The protection of the environment under the ICC Rome Statute: does the wheel really need to be reinvented?

Alessandro Faina[1]
Kosovo Specialist Chambers and Specialist Prosecutor's Office, The Hague
ORCID: https://orcid.org/0009-0000-7864-0268
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The need to improve the available legal instruments to protect the environment has led to a whirlwind of proposals in the field of criminal law and litigation, both domestically and internationally. One of the most mediatized proposals at the international level has perhaps been the inclusion within the Rome Statute of the International Criminal Court ("ICC") of the crime of "ecocide", with a view at heightening the environment to the level of those most fundamental legal interests whose protection against the most egregious violations is demanded to the ICC.
Based on the suggested definition of the crime of "ecocide", this chapter explores whether the environment should be protected under international criminal law as an independent legal interest or as enshrined in the multifaceted concept of human dignity that the Rome Statute already aims to protect. In this regard, the author argues that humankind and environment are so substantially entwined that whatever harm to the latter cannot but result in a harm to the former too. The author therefore suggests that the Rome Statute already includes tools to protect the environment from the most egregious violations and could constitute an important instrument of last resort in environmental and climate litigation.

Keywords: Criminal Environmental Law (domestic/international); Criminalization; International Criminal Court; Ecocide.

1 The views expressed herein are those of the author and do not necessarily reflect the views of the Kosovo Specialist Chambers and Specialist Prosecutor's Office.

1. Introduction

Criminal lawyers across the world have by now become acquainted with the notions of (and distinctions between) domestic criminal law, *i.e.* the body of laws that govern criminal offences committed within a particular country or jurisdiction, and transnational criminal law, a branch of criminal law based on a transnational and cross-border approach to address criminal activities,[2] whose advancement has been favoured and – one might say – even imposed by the development of a global society.

The environment is one of those domains whose protection is demanded to both the domestic and the transnational dimensions of criminal law. The protection of the environment as provided (i) domestically, by criminal law provisions, and (ii) transnationally, by treaties and agreements enhancing the cooperation, in the fight for the environment, of different criminal justice systems throughout the world, is crucial to the success of such fight. It is safe to state that only when a large majority of courts and tribunals of a large majority of countries in the world will enforce without hesitation existing or yet-to-exist criminal law provisions aimed at safeguarding the environment, will the environment be seriously protected.[3] This being said, the present paper will not (primarily) focus on domestic and/or transnational approaches to environmental criminal law, but on the contribution that can be brought to the subject by international criminal law.

International criminal law is a branch of public international law based on the idea that certain crimes are so grave that they offend the international community as a whole and that perpetrators of such crimes must be held accountable.[4] Currently, the so-called core crimes under international criminal law are genocide, war crimes, crimes against humanity, and the crime of aggression. Those are also the crimes over which the International Criminal Court ("ICC"), the only permanent international institution seized with the mission to enforce international criminal law, has jurisdiction.[5] In fact, the ICC founding document, the Rome Statute, is said to have crystallised as customary international law the legal definition of the core international crimes as developed throughout the years by the jurisprudence of the *ad hoc* international(ised) criminal courts and tribunals.[6]

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2 D. Stewart, *International Criminal Law in a Nutshell*, West Academic Publishing, St. Paul – MN, 2014, pp. 1-2.

3 P. Sands, J. Peel, A. Fabra (eds.), *Principles of International Environmental Law*, Cambridge University Press, Cambridge, 2018, pp. 3-20.

4 C. M. Bassiouni, 'International Crimes: The Ratione Materiae of International Criminal Law', in C. M. Bassiouni (ed.), *International Criminal Law. Vol. I: Sources, Subjects and Contents*, Martinus Nijhoff Publishers, Leiden, 2008, pp. 134-135.

5 ICC Rome Statute, Articles 5-8 *bis*.

6 R. Cryer, International Criminal Law *vs* State Sovereignty: Another Round?, *European Journal of International Law*, Volume 16, Issue 5, November 2005, pp. 979–1000; G. Werle and F. Jessberger,

While the present paper will later address certain conducts prohibited under the provisions criminalising crimes against humanity and war crimes, it is important to stress at the outset that one of the most fundamental features of the ICC – although perhaps not the most studied nor appreciated – is that its jurisdiction over international crimes is meant to be subsidiary to that of the States, in compliance with the principle of complementarity.[7] Provided that other jurisdictional and admissibility requirements are met,[8] the ICC has jurisdiction and can intervene only in those situations where it is demonstrated that a State is unable or unwilling to exercise its jurisdiction over a certain matter.[9] This leads to the important caveat that the ICC cannot and should not be seen as the world court in criminal matters nor as a tool to fight cross-border crimes whose international dimension might lead one to (wrongly?) assume that an international institution would be better placed to address. In sum, even though international criminal law can be defined as a branch of public international law, States bear the fundamental role to enforce it domestically by means of domestic and transnational law, and only when they fail to do so will the ICC intervene to avoid impunity.

With this in mind, the present paper will seek to offer: (i) an overview of the major proposals put forward at the international level with a view to the codification of environmental crimes and ecocide as an international crime; (ii) an analysis of the most recent and debated proposal to include the crime of ecocide in the ICC Rome Statute, that was put forward by the Stop Ecocide Foundation in 2021; and (iii) a suggestion on alternatives already available to protect the environment at the international level as well as the role that can be played in the matter by domestic and transnational law.

2. The Proposals for the Codification of the Crime of Ecocide

The need to improve the available legal instruments to adequately protect the environment has led to a whirlwind of proposals in the field of criminal law and litigation, both domestically and internationally. At the international level, the idea of criminalising ecocide can be traced back to the 1970s, when the United Nations began exploring the possibility of establishing an international court to

Principles of International Criminal Law, Oxford University Press, London, 2014, p. 61.

7 R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2014, p. 154.

8 *See* ICC Rome Statute, Articles 11-13, 20.

9 ICC Rome Statute, Article 17; ICC, *Situation in the Democratic Republic of The Congo*, ICC-01/04, Appeals Chamber, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, para. 30.

address environmental crimes.[10] However, the proposal did not gain significant traction at the time, and it was not until the late 20th century that the concept of ecocide began to gain renewed attention.

In 1991, the International Law Commission ("ILC") included in its draft of the Code of Crimes Against the Peace and Security of Mankind (the precursor to the ICC Rome Statute) Article 26, which read: "An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced […]".[11] In 1995, however, this provision was withdrawn by the ILC and did not appear in the 1996 draft Code.[12]

In the 21st century, one of the most notable proposals for the definition of the crime of "ecocide" as such came from Polly Higgins, an environmental lawyer, who in April 2010 suggested that the ILC include ecocide as a fifth international crime in the ICC Rome Statute, alongside genocide, crimes against humanity, war crimes, and the crime of aggression. The proposal defined ecocide as "the extensive damage, destruction or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished."[13]

Ms Higgins's proposal sparked new interest in the subject across civil society, and, in 2014, the group "End Ecocide on Earth" presented 170.000 signatures to the EU Parliament in support of a European Union law against ecocide.[14] Such initiative and the public debate that followed led to the most recent proposals for the definition of ecocide stemming from the activities of the Stop Ecocide Foundation, which, in 2017 and 2021, reiterated the suggestion that the crime of ecocide be included within the ICC Rome Statute, with a view at heightening the environment to the level of those fundamental legal interests whose protection against the most egregious violations is demanded to the ICC. The present paper focuses on the 2021 Stop Ecocide Foundation's proposal as it is the most recent proposal that has been put forward and has already been ground for fervent academic debates.

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10 P. Higgins, *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet*, Shepheard Walwyn Publisher, London, 2011.

11 United Nations, *Document A/46/10: Report of the International Law Commission on the work of its forty-third session (29 April – 19 July 1991)*, in *Yearbook of the International Law Commission*, 1991, Vol. II(2), pp. 1-133, at p. 107.

12 *See* United Nations, *Document A/51/10: Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996)*, in *Yearbook of the International Law Commission*, 1996, Vol. II(2), pp. 1-144, at pp. 17-54.

13 P. Higgins, *Eradicating Ecocide: Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws Needed to Eradicate Ecocide*, Shepheard Walwyn Publisher, London, 2010, p. 3.

14 A. Greene, *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?*, in *Fordham Environmental Law Review*, 2019, Vol. 30, Issue 3, pp. 1-48, at p. 5.

2.1. The Stop Ecocide Foundation

The Stop Ecocide Foundation is a non-profit organization that aims to promote the criminalization of ecocide as an international crime. The Foundation was established in 2017 by a group of international lawyers and environmental activists, and is based in the Netherlands. The Stop Ecocide Foundation is involved in a range of activities aimed at raising awareness about the importance of protecting the environment. These include advocacy and lobbying efforts to promote the criminalization of ecocide at the national and international levels, as well as educational and outreach initiatives to engage the public on environmental issues. The Foundation also works to build partnerships with other organizations and stakeholders in the environmental movement, and has established a network of legal and environmental experts to provide guidance and support for its initiatives.[15]

In June 2021, the Foundation convened an Independent Expert Panel for the Legal Definition of Ecocide ("IEP"), which proposed a definition of ecocide as a crime under international law based on the principle of "wanton destruction," which refers to acts committed recklessly or with a disregard for the consequences.[16]

2.2. The 2021 Ecocide Proposal

The 2021 Ecocide Proposal for the addition of Article 8 *ter* ("Ecocide") to the ICC Rome Statute reads as follows:

1. For the purpose of this Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.
2. For the purpose of paragraph 1:
    c. "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
    d. "Severe" means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;
    e. "Widespread" means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;
    f. "Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;

15 For more information on the Stop Ecocide Foundation and its activities, *see* the official website of the Foundation.

16 Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text* ("2021 Ecocide Proposal"), June 2021.

g. "Environment" means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.[17]

A peculiarity of the 2021 Ecocide Proposal is that, in contrast to the other four international crimes which are anthropocentric in focus, the recommended definition of the crime of ecocide is entirely eco-centric in nature. It is not focused on humans and the well-being of humans but on the protection of the environment *per se*. This has been praised by many authors, but has also been the object of harsh criticisms. In the author's view, as extensively discussed below, while adopting an eco-centric approach to protect the environment might seem ontologically correct, it may nonetheless clash, *inter alia*, with the principle of legality as well as with the foundational purposes of international criminal law.

3. Analysis of the 2021 Ecocide Proposal

The following paragraphs will analyse the 2021 Ecocide Proposal and outline some praises and criticisms to the purported definition of ecocide, borrowing from the papers already published on the topic by authoritative scholars as well as on the author's personal views on the issue.

At the outset, it is worth noting that, although the 2021 Ecocide Proposal has been criticised for the reasons addressed below, it has had the undoubtful merit of sparking a fervent debate across civil society on the crucial issue of how to better protect our endangered ecosystem in the years to come. Indeed, the 2021 Ecocide Proposal has had far-reaching effects as it impacted the public opinion as a whole and did not remain confined to a small group of legal experts. It has been extensively discussed in the press – not only in the specialised one – and has received a media coverage commensurate with the importance of the topic it addresses. Considering that large segments of the population as well as of the public governance are not yet particularly sensitive to environmental issues, a proposal driving an intense public debate such as the 2021 Ecocide Proposal undoubtedly deserves to be praised for its successful efforts in awakening civil society's conscience on such a compelling topic as the protection of the environment.

Moreover, the 2021 Ecocide Proposal has shed a light on the fundamental role that can be played by law in general, and by international criminal law in particular, in providing protection to borderless environmental issues in a global society. If environmental experts and activists needed not be reminded of their crucial role in defending the eco-system, international criminal lawyers are now aware that society no longer only expects that they focus on genocide, war crimes and crimes against humanity, but also demands that they become involved in the protection of the environment as such and as a whole.

17 2021 Ecocide Proposal, p. 5.

It is also worth mentioning that, by suggesting the inclusion of the crime of ecocide within the ICC Rome Statute, the 2021 Ecocide Proposal rendered a good service to the ICC by confirming its identification as the primary forum for the protection of the most prominent legal interests of humankind, including the environment. In a decade where international criminal justice has suffered more than one setback and its legitimacy is widely questioned by governments and scholars, such a public demonstration of trust in the ICC system shows that the Court is far from being dismantled and can still play a pivotal role in the protection of fundamental legal interests worldwide.

Lastly, some authors have also praised the 2021 Ecocide Proposal on specific legal grounds, while others have already gone so far as to suggest proposed amendments to the proposal.[18]

Turning to the criticisms that have been moved against the 2021 Ecocide Proposal, some authors have pointed out that the proposed definition of ecocide bears little resemblance to the concept of "genocide" that inspired it, in that it does not focus on the protection of a group and requires a *mens rea* much lower – and much more confusing – than specific intent.[19] It has also been authoritatively noted that the proposed definition is not consistent in its self-proclaimed eco-centric approach, since it reintroduces an anthropocentric perspective by allowing for a cost-benefit analysis in case of lawful environmental damages, while ultimately leaving the definition of (and thus the protection from) unlawful acts to the domestic level.[20]

The author agrees that the suggested definition of ecocide is vague and of difficult concrete application, and is of the view that it raises further substantive, procedural and practical issues.

First, the 2021 Ecocide Proposal sets out a definition of the *actus reus* of the crime of ecocide that appears too broad and generic. By proposing that "'ecocide' means unlawful or wanton acts", the IEP suggests that any acts, when unlawful or wanton, can satisfy the objective element of ecocide. This approach raises two issues. On the one hand, as has been noted, absent a binding set of environmental regulations at the international level, the proposal extensively relies on national laws in the characterisation of an act as unlawful. Such an approach openly contradicts one of the driving factors invoked for the introduction of

18 G. Chiarini, *Ecocide and International Criminal Court Procedural Issues: Additional Amendments to the 'Stop Ecocide Foundation' Proposal*, in *CCJHR Working Paper Series No.15, 2021*, pp. 14-27.

19 K. J. Heller, *Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)*, 23 June 2021, pp. 23, available at OpinioJuris.com (last accessed on 4 March 2023). *See also* M. Karnavas, *Ecocide: Environmental Crime of Crimes or Ill-Conceived Concept?*, 28 July 2021, pp. 7-10, available at OpinioJuris.com (last accessed on 4 March 2023).

20 K. Ambos, *Protecting the Environment through International Criminal Law?*, 29 June 2021, pp. 1-2, available at ejiltalk.org (last accessed on 30 January 2023). *See also* J. Heller, *Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)*, 23 June 2021, p. 4, available at OpinioJuris.com (last accessed on 4 March 2023).

an international crime of ecocide, namely that domestic intervention is intrinsically incapable of offering the highest, uniform protection demanded by the environment in a global society. On the other hand, by allowing for lawful *but* wanton acts to satisfy the *actus reus* of the crime, the proposal contradicts its eco-centric vocation and potentially opens the objective element of ecocide to a myriad of unidentifiable human acts, to the great detriment of the principle of legality, which should always remain the guiding star of any criminal law legislators. The definition of wanton acts as any conduct committed "with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated" does not provide any guidance in the identification of the elements upon which such anthropocentric cost-benefit analysis is to be based. The unduly broad nature of the *actus reus* of ecocide is all the more appalling when confronted with the acts prohibited under War Crimes or Crimes Against Humanity, meticulously listed and described in Articles 6 and 7 of the ICC Rome Statute.

Moreover, in the author's view, the proposed definition contains a manifest conflation between *actus reus* and *mens rea* when it introduces the above-mentioned recklessness as a qualifier of the objective element of the proposed crime in all instances in which the perpetrator's conduct is not unlawful *per se*. The conflation is seemingly carried over in the proposed definition of the subjective element of the crime, whereby the "substantial likelihood of severe and either widespread or long-term damage to the environment" qualifies the knowledge of the perpetrator and thus pertains to the required *mens rea* of the crime instead of assisting in the delimitation of the objective element of the prohibited acts. In this regard, the choice of a "substantial likelihood" threshold for the *mens rea* requisite of the crime might arguably go to the detriment of another pillar of criminal law, *i.e.* the principle of guilt, which requires that any prohibited conduct be committed with intent or at least negligence for its perpetrator to be held criminally liable. Such a low *mens rea* might also clash with the overall "beyond reasonable doubt" ("BRD") standard for the assessment of the guilt or innocence of the accused, the leading threshold in criminal matters.

Turning to the procedural issues raised by the 2021 Ecocide Proposal, the proposed definition, if ever adopted by the ICC Assembly of States Parties ("ASP") and ratified by enough States, may arguably prove very difficult to be established in the course of a criminal trial. While there is no doubt that the broad *actus reus* ("unlawful or wanton acts") can be proven by ordinary evidentiary means, questions arise in relation to the proof of the *mens rea*. Proof beyond reasonable doubt would indeed be required of the perpetrator's knowledge that there is a "substantial likelihood of severe and either widespread or long-term damage to the environment being caused by [his or her] acts". It is highly unlikely that evidentiary means to prove such an elaborated *mens rea* come from the accused or can be inferred from his or her conduct, especially if

proof that the accused's lawful conduct is wanton is required too. Establishing the subjective element of ecocide will therefore require proof that the accused elected to keep a (unlawful *or* reckless) course of action even if, and with the knowledge that, such course of action could severely impact the environment in a geographical *or* temporal perspective. It is difficult to imagine that such a technical proposition can be established by means other than expert reports establishing that it was or should have been predictable for a lay person that a certain conduct could create the substantial likelihood of severe and either widespread or long-term damage to the environment. It is true that expert reports are not uncommon in criminal law, where they serve the fundamental purpose of providing judges with access to technical notions that they do not master but whose comprehension is nonetheless necessary for the judges to correctly apply the law to the case at stake. However, it is a well-established principle that experts should serve the purpose of assisting the judges with the understanding of technicalities that are somewhat collateral to the decision-making process on the elements of crime, which should always remain the judges' exclusive prerogative.[21] The ascertainment that there was a substantial likelihood that a certain conduct could create severe and either widespread or long-term damage to the environment does not seem limited to a technicality collateral to the decision-making process, considering that the establishment of the entire *mens rea* of the crime of ecocide eventually rests with the proof of such likelihood. Moreover, doubts arise as to which bodies would be authoritative enough to render reliable reports on controversial issues such as the nature, scope and duration of the potential impact of a human action on the environment. The risk inherent to the proposed definition of ecocide is to turn international criminal trials into fora for global scientific debates about the likelihood that an abstract conduct could cause harm to the environment, to the detriment of the right of the accused to be tried for his or her own culpable acts.[22]

Turning to the practical implications of the 2021 Ecocide Proposal, the eco-centric definition of ecocide proposed by the IEP might clash with its purported collocation amongst the most atrocious crimes that the ICC was created to address, which are intrinsically anthropocentric in nature. In this regard, it must be recalled that, along with stringent jurisdictional and admissibility requirements, there is also a very high gravity threshold to be satisfied for the ICC to be seized of a case. This means that there can be atrocious crimes whose victims cannot resort to the ICC because those crimes do not meet the gravity threshold. Moreover, the ICC does not have unlimited staffing and resources.

21 ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, Judgement, 30 January 2015, para. 375.

22 *See also* E. T. Cusato, *Beyond Symbolism – Problems and Prospects with Prosecuting Environmental Destruction before the ICC*, in *Journal of International Criminal Justice,* 2017, Vol. 15, Issue 3, pp. 491-507, at pp. 501-503.

Trying purely environmental crimes regardless of their impact on victims and humankind could therefore result in the subtraction of limited resources to the prosecution at the international level of the most atrocious and grave crimes which instead bear a closer link with human sufferings. An issue of opportunity also arises: the ICC is highly criticized for its lengthy criminal proceedings and alleged politicized decision-making. Such features are probably not the most appropriate to tackle environmental crimes as promptly and expeditiously as they would require.

Lastly, it must be recalled that amendments of international crimes set forth in the Rome Statute require approval of the ASP and ratification by states, and will only be applicable to those offences committed after they have been fully implemented in the Rome Statute, in compliance with the principle of legality and its corollary *nullum crimen sine lege*. One might therefore question whether the diplomatic and legal efforts required to amend the Rome Statute, coupled with the risk that the proposed definition be (further) watered down throughout the process, are worth the benefits of including within the international core crimes a broadly formulated crime, of difficult concrete application, that is only applicable to offences that have not been committed yet.

4. Alternative Approaches

The criticisms that have been moved to the 2021 Ecocide Proposal in the preceding section of this paper do not seek to challenge the possibility, in and of itself, that the environment be protected at the international criminal level. To the contrary, the author agrees that the environment is as much in need of legal protection as the other legal interests protected under the Rome Statute. However, doubts might arise as to whether at the international criminal level the environment should be protected as an independent legal interest or as enshrined in the multifaceted concept of human dignity that the Rome Statute already aims to protect. The next paragraphs will put forward some alternative approaches that would allow for the environment to be protected at the international level without the need to amend the Rome Statute and create a brand-new international crime of ecocide, with all the difficulties and repercussions that this may entail.

As mentioned above, the ICC currently has jurisdiction over four international core crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[23] While the crimes of genocide and aggression aim at protecting national, ethnic, racial or religious groups and states, respectively, and are therefore tailored in a way that renders them hardly applicable to the protection of

23 ICC Rome Statute, Articles 5-8*bis*.

the environment,[24] the provisions setting out crimes against humanity and war crimes, though primarily aimed at the protection of human beings in time of peace as well as in time of war, provide for the criminalisation of a range of conducts which may fall in the category of international environmental crimes too.

4.1. Crimes Against Humanity

Article 7(1) lists, in subsections (a), (b), (d), (h) and (k), amongst the acts whose commission in the context of a widespread or systematic attack against a civilian population constitutes Crimes Against Humanity, "[m]urder", "[e]xtermination",[25] "[d]eportation or forcible transfer of population",[26] "[p]ersecution",[27] and "[o]ther inhumane acts […] intentionally causing great suffering, or serious injury to body or to mental or physical health".

The required contextual element of crimes against humanity excludes from their scope of application all those acts causing severe environmental damage

24 *See* M. Gillett, *Prosecuting Environmental Harm before the International Criminal Court*, Cambridge University Press, London, 2022, pp. 76-77. It must however be noted that, in the ICC *Al Bashir* case, the Prosecutor sought the arrest of the defendant for genocide for having destroyed "all the target groups' means of survival, poison sources of water including communal wells, destroy water pumps, steal livestock and strip the towns and villages of household and community assets" (ICC, *Situation in Darfur*, ICC-02/05-157-AnxA, Office of the Prosecutor, Public Redacted Version of the Prosecutor's Application under Article 58, 14 July 2008, para. 14). Initially, the majority of Judges of Pre-Trial Chamber I dismissed the allegation because of the lack of "reasonable grounds to believe that such a contamination was a core feature of their attacks" (ICC, *The Prosecutor v. Al Bashir,* ICC-02/05-01/09-3, Pre-Trial Chamber, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 93). However, in a second decision on the application for a warrant of arrest, the Pre-Trial Chamber held that "the act of contamination of water pumps and forcible transfer, coupled by resettlement by member of other tribes, were committed in furtherance of a genocidal policy and that the conditions of life inflicted on the Fur, Masalit and Zaghawa groups were calculated to bring about the group's physical destruction of part of those ethnic groups" (ICC, *The Prosecutor v. Al Bashir,* ICC-02/05-01/09-94, Pre-Trial Chamber, Second Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 12 July 2010, para. 38). The Pre-Trial Chamber thus did find a nexus between the underlying environmental harm (water contamination) and the crime of genocide. *See* E. T. Cusato, *Beyond Symbolism – Problems and Prospects with Prosecuting Environmental Destruction before the* ICC, in *Journal of International Criminal Justice,* 2017, Vol. 15, Issue 3, pp. 491-507, at p. 499.

25 "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population. ICC Rome Statute, Article 7(2)(b).

26 "Deportation or forcible transfer of population" means displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. ICC Rome Statute, Article 7(2)(d).

27 "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. ICC Rome Statute, Article 7(2)(g).

which are not coupled with a widespread or systematic attack against a civilian population. In this regard, recalling the jurisprudence of theInternational Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"),[28] the ICC has stated that the term "widespread" refers to the large-scale nature of the act involving a multiplicity of victims, while the term "systematic" requires the organized nature of the attack.[29] However, nothing prevents Article 7(1)(a), (b), (d), (h) or (k) from being used as the basis for investigating and prosecuting acts committed against the environment in times of peace, when they have such immediate and demonstrable repercussions over the civilian population so to qualify as a widespread or systematic attack against the latter. Some authors have indeed identified few key archetypes of environmental harm capable of causing widespread human suffering and injury possibly amounting to a widespread or systematic attack against a civilian population, including deforestation, contamination, and resource extraction, diversion or manipulation.[30] Several communications by non-governmental organisations have been addressed to the ICC Office of the Prosecutor on that basis. In particular, it is worth referring to the communications submitted pursuant to Article 15 of the Rome Statute by Global Diligence, in 2014, and Greenpeace, in 2022, on the commission of crimes against humanity in Cambodia and Brazil, respectively. The communication on Cambodia alleges, *inter alia*, that since 2002 hundreds of thousands of people within the indigenous minority were forcibly transferred and left in squalid conditions as a consequence of a policy of land grabbing and associated deforestation by senior members of the government and government-connected business leaders.[31] The communication alleging the commission of crimes against humanity in Brazil identifies the environmental destruction associated with the persecution of traditional and indigenous communities by public and private-sector actors since 2011 as possibly characterising the underlying crimes against humanity of murder, persecution and other inhumane acts under Article 7(1)(a), (h), and

28 ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, para. 648; ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Trial Chamber II, Opinion and Judgement, 7 May 1997, para. 580.

29 ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Pre-Trial Chamber II, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation, 31 March 2010, para. 95. *See also The Prosecutor v. Gbagbo*, ICC-02/11-01/11-656-Red, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 12 June 2014, para. 224.

30 L. Prosperi and J. Terrosi, *Embracing the 'Human Factor' – Is There New Impetus at the ICC for Conceiving and Prioritizing Intentional Environmental Harms as Crimes Against Humanity?*, in *Journal of International Criminal Justice,* 2017, Vol. 15, Issue 3, pp. 509-525, at pp. 512-514.

31 Global Diligence, Executive Summary – Communication under Article 15 of the Rome Statute of the International Criminal Court: the Commission of Crimes Against Humanity in Cambodia July 2002 to Present, October 2014, paras 3, 6-8, 13.

(k) of the Rome Statute.[32] These communications show that the Rome Statute provides valuable tools to counter conduct leading to environmental harm, and that civil society has not hesitated to resort to such tools.

It is true that the Rome Statute further requires that the commission of the underlying crimes be part of an attack perpetrated "pursuant to or in furtherance of a State or organisational policy" for such crimes to amount to crimes against humanity (the so-called organisational requirement).[33] It has been recently disputed that such a requirement may prevent the prosecution and punishment of crimes against humanity in any case in which the relevant conducts cannot be attributed to state-like organisations.[34] This would undoubtedly hinder the possibility to resort to crimes against humanity in the repression of environmental crimes committed by non-state actors, thus partly undermining the value of Article 7 of the Rome Statute in the repression of international environmental crimes. However, the ICC case-law has clarified that non-state actors or even private individuals exercising *de facto* power can constitute the entity behind the organisational policy, and that the policy itself does not need to be declared and may remain merely implicit.[35] According to the ICC, the term "organizational" can be interpreted as referring to the mere existence of a group of persons acting together for a certain period of time and within an established structure.[36] From this perspective, the definition of crimes against humanity under the Rome Statute crystallises the developments that occurred within customary international law, leading to the recognition that also individuals not linked to a state or its authorities can commit crimes against humanity.[37] What is relevant is not the state-like framework of the organisation or its formal nature or its level of organisation, but its potential capacity to commit a "widespread or systematic attack on a civilian population" and its "capability to perform acts

32 Greenpeace, Article 15 Communication to the Office of the Prosecutor of the International Criminal Court – Crimes Against Humanity in Brazil: 2011 to Present – Persecution of Rural Land Users and Defenders and Associated Environmental Destruction,9 November 2022, paras 2-4, 6374.

33 ICC Rome Statute, Article 7(2)(a).

34 G. Werle and F. Jessberger, *Principles of International Criminal Law*, Oxford University Press, London, 2014.

35 ICC, *The Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 396; *The Prosecutor v. Jean-Pierre Bemba*, ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 81.

36 ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Pre-Trial Chamber II, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation, 31 March 2010, para. 90.

37 *See* United Nations, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, in *Yearbook of the International Law Commission*, 1996, Vol. II(2), pp. 17-56, at p. 47; *see also* ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Trial Chamber II, Opinion and Judgement, 7 May 1997, para. 654.

which infringe on basic human values".[38] In any event, regarding the quality of the (non-state) entity or organisation, it has been noted that the latter must be in a position akin or similar to a state, and thus it must possess similar capacities of organisation and force.[39] Such capacities, depending on the case, could be attributed to legal corporations (especially multinational ones), and even to their administrative bodies or part of them.[40] As a consequence, the definition of crimes against humanity under the Rome Statute allows for their application to environmental crimes committed as part of a widespread or systematic attack against a civilian population not only by state-like organisations, but also by organised and resourceful non-state actors, thus potentially including large corporations amongst the subjects that can satisfy the contextual element and the organisational requirement.

As mentioned above, the specific acts which can be committed by means of environmental harm and which can amount to crimes against humanity, provided that the contextual and organisational requirements are met, include murder, extermination, deportation and forcible transfer of the population, persecution, and the residual category of other inhumane acts. While murder and extermination would require the Prosecutor to demonstrate that the accused's conduct resulting in an environmental harm caused the victim's death, and that the perpetrator intended to cause it by that means, many scenarios associated with the archetypical environmental harms mentioned above may have the potential, if committed with the required *mens rea*, to fall within the definition of enforced displacement or, when committed on discriminatory grounds, persecution.[41] Moreover, where the unlawful conduct leading to environmental harms does not fit one of the above mentioned acts, the residual category of "other inhumane acts" allows for the prosecution of those environmental crimes which have inflicted great suffering or serious injury to body or to mental or physical health, provided that the seriousness of the conduct and the perpetrator's intent are demonstrated.[42]

4.2. War Crimes

Turning to the protection of the environment in time of war, Article 8(2)(b)(iv) of the Rome Statute lists, amongst the serious violations of the laws and

38 ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Pre-Trial Chamber II, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation, 31 March 2010, para. 90.

39 M. C. Bassiouni, *The Legislative History of the International Criminal Court*, Ardsley, NY: Transnational Publishers, 2005, p. 245.

40 F. Jessberger, *Corporate Involvement in Slavery and Criminal Responsibility under International Law*, in *Journal of International Criminal Justice*, 2016, Vol. 14, Issue 2, pp. 327-341, at pp. 334-335.

41 L. Prosperi and J. Terrosi, at pp. 517-518, 520, 522.

42 L. Prosperi and J. Terrosi, at pp. 523-524.

customs applicable in international armed conflict amounting to War Crimes, "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". Such provision allows for the prosecution of disproportionate environmental violations in time of war. Some authors have focused on the limits of Article 8(2)(b)(iv), including that it only applies to international armed conflict, contains a triple *mens rea* test and a proportionality clause which make judicial scrutiny almost impossible, and cannot be seen as purely eco-centric in its orientation.[43] While these criticisms do have some merit, it is worth noting that most of them have been or could be moved also against the 2021 Ecocide Proposal, which clearly borrowed from Article 8(2)(b)(iv) with respect to certain constitutive elements such as the *mens rea* and proportionality requirements. Differently from the 2021 Ecocide Proposal, Article 8(2)(b)(iv) at least sets out a precise objective element, *i.e.* a military attack, and adopts a cost-benefit analysis based on military – rather than socio-economic – considerations, in compliance with the principles of necessity, distinction and proportionality, fundamental pillars of international humanitarian law.

In addition, it is worth noting that Article 8 of the Rome Statute sets out several further prohibited acts whose commission may amount to war crimes. Despite the anthropocentric dimension inherent to a provision protecting civilians and combatants throughout hostilities, some conduct may become relevant as possible means to repress environmental harm,[44] including pillage,[45] destruction of property,[46] intentionally directing attacks against civilians and civilian objects,[47] intentionally using starvation of civilians as a method of warfare,[48] and using poisonous weapons,[49] or asphyxiating, poisonous or other gases, liquids, materials, or devices.[50]

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43 *See e.g.* M. Gillett, at pp. 95, 104-114.

44 M. Gillett, at pp. 117-128.

45 ICC Rome Statute, Articles 8(2)(b)(xvi) (for international armed conflicts) and (e)(v) (for non-international armed conflicts).

46 ICC Rome Statute, Articles 8(2)(a)(iv), 8(2)(b)(xiii) (for international armed conflicts) and 8(2)(e)(xii) (for non-international armed conflicts).

47 ICC Rome Statute, Articles 8(2)(b)(i)-(iv) (for international armed conflicts) and 8(2)(e)(i)-(iv) (for non-international armed conflicts).

48 ICC Rome Statute, Article 8(2)(b)(xxv).

49 ICC Rome Statute, Articles 8(2)(b)(xvii) and 8(2)(e)(xiii) (applicable in an international and non-international armed conflict, respectively).

50 ICC Rome Statute, Articles 8(2)(b)(xviii) and 8(2)(e)(xiv) (applicable in an international and non-international armed conflict, respectively).

The alternative approaches to the 2021 Ecocide Proposal suggested in the preceding paragraphs rely on existing provisions of the Rome Statute and on the anthropocentric dimension permeating the latter. For this reason, they might not be as fascinating and symbolically charged as a brand-new eco-centric crime might appear, especially when mediatised as much as the 2021 Ecocide Proposal. Nonetheless, reliance on the existing crimes against humanity and war crimes to target large-scale environmental harm when domestic authorities are incapable or unwilling to do so, may perhaps bear the advantage of preserving the delicate balance between the need for protection of the most fundamental legal interests and the inherently limited resources that can be deployed at the international level to achieve this result.

While the creation of ecocide as an independent international crime, especially in the IEP's proposed definition, might jeopardise the existing gravity requirement to be satisfied for the ICC to exercise its jurisdiction over a case, resorting to crimes against humanity and war crimes to protect the environment would ensure that only the most atrocious acts committed by means of environmental harm, *i.e.* those which ultimately affect (also) the civilian population, are addressed by the ICC, in compliance with the Rome Statute's preambular statement that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity" and "the most serious crimes of concern to the international community as a whole must not go unpunished". It is true that, as a consequence of such approach, several acts that may be very harmful for the environment but do not amount to crimes against humanity or war crimes may not be prosecuted and tried at the ICC, while they could be pursuant to the definition of ecocide set out in the 2021 Ecocide Proposal. However, in the author's view, prosecuting environmental crimes at the ICC only insofar as they characterise as crimes against humanity and/or war crimes not only allows for the limited resources of the Court to be efficiently deployed to face situations directly affecting humankind, but also complies with the complementary role of the ICC *vis-à-vis* the States.

The role of domestic law and domestic jurisdictions in the fight against environmental harm cannot be overstated, and awareness should be raised that the widespread protection of the environment can only be achieved throughout a capillary action of law enforcement agencies across the world, rather than by vesting the ICC with the unrealistic role of world criminal court. In this perspective, considering that human actions affecting the environment might frequently result in cross-border harm, transnational criminal law may provide powerful instruments for the States to cooperate in the protection of the environment. As a matter of fact, agreements between neighbouring States or States facing similar environmental challenges may lead to important improvements in police as well as judiciary cooperation and may therefore assist in

enhancing the capabilities of domestic criminal systems to promptly detect and efficiently tackle serious environmental harm at the domestic or regional level. Such transnational approach may prove more effective than centralising the highest judicial response to environmental crimes within the ICC, whose lengthy and not always straightforward decision-making process might prevent the Court from being able to provide prompt answers to the raising demands for environmental protection.

The 2021 Ecocide Proposal might therefore not only prove of difficult application for the reasons set out above, but may arguably not provide for the most efficient and strategic tool to ensure that the environment be effectively protected worldwide. Based on the above considerations, the author expresses the view that the protection of the environment at the international criminal level must rely on humankind and the environment being so substantially entwined that whatever large-scale harm to the latter will eventually result in a harm to the former too, and as such should be prevented and punished. In this perspective, Articles 7 and 8 of the Rome Statute could constitute important instruments of last resort in environmental and climate litigation.

5. Conclusion

In conclusion, while there is no doubt that the protection of the environment is of paramount importance and that criminal justice certainly represents a fundamental legal tool to ensure such protection, it is the author's view that the criminal law dimension that best fits such role remains the domestic one, all the more if enhanced by treaties and agreements facilitating the cooperation between States in transnational criminal law matters. A "glocal" approach correctly implemented by States would allow for environmental crimes to be tackled in a diffuse rather than centralised fashion and appropriately addressed according to their different scale and gravity, thus safeguarding the environment in a capillary manner, which is arguably the only way to protect a widespread and variegated legal interest such as the environment. Only when the protection of the environment fails due to the inability or unwillingness of States to enforce it should international criminal law come to play, always keeping in mind that this branch of law was established to protect humankind from the most egregious crimes and violations it can suffer. When the protection of the environment at the international level is analysed under the complementarity principle, the existing remedies under the ICC Rome Statute are arguably sufficient to ensure that the most egregious violations of the environment, which will inevitably affect humankind as well, be prosecuted and punished both in time of peace and in time of war.