
Using the International Criminal Court to Address Grave Environmental Harm

1.1 A Holistic and Novel Approach: Overview of Methodology and Core Conclusions

In the seventeenth century, the eminent international law publicist Hugo Grotius recalled the maxim that ‘if trees could speak, they would cry out that, since they are not the cause of war, it is wrong for them to bear its penalties’.¹ While anthropogenic harm to the environment long predates Grotius, it has risen to potentially cataclysmic levels since his days. Indeed, scientists have described the current era as ‘the sixth mass extinction’² and ‘biological annihilation’.³ Anthropocentric harm to the environment is being inflicted in many ways, including deforestation, habitat destruction,⁴ poaching, toxic dumping, fracking, unregulated mineral extraction, carbon dioxide emissions, and the destruction of carbon sinks and reservoirs.⁵ In light of these scourges, environmental

¹ Hugo Grotius, *On the Law of War and Peace* (1646) (Francis W. Kelsey translation, William S. Hein & Co., 1995), p. 747 (under the heading ‘Concerning Moderation in regard to the spoiling the Country of our Enemies, and such other Things’, Grotius attributes this to Josephus – a Romano-Jewish historian who was also a military commander). See also John Cohan, ‘Modes of Warfare and Evolving Standards of Environmental Protection Under the International Law of War’ (2003) 15 *Florida Journal of International Law* 481 (‘Cohan (2003)’), p. 500.

² Anthony D. Barnosky et al., ‘Has the Earth’s Sixth Mass Extinction Already Arrived?’ (2011) 471 *Nature* (‘Barnosky et al. (2011)’), pp. 51–7.

³ Gerardo Ceballos, Paul R. Ehrlich, and Rodolfo Dirzo, ‘Biological Annihilation Via the Ongoing Sixth Mass Extinction Signalled by Vertebrate Population Losses and Declines’ (2017) 114 *Proceedings of the National Academy of Sciences of the United States of America* (‘Ceballosa et al. (2017)’), p. 1. This mass extinction is also referred to as the Holocene extinction; Barnosky et al. (2011), p.51.

⁴ The term ‘destruction’ is generally used herein (in relation to the environment) synonymously with ‘harm’, unless otherwise indicated.

⁵ The Covid-19 pandemic, which emerged in 2020, and consequent governmental responses around the world resulted in a discernible reduction in CO₂ emissions, largely due to a drop in tourism and transportation. However, the IPCC has concluded that ‘short-term

2 USING THE ICC TO ADDRESS GRAVE ENVIRONMENTAL HARM

degradation is arguably the most pressing threat facing the international community in the twenty-first century.⁶

Given that environmental harm is a cross-cutting problem, traversing multiple jurisdictions and fields of law, it is apposite to study its treatment under international law.⁷ Accordingly, this book focusses on a potential enforcement mechanism in this domain – that of international criminal law. It looks primarily at the framework of the International Criminal Court ('ICC' or 'Court'), in order to assess its capacity to redress serious environmental harm.

Uniquely, this book presents a comprehensive review of the Court's substantive and procedural law applicable to the prosecution of

reductions in CO₂ emissions, such as during the Covid-19 pandemic, do not have detectable effects on either CO₂ concentration or global temperature. Only sustained emission reductions over decades would have a widespread effect across the climate system', Intergovernmental Panel on Climate Change, *Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, IPCC AR6 WGI (2021), chapter IV, p. 103.

⁶ See UNESCO, *The World in 2030: Public Survey Report* (UNESCO, 2021), p. 6. See also, *UN Transforming our World: the 2030 Agenda for Sustainable Development*, A/Res/70/1 ('Sustainable Development Goals'), which set the global agenda in the lead up to 2030. Many of its goals directly or indirectly concern environmental protection, such as Goal 6 (clean water and sanitation); Goal 7 (affordable and clean energy); Goal 11 (sustainable cities and communities); Goal 12 (responsible consumption and production); Goal 13 (climate action); Goal 14 (life below water); Goal 15 (life on land).

⁷ Eliana Teresa Cusato, 'Beyond Symbolism: Problems and Prospects with Prosecuting Environmental Destruction before the ICC' (2017) 15 *Journal of International Criminal Justice* 491 ('Cusato (2017)'), p. 492. But see Ricardo Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?' (2020) 31 *Criminal Law Forum* 179, pp. 190–4 (questioning whether in fact ecocide can qualify as an international crime as opposed to a transnational crime). Cassese distinguishes international crimes from domestic and transnational crimes by 'the international element' (highlighting that international crimes are 'connected with a state policy or at any rate with "system criminality"' and are typically 'double-layered' (in that they 'breach values recognized as universal in the world community and enshrined in international customary rules and treaties'), Antonio Cassese and Paola Gaeta, *International Criminal Law* (2nd ed.) (Oxford University Press, 2008) ('Cassese (2008)'), p. 54 citing Gerhard Werle, *Principles of International Criminal Law* (1st ed.) (T.M.C. Asser Press, 2005) ('Werle (2005)'), pp. 94–5. Though ecocide violates norms of international environmental law, and the underlying forms of ecocide in the Proposed Definition below are based on environmental law treaties, not all are criminalized per se. Accordingly, it will fall to States to determine if they consider the conduct to amount to an international crime. Because environmental harm presents a global threat to a common good, which is typically connected with systemic criminality, and because States may be unable or unwilling to address it, irrespective of transnational measures such as mutual legal assistance, and with the principle of complementarity mitigating any risk of international overreach into sovereign affairs, there are compelling reasons to consider ecocide as constituting an international crime, as addressed in more detail herein.

1.1 OVERVIEW OF METHODOLOGY AND CORE CONCLUSIONS 3

environmental harm. Whereas there have been works addressing the substantive crimes that could be constituted by environmental harm,⁸ none of these go on to provide a detailed and comprehensive review of the key procedural rules and institutional parameters that would determine the feasibility of environmental harm cases (such as the admissibility of expert evidence at trial, judicial involvement in investigations, and the role of international environmental law principles in ICC proceedings).⁹ Yet these parameters are equally determinative of the Court's capacity to address environmental harm as the substantive crimes under which it is charged.

The assessment herein also encompasses the status, participatory rights, and reparations inuring to potential victims of environmental harm, including the environment itself. Moreover, to instantiate the prospects of such proceedings before the ICC, this book presents case studies of three notorious types of environmental harm (harm during military conflicts; toxic dumping; and wildlife exploitation) and superimposes the Court's legal framework onto prospective proceedings for these threats. Through this innovative, wide-ranging, and detailed analysis, this book provides a novel contribution to the scholarship regarding the adjudication of serious environmental harm under international criminal law (whether before the ICC or a new institution such as an International Court for the Environment, as proposed in Chapter 6.3.3).

Throughout the assessment, a central motif concerns the underlying nature of the institution, in light of its normative aims, its jurisdictional parameters, and its procedural matrix. The extent to which the ICC

⁸ See, e.g., Steven Freeland, *Addressing the International Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court* (Intersentia, 2015) ('Freeland (2015)'); Tara Weinstein, 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?' (2005) 17 *Georgetown International Environmental Law Review* 697 ('Weinstein (2005)'); Cusato (2017). See also the author's own earlier works on the subject, e.g., Matthew Gillett, 'Chapter 6: Environmental damage and international criminal law' ('Gillett (2013)') in Sébastien Jodoin and Marie-Claire Cordonier Segger (eds.), *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge University Press, 2013) ('Jodoin et al. (2013)'); Matthew Gillett, 'Chapter 10. Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non- International Armed Conflict' ('Gillett (2017)') in Carsten Stahn et al. (eds.), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles and Practices* (Oxford University Press, 2017) ('Stahn et al. (2017)').

⁹ For discussions of these and other procedural topics, see *inter alia* Chapter 3.

4 USING THE ICC TO ADDRESS GRAVE ENVIRONMENTAL HARM

system was conceived to address anthropocentric harm (as opposed to environmental harm), will impact on its ability to address environmental harm.

Proceeding doctrinally from the premise that international law constitutes ‘a legal system because it is a function of the social process between States and other persons regarding matters of common concern’,¹⁰ this book shows that the ICC is essentially designed as a legally autonomous justice system,¹¹ cohering with the wider precepts of international law, but with its own jurisdictional, substantive, and procedural parameters established through its constitutive instruments.¹² Nonetheless, the Court’s framework is not hermetically sealed. Rather, it leaves room for other sources of law, potentially including international environmental law, to shape and supplement its explicit provisions.¹³ In this respect, the ICC system may allow for ecocentric principles to be imported into its framework and thereby fuse together international criminal law and international environmental law in confronting instances of serious environmental harm.

¹⁰ James Crawford, *Chance, Order, Change: The Course of International Law* (Brill, 2014) (‘Crawford (2014)’), p. 145. See also James Crawford, *Brownlie’s Principles of Public International Law* (9th ed.) (Oxford University Press, 2019) (‘Crawford (2019)’), pp. 8–9 referring to Vattel’s *Le Droit des gens* and his conception of a state system as a collective capable of acting in the common interest, and pp. 14–15 (‘International law is a system of laws (albeit one that cannot be uncritically analogized to domestic legal systems). Moreover, it is a system which, day in and day out, is generally effective: millions of people are transported daily by air, land, and sea across state boundaries; those boundaries are determined and extended; the resources so allocated are extracted and sold; states are represented and committed’); Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed.) (Columbia University Press, 1979), p. 47.

¹¹ See Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (2nd ed.) (Cambridge University Press, 2010) (‘Cryer et al. (2010)’), p. 9 (‘[t]he ICC Statute contains its own set of [legal] sources for the ICC to apply, which are analogous, although by no means identical, to those in the ICJ Statute’), p. 36 (‘international tribunals, unlike their domestic counterparts, are almost entire criminal justice systems in themselves’). Multiple contributions in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court. A Commentary* (3rd ed.) (C.H. Beck, Hart, Nomos, 2016) (‘Triffterer and Ambos (2016)’ refer to the ‘Rome Statute system’, e.g. pp. 40, 1239, 1705, 2223, 2238, 2309.

¹² Article 21 of the Rome Statute of the ICC sets out the sources of law that the Court may apply, and their hierarchy starting with, in the first place, the Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence and then proceeding to other sources, as discussed in detail in Section 1.3.3.1. While the ICC is designed as an independent system, the Rome Statute has several explicit references to international law and to the proceedings in national States, as discussed in Section 1.3.4 on Adjudicative Coherence.

¹³ See Rome Statute, article 21(1)(b) and (c).

1.1 OVERVIEW OF METHODOLOGY AND CORE CONCLUSIONS 5

In order to assess the feasibility of the Court's framework addressing environmental harm, this book revolves around two interconnected questions:

1. To what extent are the Court's legal framework and practice, particularly its substantive crimes, jurisdictional parameters, rules of procedure and evidence, and provisions governing victim participation and reparations, conceived anthropocentrically, as opposed to ecocentrically?
2. Does the orientation of the Court's substantive and procedural framework preclude or significantly prejudice proceedings concerning environmental harm?

At the outset, it must be noted that international criminal law is not a panacea capable of removing the threat of environmental harm, just as it is not a definitive solution for any other atrocity. International criminal law is essentially applicable *ex post facto* after crimes have been committed or attempted. As with any other criminal system, it cannot be applied *ex ante*, in anticipation of the future commission of crimes.¹⁴ In this respect, international criminal law serves as the proverbial ambulance at the bottom of the cliff instead of the warden at the top. Moreover, international criminal law functions under restrictive jurisdictional limitations. Importantly, the ICC can only investigate and prosecute crimes that concern the territory or citizens of States that have accepted its jurisdiction or via a referral of the United Nations Security Council (UNSC).¹⁵ Universal coverage has not been achieved and appears a distant prospect at best. Notwithstanding these limitations, the ICC is the only international court with potentially global reach and was established to redress grave crimes that 'threaten the peace, security and well-being of the world'.¹⁶ In light of the pressing threat of anthropogenic environmental destruction, it is apposite to examine the Court's capacity to impose criminal sanctions on those who perpetrate such harm against the interests of the global community.

¹⁴ Although article 25(f) of the Rome Statute mandates responsibility for those who attempt to commit crimes within the Court's jurisdiction, it requires that the person has taken action to commence the execution of the crime(s) by means of a substantial step, and so it is not a fully *ex ante* safeguard.

¹⁵ But see Chapter 2, Section 2.2 (referring to ICC: Case No. ICC-RoC46(3)-01/18, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute').

¹⁶ Rome Statute, Preamble, para. 3.

6 USING THE ICC TO ADDRESS GRAVE ENVIRONMENTAL HARM

1.1.1 Summary of Major Conclusions Regarding Measures to Address Environmental Harm

Founded on the doctrinal analysis set out herein, this book reaches the following core conclusions regarding the normative prospects for the ICC to address environmental harm.

1.1.1.1 The Status Quo Approach

First, in relation to the ‘status quo’ approach of prosecuting environmental harm under the ICC’s current framework, the analysis indicates that such proceedings would be possible, albeit with significant procedural hurdles to surmount, and that such proceedings could ostensibly serve an expressive function. However, this book shows that the Court’s current framework is overwhelmingly anthropocentric in orientation, and that, in addition to the procedural constraints that would hinder prosecuting environmental harm, the status quo approach would inherently subjugate ecocentric values to anthropocentric values, signalling that environmental integrity only merits redress to the extent that human interests are impacted.

At the operational level, significant restrictions would hamper the efficacy and potential success of proceedings under the Court’s current framework. As noted, the ICC only has one crime which that refers to the environment (the war crime in article 8(2)(b)(iv)). The applicability of that crime is limited to international armed conflict, despite the fact that most armed conflicts in the twenty-first century are internal, and it has exacting requirements (particularly the combination of showing knowledge that the attack will cause widespread, long-term, and severe damage to the natural environment, as well as satisfying the proportionality test requiring knowledge that the damage to the natural environment would be ‘clearly excessive in relation to the concrete and direct overall military advantage anticipated’). While there is some room to interpret the elements of article 8(2)(b)(iv) in light of international environmental law and international humanitarian law (IHL), the ICC’s one ‘environmental’ crime, as currently framed, will remain an extremely truncated provision, inapplicable except in the most extreme circumstances, and difficult to prove even then.

Anthropocentrically oriented crimes that could be used to indirectly address environmental harm include war crimes focusing on murder, destruction of property, attacks on civilian objects, pillage, and starvation or displacement of civilians, along with crimes against humanity focusing on murder, displacement of civilians, persecution and other inhumane

1.1 OVERVIEW OF METHODOLOGY AND CORE CONCLUSIONS 7

acts, and potentially even genocide and the crime of aggression. However, as noted, applying the current legal framework would conceptually subordinate the ecocentric harm, by conditioning it on showing anthropocentric harm to humans and their property. Given the pressures of maintaining a streamlined and expeditious trial, which compound the complexities of proving environmental harm, this would potentially result in a sidelining, or dismissal, of the environmental harm. Moreover, the analysis details that procedural hurdles would arise due to the need for extensive scientific evidence, the lack of scientific training on the part of the judges, the multi-factorial and dynamic nature of environmental harm, and the likely need for longitudinal studies to establish the anticipated duration of the environmental harm. In addition, it shows that the environment per se cannot be considered to constitute a victim under the Rules of Procedure, again evincing the anthropocentric orientation of the Court's framework.

Whilst the status quo approach promises an avenue to proceed without awaiting further reform, it ultimately leads to a normative cul-de-sac, in which the prospects of addressing environmental harm are conditioned on harm to human interests and forced into an anthropocentrically oriented regulatory framework, in a manner that will inherently limit any symbolic value that could be achieved by proceeding before the world's first permanent international criminal institution.

1.1.1.2 The Amendment Approach

Second, the 'amendment' approach, whereby the Rome Statute would be amended to encompass crimes against the environment (either through the wholesale adoption of the crime of ecocide, or through more incremental steps such as expanding the parameters of the existing war crime involving environmental harm under article 8(2)(b)(iv)), could see the Court serve an ecocentric expressive function, and also potentially constitute a coherent enforcement mechanism to prosecute qualifying forms of environmental harm. However, this book shows that extensive adjustments to both the substantive and procedural framework of the Court would be required for this approach to function effectively and coherently (in addition to the political capital needed to achieve such amendments), and that such adjustments would clash with the Court's anthropocentric ontology and orientation.

Substantively, the addition of a crime of harming the environment (whether under the name of ecocide or otherwise) would allow the Court to directly adjudicate environmental harm, irrespective of whether it

8 USING THE ICC TO ADDRESS GRAVE ENVIRONMENTAL HARM

occurred during armed conflict. In the absence of the adoption of a such an amendment, incremental amendments to the existing war crime, or the addition of another crime concerning harm to the environment in armed conflict,¹⁷ would entrench the current limitation to wartime situations. Yet, a significant proportion of environmental harm occurs during peacetime, or at least irrespective of armed conflict. As Frédéric Mégret has observed ‘[t]he devastation sown by some human activities under the cover of peace is occasionally far greater than that caused in war’.¹⁸ He also points out that ‘in the search for normative and moral consistency’, punishable harm to the environment should not be limited to that occurring in armed conflict, as ‘[f]rom an environmental point of view, there is no reason why it should not be equally reprehensible to cause such damage in peacetime’.¹⁹

Procedurally, the adjustments required to effectively address environmental harm within the Court’s operating framework would involve addressing its preponderant emphasis on the principle of orality, the difficulty of adhering to time-bound stages of proceedings with an inflexible and unchanging view of the environmental harm and its impact, the role of causation in relation to multi-factorial events, and the investigative involvement of the judiciary, as detailed in Chapter 3.1–3.3. These do not necessarily require amendments to the framework but would require a major re-direction of the Court’s practice. Finally, for the environment to qualify as a victim, an amendment to the definition of victims in rule 85 would be required.

Ultimately, amending the Rome Statute could potentially lead to a conceptually coherent framework in relation to environmental harm. However, even if some amendments were made to allow the Court to address environmental harm and to re-shape its procedures in this

¹⁷ For the proposal of a new crime concerning harm to the environment in armed conflict, see Freeland (2015). Incremental amendments, or the introduction of a new crime restricted to wartime, would not necessarily be exclusive of the introduction of a broader crime of ecocide. For example, there are compelling reasons to extend the existing war crime under article 8(2)(b)(iv) to apply to non-international armed conflicts, irrespective of the introduction of a new crime of ecocide; as discussed in Gillett (2017). However, multiple proposals to amend the Rome Statute in diverging ways will dissipate the momentum and political capital required to achieve an amendment of any nature and should be rationalized as far as possible.

¹⁸ Frédéric Mégret, ‘The Problem of an International Criminal Law of the Environment’ (2011) 36 *Columbia Journal of Environmental Law* 195 (‘Mégret (2011)’), p. 247. See also Richard Falk, ‘Environmental Warfare and Ecocide: Facts, Appraisal and Proposals’ (1973) 4 *Bulletin of Peace Proposals* 80 (‘Falk (1973)’), p. 21, Annex 1.

¹⁹ Mégret (2011), p. 246.

1.1 OVERVIEW OF METHODOLOGY AND CORE CONCLUSIONS 9

respect, the Court's ability to redress environmental harm would remain limited. In light of the Court's genesis as a tool for addressing grave anthropocentric harms such as genocide, mass persecution and attacks on civilian populations, the thrust of its operations will likely continue to be directed to these ends. Moreover, the risk of a completely new type of crime (and new procedures) diverting resources and developed methodologies away from the Court's efforts to address existing anthropocentric crimes under the Rome Statute should not be overlooked.

Additionally, several key facets of the Court's framework are highly unlikely to be amended, including: the exclusion of corporations from the Court's personal jurisdiction; the intent requirements under article 30 of the Rome Statute; the exacting standards and burdens of proof; and the limited range of penalties, which are not readily applicable to the entities that are responsible for most serious environmental harm (custodial sentences cannot be applied to corporations).²⁰ Whereas amendments would send a powerful symbolic message regarding the international community's commitment to redressing serious environmental harm, the impact will ring hollow if they are not sufficiently comprehensive to allow the Court to effectively redress this threat. At the same time, an overly pervasive re-orientation towards environmental protection would be discordant with the Court's mission of addressing harm to humans and may dilute the efficacy of its proceedings for existing grave crimes.

1.1.1.3 The Establishment of an International Court for the Environment (ICE)

Third, efforts may be directed towards creating an 'international court for the environment', constituting a purpose-designed institution. If politically feasible, this would be the most promising means of comprehensively addressing serious environmental harm from a legal and procedural viewpoint.

A purpose-designed ICE could be vested with jurisdiction encompassing corporate responsibility and liability. It could also incorporate

²⁰ Currently, the penalties available at the ICC are limited to imprisonment (for a determinate period up to thirty years or, due to the extreme gravity of the crime and the individual circumstances of the convicted person, life imprisonment), and/or fines (subject to rule 146 whereby '[u]nder no circumstances may the total amount exceed 75 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependents').

10 USING THE ICC TO ADDRESS GRAVE ENVIRONMENTAL HARM

a criminal negligence standard alongside direct intent. The ICE could be designed with diverse measures and remedies available to repress and compensate for environmental harm, ranging from custodial sentences to fines to orders to engage in remedial action, as well as provisional measures such as ceasing the harmful conduct and declarations of non-compliance with international law.

Procedurally, the ICE could adopt a flexible set of regulations, for example adopting an investigative model to accommodate heavily scientific and long-term inquiries, and not requiring the establishment of all matters beyond reasonable doubt, but only those resulting in custodial sentences (in this sense, it would be a partly criminal jurisdiction). It could also incorporate experts from environmental and scientific backgrounds, alongside judges and adjudicators. An advocate for the environment could ensure that the intrinsic value of the natural environment was given voice in any proceedings. In this way, punishments and remedies for harming the environment would occur not only when anthropocentric interests were implicated but also when purely ecocentric values were compromised. Importantly for the coherence of international law, the procedures could incorporate environmental law notions, such as the precautionary principle. Based on the analysis set out herein, it is concluded that a purpose-designed institution such as the ICE would have the most impactful expressive function while also potentially constituting the most effective means of comprehensively addressing serious environmental harm.

Before entering into the detailed analysis, a couple of additional introductory notes are apposite. First, the approaches set out in Section 1.1.1 are not all necessarily mutually exclusive. For example, the establishment of a purpose-designed institution to address serious environmental harm, such as the ICE, with jurisdiction over corporations and other features set out in Section 1.1.1.3, may be complementary to the ICC also extending its jurisdiction to cover certain environmental crimes.²¹ In such circumstances, cooperation and coordination would be important in relation to matters such as evidence collection and presentation to avoid working at cross-purposes. Second, most of the innovations suggested in the core conclusions above would require considerable political capital. Such political considerations go beyond

²¹ On this note, the application of the principle of complementarity as between the ICC and another international organization (as opposed to a State) is an area open to interpretation under article 17 and the broader framework of the Rome Statute.