

ICL and Environmental Protection Symposium: The Environmental Crisis—Cases for ‘Particular Consideration’ at the ICC

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In a world consumed by the pandemic, it is easy to forget an even greater threat facing mankind – the environmental and climate emergency. The UN Secretary-General is keen to ensure this remains top of the agenda: “There is another deep emergency — the planet’s unfolding environmental crisis. Biodiversity is in steep decline. Climate disruption is approaching a point of no return. We must act decisively to protect our planet from both the coronavirus and the existential threat of climate disruption.”

If anything, the pandemic has exposed both the risks and the opportunities that flow from our globalised world. It is frightening how quickly local issues evolve into regional then global concerns. But it is also comforting how states, industry and civil society *can* pull together when faced with a crisis (with a few notable exceptions). So, what are the opportunities, if any, for international criminal law practitioners to make a difference to

the ‘unfolding environmental crisis’ through the International Criminal Court? Can we ‘act decisively’ under the current legal architecture, or must we wait for a new international crime of ‘ecocide’?

The answer, inevitably, depends on the facts. As it stands, there is no international criminal law that can be applied, neatly and directly, to many of the worst assaults on our natural environments – whether degradation of forests, poisoning of rivers, or extinction of animal species. Of the four Rome Statute crimes, the ‘natural environment’ is only referred to in a single article within the war crimes family. Article 8.2(b)(iv) criminalizes ‘[i]ntentionally launching an attack in the knowledge that such attack will cause [...] 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.’ This lone provision requires proof of an international armed conflict and an assessment of the balance between destruction and military advantage. The prohibition was really aimed at regulating war, not protecting the natural environment; it would not be applicable to the vast majority of situations involving environmental destruction, most of which occur in peacetime.

However, the Rome Statute’s Article 7 – Crimes Against Humanity – is more flexible. It does not require the existence of an armed conflict and has already been applied by the ICC’s Office of the Prosecutor (“OTP”) to several situations outside the context of war. This approach must be right. Whilst the UN tribunals for Yugoslavia, Rwanda and Sierra Leone, were designed as ‘war crimes tribunals’, the ICC was conceived as an ‘international crimes tribunal,’ covering a broader set of circumstances, geographically and factually. As the ICC Prosecutor recently emphasised, the “ICC’s personal jurisdiction is not limited to political or military leaders [...], the ICC may thus exercise jurisdiction over individuals who, through business activities, either contribute to or directly commit international crimes... .” To illustrate, she added: “certain organised industrial activities can cause serious injury to physical health or may force people to leave their land [...] could potentially amount to CAH under Article 7.”

So how can Article 7 be applied to situations involving environmental destruction? First, a cautionary note. Crimes against humanity are, like all international crimes, anthropocentric – putting mankind centre stage, and regulating behaviour that causes human suffering. Therefore, it is not surprising that the contextual elements of crimes against humanity – the attack – must be directed against “any civilian population”. And, that among the 11 underlying crime categories listed in Article 7, there is no mention of environmental destruction, let alone global warming. Even if lawyers practice creatively and judges interpret liberally, the legal elements of crimes against humanity will filter and limit the cases involving environmental destruction that can be prosecuted.

So, what types of scenarios did the Prosecutor have in mind when she talked of industrial activities causing serious injury or land displacement? The OTP’s Policy Paper on Case

Selection and Prioritization of September 2016 provides a clue. Emphasising the importance of the “gravity of the crimes” and the “impact on victims” when selecting cases for investigation and prosecution, the Policy vowed to “give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.” The Policy did not create new environmental crimes – prosecutors must still prove the crimes listed in the Rome Statute – but it did signal a recognition that, for many poor and dispossessed, the worst consequences of the global land rush are no less severe than wartime atrocities.

Several situations could attract this “particular consideration” by the OTP. For the most obvious examples we can look to kleptocratic autocracies, in which the ruling elite’s *raison d’être* is self-enrichment. Power and wealth are realized by subjugating the state apparatus and then pilfering the state’s resources. Since much of the wealth flows from natural resources, the process generally entails grabbing vast tracks of land and then clearing them for exploitation – felling forests, burning villages, and persecuting indigenous people are commonplace. When the rural poor try to defend their land and livelihood, the elite’s obedient security forces quell resistance and commit serious human rights abuses, as and when required. Environmental destruction is routine, which often contributes to global warming. According to experts, the five dozen countries whose operating systems are rooted in grand corruption are “driving climate change, persistent inequality, and spiraling conflict.”

Cambodia is a case in point. Having captured and reconfigured the state apparatus, the Cambodian ruling elite perpetrated land grabbing on a truly massive scale. Those who resisted evictions faced brutal violence and hundreds of villages were burnt to the ground. As many as a million people may have been adversely affected over the last 20 years; half of the 190,000 indigenous minorities have been displaced. The deforestation rate has been one of the highest in the world. As one Cambodian victim put it: “Under Pol Pot we died quickly, but we kept our forests. Under the democratic system it is a slow, protracted death.”

Although land grabbing is not a crime *per se*, many of the acts associated with it are listed as underlying crimes in Article 7: In Cambodia, hundreds of thousands have been forcibly evicted (Art. 7.1(d)) and sent to live in squalid conditions (Art. 7.1(k)), while those who resisted have been killed (Art. 7.1(a)) or detained on trumped-up charges (Art. 7.1(e)); ethnic minorities have been persecuted (Art. 7.1(h)). In a communication on Cambodia submitted to the OTP, I argued that although there has been no single bloody massacre “the cumulative effect of these violations has pushed this situation beyond the boundaries of human rights abuses and domestic crimes. In furtherance of its twin-objectives of self-enrichment and maintaining power at all costs, the Ruling Elite have committed serious crimes as part of a widespread and systematic attack against the Cambodian civilian

population, pursuant to a State policy.” As the Cambodia case shows, by collating Article 7 underlying crimes and showing how they attach to a single “state or organizational policy” (even when committed over several years), crimes against humanity can apply to the situations that result in environmental devastation... and which should now be earmarked for “particular consideration” by the OTP.

If the ICC is to fulfil its goal of tackling crimes that threaten the “peace, security and well-being of the world”, protection of the natural environment must become a real priority.