

## Chapter XXVIII

# Individual Accountability for Environmental Damage in Times of Armed Conflict: International and National Penal Enforcement Possibilities

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### I. Introduction

**T**he issue of regulating the protection of the environment *per se* in times of armed conflict and other military operations has, especially after the 1990-1991 Iraq-Kuwait War, attracted much scholarly and governmental attention, although the issue as such is a rather 'classic' topic under the laws of war.<sup>1</sup>

As I observed in an earlier contribution on this matter, the "... magnitude and seriousness of the environmental consequences . . . have raised a variety of legal questions concerning the validity, effectiveness and interpretation of applicable principles and rules of international law".<sup>2</sup>

It seems to me that most of the scholarly attention and governmental discussions so far have concentrated on issues like, *inter alia*, the general legal aspects of the regime applicable to the protection of the environment in times of armed conflict,<sup>3</sup> questions whether this regime provides adequate protection for the environment as such,<sup>4</sup> and issues of neutrality law and the aspect of the continued application and validity of rules of peacetime international environmental law during armed conflicts.<sup>5</sup> Others have concentrated on the relation between the relevant provisions of the 1977 Additional Protocols and the appropriate provisions to be found in the earlier Geneva Conventions and the interpretative and legal conclusions which may be drawn from such a comparison.<sup>6</sup>

Relatively little interest has been shown in individual criminal responsibility for wanton destruction and damage to the environment; a subject which was described in the invitation letter for this Symposium, as "a subset of the debate over the adequacy of current law to protect the environment during international armed conflict and in non-international armed conflict operations involving the use of force."

I remember very well that during the preparatory phase on the discussions in the Sixth Committee in 1992 and 1993, when I was still Legal Adviser at the Netherlands Ministry of Foreign Affairs, this issue was deliberately omitted, because—as most States at that time indicated—it was preferred to concentrate on the primary, more substantive, matters first, in order to come to tentative conclusions regarding the adequacy of present-day international humanitarian law to protect the environment.

Raising the issue of individual responsibility means discussing enforcement measures under international humanitarian law which, in turn, will raise delicate questions of international criminal and national penal law.

I am, therefore, very grateful to the organizers of this Symposium that they have chosen as a main item such a delicate and often ignored topic as the efficacy of the existing legal framework to hold criminally accountable those individuals responsible for wanton destruction and damage to the environment. In discussing this issue, I will put much emphasis on available enforcement mechanisms and, perhaps, less on the issue of individual accountability as such. Both time and space limitations, however, ensure that I have to limit myself in this respect.

Before turning to this issue, I would like to make some preliminary observations, which have to be kept in mind.

## II. Some Preliminary Issues

Firstly, we have to acknowledge that the subject of individual accountability for serious violations of international humanitarian law in general, has attracted much attention in recent times, as a consequence of the U.N. Security Council Resolutions on Bosnia (after having been ignored in State practice for almost 50 years!). In this respect, I may recall Security Council Resolutions 764 (13 July 1992), 771 (13 August 1992), 780 (6 October 1992), 808 (22 February 1993) and 827 (25 May 1993). It may be noted that in Resolutions 764 and 780, the Council speaks of ‘persons who commit or order the commission of *grave breaches* of the Conventions’ who will be held individually responsible in respect of such crimes, whereas in the later Resolutions 808 and 827 on Bosnia, the Council apparently prefers a less restrictive approach and refers to both the grave breaches of the 1949 Geneva Conventions and ‘other serious violations of international humanitarian law for which persons may be held individually responsible’.<sup>7</sup> The same terminology, of course, can be found in the general provisions of Article 1 of the Statute of the War Crimes Tribunal for the former-Yugoslavia and, more specifically, in Articles 6 and 7 which deal with the personal jurisdiction of the Tribunal and individual criminal responsibility.<sup>8</sup> From those Articles and accompanying commentaries in the Secretary-General’s Report,<sup>9</sup> it becomes clear that the scope of the principle of individual criminal responsibility extends to persons who have planned, instigated, ordered, committed or otherwise aided and

abetted in the planning, preparation or execution of a crime as referred to in Articles 2 to 5 of the Statute.<sup>10</sup>

Hence, and I recognize that much can be said about the appropriateness of this point of departure for the discussion on the criminal accountability of individuals responsible for wanton destruction and damage to the environment, I do feel it is justified to consider both the formulation of Article 7 on individual criminal responsibility, and the subject-matter jurisdiction as determined by Articles 2 to 5 of the Statute of the War Crimes Tribunal, as a correct reflection of the law as it stands today.

Therefore, those provisions, in my view, partly determine at the same time the conceptual framework within which we have to address the issue of the efficacy of individual accountability for wanton destruction and damage to the environment.

A second preliminary observation is closely related to the opinion which Dr. Lijnzaad and I already advocated in our 1992/1993 contribution to the Netherlands International Law Review and which was also put forward by the Netherlands in the discussions in the Sixth Committee of the United Nations at that time. We concluded that, although there is, supported by both conventional and customary law, a prohibition on inflicting unnecessary harm on the environment in times of armed conflict, “. . . those rules are neither easily comprehensible nor very clear” and that, therefore, “given this ambiguity and obscurity, there is a need for the development of a more coherent set of rules protecting the environment in times of armed conflict”.<sup>11</sup> We did consider Articles 35 and 55 of Additional Protocol I and the provisions of the 1977 ENMOD Convention<sup>12</sup> as a “nucleus of a body of rules which affect the protection of the environment as such” but argued that those rules are in need of further development. One of my concerns was, and still is—despite all kinds of arguments put forward by various respected and experienced international scholars on international humanitarian law in numerous essays—that most of the relevant provisions of Hague and Geneva law were elaborated and developed at a time when the notion of protection of the environment, *per se*, both in times of peace and in war, was virtually absent. Doctrine does not make law!<sup>13</sup>

Furthermore, Additional Protocol I, the most recently written general instrument on international humanitarian law, still has not received universal adherence and cannot be considered as an example of an instrument which has developed into generally binding rules of customary international law, whereas the relevant provisions, indeed, are not completely satisfactory if we start from the presumption that those provisions are also intended to cover the protection of the environment as such.<sup>14</sup>

I do wholeheartedly agree with the conclusion put forward by Professor Verwey during the Conference of the Alumni Association of the Hague Academy of International Law in 1994 when he stated that:

... (E)ven the most optimistic and dynamic interpretation of the relevant principles and rules could actually not justify the conclusion that one can rest assured that existing law on the protection of the environment in times of armed conflict were adequate.<sup>15</sup>

My argument is, therefore, that if the substantive provisions are already susceptible to different interpretations, what can you expect from international criminal law or national penal law enforcement?

A third preliminary observation I would like to make in relation to the determination of the legal and conceptual framework when addressing the issue of individual accountability for environmental damage during armed conflict, has to do with the far from perfect enforcement mechanisms of humanitarian law in armed conflict which are available to the international community.

The growing emphasis and reliance on penal enforcement mechanisms in the Geneva Conventions and Additional Protocol I—note the absence of any specific provision on individual criminal responsibility in the Hague Conventions of 1899 and 1907—is most probably also related to the relative failure of other implementation mechanisms in humanitarian law at a public law level, like State responsibility (still no binding international regulation), further legal restrictions on the use of reprisals since 1977, and the archaic and non-functioning of the system of Protecting Powers.<sup>16</sup> In addition, it is still a fact that many States are simply not yet ready to prosecute or implement their criminal legislation in this field of law. One of the more important functions of the International Committee of the Red Cross (ICRC) in this respect is the continuous education and advisory services it provides to governments. But the situation is far from perfect; one has to acknowledge this fact. At the same time, sometimes humanitarian objectives are more important than a sound and efficient criminal procedure; in other words, various objectives and different interests are at stake. National reconciliation, or arrangements within the framework of an armistice agreement within the context of an overall political settlement, may sometimes prove to be more important than national penal enforcement.

Enforcement of international humanitarian law through national penal law is necessary and required. However, we have to keep in mind the way in which the Geneva Conventions and Additional Protocol I have incorporated such penal law enforcement mechanisms and recognize the rather limited role such mechanisms can play in international armed conflicts in practice.<sup>17</sup> Furthermore, various States are still extremely reluctant to 'criminalize' environmental crimes. At the same time, the environment and its legal protection is still a relatively new concept. It simply takes time for a government to address the penal enforcement aspects.

Some remarks must be made about situations which can be characterized as 'non-international armed conflicts' when trying to describe the general conceptual framework. Here, I will limit myself to the definition of non-international armed

conflict as it appears in Article 1 of Additional Protocol II of 1977.<sup>18</sup> I will, therefore, not touch upon possible environmental damage resulting from military operations involving the use of force which cannot be described as 'war' ("Military Operations Other Than War -MOOTW").<sup>19</sup>

With respect to the issue of individual criminal responsibility for wanton destruction of the environment in situations of non-international armed conflict, it seems that, at present, the instruments of international humanitarian law that may be invoked offer little prospect for effective and efficient penal enforcement.

Neither common Article 3 of the Geneva Conventions, nor Additional Protocol II, refer to the possibility of holding an individual responsible for the destruction of and wanton damage to the natural environment.<sup>20</sup> A dynamic interpretation will also not be of any assistance.

It is, furthermore, interesting to note that in the Statute of the International Criminal Tribunal for Rwanda which was adopted by the Security Council on 8 November 1994,<sup>21</sup> there is no reference to individual criminal responsibility for such acts. Article 4 does not include in its non-exhaustive enumeration of violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, violations causing environmental damage, nor is there a reference to the above-mentioned provisions of Articles 14 and 15.

It seems therefore unlikely, even when applying an optimistic and dynamic interpretation, that the regulation and enforcement of international humanitarian law applicable in armed conflicts of a non-international character offer satisfactory solutions. It is still primarily a national penal affair and, therefore, dependent upon imperfect and inappropriate national penal law systems.

### III. Individual Criminal Responsibility in International Armed Conflicts: Some Observations

With these preliminary observations in mind, and having determined the conceptual framework within which the enforcement of relevant humanitarian law has to be effected, we can say something about the efficacy of the current law with respect to individual criminal responsibility for the destruction of and wanton damage to the environment *per se*.

#### *A. Hague Law*

We have already seen that the Conventions which belong to Hague law do not contain provisions which provide for individual criminal responsibility for violations of any of their rules. The London Agreement and the Charter of the Military Tribunal (1945) did, however, explicitly affirm individual responsibility (Article 6 of the Charter). Article 6 (b) referred to "plunder of public and private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity." This was later repeated in General Assembly

Resolution 95 (I). Hence, it can not be said that pre-1949 law rejected individual criminal responsibility, but—and this is an important restriction—the Nuremberg episode was a rather special, *ad hoc* arrangement and offers little guidance for our topic.

Case law from this period with a certain relation to our subject, is also rather ambiguous.<sup>22</sup>

## ***B. Geneva Law***

### **1. The 1949 Conventions**

Under the 1949 Geneva Conventions, a more advanced enforcement system, emphasizing the sanctioning of humanitarian law by penal law, was elaborated. Whether this offers more prospects to accuse and convict individuals for environmental damage and destruction, remains to be seen however. It is not the intention to describe in great detail the relevant ‘enforcement’ provisions of the 1949 Conventions as this falls outside the scope of this paper. The only relevant issue within the context of this contribution is to determine whether the 1949 system offers opportunities for a successful penal action against individuals when environmental damages have occurred which can be attributed to that particular individual.

All four Conventions contain a specific provision on the ‘Repression of Abuses and Infractions’ of the Conventions.<sup>23</sup> These Articles oblige High Contracting Parties to:

- (a) enact any legislation to provide effective penal sanctions for persons committing, or ordering *any* of the *grave breaches* [which are defined in the respective Conventions];<sup>24</sup>
- (b) search for persons alleged to have committed, or to have ordered such grave breaches and to bring such individuals before its own courts or to hand them over to another High Contracting Party;
- (c) take measures which are necessary to suppress violations of the Conventions, not falling into the category of grave breaches.

It must be observed in the context of the subject-matter of this presentation that, in order to qualify as a grave breach, conduct must be directed at ‘protected’ objects. This is an important restriction, since the Conventions attach this status only to objects which are in the hands of the adversary. Furthermore, Convention IV speaks about persons and objects which shall be ‘respected and protected.’ Only thus qualified does an ‘object’ fall under the category ‘grave breach.’

The second step, therefore, is to determine whether the formulation of grave breaches under the 1949 Conventions can serve as a guide. Such prospects seem rather bleak.

Under the Conventions the 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' is characterized as a 'grave breach.' This wording has been inspired by the formulation of Article 6 (b) of the Nuremberg Charter, which, in turn, is based on Article 23 (g) of the 1907 Hague Regulations (one might speak of the incorporation of Hague law into Geneva law).

At first sight it is not immediately clear what provisions come to mind, but Article 53 of Convention IV, which has a rather general nature, seems to qualify. However, the qualifications of Article 147, necessary to determine whether we speak of a 'grave breach' ('protected objects', 'extensive', 'unlawfully' and 'wanton') do not appear in Article 53. In other words, only if those requirements have been fulfilled is there a possibility to bring individuals to court under the grave breach provision. Violations of Article 53 as such, which are not grave, may be solved by resorting to penal law, but States may, at the same time, have a preference for disciplinary measures; States are not under an obligation to implement this provision by means of legislative measures.

In the light of the strict requirements applicable to criminal law (*nulla poena* principle, evidence, due process, etc.), the absence of ecological awareness in the period in which the Conventions were developed, the consequential imperfections in national implementation legislation and the preliminary observations made above, it seems rather unlikely that an individual will be accused and convicted (or extradited) on the basis of extensive, unlawful and wanton destruction of the environment *per se* under national penal law which sanctions either Article 53 or Article 147 (or any of the other relevant grave breach provisions in the Geneva Conventions). It seems unlikely that, even if serious environmental damage results from violations of provisions of the Geneva Conventions, the charges will be successful on the basis of wanton and excessive destruction of the environment *per se*.

## 2. Additional Protocol I

In Additional Protocol I the concept of 'grave breaches' has been developed further. Furthermore, Additional Protocol I contains provisions which specifically deal with the protection of the natural environment *per se*.<sup>25</sup>

The first step we have to take is to determine whether, for the purposes of this paper, Additional Protocol I adds something to the Geneva Conventions when it comes to penal law enforcement.

The methodology followed in Article 85 is identical to the approach found in the Geneva Conventions when it comes to a repression of breaches of the Protocol (and of the Conventions). States are under an obligation to enact legislation necessary to provide for effective penal sanctioning. In addition, they have to assert universal jurisdiction and provisions must be adopted making handing over of individuals accused of having committed such grave breaches, possible.

For violations which do not qualify as grave breaches, “measures” have to be taken to suppress such breaches. As we have seen, this does not necessarily imply that penal legislation must be developed.

Article 85(3) b. and c., refers to conduct (“launching an indiscriminate attack”) relating to damage to civilian objects which, when committed wilfully and in violation of the Protocol, may qualify as a grave breach provided, however, that certain specific consequences take place and that such conduct causes death or serious injury to body or health. There is a reference to Article 57 (2) a. iii—that provision speaks of excessive damage “. . . in relation to the concrete and direct military advantage anticipated.” One may argue, therefore, that the responsibility rests with the commanding officer ordering the attack, or his superior in determining the ‘objects.’

Again, despite the fact that such conduct may have serious environmental consequences and may result in wanton destruction of the environment, it is rather questionable whether charges will be successful under penal law systems when the charge is based on wilful conduct having caused ‘excessive’ damage to civilian objects. The norm violated in Article 85 (3) b. is Article 51 (5) b. of the Protocol (protection of the civilian population).

Article 85 (3) c. refers back to the violation of the provisions of Article 56 of the Protocol (dams, dikes and nuclear electrical generation stations). That Article constitutes a *lex specialis* of the general principle to be found in Article 51. Although I am not convinced that Article 85 (3) c. really adds something to (3) b., one may conclude that, in theory, charges can be brought against individuals.

Paragraphs 3 (b) (‘non-defended localities and demilitarized zones’) and (4) d. of Article 85 (historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples) are the only instances in Additional Protocol I where an attack directed against ‘objects’ may qualify as a grave breach. The norms violated are Articles 59, 60 and 53 respectively, the difference being that Article 85 (4) does not mention the requirement that there be victims.

Article 85 (4), however, formulates at least four additional requirements which must be fulfilled:

- (a) such objects must be clearly recognizable;
- (b) special protection by means of a special arrangement;
- (c) such objects should not be used in support of the military effort (Article 53 b); and
- (d) should not be located in the immediate proximity of military objectives.

The way in which this provision is drafted raises many interpretative issues and questions, which fall outside the scope of this paper. Actually, I sincerely doubt whether the provision adds much to the related provision of Article 147 of Geneva Convention IV. The ambiguity and interpretative issues will make a successful

charge based on an “environmental crime” even more doubtful under this provision.

#### IV Conclusions

To conclude, Additional Protocol I, although creating new ‘grave breaches.’ does not develop the system of penal enforcement for environmental damage much further. Opportunities to effectively enforce international humanitarian law in the field of environmental crimes are, because of both technical and political reasons, rather limited.

This is both the consequence of the imperfections in the system of penal law enforcement, as elaborated in the 1949 Geneva Conventions and Additional Protocol I, and the way in which States have implemented the relevant provisions in their national criminal legislation. Furthermore, there are serious flaws in the extradition mechanisms as they are incorporated in international humanitarian law. Extradition of war criminals in general has already been the exception rather than the rule (nationality exception, political offense exception, statutory limitations, or the requirement of a treaty); the possibility to extradite war criminals for the destruction of the environment seems, therefore, hardly a serious option.

The successful prosecution of war criminals for ‘environmental’ war crimes also seems hardly to be a real possibility. Apart from the *lacunae* in the relevant international instruments, the existing imperfections in implementation at the national level must be recognized. One may point not only to technical problems, for example, related to the gathering and use of evidence in a criminal procedure, but also to the practical difficulties related to the system of mutual assistance and cooperation in criminal matters of this sort (the rather meagre results of the provisions on universal jurisdiction—largely a consequence of the lack of appropriate national penal legislation—do not contribute to an optimistic picture).<sup>26</sup>

Perhaps the reliance on the penal enforcement mechanisms in the Conventions and Additional Protocol I were not supported by the firm conviction that such mechanisms would indeed become operative and effective in practice. Perhaps it was never the political intention to create really effective enforcement mechanisms based on national criminal law and their introduction was merely a recognition of, and tribute to, ethical norms and principles which the international community of States considered to be applicable at all times. If that is the case, however, it seems appropriate, some twenty years after the formulation of the Additional Protocols and in the light of recent developments, to seriously concentrate on more effective implementation and sanctioning mechanisms of international humanitarian law, both at the international level as well as at the national level, and to adequately reflect the changes which have taken place in peace-time

international law with respect to the wanton destruction of, and damage to, the environment.

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### Notes

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1. Gasser, *For Better Protection of the Natural Environment in Armed Conflict: a Proposal for Action*, 89 A.J.I.L. 637 (1995); Verwey, *Protection of the Environment in Times of Armed Conflict: in Search of a New Legal Perspective*, 8 Leiden J. Int'l L. 7 (1995); Tarasofsky, *Legal Protection of the Environment during International Armed Conflict*, 1993 Neth. Y.B. Int'l L. 17-79; Verwey, *Observations on the Legal Protection of the Environment in Times of International Armed Conflict*, 1994 Hague Y.B. Int'l L. 35-52; Morris, *Protection of the Environment in Wartime: The United Nations General Assembly Considers the Need for a New Convention*, 27 Int'l Lawyer, 775 (1993); Bothe, *The Protection of the Environment in Times of Armed Conflict: Legal Rules, Uncertainty, Deficiencies and Possible Developments*, 1991 Ger. Y.B. Int'l L. 54-62; Green, *The Environment and the Law of Conventional Warfare*, 1991, Can. Y.B. Int'l L. 222-237; Diederich, *'Law of War' and Ecology: a Proposal for a Workable Approach to Protecting the Environment through the Law of War*, 136 Mil. L. Rev. 137-160 (1992); Rackleff, *The International Council of Environmental Law: Law Concerning the Protection of the Environment in Times of Armed Conflict*, 3 Colorado J. Int'l Env. L. and Pol. 609 (1992); Antoine, *International Humanitarian Law and the Protection of the Environment in Times of Armed Conflict*, 32 Int'l Rev. of the Red Cross, 517, 554 (1992); Momtaz, *Les Regles Relative a la Protection de l'Environnement au Cours des Conflits Armes a l'Epreuve du Conflit entre l'Irak et le Koweït*, 1991 Annuaire Francais de Droit International 203-219; Lavielle, *Les Activités Militaires, la Protection de l'Environnement et le Droit International*, 4 Revue Juridique de l'Environnement 421 (1992); see also 73 Revue Internationale de la Croix-Rouge 599 (1991).

2. Lijnzaad & Tanja, *Protection of the Environment in Times of Armed Conflict: the Iraq-Kuwait War*, 2 Neth. Int'l L. Rev. 169 (1993).

3. For a recent contribution see, Gasser, *For Better protection of the Natural Environment in Armed Conflict: A Proposal for Action*, 89 A.J.I.L. 637 (1995). See also, Roberts, *Failures in Protecting the Environment in the 1990-91 Gulf War in: THE GULF WAR 1990/91 IN INTERNATIONAL AND ENGLISH LAW*, (Rowe ed. 1993) at 111-154.

4. Verwey, *Observations on the Legal Protection of the Environment in Times of Armed Conflict*, 1994 Hague Y.B. Int'l L. 35.

5. See, in this context, *inter alia*, the papers presented by M. Bothe and L. Green—also participating in this Symposium—during the Ottawa Conference on the Use of the Environment as a Tool of Conventional Warfare, 9-12 July, 1991. According to Bothe: "A modern opinion . . . favours the non-suspension of certain types of obligations even between belligerents. It would appear that some basic rules relating to the protection of the environment might be counted among the latter ones". Bothe, *Legal Rules, Uncertainty, Deficiencies and Possible Developments*, Ottawa (1991). During the same Conference, Green contested this conclusion and observed that: ". . . there is no general rule of customary or treaty law . . . that can be said to apply at all times in both peace and war". Green, *The Environment and the Law of Conventional Warfare*, *supra* n. 1.

6. For example, Schutte, *The System of Repression of Breaches of Additional Protocol I*, in: HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD. ESSAYS IN HONOUR OF FRITS KALSHOVEN, (Delissen & Tanja eds 1991) at 177-196.

7. It may be assumed that this also encompasses the 'new' grave breaches of Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977). For a discussion of the concept of grave breaches and the relation in this respect between the 1949 Conventions and Additional Protocol I, see Schutte, *supra*, n. 6.

8. Article 6 reads:

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7 provides:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Articles 2 to 5 referred to in Article 7 of the Statute are not restricted to the grave breaches as formulated in the relevant provisions of the 1949 Geneva Conventions, but cover, in addition to the grave breaches enumerated in those four documents, also other violations of international humanitarian law like violations of the laws and customs of war, genocide and crimes against humanity.

Although the differences in scope and meaning between the 'grave breaches' under the 1949 Conventions and the 'grave breaches' as laid down in Additional Protocol I, and 'war crimes' or other 'serious violations of international humanitarian law', raise interesting legal questions, this contribution will not address this aspect in depth.

9. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993 and S/25704/Corr. 1, 30 July 1993.

10. *Id.*, paras 50-59.

11. Lijnzaad & Tanja, *supra*, n. 2 at 196-197.

12. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977, *reprinted in* 16 I.L.M. 88 (1977).

13. This does not, however, mean that I am of the opinion that there are no general rules available to protect the environment during armed conflict. My argument is that rules which can be invoked need further development in the light of the developments which have taken place since 1972 (Stockholm Declaration) in the field of international environmental law and the evolution in the thinking on environmental protection in the international community.

14. Verwey is very outspoken on this matter. He speaks in this context of the "... archaic nature of [those] provisions" and refers to the "... anthropocentric nature of 'Geneva' law, Protocol I included, ... [which] ... cannot do justice to the need of environment protection as a primary value in itself. ..."

15. Verwey, *supra* n. 4 at 37.

16. This is not to say, of course, that in the pre-1949 system penal enforcement did not play a role at all. One only has to look at the events with respect to the Nuremberg trials and the various national penal enforcement procedures which have taken place after the Second World War (notably the United States, France and the United Kingdom).

17. In this respect, the renewed and recent efforts of the International Law Commission (Draft Statute for an International Criminal Court) and the ensuing discussions in the Sixth Committee to establish an International Criminal Court and to create an international criminal jurisdiction, may in the future have positive effects on the enforcement of international humanitarian law and partly enhance its efficacy and—perhaps—credibility. Since the creation of such a Court, including its general or near universal acceptance, will still take many years, this aspect will not be further elaborated upon.

At the same time, the creation of the above-mentioned War Crimes Tribunal for the former-Yugoslavia (and the Rwanda Tribunal) may also contribute to the efficacy of criminal enforcement and development of international humanitarian law at an *international* level, but those Courts are, of course, of an *ad hoc* nature.

18. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), 1977, 1125 U.N.T.S. 609, *reprinted in* 16 I.L.M. 1442 (1977).

19. I have some doubt about the use of the MOOTW-terminology in the context of Additional Protocol II and, therefore, international humanitarian law.

Article 1 of Additional Protocol II provides the High Contracting Parties with a definition which contains certain qualifications and requirements in order to be able to legally define an armed conflict as being of a non-international nature. The scope and applicability of Additional Protocol II is, therefore, determined by this definition. It seems that what is meant with 'MOOTW' may also be applicable in situations which, in a legal sense, are neither regulated nor covered by the provisions of Additional Protocol II.

20. Additional Protocol II does not contain any provision relating to the protection of the environment *as such*, although Articles 14 and 15—under Part IV on the general protection of the civilian population—may have some relevance in this respect. Those Articles, however, are not referred to in Article 6 on penal prosecutions which applies to the prosecution and punishment of criminal offenses related to the armed conflict.

21. U.N. Security Council Resolution 955 (1994).

22. As far as the present author knows, two cases may be of some relevance. One concerns a Polish case in which the War Crimes Commission had to determine whether certain German civil servants could be listed as 'war criminals' because of excessive timber felling ("... the wholesale cutting of Polish timber to an extent far in excess of what was necessary to preserve the timber resources of the country"). It was determined that this did constitute a form of pillage. In the case of *USA vs. Wilhelm List et al. (Hostages Case)*, however, the destruction of communication and transport facilities and houses in Norway (province of Finnmark) was not considered a war crime.

23. Geneva Conventions, 6 U.S.T. 3114/3217/3316/3516; 75 U.N.T.S. 31/85/135/287; Arts. 49 (Convention I); 50 (Convention II); 129 (Convention III); 146 (Convention IV).

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24. Emphasis added. A similar provision can be found in Article 28 of the Hague Convention of 14 May 1954 on the Protection of Cultural Property in the Event of Armed Conflict (an elaboration of Article 27 of the 1907 Hague Regulations). Although certain provisions of that Convention seem relevant for our purpose, it will not be addressed.

25. Article 35(3) reads:

It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause long-term and severe damage to the natural environment.

Article 55 provides:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

26. See in this respect the vague 'obligation' elaborated in Arts. 88 & 89 of Additional Protocol I. For a very pessimistic overview, see Wijngaert, *The Suppression of War Crimes under Additional Protocol I*, in Delissen & Tanja eds. *supra* n. 6 at 197-206.