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Prosecuting environmental harm before the International Criminal Court

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V. OVERALL CONCLUSIONS AND OBSERVATIONS ON THE WAY FORWARD

In 1992, over 170 States gathered in Rio de Janeiro and pledged to take individual and collective action to stem environmental harm within the framework of encouraging sustainable development.¹³⁵⁹ Along with the references to co-operation and “the spirit of global partnership”, the Rio Declaration also exhorted States to develop international law, including that applicable during armed conflict, to protect the environment.¹³⁶⁰ One means of transforming this pledge into concrete change is through international criminal law. As reports emerge that the current era of human development is causing the sixth mass extinction,¹³⁶¹ and population growth intensifies the competition for resources, the anthropogenic threat to the environment is growing. International criminal law presents a system designed to address common concerns and is increasingly being touted as a means to redress environmental harm, including by the United Nations.¹³⁶² The preceding analysis sought to map out the substantive and procedural provisions of international criminal law to discern its potential as a complementary means, along with other multilateral efforts, to protect the environment.

Despite calls in the early 1990s for criminal law to be used to protect environmental interests “as such”,¹³⁶³ no international court for the environment has been established to address this collective concern. In lieu of a specialised environmental court, the ICC presents itself as the primary institution capable of potentially addressing serious environmental harm. However, to

¹³⁵⁹ Rio Declaration, Principle 7 (“States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities...”).

¹³⁶⁰ Rio Declaration. Principles 13, 14, 19, and 24. Principle 13 (“States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.”), Principle 14 (“States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health”), Principle 19 (“States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.”); Principle 24 (“Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”).

See also Convention on the Protection of the Environment through Criminal Law, 1998, (14 European States signed this treaty, but only one has ratified it to date (Estonia) and it has not come into force).

¹³⁶¹ See *infra* Chapter I(A): Introduction, citing Gerardo Ceballosa, Paul R. Ehrlich, and Rodolfo Dirzo, “Biological annihilation via the ongoing sixth mass extinction signaled by vertebrate population losses and declines”, *Proceedings of the National Academy of Sciences of the United States of America*, May 2017, p.1.

¹³⁶² See *infra* Chapter I(A): Introduction.

¹³⁶³ United Nations Economic and Social Council, Resolution 1993/28, “The role of criminal law in the protection of the environment”, Annex: Conclusions of the Seminar on the Policy of Criminal Law in the Protection of Nature and the Environment in a European Perspective, held at Lauchhammer, Germany, from 25 to 29 April 1992, para.4.

date there have been no systematic examinations of the feasibility of investigating, prosecuting and adjudicating environmental harm before the ICC. Commentators have touched upon some substantive provisions that could be used to address environmental harm, such as the war crime in article 8(2)(b)(iv).¹³⁶⁴ But they have not conducted a detailed analysis of the applicability of genocide, crimes against humanity, and war crimes to environmental harm, and have not assessed in detail the procedures that would apply in these circumstances nor the applicability of the framework for victims' participation and reparations to environmental harm. This study seeks to fill the void.

To explore the feasibility of addressing environmental harm before the ICC, the preceding analysis surveyed the substantive and procedural frameworks applicable at the ICC, as well as its provisions on victim participation and reparations. Addressing both theoretical and practical considerations, the study applied a test of adjudicative coherence to test the ICC's ability to adequately prosecute environmental harm. While referring to a wide range of forms of environmental harm, the study primarily focused on three paradigmatic deleterious practices, those being military harms anticipated to cause excessive environmental harm, toxic dumping, and wildlife exploitation. By instantiating the analysis through these three examples, the study provides a unique insight into the manner in which the Court's provisions would operate when applied to a case of environmental harm.

A. Orientation of the Court

In terms of the suitability of prosecuting environmental harm before the ICC, the study has explored the essential orientation of the ICC's substantive crimes, jurisdictional parameters, and rules of procedure, including on victim status and reparations. The analysis shows that the ICC's legal framework is overwhelmingly anthropocentric in its orientation. The lack of any direct reference to the environment or environmental harm in the Preamble to the Rome Statute signals this anthropocentric emphasis. Similarly, the specific provisions of the Rome Statute and accompanying instruments as well as the applicable additional sources of law shows that the environment is accorded at most incidental coverage, and it ultimately subordinated to anthropocentric interests.

The only provision of the Rome Statute that mentions the environment, the war crime set out in article 8(2)(b)(xx), potentially provides a means to address environmental harm. However,

¹³⁶⁴ See *infra* Chapter II(D)(1) and references therein.

it is subject to exacting restrictions on top of its narrow applicability to only international armed conflicts. It requires knowledge that an attack will cause widespread, long-term and severe damage to the environment. And it incorporates a proportionality test requiring that the perpetrator understood at the time of launching the attack that it would cause environmental harm clearly excessive to the anticipated military advantage. While ostensibly repressed environmental harm, the provision nonetheless elevates anthropocentric interests, particularly the interest in obtaining military advantage, above those of preserving and protecting the environment.

Although there are a multitude of varied anthropocentric prohibitions within the Court's jurisdiction which could conceivably be used to prosecute environmental harm indirectly, reliance on these provisions would send a message that environmental harm is only condemnable indirectly as an offshoot of harm to human beings and their property. In relation to environmental protection, it would undercut one of the primary purposes that international criminal law may serve, which is its declaratory function of recording the human race's moral opprobrium against crimes of concern to the international community as a whole. Consequently, the orientation of the Court's guiding documents evinces a decidedly anthropocentric orientation.

B. Adjudicative (in)coherence

The analysis has also examined whether the orientation of the Court's substantive and procedural framework and its regime for victim redress preclude or significantly prejudice proceedings for environmental harm. It has used the *adjudicative coherence* test to examine whether the Court's provisions exhibit incoherence when applied to environmental crimes, particularly military attacks resulting in excessive environmental harm, toxic dumping and wildlife offences.

In terms of substantive jurisdiction, although the war crime in article 8(2)(b)(iv) is extremely curtailed, it does not indicate adjudicative incoherence *per se*. Its terms could conceivably result in a conviction for harm to the environment, albeit in the extremely rare circumstances. But it cannot be said that the limited possibility of such a conviction contradicts or undermines any explicit goal set out in the Preamble to the Rome Statute. Similarly, the prosecution of environmental harm as part of anthropocentric crimes and prohibitions does not indicate adjudicative incoherence. The crimes, such as the crime against humanity of other

inhumane acts, could be applied to conduct such as toxic dumping and wildlife harm, even though the likelihood of any conviction resulting from solely the environmental harm is not high.

Looking to the procedural framework, as surveyed in Chapter Three, the majority of evidence in environmental harm cases is unlikely to come from eye-witnesses to the perpetration of the crime *res gestae*, and instead will likely constitute scientific type compilations. Litigation for environmental harm will heavily concentrate on forecasting models and epidemic general trends, rather than discrete events such as murders. If the current ICC practice of relying primarily on witness testimony as evidence were applied to environmental harm, this would likely result in unduly lengthy proceedings. However, the emphasis on witness testimony is a feature of practice rather than a fundamental requirement under the Statute and Rules. While that practice could hinder the efficient conduct of proceedings for environmental harm, there is room under the current ICC framework for adjustment of this practice. On its face, the procedural framework of the Court permits considerable flexibility as regards the form of evidence and the manner in which it is received.

The Court's practice of limited judicial involvement during the investigative phase of proceedings would increase the risk of delays in subsequent proceedings and potentially a reduced judicial capacity to understand key technical points in the evidence. However, certain rules that have been utilized only on a limited basis to date allow the judges considerable scope to participate in the investigative stage of proceedings.

Several aspects of the Court's procedural framework present more fundamental difficulties for the prosecution of environmental harm. The prospect of criminal proceedings for environmental harm highlights the contrasting underlying standards between international criminal law and international environmental law. There is a potentially intractable tension between the requirement of certainty for an international criminal trial (or near certainty), to meet the beyond reasonable doubt standard, and the application of the precautionary principle from environmental law, according to which scientific certainty should not be a reason to postpone taking measures to repress environmental damage.¹³⁶⁵ To uphold the established beyond reasonable doubt standard in the context of environmental harm, will be to ignore the precautionary principle's entreaty to take measures even in the case of a lack of full scientific certainty. Conversely, to uphold the precautionary principle's insistence on looking past

¹³⁶⁵ Secretary-General Report 1993, p.17.

scientific certainty will be to undercut established criminal law principles, such as the beyond reasonable doubt standard. Similarly, the time-bound stages of proceedings in international criminal law, in which the Prosecution is required to commit itself to a description of the impugned environmental harm and conduct, with limited opportunity to adjust those charges, fails to address the dynamic, long-term and multi-factorial nature of environmental harm.

On an evidentiary note, the types of longitudinal and/or epidemiological studies required to show certain forms of environmental harm, such as atmospheric pollution resulting in increased pulmonary disease incidence, will involve time-delays and/or costs that may be prohibitive and clash with the accused's right to trial without undue delay as well as the Court's basic funding limitations. Compounding these difficulties will be the possibility of State's citing national security concerns to prevent necessary evidentiary materials demonstrating environmental harm being provided, and the lack of an international subpoena power to oblige witnesses to appear before the Court.

In relation to victims, the analysis herein shows that the natural environment would not qualify in and of itself as a victim under the Rules of the ICC, even though human victims of crimes involving environmental harm could qualify for victim status and potentially for reparations for their injuries. Given the ostensible inclusion of a prohibition on harming the environment, under article 8(2)(b)(iv), the inability of the environment to be accorded victim status suggests an adjudicative imbalance. However, the overwhelmingly anthropocentric tenor of the provisions on victims' participation and reparations, matches the anthropocentric essence of the Rome Statute's substantive and procedural legal framework. Judges are provided sufficient latitude to partially redress this imbalance – for example through the appointment of an advocate for the environment. However, this advocate would not be representing the environment as a victim *de lege* raising the question of whether reparations could or would be ordered in order to restore the natural environment after serious harm suffered due to the commission of a crime under the Rome Statute. The most likely scenario in which this would occur would be if the anthropocentric interests of human victims were seen as best served by restoring their natural environment in line with the Court's subordination of eco-centric to anthropocentric interests.

C. Policy options

Despite the substantive restrictions and procedural obstacles that would hamper the prosecution of environmental harm, it is not inconceivable that an environmental crimes case could be brought before the Court. With the Prosecution announcing a heightened focus on environmental harm, the likelihood of future proceedings having a significant component in this area cannot be discounted. The most direct manner of addressing environmental harm would be a prosecution under the war crime in article 8(2)(b)(iv). Other anthropocentric provisions could also be used to redress environmental harm occurring as a means or result of bringing about the crime.

In light of the restrictive parameters of article 8(2)(b)(iv) and the mismatched fit of environmental harm under anthropocentric provisions, a temptation may arise to adopt novel interpretations of the substantive prohibitions set out in the Rome Statute. Similarly, the potential incompatibility of various procedural provisions with environmental harm, including the definitions of victims, could lead to strained readings of the applicable provisions to accommodate environmental harm. However, such an approach would risk harming the institution's reputation and could have a deleterious impact on its core function of addressing atrocity crimes. In addition to the restraining impact of article 22(2), which prohibits the definition of crimes being extended by analogy, the integrity of the Court and the Rome Statute system as a whole would not be well served by adopting overly stretched interpretations of the Court's provisions in order to redress environmental harm.

An alternative option would be to seek amendment of the existing provisions of the Rome Statute to accommodate the prosecution of environmental harm. For example, a corresponding prohibition for article 8(2)(b)(iv) could be adopted to apply in the context of non-international armed conflicts, which would remove the current imbalanced approach to military attacks that can be anticipated to cause excessive environmental harm. Similarly, the exacting proportionality test in article 8(2)(b)(iv) could be re-worded to more equally balance anthropocentric and eco-centric interests. Additionally, the definition of victims under rule 85 could be adjusted to encompass the natural environment *per se*. This would partially address the current anomaly whereby the article 8(2)(b)(iv) prohibition on disproportionate environmental attacks is primarily designed to protect the environment, but the environment cannot qualify as a victim of this crime under the current ICC provisions.

However, amendments to the Rome Statute and accompanying instruments are not easily achieved.¹³⁶⁶ It is likely the States Parties would be reluctant to adjust existing definitions of war crimes and victims to provisions that have already been debated and consented to. Additionally, some adjustments would necessitate a fundamental divide between environmental harm cases, and the existing substantive crimes under the Rome Statute. For example, if the *mens rea* standard for environmental harm were adjusted to a recklessness or negligence test, as advocated by some commentators,¹³⁶⁷ proving the crime would be qualitatively distinct from the other crimes which require various forms of direct intent and knowledge. Similarly, if the precautionary principle were introduced to avoid uncertainty being an excuse for avoiding responsibility for environmental harm, arguments could be raised that similar legal mechanisms should apply to cases such as mass displacement, which are also multi-factorial and may involve perpetrators undertaking activities that entail a risk, rather than certainty, that they will cause civilians to flee their homes. On top of these questions of coherence and consistency, major adjustments to address environmental harm would provoke the question whether they constitute too great a departure from the Court's conception, which is distinctly anthropocentric in orientation.

An alternate approach would be to establish a separate, purpose-built international environmental crimes court designed to address serious environmental harm through international proceedings. This would permit the creation of a bespoke institution with prohibitions and procedures designed to address cases of serious environmental harm. For example, a specifically designed international environmental crimes court would provide the possibility to incorporate a negligence standard alongside direct intent.¹³⁶⁸

In the realm of environmental harm prosecutions, negligence has been considered a sufficient mental state to establish liability in several high-profile cases. For example, in 1999 the Erika oil spill off the coast of Brittany was reported to have killed tens of thousands of sea birds and

¹³⁶⁶ Schabas (2011), p.125 (describing the process of amending the Rome Statute as "cumbersome").

¹³⁶⁷ United Nations Economic and Social Council, Resolution 1994/15 "The role of criminal law in the protection of the environment", 25 July 1994, Annex "Recommendations Concerning the Role of Criminal Law in Protecting the Environment", para.(f) ("Environmental crimes should cover intentional as well as reckless acts. When serious harm or actual danger of harm has been caused or created, however, negligent conduct should also be a crime if the persons responsible have significantly departed from the care and skill expected of them in the pursuit of their activities. In relatively minor cases, the imposition of fines, including administratively or judicially imposed non-criminal fines, and other non-custodial alternatives should be sufficient.").

¹³⁶⁸ Mégret (2011), p.249 ("However, the possibility of international regulatory offenses based on international environmental law and those that rely on a standard of negligence should not be excluded, as long as these come with lesser penalties that reflect their lesser gravity.")

damaged approximately 400 km of coastline.¹³⁶⁹ The contracting company shipping the oil was held responsible both criminally and civilly, and ordered to pay fines as well as clean-up costs.¹³⁷⁰ After the Deepwater Horizon oil spill in the Gulf of Mexico caused huge environmental damage in 2010, British Petroleum agreed to plead guilty to criminal charges including felony manslaughter, environmental crimes and obstruction of Congress, and to pay four billion USD in criminal fines and penalties.¹³⁷¹

An international environmental crimes court would also allow for the offences to be de-linked from the existence of armed conflict. Mégret notes that “[t]he devastation sown by some human activities under the cover of peace is occasionally far greater than that caused in war.”¹³⁷² He argues that “in the search for normative and moral consistency”, punishable harm to the environment should not be limited to that occurring in armed conflict, as “[f]rom an environmental point of view, there is no reason why it should not be equally reprehensible to cause such damage in peacetime.”¹³⁷³

An international environmental crimes court could be designed with diverse measures and remedies available to repress and compensate for environmental harm. This would adhere to the advice of the United Nations Economic and Social Council that “national and supranational authorities should be provided with a wide array of measures, remedies and sanctions, within their constitutional and legal frameworks and consistent with the fundamental principles of criminal law, in order to ensure compliance with environmental protection laws.”¹³⁷⁴ It would ensure the flexibility to address cases varying from the killing of the last members of an endangered species, to industrial level toxic dumping in natural sites.

¹³⁶⁹ See <http://www.reuters.com/article/us-france-erika-idUSBRE88O0LX20120925>.

¹³⁷⁰ Papadopoulou (2009), pp.87-112, at 88 ; *T. Corr. Paris*, 16 January 2008, n8 99-34-895010, N/ H 10-82.938 Fp-P+B+R+I N/ 3439 CI 25 *Septembre* 2012 Cassation Partielle Sans Renvoi.

¹³⁷¹ United States Environmental Protection Agency, Summary of Criminal Proceedings for 2013 (available https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=2468) (last checked 27 December 2017).

¹³⁷² Mégret (2011), pp.246-247.

¹³⁷³ Mégret (2011), p.246.

¹³⁷⁴ United Nations Economic and Social Council, Resolution 1994/15 “The role of criminal law in the protection of the environment”, 25 July 1994, Annex “Recommendations Concerning The Role Of Criminal Law In Protecting The Environment”, para.(b) (“National and supranational authorities should be provided with a wide array of measures, remedies and sanctions, within their constitutional and legal frameworks and consistent with the fundamental principles of criminal law, in order to ensure compliance with environmental protection laws. They should include regulatory and licensing powers, incentives, administrative enforcement mechanisms, and punitive administrative, civil and criminal sanctions for impairing or endangering the environment. They should also include provisions for the forfeiture of profits and proceeds of crime, and of property used or employed in the commission of crime, such as vessels, vehicles, tools, equipment and buildings”).

In terms of the substantive prohibitions that a purpose-built institution could address, the most widely touted environmental crime at the international level is that of ecocide. Richard Falk proposed a Convention on the Crime of Ecocide, which defined ecocide as encompassing ‘acts committed with intent to destroy, in whole or in part, a human ecosystem’, in peacetime or wartime.¹³⁷⁵ To better adhere to the principle of *nullum crimen sine lege*, a more detailed prohibition with examples of included acts of environmental harm would assist persons to plan their behaviour and courts to regulate transgressions. A model is provided by the definition of the crime of aggression under the Rome Statute, which incorporates two tiers – a general definition and an enumerated list of examples.¹³⁷⁶ Existing treaties of international environmental law could be used to populate the specifically prohibited conduct list, such as through the Basel Convention for toxic dumping and the CITES treaty for wildlife offences, and similar instruments of international environmental law.

An international environmental crimes court could be attributed with jurisdiction covering corporate responsibility, in line with the recommendations of the United Nations Economic and Social Council that “support should be given to the extension of the idea of imposing criminal or non-criminal fines or other measures on corporations in jurisdictions in which corporate criminal liability is not currently recognized in the legal systems.”¹³⁷⁷ This would allow international criminal (or quasi-criminal) proceedings to be undertaken against the entities that frequently bear responsibility for the largest scale environmental disasters, and would allow the international community to send a message to corporate actors to ensure environmental conscientiousness.

Procedurally, several practical difficulties could be avoided through the careful framing of the new court’s procedural framework. The tension between the sacrosanct principle of the beyond reasonable doubt standard applicable in international criminal law, and the inherently dynamic nature of environmental harm could be confronted directly in the design of a purpose-built institution to address environmental harm at the international law. Incorporating the precautionary standard from international environmental law as a form of procedural device that shifted the burden onto the party who acted in the face of scientific uncertainty as to the potential consequences of their acts resulting in the environment harm, would also help

¹³⁷⁵ Richard Falk, “Environmental Warfare and Ecocide: Facts, Appraisal and Proposals”, 4 *Bulletin of Peace Proposals* (1973) 80, at 93, appendix 1.

¹³⁷⁶ Rome Statute, article 8*bis*.

¹³⁷⁷ United Nations Economic and Social Council, Resolution 1994/15 “The role of criminal law in the protection of the environment”, 25 July 1994, Annex “Recommendations Concerning the Role of Criminal Law in Protecting the Environment”, para.(g).

avoid the situation where uncertainty inherent in the nature of addressing multi-factorial, dynamic environmental harm, would prevent any responsibility being established for that harm.¹³⁷⁸

Ultimately, the world faces a growing risk of environmental harm both during and outside of armed conflict. Seeking innovative means to address and repress serious forms of environmental harm is important, and the ICC at first view appears an appropriate venue to hold those who commit serious environmental damage responsible and deter other potential offenders. But equally important is an appreciation of the potential limitations and pitfalls of seeking to prosecute environmental harm at an overwhelmingly anthropocentric institution. The substantive and procedure provisions, as well as the Court's innovative regime for victim participation and reparations, present numerous challenges to the effective and efficient investigation and prosecution of environmental harm. While there are ways in which the Court could potentially prosecute some forms of environmental harm, in many cases these indirect means would be an awkward fit and would reinforce the message of eco-centric subordination to anthropocentric interests emerging from the Court's framework. Instead of straining the ICC's provisions and principles to try to cover environmental harm, there would be considerable merit in developing a purpose designed institution able to effectively redress all forms of serious environmental harm, efficiently and through fair proceedings.

¹³⁷⁸ See *infra* Chapter III(C)(2)(d)(iv).