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BOOK REVIEWS

S. Freeland, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court*, Intersentia, Series Supranational Criminal Law: Capita Selecta, Vol. 18, 2015, ISBN 9781780683140 (pb), 354 pp., €75.00
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The significant environmental destruction that occurs during armed conflict and its long-term impact in the wider scheme of societal reconstruction and economic prosperity is clearly a matter of concern for the international community. Environmental destruction impacts on the ability of communities to recover from the scourge of war and has long-term repercussions for future peace and stability in affected regions. Yet, until the late twentieth century, environmental destruction was viewed as an unavoidable consequence of armed conflict; it was only with the 1990/1991 Gulf War that international rules on the protection of the environment in armed conflict became a topic of academic and practitioners' debate again.[1] Efforts of deterrence through international law have proven to be ineffective, largely due to the reluctance of states to add the sharp sword of criminal accountability to provisions of environmental protection.

In his book, Professor Freeland calls attention to the inadequacies of current international law in this respect and suggests how these can be remedied through international criminal law if and where environmental destruction is used as a means and method of warfare. In particular this last aspect concerning 'means and method of warfare' renders Freeland's project all the more interesting. He sets the scene for a crime with a strong link to humanitarian law and a sharp focus on *conflict-related* destruction of the environment – in contrast to the more general debate on destruction of the environment as a transnational crime, alongside wildlife crimes, smuggling, trafficking of goods and persons, and other offences whose common

[1] T. Marauhn, 'Environmental damage in times of armed conflict – not "really" a matter of criminal responsibility?', (2000) 840 *International Review of the Red Cross* 1029; K. Hulme, 'Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies: How the 1990-91 Gulf Conflict Revealed the Inadequacies of the Current Laws to Ensure Effective Protection and Preservation of the Natural Environment', (1997) 2 *Journal of Armed Conflict Law* 45, at 55 et seq. See also United Nations Environment Programme (UNEP), 'Protecting the Environment During Armed Conflict - An Inventory and Analysis of International Law', UNEP Report Series Nov. 2009.

denominator is their cross-border quality and profit-related nature rather than the specific gravity of a core international crime shocking the conscience of humankind.

The book is subdivided into five chapters. In the first chapter, the author addresses, as he calls it, '[t]he Imperative to Regulate the Intentional Destruction of the Environment during Warfare under International Criminal Law'. The author notes that most of the relevant conventional principles addressing the environmental destruction during armed conflict are indeed to be found in the essential treaties under international humanitarian law – the *jus in bello*. However, other international environmental law instruments also contain relevant elements in the general regulatory framework. Two parallel trends are highlighted that continue to influence the development of relevant law: advances in military technology and specifics of modern warfare on the one side, and growing environmental consciousness on the other.[2]

In conclusion, Freeland formulates four key questions that he sets out to address in the following chapters of the book:

(a) To what extent do treaty and customary international law presently address the intentional destruction of the environment during armed conflict?

(b) Does the status quo of existing law allow for criminal accountability for such acts?

(c) What functions should the mechanisms of the current international criminal justice system, and particularly the ICC, play in addressing this issue?

(d) Is an amendment of the Rome Statute necessary to properly address the criminality inherent in the intentional destruction of the environment during armed conflict?[3]

In Chapters Two and Three, the author comprehensively analyses the sources of relevant existing law with a view to determining to what extent the criminality of intentional destruction of the environment in armed conflict is internationally recognized. Chapter Two focuses on applicable treaty law. An astute analysis of the most relevant treaty provisions leads the author to the conclusion that at present there is indeed no comprehensive treaty regime to provide for individual accountability regarding the intentional destruction of the environment during armed conflict. While a number of treaty provisions applicable in armed conflict cover elements of criminality affecting the environment, they do not constitute a detailed and complete regime of accountability for intentional environmental damage or destruction during armed conflict.[4] Environmental destruction remains a 'side effect' of warfare

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2 S. Freeland, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court* (2015), 41.

3 Freeland, *supra* note 2, at 45.

4 Freeland, *supra* note 2, at 49–101. Freeland also hints at the underlying fundamental problem that in international humanitarian law, salient principles such as military necessity and rigid standards (see Arts. 35(3), 55(1) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3) lead to a very limited coverage of environmental crimes; Freeland, *supra* note 2, at 85 et seq., and 116.

with insufficient attention to its various forms and effects. International environmental law treaties do not add any significant legal authority due to their focus on states as the main actors – let alone the question of their applicability during war time. Finally, the author completes the picture with reference to the rather critical reactions of states to the 1991 proposal of a Convention on the Protection of the Environment in Time of Armed Conflict, underlining their clear reluctance to elevate environmental destruction into the realm of international criminality over and above the existing patchy state of acceptance and codification. This situation prevails until the present day.

In the third chapter, the author analyzes the relevance of the fundamental customary rules of international humanitarian law in regards to intentional environmental destruction. The principles of military necessity, distinction and proportionality are first explained as regards their definition, scope and interplay, and subsequently brought into context with environmental crimes.[5] He concludes convincingly that existing customary international law on environmental protection in armed conflict has advanced but remains insufficient.[6] Freeland's analysis, which also encompasses an interesting discussion of the ICRC Study on Customary International Humanitarian Law,[7] impresses the reader in its thoroughness and completeness.

In an ensuing methodical step undertaken in Chapter Four, Freeland assesses the suitability of legal provisions under international criminal law as vehicles to prosecute environmental destruction in armed conflict. These provisions are directed towards accountability of individuals for crimes that 'threaten the peace, security and well-being of the world'.[8] Turning to the relevant provision under the Rome Statute of the International Criminal Court,[9] Freeland provides an on-point analysis of Article 8(2)(b)(iv) and – importantly – the provision's effective limitations as regards the coverage of intentional environmental destruction in war. A first limitation of the crime is the fact that it is only encompassed in Article 8 for international armed conflict and wholly absent for non-international armed conflict. This is all the more relevant given the fact that in recent decades non-international armed conflicts have become at least as frequent as conflicts of an international nature. Secondly, the attack needs to cause 'widespread, long-term and severe damage to the natural environment', defining a very high threshold of environmental damage. In addition, the damage is required to be 'clearly excessive' *vis-à-vis* the 'concrete and direct overall military advantage anticipated' – tilting the proportionality scale

5 Freeland, *supra* note 2, Section 3.2. In conclusion, Freeman posits that, 'it is not entirely clear as to whether, and if so, how, some of [the *jus in bello*] rules apply to the environment at all'. This stands to an extent in contrast with ICRC – J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules* (2005), Chapter 14, Rules 43–5.

6 Freeland holds quite accurately that, 'the rules that purport to protect the environment are characterized by vagueness and uncertainty' and are, thus, anything but comprehensive, Freeland, *supra* note 2, Section 3.5, at 175–6.

7 Henckaerts and Doswald-Beck, *supra* note 5, Ch. 14; discussed in Freeland, *supra* note 2, Section 3.3, doubting whether Rules 43–45 pertaining to the natural environment indeed represent customary international law.

8 See 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90 / 37 ILM 1002, Preamble, para. 3.

9 Freeland accurately notes that neither the crime of genocide nor crimes against humanity contain elements specifically targeting the environment; this is a feature limited to the war crimes provision. See Freeland, *supra* note 2, Sections 4.4.1 and 4.4.2, particularly at 204.

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heavily towards the military advantage. Freeland accurately flags that as a further complicating factor there is no international authority that would have defined the scope of the above terms, adding a level of legal uncertainty.[10] In conclusion one cannot but agree with Freeland that the protective scope of Article 8(2)(b)(iv) regarding intentional destruction of the environment is insufficient.

Picking up on the four key questions defined earlier in his book, Freeland concludes as follows:

- There is an imperative to appropriately regulate against the intentional destruction of the environment during warfare.
- The existing *jus in bello*, international environmental law treaties, and customary law, do not meet this imperative.
- International criminal law is well suited to provide the context for the appropriate regulation of this issue, but the existing provisions of the Rome Statute of the International Criminal Court are not adequate in this regard.
- States Parties to the Rome Statute should consider including a *sui generis* crime of 'crimes against the environment' in the Rome Statute.

More concretely, Freeland proposes what he calls a 'working definition' of crimes against the environment under the Rome Statute, namely 'employing a method or means of warfare with intent to cause wide-spread, long-term or severe damage to the natural environment'.[11] He chooses a cautious approach in defining the crime by linking it to armed conflict (*nota bene* both international and non-international in character) for a number of good reasons. These include the present status of customary international law, the specific mandate of the ICC (with jurisdiction only for the worst international crimes), and states' limited appetite to submit themselves to an overly broad criminalization of acts damaging the environment.[12] This prudent approach is to be applauded, even if it is somewhat frustrating from a purely legal perspective, that considerations of political viability would seem to influence and in fact dictate limitations to an otherwise legal determination. His redefinition of the gravity threshold to 'widespread, long-term *or* severe' damage (as opposed to the cumulative 'and' in Article 8(2)(b)(iv) of the Rome Statute and Articles 35(3) and 55(1) of Additional Protocol I) appears very inclusive and could lead to problems in terms of the gravity required if the crime were to be listed next to war crimes, genocide and crimes against humanity. However, Freeland defends his choice valiantly with a comprehensive assessment of the matter, including the argument that the definition

[10] Freeland is right in holding that caution is warranted in taking guidance directly from the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention) in the context of Art. 8(2)(b)(iv) of the Rome Statute, Freeland, *supra* note 2, Section 4.4, at 208–9. See also G. Werle and F. Jeßberger, *Principles of International Criminal Law* (2014), para. 493.

[11] Freeland, *supra* note 2, Section 5.3.2, at 245.

[12] Freeland's approach to embed the new crime in international humanitarian law language (also regarding the term 'method or means of warfare') is – again – sensible; the prohibition of acts of destruction of the environment finds its sources in international humanitarian law and a complete detachment of the crime from the armed conflict context would risk to leave the grounds of what even in the most progressive view can be considered an international crime materializing in customary law.

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that can be found in Article 8(2)(b)(iv) of the Rome Statute should not be used as a reference as it is indeed overly restrictive.

Finally, as regards the mental element of the crime, Freeland requires 'intent' to target the environment 'as a victim' and to cause damage. In his words, 'it is the *intention* to target the environment that indicates the gravity' of the crime, simultaneously lending an additional argument for the seriousness – and international nature – of the crime.[13] However, the author then proceeds to include a mere *wilful blindness* standard as the lowest form of mental element for the crime[14] which would appear to run counter to the premise that the *intent* and *targeting* of the environment represent a constitutive element of the crime – suggesting a mental element that would at least require a knowledge-based level of intent (i.e., the perpetrator is *aware* of the likely damage his acts will generate). Again, Freeland shows his preparedness for a discussion of the matter in a comprehensive analysis regarding the required *mens rea* standard.[15] While one does not have to agree with his conclusion, the author carefully brings all relevant arguments together and therefore provides a fair chance for the reader to test his conclusion. Also, regarding the other elements of crimes, Freeland offers a detailed description and even proposes draft Elements of Crimes.

As part of his final reflections, Freeland sees his proposal as a 'work in progress'; at the same time, one can only agree with him that his work represents 'a logical step forward along this evolutionary path' – a big, thorough and important step forward. One cannot deny the increasing need of enforceable environmental rights and obligations in international law in light of the high environmental cost of conflict. There is, therefore, a resulting need to address crimes against the environment under international criminal law in a clear, rigorous, and appropriate way in line with societal values, technological development and mindful of the changing patterns of armed conflict. Ideally, such crimes will find their place in the framework of the Rome Statute.

Through the comprehensive analysis offered in Professor Freeland's book, the role of environmental security in the prevention of conflict and the creation of lasting peace and stability is becoming clearer. The devastating effects of environmental destruction during – and as a means of – armed conflict need to be taken seriously. The environment provides the sole basis for mankind's survival and prosperity. In a world that is getting ever more crowded, the direct link between environmental protection and preservation, and human life becomes ever more evident; attacks against the environment are attacks against humankind. By illustrating how the intentional destruction of the environment during warfare could be considered a crime before the International Criminal Court, hopefully Freeland's thorough and insightful analysis can contribute to the mission of the ICC – and other international

[13] Freeland, *supra* note 2, Section 5.1.2.2, at 229; see also, as part of a more comprehensive chapter on the international quality of the crime, Section 5.2, at 235.

[14] In Freeland's definition, a person has intent where '... (iii) that person consciously disregards information that clearly indicates a substantial likelihood that such damage will occur in the ordinary course of events', see Freeland, *supra* note 2, Section 5.3.2.1, at 245.

[15] Freeland, *supra* note 2, Section 5.3.2.1, at 250 et seq.

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initiatives – in deterring these acts and ensuring a more peaceful and stable world. His book is not only a substantial piece of solid academic work and therefore sets a standard for future researchers in this area, it is also a well-written and truly interesting piece for the (international) academic or practitioner that has a general interest in the highly relevant topic of environmental protection in armed conflict.

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Frederik Dhondt, *Balance of Power and Norm Hierarchy. Franco-British Diplomacy after the Peace of Utrecht*, Studies in the History of International Law, vol. 7, Leiden-Boston: Brill Nijhoff, 2015, xii + 636pp., ISBN 978-90-04-29374-8
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1. Introduction

International legal history has come to enjoy greater attention both among international jurists and among historians. The variety of researchers interested in international law's past is reflected in the diverse ways to study it.[1] Against studies that approach international legal history as doctrinal studies – reading works of international legal doctrine, either within their historical context or not, often confined to a limited set of classics like Vitoria, Grotius, and Vattel – stand studies that focus on the law of nations as it has actually prevailed in practice.[2]

Frederik Dhondt has delivered a paragon of the latter type of study with his PhD thesis, *Balance of Power and Norm Hierarchy*; even taking it a step further providing not so much an analysis of what the norms directing international relations were at the time or how they evolved, but insights into how law and legal reasoning operated in diplomatic relations between Europe's powers. Moreover, the book stands out as a study in international legal history of a period in time that is generally overlooked. Most international legal historians tend to stick to the late nineteenth and twentieth centuries. Or they tend to focus on historical events that are considered major turning points in the field such as the 1648 Peace of Westphalia, the 1713–1714 Peace of Utrecht, or the 1815 Congress of Vienna. To fill the gap, Dhondt turns to the so-called *trente heureuses*.

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1 E. Jouannet and A. Peters, 'The *Journal of the History of International Law:* A Forum for New Research', (2014) 16 *Journal of the History of International Law* 1–8.

2 See A. Carty, 'Doctrine versus State Practice', in B. Fassbender and A. Peters (eds.), *Oxford Handbook of the History of International Law* (2012), 1034–57; R. Lesaffer, 'International Law and its History: The Story of an Unrequited Love', in M. Craven, M. Fitzmaurice and M. Vogiatzi (eds.), *Time, History and International Law* (2007), 27–41 and ibid., 'Law and History: Law between Past and Present', in B. van Klink and S. Taekema (eds.), *Law and Method* (2011), 133–52; H. Steiger, 'Einleitung', in H. Steiger, *Von der Staatengesellschaft zur Weltrepublik?* (2009), ix-xiii.