# Eco-struggles: Using international criminal law to protect the environment during and after non-international armed conflict

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# Eco-Struggles

## Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict

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### 10.1 Introduction

As armed conflicts continue to flare up around the world, the spectre of serious damage to the environment is a recurring and growing threat. Conflict disrupts and often disables the regulatory authorities that typically enforce environmental protections, such as national and local governments, forestry rangers, and factory inspectors. As domestic regulatory systems break down, international criminal law presents an alternative mechanism that may potentially be used to address serious environmental harm. This chapter examines the provisions of international criminal law that are applicable to prosecute environmental harm, particularly during non-international armed conflicts ('NIAC'), which have grown increasingly prevalent since the end of the Second World War.[1]

The analysis begins by instantiating environmental harm caused during armed conflicts. It then surveys the law applicable to environmental harm during NIACs, which has traditionally been less developed and articulated than the law applicable during international armed conflicts ('IAC').[2] The exegesis adheres to the

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[1] In the *Tadić* Jurisdictional Decision of 2 October 1995, the Appeals Chamber of the ICTY observed that internal armed conflicts, or civil wars, have become increasingly prevalent, cruel, and protracted and that NIACs increasingly impact on third states; *Prosecutor v. Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (IT-94-1-A, 2 October 1995) ('*Tadić* Jurisdiction Decision'), paras. 96–7.

[2] In *Prosecutor v. Duško Tadić* the ICTY Appeals Chamber held that the ICTY could exercise criminal jurisdiction over crimes committed during NIACs, reflecting an apparent trend towards removing the distinction between IAC and NIAC; *Tadić* Jurisdiction Decision (n 1) paras. 97, 137. See also Jean Allain and John R.W.D. Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind' (1997) 1 European Journal of International Law 100–17, 116. The Rome Statute of the International Criminal Court has reversed this trend—using the dichotomy between IACs and NIACs as the primary organizational principle of its war crimes provision (Art. 8); Antonio Cassese and Paola Gaeta, *International Criminal Law,* (Oxford: Oxford University Press, 2nd edn, 2008) 96.

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International Law Commission's call for the examination and clarification of this area of the law.[3]

After assessing the various potentially applicable provisions of international criminal law, the analysis examines the basis for extending to NIACs the protection against military attacks causing excessive environmental harm (set out in Art. 8(2)(b)(iv) of the Rome Statute), which is currently only applicable in IACs. This provision prohibits causing widespread, long-term, and severe damage to the natural environment excessive in relation to any concrete and direct anticipated military advantage ('disproportionate environmental attacks'). The study primarily focuses on the provisions applicable at the International Criminal Court ('ICC'), as this is the only international criminal tribunal of potentially unlimited geographic jurisdiction.

While this study concentrates on circumstances of armed conflict, the ambit is not restricted to the limited period of active hostilities, but also looks to the aftermath of hostilities, including post-conflict peacebuilding efforts, to discern means of redress for serious environmental harm.[4] Traditionally, international law applicable to armed conflict has been bifurcated into *jus ad bellum*, concerning the principles governing the initiation of hostilities, and *jus in bello*, concerning the conduct of warring parties during hostilities. There has been only limited analysis and development of the application of the international law of armed conflict to address the transition to peace, referred to as *jus post bellum*.[5] In the context of NIACs, which are even less regulated by international law than IACs, the traditional view remains well entrenched that international criminal and humanitarian law diminish in relevance as hostilities end.

Contrasting with the traditional view is the increasing awareness of the continuing relevance of aspects of international law concerning armed conflict in the aftermath of conflict. The various principles, provisions, and practices of international law of armed conflict that apply in the wake of hostilities are grouped under the label *jus post bellum*, which can be defined as the 'laws and norms of justice that apply to the process of ending war and building peace'.[6] This study takes into account *jus post bellum* as it applies

[3] Report of the International Law Commission on the work of its sixty-sixth session 5 May–6 June and 7 July–8 August 2014, ILC Report, A/69/10, 2014, chap. XI, paras. 186–222 (concerning protection of the environment during armed conflict), paras. 192, 199, 201. See also Third report on the protection of the environment in relation to armed conflicts, Marie G. Jacobsson, Special Rapporteur, ILC Doc. A/CN.4/700, 3 June 2016.

[4] Environmental harm also occurs outside of the context of any armed conflict, but that harm is not addressed in this analysis.

[5] Pointing out that only recently the *jus post bellum* has begun to get attention, see Larry May, 'Jus Post Bellum, Grotius and Meionexia' in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press, 2014), 15 (with further references).

[6] Jennifer S. Easterday, Jens Iverson, and Carsten Stahn, 'Exploring the Normative Foundations of Jus Post Bellum: An Introduction' in Stahn, Easterday, and Iverson (ibid.) 1. See also Eric de Brabandere, 'The Concept of Just Post Bellum in International Law: a Normative Critique' in Stahn. Easterday, and Iverson (ibid.) ('Jus post bellum may be viewed as a normative set of principles rather than substantive rules which would give guidance in the application of the existing rules governing post-conflict reconstruction. Such principles may for example include the principle of proportionality, or the accountability of foreign actors.').

to NIACs, in order to give a full account of the legal regime applicable to the cycle of war and peace.

## 10.2 Environmental Harm During and After Armed Conflicts

It is an unfortunate truism that the environment is jeopardized, and often harmed, during armed conflict.[7] This concern was echoed in Principle 24 of the Rio Declaration on the Environment and Development, whereby the collected states recognized that:

> warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.[8]

Based on a study of the impact of armed conflict on the environment, the United Nations Environment Programme ('UNEP') concluded in 2009 that 'armed conflicts have continued to cause significant damage to the environment—directly, indirectly, and as a result of a lack of governance and institutional collapse'.[9]

Environmental harm caused by military activities has been documented by international organizations in several conflicts, including in the Vietnam War,[10] the first Gulf War in 1991,[11] the Israeli Defence Force operations in Lebanon in 2006,[12] and the North Atlantic Treaty Organization ('NATO') bombing campaign against Serbia in 1999.[13] Armed activities have caused the United Nations Educational, Scientific and Cultural Organization ('UNESCO') to list several national parks in the Democratic Republic of Congo ('DRC'), including the famed Virunga National Park, home of the mountain gorillas, as being in danger.[14]

[7] For an historical overview, see Tara Weinstein, 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?' (2005) 17 Georgetown International Environmental Law Review 699–700.

[8] General Assembly, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, Rio Declaration on Environment and Development, 12 August 1992.

[9] UNEP, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (UNEP, 2009), 8. Armed conflict can have unintended benefits for the environment, by rendering areas effectively out of bounds for human populations; UNEP, *Our Environment, Our Wealth* (UNEP, 2006), 395. However, that incidental possibility should not overshadow the demonstrated risks of armed conflict resulting in serious environmental degradation.

[10] Ines Peterson, 'The Natural Environment in Times of Armed Conflict: A Concern for International War Crimes Law?' (2009) 22 Leiden Journal of International Law 331–2; Aaron Schwabach, 'Environmental Damage Resulting from the NATO Military Action Against Yugoslavia' (2000) 25 Columbia Journal of Environmental Law 117, 126.

[11] UN Security Council Resolution 687, adopted on 3 April 1991, para. 16; UNEP (2009) (n 9) 8.

[12] See Third report on the protection of the environment in relation to armed conflicts, (n 3) para. 79 citing General Assembly Resolution 69/212, paras. 4 and 5.

[13] See Office of the Prosecutor Press Release, Prosecutor's Report on the NATO Bombing Campaign, The Hague, 13 June 2000, PR/P.I.S./510-e; Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ('Final Report on NATO'), at <http://www.icty.org/sid/10052> accessed 16 October 2015. Views on the final recommendations of the report are mixed. See, for example, Paolo Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (2001) 12(3) European Journal of International Law 503–29.

[14] See UNESCO website, at <http://whc.unesco.org/en/danger/> accessed 8 January 2016.

Illegal exploitation of, and damage to, the environment can both intensify conflict during active hostilities and reignite hostilities in the aftermath of conflict. Environmental harm feeds a vicious cycle of resource depletion, increasingly violent inter-group clashes, and environmental expropriation (the assertion of ownership rights or the spoliation of environmental features without lawful right). At the ICC, the Court determined in the *Lubanga* Judgment that exploitation of natural resources in the Ituri region of the DRC fed the protracted armed conflict.[15] More recently, the ICC Office of the Prosecutor's charges against Bosco Ntaganda allege that 'The district of Ituri is rich in natural resources, including gold, diamonds, coltan, timber and oil … Competition over these resources has, in many ways, fanned the flames of conflict in the area.'[16]

Exploiting the natural environment is an increasingly prevalent means of financing armed conflict.[17] The UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo concluded that paramilitary groups remaining in the Congo after the larger conflicting parties left had 'built up a self-financing war economy centered on mineral exploitation'.[18] The UN Security Council recognized in Resolution 1856, which extended the UN Mission in the Democratic Republic of the Congo ('MONUC'), that

> the link between the illegal exploitation of natural resources, the illicit trade in such resources and the proliferation and trafficking of arms is one of the major factors fuelling and exacerbating conflicts in the Great Lakes region of Africa, and in particular in the Democratic Republic of Congo.[19]

The incidental effects of armed conflict can also seriously harm the environment. In the Central African Republic ('CAR'), for example, the influx of small arms from the conflicts in Chad and Sudan resulted in a transition to more deadly hunting practices, which in turn contributed to a reported reduction of the elephant population by around 90 per cent between the 1970s and 1990s, and the virtual extinction of the rhinoceros population.[20] Similar incidental effects are being felt in the DRC,[21] and CAR, where the elephant population, which numbered up to 10,000 thirty years ago, has now been reported to have essentially disappeared.[22]

[15] *Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, (ICC-01/04-01/06-2842, 14 March 2012) ('*Lubanga* Article 74 Decision').

[16] *Prosecutor v. Ntaganda*, Public redacted version of 'Prosecutor's Pre-Trial Brief', Trial Chamber VI, (9 March 2015, ICC-01/04-02/06-503-Conf-AnxA), (1 September 2015, ICC-01/04-02/06-503-AnxA-Red2), para. 7.

[17] Karen Hulme, 'Environmental Security: Implications for International Law' (2009) 19(1) Yearbook of International Environmental Law 3, 15; Daniëlla Dam-de Jong, 'From Engines for Conflict into Engines for Sustainable Development: The Potential of International Law to Address Predatory Exploitation of Natural Resources in Situations of Internal Armed Conflict'(2013) 82 Nordic Journal of International Law 155–77, 155–6.

[18] Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2002/1146, 16 October 2002, para. 12.

[19] UN Security Council Resolution 1856, S/RES/1856 (2008), 22 December 2008.

[20] UNEP (2006) (n 9) 395.

[21] UN Security Council Resolution 1856, S/RES/1856 (2008), 22 December 2008.

[22] U. C. Jha, *Armed Conflict and Environmental Damage* (New Delhi: Vij Books India Pvt Ltd, 2014), 103.

Systems of natural resource exploitation continue after the termination of conflict. Post-conflict rebuilding efforts must address serious environmental damage that has occurred, or that is continuing to occur, in order to allow for people to access resources needed to earn their livelihoods. The continuity of environmental harm during and after armed conflicts necessitates efforts to identify legal mechanisms to address such harm in the rubric of *jus post bellum*.

## 10.3 The Application of International Criminal Law to Environmental Harm During Non-International Armed Conflicts

With the recent flourishing of international courts and the increasing distillation of substantive and procedural rules, the field of international criminal law constitutes a potential means of addressing environmental harm. The following discussion assesses the capacity of the international criminal law, in its current state, to address serious environmental harm, particularly during NIACs.

The relevance of international criminal law is not limited to situations of international conflict. Indeed, international criminal law has a proven track record of application to the context of NIACs. At the International Criminal Tribunal for the Former Yugoslavia ('ICTY'), International Criminal Tribunal for Rwanda ('ICTR'), and more recently at the ICC, convictions have been entered for crimes, including war crimes, crimes against humanity, and genocide, committed during NIACs.[23]

However, international criminal law should not be seen as a panacea for the environmental degradation that is occurring throughout the world, often in the context of armed conflict. Due to jurisdictional constraints, international criminal law does not automatically apply to all situations.[24] The utility of international criminal law in relation to environmental harm is also restricted by the lack of jurisdiction over corporate entities.[25] Given that environmental harm is often carried out by groups acting for a profit motive, the limit on personal jurisdiction to natural persons is significant.

[23] See for example: (ICC) *Prosecutor v. Lubanga* Article 74 Decision (n 15); Prosecutor v. Germain Katanga, Judgment Pursuant to Article 74 of the Statute, Trial Chamber II, (ICC-01/04-01/07, 7 March 2014); (ICTY) *Prosecutor v. Ljube Boškoski*, Trial Chamber, Judgment, (IT-04-82-T, 10 July 2008); (ICTR) *Prosecutor v. Ferdinand Nahimana,* Trial Chamber I, Judgment, (ICTR-99-52-T, 3 December 2003). No genocide convictions have been entered at the ICC to date.

[24] The ICTY, ICTR, Extraordinary Chambers in the Courts of Cambodia ('ECCC'), and Special Tribunal for Lebanon ('STL') are self-evidently limited to specific geographic areas, and the ICC only has jurisdiction over the territory and nationals of state parties unless another state voluntarily accepts the ICC's jurisdiction or the UN Security Council refers a situation to the court. Rome Statute, Arts. 12–13. Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 38544), Art. 8, para. 2(f). See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 17513, Art. 1 (2).

[25] None of the existing international tribunals currently have jurisdiction over corporations for substantive crimes. At the STL, the Court has found that, for cases of contempt, it has jurisdiction over legal persons, which would include companies, non-governmental organizations, and other entities; *In The Case Against New TV S.A.L. Karma Mohamed Tahsin Al Khayat*, Decision On Interlocutory Appeal Concerning Personal Jurisdiction In Contempt Proceedings, (STL-14-05/PT/AP/ARI26.1, 2 October 2014) ('STL Decision'), paras. 82–83 ('many corporations today wield far more power, influence and reach than anyone person', 'the prosecution of natural persons, rather than the legal persons that they serve, would fail to underline and punish corporate cultures that condone and in some cases encourage illegal behavior').

International criminal law is not a fail-safe mechanism even when it applies. International courts lack the security forces needed to assure the immediate enforcement of arrest warrants. Evidence is sometimes corrupted by mistakes, improper influence, and the passing of time. And there is no iron-clad, indisputable evidence that international criminal law has any general deterrent effect against the future commission of atrocities.[26] With respect to environmental harm, these problems exacerbate the difficulty of prosecuting perpetrators under the highly restricted definitions of the provisions addressing harm to the environment, as evidenced by the fact that no individual has been convicted under international criminal law specifically for destruction of the environment.[27]

In light of these limitations, international criminal law provides a complementary, but not comprehensive, vehicle for redress.[28] It is best considered as a branch of a multifaceted approach to environmental harm, incorporating other mechanisms, such as peacekeeping missions and Security Council sanctions,[29] which will generally provide more immediate and contemporaneous means of confronting serious environmental harm.

### 10.3.1 The provisions of international criminal law capable of application to environmental harm

Running through the substantive provisions of the Rome Statute of the ICC, there are very few environmental protections that apply during NIACs.

Genocide can be prosecuted irrespective of the occurrence of an armed conflict of any nature. There is a precedent for charging conduct involving environmental harm as a means of carrying out genocide under Article 6 of the Rome Statute to a situation that has been classified as a NIAC. The ICC Prosecutor indicted and charged President Omar Al-Bashir with genocide under Article 6(c), for 'deliberately inflicting on [the Fur, Masalit and Zaghawa ethnic groups] conditions of life calculated to bring about their physical destruction in part'.[30] These conditions of life resulted from ruining or depleting natural and man-made resources that the named victim populations rely on for their survival.[31]

[26] On the issue of the deterrent effect of international criminal proceedings, see Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton, 2011).

[27] Weinstein (n 7) 698, 704.

[28] Penal sanctions are necessary as civil sanctions have often proved insufficient to deter companies from polluting behaviour, see Timothy Schofield, 'The Environment as an Ideological Weapon: A Proposal to Criminalise Environmental Terrorism' (1998–1999) 26 Boston College Environmental Affairs Law Review 639, 642.

[29] See Dam-de Jong (n 17) 156 (noting that sanctions have been placed on commodities in the conflicts in Angola, Sierra Leone, Liberia, and Cote d'Ivoire).

[30] *Situation in Darfur, The Sudan,* Summary of Prosecution's Application under Article 58, (ICC-02/05-152, 14 July 2008), para. 1.

[31] ibid. 5–7 (as related in the prosecutor's application: '[The attackers] destroy all the target groups' means of survival, poison sources of water including communal wells, destroy water pumps, steal livestock and strip the towns and villages of household and community assets. As a result of the attacks, at least 2,700,000 people, including a very substantial part of the target groups attacked in their villages, have been forcibly expelled from their homes.' 'Militia/Janjaweed and the Armed Forces repeatedly destroyed, polluted or poisoned these wells so as to deprive the villagers of water needed for survival.').

However, genocide is inherently anthropocentric, with the origins of the term arising from 'genus', meaning peoples, and 'cide', meaning killing. Genocide could only ever be used to prosecute environmental harm as an incidental occurrence related to efforts to destroy a protected group. Moreover, proving genocide requires showing the accused's specific intent to destroy the targeted group in whole or in part, which is a heavy burden of proof, as reflected in the extremely limited number of convictions for genocide under international criminal law.[32]

Similar to genocide, crimes against humanity (Art. 7) apply irrespective of the existence of an armed conflict. Crimes against humanity may incidentally address environmental harm, during peacetime and during armed conflicts, including NIACs. It is possible that certain crimes against humanity, such as other inhumane acts, which essentially concern acts causing serious bodily or mental injury, would cover serious environmental damage. This could occur, for example, if perpetrators poisoned natural water sources or removed natural food sources in local flora or fauna, in turn causing serious bodily and/or mental harm.

The crimes against humanity of deportation and forcible transfer could also be perpetrated by or through serious environmental damage. Deportation and forcible transfer are sometimes referred to under the term forcible displacement.[33] They involve the forcible expulsion of persons from places where they are lawfully present without grounds permitted under international law. These crimes have been charged before international courts in connection with environmental damage. For example, in the *Bashir* case, referred to above, attacks impacting on the victims' group's means of survival, including natural resources, are charged as a means of displacing the population.[34]

Other crimes against humanity could also encompass aspects of environmental harm. Extermination, which essentially concerns the killing of large numbers of people, can be committed through the infliction of conditions of life calculated to bring about the destruction of part of a population. Such conditions include depriving the victims of access to food or medicine, which could occur as a result of an attack on the environmental habitat of a people.[35] For crimes against humanity to apply the damage would need to be committed in conjunction with a widespread or systematic attack directed against a civilian population pursuant to a state or organizational policy.[36]

However, these crimes, in keeping with their labels (crimes against humanity and genocide) are conditioned on showing harm to humans and their property. They could only ever address environmental damage incidentally. Using these provisions to

[32] While there have been several convictions for genocide at the ICTR, the occurrence of the genocide there was so well established that it was taken judicial notice of as the Tribunal's operations continued. At the ICTY only four individuals have been convicted for commission of genocide, at the time of writing, with convictions upheld on appeal: Ljubisa Beara, Vujadin Popovic, Radovan Karadzic, and Zdravko Tolimir.

[33] Technically, the term forcible displacement is used when deportation or forcible transfer or both are charged as underlying forms of persecution. In *Naletelić and Martinović* the ICTY Appeals Chamber opined that for the purposes of a persecutions conviction it is irrelevant to distinguish between deportation and forcible transfer and that criminal responsibility is sufficiently captured by forcible displacement. *Prosecutor v. Mladen Naletelić and Vinko Martinović,* Appeals Chamber, Judgment, (IT-98-34-A, 3 May 2006), para. 154.

[34] *Situation in Darfur, The Sudan* (n 30), paras. 14–15.

[35] See ICC Elements of Crimes, footnote 9.

[36] Rome Statute Art. 7(1)(k); Statute of the ICTY Art. 5(i); Statute of the ICTR Art. 3(i).

substitute for the direct prosecution of environmental harm would not signal the international community's condemnation of environmental harm itself. This would lessen the declaratory impact and potential deterrent effect of any resulting conviction.

Before looking at the applicability of war crimes under Article 8 to environmental harm, it should be noted that the Rome Statute also contains the crime of aggression.[37] Aggression is defined in detail in Article 8*bis* of the Rome Statute, and can generally be said to refer to the 'use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'.[38] A series of examples of acts of aggression are enumerated in article 8*bis*. These acts of aggression generally involve the use of armed force by a state against another state, and so would not naturally apply in the context of a NIAC.

Environmental degradation through military attacks could arguably qualify under this definition. For example, if a state were to send its forces to pollute the water supplies of another state in order to exact concessions from the targeted state, it could meet the definition of an act of aggression under Article 8*bis*(2)(a).[39] Similarly, a nuclear attack on another state could readily qualify as an armed attack. Accusations of aggression that also concerned environmental harm were levelled at NATO during its 1999 bombing campaign against Serbian security and military positions. Although no criminal case eventuated in the international courts, the initial enquiry into NATO's acts conducted by the Office of the Prosecutor of the ICTY provides a limited form of precedent for investigating aggression.[40]

However, environmental harm through means other than military attacks, such as the 'downstream' polluting effects of environmentally harmful practices, would be difficult to qualify as aggression as they would not typically involve the use of armed force. Moreover, environmental degradation committed during a NIAC would not qualify as aggression, no matter how severe, because of the definition's implicit reference to the use of force by a state against another state.

Liability for aggression will also be limited by the leadership requirement. This clause of Article 8*bis* restricts the pool of persons potentially liable for the crime of aggression to those in positions to effectively control or direct the political or military action of a state. There is an open question as to whether financiers, industrialists, lobbyists, and other individuals with considerable influence on politicians and military leaders would fall into this category.[41] Given that environmental harm is frequently attributed to

[37] The crime of aggression was not yet operational at the time of writing this chapter and will be activated in 2017 at the earliest.

[38] Art. 8*bis*.

[39] 'The invasion or attack by the armed forces of a State of the territory of another State …'

[40] See Office of the Prosecutor Press Release, Prosecutor's Report on the NATO Bombing Campaign, The Hague, 13 June 2000, PR/P.I.S./510-e; Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ('Final Report on NATO'), at <http://www.icty.org/sid/10052> accessed 16 October 2015, para. 30.

[41] Roger S. Clark, 'Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May–11 June 2010' (2010) 2 Göttingen Journal of International Law 696–7. See also Stefan Barriga, 'Against the Odds: The Results of the Special Working Group on the Crime of Aggression' in Stefan Barriga, Wolfgang Danspeckgruber, and Christian Wenaweser (eds.), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the crime of Aggression, 2003–2009* (Boulder, CO: Lynne Rienner Publishers, The Liechtenstein Institute on

corporate executives and directors, the leadership requirement may exclude an important class of potential perpetrator of environmental harm from any indirect prosecution through the vehicle of the aggression amendments.

Looking at the applicability of war crimes to environmental harm, there are several provisions that could be used to address harm to the environment. The most directly relevant provision is Article 8(2)(b)(iv) of the Rome Statute of the ICC. It is a partially ecocentric provision, which prohibits:

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or *widespread, long-term and severe damage to the natural environment* which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. (emphasis added)

However, this provision only applies to *international* armed conflicts. There is no analogue of this provision in the parts of Article 8 addressing NIACs. Given that many serious conflicts throughout the twentieth and twenty-first centuries have been NIACs,[42] the limitation of Article 8(2)(b)(iv) to IAC leaves a lacuna in the framework of international criminal law applicable to environmental harm.[43]

Moreover, the elements of Article 8(2)(b)(iv) are exacting and would apply only in the most extreme circumstances of environmental damage. The three requirements for the extent of the damage—widespread, long-term, and severe, are cumulative and must all be met in order for criminal responsibility to arise. The terms, which are not defined in the Rome Statute, but have been subjected to commentary in negotiations over other international law instruments and in academic literature, are potentially extremely restrictive.

The term 'widespread' refers to the required geographical scope of the environmental damage. The specific threshold in terms of square kilometres remains undefined and could vary between several hundred square kilometres, as interpreted in relation to the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques 1976 ('ENMOD') (discussed below),[44] to thousands of square kilometres, as suggested in background materials concerning Additional Protocol I ('AP I') to the Geneva Conventions.[45]

Self-Determination at Princeton University, 2009), 8; Kevin J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18(3) European Journal of International Law 477–97.

[42] UNEP Study (2009) (n 9) 4, referring to Uppsala Conflict Data Program Database, at http://www.pcr.uu.se/gpdatabase/search.php accessed 1 June 2017. See also *Tadić* Jurisdictional Decision (n 1) para. 97.

[43] See, for example, Dr. Mohammed Wattad, 'The Rome Statute & Captain Planet: What Lies Between "Crimes Against Humanity" and the "Natural Environment?"' (2009) 19 Fordham Environmental Law Review 265, 268.

[44] Understanding I of the Conference of the Committee of Disarmament ('ENMOD Memorandum of Understanding') reprinted in Adam Roberts and Richard Guelff (eds.), *Documents on the Law of War* (Oxford: Clarendon Press, 2nd edn, 1989).

[45] Ines Peterson, 'The Natural Environment in Times of Armed Conflict: A Concern for International War Crimes Law?'(2009) 22 Leiden Journal of International Law, 331–2.

The term 'severe' refers to the intensity of the damage caused to the environment independent of its geographic ambit or temporal duration. Severe environmental damage denotes harm going beyond typical battlefield destruction.[46]

The criterion of 'long-term' refers to the temporal duration of the environmental damage. The specific minimum duration of 'long-term' remains undetermined, and could vary from a period of several months or a season, matching the interpretation of 'long-lasting' in Article 1 of ENMOD,[47] to a period of decades, as has been sometimes ascribed to the interpretation of 'long-term' in Articles 35(3) and 55 of AP I.[48] It is unclear how the element of 'long-term' could practically be measured in the context of a criminal prosecution, but it is clear that the perpetrator's knowledge of the possibility of such damage would have to be assessed on the basis of the knowledge available to him/her at the time of the offence.[49]

The final clause of Article 8(2)(b)(iv)—'would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'—introduces a balancing test into the evaluation of environmental damage caused by armed conflict. The ICC Elements of Crimes state that the 'military advantage anticipated' is assessed from the perspective of the perpetrator on the basis of the information available to him/her at the time of launching the attack.[50] This is a highly exacting standard for any prosecution to prove. According to Cassese and Gaeta, it provides belligerents with 'a very great latitude' which makes 'judicial scrutiny almost impossible'.[51] Because of these requirements, Article 8(2)(b)(iv) has been described as 'a huge leap backwards'.[52] The narrow formulation in Article 8(2)(b)(iv) implies not only that there are forms of environmental damage that are not excessive despite being widespread, long-term, and severe, but also that any environmental damage that does not conjunctively fill all the criteria of widespread, long-term, and severe could never be excessive.

At the same time, in at least one respect, Article 8(2)(b)(iv) is potentially broad in its coverage. This is because it is not limited in terms of the types of attacks and means of warfare that it would cover. Accordingly, attacks carried out with nuclear weapons would be covered and potentially prosecutable if it could be shown that the expected incidental environmental damage was not justified by the anticipated military advantage.[53]

[46] See *travaux préparatoires* to Article 35(3) of AP I, CDDH/215/Rev.1, para.27, in 15 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva 1974–77, 268–9 (Bern: Federal Political Department, 1978).

[47] See ENMOD Memorandum of Understanding (n 45).

[48] Michael Schmitt, 'Green War: An Assessment of the Environmental Law of International Armed Conflict' (1997) 22(1) Yale Journal of International Law 71, 107. See also, for example, Australia Department of Defence, The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication, 06.4, Australian Defence Headquarters, 11 May 2006, para. 7.14 (interpreting 'long-term' as meaning a period of decades).

[49] Elements of Crimes of the Rome Statute of the International Criminal Court (n 36) footnote 37.

[50] Elements of Crimes of the Rome Statute of the International Criminal Court (n 36) footnote 36.

[51] Cassese and Gaeta (n 2) 96.

[52] ibid.

[53] In this respect, see, for example, Dissenting Opinion of Judge Weeramantry in *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Judgment of 8 July 1996, ICJ Reports 226, at <http://www.icj-cij.org/docket/files/95/7521.pdf> accessed 8 January 2016.

Despite its limitations, Article 8(2)(b)(iv) does directly address grave environmental harm and reflects at least a limited recognition of the need to protect the environment. It shows that the Rome Statute partially incorporates ecocentric values, albeit subject to anthropocentric values. There have been several calls to amend the provisions of Article 8(2)(b)(iv) or even add an entirely new crime to the Rome Statute addressing environmental harm.[54] Such amendments could see the restrictive terms of Article 8(2)(b)(iv) reframed so that the terms need not be cumulative or so that the terms themselves were given understandings designed to lessen their restrictive formulation. However, these proposals may take many years to be adopted, if at all, and suffer from several theoretical and practical shortcomings. In light of these concerns, the state parties may consider an interim measure whereby a corresponding version of Article 8(2)(b)(iv) should be added to the war crimes applicable in NIACs (Article 8(2)(e)), as discussed in more detail below.

Several other provisions could incidentally address harm to the environment committed during NIACs, but are not squarely focused on condemning environmental harm. These include, for example:

- Article 8(2)(e)(xii)[55] (destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war);[56]
- Article 8(2)(e)(v)[57] (pillaging a town or place, even when taken by assault);
- Article 8(2)(e)(xiii)[58] (employing poison or poisonous weapons);
- Article 8(2)(e)(xiv)[59] (employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices).[60]

The International Law Commission's Special Rapporteur on Protection of the Environment during Armed Conflict has suggested a broad-brush solution whereby the environment would simply be classified as civilian in nature, thereby rendering attacks on it unlawful absent its use for military purposes.[61] However, some ILC

[54] See Steven Freeland, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court*, Supranational Criminal Law: Capita Selecta, (Cambridge: Intersentia, 2015). See also Polly Higgins, 'Eradicating Ecocide', at <http://eradicatingecocide.com/the-law/> accessed 14 August 2017, (seeking to encourage the adoption of a crime of genocide).

[55] This provision mirrors Art. 8(2)(b)(xiii) but applies in non-international armed conflict.

[56] It is required that the property was protected from that destruction or seizure under the international law of armed conflict; ICC Elements of Crimes (n 36) 26, 44. (See also Art. 8(2)(a)(iv) (Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly).

[57] This provision mirrors Art. 8(2)(b)(xvi) but applies in non-international armed conflict.

[58] This provision mirrors Art. 8(2)(b)(xvii) but applies in non-international armed conflict.

[59] This provision mirrors Art. 8(2)(b)(xviii) but applies in non-international armed conflict.

[60] This provision is based on The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925).

[61] ILC Report of its sixty-seventh session, held in July 2015, where it considered the second report of the Special Rapporteur, A/CN.4/685, Chapter IX, Protection of the Environment in Relation to Armed Conflicts, footnote 376 ('The natural environment is civilian in nature and may not be the object of an attack, unless and until portions of it become a military objective. It shall be respected and protected, consistent with applicable international law and, in particular, international humanitarian law'). See also Marie G. Jacobsson, Special Rapporteur, Third Report on the Protection of the Environment in Relation to Armed Conflicts, ILC Doc. A/CN.4/700, 3 June 2016.

members expressed concerns over the wholesale categorization of the environment as civilian, and the ensuing implications for the principle of distinction.[62]

### 10.3.2 Pillage[63]

Pillage is often referred to as a relevant crime to address environmental damage in the form of misappropriation and consequent degradation.[64] However, the crime of pillage under Article 8(2)(b)(xvi) for IACs and Article 8(2)(e)(v) for NIACs, which is defined as the intentional appropriation of property for private or personal use,[65] fits uneasily with environmental damage in three ways.

First, the provision's focus on appropriation, as opposed to destruction or spoliation,[66] would exclude a significant portion of the damage done to the environment during armed conflict. Destruction of the environment is not necessarily conducted with a view to the exercise of ownership rights. For example, if an attack involves the contamination of an area through radiation it is difficult to conceptualize the attack as an appropriation of property.

Second, the idea of the environment constituting property is a contested notion. It is clear that in some cases, aspects of the natural environment can constitute property,[67] as would arise, for example, where a property happens to encompass a copse of native trees. However, questions arise concerning the extent to which the environment can be globally referred to as property. Did the forests and vegetation killed during Operation Ranch Hand in Vietnam constitute property? What body of law is used to determine who owns the property in question? What if severe damage to international waterways was caused during an armed conflict? The 'property' requirement means that pillage would not be likely to address the full extent of the environmental harm.

Third, the limitation of pillage in the Rome Statute to appropriation for private or personal use is a major restriction on the range of appropriations that occur during armed conflict. Warring factions will regularly use misappropriated property to fund their military campaigns, rather than for personal ends, which will not always be identical.[68]

In *Case concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, the International Court of Justice ('ICJ') held that members of the Ugandan People's Defence Force who carried out 'looting, plundering and exploitation of natural resources in the territory of the DRC' acted in violation of *jus in bello*,[69] including the prohibition of pillage.[70] However, it is unclear if the same conduct could be prosecuted

[62] ILC Report of its sixty-seventh session (n 62) Chapter IX, Protection of the Environment in Relation to Armed Conflicts, para. 154.

[63] See, in connection with this section, chapter 6 in this volume.

[64] Dam-de Jong (n 17) 164.

[65] Elements of Crimes (n 36), Art. 8(2)(b)(xvi). Aside from the nature of the conflict, the elements of pillage in non-international armed conflict match those in international armed conflict.

[66] *Prosecutor v. Moinina Fofan and Alley Kondewa*, Appeal Chamber, Judgment (SCSL-04-14-A, 28 May 2008), para. 309.

[67] Dam-de Jong (n 17) 162.

[68] ibid. 165.

[69] *Case concerning Armed Activities on the Territory of the Congo* (*DRC v. Uganda*), Judgment of 19 December 2005, ICJ Reports 168, para. 245, generally paras. 222–9.

[70] ibid. paras. 222–9, 245. The Court noted that both The Hague Regulations of 1907 (Art. 47) and Geneva Convention IV of 1949 (Art. 33) prohibit pillage, para. 245. Dam-de Jong (n 17) 165.

as pillage at the ICC, as it would depend on whether the specific conduct was carried out for personal or private ends. In this respect, resource exploitation by rebel groups in order to finance their activities could be classified as having personal or private motivations rather than public, and this question should not be considered *in abstracto*.[71] Conversely, governments will claim that any exploitation of the natural environment carried out on official instructions will be inherently public in nature and automatically excluded from constituting pillage. This potential insulation from liability may explain why governments were willing to include pillage committed in NIACs among the prohibitions enunciated in the Rome Statute.

Any prosecution involving charges of pillaging natural resources is likely to see the accused party contending that the resources were utilized for the public purposes matching the aims of the governmental or rebel movement and not for private ends. Given that the burden of proof is on the prosecution to bring evidence to support its charges beyond reasonable doubt, and given the likelihood that any large-scale resource exploitation will involve reasonably large numbers of people, the requirement of private or personal ends is likely to be difficult to prove. This considerably curtails the utility of the prohibition against pillage to address serious environmental harm.

### 10.3.3 Starvation of civilian population

Starvation of the civilian population is also a war crime that overlaps with environmental harm. In the context of IACs, Article 8(2)(b)(xxv) of the Rome Statute[72] bans intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions. This directly relates to methods such as razing and destroying crops and means of sustenance of people living off the land. The prohibition is broad as it does not contain the military necessity exception that is included in many other war crimes formulations such as destroying the enemy's property under Article 8(2)(b)(xiii).

However, there is no analogue of this provision in the parts of Article 8 addressing NIACs. The omission is particularly glaring as Article 14 of Additional Protocol II ('AP II'), which applies to NIACs, prohibits attacks on objects indispensable to civilian populations, including 'foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works'.[73] Although the examples listed in Article 14 of AP II are primarily man-made objects, features of the natural environment could also fall within these categories. Many peoples' food

[71] Dam-de Jong (n 17) 165.

[72] See also AP I, Art. 54 (prohibiting attacks against 'objects indispensable to the survival of the civilian population', meaning objects that are of basic importance to the population's livelihood); AP II, Art. 14, which applies the prohibition to non-international armed conflict (prohibiting attacks on objects indispensable to civilian populations, including foodstuffs, agricultural land, crops, livestock, drinking water installations and irrigation works); Michael Schmitt, 'Humanitarian Law and the Environment' (1999–2000) 28 Denver Journal of International Law and Policy 265, 301–2; Aaron Schwabach, 'Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflict' (2004) 15 Columbia Journal of International Law and Policy 1, 25.

[73] See also Art. 54 AP I and Art. 14 AP II.

sources include fruit, vegetables, cereals, animals, and fish that constitute part of the natural environment and many people source water from natural wells. Equally, many people caught up in armed conflicts rely on the natural environment for their livelihoods. For example, in the DRC, local populations rely on artisanal mining.[74] If warring factions were to take over those mineral or metal deposits and remove them or render them useless for the local population, the conduct would potentially breach Article 14 of AP II by depriving the population of its means of financing its survival.

Article 14 of AP II is designed as a form of safety net for civilian populations caught up in internecine conflict.[75] Prohibiting the destruction, ruination, or removal of supplies and objects essential for the survival of the population is an important means of containing the impact of armed conflict on the civilian population. The omission of this prohibition from the Rome Statute provisions covering NIACs is concerning—the starvation of the civilian population would not necessarily be directly prosecutable.

### 10.3.4 Destruction of property

Prosecuting environmental damage as a violation of Article 8(2)(b)(xiii) (destruction or seizure of enemy property) raises the awkward issue of the environment constituting property, which is discussed above. To the extent that the natural environment can constitute property, it is likely to vest in the state.[76] Consequently, any destruction of the environment may suffer from an inherent asymmetry, applying to rebel forces but not to governments.

This provision also includes a military necessity exception clause, which would serve to filter out all but the most egregious examples of environmental harm. Dam posits that that the 'burning of parts of a forest to clear mining sites or for large-scale timber extraction may fall within the ambit of the prohibition'.[77] However, parties carrying out such harm may be able to link the operation to their military goals and thus squeeze the conduct into the imperative military necessity exception. If, on the other hand, a group such as ISIS[78] started attacking the natural environment as part of its shock and scare propaganda tactics, such conduct could qualify under the provision subject to the additional elements being fulfilled.

The preceding survey shows that, at the world's only international criminal court, there is no provision directly applicable to environmental harm committed in the context of a NIAC. There are indirectly applicable provisions, particularly war crimes, but they are subject to restrictions that could significantly limit their utility for the prosecution of environmental harm.

[74] Dam-de Jong (n 17) 163. [75] ibid. [76] ibid. 166. [77] ibid.
[78] ISIS is the acronym commonly used to describe the so-called Islamic State, also known as Daesh.

## 10.4 Extending Environmental Protections to Non-International Armed Conflicts

With the ICC having only one provision directly addressing environmental harm (Article 8(2)(b)(iv)), and that provision only applicable in the context of IACs, the question arises as to whether the Rome Statute should be amended to add a mirror provision applicable to NIACs. While there have been several calls to amend the Rome Statute to address environmental harm, including by adding a new crime, such as ecocide, to its provisions, these will require a huge groundswell of political will to be realized. As an intermediary and complementary step, the state parties may consider whether the crime of disproportionate environmental harm set out in Article 8(2)(b)(iv) should be added to the war crimes provision applicable to NIACs (Article 8(2)(e)). Some relevant considerations are as follows.

### 10.4.1 The symbolic value of prohibiting disproportionate environmental harm during NIACs

Article 8(2)(b)(iv) serves the purpose of directly addressing grave environmental harm and demonstrating that the Rome Statute is not limited to anthropocentric values but also has an ecocentric component. If a mirror provision were adopted addressing environmental harm in NIACs, prosecutors would have a basis to prosecute environmental harm committed during NIACs. The symbolic value of such an amendment to the Rome Statute would be significant. Prohibiting conduct under international criminal law indicates that the international community considers the conduct to be a sufficiently serious threat to justify the elevation of proceedings to the international level. Because of the added notoriety, such proceedings send a cautionary message to actors throughout the world engaging in environmentally harmful activities.

Prohibiting conduct under international criminal law can lead to the prosecution of individual human beings, often high level political or military figures, and potential penal sanctions. Focusing proceedings on such individuals can serve a powerful symbolic function, which reverberates amongst other high level individuals making decisions that can lead to grave environmental harm.

### 10.4.2 Impact on future generations

Protecting the environment fits with the values under-girding the Rome Statute, particularly in protecting the interests of future inhabitants of planet earth. In its preamble, the Rome Statute indicates that it is designed to protect the current population of the world and 'future generations'.[79] One of the most pressing concerns for future

[79] Rome Statute, Preamble, 'Determined to these ends and for the sake of present and *future generations*, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.' (emphasis added).

generations will be the state of the environment.[80] In this sense, extending the protection against disproportionate environmental harm committed during NIACs would accord with the animating spirit behind the consensus reached in Rome in 1998.

### 10.4.3 Gravity

Environmental harm committed during NIACs can be of concern because of its sheer gravity.[81] Such damage can reach sufficient proportions to jeopardize the feasibility of ongoing human occupation of the land, implicating the rights of future generations. The use of landmines, for example, is widespread in NIACs and kills not only human beings but also animals long after the conflict ends. UNEP reports that in Angola landmines have caused the deaths of thousands of animals including antelope and elephants.[82] During the conflict in Liberia, environmental harm escalated in keeping with the conflict. It was reported that, as the economy and infrastructure were devastated, GDP was halved and a third of the population caused to flee to neighbouring countries. Mains electricity was reduced by 99 per cent, resulting in far greater reliance on charcoal, and a corresponding reduction in forest cover by 2 per cent per year.[83] The trade in bushmeat (which means wild animals such as monkeys and apes, including endangered species) rose exponentially. As prices increased, many farmers were reported to have switched to hunting as their primary means of earning a living.[84]

There are many other areas of the world where grave environmental harm has been caused in connection with NIACs. The sheer gravity of the harm that can be inflicted on the environment through unscrupulous practices militates in favour of international attention.

### 10.4.4 Transboundary harm

Environmental harm, including when committed during NIACs, is a concern because it often results in transboundary harm.[85] As concluded in a 2011 Office of the High Commissioner for Human Rights report on human rights and the environment, 'One country's pollution can become another country's environmental and human rights problem, particularly where the polluting media, like air and water, are capable of easily crossing boundaries.'[86] Where individuals act to cause serious harm that traverses state boundaries, international criminal law provides a means of signalling the opprobrium of the international community.[87] Given that environmental degradation requires

[80] See Sébastien Jodoin, 'Protecting the Rights of Future Generations Through Existing and New International Criminal Law' in Sébastien Jodoin and Marie-Claire Cordonier Segger (eds.), *Sustainable Development, International Criminal Justice, and Treaty Implementation* (New York: Cambridge University Press, 2015).

[81] See UNEP (2009) (n 9) footnote 9, part 2. [82] UNEP (2006) (n 9) 395.

[83] ibid. 399–400. [84] ibid. [85] ibid. 392.

[86] OHCHR Report Analytical Study on the Relationship between Human Rights and the Environment, A/HRC/19/34, 16 December 2011, para. 65.

[87] *Tadić* Jurisdictional Decision (n 1) para. 58 ('This organ is empowered and mandated, by definition, to deal with trans-boundary matters or matters which, though domestic in nature, may affect 'international peace and security').

collective solutions,[88] international criminal law presents itself as an appropriate vehicle by which the international community may take multilateral action. Although international criminal law is not limited to situations of transboundary harm, it has particular utility in such circumstances when the interests of multiple jurisdictions are concerned.

### 10.4.5 Environmental harm can exacerbate conflict and jeopardize economic and social recovery

Environmental harm committed during armed conflict exacerbates cycles of armed violence, as it entrenches the positions of the parties to the conflict as the available natural resources shrink.[89] The depletion or destruction of environmental features prejudices a return to normalcy, as it removes a means of restarting the economy in order to enhance the chances for a successful transition to peace.[90] Armed conflict typically leads to the large-scale displacement of the civilian population, which places increased strain on already stretched resources and makes environmental recovery programmes difficult to implement.[91] There is no indication that these forms of harm are less prevalent or severe in NIACs than in IACs, which also militates in favour of an extension of the prohibition to NIACs.

### 10.4.6 The traditional reluctance to impose international law obligations concerning natural resources

Alongside the policy arguments for extending the provisions of the Rome Statute to protect the environment in NIACs, there are also competing interests that run counter to such an amendment.

The criminal prohibitions applicable during NIACs are more limited[92] than those applicable during IACs, as mentioned above. This is primarily because of the strong state interest in retaining control over events occurring within the confines of the state's territory. The state interest in exclusive control over its territory is likely to be particularly fervent in relation to the natural environment. Underlying the reluctance of states to sign onto obligations constraining their use and misuse of the environment during NIACs is the strong domestic imperative of retaining exclusive sovereignty over the natural resources within a state's borders. The principle of sovereignty over natural resources is enshrined in several multilateral treaties, including Article 1(2) of the 1996 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights, and was stated in the Declaration

[88] Robert Cryer, 'The International Criminal Court and its relationship to Non-Party States' in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (The Hague: Martinus Nijhoff, 2009), 116 (footnote 10).

[89] UNEP (2006) (n 9) 393. [90] ibid. 395. [91] ibid. 394.

[92] For example, apart from the environmental harm element of the provision discussed above, attacks entailing excessive civilian damage, including civilian objects, are criminalized in IACs under Art. 8(2)(b)(iv). However, there is no corresponding provision in NIACs under Art. 8(2)(c) or (e). This has been also noted by the ICC in *Mbarushimana: Prosecutor v Callixte Mbarushimana,* Decision on the Confirmation of Charges, (ICC-01/04-01/10-465-Red, Pre-T.Ch. I, 16 December 2011), footnote 290.

on Permanent Sovereignty over Natural Resources of the United Nations General Assembly.[93] It also forms part of customary international law.[94]

State policy-makers are concerned about constraining their ability to exploit the natural environment when suppressing domestic threats. If excessive environmental harm were a crime during NIACs, government forces could face accusations of committing atrocities when responding to threats from rebel groups. The spectre of rebel groups charging members of the government with crimes against the environment would not be a palatable prospect for the state authorities.[95] Moreover, many NIACs arise from resource scarcity and it is not difficult to imagine anti-statal forces focusing on governmental exploitation of the environment as a rallying point to garner support for their struggles.

### 10.4.7 The practicalities of amending the Rome Statute to address environmental harm in NIACs

As set out above, Article 8(2)(b)(iv) is highly exacting and would only apply to the most extreme instances of environmental damage. In this light, it must be asked whether there is any utility in extending Article 8(2)(b)(iv) to NIACs, or whether that would simply constitute window dressing with no real practical effect. Because Article 8(2)(b)(iv) has not been tested, no definitive answer can be given to this question at this time. However, the blurred line between IACs and NIACs, with both forms of conflict often running in tandem,[96] and the broad-ranging nature of environmental damage in most cases militate in favour of ensuring that the elements of Article 8(2)(b)(iv) are consistent with the putative comparative provision applying to NIACs. To the extent the terms of Article 8(2)(b)(iv) are amended, the same adjustments should be reflected in the comparative provision applying to NIACs.[97]

Whereas the practical impact of amending the Rome Statute to prohibit disproportionate environmental harm in NIACs is hard to gauge, the extension of the prohibition on excessive environmental harm to NIACs would serve a symbolic function, indicating that the serious degradation of the environment is illegal within and without the confines of NIACs.

There is an analogous precedent for the creation of a mirror prohibition for Article 8(2)(b)(iv) for NIACs. An extension was carried out at the Kampala Review Conference in 2010 with respect to articles in the Rome Statute addressing poison or poisoned weapons; asphyxiating gases, liquids, materials, or devices; and expanding bullets. At

[93] UN General Assembly Resolution 1803 (XVII), Declaration on Permanent Sovereignty over Natural Resources, adopted on 14 December 1962, in particular, paras. 1 and 5.

[94] *Case concerning Armed Activities on the Territory of the Congo* (n 70), para. 244.

[95] To date, the impact of domestic legal provisions legitimizing the environmental harm is unclear in relation to international prosecutions.

[96] *Prosecutor v. Katanga*, Article 74 Decision (n 23), Section on Nature of the Armed Conflict.

[97] Art. 8(2)(b)(iv) is two-pronged and concerns not only environmental harm, but also concerns attacks with disproportionate effects on civilians. The discussion of the creation of a comparative provision concerning NIACs would have to address the anthropocentric prong of Art. 8(2)(b)(iv) and whether it can readily be applied to NIACs, which is a subject going beyond the topic of this analysis.

the time of the adoption of the Rome Statute, these acts had only been criminalized in the context of IACs, but were extended in 2010 in the same terms to NIACs.[98]

### 10.4.8 Environmental harm perpetrated during in NIACs is already criminalized under some sources of international law

It is apposite to note that some sources of international law already criminalize serious environmental harm in NIACs. Gathering state practice and the practice of non-state actors in NIACs has proved challenging.[99] Nonetheless, various instruments of international law provide guidance as to the direction and content of the law in NIACs.

In its Study on Customary International Humanitarian Law[100] ('ICRC's Study'), the International Committee of the Red Cross ('ICRC') surveyed the sources of international law prohibiting this conduct[101] in order to determine its status as customary international law.[102] Although the ICRC did not restrict its survey to instruments that criminalize the conduct *per se*, its survey provides a useful repository of potentially relevant sources of international law.[103]

[98] Paras. 2(e)(xiii)–2(e)(xv) were amended by Resolution RC/Res.5 of 11 June 2010 (adding paras. 2(e)(xiii)–2(e)(xv)). See also Amal Alamuddin and Philippa Webb, 'Expanding Jurisdiction over War Crimes under Article 8 of the Rome Statute' (2010) 8 Journal of International Criminal Justice 1237.

[99] Third Report on the Protection of the Environment in Relation to Armed Conflicts (n 62) para. 15.

[100] Jean-Marie Henckaerts and Louise Doswald-Beck, ICRC *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005).

[101] ICRC Study 156–7. Rule 45 of the ICRC Study on Customary International Law provides: The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon. ICRC Rules, 151. See also, Rule 44, which provides '[m]ethods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions'. See ICRC's Study, Vol I: Rules, Rule 44, 147. Rule 44 applies to IACs and 'arguably' also to NIACs. However, there is no corresponding provision of international criminal law in any form, and so the Rule could not be used to impose individual criminal responsibility under the current rubric of international law. In relation to Rule 45, it should be noted that Rule 45 is also not unlimited in application: the ICRC has acknowledged that it does not apply to nuclear weapons; Jean-Marie Henckaerts, 'Customary International Humanitarian Law: A Response to US Comments' (2007) 89 International Review of the Red Cross 473, 482. Note that many treaties contain prohibitions against the use of nuclear weapons on specific vulnerable areas of the world; for example, 1959 Antarctic Treaty; 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere; 1967 Treaty for the Prohibition of Nuclear weapons in Latin America (Treaty of Tlatelolco); 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; cited in Neil Popović, 'Humanitarian Law, Protection of the Environment, and Human Rights' (1995–1996) 8 Georgetown International Environmental Law Review 67, 82–3.

[102] The standard for determining the existence of a rule of customary international law is well established. The International Court of Justice has observed that 'an indispensable requirement' of customary international law is that 'State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; … and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.': *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment of 20 February 1969, ICJ Reports 3, 4, 43).

[103] There is a long-standing dispute between the ICRC and the United States concerning the status under international law of the prohibition of environmental harm during armed conflict. The ICRC states that the prohibition of environmental harm during NIACs has crystallized as customary international law, and 'arguably' applies to non-international armed conflict. The United States rejects the customary status of the

For present purposes, the dispute over the customary status of the prohibition on excessive environmental harm is not critical. Amending the Rome Statute to extend the prohibition against excessive environmental harm to NIACs is not dependent on the customary status of the prohibition, as the Rome Statute's provisions on substantive offences are formulated without prejudice to customary international law.[104] Moreover, the ICRC assessment focused on whether the prohibition existed in customary humanitarian law and did not restrict the assessment to the criminalized version of the prohibition.[105] Nonetheless, the survey provides a useful legal resource to inform the debate as to the existing status of the prohibition of excessive environmental harm during NIACs.

In its analysis, the ICRC cited five international treaties, several other instruments relevant to international law, a large number of military manuals and pieces of national legislation, and several statements made by representatives of states.[106] The following analysis addresses the most relevant of these sources in order to identify the sources which apply this prohibition in NIACs. In keeping with the focus on provisions imposing individual criminal responsibility, and in line with the fact that ICRC Rule 45 largely overlaps with the grave breach of disproportionate environmental harm set out in Article 8(2)(b)(iv) of the Rome Statute, the following survey pays particular attention to whether the relevant source of law entails individual criminal responsibility.

### 10.4.9 Additional Protocols I and II

First, the ICRC cited Article 8(2)(b)(iv) of the Rome Statute itself and AP I.[107] Both these sources are limited to IACs and therefore can be put aside for present purposes.[108]

prohibition of environmental harm *in toto* (in both IACs and NIACs) and criticizes the ICRC methodology, particularly in relation to the ICRC review of state practice. The United States argued that the ICRC's Study 'places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict. Although manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations.' John Bellinger and William Haynes, 'A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law' (2007) 89(866) International Review of the Red Cross 445 and also 444 (as to the general grounds of its critique).

[104] Rome Statute, Art. 10. In reality, the *lex lata* of the Rome Statute is likely to serve as a gravitational mass, pulling all customary definitions of crimes in the direction of its terms, particularly as the caseload of the Court increases and judgments and appeal judgments are issued.

[105] Because the present analysis concerns the support for the prohibition being criminalized, it is important to examine the sources of international law criminalizing environmental harm in NIACs, as well as the sources that limit the criminalization to IACs, in order to better understand how and when states have framed a legal basis to outlaw environmental harm in NIACs.

[106] ICRC Study (n 101) Rule 45, Practice, 156–7.

[107] The most directly applicable IHL provision is Art. 35(3) of AP I, which prohibits causing widespread, long-term and severe damage to the natural environment. However, this only applies in IACs. Also in AP I, under the heading 'Civilian Objects', Art. 55 prohibits the use of methods or means of warfare which are intended or may be expected to cause widespread, long-term, and severe damage to the natural environment and thereby to prejudice the health or survival of the population. This overlaps considerably with Art. 35(3), except that its reference to the population indicates that it is more of an anthropocentrically conceived prohibition. It also only applies in IACs.

[108] Art. 56 prohibits attacking dams, dikes, and nuclear electrical power stations if the release of 'dangerous forces and consequent severe losses among the civilian population' might result. It also prohibits attacking any surrounding military objective that might result in the release of dangerous forces; AP I, Art. 56(1).

As mentioned above, Article 35(3) AP I is the underlying humanitarian law prohibition of article 8(2)(b)(iv) Rome Statute, applicable in IACs. In explaining the reasons for the inexistence of a similar provision in AP II, the ICRC's Study noted that, during the negotiations on AP II to the Geneva Conventions in 1975, Australia proposed the addition of a provision (Article 28 *bis*) concerning the protection of the natural environment.[109] Australia stressed that 'destruction of the environment should be prohibited not only in international but also in non-international conflicts'.[110] However, this proposal was not successful.[111] According to the ICRC's Study, the reasons for the rejection 'may have been linked to the simplification process undertaken in the last stages of the negotiations in order to ensure the adoption of Additional Protocol II'.[112] The rejection of this proposal indicates that the prohibition on disproportionate environmental damage was not universally accepted in 1975.

### 10.4.10 The Convention on Certain Conventional Weapons

The UN Convention on Certain Conventional Weapons (1980) brings together a number of treaties containing prohibitions of certain uses of conventional weapons (such as the indiscriminate use of landmines, explosive remnants of war, and incendiary attacks).[113] In its preamble, the Convention refers to environmental underpinnings, stating that 'it is prohibited to employ methods or means of warfare which are

The fact that the dams, dikes, or power stations are military objectives does not remove this protection, unless they provide regular, significant, and direct support of military operations. In the case of dams, they must also be used other than in their normal manner: Art. 56(2). The launching of attacks against works or installations is listed as a grave breach in the context of IACs: ICRC Commentary, para. 2158 'It should be noted that launching an attack against works or installations containing dangerous forces under certain conditions is condemned by Article 85 "(Repression of breaches of this Protocol)," paragraph 3(c), of the Protocol as a grave breach.' Art. 56 of AP I is applied to non-international armed conflicts by Art. 15 of AP II. Although this rule has some potential to address environmental harm, it is relatively narrow in focus and is anthropocentrically formulated, being premised on harm, or risk of harm, to human beings.

[109] The draft provision stated: '[i]t is forbidden to employ methods and means of combat which are intended or may be expected to cause widespread, long-term, and severe damage to the environment.' CDDH, Official Records, Vol. XV, CDDH/215/Rev. 1, Report of Committee III, Geneva, 3 February–18 April 1975, 324. Cited by the ICRC's Study (n 101) Vol. II–Practice, Part 1, 877. See also Australia, Statement at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts ('CDDH') (Geneva 1974–77), Official Records, Vol. XIV, CDDH/III/SR.20, 14 February 1975, 176. Cited by the ICRC's Study (n 101) Vol. II–Practice, Part 1, 877.

[110] Australia (n 110).

[111] The proposal was rejected in the plenary by twenty-five votes in favour, nineteen against and thirty-three abstentions. CDDH Official Records, Vol. VII, CDDH/SR.51, 3 June 1977, 114. Cited by the ICRC's Study (n 101) Vol. II–Practice, Part 1, 878.

[112] ICRC's Study (n 102) Vol. I, Rules, 156.

[113] ibid. 154. See also Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980 ('Conventional Weapons Convention'). The preamble to the convention recalls that 'it is prohibited to employ methods and means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment'. The prohibition on incendiary attacks on forests is ecocentric in the subject it is protecting: Protocol III (Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons), Art. 2(4) ('It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives'); Schmitt, 'Green War: An Assessment of the Environmental Law of International Armed Conflict' (n 49) 89.

intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment'.[114]

Since its amendment in 2001, the provisions of the Conventional Weapons Convention apply to non-international and international armed conflicts.[115] Although the stated purpose of this convention is to *inter alia* prohibit means and methods of warfare resulting in widespread, long-term, and severe damage to the natural environment, and although it has been adjusted to apply to NIACs, the obligation to exercise criminal jurisdiction over its breaches is limited to cases of anthropocentric harm (wilful killing or serious injury to civilians).[116] Because of this, it does not serve as a general basis under which environmental harm could be prosecuted *per se*.

### 10.4.11 The African Convention on the Conservation of Nature and Natural Resources

The ICRC referred to the African Convention on the Conservation of Nature and Natural Resources of 2003. Article XV of this instrument calls on states parties to 'refrain from employing or threatening to employ methods or means of combat which are intended or may be expected to cause widespread, long-term, or severe harm to the environment and ensure that such means and methods of warfare are not developed, produced, tested or transferred'.[117] This provision is not limited to situations of IAC and so could potentially cover NIACs as well. However, the convention addresses states' obligations and does not explicitly refer to individual criminal responsibility.[118]

[114] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects 1980, ('Convention on certain Conventional Weapons') as amended on 21 December 2001, preamble, para. 4.

[115] Amended Art. 1 (to date eighty-two states parties have accepted this amendment, including the United States, the United Kingdom, the Russian Federation, France, and China).

[116] In 2006, the states parties decided that '[e]ach High Contracting Party will take all appropriate steps, including legislative and other measures, as required, to prevent and suppress violations of the Convention and any of its annexed Protocols by which it is bound by persons or on territory under its jurisdiction or control.' It was further accorded that such other measures may include, where appropriate, penal sanctions, where in relation to an armed conflict a person violates one or more of the prohibitions of the Conventional Weapons Convention or its Protocols, and wilfully causes the death or serious injury to a civilian. At the Third Review Conference of the Convention, it was decided to establish a compliance mechanism. See Decision on a Compliance Mechanism Applicable to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted on 17 November 2006), numerals 7 and 8.

[117] Art. XV of the 2003 African Convention on the Conservation of Nature and Natural Resources provides 'The Parties shall … refrain from employing or threatening to employ methods or means of combat which are intended or may be expected to cause widespread, long-term, or severe harm to the environment and ensure that such means and methods of warfare are not developed, produced, tested or transferred': African Convention on the Conservation of Nature and Natural Resources (Revised Edition), adopted by the Second Ordinary Session of the African Union in Maputo, Mozambique, 11 July 2003, Art. XV(1)(b).

[118] It is also unclear whether Art. XV has attained the required number of state ratifications to enter into force. It does not appear to be the case, as the latest ratification was deposited on 28 March 2014 by Angola, constituting the twelfth deposit of ratifications (the Convention requires a minimum of fifteen to enter into force). Source: AU website 'List of countries which have ratified/acceded to the Convention' as of 7 April 2017, at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en accessed 1 June 2017. It should be further noted that Art. 15, of interest here, was incorporated in the 2003 revision of the 1968 Convention (which entered into force on 16 June 1969).

Consequently, this instrument lends general support to the application of the prohibition to NIACs, but does not lend support to the imposition of criminal liability for engaging in such conduct.

### 10.4.12 The Draft Code of Crimes Against the Peace and Security of Mankind

Another multilateral source referred to by the ICRC is the 1996 Draft Code of Crimes against the Peace and Security of Mankind. This document, which was produced by the International Law Commission, includes a provision imposing individual criminal responsibility for using methods and means of warfare resulting in widespread, severe, and long-term damage to the environment.[119] Significantly, the ILC stated that this prohibition would apply in NIACs, acknowledging that it was extending the application of this substantive prohibition beyond the ambit of Article 35(3) of AP I, on which it was based. The ILC did not provide an explanation for the application to NIACs other than stating that it 'considered that this type of conduct could constitute a war crime covered by the Code when committed during an international or a non-international armed conflict'.[120] The ILC also acknowledged that there was some ambiguity as to whether this conduct already constituted a war crime, as opposed to a general prohibition, under existing IHL.[121]

The 1996 Draft Code is not a primary source of international law as it does not constitute an international treaty or a source of customary international law.[122] Nonetheless, the views of the ILC, as a body collecting together preeminent publicists, constitute a subsidiary means of determining the rules of international law.[123] Although not a substantive instrument of international law, the ILC's draft code provides a limited measure of support for the contention that there is a customary prohibition against disproportionate environmental attacks during NIACs that entails individual criminal responsibility.

[119] Art. 20(g) reads: 'In the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.' The ILC also considered the inclusion of a crime of ecocide, which would have applied irrespective of the existence of an armed conflict. There was considerable support for this motion and only three states explicitly opposed it (the United States, the United Kingdom, and the Netherlands). However, the provision was not ultimately included in the code: A/CN.4/448 and Yearbook of the ILC 1993, Vol. II, Pt. 1. Documents of the forty-fifth session. A/CN.4/SER.A/1993/Add.1 (Part 1) (includes A/CN.4/448 and Add.1).

[120] Draft Code of Crimes against the Peace and Security of Mankind with commentaries 1996; Report of the International Law Commission on the work of its forty-eighth session, 56.

[121] Report of the International Law Commission on the work of its forty-eighth session, 56 ('the opening clause of this sub-paragraph does not include the phrase "in violation of international humanitarian law" to avoid giving the impression that this type of conduct necessarily constitutes a war crime under existing international law in contrast to the preceding paragraph.').

[122] ICJ Statute, Art. 38(1).

[123] ICJ Statute, Art. 38(1)(d). It has been accepted that the ILC's work falls under Art. 38(1)(d), ICJ Statute. See, for example, Thirlway (pointing out that, for instance, in the *Case Concerning the Application of the Genocide Convention,* the ICJ regarded Art. 16 of the ILC's Draft Articles on State Responsibility as 'reflecting a customary rule') in Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2015), 18–19.

### 10.4.13 Agreement on the Application of International Humanitarian Law between the Parties to the Conflict in Bosnia and Herzegovina

The ICRC referred to the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina. Paragraph 2.5 of this agreement requires that hostilities be conducted in accordance with *inter alia* Articles 35(3) and 55 of AP I of 1977, which are the basis of the prohibition against disproportionate environmental attacks. The parties to this agreement included the Bosnian Serbs and their armed forces under Radovan Karadzic, which was in an armed conflict that could be classified as non-international *vis-à-vis* the Bosnian Muslim forces of Alija Izetbegović.[124] According to the Appeals Chamber of the ICTY, by undertaking to punish those responsible for violations of the substantive provisions in the agreement, the parties envisioned individual criminal responsibility as attaching to these prohibitions, including in relation to a non-international armed conflict.[125] This agreement constitutes an example of state practice accompanied by *opinio juris* by specifically affected states (or state-like entities) in which environmental damage was subjected to criminal prohibition. This agreement accordingly supports the notion of the war crime of disproportionate environmental attacks applying during NIACs.

### 10.4.14 UN Secretary-General's Bulletin Concerning Observance of International Humanitarian Law

In analysing the prohibition against excessive environmental damage, the ICRC referred to the 1999 UN Secretary-General's Bulletin Concerning Observance of International Humanitarian Law by Forces under the command and control of the United Nations. Section 6.3 of this instrument provides:

> The United Nations force is prohibited from employing methods of warfare which may cause superfluous injury or unnecessary suffering, or which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment.

The prohibition applies to UN forces in IACs and NIACs.[126] Although a statement of the Secretary-General does not constitute state practice *per se*, it is notable that the obligations set out in the Bulletin are imported into the memoranda of understanding signed with troop-contributing countries for UN peacekeeping missions. In this way, the obligations including the requirement of avoiding causing widespread, severe, and long-term damage to the environment flow directly into state practice.[127] The

[124] See *Tadić* Jurisdiction Decision (n 1) para. 73. [125] See ibid. para. 136.

[126] UN Secretary-General's Bulletin—Observance by the United Nations Forces of International Humanitarian Law, ST/SGB/1999/13, 6 August 1999. Section 1.1: 'United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement.'

[127] Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007, Resumed Session, 12 June 2007, Doc A/61/19 (part III) (directing that Annex H be included in memoranda of understanding with troop contributing countries: 'We will comply with the Guidelines on International Humanitarian Law for Forces Undertaking United Nations Peacekeeping Operations and the applicable portions of the Universal Declaration of Human Rights as the fundamental basis of our standards.').

memoranda also include robust provisions requiring individual responsibility to be imposed for serious crimes committed. In this way, the accompanying memoranda (read together with the Bulletin) constitute state practice supporting the penal punishment of excessive environmental damage committed during armed conflict.

The UN General Assembly Resolution 47/37 of 25 November 1992 also provides broad support for the illegality of grave harm to the environment and does not differentiate between IACs and NIACs.[128] However, it is unclear whether its reference to 'destruction of the environment, not justified by military necessity and carried out wantonly' is a specific legal formulation or merely a means of referring to the existing prohibitions such as that reflected in Article 8(2)(b)(iv) of the Rome Statute.

### 10.4.15 ICRC Working Paper for the Preparatory Committee for the Establishment of an International Criminal Court

In 1997, the ICRC submitted a working paper to the Preparatory Committee for the Establishment of an International Criminal Court. The working paper included Article 3(viii), which made it a crime 'to cause wilfully widespread, long-term and severe damage to the natural environment' in NIACs. No specific justification was given for the applicability of this crime to NIACs, apart from the general quotation of the *Tadić* Jurisdictional Decision that reasoned that 'what is inhumane, and consequently proscribed, in international wars, cannot but be inhuman and inadmissible in civil strife'.[129] As pointed out by the ICRC's Study, an additional condition was added in the criminalization of the conduct under Article 8(2)(b)(iv) Rome Statute, that is 'which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.[130] Despite being proposed for application to both IACs and NIACs, the crime of disproportionate environmental attacks was not incorporated into the Rome Statute in the context of NIACs. Accordingly, extending the protection to the context of NIACs would require the states parties to adjust their prior position on this issue.

### 10.4.16 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques

The Convention on the Prohibition of Environmental Modification Techniques ('ENMOD') is also relevant to the assessment.[131] ENMOD aims to exclude the use of

Marten Zwanenburg states in the *Max Planck Encyclopaedia of Public International Law United Nations and International Humanitarian Law* ('It can be argued that it is a unilateral act of the United Nations comparable to unilateral acts of States in international law. In any event it is an administrative issuance of the UN Secretary-General, a subsidiary instrument elaborating the staff rules issued by the UN Secretary-General as the highest administrative authority of the organization.').

[128] UN General Assembly Resolution 47/37, 25 November 1992, Protection of the Environment in Times of Armed Conflict ('Stressing that destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law.').

[129] Statement of the ICRC before the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, quoting *Tadić* Jurisdictional Decision (n 1) para. 119.

[130] ICRC's Study (n 101) 153.

[131] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977, 31 UST 333, TIAS No.9614.

environmental modification techniques as a method or weapon of war.[132] It prohibits state parties from using hostile environmental modification techniques that result, or could reasonably be expected to result,[133] in 'widespread, long-lasting or severe effects as the means of destruction, damage or injury to another state party'.[134] It is envisioned to address misuses of the environment through techniques such as unnaturally induced earthquakes, tsunamis, or changes in weather patterns.[135] ENMOD provides a significantly wider protection for the environment than Article 8(2)(b)(iv) of the Rome Statute and Article 35(3) of AP I, due to the disconjunctive nature of the terms 'widespread', 'long-lasting', and 'severe' in ENMOD. Significantly, ENMOD is not limited in application to international armed conflicts.

However, ENMOD is only of indirect relevance to the assessment of individual criminal responsibility, as there are no criminal sanctions for violations of its terms.[136] Rather, it relies on enforcement through political means.[137] As an upshot, ENMOD is primarily useful as an interpretive aide for other provisions that do entail individual criminal responsibility.

### 10.4.17 Military manuals

The ICRC surveyed military manuals. Several military manuals apply the prohibition against causing widespread, long-term, and severe damage to the environment, or a substantively similar prohibition, to both IACs and NIACs, even where they distinguish between IACs and NIACs elsewhere in these instruments.[138] According to the ICRC, some states' military manuals have even more robust protections of the environment that are expressly recognized as war crimes. For example, the Instructor's Manual of Chad of 2006 states that 'it is prohibited to cause "severe damage to the natural environment" and that to do so is a war crime'.[139] This is relevant state

[132] Weinstein (n 7) 700.

[133] While Art. 1(1) only employs the term 'having', the Understanding relating to Art. 2, that interprets the term 'environmental modification techniques', clarifies that prohibited use of environmental modification techniques also extends to situations where widespread, long lasting, or severe environmental harm could reasonably be expected to occur. The Annex to ENMOD notes that while the Understandings were not incorporated into ENMOD, are part of its negotiating record.

[134] ENMOD, Art. 1. [135] ENMOD, Understandings; UNEP Study (2009) (n 9) 12.

[136] ILC, Draft Statute for an International Criminal Court with commentaries 1994, Annex,.69. John Cohan, 'Modes of Warfare and Evolving Standards of Environmental Protection Under the International Law of War' (2002–2003) 15 Florida Journal of International Law, 481 524.

[137] Weinstein (n 7) 701.

[138] See, for example, Australian Defence Doctrine Publication 6.4—Law of Armed Conflict, June 2006, para. 5.50 ('It is prohibited to employ methods or means of war which cause widespread, long term and severe damage to the environment or may be expected to cause such damage and prejudice the health or survival of the population'); Canada's LOAC Manual (1999) states: '83. Care shall be taken in an armed conflict to protect the natural environment against widespread, long-term and severe damage. 84. Attacks which are intended or may be expected to cause damage to the natural environment that prejudices the health or survival of the population are prohibited', The Law of Armed Conflict at the Operational and Tactical Level, Office of the Judge Advocate General, 1999, 4-8, 4-9, paras. 8–84.

[139] Chad, Droit internationale humanitaire, Manuel de l'instructeur en vigeur dans les forces armées et de sécurité, Ministère de la Défense, Présidence de la République, Etat-major des Armées, 2006, 78.

practice, indicating that several states prohibit their armed forces from causing long-term, severe, and widespread environmental damage in the context of any armed conflict.[140]

### 10.4.18 National legislation

The ICRC also surveyed national legislation. Many states criminalize serious harm to the environment. Some states criminalize environmental harm irrespective of the occurrence of armed conflict, under the label of ecocide.[141] A large number of states have a criminal provision outlawing widespread, severe, and long-term damage to the environment (or a similar formulation) committed during armed conflict.[142] Whereas some states refer to armed conflict generally, such as Spain,[143] others expressly including the context of NIACs.[144] Many states' legislation refers to AP I and incorporates by reference Article 8(2)(b)(iv), implying that the provision in question would be limited

[140] The United States disputes the relevance of these instruments, implicitly arguing that military manuals may include these prohibitions for political reasons rather than due to any legal obligation to do so; see Bellinger and Haynes (n 104) 447 ('the United States long has stated that it will apply the rules in its manuals whether the conflict is characterized as international or non-international, but this clearly is not intended to indicate that it is bound to do so as a matter of law in non-international conflicts'). To the extent the United States asserts that it is not acting due to a legal obligation, but rather for political reasons, it is unclear whether other states would attempt to make the same distinction. The domestic criminalization of such conduct in several countries, as discussed below, suggests that the underlying conduct is considered criminal in nature and is not prohibited merely as a matter of political expediency.

[141] See ICRC's Study (n 101) referring to Armenia (*Penal Code*, 2003, Art. 394); Belarus (*Criminal Code*, 1999, Art. 131); Kazakhstan (*Penal Code*, 1997, Art. 161); Kyrgyzstan (*Criminal Code*, 1997, Art. 374); Moldova (Republic of) (*Penal Code*, 2002, Art. 136); Russia (Russian Federation, *Criminal Code*, 1996, Art. 358); Tajikistan (*Criminal Code*, 1998, Art. 400); Ukraine (*Criminal Code*, 2001, Art. 441); Vietnam (*Penal Code*, 1999, Art. 342—criminalizes ecocide as a crime against mankind). See also Mongolia (*Criminal Code*, entered into force in 2002, Art. 304. Causing Ecological Imbalance).

[142] See ICRC's Study (n 101) referring to Bosnia (Bosnia and Herzegovina, Federation, *Criminal Code*, 1998, Art. 154(2), Bosnia and Herzegovina (*Criminal Code*, 2003, Art. 173(2)(c)); Colombia (*Penal Code*, 2000, Art. 164); Croatia (*Criminal Code*, 1997, Art. 158(2), *Criminal Code*, 1997, as amended in June 2006, Art. 158(2)); Estonia (*Penal Code*, 2001, Art. 104); Ethiopia (*Criminal Code*, 2004, Art. 270); Mali (*Penal Code*, 2001, Art. 31(4)); Serbia (*Criminal Code*, 2005, Art. 372(2)); Slovenia (*Penal Code*, 1994, Art. 374(2)); Uruguay (*Law on Cooperation with the ICC*, 2006, Art. 26(3)12). See also Swiss *Criminal Code*, Art. 264(g), as amended in 2002. See also Cape Verde (*Criminal Code*, approved by Legislative Decree 4/2003, 18 November 2003—Art. 273); Montenegro (Republic of) (*Criminal Code*, 2004, Art. 428(2)); Philippines (*Act on Crimes against International Humanitarian Law, Genocide, and other Crimes Against Humanity*, 2009, Art. 4(c)(5)).

[143] Art. 610 of the Spanish Penal Code provides: 'Anyone who, in the context of an armed conflict, uses or orders the use of methods or means of combat that are prohibited or are intended to cause unnecessary suffering or superfluous injury, or that are designed to or can reasonably be expected to cause excessive, lasting and serious damage to the natural environment, thus compromising the health or survival of the population, or who orders that no quarter shall be given, shall be penalized with a term of imprisonment of 10 to 15 years, without prejudice to the penalty imposed for the resulting damage.'

[144] See ICRC's Study (n 101) referring to Azerbaijan (*Criminal Code*, 1999, Art. 116.0.2); Peru (*Code of Military and Police Justice*, 2006, Art. 101), Peru, (*Military and Police Criminal Code*, 2010, Art. 97); Korea (Republic of), (*ICC Act*, 2007, Art. 13(3)); Spain (*Penal Code*, 1995, Art. 610), Spain, (*Penal Code*, 1995, as amended by Law 15/2003, 25 November 2003, Art. 610), Spain, (*Royal Ordinances for the Armed Forces*, 2009, Art. 114). See also Greece (Law No. 3948/2011 *on the adaptation of internal law to the provisions of the ICC Statute* adopted by Law 3003/2002 (A'75), April 2011, Art. 12(1)(c)); Portugal (Adaptation of Criminal Legislation to ICC Statute, Law 31/2004, 22 July 2004, Art. 11(i)). See also Switzerland (*Federal law introducing modifications to federal legislation by virtue of the implementation of the Rome Statute of the ICC*, 18 June 2010, Art. 264(b) and (g)(a)); Panama, (*Criminal Code*, Law No. 14 of 18 May 2007, Art. 436).

to the context of IACs.[145] Other states expressly limit this criminal provision to circumstances of international armed conflict.[146]

This above survey of criminal legislation shows that the criminalization of environmental damage caused during armed conflict is not uniform among states. As a baseline, many states have incorporated the prohibition against causing widespread, severe, and long-term harm to the environment during armed conflicts. Several states have criminalized this conduct explicitly in NIACs or in sufficiently broad terms to cover the context of NIACs.

### 10.4.19 Statements of governments

In response to the work of the International Law Commission's Special Rapporteur on Protection of the Environment during Armed Conflict, the Federated States of Micronesia stated that 'intentional destruction of [the] natural environment for military gain is a type of total warfare that is abhorrent under international law, particularly in situations where the populations depend of that natural environment for its survival'.[147]

The US Department of Defense Law of War Manual of 12 June 2015 has explicitly reaffirmed its rejection to the customary law nature of Articles 35(3) and 55 AP I (with respect to both conventional and nuclear weapons), citing the US response to the ICRC's Study which contested the customary law nature of Rule 45. It regards both provisions as 'overly broad and ambiguous'.[148] In its response to the ICRC, the United States argued that Rule 45, as formulated in the ICRC Study, fails to take into account scenarios in which an attack will result in widespread, long-term, and severe damage to the natural environment but is nonetheless necessary because of the presence of a military target.[149] Responding to the ICRC Study, the representative of the United States argued that Rule 45 'would

[145] See ICRC's Study (n 101) referring to Belgium (*Penal Code*, 1867, as amended on 5 August 2003, Chapter III, Title I *bis*, Art. 136 *quater*, § 1(22)), Belgium, (*Law relating to the Repression of Grave Breaches of International Humanitarian Law*, 1993, as amended on 23 April 2003, Art. 1 *ter*, § 1(12)); Canada (*Crimes against Humanity and War Crimes Act*, 2000, Section 4(1) and (4)); Congo (Democratic Republic of the), *Genocide, War Crimes and Crimes against Humanity Act*, Law No. 8-98, 31 October 1998, Art. 4(b)); Denmark (*Military Criminal Code*, 1973, as amended in 1978, § 25(1)), Denmark, *Military Criminal Code*, 2005, § 36(2)); Georgia (Georgia, *Criminal Code*, 1999, Art. 413(d)); Ireland (*Geneva Conventions Act*, 1962, as amended in 1998, Section 4(1) and (4)); New Zealand (*International Crimes and ICC Act*, 2000, Section 11(2)); Norway (*Military Penal Code*, 1902, as amended in 1981, § 108(b)); United Kingdom (*ICC Act*, 2001, Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland, Schedule 8)).

[146] See ICRC Study (n 101) referring to Australia (*Criminal Code Act,* 1995, as amended to 2007, Chapter 8, § 268.38, 327–8), Australia, *ICC (Consequential Amendments) Act*, 2002, Schedule 1, § 268.38(2)); Burundi (*Law on Genocide, Crimes against Humanity and War Crimes*, 2003, Art. 4(B)(d)); Germany (*Law Introducing the International Crimes Code*, 2002, Art. 1, § 12(3)); Netherlands (*International Crimes Act*, 2003, Art. 5(5)(b)); South Africa (*ICC Act*, 2002, Schedule 1, Part 3, § (b)(iv)). See also Comoros (Decret n°12-022/PR du 04 12 2011 portant promulgation de la loi n°11-020/AU du 13/12/2011 portant mise en oeuvre du Statut de Rome, Art. 20(2) (iv)).

[147] See Third Report on the Protection of the Environment in Relation to Armed Conflicts, (n 62), para. 58.

[148] See Bellinger and Haynes (n 104).

[149] ibid. 456 ('An example illustrates why States—particularly those not party to AP I—are unlikely to have supported Rule 45. Suppose that country A has hidden its chemical and biological weapons arsenal in a large rainforest, and plans imminently to launch the arsenal at country B. Under such a rule, country

preclude States from taking into account the principles of military necessity and proportionality'.[150] The American view that military necessity is a necessary element of this prohibition was essentially incorporated into Article 8(2)(b)(iv) of the Rome Statute, which essentially repeats Rule 45 with the added final clause 'which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.

### 10.4.20 Conclusion on the customary status of the criminal prohibition of disproportionate environmental harm

These islands of legal support for the criminalization of environmental harm during NIACs will allay possible concerns that the ICC would be entering completely uncharted territory if its jurisdiction were to be extended to cover disproportionate harm committed during NIACs.[151] While the analysis does not definitively show that there exists a virtually uniform practice among states of following this rule, the existence of precedents for this prohibition entailing criminal consequences should reassure the Assembly of States Parties of the ICC that such an extension would not be a radical departure from the existing legal framework, but instead would constitute an important further development in the progression of the law protecting the environment.

Nonetheless, the ICRC's claim that this support reaches the level to amount to customary international law is not immune from criticism. Many of the cited sources do not impact on the analysis whereas the discussion of other sources does not sufficiently explore their impact, which is sometimes significant, on the status of the prohibition under customary international law. Moreover, the ICRC was not looking specifically at the issue of individual criminal responsibility. Accordingly, its conclusions can only be taken as indirect guidance for the customary international law support for a prohibition of disproportionate environmental damage entailing criminal responsibility.

## 10.5 Accountability for Environmental Harm as a Facet of *Jus Post Bellum*

While international humanitarian law and the war crimes provisions of the Rome Statute apply during armed conflict, it is well documented that environmental damage

B could not launch a strike against that arsenal if it expects that such a strike may cause widespread, long-term, and severe damage to the rainforest, even if it has evidence of country A's imminent launch, and knows that such a launch itself would cause environmental devastation.').

[150] ibid. 456.

[151] It is likely that such concerns or opposable views may attempt to be grounded on the general treaty rule regarding third states, as set out in Art. 34 Vienna Convention on the Law of Treaties (1969): 'A treaty does not create either obligations or rights for a third State without its consent.' It is accepted, however, 'that the consequences deriving from Art. 12 para. 2 have, arguably, little to do with an alleged third party effect of the Rome Statute.' See Proels, 'Art. 34—General Rule Regarding Third States' in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary* (Berlin: Springer, 2012), 617, para. 22 (with reference to a different view). By the same token, if the situation is referred by the Security Council under Art. 13(b), the binding effect of a Security Council Resolution under Chapter VII UN Charter, may diminish the relevance of the role of the rule enshrined in Art. 34 Vienna Convention with respect to non-state parties to the Rome Statute. See, Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009), 473, para. 13.

often continues unabated when warfare ends.[152] At this transitional time, prior to the full restoration of peace but after war, the applicability of the various laws relevant to serious environmental harm is an important consideration. States and the international community will have a strong incentive, and in some cases a legal responsibility, to establish responsibility and provide redress for environmental harm caused during armed conflicts. At the same time, leaders of warring factions will often have a strong incentive to seek amnesties and thus insulate themselves from criminal responsibility.[153] Many treaties imposing liability for environmental harm have exceptions for damage caused by acts of war or exclusions for certain persons from liability for such acts.[154] However, the existence and parameters of specific obligations fitting into the rubric of *jus post bellum* has only recently limited academic treatment and analysis.

It is a trite but important observation that the legal norms and provisions encouraging a just peace are of equal significance to the principles encouraging just war. *Jus post bellum*, which collects the laws and norms relevant to the transition from a state of armed conflict to peace, serves as a fulcrum for the creation of conditions amenable to a lasting and equitable end to hostilities.[155]

An area of *jus post bellum* of particular pertinence to the current analysis is that of accountability for atrocity crimes committed during armed conflict, and particularly NIACs.[156] In the immediate aftermath of armed hostilities, the investigation and prosecution of crimes, including environmental crimes, may seem precipitous and distracting from the tenuous peace. However, it is an important aspect of the transition to a complete resolution of the cause and consequences of hostilities. Some peace agreements even designate responsibility for the post-conflict detection and prevention of environmental harm.[157]

Larry May argues that '[c]losure is hard to achieve if there is not a public reckoning for those who used the war as an occasion to commit wrongs, or who chose to conduct war in a wrongful way'.[158] Without closure, any peace that is agreed on may be fleeting and may simply suppress and fuel increased animosity between rival groups. In this respect, environmental harm is an important factor to address. The destruction of the environment imperils reconciliation as it removes a potential platform for cooperative endeavours. A ruined or degraded environment jeopardizes the success of post-conflict economic projects across sectarian divides. It means a smaller pool of resources to be used for societal reconstruction, including basic activities such as feeding and hydrating the population. With fewer resources, a return to conflict becomes all the more

[152] UNEP (2009) (n 9).

[153] Charles Garraway, 'The Relevance of Jus Post Bellum: a Practitioner's Perspective' in Easterday, Iverson, and Stahn (n 5) 159.

[154] See Third Report on the Protection of the Environment in Relation to Armed Conflicts (n 62), paras. 110–12.

[155] See definition of *jus post bellum* above.

[156] See Carsten Stahn, 'The Future of *Jus Post Bellum*' in Carsten Stahn and Jann K. Kleffner (eds.), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (Cambridge: TMC Asser, 2008), 236; Garraway (n 154).

[157] Third Report on the Protection of the Environment in Relation to Armed Conflicts (n 62), paras. 155–8.

[158] Larry May, 'Jus Post Bellum, Grotius and Meionexia' in Easterday, Iverson, and Stahn (n 5) 16.

difficult to avoid. It also limits the possibility to enjoy features that can cross sectarian divides, such as rivers, rare or emblematic species of flora and fauna, and nature recreation areas.[159]

Reflecting the significance of environmental protection and rehabilitation in the wake of armed conflict, peace agreements between warring parties in NIACs have sometimes explicitly reflected the need to preserve the environment.[160]

Dieter Fleck advocates the prioritization of peacebuilding over retribution in a post-conflict setting.[161] It should be noted that international criminal justice is not focused on pure retribution, but also seeks to encourage accountability, truth-telling, reconciliation, and deterrence of atrocity crimes. In light of these broader goals, the oft-decried tension between peacebuilding and criminal justice is to a certain degree a false dichotomy. In many instances, justice and international peacebuilding can be mutually reinforcing, and 'it is increasingly acknowledged that peace and justice are not contradictory but complementary'.[162]

Establishing individual criminal responsibility for serious environmental harms, and imposing sentences, including custodial sentences, for perpetrators, may assist efforts to break cycles of offending and violence. Larry May argues that 'it is hard to comprehend what *jus post bellum* justice would involve if it did not have some accounting for the wrongdoers during the war or armed conflict'.[163] In doing so, he recognizes that while those seeking to rebuild states in such circumstances face a daunting array of challenges, and individual criminal responsibility should not displace the sociological, economic, and security imperatives in the wake of widespread violence and turmoil, rendering justice for grave crimes is a necessary (and sometimes arduous) component of a comprehensive transition to peace and reconciliation of sectarian groups, which is partly reliant on a healthy shared environment.

However, the form of justice that is required is a more nuanced question. Clarifying the relevant provisions and principles that impact this sphere of *jus post bellum* is an ongoing project, which will be informed by experience and retrospective analyses of the success of various justice models, from the well established international criminal tribunal model, to the various forms of truth and reconciliation processes, to hybrid models of justice. For example, a landmark model of transitional justice is that undertaken by South Africa. During the 1990s, South Africa adopted a Truth and Reconciliation Commission to generate an account of the atrocities that had occurred in the apartheid era and a basis for moving towards reconciliation by placing primacy on truth-seeking

[159] See ibid. text accompanying footnote, 17 (discussing danger of environmental harm for the viability of a sustainable peace process and for the rejuvenation of the economy).

[160] See, for example, El Salvador Peace Agreement (Chapultepec)—1992, The Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (FMLN), Arts. 13 and 17(12), available at <http://theirwords.org/?title=&country=&ansa=&document_type=&year=&__keyword_field=&keyword__0_id=651&keyword__0_type=keyword_value> accessed 30 September 2015; Eastern Sudan Peace Agreement between the Government of Sudan and the Eastern Sudan Front, 2006, available at <http://theirwords.org/?title=&country=&ansa=&document_type=&year=&__keyword_field=&keyword__0_id=651&keyword__0_type=keyword_value> accessed 30 September 2015.

[161] See chapter 9 in this volume.

[162] Vincent Chetail, 'Introduction, Post-conflict, Peacebuilding—Ambiguity and Identity' in Vincent Chetail (ed.), *Post-Conflict. Peacebuilding: a Lexicon* (Oxford: Oxford University Press, 2009).

[163] May (n 159) 16.

rather than criminal accountability. Former UN Secretary-General Kofi Annan has heralded the South African Truth and Reconciliation Commission.[164] While valid concerns have been raised that the amnesties granted by the South African Truth and Reconciliation Commission may have curtailed true accountability, the South African approach to transitional justice in 1994 remains an example of a transitional justice process which had a positive impact in a number of respects and provided a contribution towards societal reconciliation.

At the same time, when analysing obligations arising from and continuing after armed conflict, the differences between international criminal law and international humanitarian law and the overlapping field of *jus post bellum* must be borne in mind. Whereas the provisions of international criminal law are designed to be as precise, consistent, and concretely enforceable as possible, the norms and principles that could be categorized as *jus post bellum* constitute a more fluid collection that are often normatively framed and oriented to states rather than to inform individuals of their potential criminal responsibility. Suggestions such as creating protected zones of major ecological importance as a facet of *jus post bellum* are important normative goals,[165] but at present have not been formulated in a manner directly enforceable as a matter of international criminal law.

Following the question of whether to investigate allegations of atrocities, including environmental harm, comes the question of who to investigate. Grotius asserted that 'the soldiers that have participated in some common act, [such] as the burning of a city, are responsible for the total damage'.[166] However, international criminal law seeks to determine not just which soldiers participated in crimes, but also which leaders brought about those crimes through their common plans, orders, or other inducements. To do so, and to differentiate the responsibility for specific crimes, investigation of reported atrocities is required, and the highly developed provisions of international criminal law can be of significant assistance as they distinguish between principle perpetrators, acting individually or in common, those who order, solicit, or induce, those who aid and abet, and various other forms of responsibility, including superior responsibility for military and civilian leaders.[167]

Where individual accountability is established in a post-conflict setting for crimes committed during the conflict, the question of compensation and damages naturally follows. It is well established that state responsibility requires reparation for victims of wrongful acts committed during armed conflict.[168] Where criminal conduct is implicated, responsibility may be placed upon the authors of crimes in lieu of state

[164] See United Nations News Centre, at <http://www.un.org/apps/news/story.asp?NewsID=17800> accessed 8 January 2016.

[165] Third Report on the Protection of the Environment in Relation to Armed Conflicts (n 62) paras. 31, 50.

[166] May (n 159) 17.

[167] See, for example, Rome Statute of the ICC, Arts. 25 and 28; ICTY Statute, Arts. 7(1) and (3); ICTR Statute, Arts. 6(1) and (3).

[168] Art. 3 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907) 2 AJIL Supplement 90–117 (1908); Art. 91 AP I; International Law Association, *Declaration of International Law Principles on Reparation for Victims of Armed Conflict* (2010); International Law Association, *Procedural Principles for Reparation Mechanisms* (2014).

authorities, where possible. Article 12 of the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provides that perpetrators should provide compensation to victims and their families or dependents, and if this is not possible states should provide compensation to victims suffering significant physical injury or impairment of mental health, and to the families or dependents of victims who have been killed or physically or mentally incapacitated.[169]

The Special Rapporteur of the International Law Commission addressed post-conflict reparations for serious degradation of the environment during armed conflict in her third report on the prevention of environmental damage during armed conflict.[170] While some instances of compensation orders in relation to destruction of people's environments were listed (particularly in human rights courts),[171] there were no remedies given for convictions specifically concerning charges of environmental harm (as opposed to violations of human rights perpetrated through actions also causing environmental harm).

## 10.6 Conclusion

The preceding analysis shows that while environmental harm occurs in armed conflict and while such conflicts are increasingly sectarian and internal in nature, there are essentially no provisions of international criminal law that directly address harm to the environment occurring during NIACs. Contrastingly, there are several instruments of general international law supporting the application of the prohibition on disproportionate environmental damage to the context of NIACs. Moreover, in many domestic jurisdictions an individual causing serious harm to the environment without lawful grounds for doing so would find themselves charged with criminal responsibility for those acts. Between regular peace-time legal regimes in domestic systems and the relatively well developed set of rules applying in IACs, sits the murkier regulatory framework governing NIACs. The gap in coverage over NIACs for environmental harm in the Rome Statute is notable and calls for redress.

Addressing environmental harm indirectly through prohibitions aimed at other crimes presents itself as an available and feasible means of progressing. Anthropocentric provisions, such as crimes against humanity, genocide, and other war crimes can apply during NIACs. This indirect method also has the practical benefit of relying on tested

[169] General Assembly Resolution A/60/509/Add.1, 16 December 2005, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, IX Reparation for Harm Suffered, 15. ('[i]n cases where a person, a legal person or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.').

[170] ILC Report of its sixty-seventh session, held in July 2015, where it considered the Second Report of the Special Rapporteur, A/CN.4/685, Chapter IX, Protection of the Environment in Relation to Armed Conflicts, para. 165.

[171] Third Report on the Protection of the Environment in Relation to Armed Conflicts (n 62), paras. 198–205.

provisions that have formed the basis of robust trials in international courts previously. However, this is at best a temporary solution and is ultimately unable to fully address environmental harm. International criminal law has a strong symbolic component. Prosecuting environmental damage indirectly under anthropocentric provisions may result in convictions of limited symbolic impact *vis-à-vis* environmental values. This does not convey the opprobrium that serious environmental harm merits. Consequently, if the international community wishes to directly condemn harm to the environment during all armed conflict, the law must be further developed to directly and comprehensively address serious environmental harm in the context of NIACs.

One intermediate step to enhance the protection of the environment would be the adoption of a provision applicable in NIACs that prohibited the conduct set out in Article 8(2)(b)(iv) of the Rome Statute. War crimes prohibitions have been similarly expanded to cover NIACs during previous ICC negotiations.[172] The most appropriate vehicle to achieve this amendment would be the through a review conference of the ICC, where the Assembly of State Parties to the Rome Statute could consider whether to adopt a provision prohibiting environmental harm in NIACs.[173] Such an amendment would not only allow the ICC to prosecute such activity if it occurred, but would also signal a symbolic step towards the international community's recognition of such a prohibition forming part of customary international law, irrespective of whether the harm occurred during an IAC or a NIAC.

The adoption of a prohibition against environmental harm in the context of NIACs would also provide a valuable provision of *jus post bellum*. As the conflict resided and processes are designed to ensure lasting peace, it is important to have clear, *a priori*, markers as to the conduct that is broadly reproached at the international level, and which should result in prosecution. The ending of impunity for the most serious crimes against the environment would send a signal that certain boundaries should not be crossed, even when in the midst of fratricidal warfare. At the same time, care would have to be taken to ensure that the fluid and dynamic parameters of *jus post bellum* were not rendered less useful by the imposition of rigid legal definitions necessary to found fair criminal trials.

[172] See Alamuddin and Webb (n 99) 95.

[173] UNEP Study (2009) (n 9) 7.