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Prosecution of Wartime Environmental Damage by Non-State Parties at the International Criminal Court

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This article presents a novel way of prosecuting wartime environmental damage committed by non-state parties to the Rome Statute at the International Criminal Court. The current legal framework applicable during armed conflicts has many gaps and weaknesses, leaving the environment as a silent victim. The stringent threshold that must be met before environmental damage is prohibited under international humanitarian law has failed to offer any real protection, particularly in non-international armed conflicts, despite their growing prevalence. Furthermore, destruction of the environment has not materialised as a distinct crime in international law; rather, it is treated as a material element or underlying act of other crimes in the Rome Statute. Where states involved in armed conflicts are not party to the Rome Statute, individuals can seemingly enjoy impunity for serious environmental harm arising during the conflict. This article will illustrate how individuals from non-state parties could face criminal responsibility for environmental crimes where one element of the crime, namely environmental damage, is committed on the territory of a state party. This offers a novel, albeit limited route for addressing the gaps in the current law.

From aerial dumping of herbicides, extensive deforestation and artificial manipulation of climatic conditions during the Vietnam War,[1] to attacks on oil facilities and the dumping of oil during the Gulf War,[2] from the stripping of agricultural land to force the removal of people in Rwanda,[3] to the bombing of industrial sites during the Kosovo conflict causing the release of toxic contaminants,[4] the natural

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1 Michael Schmitt 'Green War' (1997) 22(1) *Yale Journal of International Law* 1, 9-11.

2 Ibid 17-19.

3 Tara Weinstein, 'Prosecuting Attacks that Destroy the Environment' (2005) 17(4) *The Georgetown International Environmental Law Review* 697, 700.

4 ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, (8 June 2000) [14] ('ICTY Final Report').

environment is a routine victim of armed conflict. Whether occurring incidentally as collateral damage from conventional warfare or employed as a deliberate military tactic to pursue a specific military advantage, the destruction and degradation of the environment has devastating consequences for the belligerent state and its inhabitants.[5] However, environmental damage can extend beyond the borders of the belligerent state/s and affect the territory and population of other states.[6] For example, the ignition of oil installations and deliberate release of oil into the Persian Gulf during the Gulf War caused atmospheric pollution and contamination of a shared waterway[7] and the bombing of chemical plants and oil refineries in Kosovo triggered the release of pollutants into the Danube river, which runs through a number of European countries, and into the air.[8] Further, the bombing of a power station during the Israel and Lebanon conflict in 2006 resulted in the release of 12,000 to 15,000 tons of fuel into the Mediterranean Sea which has coastlines along 21 countries,[9] while the deliberate contamination of water pumps during the Darfur War and the emptied marshes in Southern Iraq could, in different circumstances, conceivably cause harm to neighbouring states.

Environmental destruction can be a criminal offence under international law subject to prosecution and individual criminal liability at the International Criminal Court ('ICC'). However, the jurisdiction of the ICC to prosecute environmental crimes is limited to conduct occurring on the territory of a state party to the Rome Statute. After a background discussion of the legal framework regulating environmental damage during armed conflict, this article will consider the possibility of establishing individual criminal responsibility for wartime environmental damage through the lens of the three core crimes: war crimes, crimes against humanity and genocide. It will then assess whether the commission of cross-border environmental crimes could provide the ICC with territorial jurisdiction over crimes

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5 See Julian Wyatt 'Law-Making at the Intersection of International Environmental, Humanitarian and Criminal Law' (2010) 92(879) *International Review of the Red Cross* 596-7; Cordula Droege and Marie-Louise Tougas, 'The Protection of the Natural Environment in Armed Conflict – Existing Rules and Need for Further Legal Protection' (2013) 82 *Nordic Journal of International Law* 21, 21-2.

6 Human Rights Council, *Analytical Study on the Relationship between Human Rights and the Environment*, UN Doc A/HRC/19/34 (16 December 2011) 14 [65].

7 Jonathan P. Edwards, 'The Iraqi Oil Weapon in the 1991 Gulf War' (1992) 40 *Naval Law Review* 105-110.

8 United Nations and Environment Programme and United Nations Centre for Human Settlements (Habitat), *The Kosovo Conflict Consequences for the Environment & Human Settlements* (UNEP and UNCHS, Nairobi, 1999) 4-5.

9 United Nations Environment Programme, *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law* (UNEP, Nairobi, 2009) 8 ('UNEP Environment Report').

committed by non-state parties.[10] Relying on the reasoning of the Pre-Trial Chamber ('PTC') in its 2018 *Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute* this article will argue that it is possible to prosecute individuals for cross-border environmental damage that originates within international and non-international armed conflicts involving non-state parties, albeit only in limited circumstances.

I Protection of the Environment in International Humanitarian Law

International humanitarian law contains specific provisions directly aimed at the protection of the natural environment. Environmental protection can also be inferred from the general humanitarian provisions regulating the conduct of hostilities, namely the principles of distinction, proportionality and necessity, which can be applied to mitigate damage to the environment. The legal regime is more developed in international armed conflicts than in non-international armed conflicts.[11]

A *International Armed Conflicts*

Articles 35(3) and 55 of Additional Protocol I to the Geneva Conventions ('API')[12] require state parties to take care to prevent damage to, and refrain from means and methods of warfare that are intended or expected to cause 'widespread, long-term and severe' damage to the natural environment. Natural environment is not defined in the Protocol. The International Committee of the Red Cross ('ICRC') Commentary says it should be defined 'in the widest sense to cover the biological environment in which a population is living' including forests and other vegetation, fauna, flora and other biological or climatic elements.[13]

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[10] This article will not consider whether incidental environmental damage to neutral states constitutes an act of aggression and as a corollary, whether the ICC can exercise jurisdiction over the crime of aggression by non-state parties. It will also not consider issues of state responsibility.

[11] International armed conflicts are conflicts involving two or more states whereas non-international armed conflicts involve the armed forces of a state and the forces of one or more non-state armed groups or between non-state armed groups see *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 2 October 1995) [70].

[12] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* opened for signature on 8 June 1977, 1125 UNTS (entered into force 7 December 1978).

[13] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC/Martinus Nijhoff Publishers 1987) 2126.

The cumulative standards of duration, scope of area and degree of damage must be reached before Articles 35(3) and 55 are triggered.[14] Once this threshold is reached, the means or methods of warfare become prohibited, notwithstanding any arguments of military necessity.[15] However, widespread, long-term and severe are not defined in API and ambiguities over their quantification are compounded by limitations of scientific assessments of environmental consequences. Nonetheless, the terms are generally thought to encompass a very high (though imprecise) threshold of harm.[16] Although there is no consensus, 'long-term' has been understood to mean at least twenty to thirty years; 'widespread' as several hundred square kilometres; and 'severe' as involving serious or significant disruption or harm to human life or natural resources.[17]

As such, it is generally accepted that environmental damage incidental to conventional warfare is unlikely to reach the cumulative thresholds in Articles 35(3) and 55.[18] For example, Iraq's deliberate release of oil into the Persian Gulf and setting fire to oil wells during the Gulf War caused significant environmental damage but did not reach the threshold of long-term.[19] Likewise, the toxic contamination of the Danube River and attacks on ecosystems in protected areas by NATO forces in Kosovo, while potentially severe and widespread, were not sufficiently long-term.[20] Comparably, where damage is long-term and severe, for example species extinction, it may not be widespread if it is restricted to a limited geographical area, say where hostilities occurred. Given this high standard, the protections in API will seemingly only encompass unconventional warfare such as the mass use of herbicides or chemical agents occurring on a scale that considerably exceeds the battlefield damage conventionally expected in war.[21]

A significant number of state parties have not ratified API, including the United States, India, Israel, Iran and Turkey. This lack of ratification, coupled with the customary status of Articles 35(3) and

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14 Ibid 1457; Michael Bothe et al, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd ed, Martinus Nijhoff 2013) 389.

15 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law Volume I: Rules* (International Committee of the Red Cross/ Cambridge University Press 2005) 157 ('ICRC Customary Law Study').

16 UNEP Environment Report (n 9) 11.

17 Bothe et al (n 14) 389; Sandoz (n 13) 1454-5; Karen Hulme, 'Taking Care to Protect the Environment against Damage' (2010) 92(879) *International Review of the Red Cross* 678, 683.

18 Bothe et al (n 14) 390.

19 Schmitt (n 1) 19; Karen Hulme, 'Armed Conflict and Biodiversity' in Michael Bowman et al (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar Publishing 2016) 250.

20 ICTY Final Report (n 4) [15].

21 Bothe (n 14) 390.

55 being contested,[22] further undermines the effectiveness of the environmental protections in API. The 2005 ICRC Study on Customary International Law identified the explicit rules in API prohibiting long-term, widespread and severe damage to the natural environment as a customary rule applicable in international armed conflicts (and arguably in non-international armed conflicts).[23] While the rule was not customary at the time of adoption, the study found that state practice (including that of states not party to API) with respect to the methods of warfare and the use of conventional weapons has emerged to the effect that the prohibition is now customary.[24] On the other hand, states such as the United States, France and the United Kingdom continue to deny that the provisions have achieved customary status and vehemently object to the application of this rule to the use of nuclear weapons.[25] Therefore, if a customary rule exists it is arguably limited to conventional weapons and does not extend to the use of nuclear weapons. This further reduces the impact of the explicit environmental protections given the difficulties of reaching the cumulative threshold in Articles 35(3) and 55 during conventional warfare.

To the extent the specific environmental provisions in API are not triggered, protection can be derived from general treaty and customary rules regarding the conduct of hostilities through the principles of distinction, military necessity and proportionality.[26] In particular, belligerents must distinguish between civilian and military objects during hostilities.[27] The negative definition of civilian objects includes 'all objects which are not military objectives'.[28] As such, the natural environment is *prima facie* a civilian object.[29] Therefore it should not be targeted unless and until it qualifies as a military objective and its attack offers a distinct military advantage.[30] Environmental areas may become a military objective when they are used for military purposes

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22 The ICJ in *Nuclear Weapons* appeared to consider the rule was not customary see *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [31] ('*Nuclear Weapons*'). The Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia thought Article 55 might be reflective of customary law see ICTY Final Report (n 4) [15]. See also Yoram Dinstein, 'Protection of the Environment in International Armed Conflict' (2001) 5 *Max Planck Yearbook of United Nations Law* 523, 535.

23 ICRC Customary Law Study (n 15) 151.

24 Ibid 152.

25 Ibid 153-4.

26 Ibid 143, Rule 43: the general principles on the conduct of hostilities apply to the natural environment.

27 Ibid 25, Rule 7: Articles 48 and 52(2) API reflect customary international law in international armed conflicts.

28 Article 52(1) API; see also ICRC Customary Law Study (n 15) 33 (Rule 9).

29 ICRC Customary Law Study (n 15) 34. See also Dinstein (n 22) 533; Michael Schmitt, 'War and the Environment' in Jay Austin and Carl Bruch (eds) *The Environmental Challenges of War* (Cambridge University Press 2000) 97.

30 Article 52(2) API; ICRC Customary Law Study (n 15) 34 (Rule 10).

such as the use of a river, valley or forest as supply or communication lines.[31] Alternatively, targeting military forces using the vegetation for concealment or camouflage or an attack on a legitimate military target such as an oil refinery or tanker may cause significant environmental damage. In these circumstances, any anticipated military advantage to be gained in attacking such objects must be necessary and proportionate to the potential damage to the environment.[32] For example, the negligible military utility gained through Iraq's deliberate pumping of oil into the Persian Gulf during the Gulf War was thought to be overwhelmingly disproportionate to its impact on the natural environment.[33]

However, any proportional calculation with respect to the protection of the environment raises difficulties given the scientific uncertainties in estimating the projected severity and timeframe of potential environmental threats and its reverberating effects. For example, the casual link between habitat damage or species loss on the extended food chain will most likely be indeterminable, particularly in the fog of war. This makes arguments of military necessity easier to justify. While a lack of scientific certainty does not absolve parties from taking precautions to protect the environment,[34] in cases where information regarding the scope and duration of environmental consequences is in a state of development, the practical application of general humanitarian principles to anticipated environmental damage in armed conflicts is of limited utility.

B *Non-International Armed Conflicts*

There is no express rule prohibiting attacks against the natural environment in non-international armed conflicts. A proposal to include a rule analogous to Article 35(3) of API in Additional Protocol II was rejected at the time of drafting.[35] While some military manuals have included rules prohibiting means or methods of warfare intending to cause widespread, long-term and severe damage to the natural environment in non-international armed conflicts, the customary status of such a rule is equivocal.[36] Notwithstanding, the principles of distinction, necessity and proportionality are applicable in non-international armed conflicts and can be used to mitigate environmental damage.[37]

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31 Dinstein (n 22) 534; Droege and Marie-Louise Tougas (n 5) 28.
32 Article 51(5)(b) API. This reflects customary international law see ICRC Customary Law Study (n 15) 145-6 (Rule 43); *Nuclear Weapons* (n 22) 30; ICTY Final Report (n 4) [18].
33 Schmitt (n 1) 20; Hulme, 'Armed Conflict and Biodiversity' (n 19) 247; Dinstein (n 22) 544; UNEP Environment Report (n 9) 13.
34 ICRC Customary Law Study (n 15) 150.
35 Ibid 156.
36 Ibid.
37 Ibid 144-146.

II ICC Jurisdiction to Prosecute Environmental Crimes Committed During Armed Conflicts

The jurisdiction of the ICC to prosecute environmental crimes is limited firstly to conduct falling within one of the core crimes of genocide, crimes against humanity and war crimes and secondly, where the jurisdictional requirements of subject matter and territoriality are satisfied.[38] The Rome Statute contains a number of provisions that either explicitly or inferably allow for the prosecution of wartime environmental damage committed as an element of these core crimes. Outside a referral by the Security Council or a declaration of jurisdiction by a non-state party, the ICC only has jurisdiction where the alleged conduct occurred either on the territory of or by a national of a state party.[39] However, only 123 countries are state parties to the Rome Statute and many countries that have been or are parties to contemporary armed conflicts refuse to ratify it, such as the United States, Turkey, Iraq, Iran, Pakistan, India, Syria, Israel, Russia and Yemen. These aforementioned countries include states that possess chemical or nuclear weapons or have been accused of environmental destruction during armed conflicts. The failure of these countries to ratify the Rome Statute restricts the capacity of the Court to prosecute individuals from these and other non-state parties for environmental crimes committed during armed conflicts.

However, the jurisdictional limits to prosecuting non-state parties have been bolstered by the 2018 decision of the PTC that the ICC may assert jurisdiction pursuant to Article 12(2)(a) over the deportation of the Rohingya from the territory of a non-state party (Myanmar) into the territory of a state party (Bangladesh).[40] The PTC determined that the Court may exercise its jurisdiction over crimes that occurred partially on the territory of a state party and partially on the territory of a non-state party if at least one element of the crime was committed in the territory of a state party. [41] The Pre-Trial Chamber II confirmed this decision in 2019.[42] With respect to the crime of deportation, the PTC found that the transboundary nature of the crime meant that the crossing of an international border into the territory of another state was a distinct legal element without which the crime would not be completed.[43] As such, by virtue of the fact an element of the crime of

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38 Articles 5 and 12 of the *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('Rome Statute').

39 Ibid, Article 12(2).

40 *Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute* (6 September 2018) ICC-RoC46(3)-01/18 ('Jurisdiction Decision').

41 Ibid 36.

42 *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (14 November 2019) ICC-01/19.

43 Jurisdiction Decision (n 40) 41.

deportation (crossing the border to another state) was completed on the territory of a state party, the jurisdictional requirements of Article 12(2)(a) were satisfied.[44] The Court confirmed its rationale could be applicable in additional situations where one element of another crime within its jurisdiction was committed on the territory of a state party.[45] While the Court limited its analysis to the prosecution of other crimes against humanity, it is arguable it could be extended in analogous situations, including transboundary environmental crimes amounting to war crimes, crimes against humanity or genocide.

A *War Crimes*

Article 8(2)(b)(iv) of the Rome Statue criminalises attacks causing widespread, long-term and severe damage to the natural environment. The attack must be intentional, committed with the knowledge it would result in this degree of environmental damage and disproportionate to any anticipated military advantage.[46] Article 8(2)(b)(iv) only applies to international armed conflicts and there is no comparable provision with respect to non-international armed conflicts. Widespread, long-term and severe damage to the environment is a separate element of the crime that must occur for it to be complete. The ICC Elements of Crime does not clarify the meaning of these terms, however, given the provision is very similar to the prohibition in API, it can be interpreted in line with the commentary for Articles 35(3) and 55.[47] For the offence to crystalise it must be established that the perpetrator acted in the knowledge that the attack would cause the requisite level of damage to the environment.[48] In addition, the damage to the environment must be clearly excessive in respect to the anticipated military advantage.[49]

The difficulties of proving knowledge of potential environmental devastation are compounded by the requirement to balance the anticipated damage with the military advantage the perpetrator seeks to achieve. Where evidence of intent or knowledge is weak, arguments that the environmental damage was collateral to the anticipated military advantage may assume greater weight. While the high threshold of damage to the environment and dual requirements of knowledge and intent are difficult to meet,[50] it is not inconceivable

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44 Ibid 42.

45 Ibid.

46 Element 3, Article 8(2)(b)(iv), Assembly of State Parties to the Rome Statute, *Elements of Crime* (2010) UN Doc. ICC-ASP/1/3, 19 ('ICC Elements of Crime').

47 Michael Bothe et al, 'International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities' (2010) 92(879) *International Review of the Red Cross* 569, 576.

48 ICC Elements of Crime (n 46) 19.

49 Ibid.

50 Tara Smith, 'Creating a Framework for the Prosecution of International Crimes in International Law' in William Schabs (ed) et al *The Ashgate Research Companion to*

that an attack on a nuclear or chemical factory or the use of nuclear or chemical weapons could satisfy the threshold.[51] The defence of military necessity may likewise be difficult to substantiate in these situations where the environmental destruction is clearly excessive to any military advantage. In this circumstance, where the attack occurs during an international armed conflict between or on the territory of state parties, the ICC would consequently have jurisdiction.

Where such an attack is launched by and onto the territory of a non-state party *prima facie* the ICC would not have jurisdiction over the commission of any alleged war crime. However, in reliance on the PTC Jurisdiction Decision on Myanmar, if an element of the crime, specifically the widespread, long-term and severe damage to the natural environment, occurred on the territory of a state party, the jurisdictional preconditions in Article 12(2)(a) would be met and the ICC would have jurisdiction over individuals of non-state parties. Furthermore, with respect to the requisite knowledge and intent, where the attack is extensive enough to meet the cumulative threshold required in Article 8(2)(b)(iv), it is not inconceivable that the Prosecutor could establish that the perpetrator anticipated the attack would inflict damage to adjacent states. However, this would be dependent on the scale and location of the attack.

Alternatively, if the threshold is not reached, the court can also exercise its jurisdiction under Articles 8(2)(b)(ii) or 8(2)(b)(iv) over attacks intentionally directed at or causing damage to civilian objects. Again, these provisions apply only in international armed conflicts and there is no requisite provision applicable in non-international armed conflicts. While attacks on the natural environment, for example, bombing a cross-border forest used for military purposes may be permissible, any incidental damage to civilian objects (the environment) must be proportionate to the concrete and direct military advantage. While the proportionality requirement and requisite *mens rea* limit the practical applicability of these provisions, as damage to civilian objects, namely the environment, is again a separate element of the crime, the ICC would potentially have jurisdiction over individuals from non-state parties where the damage to the environment occurs on the territory of a state party.

B *Criminalisation as Crimes Against Humanity or Genocide*

Given the increase in environmental destruction occurring within internal conflicts, such as Sudan, Iraq and Rwanda, prosecuting

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International Criminal Law (Routledge, 2013) 55; Ines Peterson, 'The Natural Environment in Time of Armed Conflict' (2009) 22 *Leiden Journal of International Law* 325, 342-3.

51 Mathew Gillett, 'Eco-Struggles' in Carsten Stahn (ed) et al *Environmental Protection and Transition from Conflict to Peace* (Oxford University Press, 2017) 229.

environmental offences that occur within the context of crimes against humanity or the crime of genocide removes the nexus requirement of an international armed conflict.

1 *Crimes against Humanity*

Environmental destruction could amount to a crime against humanity when it is used to commit one of the crimes listed in Article 7 of the Rome Statute.[52] For example, the denial of access to water, the depletion of natural resources indispensable for survival, manipulation of climatic conditions or the use of chemical or nuclear weapons could, if the other elements are fulfilled, result in the crimes of murder, extermination, deportation or forcible transfer, persecution or other inhuman acts.[53] To satisfy Article 7, the act must be intentionally directed against the civilian population and committed with the knowledge it was part of a widespread or systematic attack pursuant to a state or organisational policy.[54] Crimes against humanity can occur in international and non-international armed conflicts but the existence of an armed conflict is not a jurisdictional requirement.

Where a state commits a widespread and systematic attack against the environment on the territory of a state party during an armed conflict and the requisite elements of Article 7 are met, the ICC would *prima facie* have jurisdiction. For example, an attack on the environment which affects the life and wellbeing of a population, such as the draining of the Mesopotamian Marshes by the Iraqi government in 1991 which deprived the Marsh Arabs of their lives and livelihood, may be sufficient to meet the *actus reus* of the crime against humanity of extermination or persecution. However, a belligerent non-state party that directs a widespread and systematic attack on the environment aimed at its own civilian population, as would most commonly occur in non-international armed conflicts, will not face prosecution at the ICC unless an element of the crime occurs in the territory of a state party. While harm to or extermination of civilian populations in neighbouring states following an attack on, for example, chemical or nuclear plants, oil wells or cross-border dams is plausible, the neighbouring state is not the primary target of the attack or of the state or organisational policy. As such, even though an element of the crime such as the death, destruction or infliction of serious bodily harm to the population occurs on the territory of a state party, this is incidental to damage caused in the territory of the non-state party, and it is not an inherent element of the aforementioned

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52 Weinstein (n 3) 720.
53 Articles 7(1)(a), (b), (d), (h) and (k) Rome Statute.
54 ICC Elements of Crime (n 46) 5.

crimes that the conduct necessarily takes place across state borders.[55] In this situation it is difficult to extend the jurisdiction of the Court to acts of non-state parties that have transboundary effects in the territory of state parties.

Notwithstanding, environmental crimes committed during international or non-international armed conflicts leading to the crime of humanity of deportation would arguably, relying on the reasoning of the PTC, provide the Court with jurisdiction over a non-state party. This could occur if a non-state party acts coercively by depleting natural resources essential to the survival of the population or otherwise causes severe environmental degradation thereby forcing the deportation of the population across a border and into the territory of a state party. If, for example, the targeting of water supplies and attacks on wells and water pumps in the Sudanese Civil War by government forces forced the displacement of civilians across an international border (rather than within Sudanese territory), the requirements for the crime of humanity of deportation may be satisfied. In this circumstance an element of the crime, the crossing of a border, would take place in the territory of another state, which, if a signatory to the Rome Statute, would provide the Court with jurisdiction.

2 *Genocide*

Environmental harm in and of itself is not sufficient to amount to genocide under Article 6 of the Rome Statute. However, the intentional destruction of the environment during armed conflict may be prosecuted as genocide if the prohibited acts enumerated in Article 6 were committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[56] Prohibited acts may include, *inter alia*, the destruction or manipulation of the environment upon which a protected group depends, environmental damage causing the systematic expulsion of the group from their homes or the deprivation of resources indispensable for their survival. Given that armed conflict is not an element of the crime of genocide, prosecution of environmental attacks conducted in furtherance of genocide could apply in both international and non-international armed conflicts.

Two examples where the necessary *actus reus* for genocide may be met through the commission of environmental crimes are the draining of the Mesopotamian Marshes and the contamination of wells and water pumps in the Sudanese Civil War. To supress a rebellion by the Marsh Arabs, the Iraqi government, amongst other atrocities, diverted

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55 Cf Jurisdiction Decision (n 40) 41.

56 Article 6 Rome Statute; see also Carl Bruch, 'All's Not Fair in (Civil) War' (2001) 25 *Vermont Law Review* 695, 727.

water from the Euphrates and Amara marshes leaving the area dry and salt encrusted, denying the population access to fresh water, food, building materials and trade routes.[57] The destruction of the environment which the targeted group relied upon for their survival caused the deaths and dispersal of large numbers of the population.[58] However, without the simultaneous intention to bring about the physical destruction of the protected group the crime of genocide cannot be established.[59] This requirement of genocidal intent is difficult to prove, particularly in circumstances where the environment alone is targeted.[60] The situation of the Marsh Arabs illustrates this problem as the Iraqi government denied the destruction of the marshes was aimed at the physical eradication of the Marsh Arabs. Rather, the Iraqi government argued it was for economic reasons.[61] In contrast, the Pre-Trial Chamber in its decision on the arrest warrant for the President of Sudan, Al-Bashir, considered attacks on the wells and water pumps in towns predominately inhabited by members of the targeted ethnic groups to have been committed in furtherance of the government's genocidal policy.[62] This shows how the destruction of the environment could be prosecuted as an underlying act of genocide.

With respect to Al-Bashir, the Court has jurisdiction to prosecute him for environmental damage committed by and on the territory of Sudan, a non-state party, due to the Security Council referral of the situation in Darfur to the Court. In addition to a Security Council referral or a self-declaration of jurisdiction, it is arguable that the reasoning of the PTC in its Jurisdiction Decision on Myanmar could be used to prosecute a non-state party for environmental destruction committed in furtherance of the crime of genocide. It is not inconceivable that acts of warfare deliberately inflicted to bring about the physical destruction of a protected group, such as the contamination or destruction of cross-boundary waterways, could cause the extermination of a protected group in adjacent or neighbouring state parties. However, absent a direct attack on the group (which would raise questions of *jus ad bellum*) there are a limited number of situations whereby the specific intent to destroy the group in whole or in part will simultaneously extend beyond the territorial border. One such situation where the *actus reus* and necessary genocidal intent may be present is where the territory of the relevant group straddles two states, for example the Kurds. Here, the Prosecutor would need to establish that the relevant acts, for example

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57 Weinstein (n 3) 715-6.
58 Ibid.
59 See for example Article 6(c)(3) ICC Elements of Crime (n 46) 3.
60 Bruch (n 56) 729.
61 Smith (n 50) 49.
62 *Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir* (12 July 2010) ICC-02/05-01/09, 7.

the contamination of a cross border waterway or forest, were intended to destroy the targeted group in whole or in part, regardless of whether they resided in the territory of the belligerent state or in neighbouring states. However, unlike the crime of humanity of deportation, it is not a necessary element of the crime of genocide that the conduct related to it occurs across borders. The Prosecutor would need to show that a distinct element of the crime, rather than an incidental effect of its commission, occurred in the territory of a state party.

With respect to Article 6(a) of the Rome Statute, genocide by killing, the cross-border element may be satisfied if the Prosecutor can show that the deaths of members of the targeted group, which resulted from the environmental destruction, occurred in the territory of a state party. In this circumstance the *actus reus* initiated in the territory of the non-state party could be completed in the territory of a state party by virtue of the deaths of members of the targeted group. However, prosecution under Article 6(a) would necessarily be constrained by the requirement to prove genocidal intent and would therefore only be present where the targeted group spans territorial boundaries. Nonetheless, it may provide a means of prosecuting a non-state party before the ICC for environmental destruction as the crime of genocide, albeit in a very limited number of circumstances. An analogous argument could not be made with respect to Article 6(c) however as it is not a requirement of Article 6(c) that the actual physical destruction of the group take place,[63] merely that the infliction of conditions calculated to bring about the group's physical destruction were done with this intention. As such, an element of the crime cannot be completed in the territory of a state party, thereby denying the Court jurisdiction under Article 12(2)(a) of the Rome Statute.

C *Prosecution Challenges*

Prosecuting environmental damage at the ICC presents challenges beyond the jurisdictional requirements, for example the collection of evidence and the arrest and extradition of suspects. These challenges are amplified in relation to non-state parties. Furthermore, even if the jurisdictional requirements in Article 12 of the Rome Statute are met, the case must be of sufficient gravity to warrant prosecution.[64] Where environmental damage meets the widespread, long term and severe threshold in Article 8(2)(b)(iv) the gravity threshold will undoubtedly be met, otherwise it may prove difficult to satisfy with respect to transboundary harm where the main target of the attack will reside

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63 *Prosecutor v Stakic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [517].

64 Article 17(1)(d) Rome Statute.

within the territory of the belligerent state. These issues will therefore need to be balanced when assessing whether to prosecute transboundary environmental crimes.

III Conclusion

Despite the devastating effects of environmental damage occurring directly or incidentally as a result of armed conflict, the ICC does not have jurisdiction over 'environmental crimes' and there has been little accountability for states and individuals for wartime environmental damage. This could be ameliorated somewhat by the ability to prosecute wartime environmental attacks as war crimes under Articles 8(2)(b)(ii) or (iv), or alternatively as an element in the commission of a crime against humanity or genocide. Still, many states involved in armed conflicts today are not parties to the Rome Statute, further prolonging their impunity for environmental destruction. However, it is not unimaginable that damage caused by environmental attacks could cross state boundaries and have devastating impacts on the environment and populations of other states. Following the reasoning of the PTC in its Jurisdiction Decision on Myanmar, it is therefore arguable that jurisdiction could be extended over non-state parties for environmental damage where an element of one of the core Rome Statute crimes is committed on the territory of a state party. Although the possibility of prosecuting environmental attacks by non-state parties will be limited, the above analysis gives some hope that perpetrators of wartime attacks on the environment could face prosecution.