ENVIRONMENTAL CRIME – CURRENT AND EMERGING THREATS
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Environmental crime – Current And Emerging Threats

Environmental Crimes and Violations of Human Rights

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Mister President, Excellencies, Ladies and Gentlemen,

It is an honour and a pleasure to address this distinguished audience with an intervention on the topic "Environmental Crimes and Violations of Human Rights".

1. Introductory remarks

The main idea of this conference is that existing legal issues allow environmental crimes to continue largely without prosecution. In this line, an important way to protect the environment is through criminal law, which seems to be an appropriate response to offences posing serious threats to the environment. Moreover, the protection of the environment through criminal law should include also international criminal law, which can play an important role in fighting against eco-crimes and eco-criminals. Whenever and wherever eco-crimes are committed human rights are violated in a massive way, so that a reaction is to be carried out at all levels, domestic and international.

Within this context, my note focuses on the following three points: 1. International law, and the law of some regional integration organizations, such as the European Union, is contributing growingly to mandate the enactment and punishment of environmental crimes at the domestic level; however, this legislative tendency should be increased, endowing international environmental treaties with a richer set of provisions dealing with the punishment of environmental offences through criminal law; 2. Secondly, we should advocate the emergence of an autonomous configuration of the environmental crime as a crime punished by

international law, retaking into considerations the lessons learnt by past experiences and building upon them to reach an international consensus on the definition of the international environmental crime and on ways and means to provide for its punishment at all the appropriate levels; moreover, this process is still in a premature stage and should be actively supported. 3. Finally, environmental crimes are closely linked to human rights, in the sense that severe and massive violations of the environment quite always amount to massive violations of fundamental human rights; for this reason, the protection of the environment against environmental crimes is also a condition for the effective protection of human rights. The international law instruments and mechanisms devoted to the protection of human rights should be used to denounce and prosecute the massive and large-scale attacks against the environment.

2. The need to increase International law instruments that mandate the enactment and punishment of environmental crimes at the domestic level.

On the first assumption, I would say that that international treaties which contain clear criminal prohibitions for the protection of the environment are certainly growing, but they not sufficient. The cases of treaties which mandate State parties to punish environmental crimes which fall within their scope of application is still limited. Among the existing treaties which belong to this category, we could mention the Basel Convention on hazardous waste, the CITES Convention on endangered species, and the Marpol Conventions on oil pollution. My argument is that other treaties encompassing clauses which oblige the Parties to enact criminal legislation aimed at sanctioning eco-crimes should be concluded and that existing MEAs should be revised or amended to this end.

Another important instrument for enacting international legislation aimed at fighting eco-crimes are the regional integration organizations to which their member States have transferred the authority to make binding decisions. This is the case of the European Union, that adopted several directives aimed at a high level of protection of the environment. Among them, we can find some acts dealing with criminal sanctions against environmental offences. The rationale laying at the basis of these acts is that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment and that such compliance should be strengthened by the availability of criminal penalties. Such kind of penalties demonstrate indeed a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law. In this line, the Directive 2008/99/EC is paradigmatic in establishing measures relating to criminal law in order to protect the environment more effectively. Member States are mandated to ensure that

some conducts constitute a criminal offence, when unlawful and committed intentionally or with at least serious negligence. They include, among others, the discharge, emission or introduction of a seriously damaging quantity of materials or ionising radiation into air, soil or water; the unlawful shipment of waste; the disposal of nuclear materials or other hazardous radioactive substances; the destruction or taking of specimens of protected wild fauna or flora species. A similar act has been adopted by the European Union in the field of ship-source pollution to introduce penalties for infringements (Directive 2009/123/EC of 21 October 2009). These directives also endorse the principle of the liability of legal persons for the offences covered, where such offences have been committed for their benefit by any person who has a leading position within the legal person[1]. This principle, if broadened also at the international level, could be very helpful to address the problem of the responsibility of multinational corporations for environmental crimes.

These acts - treaties and directives - have been transposed into national legislation, so that an increasing number of States now domestically criminalize significant harms to the environment as a matter of implementation of international obligations[2]. This is an useful option and the hope is that this trend will be confirmed and consolidated to properly address the fight against environmental crimes ad to efficiently punish their authors. Despite all these efforts, however, regulations imposed by MEAs or their implementing legislation often contain loopholes, which do not assist in fighting more efficiently against illegal traffic or laundering of contraband resources. Thus, it is necessary to amend or revise the relevant treaties in order to supplement these provisions and further strengthen them. MEAs should be more resolutely equipped to oblige States parties to introduce common rules on criminal penalties that make it possible to use more effective methods of investigation and effective cooperation within and between Member States.

3. Supporting the emergence of environmental crimes as crimes punished by international law.

Thus, the first option is not sufficient to adequately fight against eco-criminals. Alongside the development of more helpful provisions within the MEAs, it is mandatory to advocate the emergence of environmental crimes as crimes of international law. Time is ripe for the advent of an autonomous configuration of the 'environmental crime' as a crime punishable under international law. Some environmental crimes, in fact, deserve special attention at the international level because of their heavy political, social and economic consequences. We are dealing

[1] The principles of the criminal responsibility of legal persons was rejected with regard of international crimes at the time when the Statute of the ICC was negotiated and concluded in the FAO headquarters in 1998.

[2] Directives 2008/99/EC and 2009/123/EC EC on ship-source pollution and on the introduction of penalties for infringements have been transposed in Italy through Law n. 121/2011.

here with a *de lege ferenda* perspective, a sensitive matter where no *consensus* has been possible yet in the international fora. However, It is a challenge that should be issued if we want a real progress in the fight against eco-criminals. We should support the process toward the recognition of the environmental crimes in international law at large, and to help it to reach a more mature stage. For doing so, we should firstly build consensus on the goal we want to achieve.

Until now, all the attempts to consolidate an international notion of environmental crime have failed. There are several reasons for that and they have been largely addressed by scholars. However, there are also lessons that we can learn from the past experiences and I want to make a brief reference to them. Let us take again our way from the point reached in the past about the concept of international environmental crime. If it is not yet possible to speak of a commonly accepted legal definition of international environmental crime, however the main elements of the concept of eco-crime, as they have emerged since now at the level of the international community, are already there.

An environmental crime is "*a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas*." This early notion amounts to the eighties, at the time when the International Law Commission (ICL) of the United Nations began its work on the Draft Articles on State Responsibility for wrongful acts. It was the merit of an Italian eminent jurist, Roberto Ago, special Rapporteur of the Commission on the mentioned topic, to introduce the distinction between *international crimes* and international wrongful acts (*délits*) within the famous Article 19 of the draft Articles adopted in first reading by the ILC in 1980. Among the international crimes, this Article listed the environmental crimes.

The distinction we have referred to was not only theoretical. It was meant as having an important legal consequence, namely that in case of international crimes not only States were to be considered responsible, but also, and mainly, the individuals involved in their commission. In other words, international crimes of States were coupled with individual international crimes. And more. The way was open also for a distinction on the kind of reaction to the commission of such crimes involving the violations of obligations of interest for the international community as a whole. Not only the affected State, but every State could react, in accordance with international law, to an international crime. The collective reaction should be preferably channelled through the UN, including, when necessary, the Security Council. At the times, this was an explosive mixture, which explains why, *re melius perpensa*, the ICL changed its approach leaving aside the notion of international crime and including sister notions such as that of 'particular consequences' flowing from a breach of obligations *erga omnes* or of imperative norms of international law.

Another attempt to identify the international environmental crime was made in the nineties when the ILC's Draft Code of Crimes Against the Peace and Security of Mankind was discussed. Crimes against the peace and security of humankind were crimes under international law and punishable as such, whether or not punishable under national law. In this case, it was a question of individual crimes. The focus of the project was indeed on individual responsibility, namely that an individual should be responsible for a crime set out in the Code if he intentionally committed such a crime; ordered its commission; failed to prevent or repress its commission. An individual responsible for a crime should be liable to punishment and the punishment commensurate with the character and gravity of the crime.

In its original version of 1991, the draft text included provisions relating to *wilful and severe damage to the environment* as an individual crime[3]. The main criteria was the *seriousness* of the offense:

> *Article 26. Wilful and severe damage to the environment*
> An individual who wilfully causes or orders the causing of
> widespread, long-term and severe damage to the natural environment
> shall, on conviction thereof, be sentenced [to. . .].

Needless to say that the proposal of including environmental crimes within the Draft Code was largely objected, so that in the end the special Rapporteur Tomuschat thought it better to eliminate this crime from the list and to concentrate his work on the core crimes against peace. Later on, the Draft Code itself was abandoned, to give place to the process of drafting the Statute of the International Criminal Court (ICC).

The reference to the Statute of Rome of the ICC gives us the opportunity to find again the notion of 'international environmental crime' as causing a wilful and severe damage to the environment. However, the notion is evoked only with regard to *war crimes*. Article 8.2*b*)(iv) of the Statute establishes that "within the scope of an *international armed conflict*, the following actions could constitute a *war crime*: Intentionally launching an attack in the knowledge that such attack will cause … *widespread, long-term and severe damage to the environment* which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".

This mention is important, but insufficient. Indeed, a comparison of this provision with Articles 35.3 and 55.1 of the 1977 Additional Protocol I to the 1949 Geneva Conventions, which already punish acts causing "widespread, long-term and severe damage to the natural environment" in armed conflict, seems to indicates that the

[3] without prejudice to the question of state responsibility, or the responsibility of other abstract entities.

ICC Statute does not contain an added value with respect to international humanitarian law. One could also argue that some steps back have been made, considering that the level of culpable action necessary to amount to a crime has been increased. Also the Convention on the prohibition of military or any hostile use of environmental modification techniques (ENMOD), concluded on 10 December 1976, in its Article I prohibits the Contracting Parties from engaging in "military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party". The adjectives 'widespread' 'long-lasting' and 'severe' are interpreted through an understanding, which is not incorporated in the Convention, following which the term 'widespread' means "encompassing an area on the scale of several hundred square kilometres", while the terms 'long-lasting' and 'severe' mean, respectively, "lasting for a period of months, or approximately a season" and "involving serious or significant disruption or harm to human life, natural and economic resources or other assets".

Notwithstanding these rules in force within the law of warfare and international humanitarian law, there are no possibilities for prosecution of international environmental crimes occurred within the context of a non-international armed conflict.

This picture clearly shows that a new path is needed in order to resume the debate on international environmental crimes as crimes that should be prosecuted at all levels, including the international level, by reason of the cross-border damage which they may cause, and by reason of their scale and effects. All the main actors, governmental as well as non-governmental, should indeed contribute to raise awareness of such important lacuna and focus their efforts to fill it. The United Nations should be at the centre of this process and play a major role in it.

4. Environmental Crimes and Violations of Human Rights

Last but not least, the recognition of environmental crimes at the international level should be driven by the human rights perspective. In this regard, I was very much convinced by the reasoning of Judge Weeramantry in his separate opinion to the 1997 judgement of the International Court of Justice in the case between Hungary and Slovakia concerning the dam on the river Danube (*Gabcikovo-Nagymaros* case). He said:

“The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the *right to health* and the *right to life itself*. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine *all the human rights* spoken of in the Universal Declaration and other human rights instruments. While,

therefore, all peoples and States have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment".

Unfortunately, I think that it is more that necessary to insist in elaborating on how the damage to the environment, when it is a severe, large scale and widespread, can impair and undermine *all the human rights* recognized by international instruments and protected by peremptory norms of international law. Whenever an environmental crime is committed, it is certain that a severe violation of fundamental human rights has taken place. Furthermore, the human rights perspective seems more adequate to address the enforcement of the rights of the victims of environmental crimes.

Here, again, there are some lessons to be learnt from past experiences. In 1994, the final report prepared by Fatma Ksentini, special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the former UN Commission on Human Rights, made a careful analysis of the effects of the environment in the enjoyment of human rights. The Sub-Commission decided to submit a Draft Declaration of Principles on Human Rights and the Environment, which was annexed to the final report. Even if the Declaration was never adopted, it constituted the first document drafted internationally that addressed the linkage between the human rights, substantial as well as procedural, and the protection of the environment. It also identified duties corresponding to the human rights, duties that apply to individuals, governments, international organizations and transnational corporations.

More in general, the impact of environmental harm on human rights has been largely recognized, as well as the "merits of a human rights approach to environmental protection". Once again, this synergy should be emphasised and brought to a threshold of enforceability.

Some international instruments concerning the protection of human rights recognize the right to a healthy environment as a basic human right. Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights states that "Everyone shall have the right to live in a healthy environment and to have access to basic public services. The States Parties shall promote the protection preservation and improvement of the environment". Article 24 of the African Charter on Humans and Peoples Rights establishes, in its turn, that "All peoples shall have the right to a general satisfactory environment favourable to their development". Other Conventions, such as the European Convention on human rights and fundamental freedoms have been interpreted by the case-law of the European Court as protecting indirectly, through other fundamental rights, such as the right to health, to family life, to private life, to domicile and so on, the right to a healthy environment.

The approach linking human rights and environment has been criticised saying that it focuses excessively on the human being, leaving aside the protection of the environment and other living beings, which should be protected *per se*. However, it is to be noted that the human rights oriented approach is complementary to the others of a more purely environmental character and tries to draw the maximum useful effect from the existing rules for the protection of human rights against their gross and massive violation.

I also understand that the case-law is still limited. However, arguments for justifying the close connection between environment and human rights have already been developed by some international organs, such as the African Commission on Human and People's Rights and the European Court of Human Rights.

The 2001 decision of the African Commission in the *Ogoni* case said that all rights, both civil and political, and social and economic, generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. Irresponsible oil development practices in the *Ogoni* region, causing environmental degradation and health problems, amounted to several violations of human rights, such as the non-discriminatory enjoyment of rights, the right to life, the right to property, the right to health, the family rights, the right of peoples to freely dispose of their wealth and natural resources and the right to a satisfactory environment. Even if this decision had no immediate consequences and did not put an end to the criminal practice of gas flaring in the Niger Delta region, it was the first element of a chain of subsequent legal actions in Nigeria as well as in Europe, where Royal Dutch Schell has its main legal headquarters. While the recognition of an environmental crime is still an issue before the courts that have been addressed, an announcement delivered by the main company in April 2012 promised that 4 billions of dollars would be assigned for investments aimed at the re-utilisation of gases associated with the extraction of oil on-shore in the Niger delta region. This is a clear case where environmental crimes are strictly associated with the massive and large scale violations of fundamental human rights.

In this perspective, the recognized *erga omnes* nature of fundamental human rights obligations could be a strong driver for the criminalization of the most serious, large-scale and severe threats or aggressions to the environment. Moreover, international human rights law and its attendant machinery are increasingly touted as likely routes to enforce some environmental norms.

Prosecuting the most serious environmental offenses as massive violations of human rights before an international criminal tribunal would involve, of course, a consensus on such kind of crime, which is still an open issue at the international level. It would also imply the principle of complementarity, which is already a characteristic of the ICC, so that crimes against the environment should be

prosecuted internationally in situations where States are 'unable or unwilling' to prosecute them.

All in all, the perspective of environmental crimes coupled with violations of human rights deserve evident merits. The environment is increasingly viewed as tied to the protection of human life and basic human values while, more importantly, human rights are one of the great drivers of environmental criminal law's growth.

The three perspectives I mentioned here are complementary and not mutually exclusive. They should go hand in hand and reinforce themselves reciprocally. I am sure that this conference gathering such an impressive number of experts in the field of environmental crimes will constitute a major step in resuming the international debate on these aspects and in giving a new insight perspective for dealing with this issue which is really key to the fight against the eco-crimes.

Thank you for your attention.