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of the Commission**

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# DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 3]

## DOCUMENT ILC(XLVIII)/DC/CRD.3

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## Multilateral instruments cited in the present report

	<i>Source</i>
Convention respecting the Laws and Customs of War on Land (The Hague, 18 October 1907)	J. B. Scott, ed., <i>The Hague Conventions and Declarations of 1899 and 1907</i> , 3rd edition (New York, Oxford University Press, 1918), p. 100.
International Convention for the Regulation of Whaling (Washington, D.C., 2 December 1946)	United Nations, <i>Treaty Series</i> , vol. 161, p. 72.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	Ibid., vol. 75, pp. 31 et seq.
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	Ibid., p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	Ibid., p. 85.
Geneva Convention relative to the Treatment of Prisoners of War	Ibid., p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	Ibid., p. 287.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	Ibid., vol. 1125, pp. 3 and 609.
International Convention for the Prevention of Pollution of the Sea by Oil (London, 12 May 1954)	Ibid., vol. 327, p. 3.
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water (Moscow, 5 August 1963) (Partial Test Ban Treaty)	Ibid., vol. 480, p. 43.
Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, D.C., 3 March 1973)	Ibid., vol. 993, p. 243.
Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976)	Ibid., vol. 1108, p. 151.
Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979)	Ibid., vol. 1302, p. 217.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	Ibid., vol. 1833, p. 3.
Protocol to the Antarctic Treaty on Environmental Protection (Madrid, 4 October 1991)	<i>International Legal Materials</i> (Washington, D.C.), vol. XXX, No. 6 (November 1991), p. 1461.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	United Nations, <i>Treaty Series</i> , vol. 1771, p. 107.

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## Introduction

1. The Commission decided, in 1995, at its forty-seventh session, to establish a working group that would meet at the beginning of the forty-eighth session to examine the possibility of covering in the draft Code of Crimes against the Peace and Security of Mankind the issue of wilful and severe damage to the environment, while reaffirming the Commission's intention to complete the second reading

of the draft Code at that session in any event.<sup>1</sup> The present paper has been prepared to facilitate the task of the working group.

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<sup>1</sup> See *Yearbook ... 1995*, vol. II (Part Two), p. 32, para. 141.

## CHAPTER I

**Historical review**

2. The Commission intends to complete its work on the draft Code of Crimes against the Peace and Security of Mankind at its forty-eighth session in 1996. One of the issues that requires particular attention before the text can be finalized is whether causing damage to the environment should be included in the draft Code. Article 26 of the text adopted on first reading in 1991 provides:

An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced ...<sup>2</sup>

At the forty-seventh session in 1995, however, the Special Rapporteur, Mr. Doudou Thiam, expressed doubts as to whether it was advisable to go beyond the framework delineated at Nürnberg,<sup>3</sup> which is now reflected in the provisions determining the jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991. He felt that the time was not yet ripe for a provision like article 26, given a definite lack of support by Governments for the proposal of the Commission.<sup>4</sup> Before taking a decision on that issue, the Commission deemed it useful to hold a discussion in a small working group to be convened during the forty-eighth session.

**A. The Nürnberg trial**

3. At the Nürnberg trial against the major war criminals of Nazi Germany, no charges were brought against the accused on account of the damages which the natural environment had suffered during the Second World War. Indeed, the law regarding the conduct of hostilities, as it stood in the period between 1939 and 1945, did not contain any rules concerning the environment as such. Generally, the objective of humanitarian law was to protect the human person directly. Thus, the ban on “poison or poisoned weapons”, enunciated in article 23 of the Regulations concerning the Laws and Customs of War on Land annexed to the 1907 Convention respecting the Laws and Customs of War on Land, sought to prevent immediate threats resulting from the use of such weapons from military personnel engaged in fighting, but not to protect the soil or the air from dangerous long-term effects which, on their part, could at a later stage affect the health of human beings. The environment had not yet become a legal concept before the Second World War.

<sup>2</sup> For the text of the draft articles provisionally adopted by the Commission at its forty-third session, see *Yearbook ... 1991*, vol. II (Part Two), pp. 94–107.

<sup>3</sup> Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European axis (United Nations, *Treaty Series*, vol. 82, p. 279).

<sup>4</sup> See the thirteenth report of the Special Rapporteur, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/466, p. 35, para. 10.

**B. The work done by the International Law Commission**

4. It is not astonishing, therefore, that the Commission did not address the issue of environmental protection when it was asked by the General Assembly to draw the general lessons from the Nürnberg trial. The codification of the Nürnberg Principles<sup>5</sup> reproduces faithfully the three categories of crimes over which the International Military Tribunal had jurisdiction, namely crimes against peace, war crimes and crimes against humanity. Likewise, the first draft Code of Offences against the Peace and Security of Mankind, adopted by the Commission in 1954,<sup>6</sup> draws heavily on the Nürnberg precedent and does not attempt to explore new ground. This is all the more understandable since not even in the 1950s did there exist a general awareness of the necessity to take care of the natural environment. Nobody fully realized that such seemingly abundant goods as water, air and soil might be severely and perhaps even irreparably prejudiced by certain human activities.

5. A new stage was reached in 1986 when the Special Rapporteur suggested complementing the list of crimes against humanity with a provision making breaches of rules for the protection of the environment a punishable act. His proposed draft article 12 (Acts constituting crimes against humanity), in his fourth report,<sup>7</sup> read as follows:

The following constitute crimes against humanity:

...

4. Any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

In his commentary, the Special Rapporteur stressed that, within the framework of its project on State responsibility, the Commission had in the meantime included serious breaches of obligations regarding the safeguarding and preservation of the environment in the group of “international crimes”. Thus, it seemed to him obvious that the draft Code had to follow the example set by the Commission itself. In a brief comment, he stated:

It is not necessary to emphasize the growing importance of environmental problems today. The need to protect the environment would justify the inclusion of a specific provision in the draft code.<sup>8</sup>

6. In the ensuing discussion, broad support was manifested for such an enlargement of the traditional purview

<sup>5</sup> Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (*Yearbook ... 1950*, vol. II, pp. 374–378, document A/1316, paras. 95–127). Text reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 12, para. 45.

<sup>6</sup> The draft Code adopted by the Commission at its sixth session (*Yearbook ... 1954*, vol. II, pp. 150–152, document A/2693, para. 54) is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>7</sup> *Yearbook ... 1986*, vol. II (Part One), in particular pp. 85–86, document A/CN.4/398.

<sup>8</sup> *Ibid.*, p. 61, para. 67.

of crimes against humanity.<sup>9</sup> Only a few speakers cautioned against the new offence which, they felt, would not fit into a draft that was designed to address the most serious crimes threatening humankind.<sup>10</sup> Some other members emphasized that there was a need for further clarification.<sup>11</sup> In particular, it was stated that the existence of a crime against humanity presupposed that a person causing damage to the environment had acted with intent.<sup>12</sup> Notwithstanding these reservations, the debate made clear that the great majority of the members of the Commission were in favour of setting forth a rule covering acts harmful to the environment.

7. Following the debate, the Commission requested the Special Rapporteur to submit, at the next session, revised draft articles recast in the light of the opinions expressed and the proposals made by members of the Commission and those expressed in the Sixth Committee of the General Assembly. The Special Rapporteur therefore submitted new proposals at the forty-first session of the Commission in 1989. Departing from the formulation he had previously used, he now suggested that in draft article 14 (Crimes against humanity), which appears in his seventh report,<sup>13</sup> crimes affecting the environment should be couched in the following terms:

The following constitute crimes against humanity:

...

6. Any serious and intentional harm to a vital human asset, such as the human environment.

This time, fewer speakers commented on the draft provision. Mostly, the observation was made that, notwithstanding a considerable improvement in the drafting of the text, the formulations still lacked in rigour and needed to be phrased more precisely.<sup>14</sup> Other members, however, fully approved of the proposals of the Special Rapporteur.<sup>15</sup> At the end of the discussion, in any event, draft article 14 was sent to the Drafting Committee.

8. As is well known, the Commission adopted the draft Code of Crimes against the Peace and Security of Man-

<sup>9</sup> See the debates on the topic in the Commission at its thirty-eighth session (*Yearbook ... 1986*, vol. I), in particular Mr. Flitan, 1958th meeting, para. 22; Mr. Francis, 1959th meeting, para. 8; Mr. Balanda, 1960th meeting, para. 38; Mr. Roukounas, 1961st meeting, para. 61; Mr. Jagota, 1962nd meeting, para. 79; Mr. Razafindralambo, 1963rd meeting, para. 29; Mr. El Rasheed, *ibid.*, para. 52; Mr. Díaz-González, *ibid.*, para. 66; and Mr. Barboza, 1967th meeting, para. 68.

<sup>10</sup> See Sir Ian Sinclair, *Yearbook ... 1986*, vol. I, 1960th meeting, para. 17; and Mr. McCaffrey, *ibid.*, 1962nd meeting, para. 10.

<sup>11</sup> See Mr. Calero-Rodriguez, *Yearbook ... 1986*, vol. I, 1960th meeting, para. 24; Mr. Tomuschat, *ibid.*, 1961st meeting, para. 40; and Mr. Mahiou, *ibid.*, 1963rd meeting, para. 11.

<sup>12</sup> See Mr. Ogiso, *Yearbook ... 1986*, vol. I, 1961st meeting, para. 25; and Mr. Jacovides, *ibid.*, 1962nd meeting, para. 28.

<sup>13</sup> *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/419 and Add.1, p. 86.

<sup>14</sup> See Mr. Tomuschat, *Yearbook ... 1989*, vol. I, 2096th meeting, para. 28; Mr. Mahiou, *ibid.*, 2097th meeting, para. 50; Mr. Sepúlveda Gutiérrez, *ibid.*, 2098th meeting, para. 22; Mr. Shi, *ibid.*, para. 36; and Mr. Calero-Rodriguez, *ibid.*, 2099th meeting, para. 47.

<sup>15</sup> See Mr. Barsegov, *Yearbook ... 1989*, vol. I, 2097th meeting, para. 14; Mr. Solarí Tudela, *ibid.*, 2100th meeting, para. 16; Mr. Díaz González, *ibid.*, para. 26; Mr. Eiriksson, *ibid.*, 2101st meeting, para. 19; and Mr. Graefrath, *ibid.*, para. 33.

kind on first reading in 1991. Pursuant to an opinion that had emerged in the Drafting Committee, acts seriously prejudicing the environment were not listed as crimes against humanity, but were set apart to form a new, autonomous crime, whose wording has already been given (see paragraph 2 above). In the commentary to draft article 26 (Wilful and severe damage to the environment),<sup>16</sup> it was clearly stated that the draft provision had borrowed most of its elements from article 55 of Additional Protocol I to the Geneva Conventions of 12 August 1949, but that its scope *ratione materiae* was larger in that it applied also in times of peace outside an armed conflict.

9. The following written comments on the draft articles as adopted by the Commission at its forty-third session in 1991<sup>17</sup> were received from Governments:

#### Australia

50. The Commission's commentary refers to the possible inconsistency between the requirement in article 26 that the damage be caused or ordered to be caused wilfully and the possibility of a conviction under article 22, paragraph 2 (*d*), for employing methods not only intended but even likely or which "may be expected to cause" the damage. It was argued by some members of the Commission that the requisite *mens rea* in article 26 should be lowered so as to be consistent with article 22. This inconsistency could otherwise result in a deliberate violation of some regulations on protection of the environment for economic gain which caused widespread, long-term and severe damage, but did not cause that damage as the consequence of a will to do so, and did not therefore amount to criminal behaviour. Australia considers that this argument has merit and that if such violation may have been expected to cause the requisite degree of damage, then it should be treated as an international crime.

#### Austria

30. Since perpetrators of this crime are usually acting out of the motive to make commercial profit, intent should not be a condition for liability to punishment.

#### Belgium

26. Article 26 deals with wilful and severe damage to the environment. As noted in the relevant commentary, cases of damage by deliberate violation of regulations forbidding or restricting the use of certain substances or techniques if the express aim is not to cause damage to the environment are excluded from the scope of article 26. The commentary also indicates that article 26 conflicts with article 22, on war crimes, because under article 22 it is a crime to employ means of warfare that might be expected to cause damage, even if the purpose of employing such means is not to cause damage to the environment.

27. This difference between articles 26 and 22 does not seem to be justified. Article 26 should be amended to conform with the concept of damage to the environment used in article 22, since the concept of wilful damage is too restrictive.

#### Brazil

14. ... The crime of wilful and severe damage to the environment is also characterized without any reference to the international element.

<sup>16</sup> *Yearbook ... 1991*, vol. II (Part Two), p. 107, para. (2) of the commentary to article 26.

<sup>17</sup> See *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/448 and Add.1, pp. 59 et seq.



### Greece

3. With regard to draft articles 15 to 26, the Commission had identified 12 crimes which are of a particularly serious nature and which constitute an affront to mankind. The Government of Greece supports the inclusion of all these crimes in the draft Code. ...

### Netherlands

71. The Government of the Netherlands is opposed to the inclusion of articles 23 to 26 in the draft Code, since none of them satisfies the criteria set out in part I of the commentary.

### Nordic countries\*

37. It is important to establish some form of international legal regime which deals with the question of liability in connection with transboundary environmental damage. From a substantive point of view, it is clear that the article does not have the degree of precision required for a penal provision. The matter should therefore be considered further.

\* Reply submitted jointly by Denmark, Finland, Iceland, Norway and Sweden.

### Paraguay

20. Given the current gravity of ecological problems, it was deemed appropriate that severe damage to the environment should be established as an offence under international criminal law.

### Poland

43. It would be reasonable to supplement the expression “long-term” by adding the word “effects” at the end (“long-term effects”) because, as has been mentioned by the Commission, the expression “long-term” does not mean the period of time in which the damage occurs, but the long-term nature of its effects.

44. The observations made above in relation to the term used in article 25 (“on a large scale”) apply in the same manner to the expressions “widespread” and “severe”, which determine the character of damage to the environment in article 26.

45. Article 26 conflicts with article 22 on war crimes that also deals with protection of the environment (para. 2 (d)). Under the provisions of this article it is also a crime when an individual employs such methods or means of warfare that might “be expected to cause” damage, even if the purpose of using such methods has not been to cause damage in the environment, whereas article 26 is based on the concept of intention and will (“who wilfully causes”).

### United Kingdom of Great Britain and Northern Ireland

31. The origin of this provision lies in article 19 of the Commission’s draft articles on State responsibility, where its inclusion proved controversial. It is no less so here, since there is certainly no general recognition of “widespread, long-term and severe damage to the natural environment” as being an international crime, much less a crime against the peace and security of mankind. Environmental damage may give rise to civil and criminal liability under municipal law but it would be extending international law too far to characterize such damage as a crime against the peace and security of mankind.

### United States of America

24. This article, dealing with damage to the environment, is perhaps the vaguest of all the articles. The article fails to define its broad terms. There is no definition of “widespread, long-term and severe damage to the natural environment”. Similarly, the term “wilfully” is not defined, thereby creating considerable confusion concerning the precise volitional state needed for the imposition of criminal liability. The term “wilfully” could simply mean that the defendant performed an act voluntarily, i.e. without coercion, that had the unintended effect of causing

harm to the environment. “Wilfully” could also be construed to impose criminal liability only when the defendant acted for bad purpose, knowing and intending to cause serious harm to the environment. As presently drafted, the meaning of “wilfully” is subject to a variety of interpretations. This confusion is magnified by the draft Code’s failure throughout to specify the necessary mental and volitional states needed for the imposition of criminal liability.

25. Moreover, as with the other articles, this article fails to consider fully the existing and developing complex treaty framework concerning the protection of the environment.\*

\* See, for example: United Nations Framework Convention on Climate Change; Convention on Long-Range Transboundary Air Pollution (supplemented by various protocols); Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; Convention on International Trade in Endangered Species of Wild Fauna and Flora; International Convention for the Prevention of Pollution of the Sea by Oil; International Convention for the Regulation of Whaling.

### Uruguay

6. Despite this reservation, the Government of Uruguay deems it relevant, in connection with article 26, to put forward at this stage some comments and observations in accordance with what has been stated by its representatives in various international forums, and especially by the President of the Republic, Luis Alberto Lacalle, in the address delivered on 13 June 1992, at a plenary meeting of the United Nations Conference on Environment and Development.\*

7. Uruguay believes that an effective defence of the environment is possible only within the framework of international cooperation, through joint action by all States and the conclusion of international instruments setting forth specific, legally binding obligations and conferring jurisdiction on national and international courts, as the case may be, making it possible to hold perpetrators of unlawful acts against the environment effectively accountable.

8. In this connection, the Government of Uruguay has summarized its views, at the national level, in the bill entitled “Prevention of environmental impact”, which has been submitted to the legislative authorities for consideration, and, at the international level, in the document entitled “Guidelines for a draft international environmental code”, which contains a chapter specifically devoted to civil and criminal liability, that was submitted to the General Assembly at its forty-seventh session.

9. With specific reference to article 26 as drafted by the Commission and the characterization of the offence envisaged in this provision, on the basis of the observations outlined above, the Government of Uruguay believes that, given the nature of the consequences of the conduct—“widespread, long-term and severe damage to the natural environment”—the requirement of wilfulness should be deleted and replaced by the principle of liability which, in the exceptional case of the environment, should encompass not only instances of wilfully caused damage (wilful wrongs), but also damage caused through negligence or lack of precaution (culpable wrongs), since the interest which it is proposed to protect is, in the final analysis, the survival of mankind.

10. The Government of Uruguay also believes that it would be appropriate, from the standpoint of rule-making techniques, to follow the methodological approach in several draft articles and to prepare a descriptive enumeration of the principal acts which make up the envisaged offence against the environment for which those responsible are to be punished, be they individuals, corporate managers or representatives of a State.

10. The recent proposal of the Special Rapporteur to delete article 26 was extensively discussed by the General Assembly during its fiftieth session in October 1995. A great majority of States argued in favour of keeping a provision dealing with crimes against the environ-

\* Report of the United Nations Conference on the Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1) (United Nations publication, Sales No. E.93.1.8 and corrigenda), vol. III: Statements Made by Heads of State or Government at the Summit Segment of the Conference, pp. 227 et seq.

ment.<sup>18</sup> Only a few delegations stated that article 26 was inappropriate as an element of the draft Code of Crimes against the Peace and Security of Mankind,<sup>19</sup> while others expressed doubts<sup>20</sup> as to the wisdom of establishing such a crime under the draft Code or requested additional clarifications.<sup>21</sup> There were also voices that supported the decision of the Commission to set up a working group mandated to look more closely into the matter.<sup>22</sup> It should be additionally mentioned though, that some delegations praised the Commission in general terms for reducing the number of crimes from 12 to 6.

### C. Work done by other United Nations bodies

11. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana from 27 August to 7 September 1990, drew in general terms attention to the need to protect the environment not only with administrative measures and adequate rules on liability under civil law, but also with criminal sanctions. However, it did not specifically address the issue of making crimes of particular gravity punishable under international law regimes. Its focus was directed on penal sanctions under national criminal law, provided for in either domestic statutes or in international conventions. Consequently, the notion of international crimes governed in their entirety by international law was not mentioned as one of the possible avenues to be pursued.

12. The Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,<sup>23</sup> held in Cairo from 29 April to 8 May 1995, organized a two-day workshop on the topic “Environmental protection at the national and international levels: potentials and limits of criminal justice”. Again, the inclusion of crimes against the environment in the draft Code of Crimes against the Peace and Security of Mankind was not specifically inquired into. Yet, one of the conclusions set out in the final

report merits special attention. It was said that “A crime against the environment should be viewed as a crime against the security of the community”.<sup>24</sup>

### D. Work done by private bodies (learned societies)

13. In 1992 the International Association of Penal Law (AIDP) again took up the topic of crimes against the environment after having already dealt with the theme in 1978 and 1979. A preparatory colloquium to the XVth International Congress on Penal Law, devoted to such crimes, was held in Ottawa from 2 to 6 November 1992.<sup>25</sup> Following these recommendations to a large extent, the Congress itself, which was held in Rio de Janeiro, Brazil, from 4 to 10 September 1994, adopted a resolution which dealt extensively with crimes against the environment.<sup>26</sup> Although the main body of the resolution concerned criminal prosecution under national law, two of the paragraphs touched directly upon the issues discussed in this paper. Paragraph 23 read:

Core crimes against the environment affecting more than one national jurisdiction or affecting the global commons outside any national jurisdiction should be recognized as international crimes under multilateral conventions.

An additional note was added to this request in paragraph 28:

In order to facilitate the prosecution of international crimes, in particular crimes against the global commons, the jurisdiction of the international court proposed by the International Law Commission and currently being considered by the General Assembly of the United Nations should include crimes against the global commons.

<sup>18</sup> Guatemala, Bulgaria, Croatia, Switzerland, Chile, Slovenia, Belarus, Trinidad and Tobago, Morocco, Egypt, Jamaica, Burkina Faso, Malaysia, Italy and Bangladesh (see *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, respectively, 13th meeting, para. 83 (A/C.6/50/SR.13); 14th meeting, para. 23 (A/C.6/50/SR.14); *ibid.*, para. 34; *ibid.*, para. 46; 16th meeting, paras. 11 and 21 (A/C.6/50/SR.16); 17th meeting, para. 53 (A/C.6/50/SR.17); 19th meeting, para. 1 (A/C.6/50/SR.19); *ibid.*, para. 28; 20th meeting, para. 55 (A/C.6/50/SR.20); 21st meeting, para. 29 (A/C.6/50/SR.21); 22nd meeting, paras. 10 and 23 (A/C.6/50/SR.22); *ibid.*, para. 48; 23rd meeting, para. 4 (A/C.6/50/SR.23); *ibid.*, para. 67; and 25th meeting, para. 4 (A/C.6/50/SR.25), and corrigendum).

<sup>19</sup> France, Brazil and the Czech Republic (see *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, respectively, 13th meeting, para. 31 (A/C.6/50/SR.13); *ibid.*, para. 39; 15th meeting, para. 20 (A/C.6/50/SR.15), and corrigendum).

<sup>20</sup> United States of America and New Zealand (see *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, respectively, 13th meeting, para. 64 (A/C.6/50/SR.13) and 18th meeting, para. 15 (A/C.6/50/SR.18), and corrigendum).

<sup>21</sup> Germany (see *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 15th meeting, para. 85 (A/C.6/50/SR.15), and corrigendum).

<sup>22</sup> Hungary and Lebanon (see *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, respectively, 15th meeting, para. 95 (A/C.6/50/SR.15) and 25th meeting, para. 16 (A/C.6/50/SR.25), and corrigendum).

<sup>23</sup> *Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, 29 April–8 May 1995* (United Nations publication, document A/CONF.169/16/Rev.1, paras. 355–369).

<sup>24</sup> *Ibid.*, para. 358.

<sup>25</sup> See Committee of experts on the protection of the environment through criminal law, *AIDP Preparatory Colloquium on the Application of the Criminal Law to “Crimes against the Environment”*, Recommendation (document PC-EN (92) 21, Council of Europe, 1992).

<sup>26</sup> Reproduced in *International Review of Penal Law*, vol. 66, Nos. 1/2 (Paris, 1995), pp. 52–53.

## CHAPTER II

## The constituent elements of a crime against the environment

## A. General features of crimes against the peace and security of mankind

14. The first question to be posed and to be answered is whether causing harm to the environment meets the criteria that have been generally identified as characterizing crimes against the peace and security of mankind. In 1991, the Commission refrained from drawing up a draft article specifying the particular characteristics of such crimes. Nevertheless, in its commentary on article 1 it set forth its understanding of the essential features that a human act or activity must fulfil in order to come within the purview of the draft Code of Crimes against the Peace and Security of Mankind.<sup>27</sup> In the first place, the criterion of seriousness is mentioned. Seriousness, it is stated, can either be deduced from the nature of the act in question or from the extent, the magnitude of its effects. It would seem to stand to reason that, as such, seriousness is a relative notion. It must be measured within a specific context. Rightly, therefore, the Commission goes on to say that the protected object needs to be taken into account. It is, explains the commentary, the very foundations of human society which the draft Code seeks to shield from grave attacks. If this is the case, then the parallelism of article 19 of part one of the draft articles on State responsibility and the draft Code constitutes a logical inference from a common premise. Under the draft articles, States as juridical entities may incur responsibility if they breach fundamental rules of conduct securing a civilized state of affairs in international relations. Additionally, for the same acts, those who hold leadership positions in the governmental machinery of such States may be made accountable in their individual capacity,<sup>28</sup> without prejudice, of course, to the responsibility of other persons not occupying any official position. There is no denying the fact that rules imposing obligations upon States must be framed differently from rules that address individuals. Notwithstanding this technical difference, the substantive background is the same. In both instances, the foundations of the international community are at stake.

15. There can be no doubt that at least some types of injury to the environment are susceptible of meeting the criteria just recalled. The Gulf war has amply illustrated the dangers which should be borne in mind. After the Iraqi troops had ignited many of the Kuwaiti oil wells, it was feared that for months the country would have to live under a thick cloud of fumes and soot. Fortunately, these fears have proved to be unfounded; yet the damage actually sustained by the fauna and flora in the affected region is bad enough. The ozone layer is another good on whose continued existence the survival of mankind is

dependent. Should this protective belt of the atmosphere disappear, life on earth would become impossible. Lastly, reference may be made to nuclear pollution of the globe. Today, it has become clear what disastrous consequences contamination of a specific region or of the entire surface of the earth might entail for humankind.

16. Nobody can deny that the examples just provided illustrate the seriousness which may characterize damage to the environment in certain instances which, of course, require to be carefully defined. As far as the constituent elements of war crimes and crimes against humanity are concerned, in general, human life is the parameter against which gravity is measured. However, the 1907 Regulations concerning the Laws and Customs of War on Land already protected essential human assets such as enemy property in general (art. 23, para. (g)) and, specifically, undefended towns, villages, dwellings or buildings (art. 25). Other examples of war crimes whose direct target is not a human being can be found in article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (“extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”), as well as in article 85 of Additional Protocol I to the Geneva Conventions of 1949 (paras. 3 (c)–(d) and 4 (d)). The essential thrust of these prohibitions is also reflected in the work of the Commission. The codification of the Nürnberg Principles,<sup>29</sup> adopted by the Commission at its second session in 1950, lists among the category of war crimes “plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity” (principle VI, para. (b)). Employing a different method, the 1954 draft Code of Offences against the Peace and Security of Mankind referred in general to “Acts in violation of the laws or customs of war”.<sup>30</sup> Although in 1991 the Commission took care not to follow automatically the Geneva humanitarian instruments in defining the specific category of war crimes constituting at the same time crimes against the peace and security of mankind, it did not confine its proposed rules to direct attacks on human life. In draft article 22, paragraph 2 (e)–(f), massive destruction of civilian assets as well as deliberate attacks on assets of exceptional religious, historical or cultural value are also characterized as war crimes under the draft Code.

17. Reference may also be made to the crime of aggression, the core element of the draft Code as it presently stands. Aggression does not as such entail loss of human life. War will mostly cause innumerable victims not only among combatants, but also among the civilian population. Aggression, however, can also be carried out through threats of employing force which leave the target State no choice but to surrender in view of the disparity of the military potential on both sides. In such cases, aggres-

<sup>27</sup> *Yearbook ... 1987*, vol. II (Part Two), p. 13, para. 66, para. (2) of the commentary to article 1.

<sup>28</sup> For a view to the contrary see V. P. Nanda, “Commentary on article 26”, *Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind*, M. C. Bassiouni, ed. (Toulouse, Erès, 1993), p. 291.

<sup>29</sup> See footnote 5 above.

<sup>30</sup> See footnote 6 above.



sion essentially constitutes an infringement of the right of self-determination of the victimized people.

18. It can be concluded, therefore, that seriousness as the basic concept underlying the entire draft does not necessarily mean harmful to human life in a direct sense as an attack on bodily integrity. Rather, an act may be—and has indeed been—characterized as sufficiently grave for the purposes of the draft Code if its direct effect or its long-term repercussions undermine the substantive bases of life in conditions of good health and individual and collective dignity. Grave and heavy damage to the environment meets these criteria. Although such damage, by definition, does not immediately and directly destroy human life, its long-term effects may wreak havoc in the most diverse ways. Human beings may suffer genetic injury, entire regions may become uninhabitable or, in the worst of all imaginable scenarios, humankind may become threatened with extinction. In every instance of severe damage to the environment, therefore, a chain of events may be set in motion which is in addition likely to threaten international peace and security inasmuch as the affected populations will attempt to assert their right to life by all means at their disposal. To sum up, together with the criterion of seriousness the required disruptive effect on the foundations of human society is clearly present.

19. It might additionally be asked whether attacks on the environment have the necessary moral underpinnings to be elevated to the rank of crimes against the peace and security of mankind. That human life may not be taken away or that foreign States may not be attacked is nowadays deeply rooted in the conscience of mankind—although not generally respected and observed. As already stated earlier, the need to protect the environment was perceived only in the period following the “new international order” ushered in by the Charter of the United Nations, the first worldwide signal having been sent out by the United Nations Conference on the Human Environment, held in Stockholm from 5 to 16 June 1972. However, notwithstanding the relatively short time during which efforts have been undertaken at the universal level to preserve the environment, there can be no doubt nowadays that humankind has become fully aware of the precariousness of its bases of existence. Suffice it to refer to the resolutions of the United Nations Conference on Environment and Development, held at Rio de Janeiro, Brazil, from 3 to 14 June 1992, where universal consensus was reached on the necessity to protect the human environment so that the earth might remain a place where future generations can live under the same natural conditions as their ancestors. Any major attack on the environmental media is today strongly repudiated by the entire international community. Hence, the inclusion of acts damaging the environment in the draft Code of Crimes against the Peace and Security of Mankind would not lack the required moral and political support.

#### **B. Need for inclusion in the draft Code of Crimes against the Peace and Security of Mankind**

20. It is not enough to state that there exists a clearly identifiable need to proscribe attacks on the environment by making them acts punishable under criminal law. Additionally, it has to be asked whether environmental crimes

cannot be adequately dealt with by domestic jurisdictions or in accordance with the methods and procedures of international cooperation in criminal matters as provided for in a dense multilateral network of international treaties. These traditional methods and procedures have many advantages. First of all, they do already exist. No additional monies are required to establish new institutions or devise new mechanisms. Secondly, application of the provisions of national criminal codes may sometimes be more effective than treating an offence as a crime against the peace and security of mankind, given the fact that common rules of criminal law lack the political element which is inherent in the draft Code. Lastly, it might be argued that massive pollution of the environment invariably constitutes a consequence of armed conflict, not requiring any new treatment in view of the existence of article 55 of Additional Protocol I to the Geneva Conventions of 1949 and the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention). And yet, many situations can be conceived which cannot be dealt with in a satisfying manner within the framework of the existing substantive and procedural rules.

21. The draft Code of Crimes against the Peace and Security of Mankind is intended to strike at the worst crimes, those which affect the foundations of human society. While it is clear that under normal conditions of peaceful coexistence even phenomena of massive pollution or other degradation of the environment can easily be fitted into the available network of cooperation in criminal matters, this would not be the case any more if damaging the environment formed part of a general strategy on the part of a Government or a private group to exert terrorist pressure on the world community. It is precisely in such situations of a general breakdown of law and order and a sense of responsibility towards humankind that the draft Code is called into operation. The draft Code is certainly not necessary for states of normalcy, which should be taken care of pursuant to routine patterns that have long since stood the test of time. However, exceptional situations do require exceptional responses. To maintain that such situations should be tackled only after they have arisen would be short-sighted. What happened during the Gulf war has demonstrated what can become an atrocious reality within the context of an industrialized world.

22. There is no need specifically to emphasize the fact that article 55 of Additional Protocol I to the Geneva Conventions of 1949 applies solely to international armed conflict. Additional Protocol II, on the other hand, relating to the protection of victims of non-international armed conflicts, does not set forth a similar provision although widespread, long-term and severe damage to the environment may also be caused during armed conflict that does not reach an international dimension. Here, too, the probability that the authorities of the country concerned could impose adequate sanctions on the wrongdoers is extremely low. Lastly, the possibility of grave damage to the environment is not confined to armed conflict. Unfortunately, technological progress has not only increased the opportunities for exploiting more rationally and economically the resources provided by nature, but also for destroying the life supports upon which humankind is dependent. Private terrorist groups do not fall under the

Geneva rules. Nonetheless, it would be futile to believe that environmental terrorism could be tackled under the ordinary rules of criminal law.

23. To be sure, article I of the ENMOD Convention prohibits each State party from engaging not only in military, but also in “any other hostile use of environment modification techniques”. Additionally, States are required to suppress any activity in violation of this ban, occurring anywhere under their jurisdiction (art. IV). But the ENMOD Convention does not establish the deterrent of individual criminal responsibility. It is confined to providing for a useful mechanism of supervision and complaints to the Security Council (art. V). These institutional responses to allegations of non-fulfilment of the obligations undertaken should by no means be underrated. And yet they would prove largely inadequate in a case in which, unfortunately, a worst-case scenario had to be dealt with where all the preventive mechanisms of the Convention had failed.

### C. The issue of protection: the environment

24. While the first proposals submitted by the Special Rapporteur had identified the “human environment” as the object to be protected by a provision regarding environmental crimes, article 26 of the draft Code as adopted in 1991 talks about the “natural environment”. This change alone makes clear that it is imperative precisely to determine the scope and meaning of the term “environment”, no matter how difficult such a definition may be. As it would appear at first glance, “human environment” is the more extensive notion. However, it should not be overlooked that the Special Rapporteur, when he first introduced a draft provision on crimes against the environment, was guided by article 19 of the Commission’s draft articles on State responsibility where indeed the concept of “human environment” is used (para. 3 (d)).<sup>31</sup> Reading the commentary on that provision, one finds that the Commission had nothing else in mind than the natural environment that surrounds the human being and conditions its life. No example is given other than pollution of the atmosphere or the seas.<sup>32</sup> It was obviously not the intention of the authors of draft article 19 to include elements of the cultural environment of humankind in the scope of the provision. Therefore, it can be concluded that “human” and “natural” environment are meant to have the same connotation. In order, however, to eschew any possible kind of confusion, the word “natural” should be preferred, as indeed chosen in 1991 when the draft Code was adopted on first reading. No one will deny that the cultural heritage of human societies is also in need of protection against arbitrary attacks. Yet, such attacks, if they are at all to be included in the draft Code, are more appropriately dealt with under other headings. The 1991 draft Code provides for the punishment of acts of destruction directed against property of exceptional religious, historical and cultural value in article 22, paragraph 2 (f). It does not appear that an extension of this legal umbrella to situations outside armed conflict is necessary.

<sup>31</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 96.

<sup>32</sup> *Ibid.*, p. 121, paragraph (71) of the commentary to draft article 19.

25. The natural environment comprises manifold components. The environmental media like air, water and soil constitute one of these components. However, the living resources of the globe might be added. Many writers also understand by “environment” the fauna and flora in their entirety. Reference may be made to Bassiouni who, in one of his works, suggested setting forth a crime of environmental protection, defining the term “environment” in this connection as follows:

the term “environment” means the land, air, sea, the fauna and flora of the seas, rivers, and those species of animals deemed endangered of extinction.<sup>33</sup>

The XVth International Congress of Penal Law, held in Rio de Janeiro, Brazil, in 1994, adopted this approach. In its resolution on crimes against the environment,<sup>34</sup> it stated under the heading “General principles” the following (sect. 1):

Environment means all components of the earth, both abiotic and biotic, and includes air and all layers of the atmosphere, water, land, including soil and mineral resources, flora and fauna, and all ecological inter-relations among these components.

26. Similarly, numerous legal instruments can be found which rest on a broad interpretation of the notion of environment. In a curious manner, the 1982 United Nations Convention on the Law of the Sea indicates its understanding of the environment by setting out, in the very first article labelled “Use of terms and scope”, what for the purposes of the Convention “pollution of the marine environment” should mean (para. 4):

“[P]ollution of the marine environment” means the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

Thus, it is not primarily the waters of the seas that are protected; rather, the intention is to preserve the living resources of the oceans.

27. In other instances, the environment is understood as the physical framework within which life may develop. Thus, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana from 27 August to 7 September 1990, called upon Member States to enact and enforce national criminal laws designed to protect “nature and the environment”. In more recent instruments, care has been taken not just to juxtapose the two elements, but to highlight the link existing between them. Mention should be made, in the first place, of the Protocol to the Antarctic Treaty on Environmental Protection, which defines in article 2 the objectives of the Protocol as follows: “The Parties commit themselves to the comprehensive protection of the Antarctic environment.” Article 3 goes even further by including in the scope of protection Antarctica’s “wilderness and aesthetic values and its value as an area for the conduct of scientific research”. It goes without saying that

<sup>33</sup> *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Dordrecht, Martinus Nijhoff, 1987), p. 170.

<sup>34</sup> Reproduced in *International Review of Penal Law* (footnote 26 above), p. 52, para. 21.

such an additional enlargement of the substantive field of application could not be justified within the context of the draft Code of Crimes against the Peace and Security of Mankind.

28. In article 20 of its draft articles on the law of the non-navigational uses of international watercourses,<sup>35</sup> the Commission, too, made it clear that the duty of protection and preservation has as its object essentially the ecosystems of international watercourses.

29. In trying to find an adequate formula, one should not lose sight of the fact that the Code of Crimes against the Peace and Security of Mankind, once in force, would have as its objective to furnish the international community with a legal instrument only for the worst occurrences with which national jurisdictions are unable to deal. Therefore, the ambition of the Commission, if it wishes to stick by the decision it took in 1991, cannot be to establish a comprehensive instrument, suitable to be applied in each and every instance of damage to the environment. The draft Code, to give a concrete example, is not suitable as a tool to protect individual species from extinction. Furthermore, although there is a modern tendency to distance oneself from an anthropocentric approach, attempting to preserve existing ecosystems as such, the draft Code remains committed to maintaining peace and security among human beings. The Commission, therefore, is fully justified in making deliberate choices, narrowing the area of application of a provision on crimes against the environment to those instances where indeed vital human interests are adversely affected. To be sure, and this should be repeated, protection of the environment is not tantamount to protection of human life in a direct sense. Protecting the environment, even through penal law as a defence of last resort, means securing the survival of humankind from a long-term perspective. The human being is the ultimate beneficiary of the efforts undertaken, but the disruptive effect of damage to the environment does not necessarily need to be measured in terms of injury to human life and physical integrity.

30. To sum up, the conclusion seems to be warranted that by "environment" the Commission, for the purposes of the draft Code, should understand the supports that bear human life as well as fauna and flora, namely water, air—including the atmosphere with its different layers—and soil, together with the dependent and associated ecosystems. Generally, for environmental harm to become relevant under the draft Code, the condition should be that it not only damage the three media in an abstract fashion, but also and at the same time the ecosystems related thereto.

#### **D. Harm**

31. There is no need for harm to be capable of being assessed in economic terms. It may best be described as a disturbance of the natural patterns or rhythms of life. Even if an uninhabited region is contaminated by nuclear fallout, the situation thereby produced does qualify as harm. Crimes against the environment are crimes that adversely

affect the long-term prospects of human survival. They are not designed to secure commercial profits.

#### **E. The characterization of harm: international concern**

32. The next question that arises is whether environmental harm should be taken into account as such or whether it should be qualified by an international element. Three different categories may be distinguished. The classical configuration comprises those instances where transboundary damage has been caused. Secondly, an international element is present per se if and when the commons of humankind have been affected. Things are more difficult if the short-term consequences of the act concerned are confined to the territory of one specific State. As far as water and air are concerned, such a territorial departmentalization is unthinkable. Water and air move freely around the globe, with some minor exceptions for confined groundwater reserves. However, an issue may arise with regard to soil or to living resources linked to soil, in particular forests. Major destruction of forests can in the first place be equated with self-mutilation or even self-destruction of the national community concerned. In the long run, however, the harmful effects of such actions will inevitably spread beyond national boundaries. Moreover, as the development of the human rights idea has shown, matters may grow to dimensions of international concern even if the relevant events take place in national territory. Proceeding from this philosophy, the international community should not turn away from occurrences which may threaten the bases of existence of entire populations, solely on the ground that the immediate and direct effects do not transcend the territory of a given State. This proposition is not intended to brush aside national sovereignty. It remains beyond doubt that the draft Code should not interfere with routine matters, nor even with grave situations that can be dealt with in traditional ways of inter-State cooperation. It would come into operation solely in extreme circumstances with which a nation would be unable to cope on the strength of its own forces.

#### **F. The characterization of harm: the requirement of seriousness**

33. It does not appear that any voice has questioned the wisdom of qualifying damage to the environment by criteria that clearly indicate that only harm of exceptional dimensions shall be taken into account. The wording of the 1991 draft article, which has followed the precedent of article 55 of Additional Protocol I to the Geneva Conventions of 1949, fully meets this requirement. The three attributes concerned—namely widespread, long-term and severe—emphasize unequivocally the necessary gravity of the actions which may come within the purview of the draft Code. Hence, there is no need to revise the former text in this respect.

<sup>35</sup> *Yearbook ... 1994*, vol. II (Part Two), pp. 89 et seq., para. 222.



### G. The crime against the environment: an autonomous crime

34. Clarification needs to be sought on whether crimes against the environment require a violation of applicable legal standards or whether criminal sanctions might be imposed in the absence of any such standard. From the outset, it should be clear that individual criminal responsibility under the draft Code cannot be dependent on the domestic law of any individual country. Since Nürnberg, it is the guiding idea of such responsibility that it is brought into being directly by virtue of international law, independently of any rules set forth by national law-making bodies. This basic principle was also expressed by the Commission in article 2 of the 1991 draft Code. National law can under no circumstances justify inflicting grave damage on the environment.

35. It is a different question altogether whether criminal responsibility under the draft Code presupposes the violation of applicable international standards as embodied in treaties or resolutions adopted by competent international organizations. It may be recalled that the United Nations Convention on the Law of the Sea refers in many of its articles to such international standards. However, the draft Code is not meant to enforce international environmental legislation either agreed upon by contracting parties or enacted by treaty bodies duly authorized for that purpose. Draft article 26, as adopted by the Commission on first reading, rests on the premise that certain actions, inasmuch as they target the foundations of human society, must be deemed to be unlawful *per se*, without having to be prohibited by specific norms. Indeed, international environmental law does not yet constitute a comprehensive edifice dealing with all possible acts that threaten or destroy environmental goods or interests. Making responsibility under the draft Code dependent on the existence of specific environmental norms would therefore create the risk of leaving widely gaping lacunae in the intended scope of draft article 26.

36. This conclusion is buttressed by the results of the XVth Congress of International Penal Law held in Rio de Janeiro, Brazil, from 4 to 10 September 1994. In paragraph 21 of the concluding resolution, the International Association of Penal Law recommends that so-called “core crimes”, those of the utmost gravity, should not be made dependent on a breach of other rules than the relevant provisions of criminal codes. This statement has its origin in a report drawn up by a group of experts which the Association had convened for a meeting to prepare the XVth Congress. According to this report, there was a need to specify core crimes, i.e. crimes which are *sui generis* and do not depend for their content on other laws.<sup>36</sup> If this holds true for crimes under domestic statutes, it is all the more persuasive for crimes under the draft Code of Crimes against the Peace and Security of Mankind, whose gravity is such that everyone must be aware of their incompatibility with the basic tenets of human society. For this reason also, some of the critical observations formulated by the United States of America vis-à-vis draft article 26 adopted by the Commission in 1991, do not seem to be well founded. The United States complained of the

failure by the Commission “to consider fully the existing and developing complex treaty framework concerning the protection of the environment”.<sup>37</sup> The Commission has never overlooked this emerging trend. However, all the treaties which were mentioned in that connection rely for their punishment on national legislation. This is not satisfactory with regard to the instances under review here.

### H. *Mens rea*

37. A more difficult problem is posed by the mental element to be required. The Commission has not yet adopted a specific provision dealing with this issue. It may be assumed, however, that hitherto a tacit understanding had prevailed to the effect that generally crimes against the peace and security of mankind can be committed only intentionally, not by negligence. This was said explicitly for crimes against the environment in the text of draft article 26 as adopted in 1991, where the term “wilfully” was used. To be sure, a requirement of having to prove intent may more often than not impose a heavy burden on prosecutors. And yet, with regard to crimes to be included in the draft Code no other solution seems to be possible. The objective of the draft Code is not to strike at crimes that are—unfortunately—perpetrated almost every day for gainful purposes. It is meant to deal with situations that cannot be handled in the traditional ways by the existing machinery for the prosecution of criminal acts. In such instances, intent will generally be present.

38. In its comments on article 26 of the draft Code as adopted in 1991, the United States of America criticized the term “wilfully” as utterly imprecise. In fact, it cannot be denied that “wilfully” is susceptible of a variety of interpretations. Three different stages may be discerned.

39. As a minimum, “wilful” signifies that the person concerned must have acted voluntarily, without, however, necessarily knowing what the consequences of his or her conduct would be so that any harm caused could be an unintended result. Here, the threshold would be much too low. Without ignoring the fact that it may be a convenient defence for an accused in trials concerning environmental crimes to argue that he or she was unaware of the disastrous consequences of the actions underlying the charges, it should be repeated once again that the philosophy of the draft Code is not an expansive one. “Wilful” in this elementary sense, therefore, cannot be relied upon as an acceptable interpretation.

40. Another clear situation arises when a person not only knows that he or she is committing a dangerous act, but foresees all the injurious consequences that would be entailed by the act and approves of these consequences, being motivated by a definite will to cause serious harm to the environment. There can be no doubt that under such circumstances a person can be held criminally accountable.

41. Somewhat more difficult to evaluate is a middle group of cases where a person acts in full knowledge of the consequences of his or her actions, without having the intention, however, of causing harm to the environment,

<sup>36</sup> *International Review of Penal Law* (footnote 26 above), p. 52, para. 21.

<sup>37</sup> See footnote 17 above.

which then occurs as an inevitable consequence of those actions whose direct purpose is a different one. Here, the draft Code would be too lenient if it abstained from providing for responsibility. In particular, terrorists could argue that their true aim was a political one and that, unfortunately, in order to further a paramount objective of justice they had to employ methods which they would also have found unacceptable in other circumstances. On this issue, the draft Code should be placed under the general philosophy of humanitarian law, which forms a constituent element of the draft Code. There are certain acts which cannot be allowed under any circumstances and for which international law, therefore, cannot grant a licence, no matter how noble the cause to be furthered. Thus, humanitarian law imposes restrictions not only on the aggressor, but also on the victim of aggression, whose choice of methods of warfare is not unlimited. Likewise, as far as terrorist acts are concerned, the international community repudiates indiscriminate murder in any form whatsoever, no regard being paid to the political background of such strategies of killing. It is, therefore, perfectly in keeping with the basic blueprint of the draft Code to demand categorically that the environment must not be made to suffer from activities which entail widespread, long-lasting and severe damage. No valid grounds can be adduced to justify such harm. This position would be significantly weakened and perhaps even reduced to irrelevance if a requirement were established to the effect that the person under scrutiny must have acted "for bad purpose".

42. In order to respond constructively to the problems of interpretation expounded above, it may be preferable to replace the word "wilfully" by "knowingly", which would seem to reflect precisely the meaning it would be intended to carry.

### I. Scope of application *ratione personae*

43. With regard to persons capable of falling under a provision designed to combat crimes against the environment, the openness of the general part of the draft Code constitutes a great advantage. No specific links to any kind of societal organization are required. Although the draft Code is intended, in the first place, to provide the legal basis enabling the international community to make accountable members of a criminal governmental machinery, it is not confined to public officials or other holders of governmental functions. In some instances at least, private citizens can also incur responsibility under the draft Code, the forefront example being provided by the crime of genocide. Concerning crimes against the environment, it stands to reason that their scope *ratione personae* should be adapted to the general line pursued by the draft Code. Everyone qualifies as a potential author of such crimes.

### J. Examples

44. In order to make the conclusions reached more understandable, a couple of examples shall be given in the following paragraphs. Some of these examples illustrate the limits of the draft Code, others make clear in what situations the draft Code would be called into operation.

45. The burning of fossil fuels, which inevitably produces carbon dioxide and to some extent also sulphur dioxide, has led to extensive environmental harm in many countries and still continues to do so. After having been first emitted into the atmosphere, the two gases—and other noxious components—return some day to the surface of the earth, causing a massive acidification of soils and water there. In particular, many lakes have reached such a high degree of acidity that they have lost their quality as life bearers for plants and animals. Everybody who lives in modern industrialized societies contributes his or her share to the process which, in the long run, may threaten the existence of fauna and flora and, consequently, that of humans as well, since benefiting from the comforts of modern technology is inevitably tied to the use of energy, the biggest part of which is precisely produced by burning fossil fuels. In the last analysis, furthermore, nobody can evade the necessities of life and survival. Even persons living far away from centres of modern life are simply compelled to rely on fire to satisfy their basic needs. From the very outset, it would appear to be clear beyond any reasonable doubt that this general phenomenon does not fall within the scope *ratione materiae* of the draft Code. The draft Code cannot possibly deal with harm to the environment by accumulation, where an infinite multitude of separate actions cause damage not individually, but conjunctively in their combination. It would be absurd to postulate that humankind constitutes nothing more than a society of criminals. It may well be that it is on a dangerous path. However, criminal law can hardly be used as an instrument to call into question the generally accepted order. Through other methods, a resolute effort has been made to eliminate air pollution.<sup>38</sup> The application of penal sanctions would greatly disturb this process. Draft article 26 of the draft Code, adopted in 1991, makes clear by its wording that an identifiable act (or omission) by an individual is required which brings about damage of the specified kind *hic et nunc* and not just through a long-term process conditioned by a vast array of other factors. To sum up, "normal" activities by human societies, practised all over the globe, no matter how deleterious their long-term effects may be, do not fall under the draft Code.

46. The diversion of international rivers or the reduction of the quantities of water carried by them may bring about dangerous tensions between the States concerned. Through its draft articles on the law of non-navigational uses of international watercourses the Commission has sought to make a substantial contribution to the solution of such problems. Nonetheless, the question may be asked whether in extreme situations, rules under the draft Code might have a complementary role to play, acting in particular as a deterrent. Here, the answer should also be a negative one. Matters of distribution of natural resources have characteristics which are different from instances where such resources have been damaged. Many international rules apply to disputes about the apportionment of water between competing interests. The paramount rule provides that all watercourse States concerned are entitled to an equitable share of the available uses (see, in particular, article 5 of the draft articles adopted by the Commission on the law of the non-navigational uses of

<sup>38</sup> Convention on Long-Range Transboundary Air Pollution.



international watercourses).<sup>39</sup> Additionally, Article 2, paragraphs 3–4, of the Charter of the United Nations may be mentioned in this connection. However, the diversion of waters as such does not meet the criteria of a crime against the environment.

47. Massive interference with hazardous processes forming part of the production patterns of industrialized societies would constitute the core substance of a provision governing crimes against the environment. The igniting of a vast number of Kuwaiti oilfields by Iraqi troops has already been mentioned. Such a strategy of scorched earth could also be resorted to by terrorists outside an armed conflict. A similar example comes readily to mind, namely the sinking of fully loaded oil tankers with its well-known consequences for the marine environment. To date, the disasters that have occurred—suffice it to mention the *Exxon Valdez* or more recently the *Sea Empress*—have resulted from human negligence. If, however, a leakage were produced deliberately, the international community would have to judge such an act as an attack on its collective interests, justifying in the last resort sanctions by community agencies, in particular criminal prosecution.

48. The same degree of gravity would be displayed by any use of nuclear devices for criminal purposes by private gangs or other factions, in particular terrorist groups. Again, in such instances the interests of the entire international community would be gravely affected.

49. Leaving aside issues arising during warfare, which are not the subject matter of this paper and on which very soon an ICJ advisory opinion will shed more light, a last question to be raised is whether atmospheric testing of nuclear bombs or grenades would—today!—come within the scope of the draft Code of Crimes against the Peace and Security of Mankind. It is well known that during the 1950s and early 1960s all the States that today possess nuclear weapons and are recognized as doing so conducted atmospheric tests in order to ascertain the actual effects of their newly developed atomic arsenals. Only progressively was it discovered and acknowledged that

the ensuing contamination of the soils and waters carried enormous health risks not only for human beings, but for the entire fauna. It is for this reason that the Partial Test Ban Treaty was concluded in 1963, which provides for a complete end to atmospheric testing. Originally, the Partial Test Ban Treaty, like any other international treaty, engendered binding effects only for the States parties. China and France, in particular, were not willing to assume the commitments deriving from the nuclear ban as agreed upon by a majority of States. It is a matter of common knowledge that Australia and New Zealand seized ICJ when France continued a series of experiments in the Pacific, and it is also well known that the Court refrained from pronouncing itself on the merits of the case in view of the undertaking publicly given thereafter by the Government of France that it would abstain from further atmospheric tests.<sup>40</sup>

50. All this now belongs to the past. The Chernobyl accident has provided ample corroborating evidence for the health hazards posed by nuclear materials transported by air across national boundaries. It may therefore be safely concluded that the ban on atmospheric testing has by now crystallized as customary law. Additionally, there are, in 1996, good reasons to assume that such tests would fall within the scope of crimes against the environment, provided, of course, that all the other requirements listed in the relevant provision are met. No Government—and hence no individual linked to a governmental machinery—could still today plead its ignorance of the fatal consequences of nuclear contamination. As outlined above, the fact that such pollution was not intended as such, but that the only objective was to prepare his or her country's self-defence against potential attacks could not exempt anyone from responsibility. Underground testing belongs to a different category. It certainly may be undesirable. Yet, there exists no scientific evidence that it entails widespread, long-term and severe damage. Thus, it could hardly be contended that it puts in jeopardy the natural environment in the same way as atmospheric testing does.

<sup>39</sup> See footnote 35 above.

<sup>40</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, and *Nuclear Tests (New Zealand v. France)*, ibid., p. 457.