

PANEL DISCUSSION ON INTERNATIONAL ENVIRONMENTAL CRIMES: PROBLEMS OF ENFORCEABLE NORMS AND ACCOUNTABILITY

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This panel's scope of discussion covers norms as well as compliance regarding international environmental crimes during both times of peace and armed conflict. This is a huge subject, as indicated by the comments of my colleagues, which was largely directed to the past and current state of international law for environmental crimes. The task assigned to me on this panel is to focus more on the future. The views that follow are presented in a personal capacity. I am not an official spokesman for the United States government, although I work for it.

Bearing in mind that seventy percent of the earth's surface is covered by salt water, it is appropriate to begin by noting that many principles and rules to protect the international marine environment in peacetime are found in the Third United Nations Convention on the Law of the Sea. Articles 213 through 222 deal specifically with enforcement related to marine pollution violations from land-based sources, the seabed, the atmosphere, dumping and the like. Criminal violations of rules based on the Convention's norms may trigger criminal responsibility and enforcement is carried out under domestic law based on nationality, flag state, or territorial jurisdiction. Detailed regulations for commercial vessel operators are developed through the International Maritime Organization where work is underway on many complex marine environment issues. Environmental crimes committed by commercial vessel operators in the world's oceans are typically enforced through the flag state. There are instances, however, where the coastal-state enforcement jurisdiction is based on its control over fisheries, petroleum, or by conditioning the entry of vessels into its ports. This latter nexus is particularly effective for enforcing vessel standards intended to protect the marine environment. A recent regional agreement on straddling stocks and tunas, nudging enforcement against third-state vessels for overfishing on the high seas beyond the 200 mile exclusive economic zone, is a modest step beyond traditional law. The underlying jurisdictional innovation follows from the customary law obligation, which is embodied in the 1982 Law of the Sea

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Convention, and by which the flag states ensure that their vessels fishing on the high seas do not undermine the effectiveness of regionally agreed rules, whether or not the flag state is a party to the relevant regional agreement. If overfishing on the high seas proper is an international environmental crime, and it certainly can be, we may conclude that criminal enforcement to ensure better accountability is improved in this limited, but important area of international law. The principle reflected in this jurisdictional innovation may even contain the seeds for discovering more effective enforcement of environmental rules in non-high seas areas. Unfortunately, the bad news is that the United States is only one of three parties to the new agreement on straddling stocks and highly migratory species. The good news is that the world's largest high-seas fishing nation, the Peoples Republic of China, plans to sign the Convention in the near future.

Turning from the sea to the air in peacetime, we can expect any pertinent law with respect to civil aircraft involved with international environmental law and with respect to civil aircraft involved with international environmental crimes to be developed in the International Civil Aviation Organization (ICAO). The conventional rules governing this area are largely found in the Tokyo, the Hague, and Montreal Conventions. These Conventions, along with customary international law, provide what can only be fairly described as a *rudimentary system of sanctions* for civil aviation crimes during peacetime. The imperfect enforcement regime for civil aviation crimes in general, has been dramatically demonstrated in terrorism cases. Compliance on safety matters, on the other hand, is excellent, being based on well-defined and widely recognized international law rules.

At this juncture it is worth recalling that both warships and military aircraft enjoy sovereign immunity. This fundamental precept of international law is reflected both in the 1982 Law of the Sea Convention and in the various ICAO conventions.

Conventional and customary international law norms governing environment crimes during peacetime on land territory occur within the jurisdiction of sovereign states. Accordingly, they are only effectively enforced when these international norms are incorporated into the domestic authorities who base their actions on the classic jurisdiction exercised by a sovereign state over its territory or nationals. This is by far the most significant and pervasive interface between international environmental norms and their enforcement. To the extent that deficiencies exist in states' agreeing on legal norms that are equivalent to international environmental crimes, and in taking effective criminal enforcement in their sovereign territory during peacetime, suggestions for corrections are

properly addressed to generating greater political will by sovereign states. And to misuse a line from Mark Twain to make a point, the reports announcing the death of state sovereignty are greatly exaggerated.

In reviewing the international normative rules pertaining to environmental crimes, a curious pattern emerged. It became evident that there seemed to be greater agreement among states and experts about the general principles that apply during hostilities than during peacetime. At the same time, the contrary appears with respect to the enforcement regime for environmental criminal violations: enforcement seems to be more effective in peacetime than during armed conflict. This state of affairs may explain why the text of a statute for an International Criminal Court due to be finalized in 1998 by a United Nations preparatory Committee is expected to be limited to *core* crimes. Genocide will then be whether the international environmental crime at issue is a *war crime*. In addition, expectations are that enforcement of the Court's judgments will depend upon *cooperation* from national courts.¹

With the foregoing observations in mind, let us focus on possible improvements in the legal regime governing international environmental crimes during armed conflict. The comments which follow concentrate on both normative standards and on enforcement mechanisms.

A sensible beginning point is to ask whether there is sufficient law concerning international environmental crimes during hostilities and follow on with a discussion about enforcement. My fellow panelists have addressed that question by citing an impressive array of conventional and customary law rules and principles that proscribe international criminal conduct against the environment during armed conflict. A similar detailing of existing international law on this subject is contained in joint memorandum prepared by Jordan and the United States for the United Nations General Assembly in 1993.² It appears that the prevailing expert opinion is to answer the question about the adequacy of substantive law in the affirmative. Support for this view was borne out when the General Assembly urged compliance with the international rules spelled out in the memorandum and endorsed their incorporation into the military manuals of members.

To facilitate common understanding of the norms and their practical implementation, the International Committee of the Red Cross

1. See AM. SOC'Y INT'L L. NEWSL., Sept.-Oct. 1996, 16.

2. Joint Memorandum prepared by Jordan and the United States, U.N.G.A. Doc. A/C.6/47/3/ Annex (1992).

even drafted guidelines for military manuals and instructions on the protection of the environment during armed conflict.³

The United States position, that is supported by other responsible governments and many leading experts, is that the substantive law on international environmental crimes is adequate for now. A leading expert from the Office of Legal Adviser in the United States Department of State, J. Ashley Roach, identifies nine specific customary law provisions pertaining to the protection of the environment during armed conflict.⁴ He cites articles 22, 23, and 55 of the 1907 Hague Regulations, articles 53, 55, and 147 of the 1949 Fourth Geneva Convention, and among other customary law principles, military necessity, proportionality and humanity. Note is made of articles 35 and 55 of Additional Protocol I to the 1949 Convention adopted in 1977 and a number of other possibly applicable rules.

The idea is that international law rules are adequate and that the international community ought to place its emphasis on the education of military personnel and on the dissemination of existing legal obligations under international law. From this policy perspective, the real problem is seen not as a lack of norms, but rather as a lack of enforcement for environment crimes committed during armed hostilities.

Pertinent questions raised by this approach are how much effort states ought to expend on promoting international enforcement to protect the environment, and more importantly, how much effort they will exert? The painful comparison that immediately comes to mind is that international enforcement to prosecute individuals indicted for murdering groups of humans in mass killings is woefully lacking. Protracted philosophical debates about the relative weight to be accorded anthropocentric or inherent values regarding the environment have their place. But the outcome on that issue does not resolve the practical question of how much limited political capital a nation should use on trying to improve enforcement for international environmental crimes, whatever the underlying value. Only die-hard inherent value fans would quibble with the observation that crimes against the environment per se involve less direct and immediate human suffering and loss of life than do the crimes of genocide or democide. Abstract arguments, even when true, that humanity will perish if it neglects the environment fade in value intensity when compared with the evil slaughter of innocent people now. Governments must prioritize their foreign policy goals and make choices

3. *Guidelines for Military Manuals and Instructions on the Protection of the Environment during armed conflict*, U.N. Doc. A/47/328, at 2-15, (1992).

4. *The Laws of War and the Protection of the Environment*, (1996).

that husband their limited political capital. A political leader who pushes for enforcement against murderers harder than for enforcement against polluters is unlikely to be faulted. Stated plainly, if Saddam Hussein is not brought to justice for murdering Kurdish babies, how much effort should governments expend attempting to try him for crimes against the environment? Is the international community likely to pursue indicting him for killing plants when it does not indict him for killing thousands of innocent humans? The attitude in the real world toward enforcement priorities is illustrated in the current Bosnia conflict. So far, the leadership in the North Atlantic Council lacks the political will to carry out a clear legal obligation by its Member States to search for individuals known to be in IFOR's area of operations and who are indicted by the international criminal tribunal for grave war crimes. Even if international environmental war criminals ought to be tried, is there any evidence that they will be in the near future?

Despite the weight of the opinion cited above, I do not see the problem as being limited to just enforcement. My judgment is that the substantive law governing international environmental crimes is inadequate for the post Cold War era. As one of the eminent authorities on war crimes recently observed: "Governments have been exceedingly slow in drafting law-of-war agreements, or even provisions, for protecting the environment."⁵ One basis for my skepticism stems from a lack of confidence in the substantive norms themselves being adequate for successful prosecution in an international criminal court where the operative procedural presumption is that guilt must be established beyond a reasonable doubt. As is well known, this is a high standard of proof. On their face, the norms suffer from too often appearing as mere afterthoughts scattered helter-skelter throughout conventions that were concluded before modern outlooks arose that place an independent value on the environment. In truth, many of the customary international law norms that are cited by the experts as protections for the environment are, in reality, protections against wanton destruction of non-combatant property. There is quite a different legal concept that is motivated by markedly different human values. In part due to these inadequacies, the meaning of key definitions and textual terms regarding environmental crimes is often too vague to meet the standards for criminal misconduct under either substantive or procedural due process, as those concepts are generally understood. Admittedly, the notion of due process itself is at an early stage of development insofar as its use in an international criminal court

5. Howard S. Levie, *War Crimes in the Persian Gulf*, ST. LOUIS WARSAW TRANSATLANTIC L.J., 167 (1996).

trial is concerned. But this fact simply makes it all the more important that vague and ambiguous standards not be advanced prematurely. Critics will be looking for openings, especially when the victim is the environment, rather than dead groups of human beings. Fundamental fairness also dictates genuine concern for the rights of the accused. Minimum due process in criminal trials of any nature requires establishing that the accused understood the rules he allegedly breached. Promoting respect for the rule of law in the world is not enhanced if vague rules are treated as if they were clear cut and are only enforced by the victors after winning the conflict.

Assuming, for the sake of reasoned debate, that progressive codification of the law, that is, that a consolidation and more precise reformulation of international criminal norms to protect the environment were desired, how might it be done?

It is recognized that an attempt to clarify norms runs the risk of opening a Pandora's Box. Respect for the rule of law in this area is not advanced if a good faith effort to create a forum for discussion on this issue is seized upon as a pretext for opponents of weapons of mass destruction to concentrate their efforts to foist unacceptable rules on non-consenting states. The mischief potential for overreaching by well meaning, but sometimes over-zealous supporters of the environment is well understood by experienced international negotiators. Suffice it to say, it's bad enough for this area of international law that meaningful international enforcement is lacking for acknowledged war crimes against large groups of humans. Respect for law on a global scale will not be enhanced and environmental protection goals not advanced by developing a new set of criminal norms to protect the environment that will be notable only for being universally ignored.

With the above caveats about the possibility of counterproductive results in mind, I still believe that it is worthwhile to consider a consolidation and clarification of the norms applicable to international environmental crimes during armed conflict. Perhaps the day will come when there will also be realistic grounds to expect better enforcement. If it does arrive, this modest step would at least have the substantive law in a better state of organization and international consensus than it is now. Along these lines, one approach that may merit consideration is to ask the International Law Commission to prepare a draft Protocol V to the 1980 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. Step one should be to condense the wordy title of this Convention.

The Preamble to the Conventional Weapons Convention provides, "it is prohibited to employ methods of warfare which are intended, or may be expected, to cause wide spread, long term and severe damage to the natural environment, reaffirming the need to continue the codification and progressive development of the rules of international law applicable in armed conflict."⁶

The Conventional Weapons Convention is thus seen as an umbrella document that could provide the legal structure for a progressive codification of the rules pertaining to international war crimes. This proposition assumes that the terms of reference are strictly confined to a good faith effort only to clarify existing international law. This must be the limited mandate given to the International Law Convention. Use of the Conventional Weapons Convention would provide no means for enforcement beyond what states are already obligated to do as parties to an international agreement. To the extent that codified norms reflecting customary international law are embodied in the new Protocol V, then all states are already obligated to abide by them. And for the customary law rules to be true law, sovereign states must have manifested their acceptance of the rules through state practice. The suggestion to consider normative clarification and consolidation is therefore a modest one. It ought not to be taken as a signal that enforcement will be improved by creating a permanent, or even of an ad hoc, international judicial organ specifically chartered to try environmental war crimes. The sole objective of the new Protocol V would be to codify existing international law that many government experts say is already clear enough.

Responsible governments and environmentalist activists ought to share the objective of ensuring that there is little doubt about the existence in international law of a common understanding of the applicable substantive norms. Without that, convictions cannot be obtained *beyond a reasonable doubt*. After all, it will be members of the armed forces of the responsible governments who will actually try to obey the law. They deserve better than to be left with any doubt about what is and is not an international environmental crime. After there is no room for meaningful disagreement between experts on what constitutes crimes against the international environment in the normative sense, world leaders will be better positioned to turn to the task of making enforcement take place in good faith and in accordance with due process and respect for the rule of law.

6. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Apr. 10, 1981, reprinted in JOSEF GOLDBLAT, ARMS CONTROL AGREEMENTS, 242 (1982).