FROM PROTECTION TO ACCOUNTABILITY: CAN WE PUNISH ACTS INVOLVING ENVIRONMENTAL DESTRUCTION AS ROME STATUTE CRIMES?*

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ABSTRACT

This work has been prompted by the statement in the Policy Paper released recently by the Office of the Prosecutor of the International Criminal Court (ICC) which suggests an increasing focus on crimes committed by means of, or which result in, environmental destruction, and the prosecution of persons liable for them. This work defines the important concepts, including the scope of the term "environmental destruction." Examining the issue from an international law perspective, and employing legal analysis of relevant legal instruments, this work explores the subject matter jurisdiction of the ICC with respect to crimes that involve environmental destruction, and the extent of such jurisdiction's reach over corporations and their agents. This work argues that acts that involve or result in environmental destruction can be punished under crimes defined under the Rome Statute of the ICC. This argument is developed by discussing relevant materials, and by anticipating and addressing potential stumbling blocks, under both international criminal law and general international law.

I. INTRODUCTION

The consequences of environmental destruction pose significant threats to the health and survival of human beings as well as to the international community as a whole. Various responses have been explored to address the destruction of the environment through accountability and

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prevention measures, and the use of international law has been one of such responses. Considering that the destruction of the environment causes many problems that have transnational and inter-generational effects, the international community has deemed it fit to come together and forge solutions that now form part of what is called international environmental law.[1]

Nevertheless, international environmental law is not the only area of international law that may be explored and used to respond to the problem of environmental destruction. Calls have been made for international criminal law to provide protections to the environment through mechanisms within such area of law,[2] particularly those that find and hold criminally liable a person who has committed an act or has contributed to the commission of an act that damaged the natural environment.

Through years of development of legal responses to environmental destruction, it is important to point out that states have always used the criminal justice system to enforce their environmental laws.[3] By labelling and penalizing as crimes those acts that involve or result in environmental destruction, the state thus characterizes such acts as public wrongs,[4] and harnesses the deterring[5] and stigmatizing effects of criminal law.[6]

The use of criminal law as a response is set within and alongside similar responses that are traditionally pursued through national law and other international law instruments. Under the national law instrumentality, there are statutes that define and penalize an environmental crime. These measures are positively perceived because they shift the focus from mere administrative

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[1] In his book entitled *Principles of International Environmental Law*, Philippe Sands describes "international environmental law" as "compris[ing] those substantive, procedural and institutional rules of international law which have as their primary objective the protection of the environment." Similar to most fields in international law, international environmental law is comprised of treaties, customs, and similar sources. *See* PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 15 (2nd ed. 2003).

[2] *See, e.g.* STEVEN FREELAND, ADDRESSING THE INTENTIONAL DESTRUCTION OF THE ENVIRONMENT DURING WARFARE UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 34-44 (2015).

[3] RICARDO M. PEREIRA, ENVIRONMENTAL CRIMINAL LIABILITY AND ENFORCEMENT IN EUROPEAN AND INTERNATIONAL LAW 46 (2015).

[4] *Id.*

[5] *Id.*; *See also* Stephen Tully, *International Environmental Law and Sustainable Development*, *in* INTERNATIONAL CORPORATE LEGAL RESPONSIBILITY 425 (Stephen Tully ed., 2012).

[6] Pereira, *supra* note 3, at 46; *See also* Joanna Kyriakakis, *Corporations before International Criminal Courts: Implications for the International Criminal Justice Project*, 30 LEIDEN J. INT'L L. 247 (2017).

dependence to a more proactive protection of the environment.[7] However, because these measures depend on the ideas and priorities of the states that formulate and pass them, they are neither consistent nor universal.[8]

There are also measures that protect the environment through criminal law on a regional level. The leading example of this is the European Union's ("EU") directive on the protection of the environment through criminal law.[9] However, in the same way that regional measures cover only a specific region because of commonalities, it is also said that these measures may also emphasize the differences between regions, and therefore do not do well to reinforce the international character of the conduct that is aimed to be punished.[10] Given the inadequacies of these two approaches, it is proposed that international law could fill in the gaps or could supply a better means to address the problem.

The justification for the use of an international response is the reality that environmental destruction has transboundary effects, which have significant consequences to the security of other countries, as well as to the international community. In this context, it is interesting to note why acts of environmental destruction are not independently criminalized under international law. The consequences of these crimes affect all people, and the means by which they are committed are certainly an affront to humanity,[11] such that they can be considered *crimen contra omnes*, which is exactly the character of international crimes. [12] Even the Rome Statute of the International Criminal Court ("Rome Statute") speaks of addressing "the most serious crimes of concern to the international community as a whole."[13] Environmental destruction involves causing damage to a part of an integrated system where humans thrive, so it is puzzling how acts of, or acts that result in, environmental destruction are not seen as falling under this category.[14]

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[7] Freeland, *supra* note 2, at 26, *citing* Michael G. Faure & Marjolein Visser, *How to Punish Environmental Pollution? Some Reflections on Various Models of Criminalization of Environmental Harm*, 3 EUR. J. OF CRIME, CRIM. L. AND CRIM. JUST. 316-17 (1995).

[8] *Id.*

[9] *See* Directive 2008/99/EC of the European Parliament and of the Council of Nov. 19, 2008 2008 on the protection of the environment through criminal law, O.J. (L 328/28) 06 (EC).

[10] Freeland, *supra* note 2, at 28.

[11] *Id.* at 19.

[12] *Id.*

[13] Rome Statute of the International Criminal Court [hereinafter "Rome Statute"], pmbl. ¶ 4, July 17, 1998, 2187 UNTS 90.

[14] However, it must be noted that there have been efforts to punish environmental destruction under international humanitarian law, as illustrated in the proposal for a Fifth Geneva Convention.

An examination of the possibility of an international criminal law response will not be taken seriously when the work does not consider the Rome Statute—one of the instruments that codified most of the basic principles of international criminal law. The Rome Statute entered into force on July 01, 2002.[15] It established the International Criminal Court (ICC),[16] which was given the mandate to punish the "most serious crimes of concern to the international community."[17] With this function, it is hoped that the establishment of the ICC would "put an end to impunity for the perpetrators of these crimes and, thus, to contribute to the prevention of such crimes."[18]

The immediate reaction of those who are familiar with international criminal law and the ICC is that the court was established to punish violations of human rights and international humanitarian law through what are described as the *core crimes* provided in Article 5,[19] namely, the crime of genocide,[20] crimes against humanity,[21] war crimes,[22] which include the crime of causing excessive damage to the environment,[23] and the crime of aggression.[24] It is argued that these crimes do not contemplate acts that, for private ends, make use of, or result in, environmental destruction.

However, as with any development in any area of law, the Rome Statute and its mandate began to be perceived as a possible venue for environmental justice, especially since any destruction to the environment could be linked to the suffering of human beings. Although this view is placed within the context of the prevailing anthropocentric approach to environmental protection,[25] this provides the necessary framework for this paper to be able to evaluate the chances of advancing environmental justice within the rigid and focused field of international criminal law. The close linkages between the protection of the environment and that of human rights no longer allow international lawyers and policymakers to ignore an

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[15] *Id.*

[16] Rome Statute, art. 1.

[17] Pmbl. ¶ 4.

[18] Pmbl. ¶ 5.

[19] Art. 5.

[20] Art. 6.

[21] Art. 7.

[22] Art. 8.

[23] Art. 8 (2)(b)(iv).

[24] Art. 8.

[25] The difference between the anthropocentric view and the eco-centric view was articulated by Ricardo M. Pereira in this wise: "The anthropocentric view suggests that the environment should be protected chiefly as a necessary means to protect human quality of life, while the 'eco-centric' approach requires that the natural environment per se is protected." *See* Pereira, *supra* note 3, at 51.

exploration of international criminal law and its function to hold persons who destroy the environment accountable and to prevent further environmental destruction.

Initially, the calls to prosecute persons at the ICC for acts involving environmental destruction did not specifically identify which persons should be prosecuted. This was because many commentators maintained the idea that the ICC could only try and punish natural persons who have committed punishable acts as state agents, or that the Rome Statute crimes require state involvement, particularly since international criminal law emerged as a response to the devastation brought about by past or ongoing wars and armed conflicts. However, on September 15, 2016, the Office of the Prosecutor of the ICC ("ICC Prosecutor") released the *Policy Paper on Case Selection and Prioritization*, stating that the ICC Prosecutor "will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, [...] land grabbing or the destruction of the environment."[26]

The Policy Paper states further that in its case selection process, the ICC Prosecutor shall consider, among others, the manner by which the crime was committed while considering the "existence of elements of particular cruelty, including [...] *crimes committed by means of, or resulting in, the destruction of the environment.*"[27]

Of equal weight is the statement of the ICC Prosecutor that it shall assess the impact of crimes, in relation to gravity, with "particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land."[28] These pronouncements, together with the ICC Prosecutor's statement that the "selection of cases for investigation within an existing situation should not be confused with decisions to initiate an investigation into a situation as a whole[,]"[29] have been cause for celebration for organizations which have long advocated for the prosecution of crimes involving environmental destruction before the ICC.

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[26] OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL COURT, POLICY PAPER ON CASE SELECTION AND PRIORITISATION, 5, ¶ 7 (2016), *available at* https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf

[27] *Id.* at 13-14, ¶ 40. (Emphasis supplied.)

[28] *Id.* at 14, ¶ 41.

[29] *Id.* at 9, ¶ 24.

The responses to the announcement were mostly optimistic and expansive.[30] *The Washington Post*, for example, speculated that the ICC Prosecutor could prosecute cases involving environmental damage or the misuse or theft of land as crimes against humanity and, in this regard, surmised that corporations and businesses would be involved in cases before the ICC, which is traditionally seen as a court dealing primarily with cases against dictators and warlords.[31] *The Washington Post* further opined that this expansion of the ICC Prosecutor's focus would make the prosecution of individuals behind corporations involved in environmental exploitation more likely.[32]

These comments on the Policy Paper raise many questions on meaning of the statements made by the ICC Prosecutor, with respect to views on the jurisdiction of the ICC, as well as the persons who may be held liable for crimes which are "committed by means of, or that result in, environmental destruction." In a nutshell, given the statements of the ICC Prosecutor in the Policy Paper, the relevant question is whether the optimistic view offered by the commentators may realistically come into fruition. To answer this question, one needs to examine whether or not any of the crimes defined in the Rome Statute may be used to prosecute a crime involving environmental destruction.

The discussion in this work takes an international view of the problem since the law and institution involved are international in character. Thus, while the examples used in different parts of this work may pertain to situations specific to a certain country, their illustrative function mostly supports a point made in the context of international criminal law. In this regard, the methodology employed in this work is a straightforward legal analysis of international criminal law principles, as codified in the Rome Statute and other treaties and interpreted or construed under customary international law materials. As such, an examination of the provisions of the Rome Statute and the relevant principles of international criminal law will involve a discussion about the interpretations of the international criminal

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[30] It must also be noted that within these responses, there are also those who are more cautious in their assessment of this development. *See, e.g.* John Vidal & Owen Bowcott, *ICC widens remit to include environmental destruction cases,* THE GUARDIAN, *available at* https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases

[31] Adam Taylor, *Is environmental destruction a crime against humanity? The ICC may about to find out*, THE WASHINGTON POST, *available at* https://www.washingtonpost.com/news/worldviews/wp/2016/09/16/is-environmental-destruction-a-crime-against-humanity-the-icc-may-be-about-to-find-out/

[32] *Id.*

tribunals and courts, as well as the interpretation of scholars of international law. This work will then build on these interpretations through an independent analysis of the law within the corpus of such sources, and with an effort to reimagine the application of the law despite the rigid framework of international criminal law.

II. DEFINING THE ENVIRONMENT, ITS DESTRUCTION, AND THE CONTOURS OF GENERAL ROME STATUTE LIMITATIONS

A. A Definition of the Natural Environment and the Meaning of Its Destruction

In order to have a clear picture of what this work aims to do, it is important to define the most basic concept of "environment," or at least its contours. To be more precise, the concept defined herein is limited to that of "natural environment," as the broad concept of the environment may also refer to human and social constructs which are not subjects of this work.

While there is no uniform definition of the term "natural environment" under international law, Article II of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ("ENMOD"), [33] in defining "environmental modification techniques," indirectly offers a definition of the natural environment as "the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space."[34]

The ENMOD's broad conception of natural environment is implicitly recognized by international criminal law scholar Steven Freeland who, in proposing an amendment to the Rome Statute that would include "crimes against the environment" under the jurisdiction of the ICC,[35] offered a definition of the natural environment. Freeland defines "natural environment" in his proposed Article 8 of the Rome Statute[36] as that which

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[33] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques [hereinafter "ENMOD"], Dec. 10, 1976, 31 UST 333, 1108 UNTS 152.

[34] ENMOD, art. II.

[35] Freeland, *supra* note 2, at 239-83.

[36] *Id.* at 245.

"includes those ecological, biological, and resource systems necessary to sustain the continued existence of all forms of human, animal, or plant life."[37]

This definition allows one to assert that environmental destruction refers to the damaging of the environment, or more specifically, to acts that, whether intentional or not, "typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including the conservation of species."[38] To expound on the concept, Freeland also proposes to define environmental destruction in this wise:

> (f) "damage to the natural environment" includes but is not limited to circumstances that constitute a concrete end endangerment to human life or health, and may include any of the following:
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> (i) destruction or degradation of the marine environment, marine wildlife, or marine habitats;
> (ii) destruction or degradation of terrestrial fauna and flora, or their habitats;
> (iii) pollution of the atmosphere;
> (iv) destructive climate modification;
> (v) any other form of environmental destruction, degradation or harm of comparable gravity.[39]

This conception of environmental destruction is broader than what is covered by an environmental crime, which was defined by criminal justice professor Mary Clifford as "an act committed with the intent to harm or with the potential to cause harm to ecological and/or biological systems and for the purpose of securing business or personal advantage."[40] It is also broader than the more comprehensive description by the Environmental Programme ("UNEP") and the International Police Office ("Interpol") of environmental crime as "most commonly understood as a collective term to describe illegal activities harming the environment and aimed at benefitting individuals or groups or companies from the exploitation of, damage to, trade or theft of

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[37] *Id.* Note that he attempts to define the concept in a less anthropocentric way, in that he includes animal and plant life in the formulation.

[38] This is an indirect definition culled from the description of "effective protection" discussed in Pereira, *supra* note 3, at 49 *citing* Directive 2008/99/EC of the European Parliament and of the Council recital 5.

[39] Freeland, *supra* note 2, at 245-46.

[40] Pereira, *supra* note 3, at 47 *citing* MARY CLIFFORD, ENVIRONMENTAL CRIME: ENFORCEMENT, POLICY AND SOCIAL RESPONSIBILITY 26 (1998).

natural resources, including, but not limited to serious crimes and transnational organized crime."[41]

The framework of this paper focuses on the concept of environmental destruction because of its functional broadness, particularly in view of the limits of the international law response being explored here. It would have been useful to adopt Clifford's definition and make explicit reference to an environmental crime as it already identifies the element of "securing of a business or personal advantage[,]" which would make the task of linking culpability to corporations and their agents less difficult. However, the idea of the specific intent identified in the definition would restrict this exploration in an already limited framework. Further, it would have also been helpful to use UNEP and Interpol's complete definition, but it also fails to recognize the harm caused to human beings, which is certainly a major discussion point in this work considering the purpose and the limitations provided in the Rome Statute.

With the foregoing definitions, this broad conception of environmental destruction is analyzed and examined in the context of the response explored in this work. At this point, it is worth remembering that this idea of environmental destruction, or the acts constituting it, fits into what the ICC Prosecutor stated as the expansion of focus to include "crimes committed by means of, or resulting in, the destruction of the environment."

B. The Context and the Limitations of Response Under the Rome Statute

It is worth reiterating that it is important to explore an international criminal law response because of its specific relevance to the idea of accountability for environmental destruction, considering that international environmental law, in the form of treaties, are usually suspended during situations of hostilities covered by measures under international criminal law and international humanitarian law; if they in fact apply, they do not explicitly provide measures that address the damage caused to the environment during armed conflict.[42] This highlights the imperative of finding another avenue to

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[41] UNITED NATIONS ENVIRONMENTAL PROGRAMME AND INTERNATIONAL POLICE OFFICE, THE RISE OF ENVIRONMENTAL CRIME: A UNEP-INTERPOL RAPID RESPONSE ASSESSMENT 17 (Christian Nelleman, ed.).

[42] PIERRE-MARIE DUPUY & JORGE E. VINUALES, INTERNATIONAL ENVIRONMENTAL LAW 352 (2016). However, there are a couple of exceptions to this rule. *See, e.g.*, the protective regime of the Convention on the Protection of the World Cultural and Natural Heritage, otherwise known as the World Heritage Convention, Nov. 16, 1972, 1037 UNTS 151.

bring about environmental justice, with the potential effect of deterring the commission of future acts that damage the environment.

In this connection, specifically with respect to impunity and accountability, corporations and their agents—particularly those who contribute to the commission of the offenses discussed in this work—often know, but ultimately ignore, the consequences of their actions. They ignore that the products they supply in times of war are used by governments to intentionally destroy the environment, and that this act has devastating effects on both human beings and the natural environment itself.[43] It is not difficult to imagine that the products that form part of weapons of mass destruction (i.e. nuclear, biological, and chemical weapons) have lasting consequences on the environment.[44] This is egregious in itself.

However, considering the predominant idea that the function of the environment is to serve the interests of human beings, the destruction of the environment also affects human security and human rights, and can be assessed as a violation of the recognition in the Stockholm Declaration[45] of man's right to exercise his fundamental freedoms in an environment that permits it.[46] Moreover, environmental destruction also causes or escalates conflict.[47] In explaining this point, international environmental scholars Pierre-Marie Dupuy and Jorge Vinuales quote, in part, the World Commission on Environment and Development report entitled *Our Common Future*,[48] as follows:

> The first step in creating a more satisfactory basis for managing the interrelationships between security and sustainable development is to broaden our vision. Conflicts may arise not only because of political and military threats to national sovereignty; *they may derive also from environmental degradation* and the pre-emption of development options.[49]

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[43] Freeland, *supra* note 2, at 8.

[44] *Id.*

[45] United Nations Conference on the Human Environment, Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/REV.1 (1973).

[46] *Id.* at ch. 2, prin. 1.

[47] Freeland, *supra* note 2, at 8.

[48] Dupuy & Vinuales, *supra* note 42, at 339.

[49] *Id.*, *citing* United Nations Sec'y Gen., Report of the World Commission on Environment and Development: Our Common Future, at ch. 11, ¶ 37, U.N. Doc. A/42/427 (1987). (Emphasis supplied.)

In relation to this, and before proceeding to locating the potential bases for exacting accountability for environmental destruction under the Rome Statute, it is well to note that there are important provisions in the Rome Statute that could serve as limitations in the prosecution of crimes at the ICC.

First, the Rome Statute states that the ICC has jurisdiction *ratione temporis*; thus:[50]

> 1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
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> 2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3.[51]

At its core, this provision means that only those acts alleged as having elements that constitute Rome Statute crimes occurring after July 1, 2002 can be prosecuted at the ICC. As a further limitation, only those crimes committed by a state that became a party after such date may be prosecuted subject to the proviso in the same provision. Hence, all those acts which made use of, or resulted in, environmental destruction prior to these relevant dates may not fall under the mechanism being discussed herein, even though such actions have resulted in "widespread, long-lasting, and severe" destruction to the environment with dire consequences to human beings.

A *second* limitation is the principle of complementarity, which is the most basic rule in the entire structure of the Rome Statute. This principle is enshrined in the preamble of the Rome Statute which "[e[mphasiz[es] that the International Criminal Court established [...] shall be complementary to national criminal jurisdictions."[52] The same principle is reflected in Article 1.[53] In explaining this principle, international criminal law scholar Otto Triffterer notes that:

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[50] Rome Statute, art. 11.

[51] Art. 12, ¶ 3 of the Rome Statute provides as follows: "3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9".

[52] Pmbl. ¶ 10.

[53] Art. 1.

> The concept of complementarity addressed in article 1 is described in paragraph 10 of the Preamble, in articles 12-15, 17 and 18. According to these provisions complementarity means that national jurisdiction substituting the international community has in principle priority unless a "situation" is referred to the Court i.e. by the Security Council according to article 13(b) or the competent state is unwilling or unable genuinely to carry out the investigation or prosecution", article 17 para 1 (a).[54]

In other words, as Morten Bergsmo explains, "[t]he national criminal jurisdiction of States Parties have jurisdictional primacy vis-à-vis the Court [...] [and it] dictates that as long as a national criminal jurisdiction is able and willing to genuinely investigate and prosecute the matter that has come to the Court's attention, the Court does not have jurisdiction."[55] Essentially, this means that one cannot go directly to the ICC without exhausting domestic remedies, or without ensuring that the preconditions to the exercise of jurisdiction in Article 12,[56] the rules for the exercise of jurisdiction in Article 13,[57] and the provisions for admissibility in Article 17[58] of the Rome Statute are satisfied.

Third, and perhaps most importantly, this work is being explored, particularly in locating a provision that could be used to prosecute persons for committing crimes involving environmental destruction, because of the principle of legality provided in Articles 22 and 23 of the Rome Statute:

> Article 22
> *Nullum crimen sine lege*
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> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
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> 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition

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[54] Otto Triffterer, *Article 1 The Court*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVER'S NOTES, ARTICLE BY ARTICLE 57 (Otto Triffterer ed., 2nd ed. 2008).

[55] Morten Bergsmo, *Rome Statute of the International Criminal Court*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVER'S NOTES, ARTICLE BY ARTICLE 13 (Otto Triffterer ed., 2nd ed. 2008).

[56] Rome Statute, art 12.

[57] Art. 13.

[58] Art. 17.

> shall be interpreted in favour of the person being investigated, prosecuted or convicted.
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> 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.[59]
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> Article 23
> *Nulla poena sine lege*
>
> A person convicted by the Court may be punished only in accordance with this Statute.[60]

The principle of legality expressed in these twin provisions is considered an established norm of customary international law.[61] It is a basic principle in criminal law and traces its roots to the fundamental values of fairness and due process, particularly in the context of the pernicious consequences of being prosecuted for and convicted of committing a criminal offense. Susan Lamb describes that this principle is anchored on the following basic attributes: "(a) the concept of a written law; (b) the value of legal certainty; (c) the prohibition on analogy; and (d) non-retroactivity."[62]

Considering the high standard required in the application of this principle, particularly the strict construction of acts punishable under the Rome Statute[63] and the clause "conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court[,]"[64] it is important to be upfront and state that, under the present Rome Statute, there is no independently-defined and penalized "crime against the environment" to speak of. With the exception of Article 8(2)(b)(iv)[65] which explicitly refers to the punishment of causing excessive damage to the natural environment, the rest of the crimes defined under the Rome Statute have for their goal the punishment of individuals who have violated fundamental human rights and the laws on armed conflict.

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[59] Art. 22.

[60] Art. 23

[61] Susan Lamb, *Nullum Crimen, Nulla Poena Sine Lege, in* INTERNATIONAL CRIMINAL LAW, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 734 (Antonio Cassese, Paola Greta & John R.W.D. Jones, eds., 2002).

[62] *Id.*

[63] Rome Statute, art. 22, ¶ 2.

[64] Art. 22, ¶ 1.

[65] Art. 8(2)(b)(iv)

This is the reason why this work's task is not to argue that there is an independent "crime against the environment" under the Rome Statute that is just couched in different terms. Rather, this paper examines whether under the current framework of the Rome Statute, there are provisions which, although ultimately targeting the punishment of human rights violations, could also be used as a means to exact accountability for the punishment of environmental destruction. This is consistent with what the ICC Prosecutor calls "crimes committed by means of, or resulting in, the destruction of the environment."

Finally, it must be explained that the core crimes, like other crimes in various penal statutes, require the presence of two basic elements: (a) *actus reus*, which refers to the commission of the specific acts penalized under the provisions applicable to the core crime charged to have been committed;[66] and (b) *mens rea*, the standard formulation of which is described in Article 30 of the Rome Statute:

> Article 30
> Mental element
>
> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purpose of this article, a person has intent where:
>
> (a) In relation to conduct, the person means to engage in the conduct;
> (b) In relation to a consequence, the person means to cause the consequence or is aware that it will occur in the ordinary course of events.
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> 3. For the purpose of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.[67]

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[66] Maria Kelt & Herman von Hebel IV, *What are Elements of Crimes?, in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 14 (Roy Lee ed., 2001).

[67] Rome Statute, art. 30.

The element of *actus reus* is elaborated further in the next chapters, particularly in the discussion of crimes which may be used as basis for the potential prosecution inquired herein. The discussion will also keep in mind the general standard of *mens rea* under Article 30, unless the provision requires a *dolo specialis*, as in the crime of genocide.

III. THE ROME STATUTE CRIMES INVOLVING ENVIRONMENTAL DESTRUCTION

A. War Crimes and Environmental Destruction

It is easiest to imagine environmental destruction in the context of war. In the development of international law, the term armed conflict has been used in place of war, particularly in the Rome Statute, which also covers non-international armed conflict.

The law that governs the permissible and prohibited activities during or in the course of an armed conflict is traditionally referred to as *jus in bello*, or international humanitarian law.[68] While international humanitarian law primarily protects persons actively participating in the armed conflict, it also extends its reach to protect property that may come into the hands of the adversary.[69] In general, this field of law protects the "population, property, and pre-existing order of an occupied territory."[70] This, therefore, sets a potentially important link between the punishment of perpetrators of war crimes and the environmental destruction caused by them.

This is particularly clear when viewed in light of the principle enunciated in the Declaration of St. Petersburg of 1868,[71] which states that "the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy."[72] This means that parties to an armed conflict, including those from which they source their

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[68] Michael Cottier, *Art. 8 War Crimes*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVER'S NOTES, ARTICLE BY ARTICLE 305 (Otto Triffterer ed., 2nd ed. 2008).

[69] *Id.* at 306.

[70] *Id.*

[71] Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S. 297.

[72] *Id.*, ¶ 2.

tools, are not allowed to just use any and all means to achieve their goals.[73] It is therefore reasonable to conclude that environmental destruction is part of what is being prevented here.

A war crime is a crime that is committed in the course of a war or armed conflict. Broadly speaking, a war crime is committed through acts that constitute a violation of international humanitarian law, such act having been criminalized under treaty or customary international law.[74] For the purpose of this work, the second requirement is considered to have been fulfilled, as war crimes are defined and punished under Article 8 of a treaty—the Rome Statute.

The provision notes that these war crimes must be "committed as part of a plan or policy or as part of a large-scale commission of such crimes."[75] The particularity of this focus implies that the ICC has jurisdiction over crimes committed in the course of an international armed conflict. Notably, however, the language of the provision—and the character of Articles 8(2)(c) to (e), for example—does not exclude (and in fact even implies) the application of the Rome Statute in armed conflicts that are not international in character.[76] Nevertheless, the discussion of the provision is made with this distinction in mind for the sake of clarity. To this end, it is important to make this distinction by stating that an international armed conflict "occurs when one or more States have recourse to armed force against another state,"[77] while an armed conflict not of an international character, also known as a "non-international armed conflict," is defined in Article 1(1) of Protocol II to the Geneva Conventions of 1949[78] as that—

> [W]hich [takes] place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them

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[73] Freeland, *supra* note 2, at 59-60.

[74] Cottier, *supra* note 68, at 304-305.

[75] Rome Statute, art. 8(1).

[76] Herman von Herbel, *The Elements of War Crimes, in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 110 (Roy Lee ed., 2001).

[77] International Committee of the Red Cross [hereinafter "ICRC"], *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, Mar. 2008, *available at* https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf

[78] ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter "Protocol II"], June 8, 1977, 1125 UNTS 609.

> to carry out sustained and concerted military operations and to implement this Protocol.[79]

Most of the acts punished under Article 8 of the Rome Statute already form part of international humanitarian law, which Jean Pictet describes as a "branch of public international law"[80] that "owes its inspiration to a feeling for humanity and which is centered on the protection of the individual."[81]

A student of international law, aware of the many limitations in the field, would interpret this definition as likely precluding an argument that acts involving environmental destruction is part of what is being punished, since the focus of the protection is the human being, without mention of the natural environment. However, competing philosophies on the law shows that emphasis on boundaries are often being pushed, and doctrines are constantly re-examined, such that they eventually accommodate ideas which could not have been imagined as being covered by a certain concept in the past. In this regard, one could interpret "a feeling for humanity" as a concept that is broad enough to cover the application of a "humane" standard in our treatment of the environment. More importantly, the idea of being "centered on the protection of the individual" is not fully realized without the protection of the environment, considering that it is the natural environment that sustains the human being and allows him to exercise his protected freedoms. This is consistent with the anthropocentric view discussed earlier, i.e. that the protection of human beings who are adversely affected by armed conflict takes into account a host of aspects that, if not addressed, would precisely hinder the achievement of the goal. Thus, it has been argued that the objective is broader in the sense that the need for regulation is aimed at minimizing the "horrors rendered on 'people, property and the environment' by war."[82]

The discussion that ensues surveys the provisions of Article 8 of the Rome Statute and locates the space for the prosecution of acts involving environmental destruction under this "war crimes" regime. At this point, there is yet no focused discussion on the character and capacity of the perpetrator in order not to cause confusion as to the particular task for this chapter. Further, in this part of the chapter, the discussion will also begin with the provision that provides a clearer basis of prosecution because it makes explicit reference to the natural environment. Thereafter, other war crimes

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[79] Protocol II, art. 1(1).

[80] Freeland, *supra* note 2, at 51.

[81] *Id.*, *citing* Jean Pictet, *quoted in* YVES BEIGBEDER, JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE 1 (1999).

[82] Freeland, *supra* note 2, at 53.

which may by interpretation be used as basis to prosecute crimes that make use of or result in environmental destruction will be examined.

1. War Crimes Involving Environmental Destruction in International Armed Conflicts

i. The Crime of Causing Excessive Damage to the Natural Environment

The provision in the Rome Statute that makes an explicit reference to the punishment for causing damage to the natural environment is Article 8(2)(b)(iv):[83]

> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
>
> * * *
>
> (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or *widespread, long-term and severe damage to the natural environment which would be clearly excessive* in relation to the concrete and direct overall military advantage anticipated[.][84]

Establishing this crime requires proof of the following elements:

1. The perpetrator launched an attack.

2. The attack was such that it would cause [...] damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such [...] damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated

3. The perpetrator knew that the attack would cause [...] damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

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[83] Rome Statute, art. 8(2)(b)(iv).

[84] Art. 8(2)(b)(iv). (Emphasis supplied.)

4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[85]

Before examining the requirements and the limitations under this provision, the first general comment that may confront one who wishes to prosecute using this provision is how its primary aim is not to punish the damage to the environment per se; rather, it seeks to hold the perpetrator liable for environmental damage only when it is excessive vis-à-vis a strategy to gain some military advantage. In other words, the punishment of causing damage to the environment is secondary to obtaining a military objective.[86] However, as stated at the onset, this is not a significant problem when the goal is only to locate a provision which may hold a perpetrator of a crime accountable for acts involving environmental destruction, however indirectly such provision may be applied.

More significantly, this provision is a step in the right direction as it breaks free from a completely anthropocentric approach; this is seen in how the language of the provision, arguably, does not make liability for excessive damage to the environment contingent on the death of or injury to human beings.[87] Hence, the examination of the presence of the elements of the crime is relatively free of the task of gathering evidence of human suffering, and will also focus on how to show the extent of the damage caused to the environment.

Nevertheless, there are hurdles that must be overcome if one intends to prosecute on the basis of this provision. An analysis of this provision and the corresponding elements support the thesis that causing damage to the environment may only be characterized as a war crime if the same is "widespread, long-term, and severe," and if the acts do not comply with the principle of proportionality. While this provision clearly gives space for prosecuting a war crime that involves environmental destruction, the

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[85] Elements of Crimes of the International Criminal Court [hereinafter "Elements of Crimes"], art. 8(2)(b)(iv), ICC-ASP/1/3, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

[86] Freeland, *supra* note 2, at 206, *citing* Mark A. Drumbl, *Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes*, *in* THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL ECONOMIC, AND SCIENTIFIC PERSPECTIVES 623 (Jay Austin & Carl Bruch eds., 2000).

[87] Ryan Gilman, *Expanding Environmental Justice after War: The Need for Universal Jurisdiction over Environmental War Crime*, 22 COLO. J. INT'L ENVTL. L. & POL'Y 447, 453 (2011). Note, however, that the definition of the term "severe" in other instruments, like the ENMOD, may show that human injury should still be taken into account.

requirements that must be fulfilled set a high bar. For one, since all three qualifiers of the damage are joined by the conjunction "and," this means that all must be present at the same time. To aid in imagining how these requirements may be fulfilled, one may refer to what Anthony Leibler suggests as the meaning of these terms in the context of the 1977 Additional Protocol I to the Geneva Conventions, to wit:[88]

> 1. "Widespread": encompassing at least an entire region of several hundred [kilometers];
>
> 2. "Long-term": lasting for at least several decades;
>
> 3. "Severe": causing death, ill-health or loss of sustenance to thousands of people, at present or in the future.[89]

In addition to the foregoing, to be punished under this provision, the perpetrator must have violated the principle of proportionality,[90] in the sense that the "perpetrator must have known that the attack would cause death, injury, or damage to the natural environment, of a clearly excessive nature in relation to the military advantage sought."[91] The application of this customary norm of international law, in the context of *jus in bello* rules[92] such as this

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[88] Freeland, *supra* note 2, at 87, *citing* Anthony Leibler, *Deliberate Wartime Environmental Damage: New Challenges for International Law*, 23 CAL. W. INT'L L.J. 67, 105-6 (1992).

[89] The ENMOD also defines these terms, but the application of the same are limited to cases falling under the ENMOD.

[90] Freeland, *supra* note 2, at 150-58; Art. 51(5)(b) & 57(2)(a)(iii) of Additional Protocol I provide, in part, as follows:

> Article 51 – Protection of the civilian population
>
> 5. Among others, the following types of attacks are to be considered as indiscriminate:
>
> (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
>
> Article 57 – Precautions in attack
>
> 2. With respect to attacks, the following precautions shall be taken:
>
> (a) those who plan or decide upon an attack shall:
>
> (iii) refrain from deciding to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

[91] Roberta Arnold, *(iv) Intentionally launching an attack in the knowledge of its consequences to civilian or the natural environment, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVER'S NOTES, ARTICLE BY ARTICLE 339 (Otto Triffterer ed., 2nd ed. 2008).

[92] *See* Additional Protocol I.

particular provision in the Rome Statute, should also take into account effects to the environment.[93] This was confirmed by the International Court of Justice ("ICJ") in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*[94] when it stated that:

> 30. [T]he Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of [self-defense] under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality. This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that: "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."
>
> 31. The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol 1 provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals. These are powerful constraints for all the States having subscribed to these provisions. [95]

In relation to this, the International Committee of the Red Cross ("ICRC") in one study asserted that environmental destruction as part of this war crime is supported by a customary norm of international law. The ICRC noted that "[t]he use of methods or means of warfare that are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon."[96]

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[93] Freeland, *supra* note 2, at 155.

[94] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 35 I.L.M. 809 (July 8, 1996).

[95] *Id.*, ¶¶ 30-31.

[96] ICRC, Rule 45. Causing Serious Damage to the Natural Environment, *available at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule45. Note that the

Thus, the specific reference to damage to the natural environment here clearly provides a basis to prosecute persons who cause environmental destruction. However, the difficulty of doing so is obvious.

In any case, it will not be difficult to imagine a situation which may constitute this war crime. It may be recalled that Agent Orange, a lethal herbicide used by the United States in the Vietnam War,[97] was produced and supplied by Monsanto upon the alleged commissioning by the US military.[98] The ecological effect of the use of Agent Orange, used within the military operation called "Operation Ranch Hand," was explained by Dr. Gary G. Kohls in this informative manner:

> Operation Ranch Hand had actually been in operation since 1961, mainly spraying its poisons on Vietnam's forests and crop land. The purpose of the operation was to defoliate trees and shrubs and kill food crops that were providing cover and food for the "enemy".
>
> Operation Ranch Hand consisted of spraying a variety of highly toxic polychlorinated herbicide solutions that contained a variety of chemicals that are known to be (in addition to killing plant life) human and animal mitochondrial toxins, immunotoxins, hormone disrupters, genotoxins, mutagens, teratogens, diabetogens and carcinogens that were manufactured by such amoral multinational corporate chemical giants like Monsanto, Dow Chemical, DuPont and Diamond Shamrock (now Valero Energy). All were eager war profiteers whose CEOs and [shareholders] somehow have always benefitted financially from America's wars.
>
> * * *
>
> Agent Orange was the most commonly used of a handful of color-coded herbicidal poisons that the USAF sprayed (and frequently re-sprayed) over rural Vietnam (and ultimately – and secretly – Laos and Cambodia). It was also used heavily over the perimeters of many of its military bases, the toxic carcinogenic and disease-inducing chemicals often splashing directly upon American soldiers.

ICRC interpretation of norms may be persuasive, but not authoritative, considering that such is not one of the sources of international law enumerated in the ICJ Statute.

[97] Euan Black, *Makers of Agent Orange to be tried for 'war crimes' by a people's tribunal, Current Affairs,* SOUTHEAST ASIA GLOBE, Oct. 13, 2016, *available at* https://southeastasiaglobe.com/monsanto-war-crimes/

[98] *Id.*

* * *

> The soil in and around some of the US and [Army of the Republic of Viet Nam (ARVN)] military bases continue to have extremely high levels of dioxin. The US military bases where the barrels of Agent Orange were off-loaded, stored and then pumped into the spray planes or "brown water" swift boats are especially contaminated, as were those guinea pig "atomic soldiers" who handled the chemicals. The Da Nang airbase today has dioxin contamination levels over 300 times higher than that which international agencies would recommend remediation.[99]

This description of the effect caused by the use of Agent Orange in the attack is *widespread*, considering the large area which was affected (arguably a significant portion of one country or more countries); *long-term*, as the environmental damage must have lasted for more than 50 years already; and *severe*, which could be shown by the thousands of people, particularly infants and children, who are suffering disabilities caused by such a chemical. Thus, a prosecutor who is able to gather enough evidence to present this case, and in the context of an international conflict, could actually succeed in prosecuting persons who are either state or corporate agents under any of the applicable modes of responsibility.

ii. The Crime of Pillaging

Aside from this war crime, there are other provisions in Article 8 of the Rome Statute that may be used to prosecute acts involving environmental destruction. A war crime which has more association with corporations and their agents than the rest is that defined in Article 8(2)(b)(xvi):[100]

> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely any of the following acts:
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> * * *
>
> (xvi) Pillaging a town or place, even when taken by assault[.]

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[99] Gary Kohls, *Agent Orange, Monsanto, Dow Chemical and Other Ugly Legacies of the Vietnam War*, DULUTH READER WEBSITE, *available at* http://duluthreader.com/articles/2015/11/11/6224_agent_orange_monsanto_dow_chemical_and_other_ugly

[100] Rome Statute, art. 8(2)(b)(xvi).

The elements of this war crime are as follows:

1. The perpetrator appropriated certain property.

2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.

3. The appropriation was without consent of the owner.

4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[101]

Andreas Zimmerman, while noting that there is no official definition of the concept of "pillage,"[102] defines it as "the unauthorized appropriation or obtaining of property in order to confer possession of it on oneself or on a third party against the will of the rightful owner. Accordingly, the definition embraces acts of plundering, looting, and sacking."[103]

Defining pillage as essentially "theft during war," James Stewart explains that this theft or exploitation of natural resources is punished as a war crime because it continues to be one of the main sources of financing for the perpetration of armed violence, such that "the sale of natural resources within conflict zones has not only created perverse incentives for war, it has also furnished warring parties with the finances necessary to sustain some of the most brutal hostilities in recent history."[104]

In this context, the participation of corporations and businesses in the pillage of natural resources and the trade involving such pillaged resources are important parts of the chain of actions that fuel the continuation and even the commencement of a new armed conflict. Further, it is not difficult to imagine how pillaging natural resources destroys the natural environment. Pillaging,

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[101] Elements of Crimes, art. 8(2)(b)(xvi).

[102] Andreas Zimmerman, *(xiii) Prohibited destruction*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVER'S NOTES, ARTICLE BY ARTICLE 409 (Otto Triffterer ed., 2nd ed. 2008).

[103] *Id.*

[104] JAMES STEWART, PROSECUTING THE PILLAGE OF NATURAL RESOURCES 9 (2nd ed. 2011), *available at* https://www.justiceinitiative.org/publications/corporate-war-crimes-prosecuting-pillage-natural-resources.

whether extractive or non-extractive, disturbs the system by which the components of the environment sustain themselves.

One view advanced with respect to the war crime of pillage under this provision is that it excludes isolated incidents of pillage for the reason that the crimes under the jurisdiction of the ICC are those that are in the character of "the most serious crimes of concern to the international community as a whole."[105] However, this bleak view can be balanced by the fact that there is no mention in the Rome Statute nor in the Elements of Crime of this limitation.[106] Thus, given that the prohibition appears to cover all types of properties[107] (which include components of the natural environment) and is limited only by the principle of military necessity, it is not unreasonable to conclude that this could also be used to prosecute offenders such as agents who take part in the activities that constitute elements of the crime of pillaging. This is particularly supported by the assessment that there is no restriction with respect to the addressee of this prohibition; thus, both combatants and/or non-combatants or civilians may be punished under this provision.[108]

A case that discussed the duty of the state in controlling its agents is that of *Armed Activities on the Territory of the Congo*,[109] wherein the ICJ ruled that Uganda, which was the occupying power of the Ituri district in the Democratic Republic of Congo ("DRC"), violated its obligation, to wit:

> 246. The Court finds that there is sufficient evidence to support the DRC's claim that Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering and exploitation of the DRC's natural resources. As already noted, it is apparent that, despite instructions from the Ugandan President to ensure that such misconduct by UPDF troops cease, and despite assurances from General Kazini that he would take matters in hand, no action was taken by General Kazini and no verification was made by the Ugandan Government that orders were being followed up (see paragraphs 238-239 above). In particular the Court observes that the Porter Commission stated in its Report that "[t]he picture that emerges is that of a deliberate and persistent indiscipline by commanders in the field, tolerated, [and] even encouraged and covered by General Kazini, as shown

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[105] Rome Statute, pmbl. ¶ 4.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 410.

[109] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, I.C.J. Reports 2005, (Dec. 19, 2005) ¶ 246. (Citations omitted.)

> by the incompetence or total lack of inquiry and failure to deal effectively with breaches of discipline at senior levels". (Also of relevance in the Porter Commission Report are paragraphs 13.1 "UPDF Officers conducting business", 13.5 "Smuggling" and 14.5 "Allegations against General Kazini"). It follows that by this failure to act Uganda violated its international obligations, thereby incurring its international responsibility. In any event, whatever measures had been taken by its authorities, Uganda's responsibility was nonetheless engaged by the fact that the unlawful acts had been committed by members of its armed forces (see paragraph 214 above).[110]

One criticism is that the element of "private or personal use" limits the application of this provision in the protection of the environment during war time as it excludes the intention to destroy enemy property.[111] However, this is a positive assessment for the prosecution of corporate agents who, in acting for corporations, naturally aim to contribute in the pillaging for the private or personal use of these resources. This can be seen in situations of an international conflict wherein a state (which has gained control over an area of another) allows its corporate financiers, at the direction and determination of its directors or executives, to exhaust the area of its natural resources and similar properties, as a reward for its financial and other tactical support in the conduct of the hostilities.

iii. Environmental Destruction in Other War Crimes within an International Armed Conflict

Within the context of an international armed conflict, another provision which appears to punish environmental destruction is that of Article 8(2)(a)(iv):[112]

> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> * * *

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[110] *Id.* (Citations omitted).

[111] Aurelie Lopez, *Criminal Liability for Environmental Damage Occurring In Times of International Armed Conflict: Rights and Remedies*, 18 FORDHAM ENVTL. L. REV. 231 (2006-2007).

[112] Rome Statute, art. 8(2)(a)(iv).

> (iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly[.]

For a finding that this war crime has been committed, the following elements must be established:

1. The perpetrator destroyed or appropriated certain property.

2. The destruction or appropriation was not justified by military necessity.

3. The destruction or appropriation was extensive and carried out wantonly.[113]

The property referred to in this provision does not simply refer to any type of property, but to those which are protected under the Geneva Conventions of 1949.[114] This particular construction excludes the act of causing damage to the environment from the acts covered by this war crime. However, there is room to argue this point when taken in light of Article 53 of Fourth Geneva Convention[115] which provides that "[a]ny destruction by the Occupying Power or real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."[116]

Under this provision, one can make the argument that the damage to the environment, particularly an area or a natural resource that is specific and delimited, constitutes the real or personal property referred to. However, this is still a very narrow space and the difficulty of establishing the elements renders it unlikely that accountability for environmental destruction could be pursued here.

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[113] Elements of Crimes, art. 8(2)(a)(iv). "War crime of destruction and appropriation of property".

[114] Knut Dorrman, *(iv) "Extensive destruction and appropriation of property", in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVER'S NOTES, ARTICLE BY ARTICLE 312 (Otto Triffterer ed., 2nd ed. 2008).

[115] ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter "Fourth Geneva Convention"], Aug. 12 1949, 75 UNTS 287.

[116] Art. 53.

Further, the difficulty of exacting accountability under this provision is made even more challenging by the principle of military necessity,[117] as articulated in the second element of this war crime. This difficulty stems from how international criminal law courts have traditionally viewed and assessed military necessity. For example, in the case of *United States v. List*,[118] otherwise known as the *Hostages Case*, the act of Lothar Rendulic (the commander-in-chief of the German troops in Norway) in ordering and executing a "scorched earth policy"—an order that destroyed shelters and means of subsistence which included parts of the natural environment[119]—was not deemed criminal by the United States Military Tribunal in Nuremberg, which explained that:

> The evidence shows that the Russians had very excellent troops in pursuit of the Germans. Two or three land routes were open to them as well as landings by sea behind the German lines. The defendant knew that ships were available to the Russians to make these landings and that the land routes were available to them. The information obtained concerning the intentions of the Russians was limited. The extreme cold and the short days made air reconnaissance almost impossible. It was with this situation confronting him that he carried out the "scorched earth" policy in the Norwegian province of Finnmark which provided the basis for this charge of the indictment.
>
> * * *
>
> There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But [w]e are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced

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[117] International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land [hereinafter "Hague Convention (IV)"], Oct. 18, 1907, *available at* http://www.refworld.org/docid/4374cae64.html

[118] VIII UN War Crimes Commission, *Hostages Trial (Trial of Wilhelm List and Others), United States Military Tribunal, Nuremberg* [hereinafter "Hostages Trial"], *in* LAW REPORTS OF TRIALS OF WAR CRIMINALS 34-76 (1949).

[119] Dupuy & Vinuales, *supra* note 42, at 348 *citing* Hostage Case (U.S. v. List), 11 TWC 759 (1950).

> that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist.[120]

Considering the difficulty of using this preceding provision as basis of a charge, it would be helpful to examine whether such a space can be found under Article 8(2)(b)(ii), which provides:

> (b) Other serious violations of laws and customs applicable in international armed conflict, within the established framework of international law, namely any of the following acts:
>
> * * *
>
> (iii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives[.][121]

The elements of this war crime are as follows:

1. The perpetrator directed an attack.

2. The object of the attack was civilian objects, that is objects which are not military objectives.

3. The perpetrator intended such civilian objects to be the object of the attack.[122]

This is a broader provision in the sense that it does not specifically refer to property protected under a specific treaty but instead draws from provisions from the whole corpus of "laws and customs in international armed conflict."[123] Thus, there is no requirement to satisfy the specific requirements in the treaty. Further, there is yet no clear definition on what constitutes "civilian objects." Given the flexibility of the concept, it can be argued that the environment or a portion of it can be construed as constituting a civilian object. This interpretation would be supported by the ICRC draft *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*,[124] which provides that the "[d]estruction of the environment not justified by military necessity violates international

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[120] *Hostages Trial, supra* note 118, at 68.

[121] Rome Statute, art. 8(2)(b)(ii).

[122] Elements of Crimes, art. 8(2)(b)(ii): War crime of attacking civilian objects.

[123] Dorrman, *supra* note 114, at 328.

[124] ICRC, *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, Apr. 30, 1996, *available at* https://www.icrc.org/eng/resources/documents/article/other/57jn38.htm

humanitarian law."[125] It further stipulates that "[t]he general prohibition on destroy[ing] civilian objects, unless such destruction is justified by military necessity, also protects the environment."[126]

From this material, it can be seen that there is a view that civilian objects can encompass the environment and that the destruction of the latter is deemed a destruction of the former—an act which could be assessed as a violation of international humanitarian law. Together with the ICRC study, various scholars have concluded that the natural environment is to be considered as a civilian object.[127] However, this conclusion is countered by those who point out that it is precisely the "nebulous character" of the natural environment that makes it difficult to be considered as a civilian object *per se*.[128]

The basic principle underpinning this war crime is the principle of distinction, particularly pointed out in the second element with respect to civilian objects and military objectives. The content of this principle was earlier codified in Article 52 of General Protocol I,[129] which states that:

> 1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
>
> 2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[130]

As argued above, there is some space to advance the reasoning that the destruction of the natural environment as a civilian object may be covered by this provision. However, the principle of distinction does not help in supporting a regime of exacting accountability for environmental destruction

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[125] *Id.* ¶ 8.

[126] *Id.* ¶ 9.

[127] Freeland, *supra* note 2, at 141-149.

[128] *Id.*

[129] ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [hereinafter "Protocol I"], June 8, 1977, 1125 UNTS 3.

[130] Protocol I, art. 52.

under this provision because the broad definition of "military objective" means that the natural environment may still be covered, considering that the same may actually constitute an object which by its "nature, location, purpose or use, make an effective contribution to military action." In any case, one can still make the argument and find support in the pronouncement of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in the case involving the North Atlantic Treaty Organization ("NATO").[131] The ICTY held that "[e]ven when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure and natural environment with a consequential adverse effect on the civilian population."[132]

Another provision in the Rome Statute that would allow the prosecution of actors who destroy the environment is Article 8(2)(b)(v).[133] It punishes the act of "[a]ttacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives."

The elements of this war crime are as follows:

1. The perpetrator attacked one or more towns, villages, dwellings or buildings.

2. Such towns, villages, dwellings or buildings were open for unresisted occupation.

3. Such towns, villages, dwellings or buildings did not constitute military objectives.

4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[134]

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[131] International Criminal Tribunal for the former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, June 13, 2000, *available at* http://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal, as *cited* in Dupuy & Vinuales, *supra* note 42, at 348.

[132] *Id.*

[133] Rome Statute, art. 8(2)(b)(v).

[134] Elements of Crimes, art. 8(2)(b)(v): War crime of attacking undefended places.

A reading of this provision leads one to think that the destruction of towns and villages counts as destruction of the natural environment that forms part thereof. Hence, such a war crime is included in this list. A situation like this may involve corporations who manufacture and supply ammunition to the combatants. A more direct situation is when the aggressor makes use of a private security company to reinforce its military, and the employees or corporate agents of the private security entity participate in the attack or bombardment.

On top of these provisions, Article 8(2)(b)(xiii) may also provide a leeway for prosecution when it includes, as a war crime, "[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war."[135]

The elements of this war crime are:

1. The perpetrator destroyed or seized a certain property.
2. Such property was property of a hostile party.
3. Such property was protected from that destruction or seizure under the internal law of armed conflict.
4. The perpetrator was aware of the factual circumstances that established the status of the property.
5. The destruction or seizure was not justified by military necessity.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of armed conflict.[136]

The crucial element under this provision is the characterization of the term "enemy property." In this case, it is easier to satisfy the requirement that the property be owned by the enemy or by a hostile party, considering that any part of the natural environment or natural resource within the territory of an enemy, as defined in *jus in bello*, can be considered as such. It is argued that

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[135] Rome Statute, art. 8(2)(b)(xiii).

[136] Elements of Crimes art. 8(2)(b)(xiii): War crime of destroying or seizing the enemy's property.

the concept more difficult to define is "property"—which is not qualified under the said provision.[137] The debate regarding this concept revolves around whether property here means private property or government property, as such distinction is made under the 1907 Hague Convention Respecting the Laws and Custom of War on Land.[138] Hence, the absence of any definition with respect to property again provides an opportunity to argue that this term includes the natural environment, which should not be destroyed or seized under this provision.

Other war crimes which involve acts that, when committed, result in environmental destruction are those provided for in Articles 8(2)(b)(xvii)[139] and 8(2)(b)(xviii).[140] The former provides for cases "[e]mploying poison or poisoned weapons"[141] while the latter shows situations of "[e]mploying asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices."[142]

The prohibition on the use of the weapons in warfare traces back to the 1863 Lieber Code,[143] which provided that "[t]he use of poison in any manner, be it to poison wells, or food, or arms is wholly excluded from

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[137] Zimmerman, *supra* note 102, at 398.

[138] Hague Convention (IV), *supra* note 117.

[139] Rome Statute, art. 8(2)(b)(xvii).

[140] Art. 8(2)(b)(xviii).

[141] The elements of this crime are as follows:

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. 4. The perpetrator was aware of factual circumstances that established the existence of armed conflict.

[142] The elements of this crime are as follows:

1. The perpetrator employed a gas or other analogous substance of device.
2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of armed conflict.

[143] Instructions for the Government of Armies of the United States in the Field [hereinafter "Lieber Code"], Apr. 24, 1863, *available at* https://ihl-databases.icrc.org/ihl/INTRO/110

modern warfare. He that uses it puts himself out of the pale of the law and usages of war."[144]

It is easy to imagine how the weapons that may be involved, particularly chemical and toxic ones, would clearly damage the environment, with harmful and devastating effects lasting many years. However, an examination of the Elements of Crimes reveals that destruction of the natural environment is not exactly the subject of this provision. The second element of Article 8(2)(b)(xvii) describes a "substance" that "causes death or damage to health in the ordinary course of events, through its toxic properties." The "health" that is referred to here is that of human health, thereby excluding threats to health of plants and animals. However, an argument can be made as to causation, such that when the damage to the environment proximately causes the harm to the health of the human being, it could potentially be covered under this provision.

With respect to Article 8(2)(b)(xviii), one can find guidance from The 1925 Geneva Protocol[145] to argue that this provision contemplates some protection to the environment, particularly flora and fauna when it provides a prohibition on the use of "[a]ny chemical agents of warfare—chemical substances, whether gaseous, liquid, or solid—which might be employed because of their direct toxic effects on man, animals or plants."[146]

However, the same comment on Article 8(2)(b)(xvii) can be made in this provision considering that its second element similarly speaks of a "gas, substance, or device" that "causes death or serious damage to health,"[147] referring to human health.

2. War Crimes in Non-International Armed Conflicts and Environmental Destruction

This section examines the provisions applicable to an armed conflict not of an international character.

In examining the relevance of these provisions to the punishment of environmental destruction, it is first pointed out that there is a similar

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[144] LIEBER CODE, art. 70.

[145] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 LNTS 65.

[146] *Id.*

[147] Zimmerman, *supra* note 102, at 398.

provision on the prohibition of pillaging under Article 8(2)(e)(v) and the discussion above applies herein. It is worth noting, however, that this crime does not appear to be subject to the military necessity exception. In this respect, a prosecution for pillage under this provision would lead the ICC to a consideration of the ICTY's pronouncement in *Prosecutor v. Hadzihasanovic*,[148] as follows:

> 53. The Chamber is of the view that, in the context of an actual or looming famine, a state of necessity may be an exception to the prohibition on the appropriation of public or private property. Property that can be appropriated in a state of necessity includes mostly food, which may be eaten in situ, but also livestock. To plead a [defense] of necessity and for it to succeed, the following conditions must be met: (i) there must be a real and imminent threat of severe and irreparable harm to life existence; (ii) the acts of plunder must have been the only means to avoid the aforesaid harm; (iii) the acts of plunder were not disproportionate and, (iv) the situation was not voluntarily brought about by the perpetrator himself.[149]

In this regard, Tara Smith assesses further that: "[p]illage as an international crime has the potential to pierce the corporate veil to hold senior members of multi-national corporations criminally responsible for natural resource exploitation in non-international armed conflict."[150]

Further, the following articles are mirror provisions that apply in non-international armed conflicts: Article 8(2)(e)(xii), which punishes the destruction and seizure of property of an adversary subject to the principle of military necessity;[151] Article 8(2)(e)(xiii), which prohibits the employment of poison or poisoned weapon;[152] and Article 8(2)(e)(xiv), which penalizes the employment of asphyxiating, poisonous or other gases, and all analogous liquids, materials, or devices.[153]

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[148] Prosecutor v. Hadzihasanovic and Kubura, Appeal Judgment, IT-01-47-A, (Int'l Crim. Trib. for the former Yugoslavia, 2008) *available at* http://www.refworld.org/cases, ICTY,48aaefec2.html

[149] *Id.*

[150] Tara Smith, *The Prohibition of Environmental Damage during the Conduct of Hostilities in Non-International Armed Conflict*, at 194, Mar. 9, 2013, *available at* https://aran.library.nuigalway.ie/handle/10379/3523

[151] Rome Statute, art. 8(2)(e)(xii).

[152] Art. 8(2)(e)(xiii).

[153] Art. 8(2)(e)(xiv).

3. Potential Prosecution under the War Crimes Regime

Having surveyed these war crimes, one may assess that Article 8(2)(b)(iv) clearly provides a basis to charge any perpetrator with a crime that involves environmental destruction. The war crime is explicit in punishing acts that cause excessive damage to the natural environment. Additionally, it can be argued that there is less emphasis on human suffering and that this war crime is actually eco-centric, such that it would be less difficult to create a theory of accountability for crimes involving environmental destruction within the Rome Statute.[154] However, as noted above, the difficulty lies in the high bar set by the elements of the crime itself. In the same vein, it is noticeable that space can be located for the prosecution of environmental destruction in the other war crimes discussed because of the ambiguity of not only the concepts but also some of the elements included to establish the crime. This means that the ICC Prosecutor can marshal the facts and relevant principles of international criminal law to present a case that would convince the ICC that the specific situation actually constitutes a war crime under any of the relevant provisions. However, the enemy to this creativity is the principle of legality and the strict interpretation of ambiguous provisions in favor of the accused. Given these difficulties in the area of war crimes, this work proceeds to examine the other Rome Statute crimes.

B. The Crime of Genocide

This work continues the examination with Article 6 of the Rome Statute, which punishes the crime of genocide as follows:

> For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;

[154] Gilman, *supra* note 87.

(e) Forcibly transferring children of the group to another group.[155]

From this list of acts, it is discernible that there is environmental destruction in acts that "[d]eliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part." In this regard, Aurelie Lopez suggests that "[A]rticle 6(c) of the Rome Statute could provide the means to punish 'environmental cleansing' which can be defined as the 'deliberate manipulation and misuse of the environment so as to subordinate groups based on characteristics such as race, ethnicity, nationality, religion and so forth.'"[156]

This reinforces the argument made by Carl Bruch that the destruction of areas where indigenous peoples reside, and on whose environment their culture, customs, and survival depend, may be considered as genocide.[157] In making this argument, Bruch uses the example of the petition filed in 1990, by the Sierra Club Defense Legal Fund, and the Ecuadorian NGO *Confederacion de Nacionalidades Indigenas de la Amazonia Ecuatorina* ("CONFENIAE"), before the Inter-American Commission on Human Rights ("IACHR"), [158] alleging primarily that "oil exploration and development in the Ecuadorian Amazon would devastate the environment and lead to ethnocide of indigenous peoples living in the region."[159] While the IACHR did not formally recognize the petition, it conducted an investigation, and in 1997 issued a report that, although did not address the issue of genocide squarely,[160] "highlighted potential violations of fundamental human rights arising from oil exploration and development that over the previous twenty-five years had discharged more than 30 billion gallons of toxic wastes (including produced water wastes) and crude oil into the waterways and onto the land."[161]

A more optimistic take on the matter was expressed by Tara Weinsten, who used the case of the March Arabs and pointed out that the

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[155] Rome Stature, art. 6.

[156] Aurelie Lopez, *Criminal Liability for Environmental Damage Occurring in Times of Non-International Armed Conflict: Rights and Remedies*, 18 FORDHAM ENVTL. L. REV. 231, 263 (2007).

[157] Carl Bruch, *All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict*, 25 VT. L. REV. 695, 727 (2000-2001).

[158] *Id.* at 727.

[159] *Id.*

[160] *Id.* at 728.

[161] *Id.* at 727. (Citations omitted.)

same had been considered as genocide by various sectors.[162] Weinstein summarized this case as follows:

> Specifically, in regard to the environment, the marshes were drained as part of a systematic effort to "deliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part." Legal scholars have recognized that environmental destruction "particularly directed to areas on which indigenous peoples depend for their survival could be tantamount to genocide." By building the "third river," as well as four other drainage canals that served to direct the Tigris and Euphrates away from the marshes, the Iraqi regime inflicted on the Marsh Arabs conditions that led to their displacement and the destruction of their existence. The reed beds were burned or destroyed by defoliants while pollutants depleted the fish populations. As the marshes dried, the residents were denied fresh water, nutritious fish, vital reed beds to build shelter, boats, and design handicrafts for sale, and trade routes to sell their handicrafts, and as a result, suffered from starvation, cholera, and other diseases. The Marsh Arabs were cut off from the natural resources of their marshes and were either forced to resettle or flee (often in fear for their lives). According to the U.S. State Department, "the draining of the marshes has led to the destruction of the Marsh Arabs' self-sufficient economy, the near-complete atrophy of the entire ecosystem, and the flight of tens of thousands of refugees, including 95,000 to a camp in Iran." The vast majority of Marsh Arabs are now dispersed throughout Iraq and Iran, and their existence in the marshes has been essentially destroyed.[163]

Despite the cases that provide hope in the possibility of charging state and corporate agents for committing genocide, the primary hurdle in the prosecution of this crime remains to be the *dolos specialis*, or the special genocidal intent specified as the third element, thus: "[t]he perpetrator intended to destroy, in whole or in part, that national, ethnical, racial, or religious group as such."[164] If this intent is present and proved, and coupled with the *actus reus* of the deliberate infliction of the conditions specified in the elements of the crime, it can easily be perceived that such will include destroying the natural environment which, more often than not, is the source of livelihood or peoples' basic "conditions of life" that enable them to survive. However, this intent is difficult to prove and it constitutes too high a

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[162] Tara Weinstein, *Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?*, 17 GEO. INT'L ENVTL. L. REV. 697, 717 (2004-2005).

[163] *Id.* at 717.

[164] Elements of Crimes, art. 6.

threshold, such that gathering evidence to prove such an intent would be too gargantuan a task. This difficulty would essentially defeat the purpose of prosecuting the environmental destruction as too long a time would have passed before the proceedings may even be initiated. What these points show, for genocide at least, is that, holistically, it may be possible to imagine more situations as constituting genocide. However, with respect to the satisfaction of the legal requirements, particularly the genocidal intent, the application will be severely constrained.

C. Crimes Against Humanity

The high *mens rea* requirement in genocide is not present in crimes against humanity. Article 7 of the Rome Statute provides that:

> 1. For the purpose of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[165]

[165] Rome Statute, art. 7.

The nature of crimes that may constitute "crimes against humanity" reveals two broad features.[166] The first feature looks into the crime as so heinous such that it is viewed as an attack on the very quality of being human.[167] This heinous character leads to the second feature that sees it as an attack not just upon the immediate victims but also against all humanity; hence, the entire community of humankind has an interest in imposing punitive sanction on those who perpetrate it.[168]

In connection with environmental destruction, Bruch advances the theory that "crimes against humanity could include widespread or systematic attacks that are made in a discriminatory manner on drinking water, food sources, and other environmental components directly affecting the life and physical well-being of a population."[169] According to him, one can imagine a scenario wherein "armed and paramilitary forces [poison] wells in a systematic attempt to remove a civilian population of a particular ethnicity or religion from an area."[170]

Further, Weinstein cites the provision on "[o]ther inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health" as a possible space whereby acts could involve environmental destruction.[171] However, a prosecution under this charge requires the showing that the crime is of a "similar level of gravity" as the other enumerated crimes.[172] She theorizes that, the environmental destruction can be characterized as inhumane and as causing indignity to persons, similar to how the International Criminal Tribunal for Rwanda ("ICTR"), in *Prosecutor v. Akayesu*, "found the forced undressing of women a 'crime of similar gravity' because of the indignity forced on the women".[173] In the same vein, Weinstein argues that—

> [B]y draining the marshes, Hussein deprived the Marsh Arabs not only of their dignity but also of their livelihood, as well as their culture itself. As a result of the draining of the marshes, the water became polluted and crusted with salt, which, in turn, limited drinking water and the ability to obtain food. The reed beds, fish

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166 Sean Murphy, First report on crimes against humanity, at 12, U.N. Doc. A/CN.4/680 (2015).

167 *Id.*

168 *Id.*

169 Bruch, *supra* note 157, at 729.

170 *Id.*

171 Weinstein, *supra* note 162, at 720. (Citations omitted.)

172 *Id.*

173 *Id.*

> stocks, and buffalo populations were also depleted such that the Marsh Arabs were no longer able to sustain their ancient way of living, leading to the end of the Marsh Arab existence in the marshes. This suffering caused by the environmental attack is sufficient to fall under Article 12.
>
> To prove a crime against humanity, a prosecutor must also show that the attack was widespread, systematic, or pursuant to a State policy. As described above, various documents and letters found during the Kurdish rebellion indicate a specific plan to rid the marshlands of their residents. Pursuant to this policy approved by Hussein, Iraqi officials built rivers and canals between and around the Euphrates and Tigris to direct the water away from the area and dry out the ancient marshes. The cumulative effect of the draining over the ten-year period was the destruction of the marshes and the Marsh Arabs.[174]

To reiterate, what clears the way for environmental destruction to be considered a crime against humanity as a Rome Statute crime is the absence of a requirement to satisfy the challenging element of genocidal intent.[175] Nevertheless, there is still a hurdle in this regard because any "environmental damage which results in extermination, persecution, forcible transfer or other inhumane acts still remains subject to the *mens rea* requirement that the act be committed with the knowledge that it amounts to a widespread and systematic attack on the civilian population."[176] The advantage, though, is that this requirement is less stringent than genocidal intent as far as environmental damage is concerned because of the supposition that "if the foreseeable result of state, individual, or organizational action is to cause severe environmental degradation that destroys or harms civilians, a policy to continue such conduct may be deemed a policy to carry out that action--or 'attack' as deemed by the [ICC] Statute."[177]

Within the crime itself, as defined in the Rome Statute, environmental destruction can be located in the definition of extermination, which "includes the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."[178] In relation to this, Articles 7(1)(d) and 7(2)(d) punishes and defines "deportation or forcible transfer of population" as "forced

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[174] *Id.* at 720-721.
[175] Murphy, *supra* note 166, at 51.
[176] *Id.*
[177] *Id.*
[178] Rome Statute, art. 7(2).

displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without ground permitted under international law."[179] Under this paradigm, the example of the situation in South Sudan, "where the water supply and land of communities were targeted to force their exodus in order to allow oil companies to take advantage of the natural resources," is illustrative.[180]

Another provision that could capture environmental destruction is Article 7(1)(h), which punishes persecution, defined in Article 7(1)(g) as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or the collectivity."[181] In this area, an organization or corporation engaged in the business of extracting oil and other minerals can do so with the intention of depriving the local population of such resources and the general benefits of the natural environment within which they live. A specific example would be companies building pipelines in areas that are closely linked to the identity of a group, and that such building is excessive and disruptive to the extent that the local group or indigenous peoples are deprived of their only source of subsistence.

Finally, a catch-all provision in Article 7(1)(k)[182] could also be used to punish these acts. Similarly, the great suffering included herein may contemplate a situation of corporations, acting in collusion with other hostile parties, destroying the natural environment to deprive persons of sources of subsistence and, in specific cases, to pollute the waters and other areas that would cause extreme pain and suffering to the persons. Such scenario, of course, uses environmental destruction as a means to commit a crime against humanity.

D. Spaces and Borders Under the Crimes of Genocide and Crimes Against Humanity

An examination of the elements and the principles relevant to the crime of genocide and crimes against humanity would show that the absence of the requirement for an armed conflict makes it possible for the ICC prosecutor to imagine as falling under these Rome Statute crimes more current situations of corporations, whether colluding with states or acting on their own, which cause damage to the environment and suffering, or even

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[179] Art. 7(1)(d), 7(2)(d).

[180] Smith, *supra* note 150, at 187. (Citations omitted).

[181] Rome Statute, art. 7(1)(h), 7(2)(g).

[182] Art. 7(1)(k). "Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

death, to people. However, this stringent requirement in war crimes is replaced by similarly strict elements in these two crimes, such as the intent requirement for genocide and the widespread or systematic attack element for crimes against humanity. Nevertheless, it is argued that a situation is more likely to fall under any of these two crimes than in a war crime that specifically requires the context of an armed conflict.

IV. CONCLUSION

This work argued that, under the Rome Statute, there exist spaces for the prosecution of acts that involve environmental destruction, even though such spaces only allow the indirect punishment of such acts. It defined the important concepts of the natural environment and its destruction in order to set out clearly the aim and scope of the acts which are to be addressed when this work makes mention of "acts involving environmental destruction." This is also in view of the formulation in the Policy Paper which makes use of the phrase "crimes committed by means of, or result in, environmental destruction." Thereafter, a discussion was made on the general principles in the Rome Statute which could serve as the "first layer" stumbling blocks to the potential prosecution examined herein. In this regard, this work assumed, in the meantime, that these requirements have been met in order to proceed to an exploration of the Rome Statute crimes which may provide a platform to punish acts involving environmental destruction at the ICC.

This work also discussed the various war crimes, the crime of genocide, and the crimes against humanity, examined their elements, and scrutinized which of these crimes are more likely to support an optimistic view that there are indeed core crimes which may be used to hold agents who perpetrate crimes involving environmental destruction accountable. This work noted that crimes by corporations, like those which involve collusion and interaction with combatants by supplying armaments and participating in the hostilities, in the context of an attack, may amount to the crime of causing excessive damage to the natural environment as defined in Article 8(2)(b)(iv) of the Rome Statute. Other war crimes may also be interpreted to include elements that enable the indirect punishment of environmental destruction by filing charges based on them. However, aside from the particular elements which are difficult to prove, the use of these war crimes provisions would only be applicable in very limited circumstances because of the need to show the armed conflict nexus.

Thus, this work was prompted to look into the other crimes of genocide and crimes against humanity which seem to be more open to

interpretations that accommodate acts involving environmental destruction. In particular, these crimes are more likely to cover contemporary examples of corporate environmental crimes such as the supply and use of chemicals and other weapons that kill human beings and injure the environment, or those crimes that involve the pollution of the sources of sustenance of peoples such that they are either severely injured or deprived of the means to live. However, these two crimes also present their own challenges, i.e. the specific intent requirement for genocide, and the context element for crimes against humanity, which elements are difficult to prove. Nevertheless, in all these core crimes, this work was able to discuss how the various elements can be analyzed to contemplate and cover acts involving environmental destruction.

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