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Prosecuting environmental harm before the International Criminal Court

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Propositions relating to the dissertation Prosecuting Environmental Harm before the International Criminal Court by Matthew Gillett

1. Customary international law and treaties making up international environmental law technically qualify as a valid source of law to be applied by the ICC, as provided for under article 21(1)(b). However, it would not be “appropriate” under article 21(1)(b) for the court to directly apply substantive prohibitions from international environmental law conventions, as that would conflict with the inclusion of prohibitions in articles 5-8 (and now 8bis) of the Rome Statute.
2. In light of the the references to human suffering in the Preamble of the Statute, and the overwhelming majority of the substantive crimes concerning human interests, the Court’s orientation must be described as anthropocentric. The Statute’s concern with environmental harm only extends as far as human interests are impacted.
3. In order to analyse the viability of prosecuting environmental harm, the adjudicative coherence test can be used to assess whether the Court’s framework would require such interpretive stretching and risk such practical problems when applied to incidents of environmental harm, that it would see the feasibility of the proceedings seriously impaired or jeopardized.
4. The one provision of the Rome Statute that mentions the environment – article 8(2)(b)(iv), is not fully eco-centric because it subordinates the protection of the environment to the potential military anticipated by a commander launching an attack.
5. There are several provisions that could incidentally cover toxic dumping, including crimes against humanity such as murder or other inhumane acts. For wildlife offences, these existing provisions would be an awkward fit but are theoretically capable of applying. However, for both toxic dumping and wildlife offences, the chapeau requirements for crimes against humanity would mean that most incidents would be excluded unless they could be shown to have a link to other acts committed against a civilian population pursuant to a state or organizational policy.
6. Because the crimes in the Rome Statute other than article 8(2)(b)(iv) do not include an element of environmental harm, environmental harm would be restricted in relevance to incidents in which it led to anthropocentric suffering. In this way the environmental harm could be de-prioritized or even essentially excluded from consideration in the proceedings.
7. Efficiency mechanisms such as the introduction of witness evidence in written form under article 69(2) and rule 68 may assist to hasten proceedings, which would be particularly useful in environmental cases wherein many witnesses will likely be required to provide evidence on issues attenuated from the accused’s culpability, such as the nature, extent, and duration of the environmental harm. However, there is a limit to the reliance on these efficiency mechanisms

as they require cross-examination of the witness to occur in order to be considered sufficient to independently support a conviction.

8. Encouraging a more participatory role for the judiciary in the early stages of proceedings, particularly during the collection of evidence in investigations, will enhance the prospects of focused, fair, and effective trials for environmental harm.
9. The limitations of the cooperation regime, which grants States broad leeway to frustrate the Court's investigative activities in their territories, particularly when citing national security issues, is not a problem unique to environmental harm. However, it is particularly acute in relation to environmental harm, given the significance of access to the crime scene(s), and the need to conduct longitudinal studies to gauge the level of environmental damage and identify its causes to the extent possible.
10. The fact that there is no realistic means of the environment qualifying as a victim in its own right under the existing Rome Statute framework indicates that the rules on victim participation are conceived of anthropocentrically.