

Human Security and the Environment: Prosecuting Environmental Crimes in the International Criminal Court

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Modern Warfare and Conflict Demand Enhanced Environmental Rules and a Mechanism for Enforcement

History has been witness to many deliberate acts aimed at destroying the natural environment to achieve strategic goals. Few of us can forget, for example, the haunting images of the 736 burning Kuwaiti oil well heads, which had been deliberately ignited by retreating Iraqi forces towards the end of the first Iraq conflict. Over the following 10 years, the Saddam regime proceeded to drain the al-Hawizeh and al-Hammar marshes in southern Iraq, effectively destroying the livelihood of the 500,000 Ma'dan, or Marsh Arabs, who had inhabited the area of this unique ecosystem (only 10,000 of the Ma'dan now live in what is the remains of the wetlands).² During the invasion of Iraq in 2003, Human Rights Watch estimated that United States and British forces used almost 13,000 cluster bombs – containing almost 2 million munitions – causing very significant human and environmental damage. We are currently witnessing the mass poisoning of water wells in the western region of Dafur in Sudan, as part of a deliberate Government supported strategy by the Arab Janjawid militia to eliminate or displace the ethnic black Africans living in that region (over 1 million have been displaced or killed since February 2003).³

It is clear that the deliberate despoliation of the environment can have catastrophic effects. Yet the concept of environmental crimes has not, until quite recently, been a specific focus in the continuing evolution of international criminal law. This paper seeks to explore whether, and in what circumstances, these types of actions may fall within the jurisdiction of the recently established International Criminal Court (ICC) under the terms of the 1998 Rome Statute of the International Criminal Court (Rome Statute).⁴

The paper concludes that, although there is only minimal reference to the environment within the Rome Statute, there are a number of potential options for the ICC Prosecutor to 'pigeon hole' environmental crimes within the definition of those crimes set out in Part 2 of the Rome Statute. This is not to say that we will see an indictment in the short term focusing on environmental destruction – the priorities of the Prosecutor and current *realpolitik* dictate otherwise – but the potential for such prosecutions does exist. In any event, it is argued that the need to promote environmental justice and strengthen the reach of international criminal law necessitate that, at some stage, a specific crime of 'Crimes against the Environment'

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² David Blair 'Toll of infamy: regime killed 2 million' *The Sydney Morning Herald* 16 December 2003, page 8 col. 6.

³ 'U.S. Warns Sudan Death Toll Could Reach 300,000 To 1 Million' *U.N. Wire* 3 June 2004, accessed at <http://cw.groupstone.net> on 4 June 2004.

⁴ (1998) 37 ILM 999.

should also be considered for inclusion within the terms of the Rome Statute and thus within the jurisdiction of the ICC.

Environmental Crimes – a working definition

The focus of this paper, and any definition of an environmental crime that may ultimately be included within the mandate of the Rome Statute, relate to serious actions targeted to achieve very significant deleterious effects of the natural environment. It does not deal with acts that constitute a ‘mere’ violation of the over 200 International Environmental Agreements (IEAs) that exist: nor a breach of the domestic legislation in various jurisdictions that regulate the environment.⁵

Rather, it is suggested that, for the purposes of this paper, an environmental crime potentially giving rise to international criminal responsibility could be regarded as:

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

Of course, there will be many people who will quite justifiably seek to improve and refine this suggested working definition. Indeed, I am conscious that it may not cover every eventuality and may give rise to some questions of interpretation. It is offered simply in order to confirm that the notion of criminal responsibility arising from environmental damage is limited to the most serious of actions, but that, at the same time, also represents the type of act that should be the subject of prosecution under international criminal law.

Responsibility for Environmental Crimes – the State?

As mentioned above, the major thrust of this paper is to discuss whether and how the commission of an environmental crime may fall within the jurisdiction of the ICC. Of course, to mirror the oft-quoted words of the Nuremberg International Military Tribunal⁶

‘That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized ... Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced ...’

⁵ There are, of course, other instruments that are also relevant to the actions that would constitute this type of crime. For example, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (249 UNTS 240) imposes obligations on States to refrain from any act of hostility directed against cultural property and abstain from using this property for military purposes. However, this instrument does not provide for international criminal responsibility for acts constituting a breach, although Article 28 does provide: ‘The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention’.

⁶ (1947) 41 *American Journal of International Law* 172 at 221.

This is reflected in the mandates of all subsequently established international criminal tribunals and the ICC. Those courts are generally not designed to investigate and prosecute actions taken by non-natural entities, particularly States.⁷ There is no clear possibility that a criminal prosecution of a *State* may stem from actions that produce significant environmental degradation.

Yet on this point, it was not long ago that the notion of a crime by a State was contemplated by the International Law Commission (ILC). Having been given the task in 1949 of formulating draft Articles on the Responsibility of States for Internationally Wrongful Acts, the ILC introduced draft Article 19 and drew a distinction between international delicts committed by States and international crimes.

Within the definition of an international crime,⁸ the draft Article included actions from which such a crime may result, including:⁹

‘a serious breach ...

(c) on a widespread scale of an international obligation of essential importance for safeguarding the human being ...

(d) of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas ...’

Draft Article 19 gave rise to much controversy and eventually was not included in the Articles adopted by the ILC in 2001 and subsequently noted by the General Assembly late that year.¹⁰ We are not (yet) at the point of finding States guilty of environmental crimes at the international level. They remain, of course, bound by their obligations under customary international law as they relate to the environment, as well as any IEAs to which they are party. A breach of these principles will invoke the principles of State Responsibility.¹¹

This is relevant since many acts by States do impact adversely on the environment. Military or government actions are all too frequently planned and implemented to damage or destroy the environment – for example through the use of toxic munitions, and depleted uranium shells, destruction of forest systems, diversion or contamination of essential natural food resources (water, agriculture), destruction of oil refineries and deliberate oil spills, proliferation of land mines etc.

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

⁷ Rome Statute Article 25(1).

⁸ ‘An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole ...’: former draft Article 19(2).

⁹ Former draft Articles 19(3)(c) and (d) respectively.

¹⁰ General Assembly Resolution 56/83 ‘Responsibility of States for internationally wrongful acts’ 12 December 2001 A/Res/56/83.

¹¹ There may also, of course, be relevant municipal legislation that will regulate the activities of the particular State in relation to the environment.

The International Criminal Court – Individual Responsibility for Environmental Crimes?

The Rome Statute came into force on 1 July 2002, following the 60th ratification of the treaty.¹² It currently faces strong opposition from the United States, which has undertaken a number of steps to limit the effectiveness of the court to pursue perpetrators of international crimes.¹³ The ICC has jurisdiction with respect to the following crimes committed after 1 July 2002:¹⁴

- a) The crime of genocide;
- b) Crimes against humanity;
- c) War crimes;
- d) The [as yet undefined] crime of aggression

In 2001, a study prepared by the United States Army Environmental Policy Institute¹⁵ concluded that the ICC was unlikely to be called upon to determine responsibility for environmental crimes arising from military actions, at least in relation to international peacekeeping operations.¹⁶ The study focused only on the definition of War Crimes in the Rome Statute,¹⁷ and then only on the specific provision in the instrument that expressly refers to the environment (discussed below).¹⁸

Instead, it is appropriate to also consider other provisions of the Rome Statute to determine whether they could, in certain circumstances, be applied to actions designed to render significant damage to the environment. As discussed below, the definitions of the various crimes within the jurisdiction of the ICC may appear wide enough in their current terms to encompass environmental crimes. Before undertaking this exercise it is useful to reflect on a report prepared by the Office of the Prosecutor (OTP) in the International Criminal Tribunal for the former Yugoslavia (ICTY).

Environmental Crimes by NATO Personnel – a Precedent?

¹² At the time of writing, 94 States have ratified the Rome Statute.

¹³ For a discussion of the actions taken by the United States, see Steven Freeland and Michael Blissenden 'The International Criminal Court – Politics, Justice and Impunity' Proceedings of the 11th Annual Conference, Australian and New Zealand Society of International Law, 'International Governance and Institution: What Significance for International Law?' Wellington, New Zealand 4-6 July 2003, 319-326

¹⁴ Rome Statute Article 5(1).

¹⁵ Joe Sills, Jerome C Glenn, Elizabeth Florescu and Theodore J Gordon 'Environmental Crimes in Military Actions and the International Criminal Court' (ICC), accessed at <http://www.acunu.org> on 29 October 2003.

¹⁶ As discussed in Freeland and Blissenden note 6 above, United Nations Security Council Resolutions 1422 (2002) and 1487 (2003) exempts officials or personnel (principally peacekeepers) from States not party to the Rome Statute from the jurisdiction of the ICC in relation to acts or omissions undertaken in United Nations operations. It will be interesting to see whether (and how) this immunity will be renewed again following the conclusion of the one year period referred to in Resolution 1487 (2003) in July 2004, with some suggestions being made at the time of writing that the United States may not have enough support in the Security Council for a further renewal of the immunity provisions, particularly following the revelations regarding the treatment of Iraqi prisoners by United States forces in Iraq.: Evelyn Leopold 'Opposition Growing to U.S. Exemption on Global Court' *Reuters News Online* 27 May 2004, accessed at www.reuters.com on 3 June 2004.

¹⁷ Rome Statute Article 8.

¹⁸ Rome Statute Article 8(2)(b)(iv).

A consideration of what might amount to environmental crimes, at least in the context of an international criminal tribunal, is not unprecedented. For example, following the bombing of Serbia and Kosovo by NATO forces during ‘Operation Allied Force’ (March – June 1999), the OTP of the ICTY commissioned a committee of experts (the Committee) to determine whether there was evidence justifying an investigation by the OTP into the actions of NATO personnel during that period. In the end, the report of the Committee¹⁹ concluded that there was insufficient evidence to warrant such an investigation, a recommendation that was accepted in its entirety by the OTP.

During the course of preparing the Report, the Committee considered possible environmental damage caused by the actions of NATO personnel. In this respect, it looked at the requirements of Articles 35(3) and 55 of the 1977 Additional Protocol I to the 1949 Geneva Conventions²⁰ and confirmed the customary international law obligation to avoid *excessive* long-term damage to the environment, even during the bombing of a legitimate military target.²¹ The Committee also referred to the Advisory Opinion of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons Case*²² to reaffirm an even wider general obligation to protect the environment against widespread long-term and severe environmental damage.

However, the Committee could not, in the end, clearly define the meaning of ‘excessive’ in the context of long-term damage to the environment and could not therefore conclude that the actions of NATO personnel overreached the standard. Notwithstanding the failure of the Committee to recommend the initiation of a formal investigation into these matters, it is clear that such an investigation was quite within the powers of the OTP – and in my opinion would have been totally warranted.²³ It is equally the case that such matters may, in certain circumstances, fall within the mandate of the ICC. It is therefore necessary to consider in turn each of the (defined) crimes within the jurisdiction of the ICC.

Environmental Crimes as Genocide?

The crime of genocide is defined in Article 6 of the Rome Statute. It mirrors the definition contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,²⁴ as well as the Statutes for both the ICTY²⁵ and the International

¹⁹ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000 (2000) 39 ILM 1257..

²⁰ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts.

²¹ Report paragraph 23.

²² (1996) ICJ Rep 242..

²³ For a detailed discussion of the findings of the Committee as set out in the Report, see for example Michael Cottier ‘Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor’s report of 13 June 2000’ in Horst F and ors (eds) *International and National Prosecution of Crimes Under International Law* (2001) Verlag, Berlin Germany and Steven Freeland ‘The Bombing of Kosovo and the Milosevic Trial: Reflections on Some Legal Issues’ [2002] *Australian International Law Journal* 150.

²⁴ 78 UNTS 277 (Genocide Convention).

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

Criminal Tribunal for Rwanda.²⁶ Genocide has quite often been referred to as the ‘crime of crimes’ and requires a very high threshold of intent before a conviction can be upheld. Moreover, it is restricted to actions taken against a group or part of a group based on ‘national, ethnical, racial or religious’ criteria.²⁷

For many years this definition was not considered at an international level,²⁸ since no ‘international penal tribunal’ had been established by States Parties to the Genocide Convention under Article VI.²⁹ Indeed, it was not until 1998 – exactly fifty years after the adoption of the Genocide Convention by the United Nations General Assembly – that the ICTR first looked at the meaning of the definition in any detail and we have only recently witnessed the first convictions for the crime.³⁰

At the outset it must be noted that the definition of the crime does not include actions intended to destroy (in part or whole) a group based on their *culture* – there is no concept at international criminal law of cultural genocide, despite the fact that it is needed. Indeed the notion of cultural genocide was deliberately excluded from the primary deliberations and negotiations leading to the finalization of the definition of genocide in the Genocide Convention. It was certainly assumed, therefore, that it would be necessary to categorize the victimized group within one of the four headings referred to above before the crime could be found to have been committed.

Putting this aside for one moment, however, one could certainly envisage situations involving the deliberate degradation of the environment which are intended to destroy a group (or part) by damaging its ability to carry on its cultural way of life. Indeed, the Rome Statute specifies that ‘[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction ...’ would fall within the type of acts that constitute genocide, assuming that the other elements of the crime are also present.³¹ The draining of the marshes in southern Iraq or the destruction of rainforests upon which local indigenous groups depend for their way of life, would seem to fall within this set of circumstances. Even so, it may be that the targeted group does not fall within one of the established groupings within the definition. It appears at first sight that this would defeat the possibility of classifying the actions as constituting genocide (even assuming that all other elements of the crime are present) within the jurisdiction of the ICC.

²⁶ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (1994) 33 ILM 1598 (ICTR Statute).

²⁷ Genocide Convention Article II, ICTY Statute Article 4(2), ICTR Statute Article 2(2), Rome Statute Article 6.

²⁸ The meaning of the definition of genocide had previously been considered by a small number of domestic decisions, of which *Attorney-General of the Government of Israel v Eichmann* ((1961) 36 ILR 5) was the most significant.

²⁹ Article VI of the Genocide Convention provides: ‘Persons charged with genocide or any other acts enumerated in Article III [conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, complicity in genocide] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction’.

³⁰ See ICTR, Judgement *Prosecutor v Akayesu* Case No ICTR-96-4-T, 2 September 1998.

³¹ Rome Statute Article 6(c).

This is not necessarily as clear-cut as first appears. In a recent case before Trial Chamber I of the ICTR, *Prosecutor v Akayesu*,³² the Court found that it was unable to ‘label’ the Tutsis as falling within any of the established groupings in relation to their persecution by the Hutus in Rwanda during 1994. Instead, the Court extended the meaning of Article 2 to apply to a ‘stable’ and ‘permanent’ group³³ and, as a result, found the accused guilty of the crime of genocide. Whilst this may have been a laudable result in the circumstances of that case, the Court clearly read the express terms of the definition beyond their ordinary meaning.³⁴

Indeed, this approach was expressly disapproved in *Prosecutor v Sikirica and others*,³⁵ where the [Trial Chamber] affirmed that, unlike some national jurisdictions, the ICTY has consistently excluded cultural genocide from falling within the definition of the treaty crime of genocide. Of course, there may be questions as to whether the customary international law crime of genocide may be different – indeed wider – than the treaty based crime specified in the Statutes of the *ad hoc* international criminal tribunals and the ICC. Furthermore, case law in the ICTY also confirms that ‘destroy’ in the definition of genocide means the *physical* destruction of the relevant group.³⁶

Nevertheless, the innovative approach in *Akayesu* highlights a number of issues that may be relevant to the issue of environmental crimes. If an extension of the relevant groupings was eventually to be accepted, it could quite feasibly be applied to cultural genocide perpetrated through the destruction of the natural habitat or resources upon which indigenous or minority populations are dependent. Moreover, it also demonstrates the inadequacies of the current definition of genocide in relation to the complex nature of actions perpetrated in an attempt to eliminate particular groups. It is clear that a definition coined almost 50 years ago to apply to the most horrendous of acts should be ‘upgraded’ to apply to modern (and not-so-modern) day events.

In the absence of this, however, it is unlikely that the destruction of a natural habitat would *per se* be prosecuted as an act of genocide. This is more so given the need for the Prosecutor, and the ICC itself, to develop strategies to further encourage universal acceptance among the broader spectrum of the international community, including the United States. To attempt to broaden the scope of the crime of genocide, as suggested, at this early stage in the ICC’s life would, unfortunately, have political implications that may adversely affect the ability of the Court to take action in respect of other – more ‘acceptable’ – notions of international crime.

Environmental Crimes as Crimes Against Humanity?

³² ICTR, *Prosecutor v Akayesu*, Case No ICTR-96-4-T, 2 September 1998.

³³ ICTR, Judgement *Prosecutor v Akayesu*, Case No ICTR-96-4-T, 2 September 1998 at paragraph 511.

³⁴ See 1969 Vienna Convention on the Law of Treaties (1155 UNTS 331) Article 31(1).

³⁵ ICTY, Judgement on Defence Motions to Acquit, *Prosecutor v Sikirica, Dosen and Kolundzija*, Case No. IT-95-8, 3 September 2001, paragraphs 63-86.

³⁶ ICTY, Judgement *Prosecutor v Jelesić*, Case No. IT-95-10-I 14 December 1999, paragraphs 78-83 and ICTY, Judgement (Appeals Chamber) *Prosecutor v Krstić*, Case No. IT-98-33-A 19 April 2004. See also a commentary by Elies van Sliedregt to appear in Andre Klip and Goran Sluiter *Annotated Leading Cases of International Criminal Tribunals* Volume VII in late 2004 (copy of commentary with author).

The international crime of crimes against humanity has the longest history of those crimes that fall within the jurisdiction of the ICC. It was included in the Nuremberg Agreement³⁷ and the Tokyo Charter,³⁸ and its scope has evolved over time through its formalization in the various Statutes of the *ad hoc* international tribunals. The definition of crimes against humanity in the Rome Statute is broader than previous formulations and can be regarded as representing customary international law.³⁹

Despite its expansion in scope, there is no specific mention of the environment in the definition of the crime, although some jurisprudence in the *ad hoc* Tribunals has made reference to environmental damage when discussing the broader aspects of the crime. However, the definition allows for the possibility of environmental crimes to fall within its ambit. The most probable areas for use in this regard are acts falling within Articles 7(1)(h) and 7(1)(k) of the Rome Statute. Article 7(1)(h) identifies '[p]ersecution against any identifiable group or collectively on political, racial, ethnic, *cultural*, religious, gender ... or other grounds ... recognized as impermissible under international law ...' (emphasis added). Clearly here the types of groups targeted are wider than for the crime of genocide. 'Persecution' is defined as meaning 'the intentional and severe deprivation of fundamental rights contrary to international law...'.⁴⁰

The deliberate destruction of habitat or access to clean and safe water or food on a significant scale could represent a breach of the fundamental human rights of the individuals within the targeted group who are affected. The various instruments that collectively constitute the 'International Bill of Rights'⁴¹ confirm these fundamental rights of an individual.

Another aspect of crimes against humanity that may be useful in prosecuting environmental crimes is the 'catch all' Article 7(1)(k), which refers to '[o]ther inhumane acts ... intentionally causing great suffering or serious injury to body or to mental or physical health'. Once again, one could envisage the possibility of acts that constitute environmental crimes falling within this definition.

Consequently, the crime of crimes against humanity, even as presently defined, represents a possible tool for the prosecution of environmental crimes before the ICC. Of course it will be necessary for the other elements of the crime, including the need

³⁷ The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis 82 UNTS 279, 284 (Nuremberg Agreement).

³⁸ A Charter created the International Military Tribunal for the Far East whose terms were included in a Special Proclamation issued by General MacArthur, the Supreme Commander for the Allied Powers, on 19 January 1946 (1589 TIAS 3).

³⁹ For example, the ICC includes a much broader range of actions involving sexual violence within the terms of crimes against humanity than either the ICTY Statute or the ICTR Statute. Article 7(g) of the Rome Statute includes '... sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' within the range of acts that may constitute crimes against humanity in addition to 'rape', which is the term used in both the ICTY Statute and the ICTR Statute.

⁴⁰ Rome Statute Article 7(2)(g).

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

for a ‘widespread or systematic attack directed against any civilian population, with knowledge of the attack’ to also be proven before a conviction can stand.⁴² Certainly there is a greater possibility that this crime, rather than genocide, would be used to bring such a prosecution, at least under current definitions. Indeed, it may well be strategically advantageous and symbolically important for the ICC Prosecutor to indict an act of environmental crimes under the heading of crimes against humanity in addition (or as an alternative) to war crimes (discussed below), given that crimes against humanity is generally regarded as the ‘worse’ crime of the two.⁴³

War Crimes and the Environment

As mentioned above, the environment is expressly referred to in relation to one aspect of the definition of war crimes in the Rome Statute. Article 8(2)(b)(iv) reflects the basic approach of the ILC in its Code of Offences Against the Peace and Security of Mankind adopted in 1996,⁴⁴ and also the sentiments of the relevant sections of the Additional Protocol to the Geneva Conventions discussed above. The Article specifies that, within the scope of an international armed conflict, the following actions could constitute a war crime:

‘Intentionally launching an attack in the knowledge that such attack will cause ... widespread, long-term and severe damage to the environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated’

This provision requires a balancing of damage as against military advantage, but sets a very high threshold of injury to the environment before the action is sufficient to fall within the crime. The apparent difficulties relating to the requirement of ‘excessive’ damage have already been canvassed and there is a real risk that, on a strict reading, the conditions applying this provision may be almost impossible to satisfy. It is therefore to be hoped that when faced with a prosecution based on this provision, the ICC will take a more robust and practical approach than the Committee looking at the NATO actions arising from Operation Allied Force (discussed above).

It can be seen therefore that, though there is clear reference to the environment, it may be difficult (though not impossible) to secure a conviction based on this provision for an act constituting an environmental crime, given the extent of damage required. In this regard, other provisions that fall within the definition of war crimes in the Rome Statute may be helpful and should at least be considered. In the ‘grave breaches’ provisions, which relate to the 1949 Geneva Conventions, Articles 8(2)(a)(iii)⁴⁵ and 8(2)(a)(iv)⁴⁶ of the Rome Statute may be applicable.

⁴² Rome Statute Article 7(1).

⁴³ This is evidenced by the fact that the Rome Statute allows for a seven year ‘opting out’ by States Parties of the War Crimes provisions (Rome Statute Article 124), but no such provision applies to genocide or crimes against humanity.

⁴⁴ Report of the ILC (1996), GAOR A/51/10. See also Patricia Birnie and Alan Boyle *International Law & The Environment* (2nd ed) (2002) Oxford University Press at 285.

⁴⁵ ‘Wilfully causing great suffering, or serious injury to body or health’.

⁴⁶ ‘Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’ – for example dams.

In addition, again within the context of international armed conflict, Articles 8(2)(b)(v),⁴⁷ 8(2)(b)(xvii)⁴⁸ and 8(2)(b)(xviii)⁴⁹ of the Rome Statute also appear to be applicable in appropriate circumstances.

While there are various legal thresholds to satisfy in order to justify a conviction of war crimes, this crime appears to be a potentially fertile area for the prosecution of environmental crimes. However, as mentioned above, it is not the only crime that may be applicable. There may be good legal and other reasons why crimes against humanity and even genocide should also be carefully considered in this regard. The important point to note is that the Prosecutor and the Court itself are certainly not limited only to the provision in the Rome Statute that makes express reference to the environment.

Conclusion

One of the principal goals leading to the establishment of the ICC has been the deterrence and punishment of the most serious international crimes. In this regard it represents another – albeit important – step in a process of ‘internationalization of justice’ that saw its formal beginnings in the Nuremberg and Tokyo⁵⁰ War Tribunals. The fact that it is a *permanent* international criminal court represents a landmark achievement that at least raises the possibility that these goals can be more effectively realized over time.

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

The commission of acts intended to render very significant damage to the environment and to seriously affect the livelihood and well-being of a group of people, from a moral viewpoint at least, falls within the nature of actions that the ICC has been created to deal with. Even in the absence of a separate and discrete crime of ‘Crimes against the Environment’ in the Rome Statute – an inclusion that this author would strongly support – these types of actions can in certain circumstances still be classified as constituting crimes currently within the Court’s competence. This is so even though the environment was not a major concern of the conference that led to the finalization of the Rome Statute. In the end, express reference to the environment appears only sparingly in the Rome Statute. There were simply too many other crucial issues that had to be dealt with and the crimes that were included in the Rome Statute

⁴⁷ ‘Attacking or bombarding ... towns, villages, dwellings or buildings which are undefended and which are not military objectives’ – for example chemical factories.

⁴⁸ ‘Employing poison or poisoned weapons’.

⁴⁹ ‘Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices’.

⁵⁰ International Military Tribunal for the Far East.

(with the obvious exception of the crime of aggression) were less uncertain as to their necessity and existence as a crime at customary international law.

At this stage we must deal with the cards that have been handed out. There is no scope for amendment of the Rome Statute until 2009, and it is by no means certain that the jurisdiction of the ICC will be expanded at that time.⁵¹ Hence the exercise of finding ways of including horrific actions within the current terms of the Rome Statute is very important. The prosecution of environmental crimes within the terms of the existing jurisdiction of the Court is possible and appropriate where the circumstances so warrant. There is no legal reason why this should not be the case. To the extent that others have dismissed this possibility, I believe that they are not correct. Of course, the environmental damage would, in reality, have to be very serious and the suffering of the targeted group severe to attract the attentions of the Prosecutor, particularly when there are so many other horrific acts taking place. Yet, as this brief analysis indicates, at least the military and others engaged in armed conflict cannot act without regard to the impact of their actions on the environment. To do so, particularly in circumstances where the environment itself is the subject of the action (either directly or indirectly), could give rise to the potential for prosecution under the Rome Statute.

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

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

⁵¹ The Rome Statute provides for a meeting of the Assembly of States Parties or a Review Conference seven years after the instrument enters into force: Rome Statute Article 121(2).