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’. While anthropogenic harm to the environment long pre-dates Grotius, it has risen to potentially cataclysmic levels since his days. Indeed, scientists have described the current era as ‘the sixth mass extinction’ and ‘biological annihilation’. Anthropocentric harm to the environment is being inflicted in many ways, including deforestation, habitat destruction, poaching, toxic dumping, fracking, unregulated mineral extraction, carbon dioxide emissions, and the destruction of carbon sinks and reservoirs. In light of these scourges, environmental


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
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.
environmental harm. Whereas there have been works addressing the substantive crimes that could be constituted by environmental harm, 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). 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

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9 For discussions of these and other procedural topics, see *inter alia* Chapter 3.
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’, this book shows that the ICC is essentially designed as a legally autonomous justice system, cohering with the wider precepts of international law, but with its own jurisdictional, substantive, and procedural parameters established through its constitutive instruments. 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. 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.


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).
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.\textsuperscript{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).\textsuperscript{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’.\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{16} Rome Statute, Preamble, para. 3.
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
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
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, 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’. 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’.

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

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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.


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). Where 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

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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’).
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 scient-
fic 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 back-
grounds, alongside judges and adjudicators. An advocate for the envi-
ronment 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 ecocen-
tric values were compromised. Importantly for the coherence of inter-
national 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 poten-
tially constituting the most effective means of comprehensively address-
ing 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 presen-
tation to avoid working at cross-purposes. Second, most of the innov-
ations 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.
the scope of the legal, regulatory, and structural analysis presented in this book. However, potential procedural and institutional avenues for reform are discussed in the final chapter, along with related issues including the role of the UNSC.

Bearing these considerations in mind, the primary focus of the ensuing analysis is the investigation and prosecution of serious environmental harm under the framework of the ICC. As the world’s first permanent international criminal judicial institution, it is important to assess its capacity to address anthropocentric environmental harm, particularly given the growing awareness of the extent and severity of this collective problem.

1.2 Defining the Key Terms

1.2.1 The Natural Environment

The term ‘natural environment’ (or ‘environment’) is fundamental to the entire analysis. However, as familiar as this term is, it is difficult to comprehensively delineate. Many definitions have been suggested in the context of international and domestic law. The definition provided by the International Law Commission (ILC), which is the principle non-judicial body charged with examining and distilling the rules of international law, is used herein:

the words ‘natural environment’ should be taken broadly to cover the environment of the human race and where the human race develops, as well as areas the preservation of which is of fundamental importance in protecting the environment. These words therefore cover the seas, the atmosphere, climate, forests, and other plant cover, fauna, flora and other biological elements.

22 See Eric Jensen, ‘The International Law of Environmental Warfare: Active and Passive Damage During Armed Conflict’ (2005) 38 Vanderbilt Journal of Transnational Law 145 (‘Jensen (2005)’), pp. 150–2. Dam-de Jong provides the definition, ‘[t]he environment comprises the air, water, land, flora and fauna, which interact as part of different ecosystems’; Daniëlla Dam-de Jong, International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations (Cambridge University Press, 2015) (‘Dam-de Jong (2015)’), p. 25. The Independent Expert Panel, which released a proposed definition of ecocide in 2021, as detailed in Chapter 6, Section 6.3.2.3, defined the environment as meaning ‘the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space’.

1.2.2 Harm

Because the central focus of the analysis is addressing environmental harm, it is important to define this term. However, an overly restrictive definition would risk excluding some negative impacts on the environment, particularly in light of the ongoing discovery of new anthropocentric impacts on the environment. Accordingly, a broad definition of harm is ‘the existence of loss or detriment in fact of any kind’. Although the terms are not exhaustively synonymous, “harm” is used interchangeably with “damage” for the purposes of this analysis.

In light of the focus of this book, harm (and damage) is therefore used in a manner that encompasses any loss or detriment to the environment or any facet thereof deriving from human causes. For example, in Vietnam the chemical defoliant spraying operations of the United States during the 1970s (which are discussed in Section 1.2.5) led to altered ecosystems, in which mangrove-based habitats became scrubby grasslands, and species diversity in the impacted habitats was found to be significantly less than in the unimpacted habitats. This would qualify as harm to the natural environment as used in this book.

1.2.3 Anthropocentricism

Anthropocentricism denotes the prioritizing of human interests and harm to human beings. International criminal law is essentially based


For example, in relation to animals, the term ‘harm’ tends to be used for negative impacts; whereas in relation to objects, the term ‘damage’ is more common, though this is not a strict rule. As the natural environment encompasses both animals and objects, both terms are used interchangeably herein.


on human-centred values and interests. Similarly, IHL is founded on anthropocentric values (while also encompassing State-centric values), designed to minimize unnecessary human suffering resulting from armed conflict, but allowing military necessity to trump certain harmful conduct.

The environment has traditionally been viewed through an anthropocentric lens and characterized as a resource to be exploited for the benefit of humankind, particularly during times of armed conflict. From this essentially utilitarian outlook, the environment is only valued to the extent it serves the interests of humans. Traditionally, the environment has not generally been afforded its own intrinsic value under IHL except in limited circumstances, and the relevant prohibitions usually condition the prohibition of the destruction of the environment on harm to humans or their property. In the military context, this approach manifests in sentiments that ‘environmental considerations’ should not impose restrictions on the ‘application of combat power’ in any way that would render military activity predictable and thus jeopardize ‘mission accomplishment’.

1.2.4 Ecocentricism

Ecocentricism refers to the prioritization of ecological values and the attribution of intrinsic value to the environment going beyond its utility for human interests. The concept of ecocentricism essentially emerged during the twentieth century. In 1949, with the devastation and wounds

33 See Chapter 2 Section 2.3.3.
34 See, e.g., Brigadier-General Joseph G. Garrett III, US Army, ‘The Army and the Environment: Environmental Considerations during Army Operations’ (‘Garrett (1996)’) in Richard Grunawalt, John King, and Ronald McClain (eds.), Protection of the Environment During Armed Conflict (International Law Studies, 1996) Vol. 69, p. 46 (‘During combat operations, emphasis must be placed on mission accomplishment. The goal of minimizing environmental impacts is best achieved by applying the principles of war to achieve quick, decisive victory. Unavoidable environmental impacts necessary and proportional to such a response must be allowed. Restricting the application of combat power to predictable patterns of behavior based on environmental considerations must be avoided’).
of the Second World War still fresh, Aldo Leopold encapsulated the ecocentric approach in discussing the ‘land ethic’, stating

all ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts. . . . The land ethic simply enlarges the boundaries of the community to include soils, waters, plants and animals, or collectively: the land.36

This ecocentric view has become more prevalent in recent decades.37 Adherents to the ecocentric approach seek not only the application of international criminal law to environmental damage per se,38 but also the development of new prohibitions criminalizing damage to the environment irrespective of a state of armed conflict and irrespective of whether human beings are harmed by the offending actions.39

Several significant international law instruments attribute value to the environment per se, rather than simply for its anthropocentric value. For example, the 1972 World Heritage Convention defines natural heritage as natural features, geological and physiographical formations, and natural sites of ‘outstanding universal view’ from the ‘point of view of science’ and ‘conservation’, as well as due to aesthetic value.40 The 1992 Convention on Biological Diversity is motivated by the ‘the intrinsic value of biological diversity’ and ‘the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere’, while also noting ‘the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components’.41 The concept of an ecological, or environmental, point of view is also recognized in the Convention on

37 See, e.g., Jensen (2005), pp. 151–2 (noting that, while nations do not generally accept it, the view that the environment has intrinsic value may be gaining in favour).
39 See, e.g., Polly Higgins’ proposals for a crime of ecocide to be adopted at the ICC as discussed in Chapter 6.
40 Convention concerning the Protection of the World Cultural and Natural Heritage, 23 November 1972 (‘World Heritage Convention’), 1037 UNTS 151, article 2.
41 Convention on Biological Diversity 1992, 1760 UNTS 30619, Preamble.
the Conservation of Migratory Species, which refers to the ‘value of wild animals from environmental . . . point of view’.

On a complementary note, the United Nations General Assembly has emphasized the ‘intrinsic value of biological diversity’ along with its importance for human well-being, and has declared that ‘wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the Earth which must be protected for this and the generations to come.’

The environment’s intrinsic value is increasingly being recognized legally. For example, the Inter-American Court of Human Rights has held that the right to a healthy environment ‘protects the components of the environment, such as forests, seas, rivers, and other [environmental features] as legal interests in themselves, even in the absence of certainty or evidence of a risk to individuals’ and that ‘[t]his means that nature must be protected, not only because of its benefits or effects for humanity, “but because of its importance for the other living organisms with which we share the planet”’. Noting that ‘more than 155 States have recognized some form of a right to a healthy environment in, inter alia, international agreements or their national constitutions, legislation or policies’, the United Nations Human Rights Council has recognized that there is a human right to a clean, healthy, and sustainable environment.

At the domestic level, dozens of States have constitutions that recognize the intrinsic value of the environment and impose a duty on the government to protect the environment. For example, the Constitution of Ecuador, as amended in 2008, recognizes that ‘Nature or Pacha Mama, where life is

42 Convention on the Conservation of Migratory Species, 1651 UNTS 28395, Preamble (‘Conscious of the ever-growing value of wild animals from environmental, ecological, genetic, scientific, aesthetic, recreational, cultural, educational, social and economic points of view’).

43 UNGA Resolution 69/314.


45 IACtHR, Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina (6 February 2020) (‘Lhaka Honhat’), para. 203 (and citations therein) (emphasis added).


47 Kenneth McCallion and Rajan Sharma, ‘Environmental Justice without Borders: The Need for an International Court of the Environment to Protect Fundamental Environmental Rights’ (2000) 32 George Washington Journal of International Law and Economics 351 (‘McCallion and Sharma (2000)’), p. 355 (highlighting that environmental protection as a matter of obligation or other ‘environmental rights’ have been recognized at the constitutional level in approximately sixty countries); Lhaka Honhat, para. 206.
reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. The Bolivian Constitution of 2009 recognizes that it is not only humans that have the right to live in a healthy, protected, and balanced environment, but also ‘other living things’, and requires the central State and territorial authorities to ‘preserve, conserve and contribute to the protection of the environment and the wild fauna by maintaining ecological equilibrium, and controlling environmental pollution’.

Specific domestic cases have also generated jurisprudence recognizing the inherent value of the environment. In a 2008 Judgment concerning the Erika oil spill disaster, the Tribunal Correctional de Paris ascribed significance to non-commercial living beings, in other words, pure environmental harm independent of anthropocentric ownership. In 2017, the High Court of Uttarakhand in India declared that the Ganges and Yamuna rivers are living entities with legal status. Also in 2017, the Supreme Court of New Zealand held that it had to consider the measures appropriate to ‘protect the “intrinsic values” of the land concerned’ in a conservation case.

48 Constitution of the Republic of Ecuador, 28 September 2008 (as amended to 7 May 2011), article 71 (see also articles 14, 15, 32, 57, 66, 72–4, 83, and later articles addressing responsibilities of constituent units), as translated by the Centre for Democratic and Environmental Rights, at: www.centerforenvironmentalrights.org/rights-of-nature-law-library.
49 Bolivian Constitution of 2009, article 33.
50 Bolivian Constitution of 2009, article 299 (II)(1).
52 In the High Court of Uttarakhand at Nainital, Mohd. Salim v. State of Uttarakhand & others, Writ Petition (PIL) No. 126 of 2014, 20 March 2017 (‘Mohd. Salim v. State of Uttarakhand & others’), para. 19. The High Court did not explain how duties and liabilities can vest in a river. The Indian Supreme Court thereafter stayed the execution of the High Court’s ruling while it assesses the appeal, which is currently pending; Union of India Cabinet Secretary v. Mohd Salim, S.L.P.(C) CC No. 007266/2017 Registered on 5 May 2017. See also Lalit Miglani v. State of Uttarakhand, Writ Petition (PIL) No. 140 of 2015 (also finding that the Ganges and Yamuna rivers have legal personality). See further, Gabriel Eckstein et al., ‘Conferring Legal Personality on the World’s Rivers: A Brief Intellectual Assessment’ (2019) 44 Water International 1, p. 3.
53 In the Supreme Court of New Zealand, Hawke’s Bay Regional Investment Company Limited v. Royal Forest and Bird Protection Society of New Zealand Incorporated [2017] NZSC 106, 6 July 2017 (‘Hawke’s Bay Decision’), paras. 111, 114, 127. The intrinsic value of environmental features is also recognized in the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Sections 14 and 19, and Te Urewera Act 2014, Sections 11 and 16 (both pieces of New Zealand legislation).
1.2.5 Ecocide

The term ‘ecocide’ is central to the analysis in this book. Combining
the Greek oikos (meaning home or house, used in the sense of habitat)
and the Latin caedere (meaning to kill or destroy), the term was first
used publicly by the plant biologist Arthur Galston around 1970 to
encapsulate what he described as ‘wilful, permanent destruction of
environments in which people can live in a manner of their
choosing’. Galston and others condemned the American operations
during the Vietnam War, particularly Operation Ranch Hand, and
sought to enshrine a prohibition against serious harm to the environ-
ment in a similar manner to adoption of the Genocide Convention
after the Second World War. In 1973, appalled by the ecological
harm perpetrated on the former Indochina, Richard Falk sought the
enactment of an International Convention on the Crime of Ecocide
and a Draft Protocol on Environmental Warfare. He defined ecocide
as ‘acts committed with intent to disrupt or destroy, in whole or in
part, a human ecosystem’, which could be committed either in peace-
time or wartime. Falk enumerated six specific forms of environmen-
tally deleterious warfare, such as through the use of chemicals,
bulldozers, or bombs, for prohibition in the Draft Protocol on
Environmental Warfare.

Partly as a result of the defoliation operations during the Vietnam
War, prohibitions of environmental harm were incorporated into the
1977 Additional Protocols to the Geneva Conventions. Hitherto, IHL
encompassed prohibitions on certain means and methods of war in
The Hague Regulations, but none that specifically protected the

54 See Chapter 6 for an analysis of the legal elements of ecocide.
55 David Zierler, Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who
 Changed the Way We Think About the Environment (University of Georgia Press,
2011), pp. 15, 19, 114; Anja Gauger et al., Ecocide is the Missing 5th Crime against Peace,
The Ecocide Project – Human Rights Consortium, School of Advanced Study, University
of London (July 2012) (updated June 2013) (available at https://sas-space.sas.ac.uk/4830/
56 Bronwyn Leeuwa, ‘Scorched Earth: Environmental War Crimes and International Justice’
57 Falk (1973), p. 18; Giovanni Chiarini, ‘Ecocide and International Criminal Court
Procedural Issues: Additional Amendments to the “Stop Ecocide Foundation”
No.15 (CCJHR, 2021) (‘Chiarini (2021)’), p. 3.
58 Article 1 of the Proposed International Convention.
environment. Additional Protocol I to the Geneva Conventions featured articles 35(3) and 55(1) and (2), prohibiting the infliction of *inter alia* widespread, long-term, and severe harm to the environment. That same year, the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques (ENMOD) was adopted, condemning war techniques involving widespread, long-term, or severe environmental harm. The Convention was largely a reaction to the use of high quantities of chemical defoliants, most notably Agent Orange, by the United States Army during the Vietnam War, which resulted in significant destruction of forests and wildlife as well as extreme human sickness and death. It is designed to prohibit large-scale environmental modification techniques, which have the ability to turn the environment into a weapon, such as unnaturally induced earthquakes, tsunamis, or changes in weather patterns. Such IHL prohibitions provided the basis for the subsequent introduction of article 8(2)(b)(iv) of the Rome Statute, concerning attacks launched in the knowledge they would cause harm to the environment, as detailed in Chapter 2, Section 2.3.3.2.

The inclusion of ‘ecocide’ was touted during debates over the Draft Code of Offences against the Peace and Security of Mankind in the 1980s (‘Draft Code’). From the outset, a key consideration was the

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60 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 (The Hague Regulations) (‘The Hague Regulations of 1899’).

61 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977), entered into force on 7 December 1979 (‘AP1’).


level of intent required for environmental harm to be criminalized, with initial views holding that inadvertent damage would not be sufficient to attract criminal responsibility. Early versions of the Draft Code included a crime approximating ecocide in the form of article 26, which would have penalized ‘wilful and severe damage to the environment’, irrespective of a link to armed conflict. However, article 26 was dropped on the second reading of the Draft Code, apparently due to strong opposition from the United States of America, the United Kingdom, and the Netherlands, all of which questioned whether environmental crimes could affect the peace and security of humankind. Consequently, the adopted version of the Draft Code of Offences against the Peace and Security of Mankind only featured a crime involving environmental harm in the context of armed conflict, which was subject to showing widespread, long-term, and severe harm to the environment, and required showing that the environmental damage occurred and gravely prejudiced the health or survival of the relevant population(s).

Similarly, the only crime in the Rome Statute that refers to the environment (article 8(2)(b)(iv)) is bound by significant restrictions, as discussed in Chapter 2, Section 2.3.3.2. With the prohibitions against environmental harm being heavily circumscribed, calls for the adoption of a crime of ecocide have again increased in recent years. However, to date no consensus has emerged among States in this respect, and the elements of the crime of ecocide under international law remain undetermined, as discussed in detail in Chapter 6.


70 See article 20 (g) of the ILC Draft Code of Crimes Against the Peace and Security of Mankind (‘in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs’).
1.3 Applying Cosmopolitan Justice to Environmental Harm

1.3.1 The Threat of Anthropocentric Harm to the Natural Environment

Anthropocentric environmental destruction is an all too foreseeable occurrence during times of societal upheaval\(^71\) and armed conflict.\(^72\) There is a long history of environmental damage during warfare, both as a deliberate tactic and as an offshoot of lawful military operations.\(^73\) Reflecting this scourge, historic writings contain prohibitions against harming the natural environment, including in the Old Testament.\(^74\) Similarly, Muhammad’s companion, the first Caliph Abu Bakr, is said to have instructed his Muslim army to avoid burning or harming trees in the seventh century A.D.\(^75\)

Despite the ancient pedigree of environmental harm during armed conflict, a broader public awareness of the anthropogenic threat posed to the environment only emerged after the industrial revolution and the two world wars. In particular, environmental destruction arising from warfare was thrust to the forefront of public consciousness by the large-scale chemical defoliation operations (using Agent Orange) conducted by the United States of America during the Vietnam War in the 1960s and the 1970s.\(^76\) Environmental harm returned to the headlines during the first Gulf War in 1990–1, when Saddam Hussein’s Iraqi army ignited more

\(^{73}\) Weinstein (2005), p. 700. See below, Chapter 2 (on war crimes).
\(^{74}\) Division of Christian Education of the National Council of the Churches of Christ in the United States of America, Revised Standard Version of the Bible (1946, 1952, and 1971), Deuteronomy 20:19: ‘When you besiege a city for a long time, making war against it in order to take it, you shall not destroy its trees by wielding an axe against them; for you may eat of them, but you shall not cut them down. Are the trees in the field men that they should be besieged by you?’ See also John A. 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.
than 600 of Kuwait’s oil wells in an organized and premeditated attack.\textsuperscript{77} Over two decades later, reports emerged in 2016 that the so-called Islamic State or associated forces had engaged in similar tactics – setting oil wells, forests, and other locations on fire in Iraq, releasing a heavy volume of pollutants into the atmosphere.\textsuperscript{78}

During conflict, the environment can be harmed in various ways. It can be damaged directly, through chemicals and debris arising from bomb damage, troop movements, landmines and other unexploded ordnance, weapons containing depleted uranium, and the production, testing, stockpiling, and disposal of weapons.\textsuperscript{79} It can also be damaged indirectly, through the displacement of large numbers of people, who seek alternative survival strategies, often at the expense of the natural environment, and through the breakdown of governance and regular services.\textsuperscript{80}

While the impact on the ecosystem and its constituent populations varies according to ‘the nature of the disturbance, the sensitivity of the biological system (including resilience), and the timescale of the impacts’, and can include both positive and negative effects,\textsuperscript{81} it is clear that warfare can result in significant harm to the natural environment. Aerial assaults can harm wildlife populations, particularly avian species, by destroying flora and fauna and degrading natural habitats, and through noise pollution capable of rupturing animals’ ear drums, as well as through the introduction of invasive species.\textsuperscript{82} Naval warfare,


\textsuperscript{80} UNEP (2009 Matthew, Brown, and Jensen), p. 15. Regarding the internal displacement in Mosul, see Cusato Scorched Earth (2017).

\textsuperscript{81} Lawrence et al. (2015), pp. 443–4.

though sometimes leading to positive outcomes for the regeneration of over-exploited marine species, can result in the introduction of foreign species through ballast dumping, as well as direct harm to aquatic species through underwater blasts and sonar operations.\textsuperscript{83} Terrestrial combat can see harm to ecosystems through shelling and other munitions, as well as soldiers and displaced persons encroaching on the habitat of endangered species.\textsuperscript{84} Nuclear war presents perhaps the most threat of extreme environmental harm, through \textit{inter alia} the burning of vegetation, blasts impacting terrestrial and marine species, and exposure to radiation.\textsuperscript{85} Methods directly designed to harm the natural environment, such as the use of the chemical defoliant Agent Orange, can wreak havoc on ecosystems for decades after their use.\textsuperscript{86}

The harm inflicted on the environment during armed conflict is aggravated in situations of weak regulatory protection. Environmental bodies are quickly dismantled or side-lined as warring factions, profit-seeking corporations, and unscrupulous individuals scramble to control and exploit the natural environment, or even deliberately harm it for strategic purposes.\textsuperscript{87} Because of this, environmental destruction and armed conflict are often linked in a vicious cycle,\textsuperscript{88} particularly in


\textsuperscript{85} Lawrence et al. (2015), pp. 446–8.


countries with weakened or non-functioning laws and institutions.89 In light of the link between armed conflict and environmental degradation, the International Law Commission has worked for several years on distilling the relevant law and practice into principles on the protection of the environment during armed conflict.90

The harmful effects of armed conflict on the environment have been recognized by the United Nations General Assembly (UNGA) and documented in many instances by the United Nations Environment Program (UNEP) among other organizations.91 In particular, the phenomenon of illicit exploitation of natural resources has been both as a cause of the fighting and as a means of continuing the fighting in several conflicts.92 After conducting over twenty post-conflict environmental impact assessments since 1999, the United Nations Environment Programme has found that armed conflict causes significant harm to the environment and to communities that depend on natural resources.93 It has found that ‘over the past sixty years, at least forty percent of all intrastate conflicts can be associated with natural resources’.94 Competition over natural resources not only contributes to the outbreak of hostilities and finances

90 In late-2019, the ILC decided to transmit the draft principles on protection of the environment in relation to armed conflicts, through the Secretary-General, to governments, international organizations, including from the United Nations and its Environment Programme, and others, including the International Committee of the Red Cross and the Environmental Law Institute, for their comments and observations; see Summaries of the Work of the International Law Commission, ‘Protection of the Environment in Relation to Armed Conflicts’, 11 December 2019 (https://legal.un.org/ilc/summaries/8_7.shtml).
92 See, e.g., Daniëlla Dam-de Jong and James Stewart, ‘Chapter 21: Illicit Exploitation of Natural Resources’ in C. Jalloh and K. Clarke (eds.), The African Court of Human and Peoples’ Rights (Cambridge University Press, 2017) (‘Dam-de Jong and Stewart (2017)’), p. 590 (‘natural resources have triggered, financed or fuelled a number of internal armed conflicts. Examples include conflicts in Cambodia, Angola, Sierra Leone, Liberia, Côte d’Ivoire, and the Democratic Republic of the Congo . . . , which have been financed by the exploitation of a variety of valuable natural resources, including diamonds, gold, timber, oil and cocoa’).
and sustains armed conflict, but also threatens or undermines peace-making and reconciliation efforts.95

Environmentally destructive practices also occur outside of armed conflict. In 1992, the President of the UNSC concluded that ‘non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to international peace and security’.96 Toxic dumping,97 wildlife exploitation,98 and other harmful practices are frequently perpetrated outside of armed conflict,99 particularly in circumstances of regulatory breakdown or collapse.100 As noted above, environmental harm during peace time may potentially be ‘far greater’ than that caused during war.101

The threat posed by environmental crime is increasing rapidly in scope and profitability.102 Driven by the global demand for environmental goods, the large profit margins, and the regulatory gaps at the domestic and international levels, organized criminal groups, corporations, and individuals are exploiting the environment for their own enrichment.103 Already in 2000, it was estimated that criminal groups were obtaining

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96 Security Council, Provisional verbatim record of three thousand and forty-sixth meeting, New York, 31 January 1992, S/PV.3046, Statement by the President of the UNSC (United Kingdom), p. 143.
100 Skinnider (2011), pp. 1, 27–8 (underscoring the additional dilemma of protection of victims of transnational environmental crimes posed by contexts of under-development, abuse of power, and corruption); UNODC Toolkit (2012), p. 3.
102 Pereira (2015), p. 3.
103 Pereira (2015), p. 3.
between 22 and 31 billion United States dollars (USD) annually from harmful activities such as smuggling and dumping hazardous waste, and exploiting and trafficking natural resources.\textsuperscript{104}

Significantly, international environmental crime can have a disproportionate impact on less-developed countries. For example, the illegal timber and wildlife trades predominantly see raw materials unlawfully taken from countries forming part of the global South, depriving those States of natural resources, and increasing the power of criminal networks to undermine their regulatory systems.\textsuperscript{105} Similarly, as the costs of safe waste disposal in developed countries increase, opportunistic actors look for States with weaker regulations governing waste disposal in order to maximize their profits.\textsuperscript{106} Environmental harm can also create vicious circles of ever greater harm; as endangered species and forestry resources are illegally traded, their supply decreases, which in turn raises the price and the potential profit for illicit dealers to exploit.\textsuperscript{107}

1.3.2 Primary Branches of International Law Relevant to Prosecuting Environmental Harm

There is no specific framework designed for the prosecution of perpetrators of environmental harm under international law. However, two strands of existing international law constitute the international legal landscape for such an endeavour: (1) international environmental law and (2) international criminal law. Understanding the origins and parameters of these domains (as well as the inter-related body of IHL in relation to armed conflict) is important to understand their applicability to the prosecution of environmental harm before the ICC.

Both international environmental law and international criminal law have experienced dramatic growth both in quantity and breadth in the last few decades.\textsuperscript{108} Although IHL is much older in terms of written

\textsuperscript{105} Pereira (2015), pp. 3–4.
\textsuperscript{107} Pereira (2015), pp. 8–9.
provisions, it has also seen a surge in development due to its judicial application in many international criminal cases in the modern international tribunals. The steps in the development of these bodies of law are set out forthwith.

1.3.2.1 International Environmental Law


The roots of international environmental law go back to the second half of the nineteenth century, when bilateral fisheries treaties began to be formed.\footnote{Philippe Sands, Principles of International Environmental Law (4th ed.) (Cambridge University Press, 2018) (‘Sands (2018)’), pp. 21–2.} Those early treaties, and the creation of international institutions such as the League of Nations in the 1920s and the United Nations in 1945, signalled a growing understanding of the interconnectedness of the world and that limitations on the exploitation of natural resources were necessary.\footnote{Sands (2018), pp. 21–6. See also Schmitt (1997), pp. 8–9, fn. 19 (noting the lack of a significant ecocentric-oriented protest from the international community at the time of the use of atomic bombs on Hiroshima and Nagasaki, which had rendered the targeted area as a virtual wasteland).}

In this early period, States concluded treaties on an ad hoc, sporadic, and limited basis, generally seeking to preserve wildlife and protect waterways and seas.\footnote{Sands (2018), pp. 23–5.}

In the 1940s, the next major legal development for international environmental law was the recognition that States should not allow activities in their territories to cause environmental harm outside of their borders. The \emph{Trail Smelter} arbitration, which concerned sulphur fumes emitted from a smelter in Canada, generated the axiomatic principle that ‘no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence’.\footnote{\emph{Trial Smelter Case (United States v. Canada)}, 16 April 1938 and 11 March 1941, Reports of International Arbitral Awards (R.I.A.A.), Vol. III, p. 1905; \emph{Trail Smelter Arbitral}
forward the major developments in international law during this period, and the United Nations Charter contains no provisions directly addressing environmental protection or the conservation of natural resources.\(^{114}\)

Later, conventions specifically protecting the environment for its own sake began to emerge. In the late 1940s, some environmentally oriented multilateral institutions and conventions were formed, such as the International Union for the Protection of Nature of 1947\(^ {115}\) and the 1949 United Nations Conference on the Conservation and Utilisation of Resources.\(^ {116}\) In the 1950s and 1960s, several significant environmental organizations and United Nations General Assembly resolutions were enacted, covering fisheries issues, pollution, the Antarctic, and wildlife conservation.\(^ {117}\)

However, it was not until war broke out in Vietnam in the 1960s that a greater awareness of the need to collectively take measures to protect the environment emerged, particularly during times of armed conflict.\(^ {118}\) The period of sporadic and un-coordinated developments came to an end, and a new era began in 1972 with the United Nations (UN) Stockholm Conference on the Human Environment.\(^ {119}\) Mr. Olof Palme, then Prime Minister of Sweden, opened the conference by referring to the activities committed during the Vietnam War (such as indiscriminate bombing and the large-scale use of bulldozers and pesticides) as ‘ecocide’.\(^ {120}\) The Stockholm Declaration was issued by 116 States in attendance at the Stockholm conference and set out an overarching vision for this area of law.\(^ {121}\) It noted in the Preamble that ‘in the...
long and tortuous evolution of the human race on this planet a stage has
been reached when, through the rapid acceleration of science and tech-
ology, man has acquired the power to transform his environment in
countless ways and on an unprecedented scale’. Principle 1 recognized
the right to live in an environment of sufficient quality for dignity and
well-being, as well as the responsibility of humankind ‘to protect and
improve the environment for present and future generations’.

Among the most significant provisions are Principle 21, which
affirmed States’ responsibility to ensure that activities within their jurisdic-
tion or control do not cause damage in another State, or in outer
space, or on the high seas; Principle 22, which required States to
cooperate in the development of international environmental law,
including regarding liability and compensation for the victims of envi-
ronmental harm; Principle 23, which allowed States a certain margin of
appreciation to develop national standards; and Principle 24, which
called on States to cooperate ‘to effectively control, prevent, reduce and
eliminate adverse environmental effects resulting from activities con-
ducted in all spheres, in such a way that due account is taken of the
sovereignty and interests of all States’.

The Stockholm Declaration ushered in a new more organized phase,
particulary by calling on States to cooperate in the development of
international environmental law. In the wake of the Stockholm
Declaration, the United Nations Environment Program was created in
1972, and treaties were concluded concerning *inter alia* the dumping of
waste at sea and the protection of cultural heritage.

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122 Stockholm Declaration, para. 1.
123 Stockholm Declaration, para. 1.
124 Bothe et al. (2010), p. 584 (highlighting that Principle 21 encompassed the so-called Trail
Smelter principle).
125 Stockholm Declaration, Principle 24.
126 Stockholm Declaration, Principle 22.
127 The 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and
Other Matter, and its 1996 Protocol, as amended in 2006 (‘London Convention’ and
128 The World Heritage Committee maintains a World Heritage List of cultural heritage and
natural heritage properties with ‘outstanding universal value’, which are subject to special
protections during times of armed conflict; Bothe et al. (2010), p. 582. Other conventions
relevant to cultural heritage include, for instance, Convention for the Protection of
Cultural Property in the Event of Armed Conflict (1954) and its First and Second
Protocols (1954 and 1999, respectively); Convention concerning the Protection of the
World Cultural and Natural Heritage (1972); Convention on the Protection of the
Underwater Cultural Heritage (2001); Convention for the Safeguarding of the Intangible
In 1973, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973) (CITES) was adopted. The CITES treaty aims to ensure that wild animals and plants are not traded in such a way that threatens their survival.\textsuperscript{129} State Parties to CITES, which number over 170, must put in place a system of permits for any import, export, re-export, or introduction from the sea\textsuperscript{130} of any listed species, and to designate management authorities to administer the licensing system with advice from scientific authorities. Annex 1 of CITES lists the most endangered species and prevents their trade except in exceptional circumstances.\textsuperscript{131} The Convention obliges Parties to take measures to penalize trade of the protected species.\textsuperscript{132}

While environmental treaties were being concluded, the complex question of ownership of natural resources was also being addressed at the international level. For example, in 1962 General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources was adopted, recalling that ‘respect [for this principle] must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States’.\textsuperscript{133} In essence, the principle of permanent sovereignty over natural resources sought to enshrine a right of ‘governments to exploit the State’s natural resources on behalf of the State and its people on condition that it does so for national development and the well-being of the people of the State’.\textsuperscript{134}

During the 1980s, treaties were concluded on environmental impact assessments, transboundary impacts of industrial accidents, and the protection and use of international watercourses.\textsuperscript{135} International organizations became more active in the environmental field, such as through the moratorium on commercial whaling issued by the International

\textsuperscript{129} CITES, article 2.
\textsuperscript{130} Under CITES, article 1.
\textsuperscript{131} UNODC Toolkit (2012), pp. 14–16.
\textsuperscript{132} CITES, article 8; UNODC Toolkit (2012), p. 15.
\textsuperscript{133} UNGA Resolution 1803 (XVII), 14 December 1962, ‘Permanent sovereignty over natural resources’, preamble. See also Charter of Economic Rights and Duties of States, GA Res 3281 (XXIX), UN GAOR, 29th session, 2315th plenary meeting, Agenda Item 48, Supp No. 31, UN Doc A/RES/3281(XXIX) (12 December 1974) annex (‘Charter of Economic Rights and Duties of States’).
\textsuperscript{134} Dam-de Jong (2015), p. 28.
\textsuperscript{135} Sands (2018), p. 38.

In response to the practice colloquially referred to as toxic dumping, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (‘Basel Convention’) was adopted on 22 March 1989. It entered into force on 5 May 1992 and has over 175 parties. States that are party to the Basel Convention are required to criminalize the improper movement or disposal of chemical products that may seriously harm the environment, as detailed in article 9(1).

The 1992 Rio Declaration on Environment and Development placed anthropocentric interests, particularly in terms of development, in a central position concerning the international regulation of human’s interaction with the environment. Article 1 places human beings ‘at the centre of concerns for sustainable development’, and notes that they are ‘entitled to a healthy and productive life in harmony with nature’.


139 See International Law Commission, 1 Yearbook of the International Law Commission (1987) – Summary records of the meetings of the thirty-ninth session 4 May–17 July 1987, at 178, para. 47 and at 210–1, para. 46 (espousing the views of Mr. Solari Tudela and the Special Rapporteur, respectively).

140 See, e.g., article 4(3) of the Convention (asserting that the parties consider that the illegal traffic in hazardous wastes is criminal), and article 9(5) (requiring each party to introduce national/domestic legislation to prevent and punish illegal traffic).

141 Basel Convention, article 9(1).


Significantly, Principle 24 states that: ‘[w]arfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.’\textsuperscript{144} Other articles of the Rio Declaration repeat in part the ideals of the Stockholm Declaration, while linking these environmental obligations to the right to sustainable development. Significantly, the Rio Declaration reflects the ‘precautionary approach’ in Principle 15, and the polluter-pays principle (implicitly) in Principle 16.\textsuperscript{145}

Following UNCED in 1992, many environmental treaties have been adopted, and many acts of international organizations have been undertaken with a view to conserve the natural environment. In 2012, the United Nations General Assembly adopted Resolution 67/189, in which it expressed ‘deep concern about environmental crimes, including trafficking in endangered and, where applicable, protected species of wild fauna and flora’, and emphasized ‘the need to combat such crimes by strengthening international cooperation, capacity-building, criminal justice responses and law enforcement efforts’.\textsuperscript{146}

More recently, considerable political effort has been directed towards achieving a comprehensive climate change agreement. This eventually crystallized in the form of the Paris Agreement, which sets out non-binding targets for reduction in carbon dioxide emissions.\textsuperscript{147} The United Nations states that the goal of the Paris Agreement “is to limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels” and that “[t]o achieve this long-term temperature goal, countries aim to reach global peaking of greenhouse gas emissions as soon as possible to achieve a climate neutral world by mid-century.”\textsuperscript{148}

\textsuperscript{144} Rio Declaration, Principle 24.

\textsuperscript{145} Sands (2018), p. 43.


There are other instruments of international environmental law designed to protect natural resources from harm. For example, the United Nations Watercourses Convention obliges State Parties to avoid causing significant harm to waterways that are shared between States in an equitable and reasonable manner, and to avoid causing significant harm to an international watercourse. Notably, the Watercourse Convention lists natural and ecological considerations as the first to be taken into account when determining what use to make of an international watercourse.\footnote{United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997 (entered into force 2014), article 6(1)(a) (requiring State Parties to take into account geographic, hydrographic, hydrological, climatic, ecological, and other factors of a natural character).} Similarly, the Berlin Rules on Water Resources, which were approved by the International Law Association’s Water Resources Law Committee in 2004, purport to set out rules of customary international law relating to freshwater resources. Article 54 recalls that customary international law requires that ‘an occupying State shall administer water resources in an occupied territory in a way that ensures the sustainable use of the water resources and that minimizes environmental harm’. This accords with the established principles of the law of occupation whereby an occupying State is only the administrator of the occupied territory, acting as the usufructuary of State property.\footnote{International Law Association, Berlin Conference on Water Resources Law (2004), Fourth Report, Commentary to Article 54.}

Millennium Development Goals and Sustainable Development Goals have a major focus on environmental protection, alongside development and poverty reduction.\footnote{152}

In 1997, the International Court of Justice recognized the rapid development of international environmental law during the preceding two decades, stating:

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing which activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.\footnote{153}

However, most of these treaties do not incorporate individual criminal responsibility at the international level, and there is no specific international environmental court with jurisdiction to prosecute individuals for these activities.\footnote{154} Instead, this body of law may provide interpretive guidance when determining the applicability of the existing prohibitions under the Rome Statute, particularly in delineating lawful from unlawful conduct vis-à-vis the environment.\footnote{155}

\footnote{152} See, e.g., the Sustainable Development Goals, which set the global agenda in the lead up to 2030, and many of which directly or indirectly concern environmental protection; e.g. 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).


International criminal law is the corpus of law that sets out criminal sanctions for atrocity crimes along with the jurisdictional parameters and institutional frameworks to address these crimes. Modern international criminal law largely emerged in the aftermath of the Second World War. The Allies established tribunals at Nuremberg and Tokyo to prosecute the major war criminals and other high-ranking perpetrators and imbued them with jurisdiction over war crimes, crimes against humanity, and crimes against peace. The post-Second World War trials laid the foundations for modern international criminal trials.

After a considerable period of dormancy during the Cold War, international criminal law developed rapidly with the establishment of the ad hoc tribunals for the former Yugoslavia (ICTY)\(^\text{156}\) and Rwanda (ICTR)\(^\text{157}\) in 1993 and 1994, respectively. Acting under Chapter VII of the United Nations Charter, the UNSC set up these international courts as measures to address threats to international peace and security. Upon the conclusion of the ad hoc Tribunals’ mandates, the UNSC established the International Residual Mechanism for Criminal Tribunals (IRMCT), so as to continue the ad hoc Tribunals’ jurisdiction, rights, and obligations, and undertake essential functions.\(^\text{158}\) These ad hoc Tribunals were vested with subject-matter jurisdiction over natural persons accused of genocide, crimes against humanity, and war crimes. They established an international criminal procedure that has been replicated, with some adaptations, at other institutions applying international criminal law.

The ICC adheres to the model established by the ad hoc tribunals in several respects but differed in others. While the ICC’s jurisdiction \textit{ratione materiae} encompasses the same core crimes adjudicated by the ad hoc tribunals, namely genocide, crimes against humanity, and war crimes, it also has jurisdiction over the crime of aggression. Another differentiating feature of the ICC is its central principle of complementarity, discussed in Chapter 2, Section 2.2.3. It is also distinct in that it is


designed to be a permanent court with potentially unlimited geographic jurisdiction to address atrocity crimes. The Rome Statute of the ICC was adopted in 1998 and entered into force in 2002. \textsuperscript{159} Environmental harm has been specifically prohibited, albeit only in the context of an international armed conflict, under article 8(2)(b)(iv). \textsuperscript{160} In addition, many other crimes can be used to indirectly prosecute environmental harm, as elaborated in Chapter 2, Section 2.3.

In a broadly similar fashion to the ad hoc tribunals, other courts applying international criminal law were established. These included the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the War Crimes Chamber of the State Court of Bosnia and Herzegovina, the Special Tribunal for Lebanon (STL), and the Kosovo Specialist Chambers and Specialist Prosecutor’s Office (KSC). While the substantive and procedural aspects of these international criminal tribunals emulate those of the ad hoc Tribunals in some respects, there are notable divergences, usually stemming from the legal approaches of the countries falling within their geographic jurisdiction.

Looking to directly relevant jurisprudence concerning the prosecution of environmental harm, there have been no major developments in the modern era of international criminal law. Despite the well-known examples of environmental damage during times of armed conflicts and in weak regulatory contexts, there has not yet been any conviction for environmental crimes (meaning ecocentrically framed crimes) before a modern international tribunal. \textsuperscript{161}

Although the crime of causing environmental harm during armed conflict was not explicitly listed in the ICTY statute, it may have fallen under article 3 as a violation of the laws or customs of war. \textsuperscript{162} In its Report, a Review Committee recommended the ICTY Prosecutor not to

\textsuperscript{159} Rome Statute of the International Criminal Court (17 July 1998), 2187 UNTS 3, UN Reg No I-38544, UN Doc A/CONF.183/9, entered into force 1 July 2002 (‘Rome Statute’). While the Rome Statute was adopted in 1998, it entered into force only four years later, on 1 July 2002, when sixty States had become State Parties, in accordance with article 126(1).

\textsuperscript{160} The war crime set out in article 8(2)(b)(iv).


\textsuperscript{162} ICTY Statute, article 3.
initiate an investigation into any incident considering that on the basis of the evidence it had assessed there was insufficient evidence so as to substantiate criminal proceedings in relation to any incident. Particularly apposite to the present book, was the Report’s observation that although the military campaign involving air strikes on Bosnian Serb military targets – carried out between May and June 1999 – had caused ‘some damage to the environment’, the high threshold posed by API could not be met, as it was assumed that articles 35(3) and 55 covered only ‘a very significant damage’ and held that ‘[c]onsequently, it would appear extremely difficult to develop a prima facie case upon the basis of these provisions, even assuming they were applicable.’

However, aside from the ICTY Office of the Prosecutor’s examination of the potential liability of NATO personnel in connection with the 1999 bombing of Serbian sites, and the mention of environmental harm in the background to the Chemical Ali conviction before the Iraqi High Tribunal, discussed in Section 1.3.3.2, there have been no cases concentrating on charges of environmental harm; the ICTY Office of the Prosecutor questioned whether the IHL prohibitions against excessive environmental harm would even apply before the Tribunal.

The Iraqi High Tribunal (formerly the Iraqi Special Tribunal) has jurisdiction over the crime of serious environmental harm, essentially matching that in the Rome Statute. While the majority of the crimes it dealt with were massacres and other anthropocentric crimes, in its verdict against inter alia Ali Hasan Al-Majid, a.k.a. ‘Chemical Ali’ it...


166 Law No. 10 (2005), Law of the Iraqi Higher Criminal Court, article 13(Second)(5) (‘Intentionally launching an attack in the knowledge that such attack 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’); Weinstein (2005), pp. 705–6.
included reference to the destruction of the ‘natural environment, torching pastors, orchards and forests’ in An Anfal. However, it did not engage in any detailed legal discussion of the elements of this crime or the evidentiary basis for its finding in respect of these references to the ‘natural environment’.\textsuperscript{167}

Similar to article 8(2)(b)(iv) of the Rome Statute and article 13(5) of the Iraqi High Tribunal, regulation 6(1)(b)(iv) of the provisions governing the work of the East Timor Special Panels prohibited serious environmental harm.\textsuperscript{168} However, the cases there focussed on anthropocentric harms and did not address environmental harm in any extensive manner.

The remaining major international and hybrid tribunals (the ECCC, STL, SCSL, and KSC) do not have any direct jurisdiction over crimes of serious environmental harm and so have not undertaken prosecutions for these offences.\textsuperscript{169}

\textsuperscript{167} Iraqi High Tribunal, Second Criminal Court, Bagdad, Special Verdict Pertaining to Case No. 1/ CSecond/2006, 24 June 2007, p. 20.

\textsuperscript{168} United Nations Transitional Administration in East Timor, Regulation No. 2000/15, UNTAET/REG/2000/15, 6 June 2000, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. According to Section 6(1)(b)(iv), ‘[i]ntentionally launching an attack in the knowledge that such attack 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’ constitutes a war crime in international armed conflicts.

\textsuperscript{169} See Statute, Special Court for Sierra Leone (as amended), 2178 UNTS 145, UN Doc S/2002/246; Appendix II (16 January 2002), entered into force 12 April 2002, article 4 (limiting its jurisdiction over war crimes entailing other serious violations of international humanitarian law to those enumerated therein); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 10 August 2001, as amended 27 October 2004, NS/RKM/0801/12, NS/RKM/1004/006 (Cambodia) (only including in its jurisdiction over war crimes, in addition to destruction of cultural property, the grave breaches of: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (‘Geneva Convention-I’), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (‘Geneva Convention-II’), Geneva Convention Relative to the Treatment of Prisoners of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (‘Geneva Convention-III’), and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (signed 12 August 1949), entered into force 21 October 1950, 75 UNTS 287 (‘Geneva Convention-IV’) (collectively referred to as: (the four 1949 Geneva Conventions’), see articles 6 and 7, respectively); Statute of the Special Tribunal for Lebanon, UN Doc S/RES/1757 (2007), Annex article 2 (limiting its subject matter jurisdiction to terrorism and offences against life and personal integrity); Law on Specialist Chambers and Specialist Prosecutor’s Office (of Kosovo), 3 August 2015 (and references therein).
The lack of provisions and jurisprudence concerning prosecutions for environmental harm before the international criminal tribunals indicates the embryonic nature of the prosecution of environmental harm under international criminal law.

The Expressive and Enforcement Functions of International Criminal Justice Vis-à-Vis Communal Threats  

International justice has grown in prominence in recent decades as the world has become more interconnected and globalized over the last two centuries. With the global impact of human action becoming more evident each year, there is an increasing need for broadly accepted legal approaches and mechanisms to address problems of common concern to the peoples and nations of the world.

Environmental harm is one of the most pressing areas of international concern. Environmentally harmful practices do not usually end at national borders. Instead, they typically have cross-frontier ramifications and so lend themselves to international solutions. The status of environmental features, and the significance for future generations, places certain types of serious environmental harm in the category of a common concern of the international community. For example, the Preamble to the 1992 UN Framework Convention on Climate Change declares that ‘change in the earth’s climate and its adverse effects are a common concern of humankind’. Similarly, the United Nations General Assembly, in its Resolution 43/53, recognized

170 OHCHR Report Analytical Study on the Relationship between Human Rights and the Environment, A/HRC/19/34/Corr.1, 1 March 2012, para. 65 (‘One country’s pollution can become another country’s environmental and human rights problem, particularly where the polluting media, like air and water, are capable of easily crossing boundaries’); Sands (2018), p. 12 (‘Many natural resources and their environmental components are ecologically shared. The use by one state of natural resources within its territory will invariably have consequences for the use of natural resources and their environmental components in another state’); Gauger et al. (2012), p. 5.


that climate change is a common concern of mankind.\textsuperscript{174} In relation to natural heritage sites, meaning environmental features of outstanding universal value, the World Heritage Convention notes the sovereignty of the States on the territory of which the heritage is situated (along with cultural heritage located on a State’s territory), but also recognizes that ‘such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate’.\textsuperscript{175} The recognition of the ‘common concern of humankind’ provides the conceptual basis for international justice to be applied to cases of serious environmental harm.\textsuperscript{176} This is further justified by the fact that the global commons, such as the high seas and Antarctica, contain some of the world’s key environmental sites and features,\textsuperscript{177} but are not the core concern of any particular domestic criminal jurisdiction.

International criminal law provides a potential means to decry such conduct, as it seeks to deter harmful conduct by addressing large-scale atrocities and imposing ‘responsibilities directly on individuals’.\textsuperscript{178} By removing those most responsible for organizing, committing, ordering, and otherwise contributing to, or bearing superior responsibility for, grave crimes, international criminal law seeks specifically to prevent and deter those individuals from causing further offences, while also increasing the general deterrence against committing such offences.\textsuperscript{179}

At the symbolic level, international criminal law serves an expressive function by condemning atrocities. This expressivist goal is an inherent part of international criminal justice, which operates beyond the specific circumstances of a particular case by proclaiming social disapproval and reinforcing the sanctity of codified prohibitions.\textsuperscript{180}

\textsuperscript{174} UN General Assembly Resolution 43/53, Protection of Global Climate for Present and Future Generations of Mankind, UN Doc. A/RES/43/53, 6 December 1988, para. 1.

\textsuperscript{175} World Heritage Convention 1972, article 6.

\textsuperscript{176} Mégret (2011), p. 245 (highlighting the \textit{erga omnes} character of environmental norms); Pereira (2015), pp. 92–3. See also Crawford (2014), p. 145 (noting that international law is a system predicated on addressing issues of common concern).

\textsuperscript{177} Pereira (2015), pp. 93–4 (pointing out that natural resources in the global commons are \textit{res nullius}, falling therefore beyond national jurisdictional control).

\textsuperscript{178} Cryer et al. (2010), p. 3.

\textsuperscript{179} See Rome Statute, Preamble, para. 5, declaring that the State Parties are ‘[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’.

\textsuperscript{180} M. Drumbl, \textit{Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development} (International Center for Transitional Justice, 2009) (‘Drumbl (2009)’), pp. 21–2 (considering that ‘criminal prosecutions for socioeconomic and environmental crimes can serve expressive goals’).
criminal law only addresses a particularly grave sub-set of criminality, the inclusion of environmental harm within its parameters would send a significant message in and of itself. Placing severe harm to the environment alongside genocide, crimes against humanity, war crimes and aggression, and imposing criminal sanctions on it would signal the gravity of the international community’s opprobrium concerning such conduct while also reinforcing that it is a collective problem worthy of international attention.\textsuperscript{181}

Such an approach would also be categorically significant, as it would see the Court upholding ecocentric values, which go beyond the anthropocentric values protected by the existing crimes in the purview of the Court. Though international criminal law is no panacea, it can serve a symbolic function and in turn a utilitarian goal of deterring harm to the environment (through both general and specific deterrence), which is also an inherent goal of criminal justice.\textsuperscript{182} Given the limitations on the ability of the ICC’s resources, it will only ever address a handful of cases at any one time. In this light, and given that environmental cases will take some time to get up and running if and when they are prosecuted before the Court, the symbolic and expressive value of adding the

\textsuperscript{181} Drumbl (2009), pp. 21–2; Cusato (2018), p. 505. See also Directive 2008/99/EC, para. 3 (noting that criminal penalties ‘demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law’).

crime to the Court’s architecture may prove to be more impactful than the occurrence or outcome of any specific case. As with the crime of aggression, which was essentially only added to the Rome Statute following the Kampala Review Conference in 2010, there is an independent symbolic value in expanding the Court’s reach to new collective crimes, which exists irrespective of whether any specific cases are adjudicated before the Court.

However, a cautionary note must be sounded. If the crime is added to the Rome Statute, but the Court is then shown to be operationally unable to manage a case of environmental harm, the longer-term effect may be to undo any initial symbolic boost regarding environmental interests and, more broadly, to prejudice the Court’s standing and support regarding its core anthropocentric aims. This risk reinforces the importance of holistically assessing the Court’s ability to address environmental harm, including its procedures and operational constraints, as set out in the analysis herein.

Looking to the role of international law vis-à-vis domestic proceedings, international criminal justice provides a residual framework to address the limitations of regulatory coverage, particularly in locations with weak or non-existent/enforced regulatory regimes,\(^{183}\) where ‘the odds of getting caught are extremely low, and the possibility of being convicted is virtually non-existent’.\(^ {184}\) Moreover, international criminal proceedings are typically more suited than most domestic proceedings to address complex criminality carried out by multiple parties with varying levels of responsibility. As serious environmental harm will typically involve multiple perpetrators acting in various organizations, the experience of international legal institutions and professionals will assist in investigating and litigating such harm. In this manner, international criminal law can provide a safety net to address


\(^{184}\) UNODC Toolkit (2012), p. 3.
criminal incidents that domestic authorities are unable to properly investigate.\textsuperscript{185}

However, certain \textit{lacunae} in the framework of international criminal law will impact efforts to use it to address environmental harm. Most significant among these is the lack of corporate responsibility for crimes under international criminal law.\textsuperscript{186} Moreover, States cannot be subjected to criminal sanctions for violations of international criminal law,\textsuperscript{187} even if State leaders can fall within the international courts’ jurisdiction \textit{qua} natural human beings.

Nonetheless, calls for the use of international criminal law to address serious environmental harm, which the United Nations appears to be increasingly echoing,\textsuperscript{188} will likely grow in quantity and urgency over the coming years.\textsuperscript{189} In this respect, the ICC Office of the Prosecutor’s 2016 guidelines on case selection state that it will prioritize cases involving

\textsuperscript{185} See Anastacia Greene, ‘The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?’ (2019) 30 Fordham Environmental Law Review 1 (‘Greene (2019)’), pp. 20–1, for examples of domestic prosecutions for environmental harm that were unsuccessful.

\textsuperscript{186} The Special Tribunal for Lebanon, which is a hybrid court that features some aspects of international criminal law in its Statute, has extended its jurisdiction over contempt to include legal persons, namely corporations, but stands out as an exception in this respect; see, e.g., STL: \textit{Amicus Curiae Prosecutor v. New TV S.A.L. Karma Mohamed Thasin Al Khayat}, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, Case No. STL-14–05/I/CJ/; ICL 1053 (STL 2014), 31 January 2014; STL: \textit{In the Case against New TV S.A.L. Karma Mohamed Thasin Al Khayat}, STL-14–05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 October 2014, para. 74.

\textsuperscript{187} See Mark Drumbl, ‘International Human Rights, International Humanitarian Law, and Environmental Security: can the International Criminal Court Bridge the Gaps?’ (2000) 6 ILSA Journal of International & Comparative Law 305 (‘Drumbl (2000)’), p. 327 (noting that the ICC does not have jurisdiction for State liability); James Crawford, \textit{The International Law Commission’s Articles on State Responsibility: Introduction, Texts and Commentaries} (Cambridge University Press, 2002), Part 2, Chapter 3, pp. 261–3 (the International Law Commission’s final draft did not include any explicit reference to State crimes, as it considered that ‘[t]here has been . . . no development of penal consequences for states of breaches of these fundamental norms’). See also Pereira (2015), p. 111.

\textsuperscript{188} See, e.g., United Nations General Assembly Resolution 69/314, A/RES/69/314, ‘Tackling illicit trafficking in wildlife’, 30 July 2015 (‘illicit trafficking in protected species of wild fauna and flora is an increasingly sophisticated form of transnational organized crime . . . and therefore underlining the need to combat such crimes by strengthening international cooperation, capacity-building, criminal justice responses and law enforcement efforts’).

\textsuperscript{189} See also Rose (2014), p. 16 (‘growing attention to transnational environmental crime as a problem of legality and criminality, rather than just environmental management and non-compliance, confirms that this is one of the fastest growing areas of criminal endeavour’).
significant harm to the environment by giving ‘particular consideration to 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’.\textsuperscript{190} These 2016 guidelines will ‘serve as a key guiding instrument for the Office of the Prosecutor in its selection and prioritisation of cases for investigation and prosecution’.\textsuperscript{191} In signalling a focus on both the destruction of the environment itself and the use of environmental destruction to perpetrate other crimes, the Prosecution’s guidelines recognize the significance of the natural environment, particularly as a potential vector for serious harm to human life and well-being.\textsuperscript{192} Against this backdrop, it is timely to examine the ICC’s ability to redress environmental harm.

\textbf{1.3.3 The International Criminal Court: A Unique Judicial Institution}

The ICC is the only international criminal law institution with potentially unlimited geographic jurisdiction (\textit{ratione loci}).\textsuperscript{193} Its general temporal jurisdiction begins from 1 July 2002 and continues onwards indefinitely for States subject to its jurisdiction. The ICC’s jurisdiction is broader than any of its predecessor or contemporary international or hybrid courts. Moreover, it has an expansive reach over individuals participating in crimes due to the availability of modes of liability in article 25 and

\textsuperscript{190} ICC, Office of the Prosecutor’s Policy Paper on Case Selection and Prioritisation, 15 September 2016 (‘OTP 2016 Case Selection Paper’), para. 41. See also ICC, Office of the Prosecutor’s Policy Paper on Preliminary Examinations, November 2013 (‘OTP 2013 Preliminary Examination Policy Paper’), para. 65 (‘The impact of crimes may be assessed in light of, inter alia, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities’).

\textsuperscript{191} ICC Office of the Prosecutor, Press Release 15 September 2016 (available at \url{www.icc-cpi.int/Pages/item.aspx?name=pr1238}). Addressing the indication posed by the ICC Office of the Prosecutor’s Guidelines of 2016 as to the potential for adjudication at the ICC of crimes involving environmental harm or destruction, see Helen Brady and David Re, ‘Environmental and Cultural Heritage Crimes: the Possibilities under the Rome Statute’ in Martin Böse et al., \textit{Justice without Borders: Essays in Honour of Wolfgang Schomburg} (Koninklijke Brill, 2018), pp. 103, 105, 126, 133, 136.

\textsuperscript{192} See OTP 2016 Case Selection Paper.

\textsuperscript{193} Where the Security Council, acting under Chapter VII of the United Nations Charter, refers a situation to the ICC under article 13(b) of the Rome Statute, the usual geographic or personal jurisdictional link to a State Party is not required; meaning that the Court has potentially unlimited geographic reach in these circumstances: \textit{Rome Statute of the International Criminal Court}, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (‘Rome Statute’), article 13(b).
superior responsibility in article 28. These allow for proceedings against
individuals who perpetrate or participate in serious crimes in a variety of
ways including committing, ordering, inducing, soliciting, aiding and
abetting, and otherwise contributing to criminal groups carrying out
atrocities, as well as superiors who fail to take necessary and reasonable
measures to prevent or repress crimes by their subordinates. Given these
broad-ranging forms of responsibility, and its potentially open-ended
temporal jurisdiction and unlimited potential geographic jurisdiction,
the ICC is uniquely situated to address complex crimes that impact the
international community.

1.3.3.1 Applicable Law

When looking to the ICC for redress, the proponents of using inter-
national criminal law to address environmental harm must pay close
heed to its jurisdictional and operational framework. Within the ICC, the
hierarchy of sources of law set out in article 21 of the Rome Statute
govern the interpretation and application of the Court’s regulatory
framework.

In accordance with article 21(1)(a), the analysis looks first to the Rome
Statute of the ICC, the Elements of Crimes, and the Rules of Procedure
and Evidence. These instruments may be interpreted under the
Vienna Convention on the Law of Treaties, particularly article 31(1)
whereby ‘a treaty shall be interpreted in good faith in accordance with
the ordinary meaning to be given to the terms of the treaty in their
context and in the light of its object and purpose’. The Vienna

194 Rome Statute, article 21(1)(a). Notwithstanding the reference in article 21, it has been
argued that the Elements of Crimes are not binding, but instead designed to ‘assist the
Court in the interpretation and application of articles 6 (genocide), 7 (crimes against
humanity) and 8 (war crimes)’; Rome Statute, article 9; Knut Dörmann et al., Elements of
Crimes under the Rome Statute of the International Criminal Court: Sources and
Commentary (Cambridge University Press, 2004), p. 8. See also Gilbert Bitti,
‘Chapter 18: Article 21 and the Hierarchy of Sources of Law before the ICC’ in
Carsten Stahn, The Law and Practice of the International Criminal Court (Oxford
University Press, 2015) (‘Stahn (2015)’), p. 411. The Court’s framework includes the
Regulations of the Court, which are adopted by the judges of the Court to govern its
‘routine functioning’ pursuant to article 52 of the Statute. See Claus Kreß, ‘The
International Criminal Justice, 537, p. 537; Volker Nerlich, ‘The Status of ICTY and
ICTR Precedent in Proceedings before the ICC’ in Carsten Stahn and Goran Sluiter
(eds.), The Emerging Practice of the International Criminal Court (Koninklijke Brill,
2009), 305 (‘Nerlich (2009)’), p. 312 fn. 29.

Convention has been applied by several ICC trial chambers and the Appeals Chamber, and additionally provides that ‘any relevant rules of international law applicable in the relations between the parties’ should be taken into account, along with the context of the treaty, which includes its Preamble, for its interpretation. The preparatory work of the Rome Statute and associated instruments and the circumstances of their conclusion are also relevant as subsidiary means of interpretation where the primary means ‘leave the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable’.

Under article 21(1)(b), applicable treaties and rules and principles of international law, including customary international law, may be relied on where article 21(1)(a) suffers from a relevant lacuna. In this light, statutes and rules of other international courts and quasi-judicial

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198 Katanga Trial Judgment, para. 49.

199 Customary international law can be described as binding principles and/or rules of international law, encompassing both an objective and subjective element. According to article 38(1)(b) of the Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993; UKTS 67 (1946) (‘ICJ Statute’), international custom is evinced by ‘a general practice accepted as law’ amongst the actors in public international law. See the landmark interpretation advanced by the ICJ: The North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969, p. 4, para. 77 (‘[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or to be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis’). Pointing out that customary international law is generally regarded as falling within the principles and rules of international law and hence under article 21(1)(b) of the Rome Statute, see Nerlich (2009), p. 313.

bodies, as well as UNSC and General Assembly resolutions, are referred to in this analysis where relevant for the interpretation of the ICC’s instruments and determination of customary international law.\footnote{Dam-de Jong (2015), p. 109 (noting that ‘[s]oft law processes play a major role in the development of rules in the field of international environmental law’).}

Article 21(1)(b) of the Rome Statute makes explicit reference to the law of armed conflict.\footnote{Rome Statute, article 21(1)(b). Other explicit mentions of international humanitarian law are included, for example, in the war crimes under articles 8(2)(a) and 8(2)(b) of the Statute, which refer to language from the Geneva Conventions, the laws and customs applicable in armed conflict, and ‘the established framework of international law’. See also articles 8(2)(b) and (e) which refer to the violations therein falling ‘within the established framework of international law’.} In protecting non-combatants and restricting the means and methods of warfare, IHL also provides a measure of protection against environmental harm, both directly and indirectly.\footnote{Sands (2018), pp. 833–6. See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Customary International Humanitarian Law. Volume I: Principles, part 1, ICRC (Cambridge University Press, 2005) (‘ICRC Study’), commentary on rule 43.A, p. 143 (asserting that the environment is considered, by default, to be civilian in character). See further ICJ: Nuclear Weapons Advisory Opinion, para. 30 (‘States must take environmental considerations into account when assessing what is necessary and proportionate in pursuit of legitimate military objectives’).} Notably, IHL includes the Martens Clause, which provides that ‘in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience’.\footnote{See The Hague Regulations of 1899, Preamble; Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (‘Hague Convention IV of 1907’), Preamble; API of 1977, article 1(2); Protocol II Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 3, entered into force on 7 December 1979 (‘API’), Preamble.} The Secretary-General has stated that the validity of the Martens clause, is of “indisputable” relevance in relation to environmental harm during armed conflict.\footnote{Report of the Secretary-General on the Protection of the Environment in Times of Armed Conflict, UN General Assembly, Document A/48/269, 29 July 1993 (‘Secretary-General Report 1993’), para. 77.} Sands has argued that there is no reason why environmental protections should be excluded from the scope of the Martens clause.\footnote{Sands (2018), p. 832.} The reference to public conscience provides a basis to include due regard for environmental concerns to fill gaps in the framework of IHL, which in

\[\text{(201) Dam-de Jong (2015), p. 109 (noting that ‘[s]oft law processes play a major role in the development of rules in the field of international environmental law’).} \]

\[\text{(202) Rome Statute, article 21(1)(b). Other explicit mentions of international humanitarian law are included, for example, in the war crimes under articles 8(2)(a) and 8(2)(b) of the Statute, which refer to language from the Geneva Conventions, the laws and customs applicable in armed conflict, and ‘the established framework of international law’. See also articles 8(2)(b) and (e) which refer to the violations therein falling ‘within the established framework of international law’.} \]


\[\text{(204) See The Hague Regulations of 1899, Preamble; Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (‘Hague Convention IV of 1907’), Preamble; API of 1977, article 1(2); Protocol II Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 3, entered into force on 7 December 1979 (‘API’), Preamble.} \]


\[\text{(206) Sands (2018), p. 832.} \]
Another body of law that is potentially applicable under the Rome Statute is international environmental law. Article 21(1)(b) provides that ‘applicable treaties and the principles and rules of international law’ may be applied by the ICC, ‘where appropriate’. According to de Guzman, ‘the phrase “where appropriate” serves to emphasize the discretion the Court enjoys in determining when treaties or principles and rules of international law are applicable’. In cases concerning environmental harm, it would seem ‘appropriate’ that such treaties, principles, and rules could be drawn from international environmental law.

Given that the Court’s substantive jurisdiction is explicitly set out in articles 5–9 on genocide, crimes against humanity, war crimes, and aggression, the Court could not simply pick substantive prohibitions under environmental law and directly apply them in order to impose sanctions. Instead, international environmental law may potentially be used where gaps persist in the sources specified in article 21(1)(a). Examples include the precautionary principle, the preventive principle, the ‘polluter-pays’ principle, intergenerational equity, common-but-differentiated responsibilities, and sustainable development (in order to assess ‘unsustainable’ conduct), as discussed herein.

In accordance with article 21(2) of the Rome Statute, which provides that the Court may refer to its previous jurisprudence, ICC decisions and judgments are cited where relevant to the analysis herein. Jurisprudence from other international tribunals is referred to where significant to determining the specific contents of relevant treaty and customary international law under article 21(1)(b), as well as general principles of law under article 21(1)(c). The Trial Chamber in Katanga noted that even though the ad hoc tribunals’ jurisprudence is not binding

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207 See discussion of international environmental law in Section 1.3.2.1.
209 Whether the specific provision or principle would qualify as an ‘applicable’ treaty, and therefore directly applicable, or as a source relevant to determining principles and rules of international law, and therefore indirectly applicable, would depend on the specific laws and issues in question. See generally de Guzman (2016), pp. 938–41.
210 Rome Statute, article 5.
211 See, e.g., Drumbl (1998–9), pp. 139–42 (listing environmental treaty provisions that ‘will be important to draw . . . into any environmental war crimes trial’).
212 See Rome Statute, article 21(2). However, this does not establish a system of precedent, or stare decisis, as applied at the ICTY and ICTR, and now IRMCT.
on the ICC, it may be used to identify the content of relevant treaty law, customary international law, and general principles of law.\textsuperscript{214}

Domestic laws and jurisprudence from national courts are cited where provided for under article 21(1)(c), in order to demonstrate general principles of law derived from national systems. In particular, aspects of domestic law designed to implement obligations under international and transnational law are highlighted.\textsuperscript{215} Article 21(1)(c) explicitly refers to general principles of law from States that would normally exercise jurisdiction over the crime or crimes in question. In relation to environmental harm, this prioritization of principles of law from particular national States, albeit as a tertiary source of guiding law, may assist, for example, in identifying whether appropriate licenses to engage in the activity in issue had been acquired, and to identify the relevant national authority bodies charged with approving such activity. At the same time, resort to national law may introduce a measure of variation in the applicable legal principles. For example, if environmental harm occurs in national territory with extensive and highly developed rules and jurisprudence on environmental offences, the specific laws applicable by virtue of article 21(1)(c) would in theory be more exacting than if the harm occurred in a country with non-existent (or less exacting) environmental protections. Nonetheless, the term ‘as appropriate’ allows the ICC judges to avoid an automatic transposition of varying domestic laws into ICC proceedings.

Within the following analysis, reference is occasionally made to national rules, jurisprudence, or practice that do not necessarily fit into the categories of guiding law set out in article 21 of the Rome Statute. This material is included for illustrative purposes in order to demonstrate legal approaches taken in other jurisdictions that may inform the ICC’s jurisprudence. Indeed, the ICC judiciary makes reference on occasion to domestic laws and jurisprudence.\textsuperscript{216} Domestic law may also assist to identify possible

\textsuperscript{214} Katanga Trial Judgment, para. 47. See also ICC: Bemba Trial Judgment, para. 79. For the non-binding character vis-à-vis the ICC, see Nerlich (2009), pp. 320, 324–5 and Bitti (2015), pp. 426–33.

\textsuperscript{215} See Cryer et al. (2019), p. 6 (‘[t]ransnational criminal law includes the rules of national jurisdiction under which a State may enact and enforce its own criminal law where there is some transnational aspect of a crime. It also covers methods of cooperation among States to deal with domestic offences and offenders where there is a foreign element and the treaties which have been concluded to establish and encourage this inter-State cooperation’).

\textsuperscript{216} See, e.g., Lubanga Appeal Judgment, para. 470; ICC: Prosecutor v. Germaine Katanga, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04–01/07, 24 March 2017, fns. 102, 231, para. 230.
amendments to the Statute, Rules, or other instruments, or by demonstrating practices (as opposed to laws per se) that may be copied mutatis mutandis in order to address environmental cases at the ICC.

In keeping with the Rome Statute’s requirement that ‘the application and interpretation of the law [before the ICC] must be consistent with internationally recognised human rights’, major international human rights instruments such as the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966, and the International Covenant on Economic, Social and Cultural Rights of 1996, are referenced where relevant. International human rights standards are relevant both substantially in determining the parameters of crimes, and procedurally in determining the manner of conducting the cases before the Court, and may assist in identifying relevant environmental norms that are infringed in connection with human rights violations, as has been done in decisions and issuances from inter alia the European Court of Human Rights, the Inter-American Court of Human Rights, and the Human Rights Committee.

1.3.4 Adjudicative Coherence: A Novel Approach to Assessing the Court’s Ability to Address Environmental Harm

To test the efficacy of the ICC’s framework for the adjudication of environmental harm, a conceptual test of adjudicative coherence is utilized in this analysis. The adjudicative coherence test examines whether the specific ICC rules and procedures, when viewed in their context and applied to possible scenarios involving environmental harm, would result in an incoherent judicial process, which would see the feasibility of the proceedings seriously impaired or jeopardized. The adjudicative coherence test is unique to this study and novel. It provides a useful

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217 Rome Statute, article 21(3).
218 See the discussion of the crime against humanity of persecution under article 7(1)(h) and (2)(g), which centres on the denial of ‘fundamental rights’.
219 See, e.g., the discussion of the exclusion of evidence under article 69(7) of the Rome Statute, which provides a basis to exclude evidence obtained by means of a violation of the Rome Statute or internationally recognized human rights and the violation casts substantial doubt on the reliability of the evidence or else means that the admission of the evidence would seriously damage the integrity of the proceedings. See also discussion of investigation, fact-finding, and evidence at the ICC concerning environmental harm (Chapter 3, Sections 3.1–3.3).
220 A broadly analogous approach was implicitly signalled by Patrick Robinson in ‘Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the former
analytical tool for assessing legal frameworks, particularly in circumstances such as the present where there are no data pools of easily comparable procedures or jurisprudence.

The international criminal trial as an adjudicative process involves the balancing of several factors as part of a coherent legal system. Describing itself as ‘an independent judicial institution in the emerging international justice system’ the International Criminal Court has emphasized that its mission combines several imperatives, namely to ‘[f]airly, effectively and impartially investigate, prosecute and conduct trials of the most serious crimes; [a]ct transparently and efficiently; and [c]ontribute to long lasting respect for and the enforcement of international criminal justice, to the prevention of crime and to the fight against impunity’.

Key facets of ICC proceedings include the investigation and presentation of inculpatory and exculpatory evidence, respect for fair trial rights of the accused, the protection of victims and witnesses, the maintenance of efficient, expeditious and cost-effective proceedings, and the entering of a well-reasoned verdict and sentence. Pursuant to the adjudicate coherence test, the adaptability of the Rome Statute system to a certain

Yugoslavia’ (2000) 11 EJIL 569–89, p. 573 (‘the Statute and the Rules should be seen as establishing a legal system that is self-contained and comprehensive, and capable of providing answers to any question that arises in the work of the Tribunal. This does not mean that it is not appropriate to examine domestic criminal law jurisdictions for purposes of comparison. But that comparative exercise must be completed by testing the solution it provides against the Tribunal system itself. Where the Statute and the Rules do not provide an answer in explicit terms, the testing is done by measuring the solution yielded by comparative analysis against the context in which the Tribunal operates and its object and purpose. The test is whether the solution is consistent with a fair and expeditious trial of persons charged with the most serious violations of international humanitarian law’).


See, e.g., Rome Statute, article 54(1)(a).

See, e.g., Rome Statute, articles 64(2) and 67.

See, e.g., Rome Statute, articles 64(2) and 68.

Rome Statute, article 64(2). See also, International Bar Association, Evidence Matters in ICC Trials, August 2016, p. 9 (addressing critical evidentiary matters that resonate in the fairness of proceedings, including the use of digital and technological-derived evidence in ICC trials, the application of the amendment to the Rules of Procedure and Evidence for the admission of prior recorded testimony, the application of Regulation 55, and the evidentiary assessment in ‘no case to answer’ proceedings).

See, e.g., Rome Statute, article 74(5); article 76(1).
phenomenon, such as environmental harm, can be tested endogenously. If any of the core factors identified in this section would be undermined\(^{227}\) when the regulatory framework is applied to that phenomenon, then the legal framework exhibits internal incoherence and is unsuitable to be applied to that phenomenon.

Additionally, the ICC’s framework can be tested exogenously. Although the Rome System is designed at the institutional level to be independent and legally autonomous, it has several juridical links to other areas of international law, including references to the law of armed conflict and the requirement that the Rome Statute must be interpreted and applied consistently with internationally recognized human rights,\(^{228}\) as well as operational links to national criminal jurisdictions via the principle of complementarity and the applicable law,\(^{229}\) and the UNSC in relation to referrals and deferrals of investigations.\(^{230}\) If the application of the ICC’s regulatory framework to a particular phenomenon would inherently conflict with or prejudice those external links, then it would indicate potential incoherence in the ICC system regarding that phenomenon.

To illustrate the adjudicative coherence test by way of example: if it were necessary under international criminal law to produce the victim’s corpse before murder charges would be entertained, then in many instances it would become unfeasible to have a trial without undue delay, as it often takes years for bodies, including those in mass graves, to be discovered and exhumed, if at all.\(^{231}\) Consequently, the requirement to produce a corpse would result in adjudicative incoherence. It is for this reason that international criminal courts have resisted imposing

\(^{227}\) The term ‘undermined’ is used in this respect to mean that the relevant rules or principles involved could not reasonably be reconciled with the adjudication of the phenomenon in question.

\(^{228}\) While the ICC is designed as an independent and largely autonomous system, the Rome Statute has several explicit references to the broader system of international law; see, e.g., Rome Statute, articles 4(1), 8, 8bis, 13(b), 15bis, 16, 21, 87, 115, 123. By contrast, article 10 provides that ‘[n]othing in this part [of the Rome Statute] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute’.

\(^{229}\) See, e.g., Rome Statute, articles 1, 17–21, and Part IX on Cooperation.

\(^{230}\) See, e.g., Rome Statute, articles 13 and 16.

\(^{231}\) For example, in relation to the crimes committed during the 1990s in Bosnia, the bodies in the Tomašica mass grave were only found many years later than the other mass graves containing bodies from the 1990s’ war and related crimes, see ICTY: Prosecutor v. Ratko Mladić, IT-09–92-T, Decision on Prosecution Motion to Re-Open its Case-in-Chief, 23 October 2014, paras. 9–10, 12.
a requirement of producing a corpse in order to submit or prove murder charges. An additional illustrative hypothetical example would be if a rule provided that an accused had the right of appeal and the right to free legal representation if indigent (as reflected in all major human rights instruments), but the provisions on legal aid only covered the trial proceedings. The incoherent mix of rules would demonstrate ab initio a significant contradiction in that the accused’s right to appeal would be effectively rendered a nullity.

The adjudicative coherence test is an analytical tool that is conceptually distinct from the issue of whether the relevant framework is conceived of anthropocentrically or ecocentrically, but helps to illustrate that latter distinction. Whereas the issue of the Court’s anthropocentric or ecocentric orientation concerns the orientation and character of the rules, provisions, and goals of international criminal law, the adjudicative coherence test concerns the functionality of this legal framework when applied to an area of human activity – in this case, environmental harm. Despite the different functions of these concepts, there is a relationship between them. Where issues of functionality arise from the application of the ICC’s framework to a specific area of harm, one implication that can be drawn is that the system or framework was not conceived, and is not oriented, with a view to address that type of harm, as is examined herein in relation to environmental harm.

ICTY: Prosecutor v. Miroslav Kvočka et al., IT-98–30/1-A, Judgment, 28 February 2005, para. 260 (where the ICTY Appeals Chamber held that recovery of the victim’s corpse was not necessarily required for proving the victim’s death beyond reasonable doubt, which could be inferred from circumstantial evidence. This holding has been consistently upheld, see e.g. ICTY: Prosecutor v. Milan Lukić and Sredoje Lukić, IT-98–32/1-A, Judgment, 4 December 2012, para. 149. Conversely, it has been held that the discovery of bodily remains could not per se be determinative for finding the fate the victims could have faced between their disappearance and the time their bodily remains were found in the context of charges of murder qua war crime, see ICTY: Prosecutor v. Ramush Haradinaj et al., IT-04–84-T, Judgment; ICL 645 (ICTY 2008), 3 April 2008, paras. 147, 149–50, 152).

See, e.g., Report of the Working Group on Arbitrary Detention (WGAD), 24 July 2020, A/HRC/45/16, paras. 50–5 (‘Legal assistance should be available at all stages of criminal proceedings, namely, during pre-trial, trial, re-trial and appellate stages, to ensure compliance with fair trial guarantees’).