

## Chapter XXVII

# Criminal Responsibility for Environmental Damage in Times of Armed Conflict

Professor Michael Bothe\*

**I**t has often been said in this Conference that the enforcement of existing law is essential; and criminal law is referred to as an essential means of enforcement. But a report dealing with enforcement through criminal law must question this basic assumption. There are reasons to believe that the actual role of criminal law in the enforcement of international humanitarian law is rather limited,<sup>1</sup> and not as important as many seem to think.

One of the purposes of criminal law is to serve as a deterrent against prohibited acts.<sup>2</sup> But this deterrent effect presupposes that there must be a reasonable probability for the perpetrator of a crime that he or she is indeed prosecuted and punished.<sup>3</sup> But taking into account the fact that since the aftermath of the Second World War, many war crimes have been committed but very few have been prosecuted,<sup>4</sup> this requirement is hardly met. There are a number of factors inhibiting such prosecution and punishment. During the conflict, the party to which the perpetrator belongs is quite often unwilling to offend the military by prosecuting soldiers fighting for their country. The other party, if it happens to apprehend a perpetrator, quite often fears reprisals against its own prisoners. Third parties, which are also under an obligation to prosecute and punish grave breaches against the Geneva Conventions, often lack the political will to do so. It must be mentioned, however, that the only defendant physically present before the International Tribunal for former-Yugoslavia was arrested in Germany in order to be prosecuted by German authorities for grave breaches of the Geneva Convention.<sup>5</sup> But looking at State practice as a whole, this is rather an exception. After the conflict, there has often been a tendency to discontinue any trials of crimes committed during past conflicts. This has until recently even been true in many countries as far as war crimes committed during the Second World War are concerned.<sup>6</sup>

There is an additional factor reducing the deterrent effect of criminal law for crimes committed in an armed conflict. The typical war criminal is not like the clandestine thief who knows very well that he acts outside the value system of his or her society. As in many cases of peacetime torture, the war criminal thinks of himself as being part of this value system, as doing his duty for his country.<sup>7</sup> This

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

perception may or may not be true in a particular country, but it is nevertheless a reality which reduces the deterrent effect of criminal law provisions.

Whether the recent establishment of two international tribunals for the prosecution and punishment of violations of international humanitarian law is the beginning of a new era where the punishment of those violations becomes a reality likely to serve as a deterrent, remains to be seen.<sup>8</sup> The one defendant so far physically present before such a tribunal is not sufficient for this purpose.

There is, however, a very basic phenomenon, the significance of which cannot be denied: criminal law reflects and shapes basic value decisions of a given society.<sup>9</sup> This fact accounts for the importance of the grave breach provisions of the Geneva Conventions. It is also true for national criminal law. For this reason, changes in value perception of societies are often reflected in changes of criminal law. Changes in the criminalization of sexual practices and of abortion are well-known examples.<sup>10</sup> So is the protection of the environment. The tremendous development of environmental legislation which took place in many States, in particular the Western industrialized States in the seventies, was accompanied by the adoption of criminal law provisions designed to sanction offenses against the environment.<sup>11</sup> But this cultural or educational effect of criminal law presupposes clarity of the law. Reinterpretation is not enough for this purpose.

We have now to ask whether and to what extent criminal law, national or international, adequately protects environmental concerns of our global community also in times of armed conflict. In the two decades since the resumption of international negotiations to confirm and develop the law applicable in times of armed conflict in the early seventies, there has been a growing trend to reflect the international concern for the preservation of the world's environment also in norms of international humanitarian law.<sup>12</sup> Whether and to what extent this trend should lead to a further development is one of the questions discussed at this Conference. How far has criminal law followed these trends, or does it lag behind? An answer to this question, of course, presupposes an analysis of existing law relating to the conduct of armed conflict.

Here, we have to distinguish two different kinds of norms. First, there are norms which provide for an obligation of States to prosecute and punish certain violations of the laws of war. These are not criminal law provisions *stricto sensu* as they require some kind of national implementation legislation in order to become effective. The provisions of the Geneva Conventions on grave breaches are of that character. They require States to apply their national criminal law to the effect that these breaches are indeed prosecuted and punished, it being left to the national law of each State party whether or to what extent this can be done under existing law or whether specific implementation legislation is necessary.<sup>13</sup> There are a great variety of legal techniques adopted by States in order to fulfill this obligation, including an action based on the assumption (which may or may not be correct)

that existing national criminal law is sufficient to allow the punishment of all kinds of grave breaches.<sup>14</sup>

The second type of norm is an international criminal law provision *stricto sensu*, i.e., an international norm providing directly for the punishment of the guilty individual without the necessity of any additional national act.<sup>15</sup> The international crime of aggression is the best known example of this kind of a norm. The grave breach provisions of the Geneva Conventions may also acquire a similar quality where they are referred to in an additional international document giving a specific judicial body the power to apply those provisions as a basis for prosecution and punishment of offenders. This is the case for the statutes of the tribunals established for the punishment of violations of international humanitarian law in former-Yugoslavia and Rwanda.<sup>16</sup> It will also be the case if an international criminal court is established on the basis of a treaty along the lines proposed by the International Law Commission.<sup>17</sup>

Let us, therefore, first analyse the grave breaches provisions of the Geneva Conventions and Protocol I Additional thereto. The definition of grave breaches contained in the four 1949 Geneva Conventions<sup>18</sup> (Articles 50, 51, 130, 147 respectively) and Additional Protocol I<sup>19</sup> (Article 85(3) and (4)) is characterized by the fact that it mainly protects persons as victims. The new provisions of Additional Protocol I which expressly protect the environment in times of armed conflict are not in the list of grave breaches of that Protocol. The only provision protecting mainly objects is Article 85(4)(b) concerning historic monuments. There is, however, one element in the definition of the Geneva Conventions which does not refer to persons, but to objects and which is certainly relevant for the protection of the environment: "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". The Statute of the International Tribunal for the former-Yugoslavia expressly paraphrases this element of the definition.<sup>20</sup>

The question has thus to be asked whether and to what extent this kind of grave breach applies to the environment. The destruction of oil-wells in Kuwait may serve as an example for the problem. There is no doubt that this destruction constituted an "extensive destruction not justified by military necessity and carried out unlawfully and wantonly" as there was apparently no military purpose behind it.<sup>21</sup> But the environmental damage lies elsewhere, not in the destruction of the oil-wells. The environmental effect consists in the air pollution and the particles which go down on the desert or on mountains far away. To the extent that the destruction of oil installations resulted in pollution of sea areas and beaches, the same holds true: the environmental damage is not the same as the actual destruction of property. One can then argue that the elements of the environment which are damaged as a consequence of the destruction are also property within the meaning of that provision. This may be so if land owned by

somebody is damaged. But where the marine environment or certain species living on land are the victim, it is at least not a matter of course to conclude that this damage to the environment also constitutes a destruction of property. It is thus more than doubtful whether the existing grave breaches provisions of the Geneva Conventions adequately cover illegal causation of environmental damage in times of armed conflict.

Assuming that the environmental damage caused by the destruction of the oil wells constituted, within the meaning of Article 55 of Additional Protocol I, "widespread, long-term and severe damage" and also was likely "to prejudice the health or survival of the population" (for instance because of their effect on desalination plants), would this trigger a duty of States to prosecute and punish this violation of the Protocol? The question is, in other words, whether there is a duty to punish violations below the level of grave breaches. This can only be said if one assumes that the general duty to ensure compliance with the applicable law by all means necessary and appropriate necessarily includes criminal prosecution. This is far from being certain, to say the least.

But even if there is no duty to punish offenses against the environment, is there a right of States to apply their national law protecting the environment and to prosecute and punish the offender on that basis? This, first, raises a sovereign immunity problem, when the offender belongs to the other party. It is submitted, however, that a public official cannot claim sovereign immunity for official acts which are in violation of the laws of war, although the well recognized exception to the rule of immunity for official acts only applies to war crimes.<sup>22</sup> The real problem, however, is of a substantive character. National criminal law provisions relating to the environment are just not made for this kind of an offense. Generally, they are in one way or the other related to national administrative law.<sup>23</sup> Those who are polluting the environment in contravention of national rules concerning permissible pollution are punished. One could, of course, argue that a pollution caused in violation of international law should also be considered a violation of internal law and therefore punishable under the relevant national rules. But, to say the least, defense attorneys would have a good case if this were pleaded by the prosecution. A number of international conventions relating to the protection of the environment in times of peace, however, require the States parties to take specific national measures to implement those treaties, including criminal prosecution of offenders.<sup>24</sup> They are not relevant in this context, but it is in this direction that the law relating to the protection of the environment in times of armed conflict should develop.

The recent development of international criminal jurisdiction also raises the problem, already mentioned, whether causing a serious damage to the environment constitutes a genuine international crime as defined in the report of the International Law Commission concerning the creation of a permanent

international criminal tribunal: "A norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals." Article 19(3)(d) of the I.L.C. Draft Articles on International Responsibility<sup>25</sup> designates the serious breach of an international obligation of essential importance for the preservation of the environment, such as those prohibiting massive pollution of the atmosphere or of the sea, as being an "international crime." Whether this provision really envisages the creation of a genuine criminal law provision is, however, far from being certain.<sup>26</sup> This is different for Article 26 of the Draft Code of Crimes against the Peace and Security of Mankind.<sup>27</sup> It would go too far, however, to consider either draft as already constituting customary law.

In conclusion, one can say that national and international criminal law can and must be used in order to sanction violations of the laws of war relating to the protection of the environment. But the law in this respect is not as clear and unequivocal as it could and should be and it does not necessarily cover all violations which should be covered. Therefore, this law needs further development.

---

#### Notes

\*Professor of Public and International Law, Johann Wolfgang Goethe University, Frankfurt, Germany.

1. Generally on the question see Bothe, *Prevention and Repression of Breaches of International Humanitarian Law*, 1986 Y.B. Hum. Rts. 115.

2. KARDISH, SCHULHOFER & PAULSEN, *CRIMINAL LAW AND ITS PROCESS* (1983) at 195; LEFAVE & SCOTT, *HANDBOOK ON CRIMINAL LAW* (1972) at 23; NAUCKE, *STRAFRECHT - EINE EINFÜHRUNG* (1994) at 33.

3. Jäger, *Makroverbrechen als Gegenstand des Völkerstrafrechts*, in *STRAFGERICHTE GEGEN MENSCHHEITSVERBRECHEN* (Hankel & Stuby eds. 1995) at 339.

4. See Andries, *Report to the Committee on Military Criminology, International Society for Military Criminal Law and the Law of War*, 29 *Revue de Droit Militaire et de Droit de la Guerre* 422 (1990).

5. Decision 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, Case No. IT-94-1-T (The Hague: 10 Aug. 1995); Decision on the Defence Motion for Interlocutory Appeal, Appeal Chamber, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former-Yugoslavia, Case No. IT-94-1-AR72 (The Hague: 2 Oct. 1995).

6. Kirby, *War Crimes Prosecution - an Australian Update*, 19 C.L. Bull. 781 (1993); Green, *Canadian Law, War Crimes and Crimes Against Humanity*, 59 *Brit. Y.B. Int'l L.* 217 (1988).

7. Andries, *supra* n. 4 at 467; see also Jäger, *supra* n. 3 at 327.

8. 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 I.L.M. 1192 (1993); Statute for the 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 Neighboring States Between 1 January 1994 and 31 December 1994, 33 I.L.M. 1602 (1994); see also Draft of the International Law Commission (I.L.C.) for an International Criminal Tribunal (with commentary) [hereinafter I.L.C. Draft], 33 I.L.M. 258 (1994); Carter, *Proof Beyond a Reasonable Doubt? Collecting Evidence for the International Tribunal for the Former-Yugoslavia*, 31 *Can. Y.B. Int'l L.* 235 (1993); Greenwood, *The International Tribunal for Former-Yugoslavia*, 69 *Int'l Affairs* 641 (1993); Castillo, *La Compétence du Tribunal Pénal Pour la Yougoslavie*, 98 *Revue Générale de Droit International Public* 61 (1994); Oellers - Frahm, *Das Statut des Internationalen Strafgerichtshof zur Verfolgung von Kriegsverbrechen im ehemaligen Jugoslawien*, 54 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 416 (1994); see also the extensive

## 478 Protection of the Environment During Armed Conflict

literature cited by James Crawford, in *The ILC Adopts a Statute for an International Criminal Court*, 89 A.J.I.L. 404 (1995), at nn. 11 & 17; for text and commentaries on the I.L.C.-Draft Statute for an International Criminal Court, see 1994 I.L.C., Report on the Work of its Forty-sixth Session, U.N. G.A.O.R., 49th Session, Supp. No. 10, at 43-161; see also Crawford, *supra*, at 404-416.

9. PERKINS & BOYCE, CRIMINAL LAW (1982) at 6; RUDOLPHI, SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH, (1995) Vol. 1, No. 2; NAUCKE, *supra* n. 2 at 37; for the particular problems of international criminal law see Jäger, *supra* n. 3 at 341-342 & 346-347.

10. KAUP, DER SCHWANGERSCHAFTSABBRUCH AUS VERFASSUNGSRECHTLICHER SICHT -EINE RECHTSVERGLEICHENDE UNTERSUCHUNG ANHAND DES DEUTSCHEN UND DES AMERIKANISCHEN RECHTS (1991) at 7-14; PIAZOLO, DAS RECHT AUF ABTREIBUNG ALS TEILASPEKT DES RIGHT OF PRIVACY (1992) at 85.

11. This was, for example, the case in Germany, see TRIFFTERER, UMWELTSTRAFRECHT (1980) at 15-19.

12. Protection of the Environment in Time of Armed Conflict, U.N. Doc. A/47/328 of 31 July 1992 (this document includes a Report of the ICRC to the General Assembly of the U.N. of 30 June 1992); Report of the U.N. Secretary-General on "Protection of the Environment in Time of Armed Conflict," U.N. Document A/48/269 of 29 July 1993; United Nations, General Assembly, "Protection of the Environment in Times of Armed Conflict," G.A. Res. 47/37 (Nov. 25, 1992); see also ENVIRONMENTAL PROTECTION AND THE LAW OF WAR: A FIFTH GENEVA CONVENTION ON THE PROTECTION OF THE ENVIRONMENT IN TIME OF ARMED CONFLICT, (Plant ed. 1992).

13. See VInuesa, *Introductory Report on Criminal Sanctions for Violation of International Humanitarian Law, in NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW* (Bothe, Macalister-Smith & Kurzidem eds. 1990) at 82.

14. BOTHE, *supra* n. 1, at 118.

15. Ipsen in 38. no. 1, 12 *Völkerrecht* 535, (Ipsen 3rd ed. 1990); see also Art. 20 of the I.L.C.-Draft for an International Criminal Court, *supra* n. 8, and the explanation given by Crawford, *supra* n. 8 at 410 on Draft Code of Crimes against the Peace and Security of Mankind.; for further developments on the Draft see Thiam, *Eleventh Report of the Special Rapporteur*, 1993 I.L.C.U.B. vol. 1, p. 5.

16. Art. 2 of the Statute for the International Tribunal for the former-Yugoslavia, *supra* n. 8; Art. 4 of the Statute for the Criminal Tribunal for Rwanda, *supra* n. 8, is titled: Violations of Art. 3 [c]ommon to the Geneva Conventions and of Additional Protocol I.

17. I.L.C. Draft, *supra* n. 8.

18. 1949 Geneva Conventions for the Protection of War Victims, 1949, 6 U.S.T. 3114-3695; T.I.A.S. 3362-3365; 75 U.N.T.S. 31-417.

19. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, reprinted in 16 I.L.M. 1391 (1977).

20. *Supra* n. 8.

21. See Lijnzaad & Tanja, *Protection of the Environment in Times of Armed Conflict: The Iraq-Kuwait War*, 40 Netherlands Int'l L. Rev. 196 (1993); Morris, *Protection of the Environment in Wartime: the United Nations General Assembly Considers the Need for a New Convention*, 27 Int'l L. 775 (1993); General Assembly Resolution 47/37 (1992); more generally, see Baker, *Legal Protection for the Environment in Times of Armed Conflict*, 33 Va. J. Int'l L. 351 (1993).

22. Bothe, *Die strafrechtliche Immunität fremder Staatsorgane*, 31 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 246 (1971).

23. For the Penal Law in Germany, see Breuer, *Verwaltungsrechtlicher und Strafrechtlicher Umweltschutz -Vom ersten zum Zweiten Umweltkriminalitätsgesetz*, Juristischen-Zeitung 1083, 1089 (1994).

24. See BASSIOUNI & WISE, AUT DEDERE AUT JUDICARE, THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995) at 254.

25. See 1980 I.L.C. Y.B., vol. 2, at 30-34.

26. See as to that and on Article 19 in general, Mohr, *The ILC's Distinction Between "International Crimes" and "International Delicts" and its Implications*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY (Spinedi & Simma eds. 1987) at 115 & 133; Hofmann, *Zur Unterscheidung Verbrechen und Delikt im Bereich der Staatverantwortlichkeit*, 45 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 207 (1985)(with English summary); Triffterer & Völkerstrafrecht in STRAFGERICHTE GEGEN MENSCHHEITSVERBRECHEN (Hankel & Stuby eds. 1995) at 216.

27. Bothe, *supra* n. 1.