

Expanding Environmental Justice after War: The Need for Universal Jurisdiction over Environmental War Crimes

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I. INTRODUCTION

There is no such thing as an environmentally friendly war. The simplest act of a modern soldier, shooting a rifle, will cause some environmental degradation because the heavy metal in the bullet will pollute the earth wherever it lands.¹ Criminalizing all wartime environmental destruction is as feasible as criminalizing all wartime homicide—destruction is the point of war. However, the Rome Statute, creating the International Criminal Court (“ICC”), provides the natural environment criminal protection from those who “[i]ntentionally launch an attack [with] the knowledge that such attack will cause . . . widespread, long-term, and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”² While this provision can punish attacks on the natural environment, the ICC has not prosecuted anyone using it, and future prosecution under the statute is unlikely because the law is untested and its critical terms are ambiguous.³ An ICC prosecutor probably would rather charge an alleged war criminal with a more traditional war crime instead because an environmental war crime charge will require litigation regarding all the minutiae surrounding Article 8(2)(b)(iv), whereas more traditional war crimes have a larger body of precedent because national and international courts have interpreted them. The novelty of Article 8(2)(b)(iv) means there is little in the body of international law to guide courts, resulting in its non-use. To develop environmental war crime law to a point where the ICC could successfully prosecute under Article 8(2)(b)(iv), states should exercise universal jurisdiction over environmental war crimes.

Universal jurisdiction developed because states realized, as they developed rules and customs in international law, that certain criminal offenses are objectionable to such a degree that prosecutions should not be thwarted based on jurisdictional loopholes. Indeed, piracy gave birth to universal jurisdiction when Cicero proclaimed that pirates terrorizing Mediterranean shipping were *hostis humani generis*—enemies of humankind.⁴ Lord Blackstone later described the duty of every nation to

1. See Xinde Cao, et al., *Weathering of Lead Bullets and Their Environmental Effects at Outdoor Shooting Ranges*, 32 J. ENVTL. QUALITY 526 (2003).

2. Rome Statute of the International Criminal Court, July 12, 1999, U.N. Doc. A/CONF.183/9, art. 8(2)(b)(iv) [hereinafter Rome Statute].

3. Jessica C. Lawrence & Kevin Jon Heller, *The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(B)(IV) of the Rome Statute*, 20 GEO. INT'L ENVTL. L. REV. 61, 94–95 (2007).

4. Joseph McMillan, *Apocalyptic Terrorism: The Case for Preventive Action*, 212 STRATEGIC FORUM 2 (2004).

combat piracy as a collective duty to defeat the enemies of humankind.⁵ Pirates, as enemies of humankind, essentially lost any jurisdictional protection by virtue of their crimes, and courts tried any pirate found on the high seas.⁶ Later, by successfully labeling slave traders *hostis humani generis* and employing the Royal Navy for enforcement, the British Empire helped expand universal jurisdiction over slave traders.⁷

The international community applied universal jurisdiction over war crimes and crimes against humanity committed during World War II, extending universal jurisdiction to punish the horrific crimes of the Axis countries.⁸ Today, torture⁹ is broadly understood to be subject to universal jurisdiction because torturers are considered *hostis humani generis* like pirates and slave traders.¹⁰ Some even argue that “enemy combatants” in the Global War on Terror are also *hostis humani generis* subject to universal jurisdiction.¹¹ The Rome Statute acknowledges the principles of universal jurisdiction by describing its jurisdiction over “persons for the most serious crimes of international concern” as “complementary to national criminal jurisdictions.”¹²

Although not currently subject to universal jurisdiction, attacks against the natural environment are prohibited by the Rome Statute, the First Protocol to the Geneva Conventions (“Protocol I”), and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (“ENMOD”).¹³ The latter two

5. *Id.*; 4 WILLIAM BLACKSTONE, COMMENTARIES 72.

6. Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 338 (1925).

7. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 798–99 (1988).

8. *See id.* at 800.

9. The scope of this note does not encompass the debate about what conduct rises to the level of torture, because such discussion is unnecessary. No one, not even John Yoo, seriously debates the existence of conduct that could be defined as torture, and that conduct is addressed by the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc A/RES/39/46 (Dec. 10, 1984) [hereinafter Torture Convention].

10. *Filartiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). *But see* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L. J. 183, 236. Kontorovich argues that the development of universal jurisdiction beyond piracy rests on the faulty assumption that heinousness can justify universal jurisdiction. His critique and the other revisionist critiques of universal jurisdiction are interesting but are not covered in depth because they are outside the scope of this note.

11. McMillan, *supra* note 4.

12. Rome Statute, *supra* note 2, art. 1.

13. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977,

treaties have no independent international enforcement mechanism though, and the ICC is paralyzed in the matter because there is no guidance from precedent on how to prosecute an attack on the non-natural environment.¹⁴ Although these two treaties provide unprecedented wartime environmental protection, the victory is only moral; an un-enforced law has the same actual effect as no law at all. This note argues that states should adopt statutes extending universal jurisdiction over attacks against the natural environment to cure this prosecutorial paralysis in the short term using national courts, which will create the necessary precedent in environmental war crime law that international courts will rely on in the long run. National courts should extend universal jurisdiction over attacks on the natural environment because such attacks are *hostis humani generis*, and extension of universal jurisdiction over them is therefore just.

II. THE EVOLUTION OF LIABILITY FOR ENVIRONMENTAL WAR CRIMES

The term “environmental war crimes” can encompass both attacks against the human environment and the natural environment. The Nuremberg Charter contemplates attacks on the human environment with its “wanton destruction of cities, towns, and villages”¹⁵ requirement, whereas Protocol I and ENMOD proscribe, albeit with no international criminal remedy, certain attacks on the natural environment.¹⁶ When the Rome Statute was ratified, newly implemented Article 8(2)(b)(iv) created the first “eco-centric” war crime by extending ICC jurisdiction over certain attacks on the environment using language similar to that contained in Protocol I and ENMOD.¹⁷ However, the prospects of prosecuting an “eco-centric” war crime at the ICC are grim due to (1) substantial ambiguity as to Article 8(2)(b)(iv)’s key terms, (2) a very stringent *mens rea*, and (3) ICC institutional limitations.¹⁸

1125 U.N.T.S. 3 [hereinafter Protocol I]; Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, G.A. Res. 31/72, U.N. Doc. A/RES/31/72 (May 18, 1977) [hereinafter ENMOD].

14. Lawrence & Heller, *supra* note 3, at 95.

15. Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6(b) Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

16. Lawrence & Heller, *supra* note 3, at 67.

17. *Id.* at 70–71.

18. *Id.* at 94–95.

A. Environmental War Crimes before the Rome Statute

Environmental war crime history is probably as lengthy as the history of war itself, although the history of liability for such crimes is nascent. Reports of salting the soil of a conquered city exist in the Old Testament,¹⁹ and the tale of Scipio salting Carthage's soil lives on.²⁰ Environmental war crimes range from the Iraqi torching and dumping of Kuwaiti oil, to Sherman's March to the Sea, to American defoliant operations in Vietnam.²¹ Despite their long history, actual instances of environmental war crime prosecution are sparse. The International Military Tribunal sitting at Nuremberg ("IMT"), and a lesser American tribunal operating under the Nuremberg Charter, were the first tribunals to levy environmental war crime prosecutions against the German officers Alfred Jödl and Lothar Rendulic.²²

The Nuremberg Charter extended the jurisdiction of the IMT and the lesser post-war tribunals over the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity."²³ While the Nuremberg Charter did not extend jurisdiction over crimes against the environment independent of human effects, the above jurisdictional grant over scorched earth tactics was used to charge both Jödl and Rendulic.²⁴ Both men were accused of using scorched earth tactics during withdrawals from Norway and Russia. An American military tribunal acquitted Rendulic on scorched earth charges because it found Rendulic mistakenly believed that destroying vast tracts of Northern Norway was necessary to retreat from Soviet forces.²⁵ However, Alfred Jödl was convicted of war crimes by the IMT for destroying vast tracts of both Norway and Russia while retreating from the Red Army as well.²⁶ It appears the difference in outcome turns upon the fact that Jödl presented only a "superior orders" defense, a defense that was explicitly prohibited by Article Eight of the Nuremberg Charter.²⁷ If Jödl had presented a

19. *Judges* 9:45.

20. Mark A. Drumbl, *Waging War Against the World: The Need to Move From War Crimes to Environmental Crimes*, 22 *FORDHAM INT'L L. J.* 122, 123 (1998).

21. *Id.*

22. Carl E. Bruch, *All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict*, 25 *VT. L. REV.* 695, 716 (2001).

23. Nuremberg Charter, *supra* note 15.

24. *The Hostages Trial*, 8 *LAW REP. TRIALS WAR CRIMINALS* 34, 69 (1948) [hereinafter *Rendulic Trial*]; *The Trial of German Major War Criminals*, 22 *PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY* 517 (1950) [hereinafter *Jödl Trial*].

25. *Rendulic Trial*, *supra* note 24.

26. *Jödl Trial*, *supra* note 24.

27. *Id.*

military necessity defense he might have been acquitted of the scorched earth charges, although it would have had no impact on his conviction for planning the illegal invasions of Norway, Yugoslavia, Greece, Albania, and Russia.²⁸

While the IMT made the first successful international prosecution for an environmental war crime, the precedent created an extremely narrow scope of conduct actually punishable as an environmental war crime. The requirement of “wanton destruction of cities, towns, and villages”²⁹ fails to protect unpopulated areas and focuses upon the physical structures of habitation rather than the natural world that surrounds it. Although the IMT at Nuremburg acknowledged international criminal liability for environmental destruction during wartime, the court’s precedent did not create substantial criminal liability for attacks against the natural environment because such attacks were outside the scope of the IMT’s jurisdiction.³⁰

Protocol I and ENMOD contain provisions to protect the environment during wartime, but those agreements do not authorize international criminal sanctions against those responsible; states are required to ensure they live up to these obligations, but there is no international individual criminal penalty for not doing so.³¹ The UN Security Council even considered the difficulty of criminally prosecuting Iraqis as environmental war criminals when it established a compensation commission instead of establishing criminal tribunals to punish the officers responsible for the environmental catastrophe that occurred during the Arabian Gulf armed conflict from 1990 to 1991.³² Even when *ad hoc* international criminal tribunals are authorized, they have not indicted anyone for an environmental war crime despite the authorization to do so.³³ The precedent set at Nuremburg that allows mistaken belief as to military necessity to negate the *mens rea* of an environmental war crime modeled on Nuremberg Charter Article 6(b), hinders any effort by a tribunal to prosecute environmental war

28. *Id.* at 516.

29. Nuremburg Charter, *supra* note 15.

30. Aurelie Lopez, *Criminal Liability for Environmental Damage Occurring in Time of Non-International Armed Conflict: Rights and Remedies*, 18 FORDHAM ENVTL. L. REV. 231, 247–48 (2007).

31. Lawrence & Heller, *supra* note 3, at 67.

32. See generally Meshari K. Eifan, Head of State Criminal Responsibility for Environmental War Crimes: Case Study: The Arabian Gulf Armed Conflict 1990–1991 (2007) (unpublished J.S.D. dissertation) (although Iraq created a special tribunal to address the crimes of the Hussein regime and its authorizing statute has an article very similar to the Rome Statute’s 8(2)(b)(iv), the statute has not been used).

33. Drumbl, *supra* note 20, at 145–46.

criminals, especially when easier-to-prove war crimes are typically available to prosecutors.³⁴ There is little incentive to undertake a precedent-setting environmental war crime prosecution when there are much easier paths to achieve the goal of retributive justice.

*B. Environmental War Crimes after the Rome Statute:
Article 8(2)(b)(iv)*

Article 8(2)(b)(iv) revolutionized the prosecution of environmental war crimes. The scorched earth charges at Nuremberg focused on injury to a human victim, as did the other treaties authorizing criminal remedies for environmental war crimes.³⁵ Other international agreements that offered greater protection to the environment limited the scope of remedies to state reparations.³⁶ Unlike previous anthropocentric laws, the “Article does not condition individual criminal responsibility on damage to the environment also causing injury to human beings.”³⁷ Because of this, Article 8(2)(b)(iv) is the first “eco-centric” crime recognized by the international community, and it vastly expanded the scope of environmental offenses that could result in criminal liability.³⁸ Despite the expanded scope of environmental offenses, no one has been prosecuted under Article 8(2)(b)(iv), and the feasibility of such prosecution is highly doubtful.³⁹ Although the ICC now has jurisdiction over attacks against the environment, no charges under Article 8(2)(b)(iv) have been filed. It could be that the time is not right for a prosecution, but more likely, the Article’s own drawbacks combined with the ICC’s limited jurisdiction makes prosecution under Article 8(2)(b)(iv) too difficult to secure convictions.

Article 8(2)(b)(iv) requires “widespread, long-term, and severe” damage to the natural environment,⁴⁰ yet the three modifiers of “damage” and the term “natural environment” are not defined in the Rome Statute.⁴⁰ Any indictment under Article 8(2)(b)(iv) would face hurdles based on Article 22(2)’s requirement that ambiguity, as to definitions, will be construed in favor of the charged person.⁴¹ Unless the Rome Statute is modified to define these terms, the ICC will probably look to

34. See Drumbl, *supra* note 20.

35. Lawrence & Heller, *supra* note 3, at 64–67.

36. *Id.*

37. *Id.* at 71.

38. *Id.*

39. *Id.* at 95.

40. Drumbl, *supra* note 20, at 127–28.

41. Rome Statute, *supra* note 2, art. 22(2).

similar provisions of ENMOD and Protocol I for interpretive assistance.⁴²

ENMOD requires the proscribed environmental damage to be “widespread, long-term, or severe.” The use of “or” instead of “and” means that ENMOD’s scope of punishable conduct is far broader than Article 8(2)(b)(iv)’s.⁴³ Further broadening the scope of environmental damage covered under ENMOD are the definitions that ENMOD’s Committee on Disarmament attached to the words “widespread,” “long-term,” and “severe.”⁴⁴ For example, “widespread” means an area of several hundred square kilometers, “long-term” means approximately a season, and “severe” means seriously or significantly disruptive or harmful to life or natural resources.⁴⁵ In contrast, Protocol I defines “long-lasting” as a period of at least decades, fails to define the two other terms, and requires the damage to be of all three types.⁴⁶ Furthermore, there is considerable agreement that Protocol I interprets “widespread” and “severe” narrowly.⁴⁷ It has yet to be determined which definition controls, but Protocol I is much closer to Article 8(2)(b)(iv) in that both require damage to be “widespread, long-term, *and* severe.”⁴⁸ The fact that ENMOD’s Committee on Disarmament suggested that its textual interpretation should not prejudice interpretations of similar terms in other agreements further bolsters the contention that Protocol I should provide greater guidance.⁴⁹ Article 8(2)(b)(iv) also inherits the requirement from Protocol I that the proscribed attack be, “clearly excessive in relation to the concrete and direct overall military advantage anticipated.”⁵⁰ The drafters of Article 8(2)(b)(iv) intentionally took the language from Protocol I by adding “clearly” and “overall,” thus creating an *actus reus* that is less amicable to prosecutors than the already prosecutorial-unfriendly language from the Nuremberg Charter.⁵¹ Because the Rome Statute was drafted in light of the established international criminal standards in the Geneva Conventions, it is likely that its drafters intended to build upon Protocol I. If the Protocol I definitions do indeed apply to Article 8(2)(b)(iv), then it will be “nearly

42. Drumbl, *supra* note 20, at 127–28; Lawrence & Heller, *supra* note 3, at 72.

43. Rome Statute, *supra* note 2.

44. Drumbl, *supra* note 20, at 128.

45. *Id.*

46. *Id.*

47. Lawrence & Heller, *supra* note 3, at 73.

48. *Id.* (emphasis added).

49. Drumbl, *supra* note 20, at 128.

50. Rome Statute, *supra* note 2; Protocol I, *supra* note 13.

51. Lawrence & Heller, *supra* note 3, at 77.

impossible” to meet the *actus reus* in most circumstances.⁵²

The Article’s *mens rea* requires knowledge that “widespread, long-term, and severe” environmental damage will result from the attack and knowledge that the damage is disproportional to the “overall military advantage anticipated.”⁵³ An Article 8(2)(b)(iv) prosecution can only succeed if a commander knows what “widespread, long-term and severe damage” means, knows that his conduct will cause such damage, and knows that the damage will likely be disproportionate to the anticipated advantage of the military operation. As is clear, it is difficult for a defendant to know what “widespread, long-term and severe damage” means when there is no legal consensus on its meaning.⁵⁴ A commander charged under Article 8(2)(b)(iv) could present a mistake of law defense by pleading that he misunderstood the scope of “widespread, long-term, and severe damage,” and, because the definition of that term comes from outside the Rome Statute, such a defense could likely win.⁵⁵

Another barrier to application of Article 8(2)(b)(iv) is the fact that it only applies to an “international armed conflict.”⁵⁶ The Rome Statute provides no protection for the environment from war crimes during internal armed conflict. Limiting environmental protection solely to the realm of international armed conflict is a step backwards from ENMOD, which makes no distinction between intra-national and international armed conflicts.⁵⁷ The prosecution is further limited in its use of Article 8(2)(b)(iv) by the fact that there is an intentional jurisdictional exemption limiting the application of Article 8(2)(b)(iv) to high-ranking commanders that are in a position to decide the scope of an attack.⁵⁸ Thus, the article cannot be used against field officers that are not responsible for the planning of an environmental attack, the thinking being that such officers cannot be deterred from committing crimes they had no part in planning. Finally, it does not appear that drafters will amend the Rome Statute to encompass internal conflicts because the signatories seem content with Article 8(2)(b)(iv) and any expansion of the ICC’s power will adversely impact the prospects of non-party states

52. *Id.* at 95.

53. Rome Statute, *supra* note 2.

54. *Id.* This creates a problem similar to the qualified immunity problem in §1983 actions where U.S. government officials are individually immune from civil prosecution for civil rights violations if the law violated was not clearly established. *See generally* *Hope v. Pelzer*, 536 U.S. 730, 739–40 (2002).

55. Lawrence & Heller, *supra* note 3, at 79.

56. Rome Statute, *supra* note 2, art. 8(2)(b).

57. Bruch, *supra* note 22, at 703.

58. Lawrence & Heller, *supra* note 3, at 84.

joining the court.⁵⁹

A state is unlikely to agree to ICC jurisdiction over commanders who are suppressing internal dissent and defer to their own legal institutions to ensure that their commanders act consistently with treaty obligations. The drafters of the Rome Statute acknowledged this problem, and ICC jurisdiction is explicitly complementary to state jurisdiction.⁶⁰ However, states have yet to adequately embrace their obligation to control the environmental damage of internal conflict criminally.⁶¹ Essentially, under the current structure, if a state declines to prosecute a commander whose conduct even meets the stringent Article 8(2)(b)(iv) standard because the government holds him as the hero of the state's civil war and pardons him, there is no redress possible because of sovereignty's shield. Reliance on domestic jurisdiction to prosecute offenses during an "internal conflict" could also serve to legitimize malicious prosecutions of rebel commanders for environmental war crimes, while the government fails to prosecute its own commanders for similar violations. The result of this system is unjust because it gives non-international combatants substantial relief from ICC prosecution and thus relief from liability for attacks on the natural environment.

The internal conflict exemption, although intentionally derived from the sovereign state model—i.e. the nation-state model that assumes international law should not touch upon the sovereign inner-workings of a state because nation states are autonomous international actors—is a dangerous holdover from an era of state versus state conflict that has since passed and renders the revolutionary Article 8(2)(b)(iv) largely impotent.⁶² This is partly due to the modern nature of war; the age of military conquest, with a few notable exceptions, did not survive World War II.⁶³ However, complicated conflicts with actors that may not be states but have some sort of state sponsorship make sorting out the difference between international armed conflicts and intra-national armed conflicts "complex if not impossible."⁶⁴ If it is "complex if not impossible" to determine whether or not a conflict is international, then Article 8(2)(b)(iv) will only be applied in the clearest circumstances of international armed conflict so as to avoid embarrassing jurisdictional dismissals.

59. Lopez, *supra* note 30, at 245.

60. Rome Statute, *supra* note 2, pmb1.

61. See Lawrence & Heller, *supra* note 3, at 85.

62. *Id.*

63. Boaz Atzili, *When Good Fences Make Bad Neighbors: Fixed Borders, State Weakness, and International Conflict*, 31 INT'L SECURITY 139, 142 (2006).

64. Lopez, *supra* note 30, at 236.

The terms defining environmental crimes are so vague, and the jurisdictional and systemic hurdles that must be cleared are so high, that barring some change in the language of Article 8(2)(b)(iv), environmental war crime prosecution is unlikely to ever occur.⁶⁵ The Rome Statute revolutionized the scope of environmental war crimes by extending international criminal protection to the environment independent of its utility to man, but an excessively difficult to meet *actus reus* and *mens rea*, combined with the non-international armed conflict exception, limits the functional value of Article 8(2)(b)(iv) to discussions on its ineffectiveness.

III. UNIVERSAL JURISDICTION

The *Princeton Principles on Universal Jurisdiction* describes “universal jurisdiction [a]s criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”⁶⁶ Universal jurisdiction originated to combat high seas piracy but has since evolved considerably to punish slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture.⁶⁷ However, universal jurisdiction’s evolution has been fraught with difficulties regarding the relationship between universal jurisdiction and sovereignty.⁶⁸ Despite the tension, states can broadly interpret their power to use universal jurisdiction to prosecute international criminals when they obtain physical custody of the war criminal.

A. High Seas Origins

Pirates are always subject to prosecution by states with a connection to their crimes, provided such a state has physical custody of the pirate, regardless whether the state was directly harmed and regardless of the citizenship of the pirate.⁶⁹ This tradition flies in the face of traditional jurisdictional requirements. The rationale for creating universal

65. Lawrence & Heller, *supra* note 3, at 95.

66. THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001), *reprinted in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW, 21 (Stephen Macdeco ed., 2004).

67. *Id.*

68. CrimA 336/61 *Eichmann v. Attorney Gen.* [1962] 36 I.L.R. 277, *available at* <http://www.enotes.com/genocide-encyclopedia/eichmann-2>.

69. Randall, *supra* note 7, at 793.

jurisdiction was the need to protect the freedom of the high seas for the trading empires of Europe. Therefore, jurisdiction over pirates was satisfied by mere custody.⁷⁰ Pirates acted repugnantly and indiscriminately while threatening the commercial “intercourse among states.”⁷¹ Although universal jurisdiction over piracy existed for centuries under customary international law, it was eventually codified and currently exists at Article 105 of the United Nations Convention on the Law of the Sea which permits “every state [to] seize a pirate ship . . . arrest the persons and seize the property on board . . . [and] decide upon the penalties to be imposed.”⁷² States to this day rely can upon this authority to interdict pirates that haunt the world’s maritime chokepoints.⁷³

The British Empire’s control of the oceans during the nineteenth century allowed it to successfully push for treaties authorizing states to search the ships of each other’s merchant fleets for suspected slave traders.⁷⁴ These complex treaties included specific provisions for prosecution and punishment.⁷⁵ Eventually, the treaty language became strong enough to allow the Royal Navy to subject slave traders to the same treatment as pirates on the high seas.⁷⁶ Although these treaties did not mention universal jurisdiction by name, and slavery was far from being universally reviled—the practice was still widespread globally when the British Empire abolished it, the practical effect of the push for global abolition through treaties was to extend universal jurisdiction over slave traders.⁷⁷

Although pirates and slave traders eventually were similarly treated under the law, the punishment of slave traders markedly increased the scope of universal jurisdiction offenses.⁷⁸ Piracy and slave trading are both difficult to prosecute because their crimes occur on the high seas, but unlike piracy, slave trading did not pose a threat to the global economic order, nor was it universally seen as morally objectionable.⁷⁹ The reason the slave trade became subject to universal jurisdiction involves the combination of the British people’s moral objections to

70. *Id.*

71. *Id.* at 795.

72. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261.

73. *See id.*

74. Randall, *supra* note 7, at 799–800.

75. *Id.*

76. *Id.*

77. Kontorovich, *supra* note 10, at 193–94.

78. *See id.*

79. *See id.*

slavery and the enforcement mechanism of the British Navy.⁸⁰ British naval hegemony forced the world to accept that slave traders were *hostis humani generis*, and could not escape justice through jurisdictional loopholes. Justice Marshall acknowledged this in *The Antelope*, where the British captured African slaves that were being transported by the French. Despite acknowledging that slave traders were *hostis humani generis*, the United States returned the slaves to the French because (1) the “law of nations” had yet to catch up with the growing abolition movement and (2) French law still allowed slavery.⁸¹ As British power expanded in the nineteenth century, however, the “law of nations” adjusted to hold the slave trade equivalent to piracy.⁸² Although universal jurisdiction’s scope expanded dramatically with the addition of slavery, it still was limited to punishing those acting toward private ends; government actors still enjoyed immunity.⁸³ Unfortunately, another great moral crime had to occur for the next extension of universal jurisdiction.

B. Universal Jurisdiction and Nuremburg

In holding that Israel could prosecute a Nazi war criminal despite the fact the alleged offense occurred in Poland before Israel existed, the Sixth Circuit quoted the Restatement (Third) of Foreign Relations Law of the United States § 404:

The wartime allies created the International Military Tribunal which tried major Nazi officials at Nuremberg and courts within the four occupation zones of post-war Germany which tried lesser Nazis. All were tried for committing war crimes, and it is generally agreed that the establishment of these tribunals and their proceedings were based on universal jurisdiction.⁸⁴

The IMT and its lesser courts used the principle of universal jurisdiction to prosecute numerous suspects despite the fact that these suspects were largely acting as state agents and were mostly in custody in the jurisdiction where their offenses took place.⁸⁵ Part of the consideration behind piracy and slavery as universal jurisdiction offenses was the practical infeasibility of using other forms of jurisdiction when such suspects by trade are on the high seas much of the time, and outside

80. *See id.* at 194 n.61.

81. 23 U.S. 66, 118 (1825).

82. *See Randall, supra* note 7, at 799.

83. *Id.* at 804.

84. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582–83 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

85. *Id.*

the power of the state where they have their citizenship.⁸⁶ The fact that the four occupying powers conducted the tribunals in Germany, however, indicates that German-run tribunals were practically feasible from a physical venue perspective. Nevertheless, the underlying egregious nature of the Axis crimes, plus a fear of Nazis escaping justice in German courts, triggered the international concern necessary for the allied powers to utilize universal jurisdiction.⁸⁷ While the proceedings of the IMT are sparse with references to universal jurisdiction, it is widely recognized that the proceedings were based in universality principles.⁸⁸ The lesser tribunals used universal jurisdiction more explicitly than did the IMT out of fear that war criminals prosecuted domestically would receive inappropriately light punishments.⁸⁹ Piracy and slave trading, independent of the underlying nature of the crime, are subject to universal jurisdiction in part because of the high probability of offenders escaping justice; these lesser tribunals created the precedent that fear of inadequate punishment of particularly egregious crimes could create universal jurisdiction.

Although the IMT was successful in creating individual criminal responsibility for many Axis war criminals, many notable war criminals, by committing suicide or fleeing the country, escaped justice at Nuremberg. The quest to bring to justice those who fled wherever found solidified the statutory method by which individual states could use universal jurisdiction.

C. Eichmann's Precedential Value and the Validity of Statutory Universal Jurisdiction

As the Allied tribunals wrapped up their work, it was obvious that many potential war criminals had escaped prosecution by the tribunals, either by suicide or flight. In the case of Adolf Eichmann, he was able to escape from Allied custody in 1946 and made his way to Argentina under the assumed name Ricardo Klement in 1950.⁹⁰ After an elaborate surveillance operation, Israeli commandos eventually found Eichmann in Buenos Aires and abducted him in order to stand trial in Israel for his role in the Holocaust.⁹¹ Although the kidnapping caused an international

86. See Randall, *supra* note 7, at 794–95.

87. See *id.* at 804, 806–08.

88. Demjanjuk, *supra* note 84.

89. Randall, *supra* note 7, at 807.

90. Wade A. Buser, *The Jaffe Case and the Use of International Kidnapping as an Alternative to Extradition*, 14 GA. J. INT'L & COMP. L. 357, 370 (1984).

91. Gary J. Bass, *The Adolf Eichmann Case: Universal and National Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS

stir and there was a question whether the proceeding would create international precedent, the trial itself has created case law as to when domestic statutes can extend universal jurisdiction. The actual proceedings, separate from the abduction, comported with international standards excellently.⁹² Israel actually changed its law to allow Eichmann his choice of counsel—Robert Servatius, a notable German defense attorney who practiced at Nuremberg—who was given “free rein” to conduct the defense.⁹³ Even vociferous critics of the abduction before the trial, like Hannah Arendt and American Nuremberg prosecutor Telford Taylor, acknowledged that the proceedings should form valid precedent if fair and just.⁹⁴ Indeed, during and after the trial, both critics lauded the fairness of the proceedings.⁹⁵

The Israeli trial of Adolf Eichmann had to rely on universal jurisdiction for two reasons: (1) the alleged crimes did not occur in Israel and (2) the crimes preexisted the creation of Israel.⁹⁶ There was absolutely no territorial or residency connection between Eichmann’s crimes and Israel.⁹⁷ Israel enacted the Nazi and Nazi Collaborators Law in 1950 to give Israeli courts jurisdiction over those who committed “crimes against the Jewish people.”⁹⁸ The Israeli trial court based its jurisdiction on two principles: that (1) crimes against humanity are sufficient to create universal jurisdiction and (2) nation-states have an interest in punishing those who assault the nation that comprises the state.⁹⁹ The Israeli trial court decision, and the Israeli Supreme Court affirmation of it, relies heavily on universal jurisdiction.¹⁰⁰ The Israeli Supreme Court dismissed the notion that Israel could not prosecute crimes that predate its existence because states act as guardians of international law, and it is their collective duty to prosecute crimes that arouse sufficient international concern to invoke universal jurisdiction.¹⁰¹ The American born Israeli Supreme Court Justice Simon Agranat held, in upholding the use of the Nazi and Nazi Collaborators Law against Eichmann, that “international law . . . authoriz[es] the countries of the

CRIMES UNDER INTERNATIONAL LAW 77, 80 (Stephen Macedo ed., 2004).

92. *Id.* at 88–89.

93. *Id.*

94. *Id.*

95. *Id.*

96. Matthew Lippman, *Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice*, 8 BUFF. HUM. RTS. L. REV. 45, 107–08 (2002).

97. *Id.*

98. Bass, *supra* note 91, at 85.

99. Randall, *supra* note 7, at 811.

100. Bass, *supra* note 91, at 85.

101. *See Eichmann*, *supra* note 68, at 303–05.

world to mete out punishment of its provisions.”¹⁰² That is essentially the same argument Blackstone made when he spoke of the collective duty of states to fight pirates. Indeed, when international or *ad hoc* tribunals are unavailable for any reason, including unwillingness to prosecute, no other actor can enforce international law as effectively as a state can, simply because states have courts of general jurisdiction that can handle the case load.

Allowing states to use domestic courts to try international criminals is something the Geneva Conventions envisions for “grave breaches.”¹⁰³ The provision explicitly relies upon universal jurisdiction for enforcement by mandating state prosecution regardless of the alleged offender’s nationality.¹⁰⁴ The Torture Convention mandates that parties prosecute offenders regardless of nationality, or extradite them to a state that will.¹⁰⁵ States have the obligation to use their domestic legal systems as the sword of international law according to Justice Agranat.¹⁰⁶ Many states also believe they have such an obligation and have enacted legislation to serve this enforcement role, and the American attitude toward universal jurisdiction exhibits why it is crucial to create institutional inertia with regard to universal jurisdiction.

*D. Having Your Cake and Eating It Too: American Universal Jurisdiction*¹⁰⁷

The American politicians who pushed for the passage of the American Service Members’ Protection Act, which essentially authorizes the President of the United States to use military force to invade the Netherlands—an original NATO ally—to “liberate” any American personnel detained by the ICC, represent a strain of popular sentiment that is greatly skeptical of international law.¹⁰⁸ Universal jurisdiction is highly objectionable to these nationalists who hold sovereignty to be

102. PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 154 (1997).

103. Roger O’Keefe, *The Grave Breaches Regime and Universal Jurisdiction*, 7 J. INT’L CRIM. JUSTICE 811, 813 (2009).

104. *Id.*

105. Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFF. 150, 151 (2001).

106. LAHAV, *supra* note 102.

107. The inspiration for this title is the title of a South Park episode where it is learned that saying one thing and doing another is what makes America great.

108. Robert Marquand, *Will Obama Reverse ‘Invasion of The Hague’ Act?*, ABC NEWS, <http://abcnews.go.com/print?id=6870071> (last visited Nov. 11, 2010).

wholly inviolable;¹⁰⁹ states with powerful nationalist movements are subject to the popular current of politics that significantly hinders the ability of their governmental institutions to comply with international criminal law.¹¹⁰ This becomes especially problematic when states that liberally use universal jurisdiction change their laws under pressure from more powerful states that are militarily active and fear liberal application of universal jurisdiction will result in substantial command liability. For example, in 2003 this very problem occurred when General Tommy Franks, the recently resigned commander of United States Central Command, was targeted for investigation under the Belgian universal jurisdiction law.¹¹¹ The United States quickly threatened Belgium economically, and the Belgians quickly repealed the universal jurisdiction law to ensure that the investigation of General Franks and the outstanding investigations of Jiang Zemin, Ariel Sharon, George H.W. Bush, Dick Cheney, Colin Powell, and Norman Schwarzkopf stopped.¹¹²

While it seems the United States vigorously objects to universal jurisdiction reaching its citizens, it simultaneously uses universal jurisdiction broadly to obtain jurisdiction over citizens of other countries. In *Filartiga v. Peña-Irala*, the Second Circuit, holding that the United States had jurisdiction over a Paraguayan torturer who only tortured Paraguayans in Paraguay, said that, “the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”¹¹³ In a case arising one year later, the Northern District of California held that that terrorist attacks on internationally protected persons are subject to universal jurisdiction because the threat of terrorism is considered “as great a threat to the well-being of the international community as piracy was in an earlier time and therefore properly included within this type of jurisdiction.”¹¹⁴ In *Demjanjuk v. Petrovsky*, the Sixth Circuit essentially affirmed the Israeli ruling in *Eichmann* by allowing the United States to extradite a suspected war

109. See Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, 80 FOREIGN AFF. 86 (2001).

110. Compare Clinton’s Statement on War Crimes Court, BBC (Dec. 31, 2000), available at <http://news.bbc.co.uk/2/hi/1095580.stm> with John Bolton, Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security to Kofi Annan, Secretary General of the United Nations, informing Mr. Annan of the suspension of the U.S. signature (May 6, 2002), available at <http://amicc.org/docs/bolton.pdf>.

111. See Ian Black, *Franks May Face War Crimes Charge*, THE GUARDIAN (Apr. 30, 2003), available at <http://www.guardian.co.uk/world/2003/apr/30/iraq.warcrimes>.

112. Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT’L L. 927, 933–34 (2009).

113. *Filartiga*, *supra* note 10, at 890.

114. *United States v. Layton*, 509 F. Supp. 212, 214 (N.D. Cal. 1981), *appeal dismissed*, 645 F.2d 681 (9th Cir. 1981), *cert. denied*, 452 U.S. 972 (1981).

criminal to Israel for crimes in Poland predating Israel's existence.¹¹⁵ Before Pablo Escobar's assassination, the United States considered an operation to abduct the infamous drug trafficker in Colombia, and the intended justification was universal jurisdiction over drug traffickers.¹¹⁶ Before the 1988 American invasion of Panama rendered them moot, similar plans were contemplated to seize then Panamanian President Manuel Noriega.¹¹⁷ Extraordinary rendition, a practice much more troubling than the Israeli kidnapping of Eichmann, if only because the United States has done it more than once and secretly, is based on the theory that universal jurisdiction authorizes it.¹¹⁸ The evidence suggests that the United States, despite its distaste for the international criminal prosecution of its own citizens, heartily endorses universal jurisdiction for others and encourages its judicial institutions to recognize it.

The United States may have politicians who grandstand against international law to play to nationalist audiences fearful of any threat to traditional notions of sovereignty, but its laws and actions support a broad application of universal jurisdiction that allows American courts to hear cases from around the world concerning a wide variety of subject matter. The American example illustrates why national legal systems must sometimes be the sword of international law. First, because powerful states have undue influence on international criminal prosecutions, multiple potential fora are ideal to lessen this influence. Secondly, because national legal systems are much more responsive than international legal systems, they can be used to test the limits of international law and provide greater guidance for later courts, both national and international.

E. The Enduring Problem of Extradition

In 1993, the Belgian Parliament enacted the *Loi du 16 Juin*, executing its obligations under Geneva I and II, and giving Belgian courts jurisdiction over war crimes, whether or not a traditional nexus to Belgian jurisdiction existed.¹¹⁹ This gave sweeping power to the Belgian courts to try international war crimes because Belgian criminal procedure

115. *Demjanjuk*, *supra* note 84, at 582–83.

116. Bass, *supra* note 91, at 87.

117. *Id.*

118. Gregory S. McNeal & Brain J. Field, *Snatch and Grab Ops: Justifying Extraterritorial Abduction*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 491, 500 (2007).

119. *Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977*, June 16, 1993 (MONITEUR BELGE, Aug. 5, 1993).

gives victims extraordinary rights to initiate investigations.¹²⁰ The law was amended in 1999 to enlarge Belgian universal jurisdiction to encompass crimes against humanity and genocide; the amendment also affirmatively forbade official immunity for heads of state.¹²¹ Soon enough, complaints flooded in from around the globe seeking to use the Belgian courts for crimes arising on six continents accusing most every notable political leader of crimes against humanity.¹²² This swamped the Belgian prosecutors who had to investigate the deluge of claims, but convictions resulted from the law in 2001 against four Rwandans for their part in the 1994 genocide.¹²³

On April 11, 2000, Belgium issued an international arrest warrant for Congolese Foreign Minister Abdoulaye Yerodia Ndombasi.¹²⁴ The Democratic Republic of Congo challenged the warrant in front of the International Court of Justice claiming that Belgium violated international law by issuing a warrant for an incumbent minister, effectively arguing that the 1999 Belgian universal jurisdiction law violated international law with its reach over incumbent ministers.¹²⁵ The ICJ handed down a ten-to-six ruling forcing Belgium to cancel the warrant for violating the inviolable immunity that incumbent ministers enjoy from criminal prosecution under international law.¹²⁶ This was a striking blow for universal jurisdiction; a commander who commits war crimes is subject to universal jurisdiction so long as he is not a governmental minister. The fear of home states protecting their war criminals using jurisdictional obstruction—states can simply assign commanders it wants to protect to ministerial positions and then turn them loose—was realized. While *Arrest Warrant* does not stand for immunity after a minister has left office, French prosecutors cited the ruling when they dropped charges filed by victims of torture against former U.S. Secretary of Defense Donald Rumsfeld because he enjoyed “customary” immunity from prosecution for official acts after leaving office.¹²⁷ Implicitly, the prosecutors interpreted the Torture Convention as being inapplicable to governmental officials as long as the alleged

120. Roozbeh B. Baker, *Universal Jurisdiction and the Case of Belgium: A Critical Assessment*, 16 ILSA J. INT'L & COMP. L. 141, 9 (2009).

121. *Id.* at 12–13.

122. *Id.* at 14.

123. *Id.*

124. *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 4.

125. *Id.*

126. *Id.* at 34.

127. James Mackenzie, *French Prosecutors Throw out Rumsfeld Torture Case*, Reuters (Nov. 23, 2007), available at <http://www.reuters.com/article/politicsNews/idUSL238169520071123>.

torture was an "official act."

The French prosecutor's interpretation of the Torture Convention is notably at odds with Lord Browne-Wilkinson's interpretation of it in *Ex parte Pinochet*.¹²⁸ Augusto Pinochet, the former Chilean dictator, was in front of the British House of Lords for his final appeal of the ruling to extradite him to Spain after months of hearings and re-hearings.¹²⁹ Pinochet's primary defense at this point was that his organization of state torture was an official function of the Chilean Head of State, and thus he enjoyed state immunity for his actions.¹³⁰ While the ruling upheld earlier precedent bestowing immunity to heads of state for their official functions even after leaving office, the ruling rejected Pinochet's argument that state torture was an official function.¹³¹ "[C]ontinued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention" because of the "bizarre results" that would be produced if parties had to waive their state immunity defense before jurisdiction could be imposed for torture when the treaty authorizes universal jurisdiction for torture.¹³² The fact that Pinochet was never sent to Spain does not impact the precedential value of this ruling; Pinochet only avoided Spanish Magistrate Baltasar Garçon's courtroom because of a controversial political decision regarding his physical fitness to stand trial.¹³³ Unfortunately, the decision of the French prosecutors regarding Rumsfeld's investigation does not seem founded in an actual judicial interpretation of the Torture Convention, but on a political desire to avoid the ire of a state that had just recently authorized the use of military force against its close NATO ally, the Netherlands, to "liberate" its troops from The Hague if the ICC gained custody over them.¹³⁴

Even in circumstances where a suspected international criminal is not under the official protection of a state, other circumstances can thwart extradition. Although the fugitive problem can haunt any prosecution, it is especially bad in the context of apprehending international criminal suspects. So many Nazis escaped justice immediately after World War II that many were not uncovered until

128. *R v. Bartle ex parte Pinochet*, [2000] 1 A.C. 147 (H.L. 1999), reprinted in 38 I.L.M. 581. (1999).

129. Richard A. Falk, *Assessing the Pinochet Litigation*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 97, 110–14 (Stephen Macedo ed., 2004).

130. *Id.*

131. *Id.*

132. *Bartle ex parte Pinochet*, *supra* note 128, at 590.

133. *Pinochet Set Free*, BBC (Mar. 2, 2000), available at http://news.bbc.co.uk/2/hi/uk_news/663170.stm.

134. See Marquand, *supra* note 108.

decades later.¹³⁵ In Serbia, Radovan Karadzic, was able to evade capture not because he fled to Argentina like Eichmann, but because he grew a beard and reinvented himself as new age psychiatrist, Dragan Dabic.¹³⁶ Former military and political leaders often have broad support networks that assist them in fleeing justice, either with the assistance of loyalists still in power or some sort of underground network. In spite of these networks, no conspiracy is needed to evade justice by getting lucky at a checkpoint. But the fugitive problem is not unique to international crimes; there are plenty of domestic fugitives that pose considerable headaches for domestic prosecutions. The fugitive problem does not undermine universal jurisdiction in legal systems where in absentia criminal trials are procedurally appropriate because courts can secure a conviction, and sentencing can be handled once custody of the criminal is obtained.

While the scope of universal jurisdiction rapidly expanded in the post-war period over the objections of some, and criminals were prosecuted using universal jurisdiction, the practical limits to universal jurisdiction prevent widespread application.¹³⁷ Sovereignty still remains supreme; jurisdiction may be universal, but justice is not.

IV. TAKING THE NEXT STEP: EXPANDING UNIVERSAL JURISDICTION TO ENCOMPASS ENVIRONMENTAL WAR CRIMES

Universal jurisdiction is far from the perfect solution for prosecuting international crimes. If it were, the ICC would be superfluous, and Belgian prosecutors would not be swamped with requests to try major world leaders, whom prosecutors could never realistically obtain custody over. However, the international tribunals that exist today, whether they sit permanently with wide jurisdiction like the ICC, or they sit temporarily with limited jurisdiction as in an *ad hoc* tribunal, have their origins in universal jurisdiction because they are all children of Nuremberg. The first prosecutions using universal jurisdiction over piracy, slave trading, war crimes, and crimes against humanity were crucial in establishing the definitions and norms that provide international tribunals tools for interpreting the law that is

135. See Demjanjuk, *supra* note 84.

136. Ellie Tzortzi, *Karadzic Arrested in Serbia, Worked as Doctor*, Reuters (July 22, 2007), available at <http://www.reuters.com/article/topNews/idUSL2196241820080722>.

137. Randall, *supra* note 7; Kissinger, *supra* note 109.

applied to offenders today.¹³⁸ The emergence of torture and terrorism as universal jurisdiction offenses reinvigorated the *hostis humani generis* doctrine and shows that as the interests of humankind change over time, so do the enemies of humankind.

Environmental war crimes punished by Article 8(2)(b)(iv) of the Rome Statute are unique among war crimes in that the actual physical victim is not a person. It is difficult to assess the extent of the damage done to the environment; prosecutors can more easily approximate the number of people harmed, tortured, or raped because, in the end, the common denominator is human lives. The interconnectedness of ecosystems can make seemingly localized environmental damage actually far more widespread and severe than upon first impression.¹³⁹ Global commerce and the global environment both rely on the harmonious interaction between different actors. Therefore, pirates and environmental war criminals similarly pose senseless and existential threats to networks vital to humankind. Pirates are not *hostis humani generis* because their crimes are especially shocking or the actual impact of their crimes global, but because of the senseless and existential threat that their crimes—in the aggregate—pose to the global trade network.¹⁴⁰ Environmental war crimes are similar in that the crimes are not shocking, nor are the impacts of such crimes necessarily global. Indeed, “widespread, long-term, and severe environmental” damage occurs all the time around us from daily activities, but environmental war crimes, in the aggregate, pose a senseless and existential threat to the natural environment.

Failure to use universal jurisdiction to punish environmental war criminals because their crimes do not arouse an international concern comparable to other universal jurisdiction crimes is incorrect. Deterrence is an appropriate aim of universal jurisdiction when it comes to piracy because, although one act of piracy will not bring down global trade, allowing pirates to escape justice emboldens other pirates. The resultant unchecked piracy could imperil world trade. The same applies to environmental war crimes. The failure to punish war criminals that senselessly abuse the environment emboldens others to do the same, whether they would do so in vengeance or to gain a miscalculated tactical advantage. Destructive acts that imperil the health of the global environment are the concern of the international community, at least as much as the isolated acts of pirates. The lack of an individual victim does

138. See Randall, *supra* note 7.

139. Lynn Berat, *Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law*, 11 B.U. INT'L L.J. 327, 348 (1993).

140. See generally Randall, *supra* note 7.

not defeat universal jurisdiction because the universality principle on which it relies is based on prosecuting offenses that by their nature cause injury to the international community.¹⁴¹

The Rome Statute's recognition of the environment as an entity of value independent of human utility was a major victory for the environment. It shifted the dialogue from the issue of whether wartime environmental protection is necessary to the issue of what the breadth of environmental protection during wartime should be. The success is largely moral, though. To kick start the development of environmental war crime law, states should enact domestic statutes, based on the language of Article 8(2)(b)(iv), to extend universal jurisdiction over environmental war crimes while building precedent that will help the ICC use Article 8(2)(b)(iv). Such action is supported by current universal jurisdiction practices that incorporate the Rome Statute into domestic criminal codes.¹⁴²

One of the major obstacles to charging under Article 8(2)(b)(iv) is that the critical terms in the *actus reus* are undefined at the same time a conviction requires knowing intent on the part of the defendant.¹⁴³ This makes international environmental war crimes prosecution essentially impossible. States should therefore adopt the same "widespread, long-term, and severe damage" language from Article 8(2)(b)(iv) in their criminal codes with useful definitions. By doing so, states will begin to develop the legal standards surrounding environmental war crimes. Ideally, states will avoid including the military advantage defense and define "widespread, long-term, and severe damage" broadly, as is done in ENMOD. But as long as states avoid employing radically different standards in defining the key terms—and effectively close the non-international conflict loophole—the precedent created will lay the foundation for more ambitious attempts at prosecuting environmental war criminals in international tribunals.

Although the usual obstacles to international prosecution remain—extradition, ministerial immunity, fugitives, and selective enforcement—states that extend universal jurisdiction over environmental war crimes will gain custody over at least a few suspects, and that is all that is really needed at this point. Even a handful of universal jurisdiction prosecutions for environmental war crimes will radically advance the state of environmental war crime law and lay the foundation for successful international prosecutions.

141. See O'Keefe, *supra* note 103, at 823.

142. See generally Baker, *supra* note 120.

143. Rome Statute, *supra* note 2.

V. CONCLUSION

While the Rome Statute's recognition of war crimes against the environment was a major development in international criminal law, the limited jurisdiction of the ICC over "international" environmental war crimes and the ambiguity of the language within the statute significantly limit the effectiveness of the environmental war crime provision in the Rome Statute. The limits are so substantial that no one has been, nor is anyone likely to be, prosecuted as an environmental war criminal at the ICC. There is considerable confusion regarding the very basic terms of statute, and prosecutors are focusing their efforts on crimes with clearer language and better-developed precedent, many of which were developed using universal jurisdiction prior to the ICC's creation. Prosecutors recognize the problem, yet they are unable to establish a workable prosecution scheme because the international justice system has failed to develop the international criminal law to the point where international prosecution is a feasible option.

Universal jurisdiction is reserved to prosecute the worst offenses the international community recognizes to ensure that they will not go unpunished. While environmental war crimes are new to the international criminal justice system, their impact is of considerable international concern, and all offenders currently escape prosecution. States are responsible for the enforcement of international law and can take it upon themselves to enforce international criminal law. Such a groundbreaking statute should not be left to languish because of substantial obstacles to prosecution at the ICC.

Individual states can jumpstart the development of environmental war crime law by adopting universal jurisdiction statutes that encompass environmental war crimes, and their courts can begin the task of applying the law. National courts can resolve the myriad issues regarding prosecution and build institutional inertia to insulate the laws against domestic nationalist backlash against aggressive use of universal jurisdiction. Once a body of law is created, the ICC can use the new precedent to effectively prosecute war criminals that destroy the environment in the context of an international conflict. Furthermore, legal development assists other states that wish to begin prosecution of domestic offenders by providing an established set of rules to emulate.

Although there are hurdles to enforcement, Article 8(2)(b)(iv) of the Rome Statute shows that protection of the environment is paramount to many people in the world today. It is increasingly understood that the environment deserves greater protection under the law, independent of its utility to man. The current challenge is, where do we go from here?

The ICC is paralyzed, and this paralysis cannot undermine the achievement of Article (8)(2)(b)(iv). States must respond to the challenge that the current legal environment presents and criminalize environmental war crimes using universal jurisdiction. This closes the internal conflict loophole, if states desire, and cements the international prohibition against environmental war crimes into the body of international law. The most dangerous thing to do is nothing. If Article 8(2)(b)(iv) sits on the shelf un-enforced, it will demonstrate the international community's lack of seriousness with regard to environmental war crimes. The law will have zero effect on the actual conduct of human beings. Universal jurisdiction built the foundation for international criminal responsibility, and it is once again necessary to build the foundation of Article 8(2)(b)(iv).