

Environmental Damage as a War Crime?

By Emina Arella Haddlesey

I recently visited Ukraine and met with Ukrainian lawyer and politician Andriy Kostin. During our meeting, Mr Kostin told me of his efforts to push the international community to recognise environmental damage as a war crime. As a legal scholar, the idea seemed too broad in scope to be taken seriously. However, according to Mr Kostin, the international community is listening.

While the initiation of war is restricted under international law, and the conduct of war is heavily regulated, war itself is not entirely illegal. When considering the laws of war during armed conflict, a war crime must constitute a serious violation of those rules and subsequently give rise to individual criminal responsibility.

The recognition of war crimes often draws parallels with *jus cogens* norms, or international non-derogable rights, constituting the “ethically minimum” content of international law. For example, the prohibition of torture and other cruel, inhuman, or degrading treatment, and the prohibition of genocide.

For the argument of environmental damage being added to the list of currently recognised war crimes, one could expand on the current rules whereby attacking protected objects, such as hospitals, schools, and religious sites, constitutes a war crime. However, the criterion of “protected objects” in this context also provides clarity on whether an attack falls within the customs and laws of war or is a crime. All wars will inevitably result in environmental damage. Therefore, under the school of thought that environmental damage is a war crime, how much environmental damage needs to be done for it to constitute a war crime and give rise to individual criminal responsibility? How will such a broad scope of criteria be measured and applied? If all environmental damage is to become recognised as a war crime, then all war will fundamentally become illegal. The previously accepted rules of war will no longer be required because there will be no armed conflict without liability for a war crime.

Then I thought: *What if environmental damage was only inevitable in wars of the past?*

The difference between the Russian invasion of Ukraine and the traditional understanding of war is that we are witnessing the development of modern warfare in real time based on autonomy, intelligence and robots. Unlike the wars of the past, drones are estimated to cause upwards of 75 per cent of all frontline casualties. The developing variations of intelligence and robots can cause serious harm without substantially harming the environment. Thus, the international recognition and acceptance of environmental damage as a custom of war may no longer be required. As warfare changes, perhaps so does the international recognition of what constitutes war crimes.

I applaud Mr Kostin for his forward-thinking legal activism in this respect and look forward to the responses from the international community.