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Legal Analysis Regarding the Potentiality of Considering Environmental Damage a War Crime

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Abstract: *Triggered by the open letter from 24 scientists which calls on governments to draft a fifth Geneva Convention related toward a more explicit protection of the environment during an armed conflict between engaged states, this paper tends to analyze the legal potentiality of environmental damages being properly considered as war crimes. Simultaneously, this contemporary occurrence has certain influences upon international environmental law by critically reviewing the existing legislation concerning environmental damage and military activities, comparing the fundamental elements of both war crimes and crimes against humanity in order to determine potential conflicts of international norms, as well as objectively perceiving the legal benefits that could be obtained by the consideration of drafting newly developed principles, regulations and guidelines which should also include animals and non-human species to wildlife affected by war and military operations.*

Keywords: *Environment; War; International Law; Crime; Damages.*

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Introduction

When it comes to legal values, peace is, undoubtedly, one of the fundamental values for human society. It simultaneously represents a predisposition for realizing other values guaranteed and protected by law. If peace cannot be obtained, the overall legal system could potentially suffer a great risk in terms of disabling the manifestation of hierarchy. As soon as peace is not strong enough, a violation of the law immediately occurs - the performance of legal obligations is no longer orderly and complete, and that in itself means that the corresponding rights cannot be used. And the state of prolonged lack of peace leads to legal futility where no one respects the law any more nor the other social norms, above all morality and everyone behaves as he thinks is right. Therefore, the marginal strata begin to surface and legislation completely loses its primary function –guaranteeing the protection of the people. In other words, law represents the most relevant measure of maintaining peace because it contains coercion as an intermediary for that purpose. Its efficiency can be recognized by the realization on a monopoly of a state's physically organized force, or its coercive apparatus, which abides by legal norms.

The demonstration of fighting in its oldest form – war, was often conducted in a rigorous manner during history, especially during the world wars. This lead to the formation of many international conventions and treaties which purpose was to regulate warfare more respectfully and empathically towards the dignity and survival of mankind. The prevailing view in the general doctrine describes war as an armed conflict between two or more independent states. Hence, the application of a set of legal rules that apply to the armed forces between entities of international law during the war is extremely necessary. Despite the implementation of this essentiality, there are certain sections where legislation is not specifically defined or regulated in great measures and could therefore be easily violated by entities of international law engaged in war. This seems to be contradictory to the stance that war should represent a conflict between states recognized as subjects, instead of individuals as part of their population. Hence, states engaged in war should not fight against the enemy's unarmed population, but rather aim towards the weakening of the enemy's military power. According to the laws and customs of war on land (Hague. IV) in article 22 it is stated that: *"The right of belligerents to adopt means of injuring the enemy is not unlimited"* (Library of Congress, n.d.). Put in another way, when it comes to the means of warfare, among other types of weapons, armed forces are prohibited of using poisons and poisonous weapons. Many legislators would

firmly believe that concerning such weapons of similar nature and effect, a new international act must be adopted with the purpose of regulating this issue and contribute towards the elimination of any doubts in this regard. Therefore, the protection of the environment from armed conflicts should be conducted via regulation. And various reasons, selfish altruistic, political or personal may motivate environmental regulation. Public interest rationales are needed to justify environmental regulation in the public sphere, where a number of such rationales, economic, political and ethical, compete for attention (Lee, 2005). However, mostly all forces that possess such destructive weapons involved in the habit of allowing them, although they are simultaneously aware that the use of these weapons poses a serious threat to all of mankind, therefore, should lately advocating against their application during war conflicts in order for health and welfare to be preserved. Consequentially, this leads to the application of the principle *"inter armaenim silent leges"* (lat: In times of war, the law falls silent) which has the purpose of justifying unethical acts during war, such as environmental damages as part of a military activity in this particular case. Hence, what does need to be emphasized is the importance of making environmental consequences a serious concern in military decisions (Birnie & Boyle, 2002). Protection of the environment and natural resources is a key element in the transition from armed conflict to peace. Most academic studies have focused on classical peacetime or conflict situations. The United Nations Environmental Programme ('UNEP') qualified the environment as a 'silent casualty' of armed conflict. Exploring the protection of the environment in the aftermath of armed conflict and its relationship to sustainable peace is a relatively novel perspective. The environmental devastation caused by armed conflict has prompted an expansion in the international legal framework governing environmental protection (Stahn et al., 2017). In point of fact, history shows us an illustrative example of such a principle regarding Agent Orange used by the U.S. Military during the Vietnam War, between 1961 and 1971. Namely, Agent Orange was identified to be a powerful herbicide used in effort to destroy plant crops and to deprive the enemy of concealment all while containing significant amounts of dioxin as a byproduct created during its manufacturing. Dioxin is a highly persistent chemical compound that lasts for many years in the environment, particularly in soil, lake and river sediments and in the food chain (History Editors, 2019). On the other hand, Agent Orange did not only affect forests and crops, but also took a great toll upon the health of Vietnamese people, although it was not meant to target human beings. Regarding the ecological effects, it is important to notice that Vietnam's environment remains

devastated from the war; according to a report issued by the International Union for the Conservation of Nature, *"much of the damage can probably never be repaired"* (Common Sentience, n.d.). Nevertheless, it cannot be denied that, despite the destructive nature of the Vietnam War, a silver lining can be found in the sphere of international environmental law. Namely, two major developments, following the Vietnam War, have occurred; Firstly, the United Nations adopted the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Technique in 1976, where in Article I it is explicitly states the prohibition of such techniques that *have "widespread, long-lasting or severe affects as the means of destruction, damage or injury"* (United Nations, 1976), and secondly, regarding the International Committee of the Red Cross, was the inclusions of provisions in Additional Protocol I, which prohibits to *"employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment"* (United Nations, 1976). In other words, the question of properly regulating environmental damages as a war crime lately does not only concerns international legislators, but also the scientific community. Namely, recent news regarding an open letter by two dozen prominent scientists from around the world has triggered the interests of international environmental law to consider making environmental damage in conflict zones a war crime (Watts, 2019). This open letter triggers the attempt to evaluate whether environmental damages are already considered a war crime and if so, what is the reason for a sudden call upon the government to draft a new Geneva Convention specially dedicated to the United Nations' International Law Commission. Concerning military activities and the environment, it cannot be said that there weren't any previous calls for a fifth Geneva Conventions, originating from two decades ago, since uncontrolled circulations of military conflict still continue to destroy the environments of enemy territories. It is therefore believed that a fifth Geneva Convention would provide a multilateral treaty that includes legal instruments for site-based protection of crucial natural resources, while the military industry must be held more accountable for the impact of its activities (Durant, 2019). Despite these previous calls, however, it is important to primarily analyze our current legislation regarding international law and the environment in order to recognize its flaws that contribute to such a demanding of legal character.

1. Critical review of existing legislation concerning environmental damage and military activities

Regarding the means of warfare, legislators often relate this international matter to the 1949 Geneva Conventions, which main focus lies in the guaranteed protection of wounded military personnel. Although their purpose is to regulate conduct during armed conflict, still they contain no explicit mention of the environment. Adopted in 1977, Additional Protocol I to the 1949 Geneva Conventions similarly prohibits methods of warfare intended or expected to cause 'widespread, long-term and severe damage to the natural environment', or to prejudice the health or survival of the civilian population (Birnie & Boyle, 2002). Along the Geneva Conventions, other previous bodies regarding international law which address the conduct of warfare and contain formal statements of war crimes, are the Hague Conventions of 1899 and 1907, which were among the first formal statements of the laws of war and war crimes. However, while they explicitly forbade the use of "poison or poisonous weapons", specific environmental damages are not simultaneously defined. When comparing the Geneva Conventions of 1949 and Hague Conventions of 1899 and 1907 in terms of detecting any articles related to the proper regulation of environmental damages and defining them as war crimes, we come to one crucial acknowledgement – *different purposes*. While the Hague Conventions set out the rules for conducting war, the Geneva Conventions are designed to protect the victims of war. The two do not mix well because the bias for their enforcement is different. The Hague Conventions and the laws of war are based on the principle of reciprocity. The humanitarian laws of the Geneva Conventions are based on two principles: the protecting power which has been built into them and the respect for them which has developed (Fruchterman, 1983). This interpretation would produce the inaccurate impression of environmental damages not being considered as war crimes regarding international legislation. On the contrary, the existing legislation does recognize environmental destruction as a war crime by the International Criminal Court, while offering protections for the environment regarding foreign and enemy territories. Consequentially, the Rome Statute explicitly defines them as intentionally 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"* (International Criminal Court, 2011). Indeed, the abovementioned terms seem to be rather subjective and deficient in favor of environmental damages, generally speaking. In other words, the definition of

environmental crimes should not be limited regarding martial law since damage could also occur during peace. Namely, these actions, besides destruction, include the illegal exploitation of natural resources and unlawful dispossession of land. Consequentially, company executives or politicians could now be held responsible for illegal land deals which violently displace residents following the shift (Arsenault, 2016). Therefore, the International Criminal Court tends to give particular consideration on widening the overall definition of environmental damages. It is not formally extending its jurisdiction, but it would assess existing offences, such as crimes against humanity, in a broader context (Vidal & Bowcott, 2016). While some may interpret this as a method for expanding the law or changing the definitions of new crimes professor Alex White stated that the International Criminal Court is only *"paying particular attention to crimes that are committed by use of environmental impact or have consequences of environmental impact"* (Taylor, 2016). Hence, although the scientific community may be eager to make environmental damage in conflict zones a war crime, it is also important to consider the fact that environmental crimes during peacetime are no less damaging than those committed during martial law. That being said, it is necessary for international legislators to explicitly define war crimes and crimes against humanity regarding environmental damage within a proper legal act. However, we must primarily differentiate both terms in a proper manner, as well as analyze their potential application regarding certain legal clauses and principles;

2. Environmental damage: crimes against humanity versus war crimes

Based upon the previous statement regarding the equivalent significance of environmental damage, it is necessary for international environmental law to properly identify and differentiate such unlawful actions. This legal distinction would hold great relevance in concerns of a more explicit definition, primarily depending on the fact whether they are being conducted during martial law or during peacetime. Nevertheless, in order for international legislators to achieve this goal, first we must analyze the fundamental elements that distinguish war crimes and crimes against humanity, along with their consequential legal application and comparison concerning environmental damages.

According to Guénaél Mettraux's book titled "War Crimes and Crimes against Humanity" (Oxford Scholarship Online, n.d.), four elements distinguish war crimes from crimes against humanity. The first element regards the fact that war crimes may only be committed during an armed conflict, whereas crimes against humanity can be committed both in times of

war and of peace. Furthermore, a crime against humanity may be committed against nationals of any state, including that state's own nationals, if the state takes part in the attack. Whereas crimes against humanity may only be committed against civilians, most war crimes may be committed against both civilians and enemy combatants. A crime against humanity must be committed as part of a widespread or systematic attack upon a civilian population; there is no such requirement for a war crime. An isolated act could qualify as a war crime, but not as a crime against humanity. Nearly all of the underlying offences which could qualify as crimes against humanity would also amount, all other conditions being met, to war crimes, but the converse is not necessarily true (Ayodele, 2019).

Regarding environmental damage, the abovementioned elements should serve as fundamental guidelines in order to explicitly create particular definitions. Notable focus, however, should be placed upon the nationality of the targeted victims as well as the method of the unlawful act. Namely, what would make environmental damage part of international law in the first place, would be the involvement of foreign victims, no matter their status as combatants or civilians. Secondly, a systematic attack upon a certain population which target is any environmental aspect can be arguable when it comes to its identification term as a crime against "humanity" due to its potentially ambiguous meaning, most likely referring to the environment representing a primary condition for an objective wellbeing state regarding humans in general. On the other hand, such methods do not represent a requirement for war crimes although their gravity is of a similar matter. However, it simultaneously conflicts the concept of war necessity which manifest the internationally regulated limitations as to what means are allowed by the sides engaged in the armed conflict. In other words, environmental damage cannot be identified as a war necessity due to its extremely destructive nature and the current manifestation regarding the lack of proper international environmental legislation, which consequentially leads toward the high probability of non-application. However, this specific issue will be further analyzed in the paper.

3. Potential conflict of norms in concerns of environmental damages

Regarding environmental damages, this part of the research paper mainly focuses on the legal correlation between the existence of obligations and their respect that states should manifest on one hand, and the potential occurrence of an international treaty to become inapplicable due to change of circumstances on the other hand, which eventually leads toward a conducted international environmental crime. From what has been

previously discussed, current legislation via conventions does not provide international law with explicit definitions of environmental damages, which simultaneously allows the formation of "holes" that could be easily misinterpreted and abused. However, it is important to notice that no matter the flaws that these regulations have, they are still part of international treaties of significant value. Consequentially, this represents a manifestation of the clause *pacta sunt servanda* (lat. Agreements must be kept) consisted in the Vienna Convention on the Law of Treaties, where article 26 states that *"Every treaty in force is binding upon the parties to it and must be performed in good faith"* (Common Sentience, (n.d.). In other words, the entitlement of states is manifested with the requirement of obligations to be properly respected by their side. However, this clause cannot be fully applied in regards to environmental damages due to the extremely vague and imprecise definition, which simultaneously allows the configuration of legal liberty for states in terms of committing environmental damages, whether during wartime or peacetime, and not being appropriately punished for the same. The aforementioned clauseis known to be vulnerable to peremptory norms derived from general international law. However, concerning environmental damages, peremptory norms do not represent the only limitation to *pacta sunt servanda*, although a firm legal connection can be found between the two notions. Peremptory laws as fundamental principles are known to be accepted by international law even though, theoretically speaking, there is no universal agreement in existence so far that manages to specifically categorize them. Instead, they are generally concluded prohibitions of which most of them are characteristic for martial law, such as war crimes, torture, aggressive war, crimes against humanity, genocide, slavery, etc. Article 53 regarding the Vienna Convention on the Law of Treaties states that: *"A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law"* (Cornell Law School, n.d.). Dealing with the main concept of binding force of rules of international law, peremptory norms are widely accepted, where each and every state must comply with them, as the highest class of rules in the hierarchy of international law. The conflict of norms can be noticed in terms of treaties that must be legally binding, may be simultaneously contradictory when coming into direct contact with peremptory norms, or put in another way, become void. Also, the issue with environmental damage holds a high probability for disagreements over such cases to violate a peremptory norm, which leaves states with the option of individual interpretation. Furthermore, the generally conducted prohibitions, regarding environmental damage, include both war crimes and crimes against humanity. The previous speculation analyzes the legal distinction

between the two definitions and their applicability to properly define environmental damage. However, this should not be confused with *clausula rebus sic stantibus* (lat. Things thus standing), the legal doctrine that allows for a specific treaty to become inapplicable due to the occurrence of a fundamental change of circumstances, since the objective of legally defining environmental damages is to maintain a continuous focus upon the nature of those unlawful actions.

4. Legal analysis of the presumption of environmental damage as war crimes

If we are to explicitly consider environmental damage as war crimes, committed during martial law respectively, a legal analysis must be provided in order to adequately incorporate such unlawful actions as means in concerns of the Just war theory – a doctrine whose purpose is to ensure a valid justification of the engagement, as well as the continuous conduct of war. The just war theory is mainly consisted of dual criteria: *jus ad bellum* (lat. Right to go to war) and *jus in bello* (lat. Right conduct in war). A distinction must be maintained between the *ius ad bellum* and *ius in bello*. The importance of the distinction between both parts of law lies in the principle that the *ius in bello* applies in cases of armed conflict, irrespective of whether or not the commencement of the conflict is lawful under *the ius ad bellum* (Boot, 2002). In respect of environmental damage however, it is highly improbable from a legal standpoint for a certain state to manifest its right to go to war due to the occurrence of such unlawful actions as a valid motivation. Put in another way, the criteria *jus ad bellum* does not seem to apply sufficiently compared with the nature of environmental damages as war crimes, since it lacks a truly just cause. A certain state cannot primarily cause environmental damage to another state, unless such action would be conducted in order to correct a suffered wrong, being simultaneously interpreted as the right intention while excluding materialistic and economic motivations. Instead, a reasonable legal analysis can be made between the latter criteria of *jus in bello* and the potential incorporation *jus post bellum* (lat. After the war) as the third category of just war theory, which tends to deal with the righteousness of post-war reorganizations, as well as reconciliations. In point of fact, during the world wars, history has shown us that the criteria *jus in bello* with regard to environmental damages, has not been fully respected by states engaged in armed conflicts, while the criteria jus post bellum on the other hand, has been somewhat manifested via legal and diplomatic proceedings. Among exemplary cases, those worth mentioning are the Vietnamese victims class action lawsuit in U.S. courts (The New York Times, 2005), as well as the

U.S. veterans class action lawsuit against manufacturers (Abboud, 2017). In essence, once an armed conflict between certain engaged states has begun, it is reasonable to presume that various use of means and weapons will be utilized during warfare. But in spite of that, it might be slightly intricate, in respect of environmental damages, to legally determine whether it should be regarded as a military objective on one hand, or to be interpreted as prohibited means *malum in se* (lat. Evil in itself). A military objective with the status of a potential target is manifested by the principle of military necessity in order to properly govern legal use of force in an armed conflict as a constraint. More importantly, military necessity also applies to weapons and since environmental damages represent the consequences of weapons that are prohibited by the Additional Protocol I to the Geneva Conventions previously mentioned in this paper, we can come to the conclusion that it is not likely for environmental damages to be considered as an inclusion toward the principle of military necessity. That being said, regarding the criteria of *jus in bello*, international environmental legislators should reasonably presume the interpretation of weapons that cause environmental damage as prohibited means *malum in se*. Otherwise speaking, states engaged in armed conflicts are forbidden to use weapons whose outcomes cannot be properly controlled in order to maintain a warfare which will not result in the conducting of various war crimes and crimes against humanity, one of them being environmental damages, respectively. Moreover, although the concept of *jus post bellum* has not yet been officially accepted as a concept in just war theory, it is still argued that the potential third branch has been overlooked, simultaneously referencing to Immanuel Kant (Orend, 2004). Nonetheless, the concept manifests great relevance in respect of environmental damages as it guarantees usefulness originating from both legal and moral standpoints. Its utilization can be further perceived concerning harms inflicted not only through the depletion of resources that are of vital importance such as air, water and soil, but also upon military personnel and civilians represented as victims, as well as the responsible states being criminally liable, respectively. Such productive results are reflected by the Draft Principles by the International Law Commission (ILC), where in Draft principle 27 [16] it is stated that: *"After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment."* (International Law Commission, (n.d.))

5. A fifth Geneva Convention – obtained legal benefits for international environmental law

Up to this point, we are already familiarized with the fact that the existing legal framework, regarding international environmental law, has only proven to be qualified to deal with direct attacks on the natural environment. Consequentially, a fifth Geneva Convention being recognized as a recently developed international agreement could be of extensive advantage, particularly in the field of international environmental law since it would simultaneously provide respect regarding the laws that govern armed conflicts between engaged states, on one hand, and provide the deserved respect toward environmental protection. But this ignores the many other ways the environment is affected by conflict. Resources such as diamonds, coltan, timber and ivory are all used to help fund conflicts. A particular gap is that no consideration is given in the existing framework to non-human species-to wildlife affected by war or to animals used for military purposes (Daft, 2019). Otherwise speaking, there are many individual aspects that international environmental law has yet to cover. The environment should not represent a target for military purposes and along with that everything contained within must be equally subjected to protection by laws and regulations. Still, the lack of clarity of *"widespread, long term, and severe"* is continuously present within the produced work so far, which maintains the vague description of environmental damages during armed conflicts. However, the confirmation regarding the upcoming principles and regulations guarantees the firm standpoint of a focus directed toward environmental protection as an optimistic indicator for the necessary excluding of the environment from military operations. In other words, the existing laws should be properly interpreted and explicitly defined in order for the environment as an overall concept to be included in concerns of operational guidelines for military purposes. And while the field of international environmental law may still take its time regarding the consideration of a fifth Geneva Convention with particular focus related upon environmental damages and the overall protection of the environment that may not be the case for the prosperity of our natural environment, given the fact that such unlawful actions continue to tremendously contribute for environmental depletion, irrelevant of their military or lack of military background.

Conclusions

Based on the overall presented legal argumentation, it would be considered misleading to state, respectively toward the open letter, that the scientists want environmental damage to be made a war crime. In reality, environmental damage, technically, has been already considered to be a war crime, mainly by the International Criminal Court. However the definition itself is not explicit enough to legally protect the environment during armed conflicts. Also, international legislators should come to the realization that the term "environmental damage" cannot only be related to martial law, upon further analysis. Instead, it is considered necessary for the definition to include multiple aspects and elements that need to be properly regulated. While our existing legal framework regarding the field of international environmental law does offer a limited amount of protection for the environment, the concept of drafting a fifth Geneva Convention could definitely present greatly presumed legal benefits, however, it is still questionable whether its realization represents a validly confirmed actuality or not.

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