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Protection of Natural Environment and Cultural Property during Armed Conflict: An International Humanitarian Law Perspective

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Abstract
With the evolution and development of jus in bello, conflicts of both internal and international character have given due consideration to limit human casualties and minimize suffering. Post-World War trials in Nuremberg and Tokyo played a crucial role in influencing modern International Criminal Law. The international community soon realized the necessity to draft various international legal documents and establish the International Criminal Court to prosecute individuals for various categories of crimes including War Crimes. Article 8 of the Rome Statute has classified acts of destruction of the natural environment and cultural property within the ambit of the definition of War Crime. However, with a higher threshold required to prove the crime of destruction of the natural environment and a human rights approach taken in cases of destruction of cultural property, both areas seem to need much exploration and research. This paper scrutinizes the development of laws of war and dives deep into the jurisprudence laid down in various decisions of the ICC to protect these civilian objects during armed conflict. It further elucidates the lacunas in the law and explains how they may lose their protection guaranteed by humanitarian law and can be the target of attack if these civilian objects are used to achieve a military advantage. Based on the elucidation of various primary sources like legislations and case laws along with secondary sources like legal textbooks and commentaries, law review articles, and legal encyclopedias, the paper generated is descriptive with a slight element of critical analysis of the international legal framework.

Keywords: Armed conflict, civilian object, environment, ICC, cultural property

Introduction

After the horrific aftermath of the First World War (1914-1918) and the Second World War (1939-1945), countries across the globe were striving to prevent further conflicts. As a result, in 1945, delegates from 50 sovereign nations assembled in San Francisco where they agreed upon the Charter of the United Nations and established the United Nations Organization (Charter of the United Nations, 1945). As stipulated under Article 1 of the Charter, the purpose of UNO is to maintain international peace and security, develop friendly relations among member

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states, promote international cooperation and coordination to solve international problems, and encourage the peaceful enjoyment of basic human rights without any discrimination. To facilitate the purpose of the UN and to prohibit the use of force in international relations, the drafters incorporated Article 2(4). Though, not an absolute provision, it obliges the state party to prohibit the use of force in a manner contrary to the principles of the UN Charter. When collective measures and peaceful settlement of disputes, both are exhausted, then states can resort to the use of force under Chapter VII, complying with other principles of the UN Charter (Shin, 2007, p. 88).

Jus ad bellum and *Jus in bello*, the former referring to principles governing justification of war or use of force and the latter refering to principles governing the conduct/ methods of armed conflict, are two major principles used in international law. Also known as the International Humanitarian Law (IHL), *jus in bello* is more concerned with the legality of how force is used (Giladi, 2008, p. 247) to minimize human suffering to the greatest extent possible. The Geneva Conventions, Hague Conventions, their additional protocols, and various Weapon Conventions coupled with customary international humanitarian law, form the modern-day "Laws of War". Irrespective of the illegal use of force prohibited by the UN Charter, the application of *jus in bello* to all the warring parties should be ensured throughout the armed conflict of both non international and international character, as the only purpose of IHL is to ensure that armed conflicts are made as humane as possible.

With the development of the Rome Statute and the establishment of the International Criminal Court (ICC) on 1st July 2002, several individuals have been successfully prosecuted for the most serious crimes of international concern including crimes of aggression, war crimes, genocide, and crimes against humanity. War crimes are a set of such core international crimes under the ICC's jurisdiction that are committed against enemy combatants or civilians/ civilian objects by resorting to prohibited methods of warfare (Cassese, 2013, p. 73). It refers to the serious violations of the rules of customary and treaty law, especially the four Geneva Conventions, concerning international humanitarian law during armed conflict of both internal and international character (Shaw, 2008, pp. 433-434). Subject to some exceptions, the destruction of natural environment and cultural property during armed conflict constitutes a war crime under Article 8(2)(b)(iv) and Article 8(2)(b)(ix), 8(2)(e)(iv) of the Rome Statute. The former crime requires a much higher threshold for successful prosecution and the latter crime requires complex pieces of evidence like direct intention and involvement of the perpretator in the act. Overturning the notion that crimes against property are of lesser gravity than crimes against the person (Prosecutor v. Germain Katanga, Decision on Sentence under Article 76 of the Statute, 2014, pp. 42-43), the global community should now perceive a sensitive approach to protect the natural environment and cultural property. Realizing the same research gap, this research article aims to dive into the provisions of different international legal instruments and jurisprudence established by the international criminal court and tribunals amidst the emerging sentiments of the international community to protect and preserve the natural environment and cultural/ religious properties.

Research Methodology

This study is generated by following descriptive legal research methodology and analytical legal research methodology. The former method describes the characteristics phenomenon

being studied and is more concerned with "what it is" and the latter method involves critical thinking and the evaluation of available facts and information relative to drawing out a reasonable conclusion regarding a situation (Abugu, 2021, p. 7). The sources of international laws like conventions, treaties, customary international laws, state practices, general principles, and jurisprudence established by various courts and tribunals regarding war crimes have been heavily relied upon. Secondary sources like books, journal articles, legal blogs, manuals, and opinion of experts have also contributed to the process of generating this research study. The reliance on these various diverse types of primary and secondary sources is absolute with an assumption that they are credible and reliable enough to complete the research study.

Historical Development of *jus in bello*

Early roots of humanitarian law can be found in various religions, including Hinduism. In the Shanti Parva of Mahabharat, it has been mentioned that persons not taking part in direct hostilities shall not be a target of attack and must be protected and treated humanely. (Chaturvedi, 2006, p. 152) Similarly, the enemy who is exhausted; is fearful; has laid down his arms; is crying; or is running away; has no weapons left to fight with, or has given up the fight; is sick; is pleading for his life; is young or is old, must never be killed rather be protected. (Modh, 2013, p. 8) Manusmriti, a Hindu legal text, also prohibited the use of barbed and poisoned weapons during war. (Nagarajan, 2002) It also disallowed combat between mounted and unmounted soldiers, and collective attack against a single soldier. (Penna, 1985, p. 168) Attacks were forbidden on a sleeping man, a man without his armour, a naked man, a man without his weapons, a non-fighting spectator, a man engaging with someone else, a man with damaged weapons, a man in distress, a man badly wounded, a frightened man and a man with joined hands. (Olivelle, 2005, p. 159)

In 1859, after the battle of Solferino ended, businessman Herny Dunant proposed two major concepts in the area of warfare. Firstly, the establishment of a permanent relief agency in each country for humanitarian assistance during armed conflicts, which led to the establishment of the Red Cross in Geneva. Secondly, the formation of a legally binding treaty with regards to the protection of wounded soldiers on the battlefield, led to the signing of the First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field on 22nd August 1864. (ICRC, 2004) Followed by the First Geneva Convention, a series of conventions and declarations emerged at The Hague. Hugely inspired by the Lieber Code, issued by President Abraham Lincoln, (Witt, 2012, p. 3) the Hague Convention of 1899 led to the creation of the Permanent Court of Arbitration, established various principles and rules for the conduct of warfare, and laid down the base for the development of modern-day international humanitarian law.

On 8th May 1945, after the suicide of German dictator Adolf Hitler, Nazi Germany surrendered to the Allied forces and World War II ended in Europe. Similarly, within 6 months, on 2nd September 1945, Japan surrendered and the World War II in Asia-Pacific region came to a climax. While the celebrations erupted around the world on the occasion of the end of a war, the victorious allied forces were contemplating a court trial to prosecute high-level political officers and military commanders for war crimes and other wartime atrocities committed during World War II by the leaders of Nazi Germany and Empire of Japan. These series of trials held in Nuremberg and Tokyo went on to be famously known as the "Nuremberg Trials"

and "Tokyo Trials", which helped establish that individuals, including political superiors and military supremos, could be held criminally responsible for various sets of international crimes committed during the war, more specifically the war crimes, crimes against humanity, and crimes against peace.

Influenced by the principles established in the Nuremberg and Tokyo Trials and the emerging trend of promoting humanitarian values among the international community, a series of conferences were held in 1949 in Geneva reaffirming, expanding, and updating the previous Geneva and Hague Conventions. The Four Geneva Conventions of 12th August 1949 with modifications by two additional protocols in 1977 and one more additional protocol in 2005 established the modern-day international humanitarian law to be followed during armed conflicts. With some reservationsreservations or as a whole, 196 jurisdictions around the world have ratified the Four Geneva Conventions, 174 states ratified Additional Protocol I, 169 ratified Additional Protocol II and 79 states ratified Additional Protocol III (International Committee of the Red Cross, 2007). Amidst such wide recognition and specific legal framework provided by the convention, it is one of the sophisticated legal tools developed by the cooperation of the international community to minimize human suffering and promote humanity and dignity even in times of war or armed conflicts.

Rome Statute and the International Criminal Court: A Revolution

After World War II, the Convention for the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9th December 1948. Under Article VI, the Genocide Convention accepted the jurisdiction of either "a competent tribunal of the State in the territory of which the act was committed", or an "international penal tribunal" thereby rejecting the universal jurisdiction of the crime of genocide. With no such "international penal tribunal" present at that moment, the United Nations General Assembly requested the International Law Commission to work on a draft statute of such court. While the drafting was in process, the UN Security Council responded to the large-scale atrocities committed during the Yugoslav Wars and Rwandan genocide by creating two *ad hoc* tribunals in 1993 which further supported the need for an international institution to deal with such crimes (Coalition for the International Criminal Court, 2007). After years of research and preparations, in 1994, the ILC presented its final draft statute for the International Criminal Court to the General Assembly. Followed by rigorous negotiations, amendments, and restructuring of the draft statute, a conference was held in Rome on July 17th, 1998 wherein the Rome Statute was adopted by 120 nations and 21 voted against it including the USA and China (Coalition for the International Criminal Court, 2007). The Rome Statute entered into force on 1st July 2002 and the International Criminal Court was officially born.

The International Criminal Court (ICC), not an organ of the UN, is an intergovernmental organization that is a relatively fresh effort of the international community in the field of international criminal law and justice. To date, several cases have sneaked their way to the ICC and perpetrators have been punished for the commission of most serious crimes concerning the international community as a whole. Article 5(c) of the Rome Statute grants the ICC legal jurisdictional grounds to hear and settle cases concerning War Crimes committed after 1st July 2002. Article 8(2) further deals with various sets of war crimes ranging from breach of the Geneva Conventions to other serious violations of customary international humanitarian laws.

Applying to both international and non-international armed conflicts, the ICC and Rome Statute have been playing a crucial role in the field of the international criminal justice system.

Damage to Natural Environment: An Impossible War Crime?

Apart from the destruction of property and human casualties, the armed conflicts of both nature, cause a serious threat to the natural environment. During any type of armed conflict, some amount of damage to the natural environment is inevitable but the damage must be limited for survival, sound health, and well-being of conflict-affected populations (ICRC, 2020), wildlife, and future generations. Environmental harm caused by military actions has been observed by international organizations in several conflicts, including the Vietnam War and Malayan Emergency wherein herbicides and defoliants were used by the U.S. (Buckingham, 1982, p. 3) and British Military forces (Mauroni, 2006, pp. 178-180). The zeal for the need for protection of the natural environment during armed conflicts can be traced back to 1962 when the US military forces, after their involvement, started "Operation Ranch Hand" during the Vietnam War.

The 1955 Vietnam War was a proxy war fought between North Vietnam supported by communist states and South Vietnam supported by anti-communist allies including the United States of America. Fearing the rise of communism in the Asian region, the US had to directly get involved in the Vietnam War to fight against the communist-backed North Vietnam. While the top military authorities of the USA were exploring various "techniques and gadgets" to gear up the Vietnam War, the use of aerial defoliant became one of such techniques which marks the beginning of Operation Ranch Hand (Buckingham, 1982, p. 9). Operation Ranch Hand was a herbicidal warfare program launched by the USA which involved spraying an estimated 72,000 m^3 of defoliants and herbicides over the jungles of South Vietnam (Lewis, 2006, pp. 598-603). Under the name of Agent Orange, Agent Blue, and Agent White etc, these rainbow defoliants and herbicides caused defoliation of 31,000 km^2 of forest (Keeran, 2021), 3.3 million hectares of natural land and 28 river basins were affected (Quy, 2009, p. 4), and the soil contained TCCD levels that were 180 million times above the safety level (Fawthrop, 2004), making it one of the horrific ecocides (Chiarini, 2022, p. 2) in the history of armed conflicts.

In 1976, reacting to the dreadful aftermath of the Vietnam War, the United Nations ratified Resolution 31/72 and the first ever legal tool to address the issue of environment came into existence. The Environmental Modification (ENMOD) Convention prohibited the military use of environmental modification techniques having widespread, long-term, or severe effects, but limited its scope to damage to the "state party" and did not cover other forms of environmental damage caused during armed conflicts. The natural environment, being a sufferer in various armed conflicts, breathed a sigh of relief in 2002 when the Rome Statute came into force and Article 8(2)(b)(iv) was introduced with the intent of criminalizing the act of launching an attack which would cause widespread, long-term and severe damage to the natural environment. Despite the limitation of its application to international armed conflicts, the world saw the advent of the first ecocentric war crime in the Rome Statute (Mukherjee, 2022).

The prohibition of "widespread, long-term and severe" damage to the natural environment under Article 8(2)(b)(iv) is a "powerful constraint" brought with an obligation to protect the environment during armed conflicts (Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996). However, with open-to-interpretation and no concrete definitions in

the Rome Statute or Geneva Conventions, the terms "widespread, long-term, and severe" are subjected to derive their meaning from commentary in other international instruments or in academic literature (Gillett, 2017, p. 228), two of such instrument being the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) and *travaux préparatoires* of Additional Protocol I. The former defines "Widespread" as area encompassing several hundred square kilometers; "Long-term" as lasting for months, or approximately a season and "Severe" as involving serious or significant disruption or harm to human life, natural and economic resources or other assets (ICRC, 2003) whereas the latter document refers "widespread" to connote an entire region, "long-term" to be measured in decades; 20 or 30 years "as being a minimum" (Pictet, 1987, p. 415), and "severe" should reflect the "severity or prejudicial effect of the damage to the civilian population" (ICRC, 1994). This wording under Article 8(2)(b)(iv) seems to be ambiguous enough to give benefit to the accused under Article 22 of the Rome Statute which provides that in case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.

Similarly, war crime under Article 8(2)(b)(iv) has a very high threshold as, to constitute a successful prosecution, the conjunctive and cumulative benchmarks of "widespread, long term, and severe" damage to the environment along with intent must be met in the context of an International Armed Conflict. An attack even though it is long-term and widespread, is not severe, then prosecution cannot be sustained. Most military operations, even when damaging the environment, won't be in cumulative violation of these three elements (Daft, 2019). Assuming that even if these elements are satisfied cumulatively, the attack must have been launched with a clear knowledge and must be excessive in comparison to the concrete and direct overall military advantage anticipated. This implies that the threshold of Article 8(2)(b)(iv) requires the wholistic evaluation of existence of international armed conflict, launching an attack with knowledge and intent, cumulative satisfaction of "widespread, long-term and severe damage", and such an attack must be clearly excessive in relation to military advantage, the meaning of which is subjective. Article 55(1) of Additional Protocol -I includes a prohibition of methods or means of warfare that may cause damage to the environment but the inclusion of the phrase "clearly excessive" in Article 8(2)(b)(iv) has overshadowed the AP-I, as attacks on natural environmentare justified if they offer a significant direct military advantage. Hence, due to the high threshold of the crime, prosecution under it, to date, has not been sustaining by the ICC or any other military tribunals.

Additionally, Article 8(2)(b)(iv) only applies to armed conflicts of international character and not to internal armed conflicts. Given the fact that many grave and cruel conflicts throughout the 20th and 21st centuries have been non-international (Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, p. 46), the limitation of Article 8(2)(b)(iv) to international armed conflict leaves a lacuna in the framework of international criminal law applicable to environmental harm (Wattad, 2009, pp. 265, 268).

Apart from the higher threshold, ambiguity, and limitation to international armed conflicts, the attack on the natural environment can be justified by military necessity. Rule 9 of Customary International Humanitarian Law (CIHL) recalls that civilian objects, like natural environment, may lose their protection if they are used as military objectives during armed conflicts. The destruction of jungle cover behind which the enemy could move and ambush troops, appears to have been no generally accepted rule prohibiting the practice (Agent

Orange case, 2005, p. 209), and even the humanitarian law allows operations against military objectives. A similar notion has been incorporated in Art. 2(4) of Protocol III of the Convention on Certain Conventional Weapons, famously known as the "Jungle Exception", the principle prohibits states from attacking forests or jungles "except if such natural elements are used to cover, conceal or camouflage combatants or military objectives or are military objectives themselves". Despite the efforts being made at the international level, due to various reasons, the direct attack on the natural environment under Article 8(2)(b)(iv) remains a crime with no possibility and practicality of conviction by the ICC.

Damage to Cultural Property: Crime through the lens of Human Rights

Since the past, the destruction of cultural property and heritage sites has been considered a crime rooted in an area of law that has significantly prioritized securing the sentiments and rights of the people who value these sites rather than the special protection provided to these civilian buildings or sites (Francioni, 2011, pp. 9, 13). In 21st-century warfare, cultural properties are more vulnerable as seen in Afghanistan, Iraq, Libya, Mali, and Syria where the non-state actors have exploited and destroyed cultural heritage as a fundraising mechanism for financing their activities and a war tactic (Weiss & Connelly, 2017, p. 20). Often during armed conflicts, armed forces often direct attacks against cultural property to weaken the enemy forces (O'Keefe, 2014, p. 492) through discouragement and despair. Signed on 14th May 1954, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict became the first international treaty that focused entirely on the protection of cultural property and heritage sites in the event of armed conflict. Followed by the First Protocol adopted in 1954 and the Second Protocol adopted in 1999, the protection granted to cultural and religious sites, be it movable or immovable, has enhanced over the years. Unlike the previous crime of causing damage to the natural environment, this war crime of intentionally directing attacks against buildings dedicated to religion has a wider scope as it is equally applicable in international armed conflict and non-international armed conflict.

The war crime of intentionally attacking cultural property is stipulated under Article 8(2)(b)(ix) of the Rome Statute which applies to armed conflict of an international character and Article 8(2)(e)(iv) which applies to armed conflict of a non-international character. Any civilian object is granted general protection as per the rules of humanitarian law, but religious/cultural property is equipped with an additional layer of special protection as they constitute the cultural or spiritual sentiments of people (Prosecutor v. Martić, Trial Chamber Judgement, 2007, p. 36) provided that these institutions must "clearly be identified as dedicated to religion" (Prosecutor v. Blaškić, Trial Chamber Judgment, 2000, p. 61). Hence, the special protection afforded to cultural property is not available for all buildings dedicated to religion. Only those cultural properties whose value transcends geographical boundaries, are unique, and are intimately associated with the culture and history of the people are granted special protection under the legal regime of IHL (Prosecutor v. Dario Kordic, Judgement of Appeals Chamber, 2004, p. 27). It is a serious violation of international humanitarian law to attack civilian buildings but acquires even greater seriousness if an attack is directed on an especially protected site (Prosecutor v. Miodrag Jokić, Trial Judgment, 2004, p. 14).

Additionally, to constitute successful prosecution, the intent element plays a crucial role. The attack must have been directed toward cultural property with a clear *dolus directus*, a

direct intention, of destroying and damaging it (Dörmann, 2003, p. 131). Applying rules of strict interpretation of criminal law, the International Criminal Court has previously rejected prosecution under Article 8(2)(e)(iv) reasoning that the "hospital" itself was not made an object of attack rather the patients inside them were the military target (Prosecutor v. Bosco Ntaganda, Trial Judgement, 2019, p. 504). This depicts a higher level of direct intent of the perpetrator to destroy the cultural property and any instances of collateral damage to cultural property during wars do not meet the requisite threshold to constitute a successful prosecution.

The 2016 Trial Chamber Judgement against Ahmad Al Faqi Al Mahdi for war crime of launching an attack with the intent of destroying cultural property under Article 8(2)(e)(iv) was a victory for ICC as an institution (Sterio, 2017, p. 63, 66). It was the first international trial that focused specifically on the destruction of historical and religious monuments wherein the defendant pleaded guilty for the first time in the history of international criminal court trials. Following Al Mahdi's judgement, similar counts were pressed and arrest warrants were issued against Al Hasan (Prosecutor v. Al Hassan, Warrant of Arrest for Al Hassan, 2018), Alfred Yekatom (Prosecutor v. Yekatom, Warrant of Arrest for Alfred Yekatom, 2018) and Patrice-Edouard Ngaïssona (Prosecutor v. Ngaïssona, Warrant of Arrest for Patrice-Edouard Ngaïssona, 2018) whose trials are ongoing.

The ICC, in the Al Mahdi case, took a humanist approach by considering the human rights of those individuals whose dignity and identity were jeopardized by the irreplaceable destruction of religious monuments and cultural properties. The ICC went on to elaborate that the 10 religious sites which suffered destruction due to acts of Al Mahdi, were regarded and protected as a significant part of the cultural heritage of Timbuktu and Mali, and also played an important role in the life of these communities (Prosecutor v. Al Mahdi, Decision on the Confirmation of Charges Against Al Mahdi, 2016, p. 14). The ICC further went on to look at the casualties through the lens of human suffering and the diminishing of the identity of people having faith in those religious monuments and cultural property. Even while assessing gravity under Article 17(1)(d) of the Rome Statute, the court opined that the "victims" are the people whose cultural heritage has been destroyed and can no longer access them including foreigners and tourists (Prosecutor v. Ahmad Al Faqi Al Mahdi, Judgement and Sentence, 2016, p. 38). This indicates that ICC rather adopted a "purpose-based" approach and analyzed the purpose of those religious buildings in the life of the people of Mali.

With regards to the exception of the protection accorded, an attack on cultural property can only be launched in instances where such property is used as military objectives to gain military advantage against enemy forces. It simply means that the protection of institutions dedicated to religion is lost if such institutions are used for a military purpose (Prosecutor v. Pavle Strugar, Trial Judgement, 2005, p. 134). Religious institutions are protected as long as they are civilian and immediately lose protection if used to achieve military advantage (Prosecutor v Radoslav Brđanin, Trial Chamber Judgment, 2004, p. 220). When accessing such loss of protection, the use of such religious institutions to achieve military objectives acts as a decisive factor and not the location of it (Prosecutor v. Mladen Naletilic and Vinko Martinovic, Trial Judgement, 2003, p. 206).

Conclusion

With international collective efforts, we have been quite successful in prosecuting individuals for various sets of international crimes including war crimes. The objective of the ICC is to prosecute individuals for the most serious crimes of international concern. While cases of genocide, crimes against humanity, and other war crimes are ample, the crime of damage to the natural environment still seems impossible for prosecution, and attacks on religious buildings seem to have taken a new approach from the Al Mahdi judgment. The Rome Statute of International Criminal Court, theoretically, has been able to protect the natural environment and cultural property at times of war. The modern-day international humanitarian law jurisprudence has evolved in a way to maximize the protection accorded to these two civilian objects. The ICC and relevant stakeholders must not only ensure successful investigation, trial, and prosecution but also focus on amending the laws of war as per need and time. This way we can minimize the suffering to the greatest extent possible and uphold the notion of humanity, setting an example for future generations.

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