ENVIRONMENTAL ASPECTS OF THE CHARTER OF THE INTERNATIONAL CRIMINAL COURT

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The Charter of the International Criminal Court, signed in Rome, on July 17, 1998, by the Plenipotentiaries of the United Nations, makes several environmental provisions within the context of different war crime hypotheses.

Some provisions punish those acts intentionally intended to cause great suffering or serious damage to physical or mental health in such a way as to also damage the environment. Examples include the use and dissemination of toxic or poisonous substances. The activity of the International Criminal Court intended to prosecute crimes against individuals indirectly prosecutes and controls crimes against the environment.

Moreover, the cases of environmental damage which are considered war crimes are regulated. Clause 8, sub-clause b, point iv of the Charter defines a war crime as the act of "intentionally launching an attack in the knowledge that such an attack will cause [. . .] 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."

The provision above is important because it distinguishes, among the different war crimes, damage to the natural environmental as a sub-set of these war crimes, allowing, in this way, the International Criminal Court to act for their abatement should these environmental crimes be committed during a war (as defined in international law). If not transpiring in the context of a war, environmental disasters due to negligence would be excluded.

By assigning environmental crimes a minor role, this rule obviously leaves environmental damage unpunished and not defended by any universal court – see, however, the Convention of 10 December 1976, on the interdiction of modifying the environment for military or other hostile ends.

It is necessary to clarify how the expression set out in clause 8, sub-clause b, point iv of the International Criminal Court Charter is to be intended, especially in regard to the provision of the action of "intentionally launching an attack in the knowledge that such an attack will cause [. . .] 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."

A superficial, and maybe not technical, consideration would lead us to believe that, wherever there is a war, in addition to the numerous victims – that should constitute an environmental damage in themselves as the environment comprises all living beings within it – there is environmental damage as well.

However, after a more thorough examination, the regulatory environment appears to be clearly defined. First of all, the rule of the Charter in question only punishes acts causing environmental damage well in excess of the whole of the actual military advantages obtained. Furthermore, while it is easy to understand, based on the effects, the obvious disproportionality between an unusually violent attack and its meaningless target, it is not equally easy to back the applicability of the rule in question to those attacks of "normal" or "light" intensity, which may cause irreparable damage. The applicability of the rule is almost entirely based on psychological criteria and requires a very thorough examination of the will of the actors involved.

It would, however, appear that the rule does not apply to environmental damage caused by military exercises as in the current debacle concerning depleted uranium. It is worth remembering that these issues would be regulated by the aforesaid convention of 10 December 1976, which concerns environmental modifications for military purposes.

The practical application of the Charter, after the institution of the Court, will clarify the situation. For this purpose, it is necessary to add at least thirty-three more ratifications to the twenty-seven already effectuated, to reach the sixty set out as minimum for the entry into force of the Charter.

We shall acknowledge the current regulatory environment, and its shortcomings. However, we shall bear in mind that the Charter can be amended, seven years after its entry into force, upon request of one of the parties thereto. This rule allows the inclusion of environmental crimes among the crimes against humanity, which could be justified in light of the need for a wide jurisdiction of the Court, or even as an autonomous hypothesis. In addition, such a subsequent amendment would consent to avoid any questions on the usefulness of the International Criminal Court, which has already been recognised by the states which took part in the 1998 Rome Conference, as they have approved the Charter.

There are two different ways to deal with this matter: first of all, the revision of the Charter in such a way as to include all the international environmental crimes in the same jurisdiction; or the institution of an autonomous Court for all those environmental crimes not related to war crimes, with all the disadvantages implied in this solution – political opposition and the long terms of implementation.

In this second option, two different instruments of jurisdiction should coexist: the International Criminal Court and a new Environmental Court, whose authorities would remain separate.

The International Criminal Court would have jurisdiction for traditional crimes and environmental crimes resulting from war crimes, and the Environmental Court would be responsible for the remaining environmental crimes of every kind and importance.

The prosecution of environmental crimes is only possible if these crimes are a consequence of an intentional military attack and the prosecution in question is allowed by the rules of the Charter. The increase of criminal cases set out in the Charter is one of the possible solutions of the matter, and probably, at the present time, the easiest. With the institution of a special Court modelled after the International Criminal Court, we proceed toward an environmental jurisdiction comprehensive of the protection of private – as opposed to criminal – law and administrative aspects.

With regard to the aforesaid issues, the Charter of the International Criminal Court provides this Court with the authority to act in a private – as opposed to criminal – law context to achieve an effective protection of the environment, as, pursuant to article 75, the Court is allowed to issue orders for restitution and compensation against individuals deemed guilty of crimes included in its jurisdiction. It is a concise provision which allows victims to be given monetary compensation concerning only the damages – inclusive of environmental damages – suffered because of a war, and which could be extended if environmental crimes were to be included as an autonomous and independent crime within the Charter.

Should the extension of the crimes included in the Charter not happen, it would, however, be recognised that environmental crimes are more often the consequence of human negligence than of an intentional act. In these cases, being that the punishment of culpable acts is not provided by the Charter, the analogy would not be applied as it is forbidden by article 22, paragraph 2. Therefore the authority to decide on private – as opposed to criminal – law profiles of crimes due to negligence and on environmental damages not caused by a war should, at the present time, be assigned to an existing Court such as the Permanent Court of Arbitration in The Hague.

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