

Ecocide: A crime against the environment under international law?

Context:

In our last TERRE policy paper entitled “Environment is Victim in Armed conflicts”¹ we argued that a body of rules, designed to protect the environment, and whose applicability extends to armed conflicts, already exists. Responsibility under these rules can be mitigated either by a justification derived from the law of States’ responsibility or by causes of termination or suspension of environmental treaties. These elements introduce flexibility for State actions during armed conflicts but should not allow abuses and escape routes. In order to avoid misuses of these rules, relevant government representatives at national level and judicial officials engaged in the UN’s offices at international level need to initiate appropriate capacity-building efforts.

We also argued that this body of rules should be designed, framed and implemented for deterrence, prevention and punishment purposes. Yet international law offers an unclear and to some extent insufficient response to the punishment of environmental damages and their reparation. In the context of the recent findings by UNEP in its GEO report that 60% of the ecosystem on which Earth’s biodiversity and human civilisation depend have been irreversibly degraded, this policy paper aims to explore possible solutions to this insufficiency.

Introduction

According to Parsons, “[a]n effective enforcement chain requires three things: deterrence, prevention, and punishment.”² Yet, international law does not offer a clear response to the need to punish States and/or individuals in connection with environmental wrongs, notwithstanding the fact that these wrongs appear in various forms, such as the illegal exploitation of the flora and fauna, or the trade and disposal of hazardous waste and resources.³ These natural resources can be destroyed during armed conflicts but also during

¹ <http://www.terrepolicycentre.org/Environment-is-victim-in-Armed-Conflict.html>

² PARSONS Rymn James, “The fight to save the planet: U.S Armed Forces, “Greenkeeping” end enforcement of the law pertaining to environmental protection during armed conflict”, *Georgetown international environmental law review*, Vol. 10, n°2, 1998, p. 441-500.

³ <http://www.interpol.int/Crime-areas/Environmental-crime/Environmental-crime>

peaceful times. In addition, new types of environmental crimes are emerging, such as the carbon trade⁴ or the water management crime (violation of licensing in water management, or massive pollution)⁵. Environmental crimes are not restricted by borders, and are often carried out by organized criminal networks spread across the globe. In this context, international law has a specific role to play.

Multilateral Environmental Conventions

As a response to the need to protect the environment, the international community has developed a broad range of norms and standards for the protection of the environment. Today, around 200 Multilateral Environmental Agreements (MEAs) contain international obligations relating *inter alia* to the biodiversity, the marine environment or the atmosphere. These MEAs include five types of specific offences, which have also been recognised by bodies like the G8, Interpol, the European Union, the United Nations Environment Programme (UNEP) and the United Nations Interregional Crime and Justice Research Institute.⁶ These offences are: (i) the illegal trade in wildlife in contravention to the 1973 Convention on International Trade in Endangered Species of fauna and Flora (CITES); (ii) the illegal trade in ozone-depleting substances (ODS) in violation of the Montreal Protocol (1987) on Substances that Deplete the Ozone Layer; (iii) the dumping and illegal transportation of various kinds of hazardous wastes in violation of the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes and their Disposal (1989); (iv) the unregulated and unreported fishing in contravention to controls imposed by the regional fisheries management organisations (RMFOs).

Compliance Regime

Some of these MEAs also provide for their own compliance mechanism. For instance, the Montego Bay Convention on the Law of the Sea provides mechanisms that allow the compensation for damages such as the marine pollution by oil spills or other types of harmful

⁴<http://www.telegraph.co.uk/earth/copenhagen-climate-change-confe/6778003/Copenhagen-climate-summit-Carbon-trading-fraudsters-in-Europe-pocket-5bn.html>

⁵<http://www.environmentalleader.com/2010/12/13/environmental-enforcement-water-contractor-faces-criminal-charges/>

⁶http://www.unodc.org/documents/NGO/EIA_Ecocrime_report_0908_final_draft_low.pdf

substances (which could, in theory, constitute a water management crime). This type of mechanism involves several grounds for compensation: compensation for cleanup costs, damages to personal property and any economic or environmental damages. However, the convention provides for the responsibility of individuals, but not the international responsibility of States.

Two international agreements of 1971 and 1996 also provide legal mechanisms to deal with compensation issues, *i. e.* the International Convention on the Establishment of an International Fund for Compensation for Oil Damage and the Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea. These conventions include the creation of an international compensation fund for the victims of specific international wrongs. In addition, it appears that some environmental conventions provide for a non-compliance mechanism which is characterized by a form of “soft” liability⁷, which does not trigger an international responsibility mechanism for the reparation of an environmental damage. These soft liability mechanisms are based on periodical reports, inquiries and recommendations of measures to reestablish compliance. It is for instance the case of the Montreal Protocol which allows contracting parties to inform the Secretariat of its preoccupations regarding another party. The Secretariat can call for the creation of a Committee charged of inquiries and can suggest ways to reestablish compliance.

However, these MEAs do not refer to the notion of international crime against the environment. This notion would allow sanctioning various wrongs that fall outside the scope of specific MEAs and would criminalize the conduct of wrongdoers.

Ecocide

For these reasons, specialists of international law argue for that the recognition of a notion of environmental crime. Using an analogy with the crime of genocide and in light of specific domestic legislations, some of these authors have introduced the notion of "ecocide".⁸ For instance, according to Drumbl "*the legal theory of ecocide is as follow: significantly harming the natural environment constitutes a breach of a duty of care, and this consists, at*

⁷ MOLLARD-BANNELIER Karine, *La protection de l'environnement en temps de conflit armé*, Paris, Pédone, 2011, p. 401.

⁸ See for instance the Ecocide project, a report by Anja Gauger, Mai Pouye Rabatel-Fernel, Louise Kulbicki, Damien Short and Polly Higgins (<http://www.sas.ac.uk/sites/default/files/files/hrc/Events%20Documents/Ecocide%20is%20the%20missing%20th%20Crime%20Against%20Peace.pdf>)

the least, in tortious or delictual⁹ conduct and, when undertaken with wilfulness, recklessness, or negligence, ought to constitute a crime."¹⁰ These authors argue in favour of the creation of an international court which would have jurisdiction over cross-border environmental crimes.

However, this proposal needs a definition of such crimes, their potential remedies, the appropriate jurisdictional forum, and the applicants eligible for such actions. Drumbl proposes to introduce a multilateral convention on ecocide and create a permanent or an *ad hoc* international environmental court.

It is TERRE's opinion that the international law does not favour or take up this proposal. The International Law Commission's (ILC) articles on the responsibility of States for internationally wrongful acts of 2001¹¹ do not establish a hierarchy between violations of international law. In addition, the ILC has not retained the category of "international crimes"¹² as opposed to other types of international wrongful acts (all other violation of international obligation which would not constitute a crime) despite the insistence of some scholars.¹³ It should however be noted that the ILC articles refer to fundamental violations of peremptory norms of general international law and State's obligations to the international community as a whole, which carry certain consequences in the context of State responsibility. One of these obligations relates to the enforcement of environmental standards referred to by the International Court of Justice.¹⁴

In addition, the UN Commission on Crime Prevention and Criminal Justice first addressed the issue of environmental crime in 1995 and urged States to "*consider acknowledging the most serious forms of environmental crimes in an international convention*".¹⁵ Such a convention has not been adopted to date. TERRE strongly supports

⁹ In Common law systems, tortious conducts can trigger their author's responsibility.

¹⁰ DRUMBL Mark A., "Waging war against the world: the need to move from war crimes to environmental crimes", in AUSTIN Jay E., BRUCH Carl E. (ed), *The environmental consequences of war. Legal, economic and scientific perspectives*, Cambridge, Cambridge University Press, 2000, p. 636.

¹¹ These articles were adopted at the 55th session of the General Assembly of the UN. See official documents of the General Assembly, 55th session, A/RES/56/83, January 28th 2002

¹² International Law Commission, *Annuaire 1976*, Vol. II, p. 89 - 113.

¹³ See for instance :<http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0063.xml>

¹⁴ Advisory opinion of the International Court of Justice, Legality of the threat or use of nuclear weapon, July 8th 1996, <http://www.icj-cij.org/docket/files/95/7495.pdf>

¹⁵ ECOSOC Resolution 1994/15 (25 July 1994).11

such proposal. The issue of environmental crime emerged again in the 2005 Bangkok Declaration at the 11th UN Crime Congress, which called for Member States to strengthen their national crime prevention legislations, and to enhance international cooperation. The UN Crime Commission will again dedicate its 22nd session to this issue in 2013.

Conclusion and recommendation

It is essentially during the process of international negotiations of MEAs or of a specifically dedicated international convention that the definition of the concept and of the regime of an environmental crime should be designed and agreed to. In this policy paper, we have demonstrated that no such definition and regime has yet been introduced in international law. Subsequently, as suggested by UNEP, "*it should be considered whether it is desirable to attach liability for violations of International Environmental Law to State Parties and/or to individuals. Applying international law directly to individuals often increases the efficacy and deterrence effect of a given provision.*"¹⁶ In light of the difficulty of sanctioning the environmental misconducts of States and individuals in the international sphere, it is TERRE's view that the introduction of a crime of ecocide is a necessary development for the efficiency of international environmental law.

¹⁶ *Protecting the environment during armed conflicts. An inventory and analysis of International Law*, UNEP publication, 2009, p. 34s.