

RICARDO PEREIRA\*



## AFTER THE ICC OFFICE OF THE PROSECUTOR'S 2016 POLICY PAPER ON CASE SELECTION AND PRIORITISATION: TOWARDS AN INTERNATIONAL CRIME OF ECOCIDE?

**ABSTRACT.** The 2016 Office of the Prosecutor of the International Criminal Court (ICC) policy paper on case selection and prioritization is a significant development in that it highlights the possible role of the ICC in prosecuting environmental damage, illegal natural resource exploitation and land grabbing. For obvious reasons, however, the ICC Office of the Prosecutor policy paper could not expand the court's current jurisdiction over ecocide which is dependent on a formal amendment to the ICC Statute and the policy paper is only an internal policy document. But more fundamentally it has been predicted that the 2016 ICC Office of the Prosecutor may signify the revitalization of the debate on how an international crime of ecocide could be conceptualised under international law and ultimately whether the ICC should have a broader jurisdiction over ecocide. This article aims to critically evaluate how a crime of ecocide could be conceptualised under international law, as well as to assess the limitations of conceptualising ecocide based on the narrow definition of the existing crimes under the ICC Statute. Moreover, this article aims to critically evaluate developments in past three and half years following the adoption 2016 OTP Policy Paper, and notes that the practice of the OTP in dealing with recent national communications and the ICC case law itself to date have not signified a considerable shift in interpreting the law in cases involving environmental damage, illegal natural resources exploitation and land grabbing. Therefore, they have done little so far to clarify the scope of the court's existing jurisdiction over "ecocide".

### I INTRODUCTION

On 15 September 2016 the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) issued a policy paper on case

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\*Dr Ricardo Pereira, Senior Lecturer in Law, Law & Politics School, Cardiff University, Museum Avenue, Cardiff CF10 3AX, UK. e-mail: [pereirar1@cardiff.ac.uk](mailto:pereirar1@cardiff.ac.uk). I must thank two anonymous referees for their helpful review of and comments to an earlier draft of this article. Any errors remain the author's own.

selection and prioritization, which highlights a possible role of the ICC in prosecuting environmental damage, illegal natural resource exploitation and land grabbing committed in context of the existing crimes under the Rome Statute.<sup>1</sup> This is not the first initiative to galvanize the debate over the creation of a crime of ecocide in international law. In 2010, Polly Higgins, a leading advocate for the recognition of an international crime of ecocide, proposed that the UN Law Commission defined ecocide as the “extensive damage to, or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished.”<sup>2</sup> A more concrete step towards the establishment of a crime of “ecocide” (although limited to the European context) happened following a European Citizens’ Initiative which was launched in June 2012 aimed at achieving a joint EU position on the crime ecocide with the view of “end[ing] ecocide in Europe” and for adoption of a “draft ecocide Directive.”<sup>3</sup> Yet since the initiative failed to reach one million signatures in at least seven Member States required to instigate the Commission to adopt a legislative proposal,<sup>4</sup> the initiative was withdrawn in January 2013.<sup>5</sup> The Citizen’s initiative was debated subsequently by the European Parliament’s Environmental, Legal, Agricultural and Fisheries Committee in February 2015, but this has not led to concrete steps towards adoption of a “draft Ecocide

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<sup>1</sup> See Office of the Prosecutor, *Policy Paper On Case Selection And Prioritisation*, 15 September 2016, [https://www.Icc-Cpi.Int/Itemsdocuments/20160915\\_Otp-Policy\\_Case-Selection\\_Eng.Pdf](https://www.Icc-Cpi.Int/Itemsdocuments/20160915_Otp-Policy_Case-Selection_Eng.Pdf) (accessed 20 March 2020).

<sup>2</sup> See further, Polly Higgins, *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet* (2<sup>nd</sup> ed, 2015) and <http://eradicatingecocide.com> (accessed 21 June 2018). See also the Draft Ecocide Act (2011) used in the Mock Trial in the UK Supreme Court in 2011, Art 12, <http://eradicatingecocide.com> (accessed on 15 March 2020).

<sup>3</sup> See further <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000012> ; and European Parliament to discuss End Ecocide initiative, 25th February 2015, “*The Week Ahead 23 February – 01 March 2015 Plenary and committee meetings week*” at [www.europarl.europa.eu/pdfs/news/](http://www.europarl.europa.eu/pdfs/news/) (accessed on 24 June 2018).

<sup>4</sup> Article 11 (4) TEU.

<sup>5</sup> 184,000 signatures were obtained. See further <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000012> (accessed on 20 March 2020).

Directive”<sup>6</sup> given that the European Commission holds the exclusive power of legislative initiative and the limited role of the European Parliament to instigate the Commission to start legislative action. Despite the challenges faced by those initiatives, they provide evidence of an increased interest from citizens, politicians and the ICC itself – as evidenced by the 2016 OTP policy paper – in redefining the limits of the court’s jurisdiction which could ultimately lead to the creation of an international crime of ecocide.<sup>7</sup>

The four crimes that currently fall under the jurisdiction of the ICC are genocide, crimes against humanity, war crimes and the crime of aggression.<sup>8</sup> Thus at present the scope for the prosecution of environmental crime before the International Criminal Court (ICC) is very limited, given that the Rome Statute (1998)<sup>9</sup> primarily only recognises the court’s jurisdiction for certain instances of environmental damage in the context of an armed conflict falling under the definition of war crimes, such as the oil spill caused by the Iraqi forces in the Persian Gulf during the Gulf War in 1991.<sup>10</sup> Ultimately it will be for future ICC review conferences to decide whether ecocide (or other international and transnational crimes, such as terrorism and drug trafficking) should be included in the ICC Statute.<sup>11</sup>

Although the 2016 ICC OTP policy paper on case selection and prioritization is a significant development in that it highlights the

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<sup>6</sup> It should be noted that a EC directive 2008/99/EC on the protection of the environment through criminal law (“environmental crime directive”) was adopted in November 2008. This directive aims to harmonise the environmental criminal laws of the EU Member States, but falls short of creating a crime of ecocide in the EU. For a discussion of the environmental crime directive see further for example Grazia M. Vagliasindi, “The EU Environmental Crime Directive”, in Andrey Farmer, Michael Faure and Grazia M. Vagliasindi (eds), *Environmental Crime in Europe* (Hart, 2018) and Pereira, R. ‘Towards Effective Implementation of the EU Environmental Crime Directive? The Case of Illegal Waste Management and Trafficking Offences’ *Review of European, Comparative and International Environmental Law* 26 (2) (2017).

<sup>7</sup> See *ibid.*

<sup>8</sup> See Article 5, Rome Statute. The crime of aggression was defined by the ICC review conference in 2010. See Resolution RC/Res.6; adopted at the 13th plenary meeting, on 11 June 2010, by consensus.

<sup>9</sup> UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1999.

<sup>10</sup> See further, Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Martinus Nijhoff (2004).

<sup>11</sup> See A. Cassese, P. Gaeta, and J. Jones, *The Rome Statute of the International Criminal Court A Commentary* (2002), 1903.

inclination of the OTP to prosecute international crimes involving illegal natural resource exploitation, land grabbing and environmental damage,<sup>12</sup> the policy paper could not expand the court's jurisdiction over ecocide which is dependent on an amendment to the ICC Statute. Still, the policy paper is highly significant in that it outlines a policy of case selection and prioritisation which emphasises the seriousness of environmental damage in the context of the existing crimes under the Rome Statute. In particular, it recognises that land grabbing, illegal exploitation of natural resources and destruction of the environment are "serious crime *under national law*."<sup>13</sup> (emphasis added). It also states that "the Office will give particular consideration to prosecuting *Rome Statute crimes*" (emphasis added) that are committed by means of "destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land."<sup>14</sup> Hence it is to be expected that environmental damage and illegal natural resources exploitation will become important parameters in future decisions of the ICC prosecutor to investigate and eventually bring prosecutions in the context of the existing core crimes falling under the ICC jurisdiction. In this fashion, one of the central goals of the Policy Paper is to provide guiding principles for "the exercise of prosecutorial discretion in the selection and prioritisation of cases for investigation and prosecution and preliminary examinations,"<sup>15</sup> with reference to the ICC Rules of Procedure and Evidence<sup>16</sup> and the internal regulations adopted by the Office of the Prosecutor.<sup>17</sup>

The 2016 OTC Policy Paper follows a November 2013 OTC Policy Paper on preliminary examinations that used a similar wording<sup>18</sup> except that the 2016 Policy Paper makes an explicit reference to

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<sup>12</sup> Office of the Prosecutor, *Policy Paper On Case Selection And Prioritisation* (n. 1) paras. 7, 40 and 41.

<sup>13</sup> *Ibid*, Para. 7

<sup>14</sup> *Ibid*, Para. 41.

<sup>15</sup> The Office of Public Prosecutor Policy Paper (n.1), at 3. On the role of preliminary examinations, see C. Stahn, *Damned if you Do, Damned if You Don't: Challenges and Critiques of Preliminary Examinations at the ICC*, 15 *Journal of International Criminal Justice*, vol. 15 Issue 3.

<sup>16</sup> Assembly of State Parties to the Rome Statute of the International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, at 10 (Sept. 3–10, 2002)

<sup>17</sup> See e.g. Regulation of the Office of the Prosecutor, ICC-BD/05-01-09, 23rd April 2009, available at <http://www.legal-tools.org/doc/a97226/pdf/> (accessed 22 September 2019).

<sup>18</sup> OTP, Policy Paper on Preliminary Examinations, 1 November 2013, x 65.

crimes committed “by means of, or that result in: the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.”<sup>19</sup> As will be further discussed below, the Global Diligence LLP Communication brought on behalf of the victims (“Filing Victims”) against Cambodia, although at the time of writing not having triggered preliminary examinations by the OTP, is largely regarded to have inspired the adoption of the 2016 OTC Policy Paper. The 2016 OTP has been welcomed by some commentators who noted that although not binding, the Policy Paper’s focus on environmental harm as relevant to the OTP’s decision to prosecute has improved the possibility of entrenching a “green” approach to interpreting the ICC Statute.<sup>20</sup> Moreover, the OTP’s Policy Paper has been praised because of its potential to enhance the ICC’s ability to deliver justice to victims of environmental harm and to produce incidental benefits in terms of environmental protection and which could also be used as tool to combat climate change.<sup>21</sup>

This article aims to critically evaluate how a crime of ecocide could be conceptualised under international law and in particular to assess the limitations of conceptualizing the crime of ecocide based on the narrow definition of the existing crimes under the ICC Statute, as envisaged in the OTC’s 2016 policy paper. Further, this article will evaluate the OTP practice and ICC jurisprudence in the three and half years since the adoption 2016 OTP Policy Paper in order to assess whether they have marked a considerable shift from their previous positions in handling cases involving environmental damage, illegal natural resources exploitation and land grabbing.

The second section of this paper begins with a discussion of how a crime of ecocide could be conceptualised under international law, taking account of historical developments including the existing international initiatives such as those proposed or adopted by the International Law Commission, the ICC and other international institutions, as well as the legal nature (international or transna-

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<sup>19</sup> Nadia Bernaz, *An Analysis of the ICC Office of the Prosecutor’s Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights*, JICJ 15 (2017), 527–542

<sup>20</sup> Rosemary Mwanza, “Enhancing Accountability for Environmental Damage under International Law: Ecocide of a Legal Fulfilment of Ecological Integrity”, *Melbourne Journal of International Law* 19 (2018).

<sup>21</sup> Luigi Prospero and Jacopo Terrosi, “Embracing the ‘Human Factor’: Is There New Impetus at the ICC for Conceiving and Prioritizing Intentional Environmental Harms as Crimes against Humanity?” (2017) 15 *Journal of International Criminal Justice* 509. See also, *ibid.*

tional) and legal elements of an eventual crime of ecocide under the ICC Statute. This is followed by the third section which scrutinizes the impact of the ICC OTP 2016 policy paper on prosecutorial discretion and highlights the limitations in relying on the ICC's existing jurisdiction for the prosecution of ecocide. Section 4 presents the concluding remarks.

## II CONCEPTUALISING A CRIME OF “ECOCIDE” UNDER INTERNATIONAL LAW

This section discusses how a crime of ecocide could be conceptualized under international law. It starts by looking into the historical developments aimed at creating an international crime of ecocide and whether ecocide could be regarded as an international or transnational crime. Finally, this section analyses the legal elements of an international crime of ecocide (in particular the *mens rea* and the *actus reus* elements) and ends with a discussion of whether certain human rights violations may fulfill the required elements of a crime of ecocide.

### 2.1 *The Origins and Historical Developments Towards the Establishment of an International Crime of Ecocide*

The origins of the term “ecocide” can be found in reactions to the use of the “Agent Orange” in the Vietnam war.<sup>22</sup> Arthur Galston, following the 1970 conference on “War Crimes and the American conscience”, condemned Operation Ranch Hand and asked the international community, through the United Nations, to condemn and punish ecocide.<sup>23</sup> In 1973 Richard Falk called for the development of new legal instruments namely an International Convention on the Crime of Ecocide and a Draft Protocol on Environmental Warfare. Although these developments ultimately culminated in the adoption of the 1977 Convention on the Prohibition of Military or

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<sup>22</sup> See D. Zierler, *Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think about the Environment* (University of Georgia Press, 2011). See further in detail, Eliana Cusato, “Beyond Symbolism: Problems and Prospects of Prosecuting Environmental Destruction before the ICC”, 15 *Journal of International Criminal Justice* 3 (2017), pp. 491–507.

<sup>23</sup> Richard Falk “Environmental Warfare and Ecocide: Facts, Appraisal, and Proposals” 4 *Bulletin of Peace Proposals* (1973).

Any Hostile Uses of Environmental Modification (ENMOD)<sup>24</sup>, a global “ecocide” convention with a broader scope beyond armed conflicts was never formally adopted. It should be noted that ENMOD itself is only of indirect relevance to international criminal law as it does not impose individual criminal responsibility for breaches of its provisions. Indeed, ENMOD is primarily useful as an interpretive aid for other provisions and principles under the ICC Statute that do entail individual criminal responsibility.<sup>25</sup>

The first initiative by the International Law Commission calling for the criminalisation of offences against the environment was the Draft Code of Crimes Against the Peace and Security of Mankind (1954), adopted in second reading in 1996.<sup>26</sup> The original draft code recognised “widespread environmental damage” as a “crime against the peace and security of mankind” which could be defined as a war crime.<sup>27</sup> Significantly, the draft code envisaged penal protection under article 26 against “wilful and severe damage to the environment.”<sup>28</sup> It thus identified widespread environmental damage as a crime against the peace and security of mankind as a prerequisite for establishment of an international crime. It should be noted that in contrast to Article 22 (on “war crimes”) of the same draft code, article 26 was not limited to the context of an armed conflict.<sup>29</sup> However, during the second reading of the draft code the special rapporteur recommended significant changes to Article 22, and the deletion of Article 26.<sup>30</sup> This is because Article 22 received little

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<sup>24</sup> Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), opened for signature 18 May 1977, 31 U.S.T. 333, 1108, U.N.T.S. 151.

<sup>25</sup> Matthew Gillet, “Environmental Damage and International Criminal Law”, in Sebastien Jodoin and Marie-Claire Condonier Segger (eds), *Sustainable Development, International Criminal Justice and Treaty Interpretation* (CUP, 2013)

<sup>26</sup> ILC Draft Code of Crimes Against the Peace and Security of Mankind (1996), adopted by the International Law Commission at its Forty-Eighth Session. The ILC provisionally adopted a set of articles in 1991 which revised and updated the 1954 Draft Code.

<sup>27</sup> See *ibid*, article 22 (emphasis added).

<sup>28</sup> See *ibid*, articles 22 and 26.

<sup>29</sup> Compare it with Article 55 of the Additional Protocol I to the 1949 Geneva Conventions. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 1977 (Protocol I), Article 55 (1.)

<sup>30</sup> Stephen McCaffrey, “Crimes Against the Environment”, in Cherif M. Bassiouni (ed), *International Criminal Law* (1996), at 1104.

support in government comments on the draft adopted on first reading, and Article 26 faced strong opposition from member governments who have expressed doubt over whether environmental issues can affect the peace and security of humankind.<sup>31</sup> So the final version of the Draft Code adopted in 1996 has a limited scope to the criminalization of environmental offences in that it only applies to war crimes. The position of some national governments that have led to the deletion of Article 26 of the draft code is at odds with the expanding interpretation of “peace and security of mankind” given by the UN Security Council,<sup>32</sup> and with the development of the notion of ecological security.<sup>33,34</sup> The adoption of Article 26 would have marked an important step for achieving of a broader international consensus on a definition of “ecocide” under international law. As pointed out by Mark Gray, “though only certain instances of ecocide would therefore fall within article 26 [of the Draft Code], it lays the foundation for wider recognition, particularly should the link to war crimes disappear.”<sup>35</sup>

Another significant development was the proposal by the ILC to include in its Draft Articles on State Responsibility specific provisions which could have established the basis for an international crime of ecocide. The Draft articles stated that “the breach of rules concerning the environment may constitute (...) in some cases, an

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<sup>31</sup> *Ibid.* See A/CN.4/448 and Yearbook of the ILC 1993, Vol. II, Pt. 1. Documents of the 45th session. A/CN.4/SER.A/1993/Add.1 (Part 1) (includes A/CN.4/448 and Add.1); and the discussions in the Sixth Committee (Legal) of the General Assembly addressing the draft Code: 12th – 25th meeting; summary records: A/C.6/50/SR.12 to A/C.6/50/SR.25. See further, Anja Gauger, Mai Pouye Rabatel-Fernel, Louise Kulbicki, Damien Short and Polly Higgins, “*Ecocide is the Missing 5<sup>th</sup> Crime Against Peace*” July 2012, Human Rights Consortium, School of Advanced Study, University of London.

<sup>32</sup> Rene Provost, “International Criminal Environmental Law”, in G. Good-Gill and S. Talmon (eds) *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford 1999), at 444.

<sup>33</sup> See for example Jon Barnett, *The Meaning of Environmental Security: Ecological Politics and Policy in the New Security Era* (Zed Books, 2001).

<sup>34</sup> See art. 20 (g), ILC Draft Code of Crimes Against the Peace and Security of Mankind.

<sup>35</sup> Mark Gray, “The International Crime of Ecocide”, 26 *California Western International Law Journal* 2 (1996) at 331.



international crime.”<sup>36</sup> The seriousness of environmental offences is a crucial element in the ILC original definition of international crimes involving environmental damage. Indeed, according to Article 19 (3) (d) of the Draft Articles “a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment” could constitute an international crime, such as “*massive pollution of the atmosphere and the high seas*.”<sup>37</sup> Hence according to the original ILC Draft Articles an international crime could include the serious breach by a State of an obligation essential for the protection of fundamental world interests. This would include peace and security of mankind, human rights, and safeguarding and preservation of the human environment.<sup>38</sup>

The Articles on State Responsibility finally adopted in November 2001 by the ILC in its fifty-third session omit the reference to international crimes as triggering the criminal responsibility of States for environmental offences.<sup>39</sup> Moreover, the examples given in the ILC’s accompanying commentaries to the Articles – although they “may not be exhaustive” – do not include harm to the environment of the kind listed in the former Article 19 of the Draft Articles on State Responsibility.<sup>40</sup> Instead of recognizing environmental crime as international crimes, the final version of the 2001 ILC Articles identify the legal consequences of the breach of peremptory norms of international law, but do not state exhaustively what those norms are.<sup>41</sup> So it became clear that the original proposal for codification of the international crime of “ecocide” was not accepted by all members of the Commission, with ultimate effect that “massive pollution” or “other environmental catastrophes” are not listed as examples of serious breaches in the 2001 Draft Articles or in the accompanying ILC com-

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<sup>36</sup> See ILC’s *Draft Articles on State Responsibility for Internationally Wrongful Acts* “1954 ILC Report” (A/CN.4/88) Report of the International Law Commission Covering the Work of its Sixth Session, 3 28 July 1954, Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693);

<sup>37</sup> Article 19 (3) (d) *ibid*.

<sup>38</sup> Pereira, R. ‘Environmental Criminal Liability and Enforcement in European and International Law’ (Brill, 2015). See also, Gray (1996) above n. 35, at 266–267.

<sup>39</sup> See 2001 International Law Commission (ILC) Draft Articles on the Responsibility for Internationally Wrongful Acts 48, Report of the ILC to the United Nations General Assembly adopted in the fifty-third session, UN Doc. A/56/10 (2001).

<sup>40</sup> See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Article 40, commentary 6, at 286.

<sup>41</sup> See ILC draft articles on state responsibility, Articles 40 and 41. *Ibid*.

mentaries. Despite the restrictive interpretation of the ILC in its definition of the responsibility of States for international crimes, it is possible to interpret the adopted provisions (i.e. Articles 40 and 41) recognizing the existence of “serious breaches” as also leading to state responsibility for environmental damage. This is because the ILC Articles on State Responsibility are open-ended and non-exhaustive; and therefore they were not supposed to exclude the development of rules under international law detailing the consequences of serious breaches which “fulfill the criteria for peremptory norms under article 53.”<sup>42</sup>

It should be emphasised that the original ILC draft articles were concerned with *State* responsibility (as opposed to *individual* responsibility), which explains the resistance by the members of the ILC to recognise the criminal liability of States for ecocide.<sup>43</sup> Whereas international criminal law has traditionally recognised the principle of individual criminal responsibility, the principle of criminal liability of States is not yet developed in interstate or jurisprudential practices.<sup>44</sup> In this regard, Robert McLaughlin argues that it is paradoxical that whereas international environmental law is based on the predominant role of states and their responsibility for environmental harm, the subjects of ICC jurisdiction would be necessarily non-state international actors.<sup>45</sup> He further notes that “an environmental Pinochet would be subject to ICC jurisdiction, while an environmental Chile would remain apparently insulated.”<sup>46</sup> On the other hand, McCaffrey questioned whether “an entire population of a nation should be treated as international criminals because of the actions of their leaders.”<sup>47</sup> So while States remain responsible under international law for the environmental harm caused by individual actors who operate in their territory under the general rules of State

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<sup>42</sup> *Ibid.*, commentaries to Article 40, commentary 6

<sup>43</sup> See further, *ibid.* See also, Pereira, n. 38 above.

<sup>44</sup> See Christian Tomuschat, “International Crimes by States: an Endangered Species?”, in K. Wellens ed., *International Law: Theory and Practice – Essays in Honour of Eric Suy*, Martinus Nijhoff (1998) at 259; Geoff Gilbert, “The Criminal Responsibility of States” 39 *International and Comparative Law Quarterly* 345 (1990). Theodor Meron, “Is International Law Moving Towards Criminalization?” 9 *European Journal of International Law* (1998) at 21.

<sup>45</sup> Robert McLaughlin, “Improving Compliance: Making Non-State International Actors Responsible for Environmental Crimes”, 11 *Colo. J. Int’L Envtl. L. & Pol’y* 377 (2000) at 389.

<sup>46</sup> *Ibid.*

<sup>47</sup> McCaffrey, above no. 30, at 1028.

responsibility, the likelihood that *criminal* liability will eventually be attached to States under international law remains remote. This is reflected in the ICC Statute itself, which expressly states that “no provision in this Statute relating to individual responsibility shall affect the responsibility of states under international law.”<sup>48</sup>

Despite the failure of those ILC initiatives in upholding a legal basis for an international crime of ecocide in the peacetime context, a war crime involving environmental damage is embedded in Articles 35(3), 55 and 85(3)(b) of the 1977 Additional Protocol I to the 1949 Geneva conventions.<sup>49</sup> Article 35(3) of Additional Protocol I prohibits the use of “methods or means of warfare which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment.”<sup>50</sup> This prohibition is also present in Article 55(1) of Additional Protocol I.<sup>51</sup> Several States indicated that they considered the rules in Articles 35(3) and 55(1) of Additional Protocol I to be part of customary international law.<sup>52</sup> Article 8 (2) (b) (iv) of the ICC Statute<sup>53</sup> is similar to the grave breach provision of Article 85 (3) (b) of Additional Protocol I, except for the fact that it includes “widespread, long-term and severe damage to the environment”, whereas the Additional Protocol I does not; and it states that damage, loss or damage must be “clearly” excessive, while the Additional Protocol I does not.<sup>54</sup>

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<sup>48</sup> Art. 25 (4) ICC Statute.

<sup>49</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature 12 December 1977, 16 I.L.M. 1391. See also, Article 2(4) of the Protocol III of the Convention on Certain Conventional Weapons.

<sup>50</sup> Additional Protocol I, Article 35(3) (adopted by consensus) (cited in Vol. II, Ch. 14, § 145).

<sup>51</sup> See Rule 45. Causing Serious Damage to the Natural Environment, ICRC Customary IHL [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter14\\_rule45#Fn\\_4C6D6F6B\\_00003](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter14_rule45#Fn_4C6D6F6B_00003).

<sup>52</sup> See, e.g., the statements of Germany (*ibid.*, § 231), Islamic Republic of Iran (*ibid.*, § 236) and Kuwait (*ibid.*, § 245) in relation to Iraq in 1991 and the statement of Yugoslavia in relation to the NATO bombing of a petrochemical complex in 1999 (*ibid.*, § 271). In their submissions to the International Court of Justice in the *Nuclear Weapons* case and *Nuclear Weapons (WHO)* case. *Ibid.*

<sup>53</sup> It should be noted that could also note the ICC’s Preamble, with the suggestion that the preamble reference to “well-being of the world” denotes a reference to the protection of the natural environment as one of the recognised protected values of the Statute. See commentary at pp 8–9 in Triffterer/Ambos, *infra*.

<sup>54</sup> Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Third ed., 2018) at 245.

The ICRC Customary International Humanitarian Law Study also addresses the principles of customary international law that impose prohibitions on damaging the environment. Rule 43 clarifies that the international humanitarian law principles of distinction, military necessity, and proportionality apply to attacks against the natural environment resulting from military operations.<sup>55</sup> Moreover, the destruction of the environment during hostilities in the absence of any military objective is criminal, just as the destruction of civilian objects is criminal.<sup>56</sup>

Yet even though serious environmental damage often accompanies armed conflicts and there is a well-established international legal framework governing environmental damage in armed conflicts, so far there have been very few prosecutions for environmental damage since the Second World War.<sup>57</sup> The discrepancy between the seriousness and scale of damage to the environment in armed conflicts and the absence of individual accountability is of considerable concern.<sup>58</sup> Indeed, despite the serious environmental damage that are inflicted in the course of armed conflicts, it is disappointing that Article 35 (3) of Additional Protocol I has not been the subject of prosecutions in international tribunals.<sup>59</sup>

## 2.2 *The “Inter-” and “Trans-” Nationality of Ecocide*

Another obstacle to the conceptualisation of “ecocide” is the extent to which it should reflect the distinction between “crimes under international law” and “transnational crimes.” Indeed, a doctrinal distinction is made between “supranational crimes” (or “transnational crimes” such as transnational environmental crimes), and “crimes under international law” which are those international crimes subject to the jurisdiction of an international criminal court or

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<sup>54</sup> Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Third ed., 2018) at 245.

<sup>55</sup> Henckaerts and L.Doswald-Beck (eds.), *Customary International Humanitarian Law* (2005) (“ICRC Rules”).

<sup>56</sup> *Ibid.*

<sup>57</sup> See further, Gillet, above note 25.

<sup>58</sup> *Ibid.*

<sup>59</sup> Henckaerts and L.Doswald-Beck (eds.), *Customary International Humanitarian Law* (2005) (“ICRC Rules”).

tribunal.<sup>60</sup> Although those crimes which have an impact on one or more States (including transboundary environmental crimes) could be broadly considered international crimes, arguably environmental crimes cannot be defined as international crimes in the strict sense as understood under international criminal law which currently only recognises war crime, crimes against humanity, genocide, torture, crimes of aggression<sup>61</sup> (and according to some definitions, also international terrorism and maritime piracy), as international crimes. This allows one to distinguish crimes of cross-boundary effects, such as drug or human trafficking or illegal movement of hazardous waste, and other crimes which are susceptible to adjudication by an international criminal tribunal, such as the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) or the Special Court for Sierra Leone.<sup>62</sup>

According to Antonio Cassese and his co-authors, the existence of an international crime requires the following criteria to be met *cumulatively*: a) violation of international customary rules as well as treaty provisions; b) the rules are intended to protect values important to the whole international community and consequently bind all states and individuals; c) a universal interest in repressing those crimes; and d) if the perpetrator has acted in an official capacity (i.e. *de jure* or *de facto* state official), the state on whose behalf he has performed the prohibited act may be barred from claiming immunity to those state officials from civil or criminal jurisdiction of foreign states accruing under customary international law to state officials acting in the exercise of their functions.<sup>63</sup> It would not be particularly challenging for a definition of ecocide to fulfill the first three criteria.<sup>64</sup> Indeed, there is an increasing recognition that some serious types of transnational environmental offences impact on the peace and security of mankind and violate “customary rules” and “uni-

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<sup>60</sup> See also R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (CUP, 2011) at 4–6; and N. Boister, “An Introduction to Transnational Criminal Law” (OUP, 2018).

<sup>61</sup> Following a definition to the crime of aggression given during the ICC review conference in 2010. See Resolution RC/Res.6; adopted at the 13th plenary meeting, on 11 June 2010, by consensus.

<sup>62</sup> Antonio Cassese, O. Gaeta, L. Baig, M. Fan, Gosnesll, and A Whiting., *Cassese’s International Criminal Law* (Oxford, 2013) at 21.

<sup>63</sup> *Ibid.*, at 20.

<sup>64</sup> *Ibid.*

versal values.” Significantly, the UN Security Council recognized in 2007 that climate change poses a threat to peace and security of mankind.<sup>65</sup> This view was shared by the Extinction Rebellion protest group who have advocated recently for the ICC to play a role in prosecuting climate change-related damage.<sup>66</sup> Moreover, the Security Council has recognised that attacks on the environment have consequences in terms of international peace and security.<sup>67</sup> And according to Natalie Klein, illegal, unregulated and unreported (IUU) fishing is not only an environmental concern, and should be regarded as a maritime security concern of coastal states.<sup>68</sup>

On the other hand, the fourth criterion concerning the immunity of state officials is of limited applicability to the rules of international criminal law in the context of international crimes involving environmental damage, as government officials will only in limited circumstances be directly responsible for environmental damage (possibly, for example, in the context of environmental crimes committed by state-owned companies or when environmental licenses are fraudulently issued).<sup>69</sup> This of course does not mean that the ICC jurisdiction is limited to international crimes committed by state officials in a governmental capacity (although war crimes, genocide and crimes against humanity are often committed by states officials).

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<sup>65</sup> Following the Security Council meeting on “Energy, Security and Climate” held on 17 April 2007. See Security Council Holds First-Ever Debate On Impact Of Climate Change On Peace, Security, Hearing Over 50 Speakers, 5663rd Meeting, SC/9000, 17 April 2007. Resolution adopted by the General Assembly [without reference to a Main Committee (A/63/L.8/Rev.1 and Add.1)] 63/281. Climate change and its possible security implications, Sixty-third session, Agenda item 107. See also, *ibid*.

<sup>66</sup> See Harry Cockburn, Climate Change Activists who occupied International Criminal Court arrested by the Dutch Police, *The Independent* (16 April 2019), at <https://www.independent.co.uk/environment/climate-change-protest-extinction-rebellion-international-criminal-court-the-hague-a8872621.html> (accessed 22 September 2019). See generally, K. Davies and T. Riddell, The Warming War: How Climate Change is Creating Threats to International Peace and Security, 30 *Georgetown Environmental Law Review* 1 (2017).

<sup>67</sup> L.A. Malone, “Green Helmets: A Conceptual Framework for Security Council Authority in Environmental Emergencies”, (1995) 17 *Michigan Journal of International Law* 515; N. Schrijver, “International Organization for Environmental Security”, (1989) 20 *Security Dialogue* 115.

<sup>68</sup> See Natalie Klein, *Maritime Security and the Law of the Sea* (OUP, 2011) at 97.

<sup>69</sup> See also, Pereira, above note 38.

As argued by Robert Cryer et al, with exception of the crime of aggression, the status of the perpetrator is almost always irrelevant to define international criminal responsibility.<sup>70</sup>

Yet “international environmental crime” broadly defined (or “*latu sensu*”) may include illegal trade in wildlife;<sup>71</sup> illegal trade in ozone-depleting substances;<sup>72</sup> and dumping and illegal transport of various kinds of hazardous wastes,<sup>73</sup> since there are international conventions requiring signatory parties to introduce, among others, penal measures against violations of those agreements. It is thus possible to broadly define certain types of environmental damage as international environmental crimes<sup>74</sup> “(whenever) there is movement of goods across boundaries (i.e. smuggling etc) or a transboundary impact to offences.”<sup>75</sup> Those offences could be classified as “supranational crimes” or “transnational crimes,” to be distinguished from “crimes under international law” which are subject to the jurisdiction of an international criminal tribunal.<sup>76</sup> It should be noted that illegal logging is not covered by any international convention establishing punitive measures and could not be considered “international environmental crimes” even in this broader sense. As regards illegal fishing, although no binding international agreements require states to criminalise it, the FAO has implemented a number of initiatives in

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<sup>70</sup> R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge, 2011) at 28. See also Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, Volume 107, Issue 2 April 2013, pp. 334–377 addressing this question in the context of crimes against humanity.

<sup>71</sup> Washington Convention on International Trade in Endangered Species of Fauna and Flora (CITES), 993 UNTS 243, adopted on 03 March 1973; in force 07 January 1975.

<sup>72</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, opened for signature 16 September 1987, entry into force 01 January 1989, 1522 UNTS 3.

<sup>73</sup> Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Other Waste and their Disposal, 1673 UNTS 126. 22 March 1989; 05 May 1992.

<sup>74</sup> See also, Ludwik Teclaff, “Beyond Restoration – The Case of Ecocide”, 34 *Natural Resources Journal* (1994) 933.

<sup>75</sup> See Hayman, Gavin and Brack, Dunkan, *Workshop Report: International Environmental Crime: The Nature and Control of Environmental Black Markets* (the Royal Institute of International Affairs, London 1998).

<sup>76</sup> See also, R. Cryer, et al above n.70, at 4–6.

order to eliminate illegal, unregulated and unreported (IUU) fishing, calling on states to adopt sanctions which are “of sufficient severity.”<sup>77</sup> One commentator argued that this high number of international treaties and other instruments providing for prohibitions and punishment for environmental damage support the case for creation of an international crime against the environment in times of peace.<sup>78</sup>

Of course, it is not that only crimes classified as “international” may be the subject of an international tribunal – any conduct potentially might – this being more a policy question of which crimes the relevant body setting up a court or tribunal want to establish.<sup>79</sup> Similarly, Frederic Megret takes an expansive interpretation and argues that internationally mandated domestic criminal law under international agreements could legitimately be considered part of international criminal law and that there is no clear criterion to fundamentally distinguish them from the supranational criminal law that is deemed partly worthy of prosecution by international criminal tribunals.<sup>80</sup> He goes on to argue that crimes in the first category may one day move to the second, and crimes in the second are always partly reliant on the mechanisms of the first. Following this more expansive interpretation suggested by Megret, it is possible to regard some forms of transnational criminal activities – including illegal wildlife trade, transboundary illegal waste movements, and illegal fishing – as forming part of the body of international criminal law. This rationale adds support for the case for a broader crime of ecocide under international law which would have the potential to encompass a wide range of prohibited transnational criminal activities.

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<sup>77</sup> See the voluntary 2001 FAO *International Plan Of Action To Prevent, Deter And Eliminate Illegal, Unreported And Unregulated Fishing*: (21). See also, See also, the 2016 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. See also Pereira, N. 38 above.

<sup>78</sup> Matthew Gillet, note 25 above.

<sup>79</sup> For example, the Special Tribunal for Lebanon had jurisdiction over, inter alia, terrorism, or the Kosovo Specialist Chambers, with jurisdiction over, inter alia, other crimes under domestic law.

<sup>80</sup> See F. Megret, “International Criminal Law”, in J. Beard and A. Mitchell (eds.), *International Law in Principle* (2009). See also Frederic Megret, “The Case for a General International Crime against the Environment”, in Sebastien Jodoin and Marie-Claire Condonier Segger (eds), *Sustainable Development, International Criminal Justice and Treaty Interpretation* (CUP, 2013)



### 2.3 *The Legal Elements of a Crime of Ecocide: the Mens Rea* Requirement and the Scale and Severity of Environmental Damage

From a practical as well as legal perspective one of the challenges would be to establish the degree of *mens rea* required to establish a crime of ecocide. Many instances of environmental offences are committed without intention, including in the context of accidental oil spills or nuclear accidents.<sup>81</sup> A more restrictive definition of a crime of ecocide might include a *mens rea* element of intention or recklessness in destroying the planet.<sup>82</sup> Yet if applied in those strict terms, examples of acts of ecocide would be rare. Indeed, most cases of environmental damage are not sufficient to destroy the planet as a whole; rather it is the accumulation of different acts of environmental damage and pollution that endangers the life in the planet.<sup>83</sup> Although under the *Draft Ecocide Act* (2011) applied in the UK Supreme Court mock trial in 2011 it was proposed that an international crime of ecocide should include strict liability offences,<sup>84</sup> most authors conceptualising the crime of ecocide have argued that intention or recklessness would be required, and that negligence and strict liability would be insufficient.<sup>85</sup> Moreover, as will be further discussed below, “specific intent” is required for the commission of some of the Rome Statute crimes such as genocide.<sup>86</sup>

Based on the codification attempts of the ILC discussed above, a combination of existing human rights documents, emerging Conventions in draft form, and various sources of soft-law, some publicists have suggested that there is a strong case for the recognition of an international crime of ecocide in cases involving serious environ-

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<sup>81</sup> *Ibid.*

<sup>82</sup> For a discussion of the possible features of an international crime of “*geocide*”, see Lynn Berat, “Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law”, *Boston University International Law Journal* (Fall, 1993). Indeed, it is not impossible to imagine acts of *geocide*, in particular if the proliferation of nuclear weapons were to lead them to fall in the hands of rogue states or groups.

<sup>83</sup> Regina Rauxloh, “The Role of International Criminal Law in Environmental Protection” in F. Botchway (ed.) *Natural Resource Investment and Africa's Development* (Edward Elgar, 2011), at 447.

<sup>84</sup> This proposal appeared in the *Draft Ecocide Act* (2011), Art. 12. See further, <http://eradicatingecocide.com> (accessed 15 March 2020). See also, Pereira, note. 38.

<sup>85</sup> See e.g. McLaughlin above n. 45.

<sup>86</sup> See section 3.2. below.

mental damage.<sup>87</sup> It is argued that the sheer harm caused by ecocide justifies its application during peacetime activities that destroy or damage ecosystems in a massive scale. In this vein, they have built the case that these environmental crimes could rise to the status of *jus cogens* – that is, a peremptory norm – similar to the prohibition on slavery or the general prohibition on the use of force, making it unlawful for states to derogate from that norm in future agreements.<sup>88</sup> It is then argued that causing severe environmental harm could lead to the breach of an *erga omnes* duty of care arising from international environmental law and human rights obligations and so to the commission of an international delict.<sup>89</sup> This argument mirrors an earlier view by Theodor Meron that “there is a clear trend toward the criminalisation of international law.”<sup>90</sup> He further argues that this “trend is supported by simultaneous expansion of jurisdiction to prosecute crimes arising from both international and non-international conflicts, in both international and domestic tribunals, which in turn has been spurred by recent developments in customary law.”<sup>91</sup> Although this statement concerned international criminal law in general and was not specific to the environment, it provides an early endorsement – or at least a recognition – of a trend towards criminalization in international law and institutions which has been confirmed following the creation of international courts and tribunals and subsequent state practices and which could eventually be extended to protect a wider range of environmental values.

Therefore it appears crucial that if the ICC jurisdiction were to be extended to include ecocide, it would have to take into account the *scale and severity* of the impact on the environment, for example the number of victims or the degree of harm caused to the environment. In this vein, under the 2016 OTP Policy paper the gravity of the offence is a significant element driving the start of preliminary investigations which ultimately limits prosecutorial discretion.<sup>92</sup> This

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<sup>87</sup> See for example, M. Gray, above n. 35; Teclaf, above n. 74.

<sup>88</sup> See *ibid.* and Article 53 of the *Vienna Convention on the Law of Treaties* which contains the following definition of the concept of peremptory norms: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 115 UNTS 331 (entered into force 27 January 1980).

<sup>89</sup> M. Gray, above n. 35, at 267.

<sup>90</sup> Theodor Meron, “Is International Law Moving Towards Criminalization?” *European Journal of International Law* 9 (1998) 18–31.

<sup>91</sup> *Ibid.*

<sup>92</sup> See Office of the ICC OTP policy paper n.1, at 12.

is in line with the enforcement of criminal sanctions for environmental protection at the national level which is regarded in many legal systems as the *ultimum remedium*.<sup>93</sup> Yet depending on how it is framed, the emphasis on the seriousness of the offence could pose a significant limitation to the definition of ecocide. It could mean that perhaps only the most serious incidents of environmental damage, for example the state failure to prevent a nuclear accident,<sup>94</sup> significant oil spills<sup>95</sup> or a major industrial accident (such as *Bhopal* disaster in India),<sup>96</sup> for example, could be recognised as acts of ecocide.<sup>97</sup> The conceptualisation of an international crime of ecocide based on the seriousness and likelihood of harm would be consistent with existing International Law Commission's initiatives aimed at defining environmental crimes as crimes under international law.

Regina Rauxloh – borrowing from the Additional Protocol I to the Geneva Conventions – argued that the crime of ecocide should prohibit acts “which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”<sup>98</sup> Although this definition is helpful in linking a definition of ecocide to a specific threshold of environmental damage, it is questionable whether the particularly high standards established under Additional Protocol I to the Geneva Conventions (applicable to “war crimes”) should be replicated to the context of ecocide committed in the peacetime context or in post-conflict scenarios. For example, because the most serious aspects of the damage caused by Saddam Hussein's lighting of the Kuwaiti oil wells lasted a shorter time than expected, some commentators considered this to fall short of the

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<sup>93</sup> See further, Douglas Husak, “The Criminal Law as Last Resort”, 24 *Oxford Journal of Legal Studies* 2 (2004) 207–235.

<sup>94</sup> Such as *Chernobyl* nuclear accident in 1986; or the *Fukushima* disaster in 2011. See Linda Malone, The Chernobyl Accident: a Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution. *Columbia Journal of Environmental Law* 12 203 (1987).

<sup>95</sup> This could include, for example, the *Torrey Canyon* oil spill off the coast of Cornwall, Great Britain in 1967; the *Amoco Cadiz* spill off the coast of Brittany, France in 1978; and the *Exxon Valdez* oil spill off the coast of Alaska, United States in 1989.

<sup>96</sup> See C. M Abraham and Sushila Abraham, The Bhopal Case and the Development of Environmental Law in India. 40 *International and Comparative Law Quarterly* 2(1991) pp. 334–365.

<sup>97</sup> See Draft Articles on State Responsibility, above n. 43.

<sup>98</sup> See Rauxloh, above note 83.

long-term requirement of Additional Protocol I.<sup>99</sup> But even though the threshold under Article 8(2)(b)(iv) is particularly high,<sup>100</sup> it should be noted that if the crime is not being charged under that provision – and if there is no other requirement – the general seriousness/gravity requirement under Article 17(1)(d) would apply, which has been interpreted as a relatively low threshold by the Court to date.<sup>101</sup>

Still, the relevance of the scale and severity of the impact of the environmental harm was also implied when the International Law Commission made reference to “massive pollution of the atmosphere or the high seas” as possible international environmental crimes in the original version of the Draft Articles on State Responsibility.<sup>102</sup> This means that an eventual extension of the ICC jurisdiction should include most issues of global environmental concerns and large-scale harm such as the depletion of the ozone layer, global warming-related damage (for example, the environmental damage caused by sea level rises) and illegal acts leading to the exhaustion of natural resources or extinction of species.<sup>103</sup>

It should be noted that the clause referring to the natural environment under Article 8 (2)(b)(iv) of the ICC Statute is inspired by articles 35 para. 3 and 55 Additional Protocol I.<sup>104</sup> Their threshold is higher than ENMOD, which provides for disjunctive criteria.<sup>105</sup> Moreover, the reach of Article 8 (2)(b)(iv) is limited, because the

<sup>99</sup> See, e.g., Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004). See further, Gillet, above note 25.

<sup>100</sup> See associated commentary in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Hart, Third ed., 2018)

<sup>101</sup> See for example *Al Werfalli case*, Second Arrest Warrant (ICC-01/11-01/17-13), para. 30, in which the Court stated that: “The Chamber recalls that in determining whether a case is of sufficient gravity to justify further action by the Court, within the meaning of article 17(1)(d) of the Statute, it must have regard to: (i) whether the case captures those persons who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes allegedly committed, which may be examined following both a quantitative and a qualitative approach. With regard to the second element, the Chamber notes that cases encompassing a limited number of casualties or even those dealing exclusively with the destruction of buildings dedicated to religion have been considered to be sufficiently grave to justify prosecution.”

<sup>102</sup> See Article 19 (3) (d) in its Draft Articles on State Responsibility, above n. 43.

<sup>103</sup> *Ibid.*, at 449.

<sup>104</sup> Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Third ed., 2018), para. 253.

<sup>105</sup> *Ibid.*

provision only applies to international armed conflict and some scholars find this limitation of Article 8 (2)(b)(iv) particularly troubling.<sup>106</sup> Similarly, Rules 43–45 of the ICRC’s study on customary law restates the principle according to the which, prior to launching an attack, precautionary measures shall be taken.<sup>107</sup> However, like the provisions of Additional Protocol I, neither the ICC Statute nor its Elements specify the meaning of the words “widespread, long-term and excessive”.<sup>108</sup> A helpful definition of this threshold is found in the UNEP study which suggested that the notions of “widespread” should be read as encompassing an area on the scale of several hundred square kilometers, “long-term” as a period of months or approximately a season, and “serious” as involving serious or significant disruption to human life, natural and economic resources and other sources.<sup>109</sup>

In light of those considerations, my view is that a crime of ecocide under the ICC Statute should be linked to a threshold of environmental damage based on the scale and severity of harm, but it should not be restricted to “widespread, long-term and severe damage to the natural environment” as set out under Additional Protocol I of the Geneva Conventions or Article 8 (2)(b)(iv) of the ICC Statute. Other commentators have similarly proposed an international crime of ecocide that is linked to a threshold of serious environmental damage, but using a broader terminology than the Additional Protocol I. For example Poly Higgins envisioned a case in which the Court’s jurisdiction is limited to conduct that amounts to “extensive destruction, damage to or loss of ecosystem(s) of a given territory”.<sup>110</sup> Similarly, Mark Gray argued that, to be described legally as ecocide, ecological damage must be “serious, and extensive or lasting”, and result in “international consequences.”<sup>111</sup>

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<sup>106</sup> See, for example M. Wattad, “The Rome Statute & Captain Planet: What Lies Between ‘Crimes against Humanity’ and the ‘Natural Environment’?”, (2009) 19 *Fordham Environmental Law Review* 265, 268; Drumbl, *supra* note 11, at 136. See also, Gillet, note 25. See also *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No.IT-94-1-A, App.Ch., 2 October 1995 (“Tadic Jurisdiction Decision”), para. 97.

<sup>107</sup> para. 253.

<sup>108</sup> *Ibid.*

<sup>109</sup> UNEP, 5 para 1 of recommendations. See further, Lawrence, J. C. and Heller, k.j., “The limits of article 8 (2) (b) (iv) of the Rome Statute, the first ecocentric environmental war crime,” 20 *Georgetown International Environmental Law Review* 61 (2007).

<sup>110</sup> Higgins, above note 2.

<sup>111</sup> Mark Allan Gray, “The International Crime of Ecocide” (1995) 26 *California Western International Law Journal* 215, 216.

If the rationale for criminalisation at the international level based on the seriousness of the harm or threat of harm to the environment is correct, then some of the most serious incidents of environmental damage could amount to acts of “ecocide”, as mentioned above, this could include the state failure to prevent a nuclear accident, significant oil spills or a major industrial accident (such as *Bhopal* disaster in India). This would be particularly the case if environmental damage were to leave an ecosystem beyond repair, for example if a single nuclear disaster had the potential to leave the earth or particular ecosystems unfit to sustain human or animal and plant life. Moreover, when indigenous peoples are subject to serious human rights violations, including dispossession and grabbing of their lands and natural resources and the causing of environmental damage in their lands, it is very likely that the high threshold for establishment of an international crime of ecocide (or “*ethnocide*”) would be met.<sup>112</sup> Yet as will be discussed in section 2.4. below, not every human right violation constitute an international crime and so it is not necessarily the case that human rights abuses committed against indigenous peoples equate to international crimes.<sup>113</sup> However, in light of the growing number of international and regional human rights instruments protecting indigenous peoples’ rights,<sup>114</sup> crimes committed against indigenous peoples should be regarded as particularly serious – and they embody the “*anthropocentric*” element enabling the OTP to bring charges for the international crimes currently recognised in the ICC Statute, including crimes against humanity and genocide.

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<sup>112</sup> As regards decisions of the international and regional courts and tribunals addressing violations of indigenous peoples’ human rights in the context of extractive industry projects, see for example *Saramaka People v Suriname* [2007] Inter-Am Court HR (ser C) No 172; *Sawhoyamaya* [2006] Inter-Am Court HR (ser C) No 146, 73; *Moiwana Community v Suriname* [2005] Inter-Am Court HR (ser C) No 124. *Awes Tingni* [2001] Inter-Am Court HR (ser C) No 79, 5 [25]; *Kichwa Indigenous People of Sarayaku v Ecuador* [2012] Inter-Am Court HR (ser C) No 245.

<sup>113</sup> See further, T. Anthony, *Indigenous People, Crime and Punishment*, (Routledge, 2013).

<sup>114</sup> See for example *UNDRIP*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex (‘*United Nations Declaration on the Rights of Indigenous Peoples*’) and *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991). See further, Pereira, R. and Gough, O., “*Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right of Self-Determination of Indigenous Peoples under International Law*” 14 (2) *Melbourne Journal of International Law* (2013), 451.

A wide range of examples of current practices in several States that have led to serious environmental damage and illegal exploitation of natural resources, some of which could be conceptualized either individually or collectively as “ecocide”, is found in the most recent United Nations Environment Programme’s study on the “The State of Knowledge of Crimes that have Serious Impacts on the Environment” published in June 2018,<sup>115</sup> especially if one follows an expansive definition of international crimes suggested by Frederic Megret as was discussed above. For example, the UNEP study reports that wildlife crime is a particularly persistent problem in Africa, Asia and Latin America, where all kinds of species – mammals, birdlife, reptiles and amphibians, insects, and plants – are affected.<sup>116</sup> Asia, North America, and the European Union are common destinations for wildlife trafficking, alongside the Gulf countries for illegal charcoal and illegal gold from African countries.<sup>117</sup> Moreover, countries in Asia are increasingly becoming major consumer markets of a wide range of illegal wildlife resources and products including rare highly valuable wood like rosewood.<sup>118</sup> Another example of serious and illegal harms to the environment committed during peacetime include the 600 tons of caustic soda and petroleum residues were dumped in open-air public waste sites in Abidjan, Ivory Coast, in August 2006.<sup>119</sup>

In line with those developments, the ICC OTP 2016 Policy paper guides the prosecutor to assess the gravity of the crime as a key case selection criterion in “a given situation” which should reflect a

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<sup>115</sup> UNEP, *The State of Knowledge of Crimes that have Serious Impacts on the Environment* published in June 2018, [https://wedocs.unep.org/bitstream/handle/20.500.11822/25713/knowledge\\_crime\\_envImpacts.pdf?isAllowed=y&sequence=1](https://wedocs.unep.org/bitstream/handle/20.500.11822/25713/knowledge_crime_envImpacts.pdf?isAllowed=y&sequence=1) (accessed 15 March 2020). See also the London Conference on the Illegal Wildlife Trade (October 2018), <https://www.gov.uk/government/publications/declaration-london-conference-on-the-illegal-wildlife-trade-2018/london-conference-on-the-illegal-wildlife-trade-october-2018-declaration>.

<sup>116</sup> *Ibid.*

<sup>117</sup> Nellemann, C., Henriksen, R., Raxter, P., Ash, N., Mrema, E. (Eds). 2014. *The Environmental Crime Crisis: Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources. A Rapid Response Assessment*. A UNEP Rapid Response Assessment. United Nations Environment Programme and GRID-Arendal, Nairobi and Arendal, at 4. available at <http://www.unep.org/unea/docs/rracrimemecrisis.pdf> (accessed on 15 March 2020).

<sup>118</sup> The Royal Institute of International Affairs: *Controlling the international trade in illegally logged timber and wood products*, London 2002, at 9.

<sup>119</sup> See also Gillet, above note 25.

“concern to the international community as a whole.”<sup>120</sup> In particular, the factors that will guide the ICC prosecutor include the “scale, nature, manner of commission, and impact of crimes.”<sup>121</sup> The manner of commission of a crime is to be assessed *inter alia* (...) on whether it results in “the destruction of the environment or protected objects.”<sup>122</sup> Moreover, when assessing the impact of crime the ICC prosecutor will give particular consideration to prosecuting *Rome Statute crimes* committed by means of, or that result in, *inter alia* the destruction of the environment. Therefore, the assessment of gravity will most certainly limit the exercise of prosecutorial discretion by the ICC prosecutor and inform her to act guided by the substantive and procedural provisions under the Rome Statute.<sup>123,124</sup> This suggests that the ICC prosecutor’s discretion is not absolute and is limited by the Rome Statute and the ICC Rules of Procedure and Evidence. Indeed, it is in the assessment of the gravity of the offence that the ICC Prosecutor’s Policy Paper will prove to be particularly influential, given the emphasis that it places on crimes committed by means of, or resulting in, the “destruction of the environment” and leading to “environmental damage inflicted on affected communities” as particularly serious crimes.<sup>125</sup>

Yet the identification of individual offenders would not always be straightforward. This is particularly so in the case of illegal economic activities causing serious pollution which come from many sources as the identification of individual offenders often proves to be difficult, if

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<sup>120</sup> ICC OTP Policy paper, above n. 1, para. 35.

<sup>121</sup> ICC OTP paper, above n.1, paras 32 and 37.

<sup>122</sup> ICC OTP paper, above n.1 para. 41.

<sup>123</sup> See also, Alessandra Mistura, “Is There Space for Environmental Crime under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework”, 14 *Columbia Journal of Environmental Law* 1 (2018) at 216.

<sup>124</sup> See Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, reg. 1.1 (Apr. 23, 2009), 29.2. The gravity of the offence as an element for the court to decide to the admissibility of a case pursuant to Article 17.1 (d) of the Rome Statute, and prosecutor in determining whether to start an investigation under Article 15.3 or Art. 53 of the Rome Statute. For example, Regulation 29 of the OTP Regulations provides generally that, in assessing the gravity for the purposes of initiating an investigation, the Prosecutor shall consider *inter alia* the scale, the nature, the manner of commission, and the impact of potential crimes.

<sup>125</sup> Office of Prosecutor Policy Paper, above n.1, paras 13–14.



not impossible.<sup>126</sup> In fact, the difficulties in identifying and assigning liability to specific individual offenders would be a particularly strong argument for a wider range of mechanisms establishing *State* responsibility for environmental damage in the civil sphere to complement the mechanisms under international criminal law for assigning individual criminal liability.<sup>127</sup>

#### 2.4 *A Human Rights-Centred Crime of Ecocide?*

When serious environmental damage, illegal natural resources exploitation and land grabbing amount to human rights violations, arguably the case for criminalisation at the international level becomes even more apparent and imperative.<sup>128</sup> The importance of environmental protection to international human rights is now recognised in international environmental and human rights conventions and decisions of international and national courts and tribunals.<sup>129</sup> It could be argued that since the ICC has jurisdiction over the most serious crimes of concern to the international community, when defining the limits of those crimes the ICC should also prosecute environmental offences amounting to human rights abuses. Yet it is often not clear the exact point at which environmental damage crosses the threshold of a human rights violation,<sup>130</sup> and it is certainly

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<sup>126</sup> McLaughlin, above n. 45, at 397–398. There is also the option of being more strategic in litigation and bringing some key cases that will develop the case law and allow for gradual emergence of new standards and other cases under its shadow. See for example *Al Mahdi* or *Werfalli* cases before the ICC.

<sup>127</sup> Rauxloh above n. 83. See also, *ibid.*

<sup>128</sup> See further Francesca Romanin Jacur, Angelica Bonfanti and Francesco Seatzu (eds), *Natural Resource Grabbing: An International Law Perspective* (Brill, 2015).

<sup>129</sup> See for example Article 11 of the 1988 Additional Protocol to the American Convention of Human Rights (“Protocol of San Salvador” (adopted on November 17, 1988 not yet in force); Article 24 of the African Charter on Human and People’s Rights; and Article 37 of the Charter on Fundamental Rights of the European Union (2010/C 83/02). See generally Alan Boyle and Michael Anderson (eds). *Human Rights Approaches to Environmental Protection* (Oxford : Clarendon Press, 1996). For an overview of the case law, see *infra*.

<sup>130</sup> The case law of the European Court of Human Rights include *Hatton and Others v. the United Kingdom [GC]*, no. 36022/97, § 96, ECHR 2003–VIII); *López Ostra v. Spain* (judgment of 9 December 1994, Series A no. 303-C; *Guerra and Others v. Italy* (judgment of 19 February 1998, Reports of Judgments and Decisions 1998–I); *Fadeyeva v. Russia* (no. 55723/00, ECHR 2005–IV); *Moreno Gómez v. Spain* (no. 4143/02, ECHR 2004–X) In *Sporrong and Lönnroth v Sweden* (1982) 51 Eur Ct

not the case that every human rights violation is an international crime.<sup>131</sup> However, in the past few decades there has been a growing international recognition of the potential for use of human rights norms for achieving environmental protection.<sup>132,133</sup> For example the UN Committee on Economic, Social and Cultural Rights regarded the contamination of the areas inhabited by people by various toxic wastes as a violation of fundamental social and economic rights.<sup>134</sup> And although the 1998 Council of Europe Convention on the Protection of the Environment through criminal law<sup>135</sup> is not in force, in *Oneriyildiz v Turkey*<sup>136</sup> the European Court of Human Rights noted the text of the Convention when assessing the basis for authorities to establish criminal offences for loss of life involving the disposal or treatment of hazardous waste.<sup>137</sup>

In what Françoise Tulken has termed the “offensive role of human rights”, (international) criminal law plays an important role in protecting human rights as has been recognized by international and

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Footnote 130 continued

H R para 61 the ECtHR; *Fagerskiold v Sweden* (Application No 37664/04, decision of 26 February 2008).

<sup>131</sup> On the relationship between international criminal law and international human rights law, see for example G. Sluiter, “International Criminal Proceedings and the Protection of Human Rights”, 37 *New Eng. L. Rev* (2002).

<sup>132</sup> See P. Sharp, “Prospects for Environmental Liability in the International Criminal Court” 217 *Virginia Law Journal* (1999), at 219.

<sup>133</sup> See *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (“*ICCPR*”); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (“*ICESCR*”).

<sup>134</sup> See Economic, Social And Cultural Rights, Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights. Report submitted by the Special Rapporteur on toxic waste, Mrs. Fatma-Zohra Ouhachi-Vesely GE.01, , Fifty-seventh session, E/CN.4/2001/55 19 January 2001, <https://www2.ohchr.org/english/issues/environment/waste/> (accessed 22 September 2019).

<sup>135</sup> 1998 Strasbourg Council of Europe Convention on the Protection of the Environment through criminal law (ETS no. 172), not yet in force.

<sup>136</sup> *Oneriyildiz v Turkey*, App. No. 48939/99 [2004] Eur.Ct. H.R 657 (30 November 2004).

<sup>137</sup> See also Diana Shelton, “Legitimate and Necessary: Adjudicating Human Rights Violations related to Activities Causing Environmental Harm or Risk”, *JHRE* (2015) pp. 139–155.

regional human rights courts.<sup>138</sup> For example in the *M.C. v. Bulgaria* judgment of 4 December 2003, the European Court of Human Rights held that “effective protection against rape and sexual abuse requires measures of a criminal-law nature”.<sup>139</sup> William Schabas has also observed the growing cross-fertilization between human rights and the international criminal justice system.<sup>140</sup> For example prosecutions for incitement to genocide and hate speech as a crime against humanity at the International Criminal Tribunal for Rwanda raised difficult issues concerning the scope of freedom of expression. In the Trial Chamber decision, there was much reliance upon the case law of the European Court of Human Rights, as the judges sought to justify a rather high level of intrusion in the freedom of the media.<sup>141</sup>

In one example of serious human right violations involving environmental damage and illegal natural resources exploitation in a regional context, the *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* case before the African Commission on Human Rights<sup>142</sup> concerned the negative health and environmental impacts of oil exploration in Ogoniland due to the contamination of water on indigenous land with lead and mercury affecting community health, particularly that of the children. Nigeria was found to have violated several articles of the African Charter and the African Commission called on the government to ensure protection of the environment, health and livelihood of the Ogoni people.<sup>143</sup>

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<sup>138</sup> Françoise Tulken, *The Paradoxical Relationship between Criminal Law and Human Rights*, *Journal of International Criminal Justice* 9 (2011), 577. On the relationship between international criminal law and international human rights law, see also example G. Sluiter, “International Criminal Proceedings and the Protection of Human Rights”, 37 *New Eng. L. Rev.* (2002).

<sup>139</sup> *M.C. v. Bulgaria*, Appl. No. 39272/98, 4 December 2003, x186, ECHR 2003-XII (extracts).

<sup>140</sup> William Schabas, *Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights*, *Journal of International Criminal Justice* 9 (2011), 609.

<sup>141</sup> Judgment and Sentence, *Nahimana et al.* (ICTR-99-52-T), Trial Chamber, 3 December 2003, x1001. See also: Judgment, *Bikindi* (ICTR-01-72-T), Trial Chamber, 2 December 2008, x 380, fn.857. See further, *ibid.*

<sup>142</sup> African Commission on Human and Peoples’ Rights, Communication No 155/96: *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, 30th sess (27 October 2001) [56] (“Ogoni”).

<sup>143</sup> *Ibid* [68]–[69]. See further, Fons Coomans, *The Ogoni Case before the African Commission on Human and Peoples Rights*, 53(3) *International and Comparative Law Quarterly* (2003).

Moreover, the Commission called for the compensation to victims of human rights violations – including relief and resettlement assistance to victims of government raids – and undertaking Comprehensive Clean-Up Of Lands And Rivers Damaged By Oil Operators.<sup>144</sup>

It is submitted that it is fundamental that environmental protection and human rights protection continue to evolve in close connection which would further advance the case for creation of an international crime of ecocide. The cross-fertilisation between the two fields, as recognized by the decisions of international courts and tribunals discussed above, further supports the case for a human-rights centred crime of ecocide. However, this could simultaneously raise questions about what the added value of the ICC jurisdiction would be in this context, given that there are existing human rights courts, tribunals and treaty bodies which can enforce environmental norms amounting to human rights violations. Yet the jurisdiction of international and regional human rights courts and tribunals is often limited to a certain region or in scope – providing remedies against the State rather than establishing individual (criminal) responsibility – and they are not strictly concerned with realizing international criminal justice for serious environmental damage or illegal natural resources exploitation.<sup>145</sup> As was observed by Emmanuel Daux, there is a significant difference between a justice system affording civil redress for damage suffered by victims by holding states responsible in the manner of the European Court of Human Rights does; and a justice system based on criminal responsibility of the perpetrators of international crimes, with the victims having no other place in the proceedings than as witnesses.<sup>146</sup> Hence human rights courts and tribunals could not provide an effective replacement for the ICC jurisdiction as a forum for prosecutions against individual offenders for ecocide.

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<sup>144</sup> *Ibid* [68]–[69].

<sup>145</sup> In this context, it should be reminded of the ongoing debate over whether a specialist International Environmental Court should be set up. See further Ellen Hey, *Reflections on an International Environmental Court*, (Martinus Nijhoff Publishers, 2000); and Sean Murphy, *Does the World Need a New International Environmental Court?* 32 *Geo. Wash. J. Int'l L. & Econ.* 333 (1999–2000). On the question of enforcing environmental rights generally see the classic work by Christopher Stone, *Should Trees have Standing? Law, Morality and the Environment* (OUP, 2010).

<sup>146</sup> Emmanuel Daux, The Place of Human Rights Courts and International Criminal Courts in the International System, *Journal of International Criminal Justice* 9 (2011), 597.

### III THE LIMITS OF THE ICC EXISTING JURISDICTION OVER SERIOUS ENVIRONMENTAL DAMAGE, ILLE- GAL NATURAL RESOURCE EXPLOITATION AND LAND GRABBING

This section starts with a brief overview of the environmental war crime under the ICC Statute, as it has been the subject of considerable academic attention and commentaries.<sup>147</sup> It then focuses on the less explored question of how far two of the existing crimes under the ICC (crimes against humanity and genocide) could be used to prosecute environmental damage, illegal natural resources exploitation and land grabbing. The section finally evaluates the likelihood that the 2016 Office of the Prosecutor will impact on the prosecutions of those existing ICC Statute crimes, taking also into account the question of corporate criminal liability.

#### 3.1 *The “Environmental” War Crime Under the ICC Statute*

The war crime under Article 8(2)(b)(iv) of the ICC Statute adopts an eco-centric formulation that requires an international attack to be committed with the knowledge that it would 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.”<sup>148</sup> This provision thus mirrors Article 20 (g) of the ILC Code of Offences against Peace and Security.<sup>149</sup> Although the ICC statute does not define “damage to the environment,” some guidance could be found in other international agreements<sup>150</sup> even though one of the shortfalls of many international environmental agreements is that they generally fail to define environmental dam-

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<sup>147</sup> See further Marie G. Jacobsson, Special Rapporteur, Third report on the Protection of the Environment in relation to Armed Conflicts, International Law Commission, Sixty-eighth session (2016).

<sup>148</sup> Rome Statute, *supra*, Article 8 (2)(b)(iv). (emphasis added)

<sup>149</sup> Art. 20 (g) ILC Draft Code of Crimes Against the Peace and Security of Mankind, above n. 28.

<sup>150</sup> See Convention on International Liability for Damage Caused by Space Object, March 29, 1972, 961 UNTS 187, Article I (1).

age.<sup>151</sup> It is in the context of war crimes that the ICC OTP 2016 policy paper is expected to be particularly influential in driving the court to adjudicate over crimes committed through environmental means and illegal resources exploitation. It is possible that the court will come to clarify not only the scope of the “environmental” war crime under Article 8 (2)(b)(iv), but also whether the illegal exploitation of natural resources in conflict situations (such as illegal logging or the destruction and trafficking of endangered species) could amount to “pillage” and therefore to a war crime under Article 8 (2) (b) (xvi).<sup>152</sup> The clarification by the court on this question would be particularly significant in light of a string of Security Council Resolutions recognizing the interconnections between the exploitation of natural resources and armed conflicts, including in the contexts of the conflicts in Sierra Leone and the Democratic Republic of Congo.<sup>153</sup> Yet one study suggested that, even in the limited context of war crimes, the current international rules on armed conflict may be ineffective in the context of environmental crime.<sup>154</sup> In any event, the impact of the ICC OTP 2016 policy paper is likely to be limited even in the context of war crimes as it is only “an internal document of the Office and, as such, it does not give rise to legal rights.”<sup>155</sup> In the more recent ICC Trial Chamber VI case *Bosco Ntaganda* was found guilty of 18 counts of war crimes and crimes against humanity committed in the Democratic Republic of Congo in 2002–2003.<sup>156</sup> In the proceedings it was alleged that the UPC (Union Patriotic Congolose) entered into agreements with private companies providing for exploitation of natural resources in the territory under its control, in exchange for

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<sup>151</sup> See e.g. the 1988 Convention on Regulation of Antarctic Mineral Resources Activities (CRAMRA) (not in force), Article 1(15)).

<sup>152</sup> For an in depth analysis of whether the war crime of pillage could address the illegal exploitation of natural resources in armed conflicts, see Larissa van den Herik and Daniella Dam-De Jong, “Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation During Armed Conflicts” 22 *Criminal Law Forum* 3, Springer Netherlands (2011).

<sup>153</sup> See Resolution 1306 (2003) concerning the illicit trade in diamonds during the conflict in Sierra Leone; and Resolutions 1457 (2003), 1856 (2008) and 1952 (2010) concerning the DRC. See further, *ibid.*

<sup>154</sup> See K. Hulme, above n. 10.

<sup>155</sup> ICC OTP policy paper above n.1, para 2.

<sup>156</sup> See *The Prosecutor v. Bosco Ntaganda* Situation: Situation in the Democratic Republic of the Congo, Trial Chamber VI, 08 July 2019

payment.<sup>157</sup> However, illegal exploitation of natural resources played a minor role in Bosco Ntaganda's conviction for crimes against humanity, and the charges for the war crime of pillage related to a number of appliances, but not natural resources, and those charges were dismissed by the court. In fact, Ntaganda was not charged with pillage of natural resources but the Trial Chamber does make positive findings that the UPC entered into agreements with private companies for the exploitation of natural resources.<sup>158</sup>

Moreover, even though in the *Bemba* case the Trial Chamber III found the MLC soldiers committed the war crime of pillaging throughout the 2002–2003 CAR Operations and throughout the areas in which they were present,<sup>159</sup> the Appeals Chamber found errors in the judgment and reversed all charges against the defendant for war crimes and crimes against humanity.<sup>160</sup> And as with the *Ntaganda* case, Bemba was not charged for pillaging natural resources but for pillaging a number of goods and appliances such as household items (such as furniture), business supplies, tools, money, vehicles and/or livestock.<sup>161</sup> This has led Jeremie Gilbert to note that there is a lack of a developed jurisprudence examining the connections between international crimes and natural resources and currently no systematic jurisprudence regarding pillage of natural resources.<sup>162</sup>

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<sup>157</sup> *Ibid.*, para. 440.

<sup>158</sup> See (ICC-01/04-02/06-2359), para 440. Mongbwalu, the second most important town in Ituri after Bunia as known to be a strategic location and a gold mining town, where the Kilo-Moto gold mining company was located. Two UPC/FPLC attempts to control Mongbwalu and the surrounding areas (...), the first failed attempt and the First Operation. During its control over Mongbwalu, the UPC/FPLC showed interest in the factory of the Kilo-Moto gold mining company and also showed its intention to raise funds in relation to the exploitation of the gold mines.

<sup>159</sup> Trial Chamber III Situation in the Central African Republic in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo, 21 March 2016, ICC-01/05-01/08-3343.

<sup>160</sup> Appeals Chamber, Situation in the Central African Republic in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo, 8 June 2018, ICC-01/05-01/08.

<sup>161</sup> Trial Chamber III Situation in the Central African Republic in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo, 21 March 2016, ICC-01/05-01/08-3343, para. 643.

<sup>162</sup> See J. Gilbert, *Natural Resources and Human Rights: An Appraisal* (OUP, 2018) at 106. There is instead an “episodic” approach to this question by the ICJ. See e.g. *Armed Activities on the Territory of the Congo (Congo v Uganda) (Judgment)* [2005] ICJ Rep 168. See further. P. Keenan “Conflict Minerals and the Law of Pillage” 14 (2) *Chicago Journal of International Law* (2014) 524–558.

It should be noted though that International Law Commission since its sixty-fifth session in 2013 has decided to work on the topic of the “protection of the environment in relation to armed conflicts” and an outcome document endorsed by the UN General Assembly may come to clarify the circumstances in which illegal natural resources exploitation may amount to a war crime.<sup>163</sup> In her second report, the Special Rapporteur addressed certain questions related to the protection of the environment in non-international armed conflicts, with a focus on how the international rules and practices concerning natural resources may enhance the protection of the environment during and after such conflicts.<sup>164</sup> The second report also addressed certain questions related to the responsibility and liability of States and non-State actors and has proposed seven draft principles for the protection of the environment in armed conflicts.<sup>165</sup>

Yet because Article 8 (2)(b)(iv) and Article 8 (2) (b) (xvi) only apply in cases where environmental damage occurs in the course of an international conflict, they effectively preclude cases where environmental damage occurs during peacetime or in the course of a non-international conflict.<sup>166</sup> Those limitations restrict the punitive and deterrence impacts of criminal liability and hence fail to provide the basis for a broader recognition of an international crime of ecocide.

### 3.2 *Beyond War Crimes: The Basis for and Limits of the ICC Jurisdiction Over Crimes Against Humanity and Genocide*

Beyond the context of war crimes, a less explored issue among scholars and policy makers is the scope for environmental damage, illegal natural resources exploitation and land grabbing to be prosecuted under the existing crimes listed in Article 5 of the Rome Statute if it they meet the typologies of the crimes of genocide and crimes against humanity. Indeed, in case there is no consensus among the parties to extend the ICC over ecocide, the only other possible avenues for prosecution of environmental damage before the ICC would be in the context of war crimes, genocide and crimes against humanity.

<sup>163</sup> See further, Marie G. Jacobsson, above note 146.

<sup>164</sup> *Ibid*, Para. 64.

<sup>165</sup> See second report of the Special Rapporteur (A/CN.4/728): draft principle 6 *bis* (Corporate due diligence), draft principle 8 *bis* (Martens Clause), draft principle 13 *bis* (Environmental modification techniques), draft principle 13 *ter* (Pillage), draft principle 13 *quater* (Responsibility and liability), draft principle 13 *quinqies* (Corporate responsibility), and draft principle 14 *bis* (Human displacement).

<sup>166</sup> See also, Mwanza, above note 20.



The challenges in classifying environmental crime as falling under the umbrella of one of the existing crimes covered by the ICC statute is evident in the case of crimes against humanity.<sup>167</sup> Like genocide, crimes against humanity do not need to occur in the context of an armed conflict. The Rome Statute defines crimes against humanity as acts committed as part of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack”<sup>168</sup> and includes murder, extermination, “or other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health,”<sup>169</sup> which could include for example water contamination caused to kill a civilian population. But to what extent could environmental damage amount to a crime against humanity under the Rome Statute? Firstly, as per Article 7 (1) (k) of the Rome Statute, the attack to the environment would need to endanger human health in order to be recognized as a crime against humanity, thus it would leave the environment as such without effective legal protection. Moreover, the Rome Statute requires that the attack must be “widespread or systematic”. This certainly limits the scope of this provision as many instances of environmental damage would not meet this threshold. As regards the requirement that the act is directed at a civilian population, when the continuous and foreseeable result of the extraction produces severe environmental damage which kills local populations, a policy to continue such extraction becomes tantamount to an official policy to carry out attacks against a civilian population.<sup>170</sup> According to Article 7 (2) (a) of the Rome State, this act must be pursuant to “a State or organizational policy” to commit such attack. The policy does not need to emanate from the State – non-State actors or private individuals who exercise de facto power can constitute the entity behind an organizational policy.<sup>171</sup>

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<sup>167</sup> See generally, Iris Haenen, “Classifying Acts as Crimes Against Humanity in the Rome Statute of the International Criminal Court”, 14 *German Law Journal* 7 (2013).

<sup>168</sup> See Rome Statute, Article 7 (1).

<sup>169</sup> *Ibid*, Article 7 (1) (k).

<sup>170</sup> See P. Sharp, above note 131 at. 239. and Pereira, above note 38. For a detailed analysis of the “widespread or systematic” requirement, see Triffterer / Ambos (eds.) above N.100. pp. 167–172

<sup>171</sup> Triffterer / Ambos (eds.) above note 100 p. 246. The ICC’s position is that the concept of “organisation” is predicted on the respective group’s “capability to perform acts which infringe on basic human values” and not “the formal nature of a group and the level of organisation” See e.g. Situation in the Republic of Kenya, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber.

It is not impossible to think of examples of environmental damage which are “widespread or systematic” and as part of an “official policy to carry out attacks against a civilian population.” Those conditions may have been fulfilled when a pipeline operated by Texaco Petroleum Company / Chevron in Ecuador continuously discharged millions of gallons of toxic waste and oil over a period of twenty years, causing damage to the environment and indigenous people.<sup>172</sup> Texaco / Chevron started its oil extraction operations in Ecuador since 1964 and, following the serious environmental and human health damage caused by its operations in the 1980s, it cancelled all operations in Ecuador in 1993. Damage resulting from oil exploitations by the company posed a threat to the livelihood of the people and the viability and health of the environment. The indigenous groups that inhabited the Ecuadorian Amazon region have been deeply affected.<sup>173</sup> A Communication representing several victims (the ‘Lago Agrio Victims’ request”) was brought before the ICC prosecutor in October 2014<sup>174</sup> arguing that those violations amounted to crimes against humanity under Article 7 of the Rome Statute, but that communication was dismissed by the ICC prosecutor in April 2015 based on evidentiary grounds. Moreover, the ICC prosecutor dismissed the petition on the basis of the *lex temporalis* principle since the events in question happened before the entry into force of the ICC statute and Ecuador’s ratification of the ICC Statute in 2002.<sup>175</sup>

A similar fate is looking set to happen to a Communication brought by Global Diligence LLP on behalf of the victims (“Filing Victims”) before the OTP in October 2014. The Communication alleged that widespread and systematic large-scale land grabbing conducted by the Cambodian ruling elite since the year 2000 by way of illegally seizing and re-allocating millions of hectares of valuable land (and leading to the displacement of over 60,000 victims) for exploitation or speculation by its members and foreign investors amounted to crimes against humanity as defined under Article 7 of

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<sup>172</sup> See US 2nd Cir. *Aguinda v. Texaco Inc.* 2000 10650.

<sup>173</sup> See Audrey Crasson, “The Case of Chevron in Ecuador: the need for an international crime against the environment?” 9 *Amsterdam Law Forum* 3 30.

<sup>174</sup> See Communication (Oct 2014)– Situation in Ecuador (representing victims).

<sup>175</sup> For detailed analysis of this communication to the ICC and whether Chevron has committed crimes against humanity in Ecuador, see Caitlin Lambert, “Environmental Destruction in Ecuador: Crimes against Humanity under the Rome Statute?” 30 *Leiden Journal of International Law* (2017).

the ICC Statute.<sup>176</sup> The Communication, which is widely regarded to have inspired the adoption of the 2016 OTP Policy Paper on case selection and prosecution, alleges that the land grabbings amounted to a “deportation or forcible transfer of the population” which is defined in the Rome Statute as the “forced displacement of the persons concerned by expulsion or other coercive acts from the area that they are lawfully present, without grounds permitted under international law.”<sup>177</sup> It should be noted that the problem of land disputes in Cambodia had been highlighted previously by the UN Special Rapporteur on Cambodia.<sup>178</sup> However, to date no preliminary examinations have been initiated by the ICC prosecutor and little information is available on the case in light of a request of the ICC that the Communication is dealt with privacy. If the facts described in the Global Diligence Communication are accurate, it appears likely that the forced evictions in Cambodia would meet the elements of the chapeau of Article 7 in particular the “widespread or systematic attack” and potentially also the requirement that the attack is “directed against any civilian population, with knowledge of the attack.”<sup>179</sup> However, since the Cambodian government’s economic policy was driven by the interests of foreign investors, one commentator suggested that the forced evictions may not amount to a “State or organizational policy” as required under Article 7 (1) of the ICC Statute,<sup>180</sup> and this may help to explain the reluctance of the OTP to

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<sup>176</sup> FIDH/Global Diligence, Executive Summary: Communication under Article 15 of the Rome Statute of the International Criminal Court: the Commission of Crimes against Humanity in Cambodia July 2002 to Present [https://www.fidh.org/IMG/pdf/executive\\_summary-2.pdf](https://www.fidh.org/IMG/pdf/executive_summary-2.pdf) (accessed 15 March 2020). For a detailed analysis of the Communication, see Franziska Maria Oehm, Land Grabbing in Cambodia as a Crime Against Humanity – Approaches in International Criminal Law, *Verfassung und Recht in Ubersee, Law and Politics in Africa / Asia / Latin America*, 48 (2015), 469–491.

<sup>177</sup> See Article 7 (1) (d) and Article 7 (2) (d) of the Rome Statute.

<sup>178</sup> See UN Human Rights Council, A/HRC/27/70, Report of the Special Rapporteur Surya P. Subedi on the situation of human rights in Cambodia 2014, p. 13, para. 48.

<sup>179</sup> See further in detail, F. Oehm (*supra*)

<sup>180</sup> *Ibid.* This may be contrasted with the forced evictions and deportations of the Rohingya minority in Myanmar. See further, Beth Schaack, “Determining the Commission of Genocide in Myanmar: Legal and Policy Considerations” 17 *Journal of International Criminal Justice* 2 (2019). See also from a broader public international law perspective and in particular the *uti possidetis* principle, M. Shahabuddin, “Post Colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar” *Asian Journal of International Law* 9, (2019) pp. 334–358.

initiate preliminary examinations more than 5 years since the Communication was filed. Yet in this regard the Communication draws attention to the statement of the Extraordinary Chambers in the Court of Cambodia (ECCC) that “[e]conomic policy is not one of the grounds recognised under international law that justifies forced transfer of a population”<sup>181</sup> and it is not evidence from a reading of Article 7 (2) (d) that a state policy of forced evictions may be justifiable on economic grounds

Despite the failure of those two communications to trigger the OTP to initiate preliminary examinations to date as was hoped following the publication of the 2016 OTP Policy Paper, it should be emphasized that the very existence of OTP Communications is difficult to monitor. As Fairlie highlighted, the practice of the Office has been “to keep both the requests and subsequent analyses private”.<sup>182</sup> Therefore only Communications that the authors themselves have publicised are generally available to the public.<sup>183</sup> Even though the 2016 Policy Paper had the potential to encourage more non-governmental organizations to bring communications before the OTP for the conduct described in the paper, it is difficult to ascertain the success rate of existing Communications as they are only occasionally made available to the general public.

An even higher threshold would be required to link environmental damage with acts of genocide, in violation of the UN 1948 Genocide Convention<sup>184</sup> and Article 6 of the Rome Statute, thus potentially attracting the jurisdiction of the International Criminal Court.<sup>185</sup> The implications of this would be significant. This is so not only because the term “ecocide” was coined by analogy to the crime of “genocide”, but also because the crime of genocide carries the highest degree of social and political disapproval among the existing international

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<sup>181</sup> ECCC, Trial Chamber, Case 002/01 Judgment, (002-19-09-2007-TC), 7 August 2014, para. 549. It should be noted that Cambodia, alongside the Philippines, are the only two South East Asian country to have ratified the ICC Statute See further, H. Takemura, the Asian Region and the International Criminal Court, *Contemporary Issues in Human Rights Law* (2018)

<sup>182</sup> M.A. Fairlie, “The Hidden Costs of Strategic Communications for the International Criminal Court”, 51 *Texas International Law Journal* (2016) 281-319, at 283. See also, Bernaz note 19.

<sup>183</sup> *Ibid.*

<sup>184</sup> UN Convention on the Prevention and Prohibition of the Crime of Genocide, adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948, Article 2.

<sup>185</sup> Article 6 of the Rome Statute (1998).

crimes.<sup>186</sup> Yet there would be several legal challenges for environmental damage, illegal natural resource exploitation and land grabbing to be classed as genocide. One evidentiary burden would be to fulfill and prove certain elements of the crime of genocide which requires “specific intent of exterminating one ethnic group.”<sup>187</sup> In particular, even if acts such as “killing members of the group” (committed via an environmental medium) could in principle meet the *actus reus* element of the crime of genocide, it would still be challenging for the ICC prosecutor to establish that an environmental offence intended to “destroy a group.” Hence it has been suggested that defining international environmental crimes as crimes against humanity could prove more meaningful in that it covers many of the same acts that would normally fall under the rubric of genocide, but without the higher scienter element of demonstrating a “specific intent to destroy one ethnic group.”<sup>188</sup> Indeed, “knowledge of the attack” is the *mens rea* required for the establishment of the crime against humanity. This appears to encompass acts committed not only with intention but also with recklessness, which tends to be the case with a considerable number of environmental offences. Yet the ability of the OTP to prosecute crimes against humanity committed via reckless acts appear to be limited considering the history of negotiations of the Rome Statute. As noted by William Schabas, during the negotiations of the ICC Statute state parties saw little reason to define recklessness “as it is not an element in the definition of any of the offences within the jurisdiction of the court.”<sup>189</sup> In this regard, in the *Ntanga* Trial judgment the court stated that:

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<sup>186</sup> See for example Prosecutor v. Omar Hassan Ahmad Al Bashir, Judgement on the Appeal of the Prosecutor against the Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, AC 3 February 2010. For a commentary see for example Philippa Webb, “Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide”, in Larissa van den Herik and Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Brill, 2012).

<sup>187</sup> See Article 2 (e) of the Genocide Convention prohibits measures with “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”

<sup>188</sup> See Sharp above note 131, at. 236.

<sup>189</sup> William Schabas, *An Introduction to the International Criminal Court* (CUP, 2011) at 236.

‘The Chamber agrees with previous rulings that the phrase ‘will occur in the ordinary course of events’ as laid down in Article 30(2)(b) and (3) of the Statute which requires ‘virtual certainty’<sup>190</sup> Accordingly, any lower threshold, such as *dolus eventualis*, recklessness and negligence, is insufficient to establish ‘intent’ and ‘knowledge’ in relation to a consequence under Article 30(2)(b).<sup>191</sup>

Another significant limitation of classifying environmental offences as genocide (or crimes against humanity) is that these crimes require a specific result (e.g. “killing members of the group”), but it would not allow the prosecution for conduct which is *potentially* harmful to the environment or human health. This is a significant limitation in particular in light of the central role played by the precautionary principle under international environmental law.<sup>192</sup> Still, there is one precedent in the ICC’s own practice for this. In the context of the Al Bashir arrest warrant, the Pre-Trial Chamber found a nexus between the underlying environmental harm (water contamination) and the crime of genocide.<sup>193</sup> The Chamber noted that:

‘one of the reasonable conclusions that can be drawn is that the acts of contamination of water pumps and forcible transfer coupled by resettlement by member of other tribes, were committed in furtherance of the genocidal policy, and that the conditions of life inflicted on the Fur, Masalit and Zaghawa groups were calculated to bring about the physical destruction of a part of those ethnic groups.’<sup>194</sup>

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<sup>190</sup> Lubanga Appeal Judgment, paras 447 to 450; Katanga Trial Judgment, paras 774 to 777; Bemba et al. Trial Judgment, para. 29; and Bemba Confirmation Decision, paras 357 to 369)

<sup>191</sup> See, *Ntandanda*, fn. 2348

<sup>192</sup> See e.g. Principle 15 of the Rio Declaration on Environment and Development (1992). See further e.g. N. de Sadeleer (ed.), *Implementing the Precautionary Principle: Approaches from the Nordic Countries, EU and USA* (Earthscan, 2007); E. Fisher, J. Jones and R. van Schomberg (eds.), *Implementing the Precautionary Principle: Perspectives and Prospects* (Edward Elgar, 2006); M. Fitzmaurice, *Contemporary Issues in International Environmental Law* (Edward Elgar, 2009); E. Hey, “The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution,” 4 *Georgetown International Environmental Law Review* 2 (1992) 303.

<sup>193</sup> In this case the defendant has allegedly committed genocide for having destroyed “all the target groups’ means of survival, poison sources of water including communal wells, destroy water pumps, steal livestock and strip the towns and villages of household and community assets”. See, Situation In Darfur, Sudan The Prosecutor V. Omar Hassan Ahmad Al Bashir: Second Decision on the Prosecution’s Application for a Warrant of Arrest, ICC-02/05-01/09, 12 July 2010. See also Public Redacted Version of the Prosecutor’s Application under Article 58, Situation in Darfur (ICC-02/05-157-AnxA), OTP, 14 July 2008, x 14. See further Cusato, n. 19, at 9.

<sup>194</sup> *Ibid.* para. 38

In light of those considerations, the Chamber found that there were reasonable grounds to believe that the elements of the crime of genocide by deliberately inflicting on members of the target group conditions of life calculated to bring about the group's physical destruction, as provided for in article 6(c) of the ICC Statute, were fulfilled.<sup>195</sup>

### 3.3 *Evaluation of the Potential for OTP Prosecutions for Environmental Damage in the Context of the Existing International Crimes*

It is clear from the above analysis that although it is possible in principle for individual criminal liability to be assigned for environmental damage under the existing crimes covered by the Rome Statute, the main limitation is that the prohibited acts of "ecocide" would amount to a serious crimes against persons, committed through environmental means.<sup>196</sup> Hence ecocide would be conceived primarily from an anthropocentric perspective. This helps to explain why, beyond the academic discourse, there has been little policy debate on enforcing environmental rights under the rubric of crimes against humanity or genocide.

The above analysis suggests that it would be difficult for the ICC to bring effective prosecutions against international crimes involving environmental damage which fall under the umbrella of the existing crimes recognized under the ICC Statute beyond the limited context of war crimes. Moreover, it has been suggested that "even if the International Criminal Court is inclined to pursue environmental damage from an internal armed conflict, the specific standards and norms are unclear, and the danger exists that a person might be charged for something he or she did not know was a crime."<sup>197</sup> It could be argued that this runs contrary to the principle of legality, which requires that international (criminal) norms are clearly defined. Thus the principle of legality is a barrier to the prosecution of international environmental crimes committed under the umbrella of the existing ICC Statute crimes, such as crimes against humanity or genocide.

<sup>195</sup> *Ibid*, para. 39.

<sup>196</sup> See e.g. Article 7 (1) (k) of the Rome Statute. See also, Pereira, above note 38.

<sup>197</sup> Carl Bruch, "All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict" (2001) 25 *Vermont Law Review* 695, at 736. See also, Rauxloh (2011) above note 83, at 446.

It is to be hoped that the implementation of the 2016 OTP policy paper – and the eventual prosecution by the ICC of the limited range of environmental crimes currently falling under the Rome Statute – will bring some clarity to the scope of the court’s existing jurisdiction in this area. Yet an eventual amendment to the ICC Statute establishing a specific “crime against the environment” (beyond the context of war crimes and other existing international crimes)<sup>198</sup> would make the principle of criminalisation clearer to the regulated community, increasing deterrence and therefore would be more consistent with the legality and fair labelling principles.

### 3.4 *The Quest for Corporate Accountability for Ecocide*

As was discussed above the ICC currently only has jurisdiction over international crimes committed by individuals, and not States. But another significant limitation of the ICC Statute is that it currently does not recognise the concept of criminal liability of corporations for international crimes.<sup>199</sup> Although there were proposals at the Rome Conference that led to the adoption of the ICC Statute to include a regime for criminal liability of legal entities, those proposals were rejected.<sup>200</sup> Indeed, direct corporate accountability would necessitate an amendment to art 25 of the ICC Statute, which gives the ICC authority only over human actors.<sup>201</sup> Hence one important limitation of the ICC jurisdiction is that it can exercise little scrutiny

<sup>198</sup> Rauxloh (2011), above n. 77, at 445–446.

<sup>199</sup> See, e.g., Rome Statute of the ICC, UN Doc. A/CONF. 183/9 (1998); 2187 UNTS 90, Arti. 25(1): “The Court shall have jurisdiction over natural persons pursuant to this Statute.” Neither the ad hoc tribunals (ICTY and ICTR) nor the hybrid tribunals set up to try international crimes (SCSL, ECCC) provide jurisdiction over legal persons.

<sup>200</sup> See Frederic Megret, “The Problem of an International Criminal Law of the Environment”, 36 *Columbia Journal of Environmental Law* 2 (2011) at 225; Andrew Clapham, “The Complexity of International Criminal Law: Looking Beyond Individual Responsibility to the Responsibility of Organisations, Corporations and States”, in Ramesh Thakur & Peter Malcontent (eds.), *From Sovereignty Impunity to International Accountability: The Search for Justice in a World of States* 233, 245–226 (2004); and Larissa Van den Herik and Letnar Jernej, “Regulating Corporations under International Law From Human Rights to International Criminal Law and Back Again”, 8 *Journal of International Criminal Justice* 3 (2010), 725–743.

<sup>201</sup> David Scheffer, “Corporate Liability under the *Rome Statute*” (2016) 57 *Harvard International Law Journal* 35, 38. See Danwood Mzikenge Chirwa, “The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights” (2004) 5 *Melbourne Journal of International Law* 1.



over the role of corporations in international crimes.<sup>202</sup> Yet one commentator suggested that while the 2016 OTP Policy Paper will not change the ICC's jurisdiction over corporate crimes, it may encourage the prosecution of business officials, which would be an important development from the perspective of business and human rights.<sup>203</sup> In this vein, corporate "aiding and abetting" could be part of a framework for holding corporate officers accountable for violations of international criminal law.<sup>204</sup>

It is anticipated that the lack of jurisdiction over corporate crimes will represent a considerable barrier to the effective prosecution of ecocide by the ICC, which is of concern especially considering that corporations are responsible for the majority of environmental offences. Corporate responsibility for environmental damage and illegal natural resources exploitation is also endemic not only in the peacetime context but also in internal and international armed conflicts in resource-rich countries which have led to major human rights violations around the world.<sup>205</sup>

Therefore, an extension of the ICC jurisdiction would have limited scope to the context of the operations of multinational corporations and other economic operators in the environmental and natural resources sectors, as they are often able to shield behind the corporate veil which represents a significant barrier to effective prosecutions. This is also complicated by the separation of legal personality be-

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<sup>202</sup> Nadia Bernaz, "An Analysis of the ICC Office of the Prosecutor's Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights", *JICJ* 15 (2017), 527–542

<sup>203</sup> *Ibid.*

<sup>204</sup> "The ICJ Expert Panel has taken the view that 'a company official who knows that his acts will facilitate, encourage or provide moral support for the commission of a crime and nonetheless proceeds, will be in grave danger of being held criminally accountable for aiding and abetting.' See further, *Corporate Complicity & Legal Accountability: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes*", (2008) ICJ, vol. 2 ("ICJ Report"),

<sup>205</sup> Ken Roberts, *Corporate Liability and Complicity in International Crimes*, in Sebastien Jodoin and Marie-Claire Condonier Segger (eds), *Sustainable Development, International Criminal Justice and Treaty Interpretation* (CUP, 2013) For example, the participation of corporations in the "blood diamond" trade came to international attention in the late 1990 s and early 2000 s. as illustrated by gold mining companies which have provided financial and logistical support to rebel groups known for committing human rights atrocities in the DRC's Ituri region. See *ibid.* See also, L. M. Ocampo, "Second Assembly of States Parties to the Rome Statute of the ICC: Report of the Prosecutor of the ICC 4" (2003).

tween parent companies and subsidiaries recognized in many legal systems which limit the effectiveness of civil remedies available to local communities and for remediation of the environment. This further illustrates the limitations of the current penalties and remedies predicated in the Rome Statute which often fail to reflect the remedies and penalties regarded to be effective for the enforcement of national environmental laws such as environmental remediation, as well as penalties more specific to corporate entities in particular license revocation and corporate probation orders.<sup>206</sup> This limitation in penalties and remedies is particularly striking given that unlike the other international criminal tribunals before it, corrective and reparative justice is one of the distinguishing characteristics of the ICC.<sup>207</sup>

As was discussed above the International Law Commission since its sixty-fifth session in 2013 has been working on the topic of the “protection of the environment in relation to armed conflicts” and an outcome document endorsed by the UN General Assembly has attempted to clarify the circumstances in which corporations may be held liable for illegal natural resources exploitation and environmental damage.<sup>208</sup> Under the “*Draft principles on protection of the environment in relation to armed conflicts, adopted by the Commission on first reading,*” Principle 10 on “Corporate Due Diligence” states that States should take appropriate legislative and other measures “aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area of armed conflict or in a post-armed conflict situation.” Moreover, the principle of corporate accountability is embedded in Principle 11 which directs States to “take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories can be held liable for harm caused by them to the

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<sup>206</sup> See also, Eliana Cusato, “Beyond Symbolism: Problems and Prospects of Prosecuting Environmental Destruction before the ICC”, 15 *Journal of International Criminal Justice* 3 (2017), pp. 491–507. On the role of reparations under international criminal law, see Pubudu Sachithanandan, Reparations for Victims and Sustainable Development, in Sebastien Jodoin and Marie-Claire Condonier Segger (eds), *Sustainable Development, International Criminal Justice and Treaty Interpretation* (CUP, 2013).

<sup>207</sup> See International Criminal Court, *Establishment of a Fund for Victims of Crimes*, UN Doc ICC-ASP/1/Res.6, para 8. See also, Mwanza, above note 20.

<sup>208</sup> See further, Marie G. Jacobsson, above note 146

environment, including in relation to human health, in an area of armed conflict or in a post-armed conflict situation.”<sup>209</sup>

Even though there is considerable academic debate on whether criminal sanctions are effective or indeed necessary when applied to corporate entities,<sup>210</sup> it is submitted that the accountability of corporations should be recognized under the ICC Statute. In particular, powerful international non-state actors currently face limited risk of accountability under the national laws of some host states – and limited or no liability under international law – would have to act more diligently in the host countries where they operate. This is particularly the case of multinational corporations,<sup>211</sup> but this should also apply to international financial institutions which fund projects that damage the environment.<sup>212</sup> This view is echoed by Regina Rauxloh who argues that:

‘Given the significant contribution of corporate actors to global environmental problems, the inclusion of legal persons within the gamut of international criminal liability would provide an avenue to end to *the facto* immunity which multinational corporations enjoy for the most serious environmental damage.’<sup>213</sup>

Yet as not all legal systems recognise the criminal liability of corporations, it would be challenging for the ICC Statute to reconcile those disparate approaches concerning the assignment of criminal responsibility to corporate entities.<sup>214</sup>

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<sup>209</sup> See *ibid.* Principles 10 and Principle 11.

<sup>210</sup> See for example Gary Slapper and Steve Tombs, *Corporate Crime* (Longman, 1999); John Coffee, “No Soul to Damn: No Body to Kick: an Unscandalized Inquiry into the Problem of Corporate Punishment”, *MichLR*, 1980–1981; and V.S. Khanna, “Corporate Criminal Liability: What Purpose Does it Serve?” (1996) 109 *Harvard Law Review* 7.

<sup>211</sup> See further, Janet Dine, *Companies, International Trade and Human Rights* (CUP, 2010).

<sup>212</sup> See further, A. Hardenbrook, “Equator Principles: The Private Financial Sector’s Attempt at Environmental Responsibility”, 40 *Vand. J. Transnat’l L.* 197 (2007).

<sup>213</sup> Rauxloh, above note 83, 432–434.

<sup>214</sup> See John Coffee, “Corporate Criminal Liability: an Introduction and Comparative Survey”, in Albin Eser/Günter Heine/Barbara Huber (eds.) *Criminal Responsibility of Legal and Collective Entities*, International Colloquium Berlin (1998).

## IV CONCLUDING REMARKS

Although the ICC OTP 2016 policy guidance on case selection and prioritisation is a positive development, it has so far not brought a major change to the status quo. Fundamentally, it does not change the current position that environmental crime may be regarded as serious crimes under national law but not under international law outside the limited existing ICC jurisdiction over environmental crime. Still, by emphasizing the seriousness of environmental damage, illegal natural resources exploitation and land grabbing in the context of the ICC's existing crimes, the ICC prosecutor's policy guidance could be regarded as an important step towards the establishment of a crime of ecocide under international law. But the first more immediate legal implications of the ICC OTP policy paper are that it may trigger the court to clarify not only the scope of the "environmental" war crime under Article 8 (2)(b)(iv), but also whether the illegal exploitation of natural resources in conflict situations could amount to "pillage" and therefore to a war crime under Article 8 (2) (b) (xvi). Yet it is less likely that those developments will lead the ICC in the near future to recognize that ecocide falls under the definition of genocide or crimes against humanity, as there are only a limited number of scenarios in which this would be possible given the high threshold required for establishing those offences.

But despite the excitement of some international environmental and criminal lawyers, academics and NGOs following the publication of the OTP policy paper, as of March 2020 (i.e. three and a half years since the publication of the 2016 OTP policy paper), no investigations or prosecutions have been initiated by the OTP for war crimes, crimes against humanity or genocide in which environmental damage, illegal natural resources exploitation or land grabbing were regarded to be aggravating circumstances in the case selection and investigation criterion.<sup>215</sup> It is also not encouraging that two recent Communications brought before the OTP have not led to preliminary examinations, that is the large scale governmental land grabbing in Cambodia and the "Lago Agrio Victims" victims for alleged crimes against humanity committed in Ecuador, even though it is difficult to ascertain the overall success rate of the Communications filed before

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<sup>215</sup> See ICC OTC Report on Preliminary Examinations Activities (2018), available at <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>. See also, OTC Report on Preliminary Examination Activities 2019, 5 December 2019 <https://www.icccpi.int/itemsDocuments/191205-rep-otp-PE.pdf> (accessed 30 March 2020)

of the OTP as they commonly are not publicised. Moreover, the illegal exploitation of natural resources played a minor role in Bosco Ntaganda's conviction by the ICC in July 2019 for crimes against humanity, and the charges for the war crime of pillage related to enemy property but these did not involve illegal exploitation of natural resources, and in any event those charges were dismissed by the court. In addition, the mandate of the incumbent ICC prosecutor, Ms Fatou Bensouda, expires in early 2021 (i.e. 9 years since her appointment in December 2011), and it is not clear whether the new ICC prosecutor will pursue a similar policy guidance on case selection and prioritization.

It is to be hoped that if the ICC OTP eventually brings successful prosecutions concerning illegal natural resource exploitation, environmental damage and land grabbing in the circumstances envisaged in the OTP 2016 policy paper, then a particularly strong case could be made for the court to have a broader jurisdiction over ecocide in post-conflict and peacetime scenarios. With the recent unfortunate passing of a world leading advocate for the recognition of an international crime of ecocide, and with the recent rise of some populist and nationalist governments and political parties that have a low environmental protection record and little or no regard for environmental concerns, it is to be hoped that civil society and other stakeholders concerned will continue to get mobilized to call on law and policy makers to advance the case for creation of an international crime of ecocide. I have previously argued that although there are strong arguments for extending the ICC jurisdiction over ecocide,<sup>216</sup> the ICC jurisprudence and OTP practices needed further testing.<sup>217</sup> Although the 2016 OTC Policy Paper provided a promising basis for testing the court's jurisdiction, unfortunately so far it is difficult to make a strong case for extending the court's jurisdiction over ecocide on the basis of the prosecutorial and jurisprudential practices that have followed the publication of the 2016 OTC Policy Paper.

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<sup>216</sup> See in particular, Higgins, above note 2; and Mwanza, above note 20.

<sup>217</sup> Pereira, R. 'Environmental Criminal Liability and Enforcement in European and International Law' (Brill, 2015). See also, Mistura, above note 122.

RICARDO PEREIRA

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