

## Chapter XXX

### Panel Discussion: Criminal Responsibilities for Environmental Damage

**Dr. Anne Hollick, Joint Military Intelligence College:** Welcome to the beginning session of the day. Our subject is criminal responsibility for environmental damage. We are now, once again, dealing with what we called at the outset “a subset” of this broader issue. Our panelists have been looking at the effectiveness of the international legal framework to hold individuals criminally accountable for destruction of the environment. We are very, very fortunate, indeed, in the quality of the panel. Although, unlike the last panel, their names do not evoke environmental sentiments, I am sure that they all have qualities that we would esteem. I know for example that one of them has postponed a sailing trip to be with us, and I think that deserves some measure of appreciation. Professor Michael Bothe as you know is a Professor of Public and International Law at the Johann Wolfgang Goethe University in Frankfurt. Dr. Gerard Tanja is the General Director of the T.M.C. Asser Institute for International Law in The Hague. Dr. Tanja has served as a Legal Advisor to the Netherlands Government in the Ministry of Foreign Affairs. Howard Levie is now Professor Emeritus of Law of Saint Louis University School of Law. I am not going to take further time in the interest of brevity, and in part, because I want to make sure we have ample time for questions. Professor Bothe is our first speaker. Professor Bothe.

**Professor Michael Bothe, Johann Wolfgang Goethe University, Frankfurt, Germany:** Thank you very much. I am, of course, grateful for this invitation, and I think the debate so far has proven that it is a most interesting and most timely meeting. I am all the more grateful that I was assigned a subject which appears from at least some of the discussions, to be central to our inquiry. We have heard so often that what matters is not new law; it is the enforcement of existing law, and criminal law is said to be a crucial point in enforcing existing law. It is gratifying, indeed, to be thus placed at the center of what seems to matter. However, it is not only with an excess of modesty that I would like to question that basic assumption that criminal law is really that central in the field of the law that we are discussing here.

I would, therefore, start with some general reflections on the role of criminal law in enforcing respect for the laws of war. If we regarded international practice during the last few decades, this is exceedingly scarce. After the war crimes tribunals which we established following the Second World War, little has

occurred to affix criminal responsibility for violations of international law. But it is not only this scarcity of practice which makes us wonder about the importance of criminal law in enforcing the laws of war.

The war criminal is a particular kind of perpetrator. The war criminal is not like the clandestine thief. The war criminal is part of a system, at least the system as he, or one must add in some cases, she, perceives to be the system or the particular subsystem he or she is working in. That is one of the reasons why the whole mechanism of deterrence is different in the field of war crimes than it is in other fields of criminal law. The deterrent effect of criminal law is also reduced by the fact that there are obvious inhibitions to actual prosecution and punishment. During the conflict, the State of the criminal will be inhibited from actions for a variety of reasons—being that the system as a whole is criminal, which happens, being that they do not want to offend the armed forces who are doing their job, and so on. The other party to the conflict always has the risk that if it imposes criminal punishment on those it captures it will cause a kind of escalation of the conflict because there may be counterclaims that this is illegal and this may lead to a degeneration of the conflict.

So we have cases where, indeed, there were claims that certain prisoners were war criminals, but there were no prosecutions. After the fact, after the end of the conflict, there is a general tendency to make peace, to make “real” peace. It is often thought to be somehow inconvenient to prosecute war criminals. Third States, if we take the law of the Geneva Conventions strictly, should prosecute war criminals once they get hold of the perpetrator, but that too happens rather rarely. That being said, the only defendant who is so far before the International Tribunal for the former-Yugoslavia, is somebody who was first arrested in Germany, because the German Government took that obligation which exists under the Geneva Conventions seriously, and would have prosecuted that particular person had it not changed the German law in order to allow a transfer of the person to these nice prisons which exist close to the Asser Institute in The Hague. The International Tribunal may, of course, open up a whole new era of international criminal law, and we might rethink what I just said in terms of the practical relevance of international criminal law. That remains to be seen. One defendant does not really make a success story.

There is, however, a very basic phenomenon, the significance of which cannot be denied. Criminal law reflects basic value decisions of a given society. This factor accounts for the importance of the grave breach provisions of the Geneva Conventions and this is a phenomenon we can also observe in national law. For this reason, changes in value perceptions of societies are often reflected as changes in criminal law. That works both ways. The divergent views on sexual practices and abortion are obvious examples. Decriminalization or recriminalization of certain conduct is a consequence of changing value perceptions in society.

This has been true in relation to the protection of the environment. We have seen a wave of criminal legislation to protect the environment in many States in the 1970's and early 1980's. Now in order to reflect these changing perceptions/value judgments in society, there is one requirement for criminal law—it must be clear. It must be clearly reflected in the wording of the law. A mere reinterpretation of existing criminal law in order to somehow include protection of the environment does not serve that particular purpose.

Now let me briefly review with you some of the problems of protecting environmental concerns by criminal law. We have to distinguish two different kinds of criminal law provisions. First, we have the provisions of the Geneva Conventions which require States to prosecute and to punish, but require national implementation legislation. These are the grave breach provisions. As a matter of principle, these norms presuppose and require the existence of national criminal law to serve as an immediate basis for the criminal liability of the individual perpetrator. From these norms, we have to distinguish international criminal law *stricto sensu*, where the criminal liability arises directly out of the international law. A clear case of that type which is so far generally recognized is aggression. As an example of the first type of norms, those international law norms which oblige States to prosecute and to punish, we have, as I have noted, 'the Geneva Conventions' grave breach provisions, in particular in Geneva Convention IV, on Protection of the Civilian Population, the provision on wanton destruction of property that has already been mentioned. Protocol I Additional to the Geneva Conventions of 1949 is very specific that even where it relates to objects, it is damage to persons which makes the particular violation a grave breach. The only exception is that of cultural property, which can only be explained on the basis of the dynamics of the negotiations at that particular point in Geneva.

The general thrust of these provisions is quite clear; they relate to persons. Thus the only point of departure we have really for the protection of general environmental concerns is the grave breach provision in the Fourth Convention. The Iraqi case is quite telling in this respect. What is punishable under that provision is the destruction of the oil wells because that constitutes destruction of property. But the environmental damage is not the destruction of the wells; the wells are not the environment. The environmental damage is the consequence of that destruction. Now whether this consequence of the destruction of property is really covered by that particular provision of the Fourth Convention is somewhat doubtful, to say the least. One could argue that in a criminal case, but the defense attorney would also have a good case. If we want to do more for the protection of the environment through criminal law provisions, something has to be added somewhere.

My second category of norms is criminal liability directly based on international law, like aggression. There we have two examples which can be

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discussed. The first is Article 19 of the draft Articles on State Responsibility as elaborated by the International Law Commission, the so-called international crime. The second is Article 26 of the draft Code of Offenses Against the Peace and Security of Mankind, also elaborated by the International Law Commission. Professor Leslie Green has already given some comments on the latter. Whether Article 19 of the State Responsibility Articles is really meant to constitute a criminal law provision is highly doubtful. Whether either of these provisions constitute *lex lata* and are meant to reflect existing customary law is also highly doubtful. Thus, if criminal liability based on this type of norm is to be pursued, something else has to be done—there has to be some development.

My last point is the possibility of the right of States to use their own environmental law to punish perpetrators. This is a theoretical possibility because if there is a violation of international law, the States are, to a certain extent at least, free to use their national procedures to enforce that international law. They are free to use the means at their disposal, and their own criminal law may be such a means. If you examine the details of national criminal law relating to the protection of the environment, however, you will encounter difficulties because these national criminal provisions are, in one way or the other, related to national administrative law. For example, those who pollute in excess of a license granted are punishable. This is a typical case. But, it is not the kind of violation we have in mind in case of an international or non-international armed conflict. So, these norms may be used but, again, the defense counsel will also have a good case.

In conclusion, my review of the possibilities of enforcing the protection of the environment in times of armed conflict through criminal law is somewhat skeptical. I regret that, and this is why I come back to something which I have said in other contexts, including Ottawa. Something should be done for the development of international law for the protection of the environment in times of armed conflict. Thank you.

**Dr. Hollick:** Thank you Professor Bothe. Our next speaker will be Dr. Tanja.

**Dr. Gerard J. Tanja, T. M. C. Asser Institute, The Hague, The Netherlands:** Thank you Anne. Before presenting my paper I would like to point out that as the Director of the Asser Institute, I know what it means to organize a conference as perfectly as it has been done here. One point of correction: the Asser Institute is not in Amsterdam. Why is it not in Amsterdam? It is not in Amsterdam because Professor Asser, the Nobel Prize Winner, was fired at that University. Why was he fired? He was fired because he was too much in The Hague. Why was he in The Hague? Because he was involved in the preparation of the Hague Conferences which led to the 'Hague Law' which we are now discussing.

As we have witnessed during this Symposium, the issue of regulating the protection of the environment *per se* in times of armed conflict and other military operations has attracted much scholarly and governmental attention, although as Professor Roberts has pointed out this morning, it is actually a very classic issue in the laws of war. It seems to me that most of this scholarly attention and governmental discussion, so far, has 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 and questions of whether this regime provides adequate protection for the environment as such. Discussion has also focused on issues of neutrality law, and the continued application and validity of rules of peacetime international and environmental law during armed conflict have also been touched upon. Relatively little interest, as Dr. Bothe has already pointed out, has been shown in the issue of the individual criminal responsibility for wanton destruction and damage to the environment: a subset of the debate on the adequacy of current law to protect the environment during international armed conflict.

Raising the issue of individual responsibility means, of course, discussing enforcement measures and mechanisms under international humanitarian law which, in turn, will raise delicate questions not only of international criminal law, but also national penal law systems.

Before turning to the issue as such, I will make some preliminary observations which in my view have to be kept in mind. First, I think we have to acknowledge that the topic of individual accountability for serious violations of international and humanitarian law in general, has attracted much attention in recent times as a consequence of Security Council Resolutions with respect to Bosnia—one might say after being ignored in State practice for some fifty years! Security Council Resolutions 764, 771, 780, 808, and of course, 827 of 25 May 1993, touch on these issues. In this respect, I found it interesting to note that in Security Council 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 for such crimes, whereas in later resolutions on Bosnia the Council apparently prefers a less restrictive approach and refers to both grave breaches of the 1949 Geneva Conventions and ‘other serious violations of international humanitarian law’ for which persons may be held responsible. That same terminology appears 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 of that Statute which deal with the personal jurisdiction of the Tribunal and individual criminal responsibility. From those Articles and the accompanying Secretary General’s Report, 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 in the planning,

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preparation, or execution of a crime as is set forth in Articles 2 through 5 of the Statute.

Hence, and I recognized that much can be said about the appropriateness of this point of departure for a discussion on the criminal accountability of individuals responsible for wanton destruction and damage to the environment, I do think 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. Those provisions provide a conceptual framework within which we can address the issue of the efficacy of individual accountability for wanton destruction and damage to the environment.

My second preliminary observation is related to the fact that at a conventional and at a customary level, the rules which lay down a prohibition on inflicting unnecessary harm on the environment in times of armed conflict, the rules which are applicable, are neither easily comprehensible, nor very clear. Therefore, given this ambiguity and obscurity, there seems to be a need for further development of the law towards a more coherent set of rules protecting the environment as such. At the same time, however, I am of the opinion that we should not 'rush to legislate.'

I do consider Articles 35 and 55 of Additional Protocol I and the provisions of the ENMOD Convention as a nucleus of a body of applicable rules "which affect the protection of the environment as such." Those rules, however, are in need of further development. One of my concerns was, and still is, that despite all kinds of arguments brought forward by respected and experienced international scholars, most of the relevant provisions of Hague and Geneva Law were elaborated and developed at a time when the notion of the protection of the environment *per se* both in times of peace and in war was virtually absent; we should not forget that doctrine does not make law! Furthermore, the relevant provisions of Additional Protocol I still cannot be considered as customary international law in this respect. My argument is, therefore, that if the substantive provisions of existing law 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 legal conceptual framework, has to do with the far from perfect enforcement mechanisms of international humanitarian law in armed conflict, which are available to us through the international community. Growing reliance on penal enforcement mechanisms in the Geneva Conventions and Additional Protocol I in the absence of any specific provision on individual criminal responsibility in the Hague Conventions of 1899 and 1907, is most probably related to what one may describe as the relative failure of other implementation mechanisms available in humanitarian law at a public law level. Failures include a lack of State

responsibility, further legal restrictions on the use of reprisals since 1977, and the rather archaic and non-functioning system of Protecting Powers. Enforcement of international humanitarian law through national penal law is, of course, necessary and required, but 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 in practice such mechanisms can play in international armed conflicts. In this respect, the recently renewed efforts of the International Law Commission to draft a Statute for the International Criminal Court, and the discussions in the Working Group of the Sixth Committee of the U.N. to establish such a court may, in the future, have positive effects on the enforcement of international humanitarian law at an international level. At the same time, one may argue that the Rwanda Tribunal and the Yugoslav Tribunal can, indeed, also contribute to the efficacy of international criminal enforcement. Those courts are, however, of an *ad hoc* nature.

I will not, because of the time restrictions, touch upon the applicability of, or the possibility to apply, such mechanisms in non-international armed conflicts, nor will I touch upon the issue of environmental damage resulting from military operations other than war (MOOTW).

With respect to the issue of individual criminal responsibility for wanton destruction of the environment, let us first turn to Hague law. As I have indicated, 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 did, of course, explicitly affirm individual responsibility. Article 6(b) of the Charter 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 therefore do not want to say that pre-1949 law rejected individual criminal responsibility, but at the same time, we have to be realistic and acknowledge that the Nuremberg episode was a very special, an *ad hoc* arrangement and offers little guidance for our topic.

The law commonly described as Geneva law, developed a more advanced enforcement system referring to penal law sanction mechanisms. All four Conventions contain a specific provision on the "Repression of Abuses and Infractions of the Conventions." These Articles oblige High Contracting Parties to enact legislation to provide for effective penal sanctions for persons committing or ordering any of the grave breaches which are defined in the respective Conventions. A similar provision can also be found in Article 28 of the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict. Certain provisions of this Convention seem to have a certain relevance for our topic.

Secondly, those Articles oblige High Contracting Parties to search for persons alleged to have committed or ordered such grave breaches and to bring them before their own courts or to hand them over to another High Contracting Party.

Thirdly, High Contracting Parties have to take measures which are necessary to suppress violations of the Conventions not falling into the category of the grave breaches. In order to qualify as a grave breach, conduct must be directed at so-called 'protected objects,' and this is an important restriction. The Conventions attach this status only to objects which are in the hands of the adversary. Convention IV speaks, in this respect, about persons and objects which shall be "respected and protected." Only thus qualified does an object fall under the category of grave breaches.

The second step is to determine whether the formulation of grave breaches under the 1949 Conventions can serve as a guide. I think that such prospects are rather bleak. Under the Conventions, the "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" is, indeed, a grave breach, and of course, that wording has been inspired by the Nuremberg Charter.

It is not immediately clear what provisions come to mind, but Article 53 of Convention IV, which is of a rather general nature, seems to qualify. However, the qualifications of Article 147, to which I just referred—"extensive," "unlawfully" and "wantonly,"—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 breaches provision. Violations of Article 53, as such, which are not grave, may be addressed by resorting to penal law, but States may, at the same time, have a preference for discipline measures. States are not under an obligation to implement this provision by means of legislative measures in their national penal systems.

In light of the strict requirements applicable to criminal law with respect to evidence gathering requirements relating to due process, the absence of ecological awareness in the periods in which the Conventions were developed, and the consequential imperfections in national implementation legislation, it seems to me rather unlikely that an individual will be 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 breaches provisions in the Geneva Conventions. It seems unlikely that charges of serious environmental damage resulting from violations of the Geneva Conventions will be successful on the basis of wanton and excessive destruction of the environment *per se*.

Does Additional Protocol I of 1977 add anything to this imperfect system? I do not think so. The first step we have to take is to determine whether, for the purposes of this presentation, Additional Protocol I adds something to the Geneva

Conventions when it comes to penal enforcement mechanisms. Basically, the methodology followed in Article 85 is identical to the approach found in the Geneva Conventions. Article 85, Paragraphs 3(b) and (c), refers to conduct such as—"launching an indiscriminate attack"—and relates to damage to civilian objects which, when committed willfully and in violation of the Protocol, may qualify as a grave breach provided certain specific consequences take place and that such conduct causes death or serious injury to body or health. There is a reference in Article 85 to Article 57, Paragraph 2, which speaks of "excessive" damage "in relation to the concrete and direct military advantage anticipated" by an attack. One may argue, therefore, that the responsibility rests, in this respect, with the commanding officer ordering the attack or his superior when determining the "objects" to be attacked. Again, despite the fact that such conduct may have serious environmental consequences and may result in wanton destruction, it is rather questionable whether charges will be successful under penal law systems when a charge is based on the willful conduct having caused excessive environmental damage to such civilian objects.

Paragraph 3(c) of Article 85 refers back to the violation of provisions of Article 56 of the Protocol: dams, dikes, and nuclear electrical generation stations. That article may be argued to constitute a *lex specialis* of the general principle to be found in Article 51. Although I am not convinced that Article 85, Paragraph 3(c) really adds something to the earlier Paragraph 3(b), one may conclude that, in theory, charges could be brought against individuals under that paragraph. There is one other paragraph which seems relevant for our purposes, within the context of Additional Protocol I. That is Paragraph 4(d) of Article 85 which relates to "historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of peoples." Paragraphs 3(b)—"non-defended localities" and "demilitarized zones"—and 4(d)—"cultural objects"—are the only instances in Additional Protocol I where an attack directed against objects may qualify as a grave breach and the norms violated are articulated in Articles 59, 60, and 53, respectively. The difference being, however, that Article 85, Paragraph 4 does not mention the requirement that there be human victims. Article 85, Paragraph (4), however, formulates at least four additional requirements which must be fulfilled in order for the violation to qualify as a grave breach: the objects must be clearly recognizable, must have special protection by means of a special arrangement, should not be used in support of the military effort, and should not be located in the immediate proximity of military objectives. It seems to me that the way in which this provision is drafted raises many interpretative issues and questions which fall outside the scope of this presentation, but I sincerely doubt whether the provision adds much to the related provision of Article 147 of Geneva Convention IV. In conclusion, the ambiguity and interpretive issues will make a

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successful charge based on what has been labeled “ecocide” or “environmental crime” very, very doubtful under national penal law systems. Thank you.

**Dr. Hollick:** Thank you Dr. Tanja. We will now hear from our distinguished commentator, Professor Howard Levie.

**Professor Howard S. Levie, Naval War College:** Thank you Anne and thank you Professor Grunawalt for inviting me to come this great distance to attend this Symposium. (Laughter.) I can assure Professor Tanja that if there is a vote on the question of keeping the T.M.C. Asser Institute in The Hague rather than moving it to Amsterdam, he has one vote in his favor right here.

I am designated in the program as a Commentator, and I propose to commentate solely. I am not going to present any of my own ideas except to comment on the two speakers and one preliminary paragraph. And that paragraph is to point out to you that in Volume Two of Lauterpacht’s *Oppenheims International Law*, published in 1952, you will not find the words “environmental” or “ecology” in the index. The same thing applies to Schwarzenberger’s book entitled *International Laws As Applied by Courts and Tribunals*, which was published in the 1960’s and which does not contain either of those words in its index, which gives you some idea of the progress we have made in the environmental area in the last two or three decades.

I have only one problem with Professor Bothe’s presentation. He questions whether there is a duty imposed on States, and I quote, “to punish violations below the level of grave breaches.” The third paragraph of common Articles 49/50/129/146 of the four Geneva Conventions of 1949 obligate Parties to suppress all of the violations of those instruments, and I quote, “other than grave breaches.” Similarly, Article 85(1) of the 1977 Additional Protocol I refers to, and again I quote, “the suppression of breaches and grave breaches” of that Protocol. So I have no problem with the fact that breaches other than grave breaches are punishable under the four Geneva Conventions and under Additional Protocol I.

I have no difficulty either, with Dr. Tanja’s initial conclusion that we are fully justified in considering that present day international law, as most recently set forth in the two Statutes adopted by the Security Council establishing the International Tribunal for Yugoslavia and the International Tribunal for Rwanda, indicates that there is individual criminal responsibility for violations of international humanitarian conventions.

However, I do not have the difficulty that Dr. Tanja appears to have in operating under present customary and international law. It will be recalled that as long ago as shortly after World War II, German General Rendulic was tried for devastation in the Norwegian Province of Finnmark in his retreat from Finland to Western Norway. General Rendulic understood that the Russians were right behind him, and he ordered complete devastation so that there would be nothing to assist the

Russians in their pursuit of him. He was wrong. The Russians were not in immediate pursuit of him, they were several days behind him and there was plenty of time for him to escape with his troops. Nevertheless, complete devastation was committed. The bridges were destroyed, crops were destroyed, waters were diverted. Everything that could be done to hamper the Russians' advance was done. Now this was all done under a misapprehension. When he was tried, he was charged with unnecessary devastation, unnecessary destruction. He was acquitted. But he was acquitted not because that was not a crime, but because he was not wanton; he did not do it unlawfully. He believed that military necessity required him to do that, and the court found that even though military necessity did not require him to do it, there was justification for his action. The court indicated very clearly in its three or four pages of discussion of that matter, that had he acted wantonly, had he known that the Russians were not right behind him, he would not have been justified in that destruction and he would have been guilty of a war crime.

I must also agree with Dr. Tanja that, regrettably, there is nothing in international law protecting the environment from conflicts which are not international, that is, not until Additional Protocol II. International diplomatic conferences did not concern themselves with such conflicts, considering that they were within the ambit of national law and not international law, except in a few limited areas such as noninterference in a rebellion and that sort of thing, but not with respect to matters we are discussing here. Unfortunately, I can not agree with his conclusion that neither the 1907 Hague Convention, nor the London Charter of the International Military Tribunal which sat in Nuremberg, contribute to the solution of the problem of the protection of the environment in time of war or other military operations. Even though there was no specific provision in the Hague Regulations making this a crime, the trials after World War I and after World War II, conducted by many different nations, involved charges of crimes which were, in effect, violations of those Regulations. As for the London Charter, it was drafted by the four major countries, the victors—the Soviet Union, Great Britain, France, and the United States—and it was subsequently adhered to by 19 other nations. That meant 23 nations adopted the Charter; at that time there were probably about 51 nations. So you have a very large percentage of the then-world community which approved what was done at London and what was contained in the London Charter of the International Military Tribunal.

Moreover, as you all know, the General Assembly adopted and approved the principles and judgments of the Nuremberg Tribunal. So as far as I am concerned, the Nuremberg Tribunal was not an "episode," as Dr. Tanja identifies it. It was more than a "special, *ad hoc* arrangement." The fact that its basic provisions can be found in the Statutes of the two International Tribunals established in recent years is a matter of lasting importance.

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I am afraid that I must also disagree with Dr. Tanja with respect to his rather shabby treatment of Article 147 of the 1949 Fourth Geneva Convention. Each grave breach listed is an offense in and of itself and that is true of the grave breach “extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.” In effect, that provision indicates that not every destruction of property mentioned in Article 53 of the Convention is a grave breach thereof. There may be unintended destruction, there may be minor destruction, and there may be excusable extensive destruction, such as in the case of General Rendulic.

Moreover, as Article 14(3) of the Convention indicates, there will be violations of the Convention which are not grave breaches but which would still be offenses that the State has a duty to suppress. Unlawful and wanton destruction of property not obtaining the status of extensive destruction might be such an offense. It is true that unjustifiable destruction of property might not be charged as an offense against the environment as such. It was not done in General Rendulic’s case, but what difference does that make? He would have been found guilty if he had not had the excuse of his mistaken belief. The person who is guilty of extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly, which destruction adversely affects the environment, will be punished for his offense whatever the specific charge may be. The word “environment” may not appear in the charge, but that makes no difference. The perpetrator is still going to be convicted if the facts establish guilt.

I heartily agree with Dr. Tanja that there are some serious flaws in the extradition provisions of both the 1949 Geneva Conventions and the 1977 Additional Protocol I. Unfortunately, that is not unique to those five treaties.

As has been pointed out, the first international convention specifically directed towards the protection of the environment in time of hostilities was the so-called ENMOD Convention. ENMOD was followed shortly thereafter by Articles 35 and 55 of the 1977 Additional Protocol I and, as has been mentioned—but I do not think there has been enough emphasis placed upon it—by Article 2(4) of Protocol III to the 1980 Conventional Weapons Convention. The latter prohibits the use of incendiary weapons against “forests or other plant cover,” and may certainly be considered to be directed toward the protection of the environment. One has but to read the presentation made by Professor Szasz at the 1991 Annual Meeting of the American Society of International Law to become aware of the fact that while protecting the environment, particularly from the havoc of war, has become a matter of major importance to many international organizations, actual progress in this regard has been minimal. I think that after hearing him this morning, he may have changed his mind since 1991. The Gulf War included numerous acts by Iraq aimed directly at the environment, many of which had no military

significance, but any suggestion that the person or persons responsible for those acts should suffer punishment, died on the vine.

Let me just close by quoting a statement that was also made at the 1991 Annual Meeting of the ASIL and one which I heartily endorse. The speaker said this: "I am somewhat inclined to think that now it may be time for us to seriously consider the possibility of establishing an appropriate international mechanism to cope with such situations as environmental terrorism or aggression." Thank you.

**Dr. Hollick:** Thank you Professor Levie.

Well, the issue has been set forth by our panelists. We have a little time for questions and I understand that we will be given a little flexibility on the ending point. Professor Szasz, you have the first question or comment.

**Professor Paul C. Szasz:** Thank you, I do not really wish to answer Professor Levie's charge. Still, the situation is that some progress has been made but that progress, really, has not resulted in good, manifest, binding law. It was true then and unfortunately it is still true now. The binding law is still the 1907 Hague Conventions, on which we can condemn what happened in Iraq. What I would like to do is refer to some other provisions of international criminal law. First of all; two provisions that were considered by the International Law Commission. One, under the topic of State responsibility, had to do with State crimes and there it was suggested by the rapporteur to characterize as an international crime, a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas. I understand that that rapporteur's proposal is no longer under active consideration, but it does indicate that there is an effort to criminalize, on the State level, environmental crimes.

Under the draft Code of Crimes Against the Peace and Security of Mankind which, of course, deals with individual criminal responsibility, there was under consideration Article 22 on exceptionally serious war crimes. For the purpose of this draft Code, an "exceptionally serious war crime" is an exceptionally serious violation of the principles of the rules of international law, including employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment—obviously picking up the language of Additional Protocol I. Also in the draft Code is Article 26 pertaining to willful and severe damage to the environment. An individual who willfully causes or orders the causing of widespread, long-term, and severe damage to the natural environment, is subject to prosecution and appropriate punishment. Again, that is in the draft Code of Crimes which would accompany any statute of international criminal courts set up by the General Assembly.

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As far as not including environmental provisions in the statutes of the two criminal courts that have been set up by the Security Council—Yugoslavia and Rwanda—that reflects the fact that in respect of those two conflicts, environmental crimes do not have particular prominence compared to others. You can tell that these tribunals are *ad hoc*, adjusted to the situation. If you compare the crimes under the Yugoslavia Tribunal and with those under the Rwanda Tribunal, you will find that they are not identical. So it indicates that the Security Council tailors each of those to the crimes it sees having been committed.

Now I would like to refer to just one more provision which is of some interest in this connection. At the Eighth United Nations Congress on Prevention of Crime and Treatment of Offenders—the 1990 Havana Conference—a resolution was adopted pertaining to the role of criminal law in the protection of nature and the environment. It called upon States to enact and to enforce national criminal laws designed to protect nature and the environment. To the extent that this would be generally followed, it would start creating a general principle of law which would, by that fact, rise to the level of an international law under Article 31(c) of the Statute of the International Court of Justice. So there are a number of movements toward criminalizing environmental misconduct, aside from the ones that exist already in the Geneva Conventions, the Additional Protocols and the other instruments referred to. Thank you.

**Dr. Hollick:** Thank you. You have obviously stimulated our panelists. At this point I will invite Dr. Tanja, if he wishes, to respond to Professor Szasz' comments.

**Dr. Tanja:** We could make it a joint response. Well, the only observation I have with respect to Professor Szasz' remarks relates to what he apparently sees as a relationship between the draft Code which he referred to, and the efforts toward the establishment of a permanent international criminal court. I am not quite sure whether those two efforts, at the international scene, are as closely related as you think they are. It seems to me legally quite dangerous if you base your conclusions on the fact that the two documents should be seen together.

**Professor Levie:** With regard to the I.L.C. Statute for an International Criminal Court, you will note that the only reference to any convention which deals, even remotely, with the environment are the five conventions talked about repeatedly here; the four 1949 Geneva Conventions and the 1977 Additional Protocol I. The 1954 Hague Convention, which should have been included, is not listed among the treaties that are to be the subject of criminal prosecutions before that court.

Secondly, with regard to the two international tribunals that have been established, the one for Yugoslavia includes crimes listed in Article 6, Paragraphs

(a), (b) and (c) from the London Charter of 1945; that is “wars of aggression,” “crimes against peace,” “conventional crimes,” and “crimes against humanity.” The second one, Rwanda, does not, of course, contain crimes against peace because it is a civil war. However, it does contain, almost identically, Article 6, Paragraphs (b) and (c) of the London Charter.

**Professor Bothe:** I have just a few remarks concerning the duty to punish violations below the level of grave breaches. The relevant provision of Additional Protocol I states: “High Contracting Parties and the Parties to the conflict shall repress grave breaches”—that refers back to the duty to prosecute and punish—“and take measures necessary to suppress all other breaches,” which gives much more freedom to the States as to how to do that. It does not necessarily require criminal prosecution.

Regarding the question of the definition of “international crime” and the possible marriage between the draft Code and the Statute of a Permanent Court of Criminal Justice. In the draft Statute, elaborated by the International Law Commission, an international crime is “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 criminal responsibility of individuals.”

Now this is a very open-ended formula which may attract value judgments expressed in other documents. In this respect, the trends which are rightly observed by Professor Szasz may become relevant, and may finally lead to the point where some violations of international environmental law would be included in this provision. The query I have is whether we have already reached that stage.

**Dr. Hans-Peter Gasser, Senior Legal Advisor, International Committee of the Red Cross:** May I say just one word to what both of you have mentioned, namely the absence, the regretful absence, of actual prosecutions on the domestic level. I think one of the reasons, quite simply, is that many States are not ready, are not prepared to do this. They have not enacted the necessary domestic laws in order to make it clear what is the crime that can be prosecuted before a domestic court and also have not clarified the jurisdictional procedures and so on. We at the ICRC, of course, have seen this and regretted it. Just recently, we have started to strengthen our advisory service which is to advise national authorities on enacting the necessary penal legislation in order to implement these obligations to prosecute or to extradite.

My second comment is that after the end of the hostilities in the Gulf War, the Coalition very quickly repatriated the Iraqi POWs and sent them home. That had an effect, amongst others, that none of those POWs were detained for possible prosecution for war crimes. This despite the fact, of course, that much emphasis

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has been put on these serious crimes which were committed by Iraqi forces. This, too, has been regretted, and I wonder whether it would not have been necessary to explain in some way why this has happened? Why the POWs have been sent home so fast and they have not been kept a longer time to allow the necessary inquiries and to individualize possible criminals? What was this urgency to repatriate these POWs as quickly as possible? There are humanitarian considerations that came in, which was probably the case here; other interests acting as an opposite force to the interest of justice. Therefore, we have to recognize that there may be different interests which have to be respected in such situations.

**Dr. Anne Hollick:** Perhaps we should start collecting these questions and then turn them over to the panel. Our next question is from Professor Meron.

**Professor Theodor Meron, New York University:** Thank you. First I would like to follow-up on a comment made by Paul Szasz. It seems to me that the Security Council has carefully calibrated the offenses listed in the Statutes for Yugoslavia and Rwanda bearing in mind the character of the conflict. In the case of Yugoslavia, because it considered the conflict, obviously, to be one of an international character, it listed the Hague law, grave breaches, in addition to genocide and crimes against humanity. In the case of the Statute for Rwanda, it listed common Article 3, Additional Protocol II, crimes against humanity and genocide, without any reference to either the Hague law or the grave breaches. But I would like, if I may, to refer to the controversy between Professors Bothe and Levie regarding the scope of obligations of States with regard to grave breaches, because I believe it is a very fundamental question. With regard to grave breaches, the situation, I believe, is simple. Third States—all States—have the duty either to prosecute or to extradite. In a way, you can regard the grave breaches provisions of the Geneva Conventions as almost a treaty dealing with judicial cooperation among States. Now, I turn to those breaches which do not rise to the level of grave breaches, but I am not speaking of all breaches of the Geneva Conventions, only those that are significant violations. For example, common Article 3 or Article 27. I am not speaking of technical or administrative matters. It seems to me that with regard to those matters, that is the bulk of the provisions of the Geneva Conventions, third States have the right to punish, but they are not under the duty to punish. An example from recent practice, suggesting that this is not only a theoretical right but a practical assertion of jurisdiction, is a recent 1993 law which was adopted by the Belgian Parliament. Under that law, in 1995, Belgian prosecutors requested that international arrest warrants be issued against a person in Rwanda accused of violations of common Article 3 and Additional Protocol II. We are not talking now of the grave breaches, what we have is an

assertion of universal jurisdiction with regard to things which are lower breaches.

Now, having said that, I would like to express a note of caution. Environment and everything that concerns it, is basically a new concept. And if we can learn anything from the Nuremberg proceedings, and indeed from the arguments made by the defense before the Criminal Tribunal at the Hague during the last few weeks, it is the difficulty of bringing criminal charges for “new” crimes. I had the honor of assisting the prosecution in that case. I saw the extraordinary care placed by both the defense and the prosecution and, of course, by the judges, on the concept of customary law in order to deal persuasively with *ex post facto* challenge. I would think that third States and international tribunals, criminal courts to be established or those that exist, will be extremely careful about criminalizing anything pertaining to violation of the environment because they will want to be absolutely certain that we are talking about solid customary law. Thank you.

**Professor Bernard H. Oxman, University of Miami:** In its application for provisional measures against Great Britain and the United States in connection with the extradition of individuals charged with responsibility for the Pan Am Flight 103 disaster, Libya raised a question which, in fact, challenges many assumptions about the structure of the international law of jurisdiction. Libya raised the question of whether the defendants could receive a fair trial in Great Britain. It seems to me that with the development of the international law of human rights—not just the international law of war crimes—we have to accept the premise that everyone is entitled to a fair trial. I was wondering if one of the panelists could comment on the reverse side of the preoccupation of the panel and that is whether these authorizations or insurances on prosecution, particularly by States where emotions may be running very high against the defendant, are consistent with human rights notions of a fair trial?

**Dr. Hollick:** We will take one last question and then let the panelists have their say.

**Professor Christopher Greenwood, Cambridge University:** Thank you. May I just briefly take issue with what Hans-Peter Gasser said about the repatriation of prisoners of war and the investigation of war crimes. There is a very clear duty under the Prisoners of War Convention to repatriate prisoners of war without delay on the cessation of hostilities. The International Committee has been one of the foremost advocates of the implementation of that provision. You really cannot have it both ways, and say that something like 85,000 prisoners of war should be detained in Saudi Arabia for possibly several years while it is investigated whether

any of them are liable for prosecution for crimes against the environment. It is just not practically possible to do that sort of thing and reconcile it with other duties under the Convention.

**Dr. Hollick:** Thank you. It is now time for our panelists to have the final word.

**Professor Bothe:** Thank you Anne. First the point raised by Hans-Peter Gasser, relating to the non-existence of adequate national legislation—of course, there I agree. What we find if we look more closely into national legislation quite often is that the claim that a particular State does not have to do anything about its legislation because it covers, rather automatically, all the grave breaches of the Conventions, is not well founded. This, of course, does not apply to the Commonwealth Countries who have their own way of transforming the Geneva Conventions, and the Protocols Additional to them, to the national law. Just a reference to the provisions of the Convention and Protocol, as the case may be, in the implementation will technically cover any grave breach. But there are a number of countries that just claim that they do not need any implementing legislation because these things are covered in any event by national criminal law, and it is there that doubts are appropriate whether this is really true. This, in my view, is particularly true for breaches which are below the level of grave breaches. It may well be that an effective measure can only be a criminal law provision, but this is far from being certain.

The national provisions relating to environmental protection, and I am sorry to repeat myself here, but national environmental protection provisions are not geared to the particular kind of offense against the environment which we may find in times of war.

Concerning the reverse side of the *Lockerbie Case*; the argument was not really invented by Libya, the argument was pleaded elsewhere. It was the basis of a similar argument in the decision of the European Court of Human Rights in the *Sirring Case*, where the Court said that it was illegal for the United Kingdom to extradite an accused to the United States where he might face the death penalty and would be exposed to the death row phenomenon—the death row phenomenon being considered by the Court as a form of degrading treatment and Great Britain would have contributed to that degrading treatment by extraditing the person to the United States.

This is exactly the kind of argument which is also raised by Libya. The structure of the argument is the same. I would not evaluate the argument in the same way, but the structure of the argument is the same, and it is a serious argument which has to be considered. There are, and this is a general remark, certainly some human rights limitations to which the prosecution of war criminals is subject. This applies to the International Tribunal and has a provision for that. It applies to any State.

This is very difficult. We have witnessed that in Germany there is a long practice of prosecution of war criminals in the later 1950s, the 60s, and the 70s. On the one hand, the desire to arrive at a punishment which was adequate in view of the atrocities which had been committed, and on the other hand to come to that conclusion by respecting all of the procedural guarantees required by the rule of law. These are two requirements which do not co-exist very easily. This is something I think any prosecution faces. These are crimes which are, quite often, difficult to prove. We are dealing with the individual contribution of an individual accused in a course of conduct that involves, quite often, systemic crimes. You know it happens—you know that there is ethnic cleansing, you know there is systematic rape—but was it this particular guy, at this particular place, in relation to this particular victim. Because that is what you have to prove. And you have to prove it by respecting all the rights of the accused, and there you may, as a prosecutor, have a rough time.

**Dr. Tanja:** There is only one comment I would like to make and that relates to an observation made by Professor Levie. According to Professor Levie, I stated that before 1949 there was not a customary principle with respect to reliance on a penal enforcement mechanisms. If I said it, it was probably because I am not a native speaker. What I did mean to say was that after 1945, you cannot deny that in international instruments on the laws of war—international humanitarian law like the Geneva Conventions and Additional Protocols—there has been put a growing emphasis and reliance on penal enforcement mechanisms. That is the only thing I wanted to state.

**Professor Levie:** I have two short comments. First, with regard to what Hans-Peter Gasser said, I think that the quick repatriation of prisoners of war after the Gulf War was due to the Security Council Resolution which called for the repatriation of prisoners of war on both sides and that was probably motivated by the fact that we wanted to get our prisoners of war back as quickly as we could. Secondly, on that same subject, after the Korean War we held 200 alleged war criminals in a separate prisoner of war compound as we prepared to try them for war crimes. We had another compound with several hundred prisoners of war who were prepared to testify against their fellow prisoners. No trials took place because the Armistice Agreement required that all prisoners of war who desired to be repatriated should be repatriated. That is what is going to happen very frequently.

Whenever there is a cease fire or an armistice, it is likely going to include a provision for repatriation, and there are not going to be provisions regarding possible war crimes trials. I would say that that is one of the reasons why you did not have it after the Gulf War, because we were in such a hurry to get prisoners of war back and the Security Council was not going to put in its resolution on the

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terms for the cease fire any provision that called for the surrender of prisoners for trial by a war crimes tribunal.

With regard to Libya, it is interesting to note that after Libya filed its notice that it was going to institute the suit, it took about six months to file its memorial. The Court allowed the United States and Great Britain almost a year to file their respective counter\memorials. They were filed on June 20th, 1995. Libya has asked for until December 15th, another six months, to file its reply. After that, the Court is probably going to agree to the United States taking another six months to answer the reply. This all looks to me like an attempt to stall, perhaps with the idea that passions will disappear, and that there will not be any necessity for the trial; that the United States and Great Britain will give up the demand for the surrender of the two Libyans and forget about the matter.