69. Bruch, *supra* note 17, at 710.

70. Weinstein, *supra* note 6 (referring to the International and Operational Law Department, The Judge Advocate General’s School, U.S. Army); see also *Operational Law Handbook* (2002), available at <https://www.jagcnet.army.mil>

ing certain methods of warfare as well as the testing and use of certain types of weapons causing unnecessary damage or excessive destruction⁷¹ On the other hand, however, it “allows collateral destruction if military circumstances require it.”⁷²

Therefore, the principle of necessity, combined with the principles of proportionality and discrimination, require discrimination between military and non-military objectives and the subsequent need to apply proportionality between the use of force and the military objective while on the other hand excusing wanton environmental damage if this damage reasonably appeared necessary to the decision maker at the time the action was undertaken.

Based on the principles of customary international law, some provisions were set forth to protect the environment in times of armed conflict. Nevertheless these principles, in particular the principle of military necessity, set up an important limit which has until now prevented these scant provisions from being effective.

The Nuremberg tribunal provides the most accurate illustration of the hurdles to prosecute environmental damage because of the defense of military necessity.⁷³ The Charter of the International Military Tribunal, under Article 6(b), prosecutes and punishes “violations of the laws and customs of war . . . [which] shall include, but not be limited to . . . plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”⁷⁴ Despite a wording that reveals great and innovative resources to prosecute environmental destruction, the military necessity exception establishes an important restriction in the scope of the provision and, in practice, prevents the tribunal from punishing any of the accused. Indeed, although the tribunal prosecuted General Alfred Jold for war crimes associated with scorched earth practices in Northern Norway, Leningrad and Moscow, it eventually

(Search for Operational Law Handbook, select “Operational Law Handbook & CLAMO disk.”).

71. Mark J. T. Caggiano, *The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance Over Conventional Form*, 20 B.C. ENVTL. AFF. L. REV. 499 (1993); see also Neil A.F. Popovic, *Humanitarian Law, Protection of the Environment, and Human Rights*, 8 GEO. INT’L ENVTL. L. REV. 71 (1995).

72. Weinstein, *supra* note 6.

73. Charter of the International Military Tribunal, *supra* note 47.

74. *Id.* at art. 6(b).

referred to military necessity to exculpate General Alfred Jold.⁷⁵ The US Military Tribunal in Nuremberg upheld the same reasoning and found that General Lothar Rendulic was not guilty of war crimes associated with scorched earth destruction in Finmark, Norway because his order was reasonably, if mistakenly, based on military necessity.⁷⁶

The notion of “military necessity” has a vague and malleable meaning, which at the present time has not been interpreted in an environmentally sensitive manner. Nonetheless, in situations not specifically addressed by the laws of armed conflict, the Martens Clause⁷⁷ resorts to “the usages established among civilised peoples, the laws of humanity and the dictates of public conscience,”⁷⁸ which are meant to evolve over time to, hopefully, influence the assessment of the subjective notions of necessity, proportionality and discrimination, and further foster environmental protection.

Despite the limits set by the interpretation given to the principles of necessity, proportionality and discrimination, international customary law has evolved over the years to encompass a broader array of weapons prohibited because of their destructive effects on both humanity and the natural environment. Recently, some authors have questioned the legality, under customary international law, of de-

75. Prosecution of Alfred Jold, Trial of German Major War Criminals: Judgment of the International Military Tribunal Sitting in Nuremberg Germany, Nov. 14, 1945 - Oct. 1, 1946, First indictment *available at* <http://www.nizkor.org/hweb/imt/nca/nca-01/nca-01-03-indictment.html> (last visited Dec. 13, 2005).

76. Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No. 10, pt. XI, at 1297 (1949) Trial of General Lothar Rendulic. *See also* Burger, *supra* note 67, at 508-09, and the comments by Professor Howard S. Levie discussing the case against General Lothar Rendulic.

77. Rupert Ticehurst, *The Martens Clause and The Laws of Armed Conflict*, 317 INT'L REV. RED CROSS 125, 125-34 (1997); The life and works of Martens are detailed in V. Pustogarov, Fyodor Fyodorovich Martens (1845-1909) – A Humanist of Modern Times, 312 INT'L REV. RED CROSS 300, 300-14 (1996).

78. Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land pmbl., 32 Stat. 1803, 1 Bevans 247 (*entered into force* Sept. 4, 1900); Hague Convention (IV) Respecting the Laws and Customs of War on Land pmbl., 36 Stat. 2277, 1 Bevans 631, (*entered into force* Jan. 26, 1910); the four 1949 Geneva Conventions for the protection of war victims, *supra* note 41, see respectively Art. 63; Art. 62; Art. 142; Art. 158); First Additional Protocol to the Geneva Conventions of August 12, 1949, *supra* note 46, Art. 1(2); Second Additional Protocol to the Geneva Conventions of August 12, 1949, *supra* note 20, para. 4.

pleted uranium munitions and cluster bombs.⁷⁹ Bruch relates that “[d]epleted uranium munitions are used to penetrate military armor, but their persistence in the environment as radioactive and toxic dust and aerosol may have severe environmental and human health impacts.”⁸⁰ Moreover, he highlights that “cluster bombs - in which a single bomb contains many bomblets, not all of which necessarily explode on impact - pose problems similar to land-mines, except with even more explosive potential.”⁸¹

Furthermore, these prohibitions are enshrined in various treaties, applicable in armed conflicts irrespective of their character, and extend to the use of land-mines, biological and chemical weapons. Each of the following are examples of treaties that codify principles of customary international law: The United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects,⁸² The Amended Protocol II on Anti-Personnel Land-Mines to the 1980 UN Convention on Certain Conventional Weapons,⁸³ The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction,⁸⁴ and The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.⁸⁵

79. Austin and Bruch, *supra* note 6, at 10075; Marlise Simons, *Radiation from the Balkan Bombing Alarms Europe*, N.Y. Times, Jan. 7, 2001, at A3.

80. Bruch, *supra* note 17, (citing Marlise Simons, *Id.*); Howard Schneider, *WHO to Study Health Effects of Depleted Uranium in Iraq*, Washington Post, Mar. 15, 2001, at A20.

81. Bruch, *supra* note 17 (citing Carlotta Gall, *Mines and NATO Bombs Still Killing in Kosovo*, N.Y. Times, Aug. 6, 1999, at A3).

82. U.N. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, U.N. GAOR, 35th Sess., U.N.Doc. A/CONF.95/15 (1980).

83. Amended Protocol II on Anti-Personnel Land-Mines to the 1980 UN Convention on Certain Conventional Weapons art. 1, May 3, 1996 (entered into force Dec. 3, 1998), *reprinted in* 35 I.L.M. 1209. (Stating that the protocol applies to “situations referred to in Article 3 common to the Geneva Conventions of August 12, 1949.”).

84. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, opened for signature Dec. 3-4, 1997 (entered into force Mar. 1, 1999), *reprinted in* 36 I.L.M. 1507.

85. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, (entered into force Feb. 8, 1928), T.I.A.S. No. 8061.

Bruch refers to these treaty laws governing armed conflicts, which reflect international customary law and extend basic protection in all armed conflicts, for the elaboration of an expanded set of rules applicable in times of non-international armed conflict. He notes that the result is, however, limited to a few provisions such as Article 3 common to the Geneva Conventions of 1949, the provisions of Second Additional Protocol to the Geneva Conventions of 1949, the several conventions banning the use of certain weapons and methods of warfare previously mentioned, and the 1954 Hague Convention and its protocols protecting cultural, historical and religious monuments.⁸⁶

As for a provision directly and specifically protecting the environment, the drafters of the Rome Statute considered inserting a provision similar to Article 8(2)(b)(iv) for non-international armed conflicts but the proposition was explicitly rejected.⁸⁷ The premise of State sovereignty over its internal affairs has always hindered the development of international law on burning issues. Bruch acknowledges the political difficulties in endorsing the implication of foreign countries in one's "traditional reserved domain of sovereign national territory"⁸⁸ and illustrates that those concerns are particularly accurate for criminal justice from which the environmental issue is not exempt. The hypothesis to elaborate a new treaty on armed conflict and the environment would consequently remain limited in its scope.

Yet, some scholars hail the development of a protocol specifically addressing the environmental issue in order to extend and implement existing norms applicable during armed conflict, and to specify the role of peacetime environmental norms.⁸⁹

Nonetheless, the proposition to elaborate new treaties or protocols is not necessarily advocated by all the authors. Following the events of the Gulf War (1990-1991), the question of the protection of the environment in times of armed conflict was the object of scientific

86. See Geneva Conventions of 1949, *supra* note 41; Second Additional Protocol to the Geneva Conventions of 1949, *supra* note 20; the several conventions banning the use of certain weapons and methods of warfare previously mentioned *supra* notes 83-86; and the 1954 Hague Convention and its protocols protecting cultural, historical and religious monuments, *supra* note 47.

87. Report of the Working Group on the Definition of War Crimes, Draft Consolidated Text 1, A/AC.249/1997/WG.1/CRP.2 (Feb. 11-21, 1997).

88. Meron, *supra* note 67, at 625.

89. Roberts, *supra* note 42, at 81-86; Meron, *supra* note 67, at 354.

meetings. A symposium held in London on June 3rd, 1991 under the auspices of the London School of Economics, the Centre for Defence Studies and Greenpeace International, discussed the need for a fifth Geneva Convention dealing with environmental matters. Similarly, a meeting of experts convened by the Canadian government in Ottawa, from July 10th through the 12th in 1991, to discuss the issue of protecting the environment in times of non-international armed conflict. Besides these two examples, the General Assembly of the United Nations⁹⁰ engaged the International Committee of the Red Cross ("ICRC") to assess the existing norms relevant to the protection of the environment. The ICRC gathered experts in Geneva, between the 27th and 29th of April 1992, who concluded that international humanitarian laws, either conventional or customary in nature, international environmental law and general principles of international law may provide an adequate protection of the environment if they are well-known, enforced and respected. Similarly, Antoine Bouvier, legal advisor at the International Committee of the Red Cross Legal Division, argues that, except in the case of invention of new weapons, adaptation of the law with the creation of a new set of rules is not necessary. He opines that it is more important to adequately implement the existing norms.⁹¹

Accordingly, the experts insisted on the importance to spread those rules in peacetime, principally through the diffusion of military manuals.⁹² The Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict,⁹³ developed by the ICRC, provide a model for national military guidelines. They are "[i]ntended as a tool to facilitate the instruction and training of armed forces in an often neglected area of international

90. G.A. Dec. 46/417, U.N. GAOR, U.N. Doc. A/DEC/46/417 (1991).

91. Antoine Bouvier, *Protection of the Natural Environment in Time of Armed Conflict*, 285 INT'L REV. RED CROSS 567-78 (Dec. 31, 1991) and *Recent Studies on the Protection of the Environment in time of Armed Conflict*, 291 INT'L REV. RED CROSS 554-66 (Nov.-Dec. 1992).

92. See the above mentioned meeting of experts; see also Hans-Peter Gasser, *For Better Protection of the Natural Environment in Armed Conflict: A Proposal for Action*, 89 AM. J. INT'L L. 637, 639 (1995) (praising the development of military guidelines as measures to strengthen compliance with international obligations).

93. *Follow-up to the International Conference for the Protection of War Victims* 311 INT'L REV. RED CROSS 230-37 (Mar. 1, 1996), published as an annex to U.N. Doc. A/49/323 (1994).

humanitarian law: the protection of the natural environment.”⁹⁴ The guideline’s “sole aim is to contribute in a practical and effective way to raising awareness [T]hey are an instrument for dissemination purposes.”⁹⁵

These Environment Guidelines may be beneficial in any kind of conflict. Moreover, not only do these guidelines provide for environmentally sensitive training for military forces, thus helping to prevent environmental devastation. The guidelines also make sure that the military has actual knowledge of what is acceptable and therefore may not claim ignorance of the law when convicted of environmental crimes. Indeed, the existence of military guidelines could allow presuming armed forces’ objective knowledge on environmental issues.⁹⁶ Thereby, Bruch’s argument that the specific standards and norms are unclear, and accordingly that a danger exists that a person might be charged for something he or she did not know was a crime would be less accurate.⁹⁷ Eventually, these Guidelines may have an influence in the development, acquisition or adoption of new weaponry.⁹⁸

In parallel to the work of disseminating the law, the International Committee for the Red Cross, together with other organizations, support the role of the ICC as a forum to prohibit and punish environmental devastation occurring in armed conflict.⁹⁹ For this purpose, Mark Drumbl, Associate Professor of Law and Ethan Allen Faculty Fellow at Washington and Lee University School of Law, points out that the formulation of article 8(2)(e) may increase the number of acts deserving criminal sanctions under the Rome Stat-

94. Drumbl, *supra* note 32, at 131 (quoting *Follow-up to the International conference for the Protection of War Victims, Id.* at 230-37).

95. See *id.*

96. *Id.* at 132 (noting that “it is hoped that the Environment Guidelines could constitute the level of objective knowledge imputed to all military and civilian leaders and agents for purposes of culpability under international criminal legislation.”).

97. Bruch, *supra* note 17, at 736. He bases his argument on article 22 of the Rome Statute which reaffirms the general principle of *Nullum Crimen sine Lege*.

98. According to article IV(18) of the Environment Guidelines, in the study, development, acquisition or adoption of a new weapon, means or method of warfare, States are under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by applicable rules of international law, including those providing protection of the environment in times of armed conflict.

99. First International Conference on Addressing Environmental Consequences of War: Legal, Economic, and Scientific Perspectives, Addressing Environmental Consequences of War, Background Paper 17 (June 10-12, 1998).

ute.¹⁰⁰ His argument relates to article 8(2)(b) but may arguably be applied to article 8(2)(e) since both articles are written in the same fashion. Article 8(2)(b) defines as war crimes “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:”¹⁰¹ Drumbl observes that the list does not seem to be exhaustive, rather, that “there may be some residual room within article 8(2)(b) to accommodate serious violations of international laws and customs that are not listed” since the term “namely” does not seem to suggest that it implies “exclusively” the following acts enumerated.¹⁰² Accordingly, he concludes that the Court may qualify as war crimes “unenumerated acts on the base of these laws and customs.”¹⁰³ In other words, even the provisions that “go beyond the category of conduct expressly prescribed by the Rome Statute . . . could arguably form part of the ICC’s residual jurisdiction.”¹⁰⁴

This argument is sustained by article 21 of the Rome Statute. The article stipulates that [t]he Court shall apply:

1. (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence ; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. 2. The Court may

100. Rome Statute on the International Criminal Court, *supra* note 1, art. 8(2)(e).

101. Rome Statute on the International Criminal Court, *supra* note 1, art. 8(2)(b), while Article 8(2)(e) states “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established of international law, namely, any of the following acts”

102. Drumbl, *supra* note 32, at 138.

103. *Id.*

104. *Id.*

apply principles and rules of law as interpreted in its previous decisions.¹⁰⁵

Indeed, article 21(2) provides the means to refer to the principles of international customary law as well as to the above mentioned treaties.¹⁰⁶ By the reference to “the principles and rules of international law,” the article may arguably imply the environmental provisions applicable in peacetime. Moreover, it is noteworthy to observe that the article uses the word ‘armed conflict’ without any further characterization so that the provision applies also to non-international armed conflicts.

Some authors insist on the relevance of some environmental treaties in times of armed conflict. Silja Vöneky affirms that the following treaties are still applicable in times of armed conflict: 1) treaties protecting the environment that expressly provide for continuance during war; 2) treaties protecting the environment that are compatible with the maintenance of war; 3) *jus cogens* rules and obligations *erga omnes* for the protection of the environment; 4) treaties that oblige States to protect the environment in the interest of the State community as a whole.¹⁰⁷ He emphasises that any treaty concluded in the interest of the whole community with the aim to protect the environment is a contribution for protection of the environment in times of armed conflict.¹⁰⁸

Similarly, Lynn Berat argues that peacetime environmental norms may provide protection to the environment in times of armed conflict, principally through the protection of the right to a healthy envi-

105. Rome Statute on the International Criminal Court, *supra* note 1, art. 21.

106. In addition to the treaties banning the use of certain weapons and methods of warfare, some treaties prohibit damage to the environment as a general rule. For instance, the World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, 37th Sess., 48th plen. mtg., Annex, U.N. Doc. A/RES/37/7 (1982), Article 5 stipulates that “[n]ature shall be secured against degradation caused by warfare or other hostiles activities;” the Rio Declaration, *infra* note 112, Article 24 states that “[w]arfare 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.”

107. Silja Vöneky, *A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage*, 9(1) REICEL 32 (2000).

108. *Id.*; see also comment by Rea Gehring, *La Protection de l'environnement en période de conflit armé, que peut -ou pourrait- apporter la Cour Pénale Internationale (CPI)?*, available at <http://www.unil.ch/icdp/quoi/memoires/environnement/conflitarne.pdf> (last visited Nov. 1, 2005).

ronment.¹⁰⁹ The right to a healthy environment was set forth in the Stockholm Declaration¹¹⁰ and reasserted in various international and regional instruments¹¹¹ as well as in national legislations.¹¹² Paul Gormley argues that the Stockholm Declaration reflects international consensus on a number of environmental issues, principally that fun-

109. Berat, *supra* note 40, at 327-48.

110. *Id.* at 330. Lynn Berat explains that the "seminal event in the creation of a right to a healthy environment was the first United Nations Conference on the Human Environment held in Stockholm in June 1972," and the subsequent Declaration issued by the Conference. Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14 (1972), *reprinted in* 11 I.L.M. 1416 art. 1 [hereinafter the Stockholm Declaration], ("[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being."). Before that, the right to an adequate quality of life for all was asserted in the Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., art. 25, at 71, U.N. Doc. A/810 (1948); *see also* the International Covenant on Economic, Social and Cultural Rights of 1966, Dec. 16, 1966 (entered into force Jan. 3, 1976), art. 11, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360 (1967).

111. *See* The World Charter for Nature, *supra* note 107, at art. 1 (establishing a "fundamental right to an environment adequate for . . . health and well-being."). The 1989 Conference on the Environment at the Hague issued the Hague Declaration. Declaration of The Hague on the Environment, (Mar. 11, 1989), 28 I.L.M., 1308, para. 5, at 1309. Furthermore, the 1992 World Environmental Summit in Rio de Janeiro issued the Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/1 (1992), *reprinted in* 31 I.L.M. 876; more recently, UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark, (June 25, 1998), ECE/CEP/43, pmb., para. 7. As for regional systems, Lynn Berat refers to the European Convention for the protection of Human Rights and Fundamental Freedoms, 213 I.N.T.S. 221 (Nov. 4, 1950); the 1990 adoption of a Recommendation to the Parliamentary Assembly of the Council of Europe on the formulation of a European Charter and a European Convention on environmental protection, EUR. PARL. ASS., 42d Sess., Recommendation 1130 (1990); Additional Protocol to the American Convention on Human Rights, (Nov. 14, 1988), 28 I.L.M. 161, 165, art. 11; African Charter on Human and Peoples' Rights, done at Banjul June 26, 1981, (entered into force Oct. 21, 1986), art. 24, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, *reprinted in* 21 I.L.M. 59, 63.

112. *See generally* FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERNATIONAL EQUITY (Edith Weiss ed., 1989) (Edith Weiss gives examples of countries inserting the right to a healthy environment in their national constitutions); CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert Blaustein & Gisbert Flanz eds., 1980) (Specifically Article 225 of the 1988 Brazilian Constitution, Article 95 of the 1990 Namibian Constitution and the Charter of Fundamental Rights and Freedoms of the Czech and Slovak Federative Republic, Constitutional Law, 9 January 1991, Article 35).

damental human rights cannot be achieved in a damaged environment. His argument received the support of many governments.¹¹³ Consequently, its principles acquired international customary law character.¹¹⁴ Furthermore, Lynn Berat observes that the World Environmental Summit that took place in Rio de Janeiro in 1992 “added credence to the proposition that the right to a healthy environment and other principles of environmental law have passed into the corpus of international customary law.”¹¹⁵

Nevertheless, the argument does not seem persuasive for environmental protection in times of non-international armed conflict. Indeed, the Stockholm Declaration further indicates that “[s]tates have, in accordance with the Charter of the United Nations and the principles of international law, the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹¹⁶ Thus, the article affirms that the responsibility not to damage the environment falls to States vis-à-vis other States and accordingly limits the obligations inferred from the application of the right to a healthy environment to international situations.¹¹⁷ Yet, even in an international context, the article does not imply individual responsibility for environmental damage. As a consequence, an individual criminal responsibility will be even more unlikely to be admitted. Furthermore, even though this responsibility *erga omnes* entails States “to advance claims furthering the interest that all people have in the preservation of the global environment”,¹¹⁸ the article does not imply an individual right to claim reparation. Nonetheless, the Declaration further asserts that “States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by

113. W. Paul Gormley, *The Right to a Safe Environment*, 28 *INDIAN J. INT’L L.* 1, 13 (1988).

114. *Id.*

115. See Berat, *supra* note 40, at 334.

116. See The Stockholm Declaration, *supra* note 109, at art. 21.

117. Silja Vöneky, *Peacetime Environmental Law as a Basis of State Responsibility for Environmental Damage caused by War*, in *THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES* 190 (Jay E. Austin and Carl E. Bruch eds., 2000).

118. Berat, *supra* note 40, at 332 (citing L.F.E. Goldie, *A General View of International Environmental Law: A Survey of Capabilities, Trends, and Limits*, 35 *COLLOQUIUM HAGUE ACAD. INT’L L.* 103 (1974)).

activities within the jurisdiction or control of such States to areas beyond their jurisdiction.”¹¹⁹

Moreover, acknowledging the pressing necessity of averting a global environmental catastrophe which depends on the enforcement of the right to a healthy environment, Lynn Berat further advocates for the recognition of the right to a healthy environment as a norm of *jus cogens*.¹²⁰ She infers from the universal application of norms of *jus cogens* that a State violating such norms commits an international crime.¹²¹ Nevertheless, with respect to the international customary law character of the right to a healthy environment, the recognition of the right as a *jus cogens* norm does not imply an individual criminal responsibility, nor does it recognize an individual right to complain.

As a consequence, it is controversial to admit that Article 21 of the Rome Statute triggers individual criminal responsibility for a breach of the right to a healthy environment. Furthermore, despite the character of international customary law or even *jus cogens*, the right remains too imprecise to be enforceable as such. Nevertheless, it may serve as an underlying argument in decisions concerning damage to the environment before the International Criminal Court. The propositions to elaborate a single set of rules seem consequently to be undermined by political and legal difficulties. The attempts to expand the norms applicable in times of non-international armed conflict seem on the other hand more promising, but will not reach a complete harmonization between both kinds of conflicts.

Furthermore, Bruch recognizes the conundrum to expand the environmental provisions applicable in times of international armed conflict because of the considerable uncertainties that remain about the potential of the existing norms to afford meaningful protections, even in times of international armed conflict.¹²² The hurdles to prosecute environmental war crimes under Article 8(2)(b)(iv) are best expressed by Mark Drumbl.¹²³

Article 8(2)(b)(iv) requires three elements to define an environmental war crime. Firstly, it requires conjunctively a “widespread,

119. The Stockholm Declaration, *supra* note 109, at art. 22.

120. Berat, *supra* note 40, at 334.

121. *Id.*

122. Bruch, *supra* note 17, at 741.

123. Drumbl, *supra* note 32, at 122-53.

long-term and severe” damage to the natural environment.¹²⁴ The Rome Statute does not, however, define these terms, nor does it provide any explanation of the meaning of these terms. Yet considering the general principle of criminal law, *nullum crimen sine lege*, reaffirmed in the Rome Statute under Article 22¹²⁵ and according to which “all crimes should be legislatively defined prior to their commission”,¹²⁶ it is important to examine whether these standards are precise enough so that they do not raise a problem of illegal criminalization. On the other hand, these standards should be expansive enough in order to have the capacity to effectively protect the environment. Indeed, the threshold of applicability will vary upon the meaning given to the terms: if the provisions cover only exceptionally serious damages to the environment, the provisions may have few applications.

Article 1 of the 1977 United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques¹²⁷ and Articles 35(3) and 55 of the 1977 Protocol I to the 1949 Geneva Convention already used the terms “widespread,” longterm, and “severe.”¹²⁸ Nevertheless, different interpre-

124. Rome Statute on the International Criminal Court, *supra* note 1, at art. 8(2)(b)(iv).

125. *Id.* at art. 22:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

126. George P. Fletcher and Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539 (2005).

127. United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 31 U.S.T. 333, T.I.A.S. No. 9614 (entered into force May 18, 1977).

128. First Additional Protocol to the Geneva Conventions of 12 August 1949, *supra* note 46, art. 35(3) prohibits “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.” Article 55 asserts that:

[C]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition on the use of methods and means of warfare which are intended or may be expected to cause such damage to the natural environment and

tations were given for both instruments. The former refers to damage spread throughout an area on the scale of several hundred square kilometres, lasting several months or approximately a season, and involving serious or significant disruption or harm to human life, natural and economic resources or other assets.¹²⁹ The latter refers to damage spread throughout an area smaller than several hundred square kilometres, lasting an impossible period of time to determine with precision but at a minimum, one decade, more likely several,¹³⁰ and endangering survival of the civilian population or threatening its health.

Arguably, it is very likely that the Rome Statute, which protects the environment indirectly,¹³¹ without any further requirement of widespread, long-term or severe consequences,¹³² will require a higher threshold of severity for damage to the environment when it does not serve any human purpose.¹³³

thereby to prejudice the health or survival of the population. Attacks against the natural environment by way of reprisals are prohibited.

129. Understanding I of the Geneva Conference of the Committee on Disarmament, reprinted in Adam Roberts and Richard Guelff, *DOCUMENTS ON THE LAW OF WAR* 377-85 (1989).

130. Jozef Goldblat, *The Mitigation of Environmental Disruption by War: Legal Approaches*, in Arthur Westing, in *ENVIRONMENTAL HAZARDS OF WAR: RELEASING DANGEROUS FORCES IN AN INDUSTRIALIZED WORLD* 48, 52 (Arthur Westing ed., 1990).

131. The following are examples of these provisions: Rome Statute on the International Criminal Court, *supra* note 1, art. 8(2)(b)(v) ("Attacking or bombarding by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives."), *id.* at art. 8(2)(b)(ix) ("Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals . . ."), *id.* at art. 8(2)(b)(xiii). ("Destroying or seizing enemy's property . . ."), *id.* at art. 8(2)(b)(xvi) ("Pillaging a town or place . . ."), *id.* at art. 8(2)(b)(xxv) ("[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival . . .").

132. As mentioned *supra* in section II(C)(2), the enumerated prohibited acts, to be characterised as violation of the laws and customs of war, must be sufficiently important or must involve "grave consequences for the victims." There is, nevertheless, no further requirement such as "widespread, long-term or severe" damages.

133. Mark Drumbl explains that "[a]lthough tactics such as 'scorched earth' and 'defoliation' have been used to starve civilians and thereby to dissuade their helping insurgency movements, the Rome Statute does not criminalize the destruction of the earth but, rather, the denial of a type of the earth's resources to civilian populations." Drumbl, *supra* note 32, at 129. In other words, the destruction of

It is, however, very important to tackle the problem of the interpretation of these terms in order to give a substance or a “useful effect” to the article and prevent it from remaining “dead letter.”¹³⁴ During a meeting that took place in Ottawa, the experts argued that it should be possible to agree on the meaning of these terms in accordance to the general rules of the law of treaties as stipulated in the 1969 Vienna Convention, in particular articles 31 and 32, since these terms were not defined in the body of the treaties and were given approximate indication of their meaning in the proceedings of the diplomatic conference.¹³⁵ Drumbl proposes, ideally, to reduce the threshold of responsibility to “harm,” with the sentence subsequently varying with regard to the degree of harm to the environment.¹³⁶ Nevertheless, according to the letter of the Rome Statute, although the interpretation given to the terms “widespread, long-lasting and severe” may reduce the wanton character of the damage required to constitute the crime, it may not get rid of the requirement of characterised damage.

Secondly, Article 8(2)(b)(iv) requires that the accused know that the behaviour would cause the “widespread, long-lasting and severe”

land that does not provide food would not be cognizable within the Rome Statute unless the conditions of Article 8(2)(b)(iv) were met.

134. The precedent of non-liquet of the Final Report by the Committee established to review the NATO Bombing Campaign against the Federal Republic of Yugoslavia justifies the concerns on the use of the words “widespread, long-lasting and severe.” Indeed, in 1999 the Committee was established to assess the information of war crimes allegedly committed during the NATO Bombing campaign, it concluded in the penultimate paragraph that “the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against the lower accused for particularly heinous offences.” See The Final Report to the Prosecutor by the Committee Established to Review the NATO bombing Campaign Against the Federal Republic of Yugoslavia 14-25, available at <http://www.un.org/icty/pressreal/nato061300.htm> (last visited Dec. 1 2005). See also Ronzitti and Marauhn, *supra* note 34; Thilo Marauhn, *Environmental Damage in Times of Armed Conflict – not “really” a matter of criminal responsibility?*, 840 INT’L REV. RED CROSS 1029-36 (2000).

135. Conference of Experts on the Use of the Environment as a Tool of Conventional Warfare (Ottawa, July 1992), referring to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, which led to the elaboration of the two Additional Protocols to the Geneva Conventions of 12 August 1949. Comments by Antoine Bouvier, Protection of the Natural Environment in Time of Armed Conflict, *supra* note 91, at 567-78.

136. Drumbl, *supra* note 32, at 129.

damage and, in addition, the intention to cause such a damage. Accordingly, the provision precludes prosecution of negligent or reckless behaviour and narrows substantially the provision's scope. The accused's knowledge is assessed according to the "relevant circumstances of, and information available to, the accused at the time" he or she acted.¹³⁷ Nonetheless, the knowledge should be, at least in part, objectively assessed in order to dismiss the ignorance of individuals who choose not to inform themselves about the deleterious consequences of their act on the environment as a full defence.¹³⁸ The Rome Statute would be more effective if, like the First Additional Protocol to the Geneva Conventions, it only required a reasonable expectation that environmental damage would occur.

Eventually, article 8(2)(b)(iv) sets forth that the damage must be "clearly excessive" in relation to the concrete and direct overall military advantage anticipated.¹³⁹ Unlike the First Additional Protocol to the Geneva Conventions or the ENMOD Convention, the Rome Statute sets up military necessity as a defense, so that once the threshold of widespread, long-lasting and severe is surpassed, a prosecutor still has to prove that the destruction was not conducted in respect to what was necessary for the success of the military operation and furthermore was clearly excessive. The Rome Statute does not, however, define the terms "clearly excessive," "concrete," "direct," or "overall." Moreover, the military advantage simply needs to be anticipated. The problems encountered in determining the author's knowledge and intent regarding the necessity of the damage apply similarly when determining the "anticipated" military advantage. In sum, the environmental war crime may require a "very significant level of knowledge, intentionality, and harm."¹⁴⁰

Despite the apparent substantive and procedural lacunae of the Rome Statute, it is noteworthy to highlight an important aspect of the International Criminal Court. According to the principle of complementarity, the ICC should intervene only whenever the national courts are 'unwilling or unable' to prosecute.¹⁴¹ Indeed, to use the

137. United Nations Conference on the Establishment of an International Criminal Court, April 2, 1998, section B(b) to the 'war crimes' section of part 2, available at <http://www.un.org/icc/part2.htm> (last visited Nov. 24, 2005).

138. Drumbl, *supra* note 32, at 133.

139. Rome Statute on the International Criminal Court, *supra* note 1, at art. 8(2)(b)(iv).

140. Drumbl, *supra* note 32, at 136.

141. Fletcher and Ohlin, *supra* note 126, at 539.

words spelled out by Drumbl, international criminal law is the 'ultima ratio' to punish the most severe damage to the environment, domestic mechanisms remaining the first instance to punish environmental crimes.¹⁴²

Furthermore, bearing in mind that the law of armed conflict is a law of compromise between military imperatives and the respect of humanity, these laws are not meant to prevent damage completely but, rather to limit damage to a "tolerable" level. Accordingly, it appears that only the most egregious damage to the environment would ever be prohibited by international law. Some authors, however, advocate for a reinterpretation of the "interaction between international environmental law and the law of war"¹⁴³ to proscribe environmental crime in a similar fashion as genocide and torture for instance, namely sanctioning the crime "as illegal by the international community to the extent that [it] can never be undertaken even if essential to defend national sovereignty."¹⁴⁴ The argument seems to go beyond all the expectations imaginable at the present time considering the absence of concrete protection afforded by the previous tribunals and the burden falling to the ICC to set up the first stone in environmental protection. Nonetheless, the suggestion to prosecute environmental damage when conducted in order to commit a separate atrocity such as genocide or crimes against humanity will be considered in the next part of the article.

Notwithstanding the limited expectation of prosecution for environmental damage, the role of the international criminal law is primordial because it sets forth, in a valuable instrument, the wrongs identified by the international community and threatens individuals with criminal sanctions.

B. Circumventing the Conundrum: Prosecuting Environmental Destruction When Conducted in Order to Perpetrate a Separate Atrocity Proscribed by the Rome Statute

The argument to raise environmental rights under the Rome Statute as independent and non-derogable rights is praiseworthy but remains utopian at the present time. The proposition advanced by Tara Weinstein seems more viable and could find concrete application in practice.

142. Drumbl, *supra* note 32, at 148 n.81.

143. *Id.* at 135.

144. *Id.*

Tara Weinstein argues that at the present time environmental destruction is not an independent violation of international law and that:

[G]iven the history of environmental destruction in international conflict and the improbability of prosecution of environmental war crimes as stand-alone violations, the international community should focus on prosecuting environmental destruction when conducted to achieve another atrocity, such as genocide or crimes against humanity. This would set international legal precedent for the prosecution of individuals who have used the environment to achieve genocide or a crime against humanity, but could also serve as an intermediate step toward the ultimate goal of prosecuting individuals for environmental destruction as an independent violation rather than only when committed in conjunction with human rights violations.¹⁴⁵

Genocide has long been recognized as a serious crime of concern to the entire international community, and was accordingly subjected to the jurisdiction of international criminal tribunals. Under the Rome Statute, genocide is defined as a list of acts “committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”¹⁴⁶ Article 6(c) of the Rome Statute asserts that the act of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,” is genocide.¹⁴⁷ Thus, article 6(c) of the Rome Statute could provide the means to punish “environmental cleansing” which can be defined as the “deliberate manipulation and misuse of the environment so as to subordinate groups based on characteristics such as race, ethnicity, nationality, religion and so forth.”¹⁴⁸

145. Weinstein, *supra* note 6, at 698.

146. Rome Statute on the International Criminal Court, *supra* note 1, at art. 6.

147. *Id.* at art. 6(c).

148. Oral intervention of Mark A. Drumbl, *The International responses to the environmental impacts of war*, 17 GEO. INT'L ENVTL. L. REV. 565, 627 (2005) (SYMPOSIUM).

Principally, environmental devastation of areas inhabited by indigenous peoples whose culture, customs and survival depend on the environment could arguably be considered as genocide.¹⁴⁹

Carl Bruch illustrates the possible use of genocide provisions to punish environmental devastation directed to land of particular importance for indigenous peoples' survival. His example focuses on the Ecuadorian Amazon.¹⁵⁰ The Inter-American Commission on Human Rights examined a complaint alleging "that oil exploration and development in the Ecuadorian Amazon would devastate the environment and lead to ethnocide of indigenous peoples living in the region."¹⁵¹

The Commission recognized the threat to life, health and culture due to the exploitation of the environment,¹⁵² yet did not consider the charge of ethnocide. Indeed, the Report on human rights in Ecuador did not identify any intention to destroy the indigenous peoples of the region, rather the report highlighted that it was merely the negligence of the factories that led to the environmental devastation.

However, as Tara Weinstein emphasises, the case of the Marsh Arabs in Southern Iraq was construed as genocide. Indeed, in the specific case of the Marsh Arabs, the intention was to destroy the population by inflicting on the group conditions calculated to bring about the destruction of the people through the physical destruction of the region in whole or in part, (namely by drying the marshes which the people depended on for survival).¹⁵³ Therefore, prosecuting environmental devastation when it is used as an instrument to commit another humanitarian atrocity may well prove effective. Nevertheless, although in many instances the natural environment is damaged in order to primarily kill a group of people, namely the enemy, the reason is often not based on one of the four conventional

149. Bruch, *supra* note 17, at 727.

150. *Id.*

151. IACHR Report on the Situation of Human Rights in Ecuador, Inter-Am. C.H.R., OEA/Ser.L/V/II.96, Doc. 10, rev. 1 at ch. ix (Apr. 24, 1997).

152. Bruch, *supra* note 17, at 727 (Relating that a report issued in 1997 highlighted potential violations of fundamental human rights arising from oil exploration and development that over the previous twenty-five years had discharged more than 30 billion gallons of toxic wastes (including produced water wastes) and crude oil into the waterways and onto the land.). See Report on the Situation of Human Rights in Ecuador, *supra*, note 151 at ch. VIII.

153. Weinstein, *supra* note 6, at 713.

grounds¹⁵⁴ and accordingly does not qualify as genocide. Thus, prosecuting environmental damage when engaged to commit genocide circumvents the hurdles posed by the critical distinction between the different situations of armed conflict but remains limited to specific and restricted environmental destruction.

Tara Weinstein refers also to the prosecution of environmental destruction as a crime against humanity. Under the Rome Statute, a crime against humanity is defined as any listed act “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹⁵⁵ She argues that “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health,”¹⁵⁶ could encompass environmental destruction when committed “with the intent to cause great suffering in a widespread or systemic manner, or pursuant to a State policy.”¹⁵⁷

Indeed, Bruch affirms that crimes against humanity could include widespread and systematic attacks conducted in a discriminatory manner on “drinking water, food sources, and other environmental components directly affecting the life and physical well-being of a population.”¹⁵⁸ Tara Weinstein illustrates this theory with the example of the Marsh Arabs, saying that in their case, the draining of the marshes deprived the members of the group of not only their “dignity but also of their livelihood, as well as their culture itself.”¹⁵⁹

154. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, (entered into force Jan. 12, 1951). Art. 2 affirms that in the present Convention, genocide means any of the enumerated acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The four grounds of persecution are therefore the national, ethnical, racial or religious character of the person persecuted.

155. Rome Statute on the International Criminal Court, *supra* note 1, art. 7.

156. *Id.* at art. 7(1)(k).

157. Weinstein, *supra* note 6, at 720.

158. Bruch, *supra* note 17, at 729.

159. Weinstein, *supra* note 6, at 720. She notes that “[a]s a result of the draining of the marshes, the water became polluted and crusted with salt, which, in turn, limited drinking water and the ability to obtain food.” She further observes that “[a]ccording to the U.S. State Department, ‘the draining of the marshes has led to the destruction of the Marsh Arabs’ self-sufficient economy, the near-complete atrophy of the entire ecosystem, and the flight of ten of thousands of refugees’. *Id.* at 717.

The positive aspect of these propositions is that they do not require any connection to armed conflicts¹⁶⁰ and accordingly avoid both the controversy of the qualification of an armed conflict as well as the subsequent disparate protection afforded in both kinds of conflict. Nevertheless, crimes against humanity and genocide are difficult to prove and remain sporadic, so they do not provide remedies to all environmental concerns. On the other hand, while prosecution of these crimes does not serve environmental purposes specifically, it serves humanitarian concerns. It is a potentially effective solution to punishing environmental damage, even if it would be limited to few situations. Ultimately, every proposition, even those disparate and isolated, is a solid step forward if it fosters protection of the environment.

Finally, some scholars, including Lynn Berat, propose to concentrate on the development of a crime of "Geocide" or "Ecocide." Framed on the definition of genocide, geocide could be defined as the:

[D]estruction, in whole or in part, of any of portion of the global ecosystem, via killing members of a species; causing serious bodily or mental harm to members of the species; inflicting on the species conditions of life that bring about its physical destruction in whole or in part; and imposing measures that prevent births within the group or lead to birth defects.¹⁶¹

The authors put forward the idea to sanction intentional as well as reckless or negligent "destruction of any species or the serious impairment of any part of the global environment,"¹⁶² at any time, irrespective of the situation of armed conflict or peace.¹⁶³

160. M. Cherif Bassiouni, *The Permanent International Criminal Court, in JUSTICE FOR CRIMES AGAINST HUMANITY* 173, 187 (Mark Lattimer & Phillippe Sands QC eds., 2003).

161. Berat, *supra* note 40, at 343.

162. *Id.*

163. Richard A. Falk, *Environmental Disruption by Military Means and International Law, in ENVIRONMENTAL WARFARE: A TECHNICAL, LEGAL AND POLICY APPRAISAL* 33-51 (Arthur H. Westing ed., 1984); Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L.J. 215 (1996); Caggiano, *supra* note 70, at 499; Ensign Florencio Yuzon, *Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons: "Greening" the Interna-*

The merit of the proposition would be to evade the difficult problem of proving intent in international criminal law. Furthermore, according to the propositions, the existence of damage per se to the natural environment would entail liability. Indeed, as Florencio Yuzon remarked, “any damage, regardless of the degree . . . would automatically render the State and/or its military, criminally liable,”¹⁶⁴ and the severity of any resulting sentence would be determined by the “extent of the damage, together with the pervasiveness of the mental element.”¹⁶⁵ Eventually, natural as well as legal persons, public authorities and States could be liable.

In addition, the merit of the proposed crime of geocide – enshrined in a specific convention and enforced in a special court – would be in developing the skill to address environmental matters. Indeed, referring to a specialised court could improve the scientific expertise of environmental damage and thereby enhance the quality and effectiveness of the jurisprudence of this court. Unfortunately, while the proposition is laudable, the discussion surrounding the crime of geocide has not moved beyond the debate on definitional issues.

IV. CONCLUSION

The environmental issue has been approached from different perspectives and analyzed with different sets of rules and procedures.¹⁶⁶

Firstly, environmental destruction has been recognised as an humanitarian issue. Acknowledging that environmental degradation has profound human consequences, humanitarian law and human rights law advanced norms to protect the environment in times of peace as well as in times of armed conflict. Even though non-derogable human rights are still applicable in times of armed conflict, humanitarian law is the main set of rules by which situations of armed conflict are regulated. The principles of humanitarian law have been developed and enforced through the actions of the Red Cross, but proved nonetheless to be insufficient to prevent environmental destruction. Principally, the enforcement mechanisms hindered the effectiveness of the provisions.

tional Laws of Armed Conflict to Establish an Environmentally Protective Regime, 11 AM. U. J. INT'L L. & POL'Y 793 (1996).

164. Yuzon, *supra* note 163, at 841.

165. Drumbi, *supra* note 32, at 144.

166. Popovic, *supra* note 71, at 67.

International criminal law presents the advantage of both providing remedies for the victims and of deterring further atrocities through the infliction of penal sentences. Yet, although the Rome Statute heralds the end of “impunity” for “the most serious crimes of concern to the international community as a whole,”¹⁶⁷ it appears to set a high threshold for the constitution of environmental war crimes and thereby may impede the prosecution of such crimes. These limits may be explained by the fact that the Rome Statute is an international agreement by which States agreed to transfer some sovereignty over criminal matters. Since the Rome Statute concerns the conduct of hostilities which entail individual criminal responsibility, its provisions could not be too restrictive on State’s practices. Nonetheless, according to article 21 of the Rome Statute and with respect to the principle of *nullum crimen sine lege*, these provisions may be subject to extensive interpretation.¹⁶⁸

Furthermore, despite the vagueness of the terms used in Article 8(2)(b)(iv), all the examples given in part II(B) of this article could arguably meet the criteria of “widespread, long-lasting and severe.” Therefore the difficulty does not seem to be the wording of the Rome Statute but rather the willingness of the ICC on behalf of the international community to confront the problem. Importantly, however, the Rome Statute does not expand the application of Article 8(2)(b)(iv) to non-international armed conflicts, rather, it refers to dispositions previously developed in international law and applied in international criminal tribunals, such as “pillage” or “destruction of property.”

Since these international tribunals failed to address environmental issues in the past, one may be concerned by the effectiveness of the Rome Statute to address the issue.

However, one must be careful to make premature conclusions about the exercise of the Court, especially regarding its sensitivity towards the environment. The development of international criminal law is a slow process. The substance of criminal laws has advanced progressively through the jurisprudence of the previous international tribunals. Those tribunals developed the set of rules applicable in times of armed conflict and, most importantly, spelled out the content of such crimes as genocide and crimes against humanity.

167. Rome Statute on the International Criminal Court, *supra* note 1, at art. 5.

168. *Id.* at art. 21.

The scattered inclusion in the various statutes of these tribunals of dispositions indirectly protecting the environment may be explained by the fact that tremendous and unimaginable horrors directed towards human beings took place and consequently the environmental issue was not a priority.

The potential of these provisions has, however, never been assessed properly. Either international tribunals did not make any mention of these issues in their proceedings,¹⁶⁹ or they prosecuted individuals for wanton devastation of the environment but eventually relied on the military necessity defense.¹⁷⁰ On the other hand, the United Nations Transitional Administration in East Timor established panels with exclusive jurisdiction over serious criminal offences, defined as those crimes committed against the environment in East Timor.¹⁷¹ Although, the panels have yet to consider any charges against such crimes, this could set a precedent in the prosecution of environmental damage in times of non-international armed conflict.

Carl Bruch points out, however, that although it is time to move from norms to practice,¹⁷² there are a few areas where the lack of norms and the lack of clarity regarding the norms hampers the practical implementation.¹⁷² Accordingly, the proposition to expand the set of rules applicable in times of non-international armed conflict presents an interesting and practical solution. Principally, the argu-

169. No charge of pillage or, any other crime that could indirectly protect the environment, was brought before the ICTR. Similarly, neither the Extraordinary Chambers for Cambodia nor the Special Tribunal for Sierra Leone was concerned by the environmental issue. See Extraordinary Chambers for Cambodia, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Reach Kram No. NS/RKM/0801/12, available at <http://www.derechos.org/human-rights/seasia/doc/krlaw.html> (last visited Nov. 21, 2005); Special Tribunal for Sierra Leone, Statute for the Special Court for Sierra Leone, U.N. Doc. No. S/2002/246 (Aug. 14, 2000), available at <http://www.sc-sl.org/scsl-statute.html> (last visited Nov. 21, 2005).

170. As mentioned *supra*, both the military tribunal of Nuremberg and the ICTY illustrate this problem.

171. Agreement on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences in East Timor, U.N. Transitional Administration in East Timor, Article 6.1(b)(iv), U.N. Doc. UNTAET/REG/2000/15 (2000), pursuant to U.N. SCOR Res. 1272, available at <http://www.un.org/peace/etmor/untactR/Reg0015E.pdf> (last visited Nov. 21, 2005).

172. Jay Austin, *The International Responses to the Environmental Impacts of War*, 17 GEO. INT'L ENVTL. L. REV. 565 (2005).

ment based on the wording of the Rome Statute to extend the ICC's jurisdiction over acts enshrined in treaties or expressed in customary law represents a valuable resource.

First and foremost, however, a successful prosecution for environmental damage occurring in times of armed conflict lies in the willingness of the International Criminal Court to tackle the issue. As a matter of fact, literature and work on environmental issues in times of armed conflict are recent and increasing in number. In this article, reference was made to monographs, articles, symposiums, which in the majority date back to the 1990s. Thus, the variety of sources reveals the increased interest as well as an increased awareness on the issue, and accordingly engenders the belief that the ICC may confront the problem. The concerns that priority may be given to try atrocities other than the environmental ones may be justified, yet it is not certain that the Court will avoid the subject.

Just as previous tribunals have advanced the content of the norms applicable during armed conflicts, the ICC, considering the parallel work in the area of informing armed forces and assessing damages,¹⁷³ could provide a forum to deal with the environmental issue and could therefore take a step forward to implement and develop existing norms.

Drumbl questions the adequacy of the Rome Statute's punishment provisions to address the environmental issue. He notes that "[p]enalties are geared to deter misconduct, to restitute the aggrieved, to voice condemnation, and to offer some rehabilitation for the convicted."¹⁷⁴ However, since the sentence is based on imprisonment, fines and forfeiture of the proceeds of the crime, he argues that "[t]here does not appear to be much room to compel restitution, remediation of blight, civil liability or, simply put, to clean up the environmental harm."¹⁷⁵

For this reason, among others, some authors praise the conception of a convention specifically addressing environmental concerns and enforceable in a special jurisdiction. The argument is praiseworthy since the special court would, according to the propositions ad-

173. *Id.* Mr. Austin discusses the increased awareness of environmental issues as well as the increased capacity for monitoring and assessing environmental damage. Principally he refers to the practice of the United Nations Compensation Commission, which made an important work in assessing the scientific and technical environmental consequences of the Gulf war.

174. Drumbl, *supra* note 32, at 149.

175. *Id.* at 150.

vanced, punish reckless or intentional “harm to the environment outside and inside war.”¹⁷⁶ Thus, this proposition would preclude both the problem of determining whether there is an armed conflict and whether the armed conflict is of an international or non-international character. Subsequently, it would preclude the problem of the controversial dichotomy in the applicable law. Besides, the jurisdiction could develop consistent knowledge to assess damage to the environment and accordingly would foster a constructive jurisprudence. Furthermore, by highlighting that China, India, Russia and the United States are not parties to the Rome Statute because of fears not directly related to environmental war crimes, Drumbl argues that setting apart environmental war crimes from other types of war crimes may facilitate consensus-building in the environmental arena.¹⁷⁷

Nevertheless, however praiseworthy this proposition is, the convention remains at the initial stage of suggestion. Meanwhile, as the project is considered, the environment may be further damaged. Thus, this project should be conducted parallel to the present work of the ICC to develop a jurisprudence that, for once in the history of international criminal law, effectively protects the natural environment.

176. *Id.* at 142.

177. *Id.* at 147.

