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Chapter 7

Crimes against the Environment: What Role for the International Criminal Court?

Steven Freeland*

Abstract: Acts perpetrated during the course of warfare have, through the ages, led to significant environmental destruction. These have included situations where the natural environment has intentionally been targeted as a ‘victim’ or has somehow been manipulated to serve as a ‘weapon’ of warfare. Until recently, such acts were generally regarded as an unfortunate but unavoidable element of armed conflict, despite their potentially disastrous impacts. The existing international rules have largely been ineffective and inappropriate and have in practical terms done little to deter deliberate environmental destruction, particularly when measured against perceived military advantages. However, as the significance of the environment has come to be more widely understood and recognised, this is no longer acceptable, particularly given the ongoing development of weapons capable of widespread and significant damage. This chapter examines the current legal regime under international criminal law relevant to the intentional destruction of the environment during warfare, and argues that such acts should, in appropriate circumstances, be recognised as an international crime and should be subject to more effective rules giving rise to international criminal responsibility within the framework of the Rome Statute of the International Criminal Court.

Keywords: international criminal law, international humanitarian law, criminal accountability for deliberate environmental destruction, crimes against the environment

7.1 The need for international criminal justice for the protection of the environment

History has borne witness to many deliberate acts aimed at destroying the natural environment during the course of a military conflict. Herodotus described how, in the fifth century BC, the retreating Scythians scorched the earth and poisoned the water wells in an effort to slow the advancing Persian army led by Darius. In 146 BC, Roman troops razed the city of Carthage and poisoned the surrounding soil with salt to prevent its future fertilisation. More recent warfare has seen further examples including:

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- (a) During the Vietnam War, the United States implemented ‘Operation Ranch Hand’ to devastating effect to destroy vegetation used by the enemy for cover and sustenance through the use of chemicals such as Agent Orange.¹
- (b) Towards the end of the Gulf War in 1991, retreating Iraqi forces deliberately ignited over 700 burning Kuwaiti oil well heads and emptied millions of barrels of oil into the Gulf waters. These actions gave rise to almost universal condemnation.² The then German Chancellor, Helmut Kohl, asserted that this constituted a ‘crime against the environment’.³
- (c) During the course of the 2003 invasion of Iraq, Human Rights Watch estimated that United States and British forces used almost 13,000 cluster bombs and over 1.9 tonnes of depleted uranium,⁴ causing very significant environmental damage, the extent of which may not be known for a considerable period of time.⁵
- (d) The western region of Darfur in Sudan has seen the poisoning of vital water wells and drinking water installations,⁶ as part of a deliberate government-supported strategy by the Arab Janjaweed Militia to eliminate or displace the ethnic black Africans living in that region.

As indicated by these examples (there are many more), and notwithstanding (or perhaps because of) its significance to human populations, the targeting of the environment has increasingly become a part of the conduct of armed conflict. Given the diverse ways in which armed conflict might be conducted, particularly in light of the development of weapons technology, there is even greater scope for such destructive actions in future warfare.

In the author’s opinion, the most appropriate method to address the issue is not through (civil) environmental protection measures, but rather under international criminal law (although it is hoped that this will have positive consequences for the environment), so that those who intentionally instigate such destruction can be made criminally liable. This chapter therefore examines the existing provisions of the Rome Statute that are, or may be, of relevance to the issue of the protection of the environment, and concludes by offering some comments and suggestions based on this analysis.

7.2 Historical background

International criminal law has been developing rapidly, particularly over the past two decades. This has principally been through the operation of the United Nations *ad hoc* international criminal tribunals, as well as a number of ‘hybrid’ or ‘internationalised’ courts established to deal with international crimes

¹ It has been estimated that Operation Ranch Hand destroyed 8 per cent of Vietnam’s croplands, 14 per cent of its forests, and 50 per cent of its swamp areas: Yuzon 1996, pp 795-6.

² Shortly afterwards, the Parliamentary Assembly of the Council of Europe called for the establishment of a war crimes tribunal to prosecute those responsible for ‘this disgraceful attack on the environment’: Leibler (1992), p 68.

³ Kohl 1991, p 255.

⁴ Haavisto 2005, p 581.

⁵ Depleted uranium is a by-product of the process of ‘uranium enrichment’, which involves the separation of the three different uranium isotopes (uranium-238, uranium-235 and uranium-234) as a preliminary step towards the use of nuclear fission as a source of energy (uranium-235 is the most suitable for nuclear fission): Koppe 2006, p 18.

⁶ See United Nations Commission on Human Rights ‘Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Situation of Human Rights in Darfur Region of the Sudan’ (7 May 2004) E/CN.4/2005/3, para 50 and 73.

perpetrated during specific conflicts.⁷ In addition, the world's first permanent international criminal institution, the International Criminal Court (ICC), was established in 2002. The development of this system of international criminal justice has been described as 'one of the few bright spots in the recent history of international law'.⁸

The establishment of the ICC dates back to December 1989 when the United Nations General Assembly asked the International Law Commission (ILC) to resume its work on the drafting of a constitutive instrument for an international criminal court,⁹ with a jurisdiction that would specifically include drug trafficking.¹⁰ The ILC completed a draft statute and submitted it to the United Nations General Assembly in 1994 (ILC Draft Statute).¹¹ After further work on the draft by the *Ad Hoc* Committee on the Establishment of an International Criminal Court, and later the Preparatory Committee on the Establishment of an International Criminal Court – a consolidated draft text was ready for submission to a diplomatic conference.

The General Assembly convened the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) from 15 June to 17 July 1998, 'with a view to finalizing and adopting a convention on the establishment of an international criminal court'.¹² The Rome Conference was attended by delegations from over 160 States, 30 Intergovernmental Organizations and 230 Non-Governmental Organizations. Right up until the final vote, there remained a number of contentious issues – particularly in relation to the extent of the Court's

⁷ The United Nations *ad hoc* Tribunals are the International Criminal Tribunal for the Former Yugoslavia (ICTY) – established by United Nations Security Council Resolution 827 (25 May 1993); and the International Criminal Tribunal for Rwanda – established by United Nations Security Council Resolution 955 (8 November 1994) (ICTR). In December 2010, the Mechanism for International Criminal Tribunals (MICT) was established to continue the 'obligations and essential functions' of the ICTR and the ICTY: United Nations Security Council Resolution 1966 (22 December 2010). The 'hybrid' or 'internationalised' criminal tribunals include those that operate or have operated in East Timor – established in 2000 by the United Nations Transitional Administration in East Timor (UNTAET), pursuant to UNTAET Regulations 2000/11 and 2000/15 (6 March 2000 and 6 June 2000 respectively); Sierra Leone – established by an agreement between the United Nations and the Government of Sierra Leone dated 16 January 2002, pursuant to United Nations Security Council Resolution 1315 (14 August 2000); and Cambodia – established by an agreement between the United Nations and the Government of Cambodia dated 6 June 2003, pursuant to United Nations General Assembly Resolution 57/228 B (13 May 2003). There is also the Special Tribunal for Lebanon, which operates in the Netherlands and was established by United Nations Security Council Resolution 1757 (30 May 2007).

⁸ Jessberger and Geneuss 2013, p 501.

⁹ The ILC had in 1948 already been invited by the United Nations General Assembly to 'study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide and other crimes': United Nations General Assembly Resolution 260 (III) B (9 December 1948). However, the political realities associated with the Cold War meant that, in 1954, the United Nations General Assembly halted work on the drafting of any statute for such a proposed court: see United Nations General Assembly Resolution 897 (IX) (4 December 1954), and United Nations General Assembly Resolution 898 (IX) (14 December 1954). For a description of the evolution of a system of international criminal justice leading up to the establishment of the ICC, see Freeland (2010), pp 195-210.

¹⁰ United Nations General Assembly Resolution 44/39 (4 December 1989), para 1.

¹¹ Draft Statute for an International Criminal Court, Report of the International Law Commission on Its Forty-sixth session, United Nations General Assembly Official Records 49th Sess., Supp. No. 10, (1994) (ILC Draft Statute).

¹² United Nations General Assembly Resolution 52/160 (15 December 1997), para 3.

proposed jurisdiction, as well as its relationship with the United Nations Security Council. In the end, however, the delegates adopted the final terms of the Rome Statute, albeit not unanimously.¹³

As events at the Rome Conference and subsequently have illustrated, the establishment of the ICC was as political an event as it was significant in the evolution of international criminal justice. The negotiating States, as well as the other stakeholders, represented a multitude of differing views as to how the Court should be structured. The final terms of the Rome Statute were, in many respects, the result of an ‘enduring tension inherent in multilateral negotiations between sovereignty and universality’,¹⁴ which by necessity required a ‘solution’ based upon political compromise. This was even the case in relation to the question of what crimes should be included in the Rome Statute,¹⁵ in order that the (draft) instrument could be presented as ‘marketable’ to the delegates.¹⁶

The precise scope of those crimes included in the final version of Rome Statute thus represented a *realpolitik* compromise in the circumstances – a careful balance between the important goals of the Court on the one hand,¹⁷ and a politically acceptable series of definitions of proscribed acts to be regarded as international crimes within the jurisdiction of the Court on the other. In such a context, a more expansive approach towards prohibiting intentional environmental damage during armed conflict beyond the scope of what was agreed under article 8(2)(b)(iv) was not politically feasible. Certainly, also, measures that would specifically protect the environment were not among the principal concerns of the delegates to the Rome Conference.

The ICC has the mandate to play a role when certain international crimes have (allegedly) been committed. As a permanent court, it differs from the *ad hoc* international criminal Tribunals. The ICTY and ICTR were set up as ‘UN subsidiary organs’,¹⁸ in response to specific events and were always intended to have a limited life-span, as is indicated by the formulation of the Completion Strategy for those Tribunals.¹⁹ By contrast, the ICC is ‘a permanent institution’, established under a treaty and, as such, is formally independent of the United Nations, although there is clearly an ongoing relationship between the two institutions on several key issues.²⁰ Unless the Assembly of States Parties to the Rome

¹³ Of those represented at the Rome Conference, 120 states voted to adopt the Rome Statute. There were 21 abstentions and seven states (China, Iraq, Israel, Libya, Qatar, Yemen and the USA) voted against the resolution.

¹⁴ McCormack and Robertson 1999, p 636.

¹⁵ For example, several states had argued that the definition of war crimes should include a provision prohibiting the use of nuclear weapons. As the Rome Conference was drawing to a close, these states largely agreed to compromise on this point – with the result that such a provision was not included in the Rome Statute – since they were prepared to ‘put the larger goal of achieving an international criminal court first’: see Kalivretakis (2001), p 702.

¹⁶ Williams 2000, p 546.

¹⁷ See Rome Statute, preamble.

¹⁸ Sarooshi 1999, p 389.

¹⁹ See *inter alia* United Nations Security Council Resolution 1503 (28 August 2003); United Nations Security Council Resolution 1534 (26 March 2004); United Nations Security Council Resolution 1966 (22 December

²⁰ There is a Negotiated Relationship Agreement between the International Criminal Court and the United Nations (4 October 2004), whose purpose is to ‘define [...] the terms on which the United Nations and the Court shall be brought into relationship’ (Article 1(1)). In addition, there are a number of provisions in the Rome Statute that formalize various aspects of the specific relationship between the Court and the United Nations Security Council: see, for example, Rome Statute, Articles 13(b), 16, 53(2)(c), 53(3)(a), 87(5), 87(7) and 115(b).

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Statute decides to completely alter the nature or focus of the Court, the ICC will remain in place for the long-term, and will have the potential to play a role in circumstances where ‘the most serious crimes of concern to the international community as a whole’ have been committed.²¹ In this sense, the Court represents an important mechanism of international criminal justice in relation to values and norms that are accepted universally among the international community now and into the future. These values and norms will continue to evolve further in the years and decades to follow in order to address relevant concerns regarding actions taken within the context of armed conflict that may, for example, threaten the future of humanity.

7.3 The core crimes under the Rome Statute

The Rome Statute currently provides that the following crimes fall within the jurisdiction of the ICC:

- (a) Genocide – when committed ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’;²²
- (b) Crimes against humanity – when committed ‘as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’;²³
- (c) War crimes – which usually involves a breach of the 1949 Geneva Conventions,²⁴ and/or the laws and customs of armed conflict, ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’;²⁵ and
- (d) The Crime of Aggression as more recently defined.²⁶

These crimes, particularly those of genocide, crimes against humanity and war crimes, are broadly regarded as reflecting universal international criminal norms.²⁷ Shortly after the conclusion of the Rome Statute, a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) described the legal effect of the provisions of the Rome Statute in the following way:

Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be

brought into relationship’ (Article 1(1)). In addition, there are a number of provisions in the Rome Statute that formalize various aspects of the specific relationship between the Court and the United Nations Security Council: see, for example, Rome Statute, Articles 13(b), 16, 53(2)(c), 53(3)(a), 87(5), 87(7) and 115(b).

²¹ Rome Statute, preamble, para 4.

²² See Rome Statute, chapeau, Article 6.

²³ *Ibid.*, Article 7(1).

²⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 31, entered into force 21 October 1950; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85, entered into force 21 October 1950; Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135, entered into force 21 October 1950; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287, entered into force 21 October 1950.

²⁵ See Rome Statute, Article 8(1).

²⁶ See *ibid.*, Article 8 bis.

²⁷ For the purposes of the discussion that follows in this chapter, these three crimes are referred to as the ‘core international crimes’.

taken as constituting an authoritative expression of the legal views of a great number of States.²⁸

Since that time, it has been asserted that the Rome Statute ‘purports to contain a comprehensive stocktaking of the current status of customary international law’.²⁹ This may be over-stating the case, since particular aspects of the definitions of crimes in the Rome Statute, in particular, that of crimes against humanity and war crimes, and the crime of aggression as a whole, most likely also include(d) elements of ‘progressive development’, rather than already well-established principles of law. Hence, arguments persist as to whether every aspect of the definitions of the crimes in the Rome Statute may (or may not) be identical to current customary international law.³⁰ Nevertheless, it is generally acknowledged that the general parameters of the core international crimes represent acts that are a gross affront to fundamental norms.

Whilst the Rome Statute does not contain a specific crime of ‘crimes against the environment’ within the crimes in relation to which the Court has jurisdiction,³¹ it does set out the circumstances in which a particular level of damage to the ‘natural environment’ may constitute a war crime. This represents the first time that the environment has been expressly mentioned in the constitutive documents of any of the international criminal courts/tribunals that have been established.

As a general observation, the inclusion of such a provision within the statute of what is intended to be a *permanent* international criminal court might, potentially, represent an important preliminary step towards individual criminal responsibility for intentional environmental destruction during armed conflict. However, the effectiveness of any provision depends upon its express terms. The reality of the severe damage that has been, and inevitably will in the future be inflicted on the environment during the course of armed conflict necessitates an understanding of whether the existing obligations are adequate, or whether, in fact, they may need further development and amendment.

7.4 Jurisdiction of the ICC – a brief overview

As noted above, the ICC has jurisdiction in relation to the specific crimes of genocide (article 6), crimes against humanity (article 7), war crimes (article 8), as well as the more recently defined crime of aggression.³² The specific requirements of the former three crimes, particularly as they might possibly be applied to intentional destruction of the environment during armed conflict, are discussed below.

In general terms, and as is the case with serious crimes under the national law of most countries, these crimes require the presence of both a ‘physical’ element (*actus reus*) and a ‘mental’ element (*mens rea*).³³ In terms of the mental element, the Rome Statute sets out a ‘default’ standard of *mens rea*, which specifies that, for individual criminal responsibility to apply, the material (physical) elements of the

²⁸ ICTY Trial Chamber, *Prosecutor v Furundzija*, Judgment, 10 December 1998, Case No. IT-95-17/1, para 227.

²⁹ Kalivretakis 2001, p 684.

³⁰ See, for example, Cassese 2003, pp 91-94. See also ICTY Trial Chamber, *Prosecutor v Kupreskic et al*, Judgment, 14 January 2000, Case No. IT-95-16-T, where the Trial Chamber (at para 545) noted that ‘[b]y requiring that crimes against humanity be committed in either internal or international armed conflict, the [United Nations] Security Council, in establishing the [ICTY], may have defined the crime in Article 5 [of the Statute of the ICTY] more narrowly than is necessary under customary international law’.

³¹ This was partly due to the fact that such an idea ‘regrettably’ failed to gain support in the deliberations leading to the finalization of the Rome Statute: Rest 2004), p 18.

³³ See, for example, Schabas 2000, chapters 4 and 5.

crime must be ‘committed with intent and knowledge’, as those terms are defined in the provision.³⁴ This standard applies ‘[u]nless otherwise provided’, so that specific crimes may have *mens rea* requirements that differ from the article 30 standard.

Articles 12 and 13 of the Rome Statute specify the ‘[p]reconditions to the exercise of jurisdiction’ and ‘exercise of jurisdiction’ by the Court respectively.³⁵ The Court has jurisdiction over natural persons only – thus excluding the possibility of bringing charges under the Rome Statute against a corporation.³⁶ In summary, the Court can exercise its jurisdiction in relation to the crimes identified in the Rome Statute in the following circumstances:

- (a) where an (alleged) crime has been committed on the territory of a State Party to the Rome Statute;³⁷
- (b) where a national(s) of a State Party to the Rome Statute is alleged to have committed a crime;³⁸
- (c) where a situation in which a crime(s) ‘appears to have been committed’ has been referred to the Prosecutor of the ICC by the United Nations Security Council acting under Chapter VII of the United Nations Charter;³⁹ or
- (d) where a non-State Party to the Rome Statute lodges a declaration with the Registrar of the ICC, accepting the jurisdiction of the Court with respect to the ‘crime in question’.⁴⁰

The ICC is also subject to a specific *ratione temporis*. As set out in article 11 of the Rome Statute, the Court has the power to exercise its jurisdiction with respect to circumstances that may occur *in the future* – that is, at any time after the Rome Statute came into force (1 July 2002).⁴¹

Finally, the jurisdiction of the Court is subject to the principle of ‘complementarity’ as established under the Rome Statute. In essence, this means that primary responsibility for the prosecution of these crimes lies with States, and that the ICC therefore operates as a ‘court of last resort’. This in itself demonstrates a shift in emphasis from the culture of impunity that had existed before the 1990s, during which time States had been reluctant to try their own nationals for war crimes, ‘and even more [so] where crimes against humanity or genocide [were] concerned’.⁴²

Article 17 of the Rome Statute applies the complementarity principle in terms of the ‘admissibility’ of a case. A case is determined by the Court as being inadmissible *inter alia* where:

³⁴ Rome Statute, Article 30(1).

³⁵ There are specific provisions relating to the exercise by the Court of its jurisdiction over the crime of aggression: see *ibid.*, Article 15 bis and 15 ter.

³⁶ *Ibid.*, Article 25(1).

³⁷ *Ibid.*, Article 12(2)(a).

³⁸ *Ibid.*, Article 12(2)(b).

³⁹ *Ibid.*, Article 13(b).

⁴⁰ *Ibid.*, Article 12(3). For a discussion of the declaration process by non-state parties under Article 12(3) of the Rome Statute, see Freeland (2006); Stahn (2006).

⁴¹ It should be noted, however, that if a state becomes a State Party to the Rome Statute after 1 July 2002, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute for that state, unless that state has made a declaration as a non-state party under Article 12(3) of the Rome Statute: see Rome Statute, Article 11(2).

⁴² Sands 2003, p 72.

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- [...]
- (d) The case is not of sufficient gravity to justify further action by the Court.⁴³

This creates what has been described as a ‘presumption in favour of prosecution in domestic courts’,⁴⁴ given that it accords a priority to national jurisdiction. This is to be contrasted with the ‘primacy’ principle under which the *ad hoc* Tribunals operate.⁴⁵

Article 17(2) specifies those circumstances in which the ICC may determine the ‘unwillingness’ of a State in a particular case. This may arise in the following situations:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility;
- (b) ... an unjustified delay in the proceedings ... inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were or are not being conducted independently or impartially, and ... are being conducted in a manner ... inconsistent with an intent to bring the person concerned to justice.⁴⁶

In assessing these circumstances, the Court is to have regard to ‘the principles of due process recognized by international law’.⁴⁷ In determining a State’s (in)ability in a particular case, the Court has to consider whether:

⁴³ Rome Statute, Article 17(1). The Appeals Chamber of the ICC considered the meaning of the words ‘is being investigated’ in Article 17(1)(a) of the Rome Statute in Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’: Appeals Chamber, *Prosecutor v Ruto, Kosgey and Sang*, 30 August 2011, Case No. ICC-01/09-01/11 OA, and Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’: Appeals Chamber, *Prosecutor v Muthaura, Kenyatta and Ali*, 30 August 2011, Case No. ICC-01/09-02/11 OA.

⁴⁴ Sarooshi 1999, p 395.

⁴⁵ See Articles 9(1) and 9(2) of the 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, 32 ILM 1159 (ICTY Statute). The Appeals Chamber of the ICTY confirmed the legitimacy of its primacy in Decision on Defence Motion for Interlocutory Appeal on Jurisdiction: ICTY Appeals Chamber, *Prosecutor v Duško Tadić*, 2 October 1995, Case No. IT-94-1, para 49-64. See also Articles 8(1) and 8(2) of the 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, 33 ILM 1598 (ICTR Statute), which is in slightly wider terms.

⁴⁶ Rome Statute, Article 17(2).

⁴⁷ *Ibid.*

...due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or ... evidence or otherwise [is] unable to carry out its proceedings.⁴⁸

7.5 Applicability of the Rome Statute to environmental crimes

As mentioned, article 8(2)(b)(iv) expressly refers to, and ‘criminalizes’ damage to, the natural environment in certain specific circumstances and will be considered in detail below. Before turning to that specific provision, however, we first consider whether it may be possible that other provisions of the Rome Statute might also be relevant to such acts; specifically, whether the crimes of genocide, crimes against humanity and other war crimes also address the issue to any significant degree. In this way, one can gain a more comprehensive understanding of the applicability of the Rome Statute to acts that might constitute a crime against the environment, as well as the significance of article 8(2)(b)(iv) itself within the broader schema of crimes within the instrument. In undertaking this exercise, however, it is important to bear in mind that, as provided in the Rome Statute itself:⁴⁹

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.

7.6 Intentional destruction of the environment as genocide?

The word ‘genocide’ was first coined in 1944 by a Polish-Jewish lawyer, Raphael Lemkin, who lobbied to have the issue of genocide as an international crime discussed at the United Nations General Assembly. The international community ultimately agreed with the assertion that genocide was indeed a crime under international law.⁵⁰ There then followed a number of General Assembly Resolutions,⁵¹

⁴⁸ Rome Statute, Article 17(3).

⁴⁹ *Ibid.*, Article 22(2). In May 2008, the ICC Appeals Chamber endorsed its earlier finding when considering its methodology for the interpretation of the Rome Statute, where it had stated: ‘The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty’: Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber 1 entitled ‘Decision on the Defence Request Concerning Languages’: Appeals Chamber, *Prosecutor v Germain Katanga*, 27 May 2008, Case No. ICC-01/04-01/07 (OA3), para 39.

⁵⁰ Some commentators consider that *acts* of genocide had in fact been included within the concept of ‘crimes against humanity’ as applied in the indictments brought under the Charter of the Nuremberg International Military Tribunal, annexed to the 1945 London Agreement for the Establishment of an International Military Tribunal (8 August 1945) 82 UNTS 279 (Nuremberg Charter): see, for example, Restatement of the Law: Third Restatement of U.S. Foreign Relations Law, Volume 2 (1987), 165, ss 702, Reporters’ comments, para 3. However, it is now accepted that, even though they have some common elements, what distinguishes genocide from crimes against humanity is that the crime of genocide is a ‘crime of intent’ in which a specific ‘group’ is targeted, and not merely specific individuals within that group; or put another way, ‘the ultimate victim of genocide is the group’: Judgment on Defence Motions to Acquit: Trial Chamber, *Prosecutor v Sikirica, Dosen and Kolundzija*, 3 September 2001, Case No. IT-95-8-T, para 89.

⁵¹ See, for example, United Nations General Assembly Resolution 96(I) (11 December 1946).

culminating in the adoption of the Genocide Convention.⁵² This landmark instrument set out an agreed definition of genocide that has since remained largely unchanged.

The Genocide Convention was the first major treaty dealing with human rights issues to be concluded under the auspices of the United Nations. The ICJ has said of the Genocide Convention that:

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as “a crime under international law” involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations.⁵³

The crime of genocide as defined in the Rome Statute is drawn from the definition in the 1948 Genocide Convention, which was incorporated as well into the ICTY and ICTR Statutes.⁵⁴ The preamble of the Genocide Convention notes that ‘at all periods of history genocide has inflicted great losses on humanity’.⁵⁵ Genocide has been referred to as the ‘crime of crimes’⁵⁶ and is often regarded as the most heinous of all violations of human rights.⁵⁷ The particular distinguishing characteristic of the crime is, as noted, its focus on ‘groups’, specifically the intended destruction of entire human groups.⁵⁸ It therefore incorporates a very specific *dolus specialis*, being the intent ‘to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’.⁵⁹

From the perspective of any prosecution, this specific intent is far more complex in terms of proof than a *general* intent, which might instead be inferred on the basis of a ‘reasonable person’ test,⁶⁰ and/or the default standard of intent set out in article 30 of the Rome Statute. For this reason, genocide is a very difficult crime to prove in the absence of a clear ‘paper trail’ - which would not normally exist⁶¹ –

⁵² Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277, entered into force 12 June 1951 (Genocide Convention).

⁵³ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, [1951] ICJ Rep 16, 23.

⁵⁴ There are, however, some differences between the ICTY and ICTR Statutes on the one hand and the Rome Statute on the other. For example, Article 4(3) of the ICTY Statute and Article 2(3) of the ICTR Statute respectively specify that the following acts are punishable:

‘(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide’.

By contrast, these acts are not included in Article 6 of the Rome Statute, but are instead incorporated into Article 25(3), which deals with individual criminal responsibility and applies to each of the crimes within the jurisdiction of the Court. The act of ‘directly and publicly incit[ing] others to commit genocide’ is, however, specifically referred to in Article 25(3)(e) of the Rome Statute.

⁵⁵ *Genocide Convention*, preamble para 2.

⁵⁶ ICTR Trial Chamber, *Prosecutor v Akayesu*, Judgment, 2 September 1998, Case No. ICTR-96-4-T, para 16.

⁵⁷ de Vito et al 2009, p 37.

⁵⁸ *Ibid.*, p 36.

⁵⁹ *Genocide Convention*, Article II. See also, for example, Rome Statute, chapeau Article 6.

⁶⁰ Bassiouni 2000, p 9.

⁶¹ See, for example, *Ibid.*, where Bassiouni suggests that the *Genocide Convention* was drafted with the Nazi Germany experience in mind, which left behind a very detailed paper trail, but that this is a ‘situation [that] never has been repeated’.

although there have since 1998 been several successful prosecutions of genocide before the *ad hoc* Tribunals, and counts of genocide have also been alleged against accused before the ICC.⁶²

As for the ‘physical’ elements, the crime comprises a number of acts of genocide relating to four specific types of group. The concept of genocide based on an intention to destroy a ‘political’ group was not included in the final definition, despite having been part of both Lemkin’s original draft definition, as well as the more general description adopted by the United Nations General Assembly two years prior to the conclusion of the Genocide Convention.⁶³ Attempts to include political and social groups into the Rome Statute definition were also not accepted at the Rome Conference, as the majority of States present did not want to alter a definition that was clearly recognized under customary international law.⁶⁴

Similarly, the definition of genocide does not appear to include actions intended to destroy (in whole or in part) a group based on their *culture*. Thus, from a legal perspective, there exists no formal concept under international criminal law of ‘cultural genocide’.⁶⁵

Acts designed to destroy a group (in whole or in part) could possibly involve the intentional destruction of the environment during armed conflict, as a way of attempting to render impossible the group’s ability to continue to exist. 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.⁶⁶ Under this provision, it is not necessary for the intended ‘results’ – the *actual* destruction of the group – to occur. A ‘result requirement’ had been proposed by the United States in the drafting process of the Elements of Crimes under the Rome Statute (Elements of Crimes),⁶⁷ but was ultimately not included in the final version.⁶⁸

Although the footnote to article 6(c) in the Elements of Crimes also envisages a broader range of circumstances,⁶⁹ acts such as the poisoning of water wells or destruction of forests upon which local indigenous groups depend could arguably fall within this description, although it is still necessary to demonstrate that the special intention to ‘destroy’ is directed towards the *physical* destruction (in whole

⁶² See, for example, *Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, ICC Pre-Trial Chamber I, *Prosecutor v. Al Bashir* (‘Omar Al Bashir’), 12 July 2010, Case No. ICC-02/05-01/09. This accused was also charged with five counts of crimes against humanity and two counts of war crimes.

⁶³ See United Nations General Assembly Resolution 96(I) (11 December 1946), para 4.

⁶⁴ See Werle 2005, p 191.

⁶⁵ See, however, *ibid*, where the author suggests that Article 6(e) of the Rome Statute (‘Forcibly transferring children of the group to another group’) ‘defines a form of cultural genocide’.

⁶⁶ Rome Statute, Article 6(c).

⁶⁷ Article 9(1) of the Rome Statute provides for the adoption of the ‘Elements of Crimes’ by a two-thirds majority of the Assembly of States Parties to the Rome Statute, and specifies that their function is to ‘assist the Court in the interpretation and application of Articles 6, 7 and 8’ of the Rome Statute. See also Elements of Crimes (9 September 2002), Article 6(c).

⁶⁸ Rückert and Witschel 2001, p 68.

⁶⁹ This footnote provides that: ‘[t]he ‘conditions of life’ may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes’. See also ICTR Trial Chamber, *Prosecutor v Akayesu*, Judgment, 2 September 1998, Case No. ICTR-96-4-T, para 506.

or in part) of the relevant group,⁷⁰ rather than, for example, their ‘way of life’. As noted, proving the existence of this *dolus specialis* is a difficult exercise, and reliance on this provision to address the intentional destruction of the environment will therefore rarely be applicable.

In addition, it may be that the targeted group that is the subject of the environmental destruction does not constitute one of the established groupings within the definition of genocide. As noted, these groups were ‘chosen’ very carefully by the international community when originally agreeing the definition of the crime, and various additional groups suggested by Lemkin and others were deliberately not included. That said, the categorization into (one or more of) the four specified groups in the definition of the crime of genocide may not, however, always be quite as clear-cut as might first appear. Schabas has, for example, suggested that the listed groups ‘resist efforts at precise definition’.⁷¹

Nevertheless, it appears highly unlikely that the intentional destruction of the environment during armed conflict would *per se* fall within the (current) definition of genocide. To assert otherwise would, in effect, impose a ‘double intent’ requirement to what is already a very complex crime. Not only would it be necessary to show the existence of the current *dolus specialis*, but an additional intent – to target the environment as a victim or use it as a weapon – would also be necessary to prove genocide for such acts. This would constitute a redefinition of the crime (at least in relation to circumstances involving the intentional destruction of the environment) and would mean that, for practical purposes, it would be virtually impossible to prove beyond a reasonable doubt the commission of what is a very difficult crime to prove.

In any event, given the ‘stigma’ associated with this crime of crimes, it would be unlikely that circumstances pointing ‘just’ to the intentional targeting of the environment alone would be prosecuted as genocide. Consequently, even if acts of this type were such as to (possibly) constitute an act of genocide, it is likely that the Prosecutor would take a conservative approach. To date, prosecution in the international Tribunals for the crime of genocide has generally been ‘reserved’ for ‘high profile’ acts that have resulted in, or have been intended to, directly cause very considerable harm to a relevant group.

Moreover, the Elements of Crimes appear to limit any scope for considering intentional environmental destruction as an act of genocide, by stipulating that, for each of the acts that might constitute an act of genocide under the Rome Statute, that act *inter alia* must have taken place ‘in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction’.⁷²

This is not to say that the range of acts of genocide may not expand in the future. However, at least in the relatively early stages of the judicial activities of the ICC, there is a need for the Prosecutor, and the Court itself, not to be seen to be ‘creating’ crimes that are not clearly set out in the Rome Statute, as this flies in the face of the political concerns that lead to the compromised terms of the Rome Statute.

⁷⁰ ICTY Trial Chamber, *Prosecutor v Jelešić*, Judgment, 14 December 1999, Case No. IT-95-10-I, para 78-83. It has been held by the ICTY Appeals Chamber that the ‘in part’ requirement refers to a ‘substantial part of that group’: see ICTY Appeals Chamber, *Prosecutor v Krstić*, Judgment, 19 April 2004, Case No. IT-98-33-A, para 8 and the various references made in paras 8-13.

⁷¹ Schabas 2000, p 109. See also ICTR Trial Chamber, *Prosecutor v Akayesu*, Judgment, 2 September 1998, Case No. ICTR-96-4-T.

⁷² See Elements of Crimes, Articles 6(a)(4), 6(b)(4), 6(c)(5), 6(d)(5) and 6(e)(7).

7.7 Intentional destruction of the environment as a crime against humanity?

Although ‘crimes against humanity’ was not formally categorized as a separate crime until after the Second World War, the concept had by that time already been recognized. In May 1915, the Governments of France, Great Britain and Russia made a declaration regarding the massacres of the Armenian population in Turkey, denouncing them as ‘crimes against humanity and civilisation for which all the members of the Turkish government will be held responsible together with its agents implicated in the massacres’.⁷³

Crimes against humanity were recognized (and codified) in the Nuremberg Charter,⁷⁴ and considered in the Judgment of the Nuremberg Military Tribunal, as well as in Law No. 10 of the Control Council for Germany,⁷⁵ and the Tokyo Military Tribunal Charter.⁷⁶

Since the Nuremberg and Tokyo Military Tribunal trials, the concept of crimes against humanity has continued to undergo a gradual evolution, firstly in national cases such as *Eichmann*⁷⁷ and *Barbie*,⁷⁸ and subsequently as it has been defined in the Statutes of the *ad hoc* international Tribunals⁷⁹ and, ultimately, in the Rome Statute itself. The definition of crimes against humanity in the Rome Statute is broader than any previous formulation in several important respects.

Despite this process of evolution and expansion, there is no specific reference to the environment in the definition of crimes against humanity. It is true, however, that certain acts that constitute crimes against

⁷³ See ICTR Trial Chamber, *Prosecutor v Akayesu*, Judgment, 2 September 1998, Case No. ICTR-96-4-T, para 565 and the corresponding footnote.

⁷⁴ See Nuremberg Charter, Article 6(c).

⁷⁵ See Law No. 10 of the Control Council for Germany, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (20 December 1945) 36 ILR 31, Article II. This law was enacted to establish a legal basis in Germany for the trial of war criminals who were not prosecuted by the Nuremberg Military Tribunal: Jørgensen 2000, p 20.

⁷⁶ See Charter of the International Military Tribunal for the trial of the major war criminals in the Far East (19 January 1946) TIAS 1589; 4 Bevans 20 (Tokyo Charter), Article 5(c).

⁷⁷ *Attorney-General of the Government of Israel v Eichmann* (1961) 36 ILR 5. Eichmann was prosecuted under Israeli law (1951 Nazi and Nazi Collaborators (Punishment) Law) for war crimes, crimes against the Jewish people (the definition of which was modeled on the definition of genocide in the 1948 Genocide Convention) and crimes against humanity. He was convicted by the District Court of Jerusalem and sentenced to death. His appeal to the Supreme Court of Israel was dismissed: *Eichmann v Attorney-General of the Government of Israel* (1962) 36 ILR 277.

⁷⁸ In 1987, Klaus Barbie, who had been the head of the Gestapo in Lyon from November 1942 to August 1943 and was known as the ‘Butcher of Lyon’, was convicted by the Rhone *Cour d’assises* of 17 counts of crimes against humanity. His appeal was dismissed by the French Court of Cassation: *Fédération Nationale des Déportées et Internés Résistants et Patriotes and Others v. Barbie* 100 ILR 330.

⁷⁹ Article 3 of the ICTR Statute defines crimes against humanity as any one of a number of enumerated acts ‘... when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds’. Article 5 of the ICTY Statute defines crimes against humanity to include the same acts, but ‘... when committed in armed conflict, whether international or internal in character, and directed against any civilian population’. However, in practice, the ICTY has adopted the criteria mentioned in the chapeau of Article 3 of the ICTR Statute: see, for example, ICTY Appeals Chamber, *Prosecutor v Kupreskic & Ors*, Judgment, 14 January 2000, Case No. IT-95-16-T, para 544; ICTY Appeals Chamber, *Prosecutor v Blaskic*, Judgment, 29 July 2004, Case No. IT-95-14-A, paras 96-126. This practice has been criticised by some commentators: see, for example, Lattanzi 2001, pp 478-82.

humanity might also relate to circumstances where the environment has been intentionally targeted. The Rome Statute defines a crime against humanity as any of a number of specified acts ‘committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.⁸⁰ These include:

[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court⁸¹

and ‘[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’.⁸²

Article 7(1)(h) identifies persecution against ‘any identifiable group’ or ‘collectively’ on a very broad basis (‘any other grounds’) – the characterization of the targeted groups for this crime is therefore significantly wider than for the crime of genocide. ‘Persecution’ is defined for the purposes of article 7(1) of the Rome Statute as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’.⁸³

The deliberate destruction of a habitat⁸⁴ or of access to clean and safe water or food on a significant scale could, in certain circumstances, represent a breach of the fundamental human rights of the individuals within a targeted group, as perhaps might some other acts of environmental destruction. The right to ‘adequate food’ is, for example, expressly included in article 11 of the ICESCR,⁸⁵ one of the principal human rights instruments that makes up the so-called ‘International Bill of Human Rights’.⁸⁶ The right to water is, in addition, guaranteed in articles 11 and 12 of the ICESCR. The duty to provide water is also expressly specified in article 24 of the Convention on the Rights of the Child,⁸⁷ and article 14 of the Convention of All Forms of Discrimination against Women.⁸⁸ In relation to the right to water, the United Nations Committee on Economic, Social and Cultural Rights has stated that:⁸⁹

⁸⁰ Rome Statute, chapeau Article 7(1).

⁸¹ *Ibid.*, Article 7(1)(h).

⁸² *Ibid.*, Article 7(1)(k).

⁸³ Rome Statute, Article 7(2)(g).

⁸⁴ Conservation regimes such as those specified in the European Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora are not expressly designed, nor appropriate to deal with the intentional destruction of the environment during armed conflict.

⁸⁵ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (ICESCR).

⁸⁶ The other two instruments that, together with the ICESCR make up the ‘International Bill of Human Rights’, are the Universal Declaration of Human Rights, adopted by United Nations General Assembly Resolution 217A (III) (10 December 1948), and the International Covenant on Civil and Political Rights, 999 UNTS 171.

⁸⁷ See Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990, Article 24(2)(c).

⁸⁸ See Convention on the Elimination of All Forms of Discrimination against Women, entered into force 18 December 1979, 19 ILM 33, entered into force 3 September 1981, Article 14(h).

⁸⁹ United Nations Committee on Economic, Social and Cultural Rights, ‘Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15 (2002) - The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)’ (November 2002), para 1 and 3. See also Horn and Freeland, p 101.

Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights

(...)

The right [to water] should also be seen in conjunction with the other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity

Thus, in theory, the terms of article 7(1)(h) of the Rome Statute might extend to certain acts that intentionally target the environment during armed conflict. One should also note the ‘catch all’ provision, article 7(1)(k) of the Rome Statute, referred to above. Once again, one could envisage the possibility of acts that constitute environmental crimes perhaps falling within the terms of that provision.

However, it would of course also be necessary to prove the other elements of the crime of crimes against humanity. The chapeau of article 7 sets out a number of overarching elements of the crime of crimes against humanity, which must also be present in order to support a conviction. This includes a ‘widespread or systematic attack directed against any civilian population’. There has been considerable jurisprudence in relation to the meaning of the concepts of ‘widespread’ and ‘systematic’ in this context. The Appeals Chamber of the ICTY has confirmed that “‘widespread’ refers to the large-scale nature of the attack and the number of targeted persons, while the phrase “systematic” refers to the organized nature of the acts of violence and the improbability of their random occurrence’.”⁹⁰ In a similar vein, in 2009, a Pre-Trial Chamber of the ICC confirmed that:

Although the terms “widespread” and “systematic” are not specifically defined in the Statute, the Chamber has previously held that this language excludes random or isolated acts of violence, and that the term “widespread” refers to the large-scale nature of the attack, as well as to the number of victims, while the term “systematic” pertains to the organised nature of the acts of violence and to the improbability of their random occurrence.⁹¹

The two expressions are set out in the chapeau in the disjunctive (‘or’) form and are therefore alternate requirements. It is not necessary to demonstrate that the relevant attack meets both criteria – one would be sufficient to support a conviction. Be that as it may, both expressions at least suggest on their face that a crime against humanity will generally only occur in the context of a multiplicity of actions, an observation that is reinforced by article 7(2)(a) of the Rome Statute, which specifies that an ‘attack directed against any civilian population’ means:

... a course of conduct involving the *multiple commission of acts* referred to in [article 7(1) of the Rome Statute] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;⁹²

⁹⁰ ICTY Appeals Chamber, *Prosecutor v Blaskic*, Judgment, 29 July 2004, Case No. IT-95-14-A, para 101, referring to ICTY Appeals Chamber, *Prosecutor v Kunarac & Ors*, Judgment, 12 June 2002, Case No. IT-96-23 and IT-96-23/1-A, para 94.

⁹¹ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC Pre-Trial Chamber I, *Prosecutor v Al Bashir (‘Omar Al Bashir’)*, 4 March 2009, Case No. ICC-02/05-01/09, para 81.

⁹² Rome Statute, Article 7(2)(a) (emphasis added).

However, it is still possible for a limited number of acts, or even a single act by an accused, to constitute a crime against humanity, assuming that all other elements of the crime are satisfied, if they are ‘a part of [the] attack ... unless those acts may be said to be isolated or random’.⁹³ Nevertheless, the overall combined effect of these elements, coupled with the fact that there is a need to demonstrate the existence of a ‘policy to commit such attack’, would seem to make it very difficult to bring acts done with the intent to destroy the environment during armed conflict within the terms of crimes against humanity.

Further, and most significantly for the purposes of this discussion, any possible connection is made even more tenuous due to the requirement that the attack must be directed ‘against any civilian population’. In essence, for a crime against humanity to be committed, it is necessary to demonstrate that the civilian population is the ‘victim’ or ‘primary object’ of such an attack.⁹⁴ Indeed, the ‘status of the victim as a civilian’ is one of the characterizing features of a crime against humanity.⁹⁵ In order to determine whether the attack has been directed against the civilian population in this way, the ICTY has stated that the following factors must be considered:

...the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war...⁹⁶

Although the intentional destruction of the environment during armed conflict may often be intended as a method of harming specific populations, it is for this reason that the crime of crimes against humanity is not readily applicable in circumstances where it is the *environment* (as opposed to the civilians) that is deliberately targeted as the victim or the primary object of such acts. It is this specific victim perspective that differentiates any notion of a crime *against* the environment from the other core international crimes in the Rome Statute and, as a consequence, such acts will not fall within the requirements of crimes against humanity.

7.8 Intentional destruction of the environment as a war crime?

7.8.1 Article 8(2)(b)(iv)

As noted, the ‘natural environment’ is expressly referred to in only one provision of the Rome Statute, this being a specific act within the definition of war crimes.⁹⁷ Article 8(2)(b)(iv) specifies that, ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’,⁹⁸ a war crime within the jurisdiction of the Court includes:

⁹³ ICTY Appeals Chamber, *Prosecutor v Blaskic*, Judgment, 29 July 2004, Case No. IT-95-14-A, para 101, referring to ICTY Appeals Chamber, *Prosecutor v Kunarac & Ors*, Judgment, 12 June 2002, Case No. IT-96-23 and IT-96-23/1-A, para 96.

⁹⁴ ICTY Appeals Chamber, *Prosecutor v Kunarac & Ors*, Judgment, 12 June 2002, Case No. IT-96-23 and IT-96-23/1-A, para 91.

⁹⁵ ICTY Appeals Chamber, *Prosecutor v Blaskic*, Judgment, 29 July 2004, Case No. IT-95-14-A, para 107.

⁹⁶ ICTY Appeals Chamber, *Prosecutor v Kunarac & Ors*, Judgment, 12 June 2002, Case No. IT-96-23 and IT-96-23/1-A, para 91: see also ICTY Appeals Chamber, *Prosecutor v Blaskic*, Judgment, 29 July 2004, Case No. IT-95-14-A, para 106.

⁹⁷ Of course, other ‘war crimes’ defined in Article 8 of the Rome Statute may also relate to conduct that might indirectly involve damage to the natural environment.

⁹⁸ Rome Statute, Article 8(1).

(b) ... 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:

(...)

(iv) Intentionally 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.⁹⁹

As can be seen, the article specifies three ‘variants of the offence’¹⁰⁰ – relating to (i) incidental loss of life or injury to civilians; (ii) damage to civilian objects; or (iii) damage to the natural environment. Given the focus of this chapter, it is only the third variant that is the subject of the discussion.

Before assessing the scope of this aspect of the provision, it is necessary to consider its drafting history. Although the notion of the ‘criminality’ of States for significant environmental damage was, for a period, included in the ILC Draft Articles on State Responsibility,¹⁰¹ and the concept of individual criminal responsibility for ‘widespread, long-term and severe damage to the natural environment’ was included in the Draft Code of Crimes against the Peace and Security of Mankind,¹⁰² such actions did not form part of the ILC Draft Statute. Instead, it was suggested that such damage would usually fall within the scope of other crimes already included in the draft text, and that, if that were not the case in a specific situation, it might be that the act does not meet the ‘threshold of gravity for an international crime’.¹⁰³

The revised draft version of the Statute, which subsequently formed the basis for the final discussions at the Rome Conference, contained three additional options, other than the version that was ultimately adopted as article 8(2)(b)(iv), namely:

(1) ‘Intentionally 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 is not justified by military necessity’;

(2) ‘Intentionally 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’;

⁹⁹ *Ibid.*, Article 8(2)(b)(iv).

¹⁰⁰ Werle and Jessberger 2014, p 493.

¹⁰¹ See Report of the International Law Commission to the General Assembly on its work of the thirty-second session, [1980] 2 *Yearbook of the International Law Commission* Part II, 32. Draft Article 19 of the ‘Draft Articles on State Responsibility for International Wrongful Acts’ had provided that an ‘international crime’ included: ‘[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime’, and included (draft Article 19(3)(d)) ‘a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas’.

¹⁰² [1991] 1 *Yearbook of the International Law Commission* 234. See draft Article 26 of the Draft Code of Crimes Against the Peace and Security of Mankind.

¹⁰³ Cassese *et al.* (eds)(2002, pp 522-3.

(3) ‘No paragraph’ – which would have meant that there would be no prohibition included in the Rome Statute in relation to widespread, long-term and severe damage to the natural environment.¹⁰⁴

In the end, a compromise was reached with the final provision requiring a balancing of the damage as against military advantage. In practical terms, this means that environmental issues are ‘made secondary’ to interests of military importance.¹⁰⁵ In so doing, the provision therefore does not focus on the issues that arise from the intentional targeting of the environment during the course of armed conflict. It fails to recognize the importance of the protection of the environment *as such*, instead falling back on the traditional and outdated approach that environmental harm is to be regarded as an unfortunate ‘bi-product’ of warfare, even in circumstances where the damage is deliberate and intentional.

Similar language is used in article 55(1) of Additional Protocol I,¹⁰⁶ and article I(1) of the ENMOD Convention.¹⁰⁷ Several points bear further elaboration here. First, it is apparent that article 8(2)(b)(iv) demands a very high threshold of injury to the environment before an act would fall within the scope of the crime. The use of the conjunctive (‘and’) between the words widespread, long-term and severe, rather than the disjunctive form, has, at least from an environmental protection perspective, effectively meant a ‘regression’ from the standard that had been specified in the ENMOD Convention (where the disjunctive form is used).¹⁰⁸ Werle and Jessberger explain this variance as follows: ‘Since environmental damage can be expected as a collateral consequence in any type of warfare, the requirements were raised in comparison to those in ENMOD’.¹⁰⁹

Moreover, a comparison of article 8(2)(b)(iv) with article 55(1) of Additional Protocol I indicates how the degree of culpable action necessary to amount to a war crime under the Rome Statute appears to have been increased. Acts that would contravene article 55(1) would not necessarily constitute a war crime under article 8(2)(b)(iv) of the Rome Statute, since this latter provision includes the need for the damage to be ‘clearly excessive’. It is generally agreed that, under customary international law, the parties to an armed conflict are prohibited from causing ‘excessive damage to the environment during military operations’.¹¹⁰ The difficulties relating to the requirement of ‘excessive’ damage under article 8(2)(b)(iv) were highlighted in the 2000 Committee Report examining NATO’s actions during Operation Allied Force.¹¹¹ However, not only must the damage be ‘excessive’, but it must also be ‘clearly’ so. Irrespective of any uncertainties as to what ‘excessive’ means, the inclusion of the

¹⁰⁴ See Draft Statute for the International Criminal Court (14 April 1998) Part 2 ‘War Crimes’, ss B(b), as quoted in Drumbl 2000, pp 622-3.

¹⁰⁵ Drumbl 2000, p 623.

¹⁰⁶ Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 16 ILM 1391 (Additional Protocol I).

¹⁰⁷ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, entered into force 10 December 1976, 1108 UNTS 151; 16 ILM 88, entered into force 5 October 1978 (ENMOD Convention).

¹⁰⁸ Drumbl 2000, p 624.

¹⁰⁹ Werle and Jessberger 2014, p 493.

¹¹⁰ See Werle and Jessberger 2014, p 492 and the references in the corresponding footnote.

¹¹¹ Final Report to the Prosecutor of the International Criminal Tribunal for the former Yugoslavia by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, 39 ILM 1257 (Committee Report).

descriptor ‘clearly’ suggests an intention to set an even higher level of damage as the requisite threshold, although how this is to be determined is unclear.

There is also no guidance provided as to the meaning of ‘widespread’, ‘long-term’ or ‘severe’ as they appear in article 8(2)(b)(iv). Under the interpretative guidance provided in relation to their meaning in the ENMOD Convention, these three terms are defined, for the purposes of that Convention, as follows:

- (a) ‘widespread’: encompassing an area on the scale of several hundred square kilometres;
- (b) ‘long-lasting’: lasting for a period of months, or approximately a season;
- (c) ‘severe’: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.¹¹²

The breadth of these interpretations, particularly as *all* of the variables must be satisfied (‘and’), already sets the bar at a very high point in terms of what level of environmental damage will be necessary before article 8(2)(b)(iv) might apply.¹¹³ Yet, in relation to the use of these words in article 55(1) of Additional Protocol I, various commentaries have provided even more restrictive interpretations. In a 1993 report to the United Nations General Assembly, the Secretary-General stated that:

There are substantial grounds, including from the *travaux préparatoires* of [Additional] Protocol I, for interpreting ‘long-term’ to refer to *decades rather than months*. On the other hand, it is not easy to know in advance exactly what the scope and duration of some environmentally damaging acts will be.¹¹⁴

Naturally, it will be important to develop an understanding as to the scope of these words as they are used in any specific provision of the Rome Statute. The interpretations offered for the purposes of ENMOD ‘should not be transferred mechanically’ to article 8(2)(b)(iv).¹¹⁵ Moreover, the words will not necessarily have the same meaning in different articles of the same instrument – obviously, the context in which a particular word appears is relevant to its precise meaning. For example, the meaning of the word ‘widespread’ as it appears in the *chapeau* of article 7(1) (crimes against humanity) will not be the same as its meaning in article 8(2)(b)(iv). Without a specific definition of such words, it ultimately falls to the Court itself to determine their precise meaning, thus leaving the issue unclear at least until that point.

In the absence of an express definition (or clarification) within the Rome Statute, for the ICC Judges to determine a different (lower) interpretation of these words in the context of environmental damage than the thresholds in the ENMOD Convention and Additional Protocol I, it would be necessary for them to base their conclusions, at least partially, on environmental concerns. This might possibly eventuate, but such an outcome would require the involvement of environmental groups in the proceedings, although it is not entirely clear how this would work in practice.¹¹⁶ It would also require a ‘brave’ bench of

¹¹² 1976 CCD Understanding Relating to Article I of ENMOD, 31 United Nations General Assembly Official Records Supp. No. 27 (A/31/27), Annex I.

¹¹³ Fenrick has suggested, for example, that the threshold would probably not be reached even by ‘the sort of damage caused by heavy shelling during World War I battles on the Western Front’: Fenrick (1999), p 197.

¹¹⁴ United Nations Secretary-General, ‘Report of the Secretary-General on the Protection of the Environment in Times of Armed Conflict’ (29 July 1993) para 34 (emphasis added).

¹¹⁵ Werle and Jessberger 2014, p 493.

¹¹⁶ One possibility might be for the Judges to require that specific information relating to the relevant environmental concerns be presented, pursuant to Article 64(6)(d) of the Rome Statute, which empowers a Trial

Judges, given the reality that environmental damage invariably occurs in armed conflict, and the traditional political reluctance to extend the express sanctions against environmental damage beyond what is specifically provided for in the Rome Statute.

In addition, article 8(2)(b)(iv) requires an assessment of the proportionality of the environmental damage seen in the context of the military contingencies surrounding such actions. The requirement that the anticipated military advantage must be taken into account when looking at the damage to the environment – which was not the case with respect to either of articles 35(3) or 55(1) of Additional Protocol I – adds to the uncertainty, subjectivity and difficulty of applying the provision. Even if the requisite threshold of widespread, long-term and severe damage is found to have resulted from a particular act, a war crime still would not have been committed if this falls within what was acceptable in the light of the anticipated military advantage.

The Elements of Crimes, when referring to article 8(2)(b)(iv), emphasize that the military considerations that are to be weighed in determining the proportionality of the act are to be determined on a subjective basis. It provides that:¹¹⁷

The expression ‘concrete and direct overall military advantage’ refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack ... It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.

The military ‘value’ of any particular act(s) is to be determined on the basis of ‘the broader purpose’ of the particular operation.¹¹⁸ A determination of whether the relevant act is acceptable will be dependent upon the knowledge of the alleged perpetrator, based on his/her (‘foreseeable’) perceptions at the time. The Elements of Crimes confirm this as follows:

... this knowledge element requires that the perpetrator make the *value judgement* as described therein. An evaluation of that value judgement must be based on the *requisite information available to the perpetrator at the time*.¹¹⁹

It is highly likely that the terms of article 8(2)(b)(iv), when read together with the guidance provided by the Elements of Crimes, would ‘excuse’ many (and possibly all) decisions made by military commanders to intentionally target the environment.¹²⁰ Taking these considerations into account, the terms of article 8(2)(b)(iv) are therefore, in the words of Okowa, ‘heavily tilted in favour of military advantage and against environmental protection’.¹²¹

In addition, article 30 of the Rome Statute applies as the default *mens rea* standard for article 8(2)(b)(iv).¹²² The dual requirement of both intention and knowledge further restricts any possible

Chamber to ‘[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties’.

¹¹⁷ Elements of Crimes, Article 8(2)(b)(iv), footnote 36.

¹¹⁸ Dörmann 2004, p 173.

¹¹⁹ Elements of Crimes, Article 8(2)(b)(iv), footnote 37 (emphasis added).

¹²⁰ Dörmann 2001, p 127.

¹²¹ Okowa 2009, p 248.

¹²² Werle and Jessberger 2014, p 494.

practical application of article 8(2)(b)(iv). For example, the 2000 Committee Report examining NATO's actions during Operation Allied Force concluded that:

...the requisite *mens rea* [under article 8(2)(b)(iv)] on the part of a commander would be *actual or constructive* knowledge as to the grave environmental effects of a military attack; a standard which would be *difficult to establish for the purposes of prosecution* and which may provide an insufficient basis to prosecute military commanders inflicting environmental harm in the (mistaken) belief that such conduct was warranted by military necessity.¹²³

It must also be noted that article 8(2)(b)(iv) is only applicable 'in international armed conflict, within the established framework of international law'. This express limitation restricts its applicability in dealing with the environmental aspects of armed conflict. Earlier drafts of the instrument had included wording similar to article 8(2)(b)(iv) within articles 8(2)(c), and 8(2)(e), which both now deal with war crimes committed in an armed conflict 'not of an international character'. This was omitted, however, during the negotiation process and was not included in the final version of the Rome Statute.¹²⁴

Several other provisions in the Rome Statute that originally only applied to international armed conflicts have more recently been extended to the war crimes provisions applying to non-international armed conflicts. However, the scope of article 8(2)(b)(iv) was never part of that debate. In any event, the definition of a non-international armed conflict in the Rome Statute is itself quite limited.¹²⁵

This is a particularly notable omission given that an increasing number of armed conflicts in the world are of a non-international nature and, in any event, there is no overwhelming logic preventing the applicability of such a provision in relation to internal conflicts. The environmental damage that occurred during the Rwandan and Yugoslav conflicts (the latter being regarded as having the characteristics of both an international and a non-international armed conflict),¹²⁶ indicate the extent of environmental destruction that can take place during the course of a 'civil war'. This would be the case, for example, in circumstances where an insurgency group uses a tropical forest as its 'base' and the Government forces, believing that such acts are 'legitimate theaters of operations', deliberately destroy the forest and/or poison water and river systems as part of its attempt to defeat the insurgents.¹²⁷

In sum, therefore, it seems that there is a real risk that, in reality, resort will not be made to the environmental damage variant in article 8(2)(b)(iv). This provision is but one of a multitude of different war crimes set out in the Rome Statute, and the requirements necessary for it to be applied appear virtually impossible to satisfy in practical terms. Not only are there very significant legal hurdles to overcome in this regard, but this is also a reflection of the resistance towards the issue at the political level, given the general reluctance of states to limit the actions of their own military personnel.

It is true in one respect that express reference to environmental damage as a war crime is to be regarded as a step forward in the development of international criminal law, particularly since there is now a

¹²³ Committee Report, para 23 (emphasis added).

¹²⁴ Drumbl 2000, p 631.

¹²⁵ See Rome Statute, Article 8(2)(f). See also Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Omar Hassan Ahmad Al Bashir ('Omar Al Bashir')*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I, 4 March 2009, para 59.

¹²⁶ See, for example, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v Duško Tadić*, Case No. IT-94-1, Appeals Chamber, 2 October 1995, para 73.

¹²⁷ Drumbl 2000, p 631.

mechanism of international justice – the ICC – through which such acts can be prosecuted. At least the issue has been raised and discussed, and there is an acceptance, in relation to the jurisdiction of the ICC, that completely unfettered environmental destruction is no longer accepted. For example, refer to the fact that the third possible ‘no paragraph’ option quoted above in the draft version of the Statute was ultimately rejected.

However, as indicated by the discussion above, the issue of intentional environmental destruction during armed conflict still appears at best to be a narrowly defined ‘add-on’.¹²⁸ The very considerable – perhaps even insurmountable – legal hurdles will, for all practical purposes, serve to curtail any effective prosecution. Indeed, the high damage thresholds and very limited circumstances as to when the provision may be relevant, if anything, serve to reinforce traditional perceptions that environmental concerns will remain very much minor and subsidiary issues when planning and implementing a military action.

7.8.2 Other war crimes

For the sake of completeness, the remaining acts under article 8 that might be helpful in addressing the issue of intentional destruction of the environment are addressed. In doing so, it must be noted that the chapeau of article 8 suggests that the enumerated war crimes within that paragraph are to be regarded as exhaustive, since it has generally been accepted that the use of the words ‘namely, any of the following acts’¹²⁹ implies exclusivity.¹³⁰ As a consequence, it does not appear possible to extend the scope of article 8 of the Rome Statute beyond the specific war crimes that have been expressly stipulated. This is notwithstanding the fact that article 21(1)(b) of the Rome Statute provides that the applicable law of the Court shall include:¹³¹

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 ...

With this caveat in mind, one can list those war crimes provisions that criminalize particular acts, the implementation of which could have destructive effects on the environment. Within the ‘grave breaches’ provisions, articles 8(2)(a)(iii) and 8(2)(a)(iv) of the Rome Statute may be relevant. In addition, within the context of an international armed conflict, articles 8(2)(b)(v), 8(2)(b)(xiii), 8(2)(b)(xvi), 8(2)(b)(xvii) and 8(2)(b)(xviii) also appear to apply to acts that may impact negatively on the environment. The latter two of these provisions relate to the use of weapons that might already be prohibited by some other international agreements.¹³² With respect to the prosecution of

¹²⁸ *Ibid.*, 632.

¹²⁹ See Rome Statute, chapeau of Articles 8(2)(a), 8(2)(b), 8(2)(c) and 8(2)(e) respectively.

¹³⁰ Drumbl 2000, p 633. For a contrary view, see Bruch 2001, p 719.

¹³¹ Rome Statute, Article 21(1)(b).

¹³² See, for example, Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous and Other Gases, and of Bacteriological Methods of Warfare, 26 Martens (3rd) 643; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction, opened for signature 10 April 1972, 1015 UNTS 163, entered into force 26 March 1975; 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, entered into force 10 October 1980, 1342 UNTS 137, entered into force 2 December 1983; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature 3 September 1992, 32 ILM 800 entered into force 29 April 1997.

environmentally destructive acts within the context of a non-international armed conflict, the only possible provisions of relevance are articles 8(2)(e)(v), 8(2)(e)(xii), and the more recently included articles 8(2)(e)(xiii) and 8(2)(e)(xiv).

However, each of these provisions, to the extent they may be relevant, do not, either individually or collectively, address adequately all of the fundamental issues associated with the intentional destruction of the environment during warfare.¹³³ The structure of article 8 of the Rome Statute thus creates somewhat of a dilemma; in the event that the Prosecutor wishes to proceed against an accused in relation to such damage, they would in all likelihood look at the first instance to article 8(2)(b)(iv) as the ‘standard’ for such a war crime. However, as discussed above, there are very significant difficulties associated with proving the requisite threshold requirements of that provision.

On the other hand, a ‘fall back’ position of resorting to other war crimes, assuming that they may be applicable, and that all of the relevant elements of those crimes have been met, would in most circumstances not cover all of the elements of such damage and, in any event, would not address the specific ‘intent’ aspect of a crime against the environment – the deliberate targeting of the environment as a victim, and/or its use as a weapon, during armed conflict.

7.9 Conclusion

One of the principal goals behind the establishment of the ICC has been the deterrence and punishment of the most serious international crimes, which also ‘threaten the peace, security and well-being of the world’.¹³⁴ Given the rapid development of technology and the sometimes bewildering shift in geopolitical alliances, such threats are themselves ‘fluid’ in nature and will almost certainly vary (expand) in the future.

The intentional destruction of the environment during an armed conflict now falls plainly within this description, particularly given the catastrophic environmental damage that may result. However, the limitations of, and uncertainties with the definitions of the existing crimes within the jurisdiction of the Court significantly restrict any attempt to utilize them in such a way so as to comprehensively apply to such acts.

It might be suggested by some that the inclusion of article 8(2)(b)(iv) of the Rome Statute, which makes express reference to the natural environment, may be sufficient in this regard. Indeed, the fact that there currently exists a specific war crime dealing with the issue might reinforce to most military personnel and others engaged in armed conflict that they cannot act with complete disregard of the environmental impact of their actions. In this regard, it could even be argued that, on a cursory reading, this provision provides some protection to the environment, and that therefore the ‘need’ to impose an enforcement mechanism has somehow been satisfied.

Yet, this is both simplistic and inaccurate. The intentional destruction of the environment during armed conflict represents a blatant disregard for the environment and for the (potential) consequences of such acts. Article 8(2)(b)(iv) is insufficient and inadequate to address the problem, due to the uncertainties of the provision and the inordinately high threshold level of damage that it requires, and even then only after taking account of the military contingencies.

Moreover, none of the core international crimes within the jurisdiction of the ICC are in terms that would adequately regulate such acts. In relation to these crimes, it will no doubt be important that the

¹³³ See, for example, Ezekiel 2007, pp 237-9.

¹³⁴ Rome Statute, preamble, para 3.

Court and the Prosecutor act in such a way as to avoid claims (whether or not justified) that they are perhaps ‘overreaching’ the boundaries of their respective powers, particularly given the highly political nature of the subject matter of the Court’s mandate.

Yet, it is argued that acts done with the intent to cause significant environmental destruction during armed conflict should be prosecuted at the international level in particular circumstances, and certainly in broader terms than appear possible within the existing structure of the Rome Statute.¹³⁵ This flows from two important considerations – first, the need to properly formalize the criminalization of such acts through a mechanism (a clearly defined crime) that appropriately addresses their heinous nature; and secondly, that this mechanism should be included within the jurisdiction of the ICC, given the functions of that institution as determined by the broader international community, and the level of seriousness of the actions it addresses. In regards the latter point, the need to ensure the integrity of any such prosecution means that they must be carried out by/through a body that has been created with the general (ideally universal) acceptance of states. As the first and only *permanent* international criminal court, the ICC represents the appropriate judicial ‘forum’ through which to prosecute such acts.

Hence, we are now at a crossroads – there is, in the author’s view, an imperative to address the intentional targeting of the environment during armed conflict, and an appropriate enforcement mechanism exists for that to be done. Yet, article 8(b)(2)(iv), and indeed the Rome Statute as a whole, is simply not performing the role that it should with respect to such acts and, frankly, is incapable of doing so as presently constituted. This is notwithstanding the Prosecutor’s 2016 Policy Paper in which she stated that her Office ‘will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment ...’.¹³⁶ Whilst this policy is laudable and, in theory at least, would give greater scope for victims from affected communities to participate in, and give evidence in cases relating to the impact of deliberate environmental destruction on their lives, in the author’s view, it may not be practically feasible under the terms of the Rome Statute as they stand. The current legal framework fails to provide sufficient protection for the environment against such acts and thus fails humanity on this issue.

It is therefore submitted that a new (fifth) crime – ‘crimes against the environment’ – be included within the terms of the Rome Statute so as to create international criminal responsibility in appropriate circumstances for those who deliberately target the environment as a strategy of armed conflict. The author has elsewhere elaborated on this argument and has provided a detailed draft of his proposed definition and structure for this crime.¹³⁷

¹³⁵ See ‘Vulnerable Nations Call for Ecocide to be Recognized as an International Crime’ <<https://www.climateliabilitynews.org/2019/12/06/ecocide-international-criminal-court-vanuatu/>> (accessed 10 February 2020).

¹³⁶ ICC Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’, 15 September 2016, p 14.

¹³⁷ For a more detailed discussion, including this author’s suggestion for the terms of the crime of ‘crimes against the environment’ to be included into the Rome Statute, see Freeland 2015.

Reference list

- Bassiouni MC (2000) The Normative Framework of International Humanitarian Law: Overlaps, Gaps, and Ambiguities. In: Schmitt M (ed), International Law Studies Volume 75: International Law Across the Spectrum of Conflict, Naval War College, pp 1-55
- Bruch CE (2001) All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict, Vermont Law Review 25:695
- Cassese A (2003) International Criminal Law. Oxford University Press, Oxford
- Cassese A, Eser A, Gaja G, Kirsch P, Pellet A and Swart B (eds) (2002) The Rome Statute of the International Criminal Court: A Commentary. Oxford University Press, Oxford
- de Vito D, Gill A and Short D (2009) Rape characterized as genocide. SUR International Journal on Human Rights 10:29
- Dörmann K (2001) War Crimes in the Elements of Crimes. In: Fischer H, Kress C and Rolf Lüder S (eds) International and National Prosecution of Crimes Under International Law: Current Developments. Verlag Arno Spitz, Berlin, pp 461-488
- Dörmann K (2004) Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary. Cambridge University Press, Cambridge
- Drumbl M (2000) Waging War against the World: The Need to Move from War Crimes to Environmental Crimes. In: Austin J E and Bruch C E (eds) The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives. Cambridge University Press, pp 620-646
- Ezekiel A (2007) The Application of International Criminal Law to Resource Exploitation: Ituri, Democratic Republic of the Congo, Natural Resources Journal 47:225
- Fenrick W J (1999) Article 8: War Crimes – article 8(2)(b)(iv). In: Triffterer O (ed), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article. Hart Publishing, London, 197
- Fischer H, Kress C and Rolf Lüder S (eds) (2001) International and National Prosecution of Crimes Under International Law: Current Developments. Verlag Arno Spitz, Berlin
- Freeland S (2006) How Open Should the Door Be? - Declarations by non-states Parties under Article 12(3) of the Rome Statute of the International Criminal Court, Nordic Journal of International Law 752:211
- Freeland S (2010) International Criminal Justice and the Death Penalty. In: Yorke J (ed) The Right to Life and the Value of Life: Orientations in Law, Politics and Ethics. Routledge, 193
- Freeland S (2015) Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court. Intersentia, Cambridge
- Haavisto P (2005) The International Responses to the Environmental Impacts of War. Symposium, Georgetown International Environmental Law Review 17:565
- Horn L and Freeland S (2009) More than Hot Air: Reflections on the Relationship between Climate Change and Human Rights, University of Western Sydney Law Review 13:101
- Jessberger F and Geneuss J (2013) Down the Drain or Down to Earth? International Criminal Justice under Pressure, Journal of International Criminal Justice 11:501

- Jørgensen N (2000) *The Responsibility of States for International Crimes*. Oxford University Press, Oxford
- Kalivretakis EI (2001) Are Nuclear Weapons Above the Law? A Look at the International Criminal Court and the Prohibited Weapons Category, *Emory International Law Review* 15:683
- Koppe E (2006) *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*. Hart Publishing
- Lattanzi F (2001) Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. In: Fischer H, Kress C and Rolf Lüder S (eds) *International and National Prosecution of Crimes Under International Law: Current Developments*. Verlag Arno Spitz, Berlin, 473
- Leibler A (1992) Deliberate Wartime Environmental Damage: New Challenges for International Law, *California Western International Law Journal* 23:67
- McCormack T and Robertson S (1999) Jurisdictional Aspects of the Rome Statute for the New International Criminal Court, *Melbourne University Law Review* 23:635
- Okowa P (2009) Environmental Justice in Situations of Armed Conflict. In: Ebbesson J and Okawa P (eds), *Environmental Law and Justice in Context*. Cambridge University Press, 231
- Rest A (2004) Enhanced Implementation of International Environmental Treaties by Judiciary – Access to Justice in International Environmental Law for Individuals and NGOs: Efficacious Enforcement by the Permanent Court of Arbitration, *Macquarie Journal of International and Comparative Environmental Law* 1:1.
- Restatement of the Law: Third Restatement of U.S. Foreign Relations Law, Volume 2 (1987), 165, ss 702, Reporters' comments.
- Sands P (2003) After Pinochet: the role of national courts. In: Sands P (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice*. Cambridge University Press, pp 68-108.
- Sarooshi D (1999) The Statute of the International Criminal Court, *International and Comparative Law Quarterly* 48:387
- Schabas W (2000) *Genocide in International Law*. Cambridge University Press, Cambridge
- Stahn C (2006) Why some Doors may be Closed Already: Second Thoughts on a 'Case-by-Case' Treatment of Article 12(3) Declarations, *Nordic Journal of International Law* 75:243
- United Nations Commission on Human Rights (2004) Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Situation of Human Rights in Darfur Region of the Sudan. E/CN.4/2005/3 (7 May 2004)
- United Nations General Assembly Resolution 260 (III) B (9 December 1948).
- United Nations General Assembly Resolution 44/39 (4 December 1989)
- United Nations General Assembly Resolution 52/160 (15 December 1997)
- United Nations General Assembly Resolution 57/228 B (13 May 2003)
- United Nations General Assembly Resolution 897 (IX) (4 December 1954)
- United Nations General Assembly Resolution 898 (IX) (14 December 1954)

United Nations General Assembly Resolution 96(I) (11 December 1946)

United Nations General Assembly Resolution 96(I) (11 December 1946)

United Nations Secretary General (1993) Report of the Secretary-General on the Protection of the Environment in Times of Armed Conflict. A/48/269 (29 July 1993)

United Nations Security Council Resolution 1315 (14 August 2000)

United Nations Security Council Resolution 1503 (28 August 2003)

United Nations Security Council Resolution 1534 (26 March 2004)

United Nations Security Council Resolution 1757 (30 May 2007)

United Nations Security Council Resolution 1966 (22 December 2010)

United Nations Security Council Resolution 1966 (22 December 2010)

UNTAET Regulations 2000/11 (6 March 2000)

UNTAET Regulations 2000/15 (6 June 2000)

Werle G (2005) Principles of International Criminal Law. Oxford University Press, Oxford

Werle G and Jessberger F (2014) Principles of International Criminal Law. Oxford University Press, Oxford.

Williams S (2000) The Rome Statute on the International Criminal Court – Universal Jurisdiction or State Consent – To Make or Break the Package Deal. In: Schmitt M (ed) International Law Studies Volume 75: International Law Across the Spectrum of Conflict. Naval War College, 539

Yuzon EF (1996) Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons: “Greening” the Environmental Laws of Armed Conflict to Establish an Environmentally Protective Regime, American University Journal of International Law and Policy 11:793