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Prosecuting environmental harm before the International Criminal Court

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VI. SUMMARY

Prosecuting Environmental Harm before the International Criminal Court

This thesis explores the feasibility of prosecuting environmental harm before the International Criminal Court. It examines the Court's substantive and procedural framework to determine its applicability to instances of serious destruction of the environment. It analyses the rules concerning victim participation and compensation arising from environmental harm. Key provisions and jurisprudence governing the Court's work are assessed, along with relevant international law conventions, principles, cases and commentary. Fundamentally, the study questions the extent of the Court's anthropocentric orientation and impact thereof on any prospective eco-centric proceedings.

The opening chapter surveys key environmental threats currently plaguing the world. It places particular focus on three activities which threaten the environment: military attacks resulting in environmental harm, toxic dumping, and wildlife offences. It highlights the recognition of these threats in United Nations General Assembly and Security Council resolutions, as well as in international conventions such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 1989 and the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973. Moving to the framework governing international criminal prosecutions, the opening chapter looks to the development of international criminal law, noting the multiplication of international criminal institutions with jurisdiction to address the most grave atrocities menacing the well-being of human beings around the world. On a parallel track, it summarizes the development of international environmental law and the key principles emerging from this regulatory body.

To introduce the terminology used throughout the work, the opening chapter sets out definitions of key concepts such as the natural environment, anthropocentrism, and eco-centrism. Looking to the possibility of the International Criminal Court intervening to address environmental harm, the analysis notes the sources of law listed in article 21 of the Rome Statute of the ICC, which encompass the Statute itself, the Rules of Procedure and Evidence, customary and conventional law, and general principles of law derived from national systems. These sources potentially leave room to import principles and practices from the field of environmental law but also raise questions about how far such incorporation of other bodies of law may be taken. The analysis concludes that whereas certain principles of international environmental law, such as the precautionary principle, could be potentially used to assist interpreting the Rome Statute, the direct importation of substantive prohibitions from international environmental law would be a step too far and would clash, in particular, with the express inclusion of certain crimes in articles 5 to 8bis of the Rome Statute.

The opening chapter also explains the approach taken in the analysis of prosecuting environmental harm before the ICC. In this respect, it presents the test of adjudicative coherence, which is used to test the viability of prosecuting international environmental harm under the Rome Statute. While based on approaches taken in certain international judicial decisions testing unprecedented regulatory features, the adjudicative coherence test as formulated herein is novel. It examines whether the specific ICC rules and procedures, when viewed in their context and applied to possible scenarios involving environmental harm, would result in an incoherent judicial process. Essentially, the test asks whether the application of the Court's framework to environmental harm would require such interpretive gymnastics or would meet such practical obstacles because of the nature of the harm being prosecuted, that it would see the feasibility of the proceedings seriously impaired or

jeopardized. In subsequent chapters, the adjudicative coherence test is applied to assess the feasibility of ICC proceedings for the three causes of environmental harm listed above – military attacks, toxic dumping and wildlife offences.

In chapter II, the analysis shifts to the substantive provisions and prohibitions set out in the Rome Statute, namely genocide, crimes against humanity, war crimes, and aggression. Each of these crimes is examined for its potential to capture and condemn environmental harm. In each instance, the assessment concludes that prosecuting environmental harm under the Rome Statute's provisions would almost certainly require the showing of significant anthropocentric harm. The assessment then narrows the focus to the three key forms of environmental harm mentioned above. Various complications that can be foreseen are presented in order to provide a detailed picture of the capacity of international criminal law, and the international criminal court specifically, to address environmental harm.

For military attacks causing excessive environmental harm, the analysis concludes that the more directly relevant provision, article 8(2)(b)(iv), is encumbered by such restrictive requirements that it would be extremely difficult to apply to any actual instance of environmental harm. Other war crimes, crimes against humanity, and forms of genocide could potentially address military attacks resulting in serious environmental harm, but those other crimes are primarily focused on anthropocentric interests. Applying the Rome Statute's provisions to a posited case of toxic dumping or wildlife offences, would see similar concerns arise; although it would be theoretically possible, particularly under the crime against humanity of other inhumane acts, or through the various forcible displacement type crimes, these would see eco-centric interests subordinated and made conditional upon anthropocentric harm.

In chapter III, the survey shifts to the jurisdictional and procedural issues that are likely to arise if proceedings centred on environmental harm are undertaken. Jurisdictional concerns that are discussed include the substantive limits on the ICC's remit, along with temporal and personnel limitations on the Court's jurisdiction. The chapter then moves to the rules of procedure and evidence, and maps these onto potential environmental harm cases. A major focus of this chapter is on evidence, including witness evidence, bar table motions, and expert evidence. The assessment concludes that several significant hurdles are presented by the Court's jurisdictional and procedural framework in relation to prosecuting environmental harm. From the technical demands of gathering and assessing evidence of environmental harm, to the difficulty of completing investigations and presenting evidence in a timely manner when that evidence requires longitudinal studies and large amounts of expert evidence, along with the complexity of proving criminal culpability for environmental damage that will frequently be multi-factorial, there are several respects in which the Court's procedures will make prosecuting environmental harm highly challenging.

In chapter IV, the thesis looks to the ICC's system of victim participation and reparations. It notes the Court's expansive approach to victim participation, but also the lack of a provision on the definition of victims for living entities other than humans, aside from organisations that are created by human beings. The Court's provisions on victims do not leave space for the environment to qualify as a victim in its own right. As for human victims of environmental harm, they may seek to participate in proceedings and receive reparations, which accords with the Court's strongly anthropocentric orientation. This conclusion is reinforced when the examples of military attacks resulting in excessive environmental harm, toxic dumping, and wildlife offences are assessed under the victim participation and reparations framework.

Finally, in its last chapter, the thesis presents overarching conclusions concerning the nature of the Court's orientation (anthropocentric vs eco-centric). Based on the preceding analysis, the thesis concludes that the ICC is primarily designed to address anthropocentric crimes. It notes that potential criminal proceedings for environmental harm will, if taken to trial, highlight the contrasting underlying standards between international criminal law and international environmental law. In that respect, the potentially intractable tension between the requirement of certainty for an international criminal trial (or near certainty), to meet the beyond reasonable doubt standard, and international environmental law's precautionary principle, according to which scientific certainty should not be a reason to postpone taking measures to protect the environment.

Looking forward, the thesis presents several policy options for how maximize the powerful potential of international criminal law to address environmental harm in some form or another. It concludes that while many apparent difficulties will arise if the Rome Statute is applied to environmental harm in its current formulation, it will also be difficult to amend the Rome Statute to accommodate prohibitions of environmental harm without unbalancing or fundamentally altering the nature of the Court. Alternatively, the prospect of a specifically designed international institution to address serious environmental harm through judicial proceedings presents itself as a means of effectively redressing environmental harm while avoiding several of the complications inherent in using the primarily anthropocentric ICC framework to address such harm. The applicable *mens rea* standard could be set at a level considered most appropriate for environmental harm, offences could be de-linked from armed conflict without having to be linked to anthropocentric suffering, corporate responsibility could be encompassed in the Court's scope, and procedures could be adapted to best suit cases heavily dependent on the introduction and assessment of scientific and expert evidence. While there would be considerable costs involved, both political and economic, in establishing such an institution, it would provide the international community with a mechanism crafted to address the threat of grave environmental harm which is a cause to all those who inhabit the Earth and to the Earth itself.