Inputs on the public consultation of the Office of the Prosecutor of the International Criminal Court regarding accountability for environmental crimes under the Rome Statute

Jérôme de Hemptinne[1], Anne Peters[2], Luigi Prosperi[3], Cedric Ryngaert[4],

Raphaël van Steenberghe[5], Daan van Uhm[6]

[1] Assistant Professor of International Law, Utrecht University Law School; Researcher at the University of Louvain.
[2] Managing Director, Max Planck Institute for Comparative Public Law and International Law Heidelberg; Professor at the universities of Heidelberg, Freie Universität Berlin, Basel; L. Bates Lea Global Law professor, University of Michigan Law School; member of the Permanent Court of Arbitration; associate member of the Institut de Droit International.
[3] Assistant Professor of Criminal Law, Willem Pompe Institute for Criminal Law and Criminology, Utrecht University.
[4] Professor of Public International Law, Utrecht University Law School.
[5] Professor, University of Louvain; Research Associate of the National Fund for Scientific Research in Belgium.
[6] Associate Professor of Criminology, Willem Pompe Institute for Criminal Law and Criminology, Utrecht University.

Table of Contents

1. Introduction

1. Pursuant to the call of the Prosecutor of the International Criminal Court (ICC) of 16 February 2024 regarding the designing of a new policy to tackle environmental criminality (new Policy paper), please find below some theoretical and practical inputs on the matter. These inputs are the result of a collective effort of the Max Planck Institute for Comparative Public Law and International Law (Heidelberg, Germany), the School of Law of the University of Utrecht (the Netherlands),[7] and the Law Faculty of the University of Louvain (Belgium). As demanded in the call, our observations focus on the following three issues: (**1**) international environmental crimes; (**2**) modes of liability applicable to these crimes; and (**3**) complementarity and cooperation issues. Given the short timeframe to respond to this call and the complexity of the questions at stake, the analysis below serves the purpose of flagging relevant issues and outlining arguments that would require further consideration.

2. Before addressing these issues, we would like to make a general observation. So far there has not been any ICC case that specifically addressed massive degradation and destruction of ecosystems despite the fact that it is now well-documented that these ecosystems are severely impacted by armed conflicts and other related crisis situations. The optimism generated by the publication of the Policy paper on case selection and prioritization on 15 September 2016 (2016 Policy Paper),[8] announcing that the ICC Prosecutor would 'give 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', has quickly evaporated. Communications filed pursuant to Article 15 of the ICC Statute with regard to, among others, international crimes allegedly committed in the context of land grabbing by the Cambodian Government since the early 2000s[9] and in the context of the mass deforestation of the Amazon rainforest under Bolsonaro's government since 2019[10] have not been picked up nor publicly acknowledged by the Office of the Prosecutor.

3. The silence of the ICC on the matter could be explained by the fact that devoting time, resources, and energy to protect environmental interests might interfere with — if not run contrary to — safeguarding the interests of vulnerable human communities, which the Statute clearly prioritizes. It is also true that the main legal instruments at the disposal of the ICC Prosecutor and judges — the ICC Statute and the Rules of Procedure and Evidence — seem

---

[7] In particular, the Building Block Illegal Environmental Markets of the School's research programme on Regulation and Enforcement in Europe, which is institutionally linked to Project Ecocide, funded by Utrecht University's Strategic Theme Pathways to Sustainability.

[8] Office of the Prosecutor, Policy Paper on case selection and prioritization (2016 Policy Paper), 15 September 2016, § 41, available online at https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTPPolicy_Case-Selection_Eng.pdf (all online resources mentioned in this document have last been accessed on 16 March 2024).

[9] Global Diligence LLP, 'Communication Under Article 15 of the Rome Statute of the International Criminal Court. The Commission of Crimes Against Humanity in Cambodia – July 2002 to Present' (Executive Summary), 7 October 2014, available online at https://media.business-humanrights.org/media/documents/files/documents/Executive_Summary_Communication_Under_Article_15_ICC_Rome_Statute.pdf.

[10] See AllRise, 'Communication under Article 15 of the Rome Statute of the International Criminal Court regarding the Commission of Crimes Against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to present, perpetrated by Brazilian President Jair Messias Bolsonaro and certain former and current principal actors of his administration', 12 October 2021, available online at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211012_14633_na.pdf; and Greenpeace, Climate Counsel, Observatório do Clima, 'Article 15 Communication to the Office of the Prosecutor of the International Criminal Court. Crimes Against Humanity in Brazil: 2011 to the Present – Persecution of Rural Land Users and Defenders and Associated Environmental Destruction', 9 November 2022, available online at https://brasil-crimes.org/downloads-docs/EN/Brazil_Communication_09-11-22_1.pdf.

to be ill-equipped to address complex environmental criminality. Indeed, anthropocentric in nature, ICL contains few (and mostly inadequate) provisions that, directly or indirectly, criminalize acts which harm the environment and regulate the repression of these acts and the reparation of the damage that they cause.

4. That being said, we are of the view that putting emphasis on environmental criminality is now becoming urgent for the three following main reasons.

   First reason: this would in no way downgrade the protection of humans' interests, as sometimes contended. On the contrary! Environmental and human preoccupations are very much intertwined: the adverse consequences that warfare has on the environment usually severely impact human rights. Indeed, it is now widely acknowledged that the protection of the environment is indispensable to guaranteeing the respect of human dignity and, in particular, of several fundamental human rights, such as the right to life,[11] the right to an adequate standard of living, including food,[12] and the right to 'the enjoyment of the highest attainable standard of physical and mental health.'[13] Already in 1972, the Stockholm Declaration stated that 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.'[14] In the same vein, the United Nations (UN) Human Rights Council and regional Human Rights instruments (the African Convention on Human rights and the the Protocol of San Salvador to the American Convention on Human Rights) have recognized a human right to life and a healthy environment.[15] In a resolution adopted on 26 July 2022, the UN General Assembly also stressed that 'the right to a clean, healthy and sustainable environment is related to other rights and existing international law.'[16] Moreover, as recently noted by the International Law Commission (ILC), '[t]here is in general a close link between key human rights, on the one hand, and the protection of the quality of the soil and water, as well as biodiversity to ensure viable and healthy ecosystems, on the other.'[17]

   Second reason: making the protection of the environment a priority would contribute to incentivize State and non-State belligerents to better anticipate — and potentially reduce — the highly destructive effects that their military operations have on the fauna and flora and, more generally, on interconnected ecosystems.

   Third reason: this would also put the ICC's policies in line with the approach recently developed by other organizations that are involved in the regulation of warfare, such as the

---

[11] International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966, Art. 6.
[12] International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966, Art. 11.
[13] *Ibid.*, Art. 12.
[14] Declaration on Human Environment, Adopted by the United Nations Conference on the Human Environment, Stockholm, 16 June 1972. See United Nations General Assembly Resolutions 2994/XXVII, 2995/XXII, and 2996/XXII of 15 December 1972.
[15] UN Human Rights Council 48/13 of October 2021; Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017. See also: Inter-American Commission on Human Rights, *Report on the situation of human rights in Ecuador*, 1997, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, Chapter VIII; European Court of Human Rights, *Öneryildiz v. Turkey*, Judgment, 30 November 2004, cited in International Committee of the Red Cross, 'Guidelines on the Protection of the Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary', ICRC, 2020 (ICRC Guidelines), footnote 80.
[16] UN General Assembly, Resolution A/76/L.75, *The human right to a clean, healthy and sustainable environment,* 16 July 2022, § 2.
[17] ILC, Draft Principles on Protection of the Environment in Relation to Armed Conflicts, with Commentaries, *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2022, UN Doc. A/77/10 (ILC Draft Principles), 162.

International Committee of the Red Cross (ICRC)[18] and the ILC[19]. Indeed, these organizations have now put the protection of the environment at the forefront of their agendas.

5. With these considerations in mind, we very much welcome the ICC Prosecutor's initiative to issue a new Policy paper on the matter, reflecting upon how the ICL corpus could be advanced with a view to — hopefully — soon bringing environmental cases under the ICC's jurisdiction.

2. International Crimes

6. We first suggest that, in its new Policy paper, the Office of the Prosecutor clarifies how the existing war crimes (**2.1.**) and crimes against humanity (**2.2.**) could better address environmental criminality, especially in light of recent developments that have taken place in the field of international environmental law (IEL).[20] We also propose that the Office of the Prosecutor take the opportunity to examine whether genocide and the crime of aggression could become relevant — albeit marginally — in this context (**2.3**). Finally, the Office of the Prosecutor could shed light on whether (and under which conditions) a new crime of 'ecocide' should be brought under the ICC's jurisdiction by means of an amendment to the ICC Statute (**2.4**).

2.1. War crimes

7. Many provisions of the ICC Statute on war crimes are useful to, directly or indirectly, protect the environment when threatened or damaged by hostilities.[21] The most emblematic provision — on which we will focus our attention in this note — is Article 8(2)(b)(iv) which specifically criminalizes 'intentionally launching an attack in the knowledge that such attach will cause […] 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.' But the cumulative 'widespread, long-term and severe' condition is not defined in the ICC Statute nor in the ICC Elements of Crimes. The ICC jurisprudence is also silent on the matter. Determining the exact meaning of these terms — in light of recent legal and empirical knowledge regarding the effects that military activities have on the natural environment — would, however, reinforce transparency, and ultimately be beneficial for commanders and their subordinates involved in military operations and, even more importantly in the ICC context, for accused persons prosecuted and tried by the ICC. This would also constitute a good opportunity to test how the views of the Office of the Prosecutor on the matter are perceived by States Parties, international organizations, as well as scholars in the field.

---

[18] ICRC Guidelines, *supra* note 15.

[19] ILC Draft Principles, *supra* note 17.

[20] See J. de Hemptinne, 'Concluding Observations on the Influence of International Environmental Law over International Criminal Law', 20 *Journal of International Criminal Justice* (2022), 1287-1298.

[21] See, for instance, the war crimes of: 'intentionally directing attacks against civilian objects, that is, objects which are not military objectives' (the environment is, by definition, a civilian object; only parts of it could become 'military objectives under limited circumstances) (Art. 8(2)(b)(iii) of the ICC Statute); 'employing poison or poisoned weapons' (Art. 8(2)(b)(xvii) of the ICC Statute); 'employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices' (Art. 8(2)(b)(xviii) of the ICC Statute); 'employing weapons, projectiles and material and methods of warfare which are inherently indiscriminate in violation of the international law of armed conflict (Art. 8(2)(b)(xx) of the ICC Statute); 'intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions' (Art. 8(2)(b)(xxv) of the ICC Statute). All these crimes could also be 'greened' in light of recent IEL developments.

8. As the 'widespread, long-term, and severe' condition is directly borrowed from Articles 35(3) and 55(1) of Additional Protocol I (AP I),[22] in line with Article 21 of the ICC Statute and the principle of 'systemic integration' enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties,[23] our initial instinct would be to examine whether the IHL framework helps understanding these notions.[24] Unfortunately, IHL is not clearer on the matter. Neither AP I's negotiation history nor its official commentary give precise meaning to this terminology,[25] beyond the fact that the threshold of applicability of Articles 35(3) and 55(1) is very high (if not impossible to meet in practice)[26] and that, for instance, the long-term requirement must be measured in decades.[27] We thus consider that further guidance should be sought elsewhere.

9. This is precisely why we advocate that the Office of the Prosecutor rely on international instruments and principles protecting the environment in peacetime to establish concrete and reasonable standards in this regard.[28] While these instruments and principles have not been primarily designed to deal with activities that are connected to warfare, they could nonetheless help clarify how to concretely assess the seriousness of the effects that military operations have on the environment. Indeed, as recently noted by the ICRC, IEL reflects the 'increasing and more sophisticated knowledge of and scientific data on the connectedness and interrelationships between the different parts of the natural environment, as well as of the interdependent nature of environmental processes.'[29] For instance, the essential function of biological diversity in 'maintaining life sustaining systems of the biosphere' – as recognized in several multilateral treaties[30] – could serve to reflect the high value that is currently attached to biodiversity and, thus, the severeness of damage caused to it by hostilities. In the same vein, the importance of preserving numerous species – acknowledged by international conventions

[22] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3.
[23] Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331.
[24] Art. 8(2)(b) of the ICC Statute. As noted by the ICC Appeals Chamber, 'the expression "the established framework of international law" in the chapeaux [sic] of article 8(2)(b) and (2)(e) as well as in the Introduction to the Elements of Crimes for article 8 of the Statute, when read together with article 21 of the Statute, requires the former to be interpreted in a manner that is "consistent with international law, and international humanitarian law in particular". Thus, the specific reference to the "established framework of international law" within article 8(2)(b) and (e) of the Statute permits recourse to customary and convention [sic] international law regardless of whether lacunas exist, to ensure an interpretation of article 8 of the Statute that is fully consistent with, in particular, international humanitarian law.' (Judgment on the Appeal of Mr Ntaganda Against the 'Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9', Ntaganda (ICC-01/04-02 AA2), Appeals Chamber, 15 June 2017, § 53. There are instances, however, where the interpretation of the constitutive elements of certain war crime provisions departed from underlying IHL rules. See e.g. F.G. Pinto, 'The International Committee of the Red Cross and the International Criminal Court: Turning International Humanitarian Law into a Two-Headed Snake?', 102 *International Review of the Red* Cross (2020) 745–763.
[25] ICRC Guidelines, *supra* note 15, § 51.
[26] M. Bothe et al., 'International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities', 92 *International Review of the Red Cross* (2010) 569–592, 576.
[27] Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), § 1452.
[28] The ICC could do it in two ways: either by relying on Art. 21(1)(b) and directly applying international environmental law as 'applicable treaties and the principles and rules of international law'; or by relying on international humanitarian law (as indicated in footnote 11) but that must have been interpreted in light of international environmental law through classical processes such as the principle of systemic interpretation enshrined in the Vienna Convention on the Law of Treaties (Art. 31(3)(c) (see e.g., on such interpretation process, Raphaël van Steenberghe, 'The Interplay between International Humanitarian Law and International Environmental Law', 20 *Journal of International Criminal Justice* (2022) (van Steenberghe 2022), 1123-1154; and Raphaël van Steenberghe, 'International environmental law as means for enhancing the protection of the environment in warfare: A critical assessment of scholarly theoretical frameworks', 94 *International Review of the Red Cross* (2023), 1568-1599).
[29] ICRC Guidelines, *supra* note 17, § 54.
[30] See, e.g., Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79, Preamble.

adopted on the topic[31] – could also be factored into the assessment process, especially given the fact that the disappearance of certain species could have widespread and long-term repercussions on the functioning of ecosystems much beyond the damaged area.[32] On another level, some IEL instruments[33] limit, if not phase out, the employment of products and waste that are classified as hazardous or ultrahazardous, like persistent organic pollutants.[34] The dangerousness of these substances when released during hostilities should be determined with a view to taking them into account when assessing the nature of damage caused to the environment under Article 8(2)(b)(iv) ICC Statute.

10. To conclude, we would like to make three additional observations.

First observation: we understand that relying on IEL to interpret the ICC environmental framework could generate debates, especially given legality considerations that come into play under ICL. Indeed, while IEL can help assessing the conditions foreseen in AP I and, by repercussion, in the ICC Statute, this assessment must always remain reasonably 'foreseeable' and 'accessible', as well as 'consistent with the essence of the offence.'[35] We nonetheless consider that, if such an interpretation process is grounded on widely ratified environmental multilateral treaties, it could then be compatible with underlying legality imperatives (and Article 21 of the ICC Statute). The use of soft law instruments or general principles of environmental law and of regional instruments – which do not have customary status, or whose customary status remains uncertain – would be far more problematic.[36]

Second observation: the ICC war crimes provision contains an additional and heightened proportionality requirement: environmental damage must be 'clearly excessive in relation to the concrete and direct overall military advantage anticipated.' It appears to us that the Office of the Prosecutor should take the opportunity to re-evaluate this proportionality test in light of IEL developments, and particularly of the high value which is attributed to threatened aspects of the environment, such as endangered natural habitats or plant and animal species facing extinction. Given the potentially extremely severe damage that military operations may inflict on these aspects of the environment, such damage should be attributed a heavy weight in the proportionality test that is needed to determine what is 'clearly excessive.'[37]

Third observation: the ICC war crime provision is further limited by the fact that it does not apply in the context of non-international armed conflicts (NIACs). Indeed, Article 8(2)(b)(iv) only applies to international armed conflicts and there is no correspondent provision addressing NIACs. This leaves a lacuna in the ICL framework in relation to environmental harm.[38] IEL could also contribute to progressively strengthening ICL with a view to ultimately criminalizing environmental damage in NIACs. Indeed, the lack of environmental protection in NIACs under both IHL and ICL is increasingly difficult to reconcile with the fact that IEL

---

[31] See, e.g., Agreement on the Conservation of Albatrosses and Petrels, 19 June 2001, 2258 UNTS 257; Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 UNTS 333; Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243; International Convention on the Regulation of Whaling, 2 December 1946, 161 UNTS 72.

[32] ICRC Guidelines, *supra* note 15, § 58.

[33] See, e.g., Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 2256 UNTS 119.

[34] See P. Sands and J. Peel, *Principles of International Environmental Law* (Cambridge University Press, 2018), 579.

[35] See C. Davidson, 'How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court', 91 *St. John's Law Review* (2017) 37–104.

[36] van Steenberghe 2022, *supra* note 28, pp. 1128-1134.

[37] A. Peters and J. de Hemptinne, 'Animals in War: At the Vanishing Point of International Humanitarian Law', 104 *International Review of the Red Cross* (2022) 1285–1314, 1290–1291.

[38] D.P. van Uhm, 'Atrocity Crimes and Ecocide: Interrelations between Armed Conflict, Violence, and Harm to the Environment', In: B. Holá, H. Nyseth, and M. Weerdesteijn (eds), *The Oxford Handbook of Atrocity Crimes* (OUP, 2022), 511-534

has ascribed a universal normative value to the environment – and, in particular, to vulnerable habitats and ecosystems – independently of any limits imposed by the sovereignty of States. Furthermore, many environmental instruments prohibit or regulate activities that may potentially cause harm to the environment precisely because environmental concerns exceed the mere domestic affairs of individual States given their transboundary implications.[39] As observed by the ICRC, 'major damage to the environment rarely respects international frontiers."[40] This should prompt the Office of the Prosecutor to suggest, in the new Policy paper, an amendment to the ICC Statute for the purpose of criminalizing serious environmental damage committed in the context of NIACs.

2.2. Crimes against humanity

11. We also believe that recent IEL developments could contribute to the 'greening' of crimes against humanity from both conceptual and practical perspectives.[41] Conceptually, as indicated by its name, this category of crimes is anthropocentric in nature. It is first and foremost orientated towards protecting civilian populations whose fundamental rights are violated by massive or systematic forms of violence.[42] This is illustrated by the fact that among the underlying acts that may constitute crimes against humanity, Article 7(1) of the ICC Statute does not explicitly refer to any conduct that harms the environment. Hence, at first glance, this crime does not appear well-suited to tackle environmental degradation and destruction.[43] That said, crimes against humanity, like any other international crimes, cannot remain completely isolated from recent IEL developments.[44] Indeed, as shown by this body of law and as recalled above, the enjoyment of fundamental rights by a given population is intimately dependent upon the environment in which this population lives.[45] For a long time, IEL instruments have recognized the relationship that exists between the conservation of nature and human interests. A reference point of 'humanity' is the human conscience.[46] This shines up in the official German translation of the crime: 'Verbrechen gegen die *Menschlichkeit*' which means 'crimes committed in violation of human sentiments.' Building on this tradition, it is

[39] M. Vordermayer, 'The Extraterritorial Application of Multilateral Environmental Agreements', 59 *Harvard International Law Review* (2018) 60–124, 110.

[40] Rule 45 of the ICRC Customary Law Database, available online at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.

[41] See de Hemptinne, *supra* note 20.

[42] D. Robinson, 'ICL and Environmental Protection Symposium: Environmental Crimes Against Humanity', *Opinio Juris*, 2 June 2020, available online at http://opiniojuris.org/2020/06/02/icland-environmental-protection-symposium-environmental-crimes-against-humanity/. See also F. Mégret, 'The Problem of an International Criminal Law of the Environment', 36 *Columbia Journal of Environmental Law* (2011) 195-258, 208-211 and 244-245; T. Lindgren, 'Grounding Ecocide, Humanity, and International Law', in V. Chapaux, F. Mégret, U. Natarajan (eds.), *The Routledge Handbook of International Law and Anthropocentrism* (Routledge, 2023) 307-321, 311-316.

[43] K.J. Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)', *Opinio Juris*, 23 June 2021, available online at http://opiniojuris.org/2021/06/23/skeptical-thoughts-on-theproposed-crime-of-ecocide-that-isnt/.

[44] T. Weinstein, 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities', 17 *Georgetown International Environmental Law Review* (2005) 697–722.

[45] See J.P. Perez-Leon Acevedo, 'The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses', 17 *Anuario Mexicano de Derecho Internacional* (2017) 145–186.

[46] A. Cançado Trindade, 'Some reflections on the principle of humanity in its wide dimension', in R. Kolb and G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Elgar, Cheltenham, 2013), 195 ('The principle of humanity "emanates from human conscience".'). See for this understanding of the crime against humanity, e.g., G. Acquaviva and F. Pocar, 'Crimes Against Humanity', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (OUP) 2015, § 2: '"[H]umanity', may be understood as referring to (...) the feelings of humanness or compassion supposedly shared by all men and women." But see critically V. Tochilovsky, 'Crimes Against 'Humaneness'? The Russian Interpretation of Crimes Against Humanity', 16 *Journal of International Criminal Justice* (2018) 1011–1019.

conceivable that certain acts committed *against nature* are so egregious that they might constitute a crime against humanity in the sense of a crime deeply shocking the conscience of humanity. According to M. Schmitt, '[t]hat environmental destruction can easily violate the principle of humanity should be obvious.'[47]

12. Two practical consequences regarding the definition of the constitutive elements of crimes against humanity flows from these theoretical considerations.

First consequence: the requirement of a 'widespread or systematic attack against any civilian population' could be understood as also encompassing actions that are designed to harm the environment. Indeed, this requirement is broadly defined as 'a course of conduct involving the multiple commission of acts' referred to in Article 7(1) ICC Statute.[48] Thus, we suggest that it be made clear by the Office of the Prosecutor that acts that damage the environment may fall within the scope of an 'attack'[49] not only when they constitute *means to commit*, but also when they *result in* the commission of any of the acts enumerated in Article 7(1)(a) to (k), such as: the extermination of a population; the deportation or forcible transfer of individuals; the deprivation of rights on discriminatory grounds, including the right of all peoples to freely dispose of their natural wealth and resources, or the right to access to a healthy environment ('persecution'); or the infliction of great suffering or serious mental or physical injury to several individuals ('other inhumane acts'). Therefore, the Office of the Prosecutor should emphasize two different types of considerations relating to the protection of the environment. On the one hand, as announced in the 2016 Policy paper,[50] large-scale attacks against individuals should be prioritized in case they seriously impact the environment. On the other, the new Policy paper should recognize that large-scale attacks primarily conducted on natural resources and having severe – short- and long-term – repercussions on the fundamental rights of individuals living in the vicinity of such resources may amount to crimes against humanity.

Second consequence: according to Article 7(2)(a) of the ICC Statute, attacks must be carried out pursuant to a State or organizational policy; but, unlike the Malabo Protocol, the ICC Statute does not clearly affirm that such a policy may be implemented not just by States or State-like entities, but also by corporations. There again, ICC-defined crimes against humanity could be interpreted in light of IEL,[51] which increasingly regulates at the international level the activities of private companies – in particular those with a transnational dimension – that cause

---

[47] M. Schmitt, 'Green War: An Assessment of the Environmental Law of International Armed Conflict', 22 *Yale Journal of International Law* (1997) 1-109, 60.

[48] J. Durney, 'Crafting a Standard: Environmental Crimes as Crimes Against Humanity Under the International Criminal Court', 24 *Hastings Environmental Law Journal* (2018) 413–430, 417– 418; A. Mistura, 'Is There Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework', 43 *Journal of Environmental Law* (2018) 181–226, 208–210; L. Prosperi and J. Terrosi, 'Embracing the "Human Factor": Is There New Impetus at the ICC for Conceiving and Prioritizing International Environmental Harms as Crimes Against Humanity?' 15 *Journal of International Criminal Justice* (2017) 509–525, 517–524.

[49] Robinson, *supra* note 42.

[50] In the 2016 Policy paper (*supra* note 8, §§ 40–41), the Office of the Prosecutor emphasized that '[t]he manner of commission of the [ICC] crimes may be assessed in light of, inter alia, […] the elements of particular cruelty, including […] crimes committed by means of, or resulting in, the destruction of the environment […] The impact of the crimes may be assessed in light of, *inter alia*, […] the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give 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.'

[51] The ICC could do it by relying on Art. 21(1)(b) and directly applying international environmental law as 'applicable treaties and the principles and rules of international law'.

significant environmental degradation.[52] This is even more so, since there is a tendency in ICC case law to avoid grounding the organizational requirement on strict objective criteria but to follow instead a functional approach on the matter.[53] Accordingly, non-State actors could potentially be held accountable for crimes against humanity to the extent that these actors have the institutional capacity to instigate or orchestrate the policy behind the widespread or systematic attack.[54] Obviously, such an approach would limit the application of crimes against humanity to corporations that are able to harm the environment and related populations on a wide or systematic scale.[55] If this was explicitly recognized by the Office of the Prosecutor, it would nonetheless already constitute an important breakthrough.

2.3. Genocide and aggression

13. We are aware that applying the existing crimes of genocide and aggression to environmental criminality would have limited implications given the restrictive material and intentional constitutive elements of both crimes. That said, regarding genocide, it could be emphasized that prohibited acts – including 'killing members of the group', 'causing serious bodily or mental harm to members of the group', and 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' – could be committed by means of significant environmental degradation and destruction and, as a result, by deprivation of resources indispensable for the survival of that group, such as food or water supplies[56] or by the destruction of vital socioecological and cultural relationships between humans and nature.[57] The level of degradation and destruction would, however, need to be such that the existence of the said group would be threatened.[58]

14. As far as the crime of aggression is concerned, Article 8*bis* of the ICC Statute provides that a use of force must constitute a 'manifest violation of the Charter of the United Nations' in

---

[52] See Sands and Peel, *supra* note 34, 92; and Organization for Economic Co-operation and Development (OECD), *Guidelines for Multinational Enterprises* (2011 edn.), available online at https://www.oecd.org/daf/inv/mne/48004323.pdf .

[53] For a discussion on the notion of organization and crimes against humanity, see T. Rodenhauser, Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, *Human Rights Law, and International Criminal Law* (OUP, 2018) 250–281. See also M. Holvoet, 'The State or Organisational Policy Requirement Within the Definition of Crimes Against Humanity in the Rome Statute: An Appraisal of the Emerging Jurisprudence and the Implementation Practice by ICC States Parties', *International Crimes Database* (October 2013) 1–15, 6–7, available online at https://www.internationalcrimesdatabase.org/upload/documents/20131111T105507-ICD%20Brief%20%202%20-%20Holvoet.pdf. See also The Prosecutor v. Germain Katanga, Judgment Pursuant to article 74 of the Statute (ICC-01/04-01/07), Trial Chamber II, 7 March 2014, § 1119 ('It therefore suffices that the organisation have a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population. Accordingly, as aforementioned, the organisation concerned must have sufficient means to promote or encourage the attack, with no further requirement necessary. Indeed, by no means can it be ruled out, particularly in view of modern asymmetric warfare, that an attack against a civilian population may also be the doing of a private entity consisting of a group of persons pursuing the objective of attacking a civilian population; in other words, of a group not necessarily endowed with a well-developed structure that could be described as quasi-State.').

[54] *Ibid.*

[55] R. Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide', 31(2) *Criminal Law Forum* (2022), 179-224.

[56] See Separate and Partly Dissenting Opinion of Judge Anita Usacka, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber, 4 March 2009, § 98.

[57] See T. Lindgren. 'Ecocide, genocide and the disregard of alternative life-systems', 22 *The International Journal of Human Rights* (2018) 525-549.

[58] See P. Patel, 'Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can ICC Policy Paper Expand the Court's Mandate to Prosecuting Environmental Crimes?', 14 *Loyola University Chicago International Law Review* (2016) 175–197, 190. See also A. Mistura, *supra* note 48, 204–208.

order to amount to such a crime. The manifest nature of such violation must be assessed in light of the 'character, gravity and scale' of the use of force and, more particularly, according to the 'Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression', in light of 'all the circumstances of each particular case, including the gravity of the acts concerned and their consequences'.[59] Pursuant to the Elements of Crimes, such a determination must be objective.[60] We are of the view that this determination should include considerations relating to the protection of the environment, as informed by recent IEL developments. Accordingly, extensive damage to the environment caused by a use of force contrary to the UN Charter, especially to environmental aspects subject to a worldwide treaty regulation – like the Convention on Biological Diversity[61] – should play a significant role in determining whether the threshold of 'manifest violation' has been reached and a crime of aggression committed.

15. We would also like to highlight that a use of force that initially conforms with the UN Charter could later become inconsistent with that Charter. In particular, force may lawfully be triggered by a State when that State is victim of an armed attack in accordance with the right to self-defence enshrined in Article 51 of the UN Charter. However, such use of force may become contrary to the UN Charter and violate the prohibition on the use of force or even constitute an act of aggression when it does not respect the conditions for its exercise, especially the customary conditions of proportionality and necessity.[62] And, as emphasized by the International Court of Justice (ICJ) in the *Nuclear Weapons* advisory opinion, 'States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.'[63] Furthermore, the ICJ concluded that '[r]espect 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'.[64] As a result, environmental considerations and respect for the environment should be treated as relevant criteria to be taken into account to assess whether a use of force in self-defence remains lawful or whether it violates the prohibition on the use of force or even amounts to an act of aggression for the purpose of establishing the crime of aggression.

2.4. Ecocide

16. The idea of adding ecocide as a crime falling under the jurisdiction of the ICC is currently discussed. To effect this change, in 2021, a panel of legal experts convened by the Stop Ecocide International Foundation ('Expert Panel') proposed the following definition of this crime: 'unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.'[65] According to the Expert Panel, 'wanton' shall mean in this context that ecocide must be committed 'with reckless disregard for damage which would be clearly excessive in relation

[59] Annex III. Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, in Resolution RC/Res.6 adopted at the 13th plenary meeting, on 11 June 2010, by consensus, RC/11, 22.
[60] ICC, Elements of Crimes, Article 8*bis*, Introduction, § 3.
[61] See *supra* note 30.
[62] ICJ, *Nicaragua v. United States of America*, Merits, ICJ Reports 1986, 94, § 176; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 245, § 41; in scholarship see, e.g., O. Corten, *The Law against War. The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2021, 2nd ed.).
[63] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 62, § 30.
[64] *Ibid.*
[65] Art. 8*ter*(1) of Stop Ecocide International, 'The Legal Definition of Ecocide', June 2021, available online at https://www.stopecocide.earth/expert-drafting-panel.

to the social and economic benefits anticipated."[66] While States are debating this proposal, we submit that the Office of the Prosecutor could step in the discussion to propose a more IEL-oriented definition of ecocide. Indeed, to maximize the chances of building a consensus among States around its proposed definition, the Expert Panel has anchored the above constitutive elements of ecocide on existing IHL and ICL provisions which are contained in widely ratified instruments. For instance, it has borrowed the conditions of severity, 'widespreadness' and long-lasting character (albeit presented in an alternative manner) from Articles 35(3) and 55 of AP I, and the proportionality test from Article 8(2)(b)(iv) of the ICC Statute. But, as emphasized above in the context of war crimes, these conditions have acquired a restrictive connotation under IHL. In addition, the proportionality assessment considerably limits the threshold of applicability of ecocide.

17. This is where, according to us, environmental instruments, mainly designed to protect the environment in peacetime, could help disconnect ecocide from IHL and ICL anthropocentrism, by shifting the focus of this crime from crisis contexts to peacetime situations. This could concretely mean, for instance, proposing the application of a lower standard of 'significant' or 'serious' damage traditionally used in IEL.[67] It could also entail replacing the proportionality calculation with a more realistic test drawn from environmental norms based on whether appropriate measures 'to prevent, mitigate or abate harms' have been taken.[68]

18. Alternatively, it could be suggested that the ecocide definition mirrors crimes against humanity and, for the sake of clarity, the ICC may draw from widely ratified IEL treaties a list of prohibited conducts, such as 'destruction or despoliation of natural habitats, ecosystems, or natural heritage', 'illegal traffic in hazardous waste', 'killing, destruction, or taking of specimens of protected wild fauna or flora species, on a scale likely to impact the survival of the species.'[69] While this approach has advantages – especially in terms of ensuring the respect of the principle of legality –, we understand that it also has shortcomings. Indeed, it could considerably limit the margin of appreciation that judges need to have in order to progressively adapt ecocide to emerging forms of environmental criminality. This wording also runs the risk of being at odds with the flexible conception of ecocide which seems to be currently shared by most States and international organizations. It remains essential that a common definition of ecocide, widely shared by States, be adopted to facilitate judicial cooperation among them.[70]

---

[66] *Ibid.*, Art. 8*ter*(2)(a).

[67] See B. Sjostedt, *The Role of Multilateral Environmental Agreements: A Reconciliatory Approach to Environmental Protection in Armed Conflict* (Hart Publishing, 2020), 51.

[68] See the definition of ecocide by the UCLA Promise Institute for Human Rights Group of Experts, Proposed Definition of Ecocide (2021), available online at https://ecocidelaw.com/wp-content/uploads/2022/02/Proposed-Definition-of-Ecocide-Promise-Group-April-9-2021-final.pdf.

[69] *Ibid.*

[70] Another option could be to remove the 'recklessness' component of ecocide and only focus on 'unlawfulness', thereby drawing the definition from the Proposal for a new EU Directive amending Directive 2008/99. In particular, one could turn to Recital 10 and Article 2(1) of the Proposal, establishing that a conduct may be qualified as 'unlawful' even if it is carried out pursuant to an authorisation issued by a competent domestic authority, under the condition that the authorisation was obtained fraudulently or by corruption, extortion or coercion, or that it manifestly violates substantive legal requirements for its issuance (see Position of the European Parliament adopted at first reading on 27 February 2024 with a view to the adoption of Directive (EU) 2024/… of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, Recital 10 and Article 2(1), available online at https://www.europarl.europa.eu/doceo/document/TA-9-2024-0093_EN.html#title2).

3. Modes of liability

19. In this section, we will first make two general observations concerning the mental elements required for the modes of liability set forth by Articles 25 and 28 of the ICC Statute in light of the specific features of environmental criminality. The first remark relates to the default standard generally applicable to most modes of liability (**3.1.**), the second, to the specific mental requirements of command responsibility (**3.2.**). We will then turn our attention to the question whether the modes of liability, as provided in Article 25(3) of the ICC Statute, are fit for the purpose of addressing the conducts of the people that are most responsible for environmental degradation – particularly where corporations are involved (**3.3**).

3.1. Default standard

20. According to Article 30(1) of the ICC Statute, the default standard of the mental elements that need to be satisfied for most modes of liability is 'intent' and 'knowledge'. Pursuant to Article 30(2) of the ICC Statute, intention signifies that the perpetrator 'means to engage in the conduct' and 'means to cause the consequence [of his/her] conduct or is aware that it will occur in the ordinary course of event.' Knowledge is defined in Article 30(3) as 'awareness that a circumstance exists, or a consequence will occur in the ordinary course of events.' The ICC judges have, however, interpreted the awareness condition to require that the perpetrator be aware that his or her actions are 'virtually certain' to bring about the prohibited consequence(s).[71] We suggest that the Office of the Prosecutor seek a jurisprudential revision of this restrictive approach in view of the fact that, in some legal provisions on environmental crimes, a lower *mens rea* requirement of *dolus eventualis* or gross negligence (or even, on some occasions, 'simple' negligence) has been set.[72] We are aware that the ICC judges might not be willing to go as far as implementing a 'non-intentional' standard of negligence in the context of international crimes, be they of an environmental nature. At some point, they might nonetheless be prompted to adopt a more realistic *mens rea* standard of *dolus eventualis*, lowering the 'virtual certainty' test and, for instance, solely requiring in the context of 'environmental war crimes and crimes against humanity' that the perpetrator is aware that environmental harm is a very likely (or probable) consequence of his or her act or omission and that he or she reconciled himself or herself with such foreseeable outcome. It is interesting to note in this regard that this standard was applied not only in the ICTY jurisprudence,[73] but also by ICC Pre-Trial Chambers.[74]

21. It is also worth recalling that Article 30(1) of the ICC Statute prescribes that the default standard can be derogated from.[75] In amending the Statute for the purpose of bringing a crime

---

[71] See, e.g., Decision Pursuant to Art. 61(7)(a) and (b) on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Bemba Gombo (ICC-01/05-01/08-424), Pre-Trial Chamber, 15 June 2009, §§ 361–362; Decision on the Confirmation of Charges, Lubanga (ICC-01/04-01/06-803-tEN), Pre-Trial Chamber, 29 January 2007, § 352.

[72] See, e.g., Art. 3 Convention on the Protection of the Environment through Criminal Law, 4 November 1998, European Treaty Series No. 172, available online at https://rm.coe.int/168007f3f4. It is interesting to note that this Convention of the Council of Europe — which has not yet entered into force — obliges each party to adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally or with negligence, the commission of listed environmental offences.

[73] See, e.g., Judgment, Strugar (IT-01-42-T), Trial Chamber, 31 January 2005, § 236; Judgment, Delic (IT-04-83-T), Trial Chamber, 15 September 2008, § 48; Judgment, Perisic (IT-04-81-T), Trial Chamber, 6 September 2011, § 104.

[74] See e.g. Decision on the confirmation of charges, Lubanga (ICC-01/04-01/06-803-tEN), Pre-Trial Chamber I, 29 January 2007, § 352; Decision on the confirmation of charges, Katanga and Ngudjolo Chui (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, § 251, footnote 329.

[75] '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' (Art. 30(1) of the ICC Statute).

of ecocide within the jurisdiction of the Court, the Assembly of States Parties may therefore consider to incorporate specific mental element requirements. In particular, following up on the above-mentioned proposal of the Expert Panel, the new provision might expressly mention that in order to amount to ecocide, the prohibited conduct must be committed with knowledge that there is a *substantial likelihood* of (severe and/or widespread and/or long-term) damage to the environment. In addition to that, provided that States Parties agreed to broadening the scope of the crime, the new provision might also encompass lower *mens rea* standards such as 'wantonness', 'negligence', or even 'strict liability'[76].

3.2. Command responsibility standard

22. Article 28 of the ICC Statute grounds liability in a lesser form of intent/knowledge. Indeed, the responsibility of military commanders is based on negligence when soldiers that are under the effective control of those commanders have committed an international crime as a result of commanders' failure to exercise proper control over soldiers and when commanders did not actually know but 'should have known' that they were committing or about to commit the crime in question. However, as far as superiors other than military commanders are concerned, the applicable standard is higher. They can only be held accountable if, *inter alia*, they did not actually know but 'consciously disregarded' information indicating that a subordinate was committing or was about to commit an international crime. Hence, in that case, negligence will not suffice. The application of this more restrictive standard could be particularly problematic in the context of (transnational) corporations whose activities are causing significant damage to the environment, and whose managers should thus be held accountable for crimes against humanity or ecocide (should this latter crime be brought under the jurisdiction of the ICC). Indeed, it might be difficult — if not impossible — to demonstrate that, for instance, members of the boards or CEOs of these corporations had actual information about such activities and that these persons 'consciously disregarded them'.[77] This explains why the Office of the Prosecutor should consider examining whether, as the benchmark for the conviction of persons who hold high-level positions within such corporations, the 'negligence' standard could be acceptable. This is even more so when such companies are complex organizations, particularly where they rely for their operations on subsidiaries and/or parent companies and/or contractors and sub-contractors.[78]

3.3. Compatibility of existing modes of liability with environmental criminality

23. Following up on these considerations, we believe that the Office of the Prosecutor should take this opportunity to consider whether in light of the ICC framework and of the policies of the Office of the Prosecutor, the ICC is in the position to bring the people that are most responsible for environmental degradation under the ICC's purview, particularly where corporations or a State apparatus are involved. Therefore, in this section we will examine two separate but related issues: a) whether the existing modes of liability are fit for the purpose of holding directors and managers of corporations as well as the people in the highest offices in a State apparatus accountable for environmental harms; b) whether in order to achieve this goal, the ICC framework and/or prosecutorial policies should be revised.

---

[76] As suggested by the late Polly Higgins (*see* P. Higgins, *Eradicating Ecocide* (Shepheard-Walwyn, 2010), 68).

[77] See M. Kelly, 'Grafting the command responsibility doctrine onto corporate criminal liability for atrocities', 24 *Emory International Law Review* (2010) 671-696, 681-683.

[78] However, we understand that this may be incompatible with the 'consciously disregarded' condition and thus require an amendment to the ICC Statute.

24. Concerning the first issue, the starting point is that under the ICC statutory framework, only natural persons can be held accountable for the commission of the crimes falling within the jurisdiction of the ICC. Article 25(1) of the ICC Statute establishes that the Court 'shall have jurisdiction over natural persons pursuant to this Statute'. This is a significant gap, especially considering that for instance, transnational corporations enjoy the lion's share of the extractive industry – including mining and food production –, having a serious impact on deforestation.[79] However, this does not mean that directors, board members, or CEOs of companies and (transnational) corporations alike may not be investigated and prosecuted for the commission of international crimes. Pursuant to Article 25(3) of the Statute, this may happen where they: (a) commit a crime, whether as an individual, jointly with another or through another person; (b) order, solicit or induce the commission of a crime; (c) aid, abet or otherwise assist in the commission of a crime for the purpose of facilitating its commission, including through the provision of the means for its commission; (d) in any other way contribute to the commission or attempted commission of a crime; (e) in respect of the crime of genocide, directly and publicly incite others to commit it; (f) attempt to commit the crime. The main problem, with regard to directors and managers of corporations, is that it is very unlikely that their conduct may be brought under the purview of the ICC. First of all, it is highly unlikely that people acting in such capacity would *directly* commit the crime. Secondly, as to forms of indirect perpetration, pursuant to the ICC case law in order to establish 'perpetration through another person' it must be proven that the indirect perpetrator – in hypothesis, the manager of a corporation – exercised control over a hierarchical organization and was thus able to steer the direct perpetrator – a member of this organization – towards the commission of the crime.[80] This is a highly unlikely scenario, particularly due to the fact that '[t]he corporation's structural architecture ensures that corporate owners and investors, and directors and senior managers, will almost always be protected from liability.'[81] In most scenarios, the managers of a corporation will hide behind the 'corporate veil'[82] and/or shift the blame for the crime to parent companies, subsidiaries or contractors conducting operations in the field. Analogous considerations apply to other kinds of organizations as well, such as a State apparatus where people holding the highest offices can obfuscate their responsibility and 'hide behind the veil' of the structure of the State. The risk that the ICC would only focus on the 'low-hanging fruits' is real. In fact, under the existing framework it is much easier to focus on direct perpetrators – for instance, the people who physically set a forest on fire – and hold them liable for attacks against the environment. It is much more complex to link the ultimate beneficiaries or 'profiteers' of environmental degradation to such attacks. However, one possible solution is to turn to the so-called 'secondary' or 'accessory' liability. That is why for the purpose of this brief we will focus the modes of liability detailed under letters (b), (c), and (d) of Article 25(3) of the ICC Statute.

---

[79] See, i.e, S. Chavkin, 'How an American meat broker is fueling Amazon deforestation', *Associated Press*, 3 November 2023, available online at https://apnews.com/article/brazil-china-amazon-deforestation-beef-climate-trade-2a7a9a4310b6abca727dabb596e2e84d; J. Watts, P. Greenfield, B. van der Zee, 'The multinational companies that industrialised the Amazon rainforest', *The Guardian*, 2 June 2023, available online at https://www.theguardian.com/global-development/2023/jun/02/the-multinational-companies-that-industrialised-the-amazon-rainforest; L. Tompkins, 'Hundreds of Companies Promised to Help Save Forests. Did They?', *The New York Times*, 2 December 2021, available online at https://www.nytimes.com/2021/12/02/climate/companies-net-zero-deforestation.html; B. Piven, 'BlackRock in Amazon: 'World's largest investor in deforestation'', *Al Jazeera*, 30 August 2019, available online at https://www.aljazeera.com/economy/2019/8/30/blackrock-in-amazon-worlds-largest-investor-in-deforestation.

[80] See Judgment pursuant to article 74 of the Statute, Katanga (ICC-01/04-01/07), Trial Chamber II, 7 March 2014, §§ 1404-1412.

[81] D. Whyte, *Ecocide. Kill the corporation before it kills us* (Manchester University Press, 2020), 49.

[82] *Ibid.*, 49. On the difficulties relating to prosecuting employees of a corporation in light of the 'corporate veil' doctrine, see H. van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities', 12 *Chinese Journal of International Law* (2013) 43-77, 73.

25. Pursuant to Article 25(3)(b) of the ICC Statute, an individual can be held liable for a crime if that person orders, solicits, or induces the commission of such crime. As stressed by scholars, the first alternative (ordering) 'complements the command responsibility provision'.[83] ICC judges have interpreted this mode of liability as entailing, among others, that the suspect had a position of authority from which he or she instructed another person (the direct perpetrator) to commit a crime.[84] These requirements would be quite difficult to meet in respect to organizations – such as corporations or a State apparatus – the leaders of which are several levels above the 'people on the ground'. The other alternatives (soliciting and inducing) encompass situations where the accessory prompts the commission of an offence by the direct perpetrator.[85] Although both forms do not require that the perpetrator held a position of authority nor that the crime is indeed committed, in both cases it must be proven that the 'instigator' had a direct (causal) effect on the commission of the crime[86] – thus requiring a contact or a relationship between the accessory and the direct perpetrator that would highly unlikely take place in the scenarios under scrutiny.

26. Article 25(3)(c) of the Statute prescribes that an individual can be held liable for a crime if that person aids, abets or otherwise assists in its (attempted) commission, including through the provision of the means for its commission, for the purpose of facilitating the commission of the crime. Two are the peculiarities of this mode of liability: 1) even though the level of assistance (that is, whether substantial or not) remains unsettled, such assistance must have a causal effect on the commission of the crime;[87] 2) the additional requirement that the accessory 'must have lent his or her assistance with the aim of facilitating the offence.'[88] While several forms of assistance with regard to attacks against the environment could meet the standard for the first requirement – including for instance the provision of funding for operations on the ground –, it seems quite unlikely that the mental element requirement may be met in scenarios involving corporations or a State. In particular, senior managers of corporations as well as people holding high office in a State apparatus would be in the position to (successfully) argue that their respective assistance was geared towards profit-making and/or economic development.

27. The last form of accessory liability we will focus on for the purpose of this brief, as provided for in Article 25(3)(d) of the Statute, consists in contributing to the (attempted) commission of a crime by a group of persons acting with a common purpose, either (i) with the aim of furthering the criminal activity or criminal purpose of such group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court, or (ii) in the knowledge of the intention of the group to commit the crime. At face value, considering that the requirements for this mode of liability are lower than for the above-mentioned forms of liability and that it is not necessary to prove that the accessory shared the intent to commit the crime,[89] this seems the most suitable form to capture the culpability of senior managers of corporations as well as people holding the highest offices in the State apparatus. In practice, this would not come easily. Two are the main challenges. First, pursuant to the case law of the ICC it must be proven that the crime was committed by a group of persons acting *with a*

[83] K. Ambos, 'Article 25', in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (4th edn., Beck/Hart/Nomos, 2021) 1189-1246, 1217, mn. 22.
[84] See Decision on the Prosecutor's Application under Article 58, Mudacumura (ICC-01/04-01/12), Pre-Trial Chamber II, 13 July 2012, § 63.
[85] See Judgment pursuant to Article 74 of the Statute, Bemba et alii (ICC-01/05-01/13), Trial Chamber VII, 19 October 2016, § 74.
[86] *Ibid.*, §§ 77 and 81.
[87] *Ibid.*, §§ 90-94.
[88] *Ibid.*, §§ 97.
[89] See Judgment pursuant to article 74 of the Statute, Katanga (ICC-01/04-01/07), Trial Chamber II, 7 March 2014, §§ 1637-1642.

common purpose. While the group does not need to be formally structured and its ultimate purpose need not be criminal, ICC judges held that the Prosecution must show that the group specified the criminal goal it aimed to pursue – that is, its scope, the type of victims targeted, and the identity of the members of the group – and that the crime formed part of the common purpose.[90] This results in placing an additional burden on the Office of the Prosecutor, that will need to demonstrate that in the concrete circumstances of the case, the direct perpetrator(s) of the crime consisting or resulting in environmental harm belonged to a group acting with a common purpose that encompassed the commission of such crime. Second, it must be proven that the accessory made a *significant* contribution to the commission of the crime.[91] Even though this does not entail proximity to the crime nor a link with the direct perpetrator(s), the contribution need have an effect on the realisation of the crime – that is, either on its occurrence or on the manner of its commission.[92] In practice, this means that the contribution may for instance consist in the provision of financial resources to the group *insofar as* this had a causal effect on or influence the crime. Which may be difficult to prove, especially where such resources may have been provided with regard to broader operations and/or legitimate economic activities.

28. In light of the above, it seems that the existing modes of liability are not (entirely) fit for the purpose of holding directors and managers of corporations, as well as people holding the highest offices in a State apparatus accountable for environmental harms.

29. A separate but related question is whether in order to bring directors and managers of corporations as well as the people holding the highest offices in a State apparatus under the ICC's purview, the ICC framework and/or prosecutorial policies should be revised. This question has to do with the determination concerning admissibility. In fact, the admissibility of a case involving environmental degradation or destruction will entail, among others, an assessment of whether the individuals that are likely to be the object of such investigation are the most responsible for the commission of the crimes. The concept of 'most responsible' has been considered both under the case law of the ICC and in two separate policy papers issued by the Office of the Prosecutor.

30. Concerning the case law, in the *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber I found that the determination regarding gravity involves, among other things, 'a generic assessment […] of whether the groups of persons that are likely to form the object of the investigation capture those who may bear the greatest responsibility for the alleged crimes committed.'[93] The Pre-Trial Chamber clarified that this assessment 'relates to the Prosecutor's ability to investigate and prosecute those being the most responsible for the crimes under consideration and not as such to the seniority or hierarchical position of those who may be responsible for such crime.'[94] Meaning that provided that quantitative and qualitative factors would justify the opening of an investigation, the Prosecutor should show that an investigation into the situation encompassing environmental degradation or destruction would 'lead to the prosecution of those persons who may bear the greatest responsibility for the identified crimes.'[95] However, the concept of 'most responsible' does not equate with those of 'higher-level' or 'hierarchically

[90] *Ibid.*, §§ 1626-1627 and 1630.
[91] *Ibid.*, § 1632.
[92] *Ibid.*, §§ 1633-1636.
[93] Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (ICC-01/13), Pre-Trial Chamber I, 16 July 2015, § 21.
[94] *Ibid.*, § 23.
[95] *Ibid.*, § 24.

superior'. This has been confirmed in the *Al Hassan* case, where the Appeals Chamber held that the 'significant role' and the 'degree of participation' of the suspect vis-à-vis the crime(s) are relevant factors to consider, together with his/her 'seniority', for the purpose of the gravity assessment.[96] In practice, this means that an investigation relating to environmental degradation or destruction might result in the prosecution of direct or physical perpetrators, including where they are just low-level perpetrators.

31. This jurisprudence is in tension – if not in conflict – with two policy papers issued by the Office of the Prosecutor. In the 'Policy Paper on Preliminary Examinations' issued in November 2013, the Office stressed that it had adopted 'a policy of investigating and prosecuting those most responsible for the most serious crimes.'[97] However, the Office of the Prosecutor seemed to interpret the concept of 'most responsible' in a rather different way than ICC judges. In particular, a footnote clarified that the OTP would 'expand its general prosecutorial strategy to encompass mid- or high-level perpetrators, or even particularly notorious low-level perpetrators, with a view to building cases up to reach those most responsible for the most serious crimes.'[98] In so doing, the Office seemed to equate the notion of 'most responsible' with 'seniority' or 'hierarchical position' within the organization involved in the commission of the crime(s) under scrutiny. This is confirmed by the reference, in the policy paper, to the preliminary examinations concerning the Situation in the Republic of Kenya and the Situation in the Republic of Côte d'Ivoire,[99] where the Office focused on the seniority and hierarchical positions of the people it had put under its radar. For instance, in its *Request for authorisation of an investigation pursuant to Article 15* relating to the situation in the Republic of Côte d'Ivoire, it had expressly mentioned that 'the category of persons bearing the greatest responsibility includes those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes.'[100] This position did not substantially change after – and on the basis of – the publication of the decision of Pre-Trial Chamber I. In the 2016 Policy paper, the Office of the Prosecutor recognized that '[t]he notion of the most responsible does not necessarily equate with the *de jure* hierarchical status of an individual within a structure, but will be assessed on a case-by-case basis depending on the evidence.'[101] However, it also stressed 'the need to consider the investigation and prosecution of a limited number of mid- and high- level perpetrators in order to ultimately build the evidentiary foundations for case(s) against those most responsible', and the prosecution of low-level perpetrators 'where their conduct has been particularly grave or notorius.'[102] In other words, the Office of the Prosecutor seems to consider the prosecution of 'small fries' an exception.

32. In light of these considerations, we believe that in the new Policy paper the Office of the Prosecutor shall try to reconcile this tension with particular regard to situations encompassing the commission of crimes consisting or resulting in environmental degradation or destruction. While the prosecution of lower-level perpetrators may continue to be considered an exception, it could be worth stressing that in some situations it might be *practically impossible* to reach higher-level perpetrators. This is particularly the case where the latter can hide behind the

---

[96] Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense', Al Hassan (ICC-01/12-01), Appeals Chamber, 19 February 2020, §§ 89-93, 102, 109-112.
[97] Office of the Prosecutor, *Policy Paper on Preliminary Examinations,* November 2013, § 103.
[98] *Ibid.,* footnote 72.
[99] *Ibid.,* § 32.
[100] Request for authorisation of an investigation pursuant to Article 15, Situation in the Republic of Côte d'Ivoire (ICC-02/11), Pre-Trial Chamber III, 23 June 2011, § 46.
[101] 2016 Policy Paper*, supra* note 8, § 43.
[102] *Ibid.,* § 42.

corporation veil or the State apparatus. The Office may go even further than that, warning that in such situations there might be only 'low-hanging fruits' to pick unless the Assembly of States Parties considered an amendment to the ICC Statute not only for the purpose of criminalizing ecocide, but also of introducing specific mental element requirements with regard to such crime (encompassing 'wantonness', 'negligence', or even 'strict liability').

4. Complementarity and cooperation

33. We are aware that the ICC will only have limited time, means and resources to tackle complex environmental crimes. Furthermore, relying, under the complementary mechanism, on national courts and tribunals to genuinely and effectively prosecute such crimes will often raise significant challenges. Indeed, these crimes would affect huge economic and political interests and trying them requires capacities that national institutions might often be lacking. That being noted, we remain convinced that this situation could be ameliorated by taking several measures at both the ICC (**4.1.**) and national levels (**4.2.**).

4.1. ICC level

34. Four types of measures could be envisaged at the ICC level. Firstly, the Office of the Prosecutor should consider adopting precise guidelines on its investigative and prosecutorial strategy, identifying key factors to be taken into account when assessing the gravity of environmental crimes (for instance, on the basis of the magnitude and duration of their effects on ecosystems). Secondly, given the complexity of investigating, prosecuting, and trying environmental criminality, an 'environmental section' could be created within the Office of the Prosecutor – composed of highly qualified investigators, trial attorneys and experts –, as well as an 'environmental Chamber' – composed of highly qualified judges. Thirdly, as part of its mandate to provide assistance to victims independently of any court order, the ICC Trust Fund could be encouraged – through the adoption of guidelines – to develop new strategies to address significant and extensive environmental damages that are caused by warfare or other related crisis situations. This could entail providing resources to environmental restoration projects to rebuild destroyed or disrupted ecosystems, or to reforest damaged areas. Fourthly, a discussion could take place on whether amendments to the ICC Rules of Procedure and Evidence or the adoption of specific directives should be contemplated regarding the gathering and the introduction in court of technical and scientific evidence which relates, for instance, to the adverse effects that hazardous substances have on living organisms (statistical or toxicological evidence) or to the impact of military operations on climate change. Furthermore, specific provisions on environmental sanctioning and reparation could also be discussed. Finally, creative ways of representing the intrinsic interests/rights of the fauna and flora in court could also be explored.

4.2. National level

35. At the national level, cooperation between domestic authorities in the investigation and prosecution of environmental criminality – and, in particular, of ecocide (should it be brought under the ICC's jurisdiction) – should be facilitated. Indeed, beyond the challenges identified above, national judges will also inevitably be confronted with the necessity of exercising 'extraterritorial jurisdiction' over criminal environmental conducts committed outside of their territory.[103] Hence, there is a risk that evidence, victims, suspects, and assets (to be used for

[103] See F. Tekle, 'The Ljubljana-The Hague Convention: A step forward in Combating Impunity for Atrocity Crimes', *International Law Blog*, 18 September 2023, available at: https://internationallaw.blog/2023/09/18/the-ljubljana-the-

reparation purposes) are scattered across different jurisdictions.[104] Yet, mutual legal assistance and extradition for the domestic investigation and prosecution of such a crime could be jeopardized by many different factors (for instance, by the application of the principle of double criminalization).[105] Conflicts among domestic rules governing the arrest and transfer of suspects, the gathering of evidence, or the seizure, confiscation, and transfer of assets may further complicate this matter.[106] A possible avenue to overcome these barriers could be to promote the idea of adding ecocide to the crimes listed in the *Ljubljana-The Hague Convention on International Cooperation in Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes, and other International Crimes* (Ljubljana-The Hague Convention).[107] Indeed, the Ljubljana-The Hague Convention – which has just been adopted on 26 May 2023 and not yet entered into force at the time of writing – precisely aims at facilitating cooperation among States when investigating or prosecuting core international crimes – i.e., genocide, crimes against humanity, and war crimes.[108] It also provides States parties with the opportunity to extend the application of the Ljubljana-The Hague Convention to other crimes which are defined in annexes A to H.[109] Should ecocide be added to the crimes falling within the jurisdiction of the ICC, the Office of the Prosecutor could then propose to also add it to the list of crimes referred to in these annexes. This would enhance cooperation among States when confronted with environmental criminality, especially when it may affect the interests of several jurisdictions, and would ultimately facilitate the work of the ICC. It is worth noting in this regard that the nature of 'international crimes' of certain offences that are mentioned in these annexes – such as 'enforced disappearance' or 'torture' – remains disputed. This should help including ecocide, a crime whose status is also uncertain.

5. Concluding recommendations

36. Pursuant to the above discussions, our key recommendations could be summarized as follows:

a. the 'widespread, long-term, and severe' requirement as well as the proportionality test contained in the war crimes provision of the ICC Statute should be 'greened' in light of recent developments reflected in IEL instruments and principles and, for instance, should reflect the high value that is attached to the preservation of ecosystems, fauna and flora that are endangered by warfare;

b. the requirement that acts amounting to crimes against humanity form part of a 'widespread or systematic attack directed against any civilian population' contained in Article 7(1) of the ICC Statute should be understood as also encompassing conducts that are aimed at harming the environment, particularly when such conducts are means to commit or result in the commission of one of the prohibited acts enumerated in Article 7(1)(a) to (k) of the ICC Statute;

c. the requirement of 'organizational policy' contained in Article 7(2)(a) of the ICC Statute should be understood as also encompassing a policy designed by a corporation;

---

hague-convention-a-step-forward-in-combating-impunity-for-atrocity-crimes/#:~:text=On%2026%20May%202023%2C%20in,Crimes%20and%20other%20International%20Crimes.

[104] *Ibid.*

[105] *Ibid.*

[106] *Ibid.*

[107] MLA Diplomatic Conference, Ljubljana, Slovenia, 15 – 26 May 2023, available online at: https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention.pdf.

[108] *Ibid.*, Arts 2(1) and (5).

[109] *Ibid.*, Art. 2(2).

d. the 'acts of genocide' detailed in Article 6 of the ICC Statute, and particularly in Article 6(a), (b), and (c) should be understood as being committed by means of, among others, environmental degradation and destruction (where accompanied by the required *mens rea*);

e. the requirement of 'manifest violation of the UN Charter' contained in Article 8*bis* of the ICC Statute should be appraised also in light of extensive damage to the environment caused by the use of force;

f. environmental considerations and respect for the environment should be relevant criteria when assessing whether a use of force in self-defence remains lawful or violates the prohibition on the use of force, and thus whether it amounts to an act of aggression for the purpose of establishing the crime of aggression;

g. ecocide should be further disconnected from anthropocentric IHL and ICL concepts by, for instance, replacing the 'widespread, long-term, and severe' damage standard by a lower standard of 'significant' or 'serious' damage traditionally used in IEL, and by replacing the proportionality test with a more realistic test based on whether appropriate measures 'to prevent, mitigate or abate harms' have been taken;

h. a more realistic *mens rea* of *dolus eventualis* requiring, in the context of 'environmental war crimes and crimes against humanity', that the perpetrator is aware that environmental harm is a likely (or probable) consequence of his or her act or omission should replace, through judicial evolution, the 'virtual certainty' test currently followed by ICC judges;

i. the conviction under command responsibility of persons who hold high-level positions within corporations should be based on the 'negligence standard' instead of the higher standard applicable to civilian superiors under Article 28 of the ICC Statute;

j. a discussion should be encouraged within the Assembly of States Parties, geared towards the adoption of an amendment to the ICC Statute for the purpose of criminalizing 'ecocide' as a standalone crime with a specific mental element requirement (encompassing 'wantonness', 'negligence', or even 'strict liability'), as this would allow the ICC to also bring under its jurisdiction the conducts of high-level perpetrators which would unlikely fall under the scope of the existing modes of liability pursuant to Article 25(3)(a)-(d);

k. the creation of an environmental section within the Office of the Prosecutor – composed of highly qualified investigators and trial attorneys – and of an environmental Chamber – composed of highly qualified judges – should be envisaged;

l. the ICC Trust Fund should be encouraged to adopt guidelines on the reparation of significant and extensive environmental damages that are caused by warfare or other related crisis situations;

m. a discussion should be encouraged within the Assembly of States Parties on whether amendments to the existing ICC Rules of Procedure and Evidence are needed to tackle environmental criminality; and

n. in order to facilitate cooperation among States in the investigation and prosecution of environmental harms – once incorporated in the criminal codes of many States –, ecocide should be added to the crimes listed in the Ljubljana-The Hague Convention.