

Is There Space for Environmental Crimes Under International Criminal Law?

The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework

Alessandra Mistura*

I. Introduction.....	182
II. Setting the Framework: A Few Principles of International Criminal Law.....	185
A. International Criminal Law: What Are We Talking About?..	185
B. The Notion of International Crimes.....	188
C. The Interaction Between Treaties and Custom as Sources of International Criminal Law.....	192
D. Conclusions.....	195
III. International Environmental Crimes.....	196
A. Environmental Crimes: Is a Definition Necessary?.....	196
B. Criminalization Under Multilateral Environmental Conventions.....	199
C. Criminalization Under International Criminal Law.....	204
1. Genocide.....	204
2. Crimes Against Humanity.....	208
3. War Crimes.....	210
D. Conclusions.....	213
IV. Enhancing Environmental Protection Under International Criminal Law: Future Developments.....	213
A. The Impact of the Policy Paper on the ICC's Jurisdiction....	215

* L.L.M., Columbia School of Law, Class of 2018; J.D., University of Parma, Class of 2013.

1. Independence, Discretion and the Assessment of Gravity.....	216
2. The Policy Paper's Impact	219
B. Expanding the Consideration of Environmental Crimes	220
1. The Role of Custom in Changing the Scope of Core Crimes.....	221
2. The Case for Ecocide	222
V. Conclusion	225

I. INTRODUCTION

The publication of a Policy Paper on Case Selection and Prioritization¹ (the “Policy Paper”) by the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC”) in September 2016 has reignited the longstanding discussion about the status of environmental crimes under international law.² The Policy Paper expressed the intention of the OTP to consider, in the selection of crimes to be submitted to the jurisdiction of the ICC, those committed through, or resulting in, “the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.”³ Such wording soon gained widespread attention, prompting many news outlets to declare that, from now on, the ICC would focus on prosecuting “environmental crimes.”⁴ The news sources’ enthusiasm, however, appears misplaced for several reasons.

1. OFFICE OF THE PROSECUTOR INT’L CRIMINAL COURT, POLICY PAPER ON CASE SELECTION AND PRIORITISATION (2016) [hereinafter OFFICE OF THE PROSECUTOR].

2. See *infra* Part IV.A.

3. OFFICE OF THE PROSECUTOR, *supra* note 1, at 14.

4. See *ICC Prosecutors Signal New Focus on Environmental Crimes*, BUS. INSIDER (Sept. 15, 2016, 12:43 PM), <http://www.businessinsider.com/ap-icc-prosecutors-signal-new-focus-on-environmental-crimes-2016-9?IR=T> [<https://perma.cc/ZF85-NKEZ>]; see also Phoebe Braithwaite, *Environmental Crimes Could Warrant International Criminal Court Prosecutions*, INTER PRESS SERV. (Oct. 1, 2016), <http://www.ipsnews.net/2016/10/environmental-crimes-could-warrant-international-criminal-court-prosecutions/> [<https://perma.cc/8SGG-XQVR>]; Brittany Felder, *ICC to Focus on Environmental Crimes*, JURIST (Sept. 16, 2016, 10:42 AM), <http://www.jurist.org/paperchase/2016/09/icc-to-focus-on-environmental-crimes.php> [<https://perma.cc/V854-XFQV>]; John Vidal & Owen Bowcott, *ICC Widens Remit to Include Environmental Destruction Cases*, THE GUARDIAN (Sept. 15, 2016), <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases> [<https://perma.cc/MN5U-HFP8>].

The first and foremost objection comes from a consideration of the ICC's limited jurisdiction. In fact, this is strictly confined by the Rome Statute to the prosecution of "the most serious crimes of [international] concern,"⁵ currently identified as the genocide, war crimes, crimes against humanity, and aggression.⁶ The only reference to the environment that appears in the Rome Statute is included in Article 8.2(b)(iv), which lists among the activities constituting a war crime the act of, "[i]ntentionally launching an attack in the knowledge that such attack will cause . . . *widespread, long-term and severe damage to the natural environment.*"⁷

Given the limited attention to the environment, it would be difficult to maintain that the ICC has jurisdiction over "environmental crimes," unless it could be shown that such jurisdiction either (i) may be derived implicitly from the current description under the Rome Statute of the crime of genocide, war crimes, and crimes against humanity, or (ii) has been extended by virtue of the creation of a new rule of international law, either customary or treaty-based.⁸

Most importantly, though, the possibility for the ICC to prosecute "environmental crimes" seems prevented by the failure to find a satisfactory definition for this notion. In the legal practice, this expression doesn't have any authoritative meaning, as international treaties remain completely silent on the issue. And while several attempts at a definition have been made, as will be examined in more detail below,⁹ each of them raises several doubts and concerns.

Many of the suggested definitions are, in fact, characterized by the lack of clarity with respect to the different sources from which the liability for "environmental crimes" arises and the specific consequences attached thereto. Indeed, such definitions indiscriminately consider: (i) the criminal liability of an individual arising from the breach of a rule of national environmental law; (ii)

5. Rome Statute of the International Criminal Court art. 5.1, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

6. *Id.*

7. *Id.* art. 8.2(b)(iv) (emphasis added).

8. It may be worthwhile to recall here that rules of customary international law arise when the following elements are present: (i) the widespread repetition by States of similar international acts over time (State Practice); and (ii) the requirement that States repeat such acts because they believe they have a legal obligation to do so (*Opinio Juris*). See MALCOLM N. SHAW, INTERNATIONAL LAW 53–54 (8th ed. 2017).

9. See *infra* Part III.A.

the criminal liability of an individual arising from the breach of a rule of international environmental law; and (iii) the liability of the State arising from the breach of a rule of international environmental law, whether customary or treaty-based.¹⁰ Of these three options, only the second would seem viable to serve as a foundation of the ICC's jurisdiction over environmental crimes.

The picture that emerges from the above-mentioned remarks shows that there is still widespread confusion on the consideration to be attributed to environmental crimes under international law, as well as the possibility of seeking prosecution for these crimes before an international tribunal. The purpose of this Note is to address such confusion and shed some light on the treatment that environmental crimes receive under international law.

To do so, Part II provides a brief and general overview of the principles of international criminal law, with particular respect to: (i) its definition and the features distinguishing it from other overlapping branches of international law; (ii) the crimes that can be considered as belonging to its realm; and (iii) its sources and the possibility for it to evolve over time. Part III discusses what the term "environmental crime" means and which specific offenses, if any, may be punishable under international criminal law. In doing so, this Part will focus on the fundamental difference between "crimes under international law" and "transnational crimes" and the differences in the regimes applicable to each category. Lastly, Part IV discusses the current limits of the ICC's jurisdiction and, in particular, the possibility of extending it to the prosecution of crimes, including environmental crimes not currently captured by the Rome Statute. Accordingly, this Part examines the potential impact of the Policy Paper in changing the scope of the ICC's jurisdiction, as well as the relevance of other proposals advanced by academics and scholars to extend the ICC's jurisdiction to environmental crimes. In this context, relevance will be given to the introduction of a crime of "ecocide" as a fifth crime against peace,¹¹ and to the amendment of the description of the crimes provided under the Rome Statute through customary international law.

10. *See id.*

11. Crimes against peace are those prosecuted by the ICC. *See infra* Part IV.B.2.

II. SETTING THE FRAMEWORK: A FEW PRINCIPLES OF INTERNATIONAL CRIMINAL LAW

This Part provides an overview of the main concepts of international criminal law and, in particular, focuses on: (i) the definition of “international criminal law;” (ii) the scope of international criminal law with specific respect to the crimes it punishes; and (iii) the sources of international criminal law, with particular attention to the role of customary law.

A. International Criminal Law: What Are We Talking About?

The most striking feature of international criminal law, and the one that inevitably influences every attempt to provide for a satisfactory definition, is that it tries to reconcile and connect two conflicting fields:¹² international law and criminal law. International law is traditionally concerned with regulating the rights and the responsibilities of sovereign States.¹³ Criminal law, on the other hand, is concerned with defining prohibited conducts and imposing punishment on the individuals responsible for breaching such prohibition.¹⁴

Given the different areas of focus of these two fields, the existence of international criminal law itself has been forcefully denied for many years.¹⁵ Indeed, international criminal law became a generally accepted branch of the law only when international law started to recognize individuals as the recipient of international rights and obligations.¹⁶

12. See ALESSANDRA VIVIANI, *CRIMINI INTERNAZIONALI E RESPONSABILITÀ DEI LEADER POLITICI E MILITARI* 15–16 (2005).

13. *Id.*; see also, ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 1 (2nd ed. 2010).

14. CRYER ET AL., *supra* note 13, at 1; see also VIVIANI, *supra* note 12, at 16.

15. See Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 *CURRENT LEGAL PROBS.* 263, 295–96 (1950) (stating firmly that in light of the inherent sovereign equality of States, “in the present state of world society, international criminal law in any true sense does not exist”).

16. The process of recognition of the individual as a subject of international law may be deemed to have started after World War II with the development of the field of human rights law and the negotiation of treaties granting fundamental rights directly to the individuals. See ANNE PETERS, *BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW* 20 (2016). Simultaneously, it was increasingly maintained that individuals had not only rights but also obligations under international law and that the breach of such obligations could be the source of criminal liability under international law. *Id.* In this respect the International Military Tribunal at Nuremberg declared that

Nowadays, there is little doubt that international criminal law exists. There is also general agreement that international criminal law encompasses all of the rules governing the criminal responsibility of the individual for crimes under international law.¹⁷ Therefore, it is the individual, as opposed to the State, that represents the center of the international criminal law system, and the individual that will bear the criminal consequences of its own conduct.¹⁸

International criminal law must, then, be distinguished from the rules of international law governing the responsibility of the States for internationally wrongful acts, which regulate the consequences of a State's breach of its obligations under international law. It is true that the commission of certain crimes may give rise to both forms of responsibility.¹⁹ However, they remain independent from

"international law imposes duties and liabilities upon individuals as well as upon States" and that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *See* *France v. Göring*, 41 AM. J. INT'L L. 172, 220–21. (1946). The work of the International Military Tribunal laid the groundwork for the development of the future international criminal law system, which spanned from the work of the International Law Commission (the "ILC") on a Draft Code of Crimes against Peace and Security of Mankind to the adoption of the Rome Statute and the creation of the ICC.

17. *See* GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 25 (2005); *see also* BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT* 10 (2003); CRYER ET AL., *supra* note 13, at 3–4; ROGER O'KEEFE, *INTERNATIONAL CRIMINAL LAW* 49 (2015).

18. The debate as to whether it is possible to identify a criminal responsibility of the States for grave violations of international law is still ongoing and it does not appear that will be resolved any time soon. The issue arose in the context of the works of the ILC on the codification of international law principles concerning the responsibility of States. In the first stage of its work, the ILC expressly recognized the notion of "international crime," defined as "[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole." *See* Int'l Law Comm'n, Report on the Work of its Forty-Eighth Session, U.N. Doc. A/51/10, at 60 (1996). However, the lack of consent between the States over the existence of such international crimes led the ILC to abandon its inclusion in the final version of the Draft Articles on State Responsibility for Internationally Wrongful Act (the "2001 Draft Articles"). *See* Int'l Law Comm'n, Report on the Work of its Fifty-Third Session, U.N. Doc. A/56/10 (2001) [hereinafter 2001 Draft Articles]. Instead, the 2001 Draft Articles only contain a reference to "serious breach by a State of an obligation arising under peremptory norm of general international law," the commission of which calls for consequences additional to those usually attached to the commission of an internationally wrongful act by the State. *Id.* at 53.

19. For example, the case of genocide both entails the individual criminal responsibility of the person responsible for such crime as well as the international responsibility of the State for breach of its obligations under international law relating to the punishment and the

one another, as each of them is concerned with the breach of different rules of international law applicable to different subjects.²⁰

The parallelism and coexistence between two different systems of responsibility under international law has been acknowledged by the International Court of Justice in its judgment on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, where the court referred to this double system as a “duality of responsibility.”²¹ This dual system has also been recognized by the Rome Statute, which expressly states that “[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.”²² Furthermore, Article 58 of the 2001 Draft Articles also provides that “[t]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.”²³

More doubts exist as to whether international criminal law includes those areas of national law that deal with transnational cooperation for the harmonization of domestic criminal law and the procedures for the investigation, extradition, and prosecution of domestic crimes. In the most recent decades, national legislatures have adopted international instruments aimed at creating an international system for the cooperation and prosecution of cross-border crimes.²⁴ These may be defined as crimes that transcend national borders, thus transgressing the laws of several States or having an impact in another country.²⁵

However, cross-border crimes essentially remain crimes under the national laws of each concerned State and are therefore fundamentally different from those crimes punished pursuant to

prevention of such crime, under both customary and treaty-based international law. Dual responsibility consisting of the criminal liability of the individual and the international responsibility of the State under customary and treaty-based law may also be envisaged with respect to the crimes of aggression and torture. See *infra* Part III.C.1.

20. See O'KEEFE, *supra* note 17, at 79 (stating that “individual criminal responsibility under international law is without prejudice to state responsibility”).

21. *Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. Rep. 43, ¶ 173 (Feb. 26).

22. Rome Statute, *supra* note 5, art. 25.4.

23. 2001 Draft Articles, *supra* note 18, at 59.

24. See BROOMHALL, *supra* note 17, at 11.

25. See Neil Boister, ‘*Transnational Criminal Law?*’, 14 EUR. J. INT’L LAW 953, 954 (2003).

international law.²⁶ In addition, the role of international law with respect to cross-border crimes is usually limited to procedural measures aimed at improving the cooperation between States in their prevention and punishment, without necessarily playing any role in their criminalization from a substantive standpoint.²⁷ As such, it has been suggested that the branch of international law concerned with international cooperation in criminal matters should be more correctly referred to as “[c]omparative transnational” or “‘inter-jurisdictional’ criminal law,” in order to highlight its fundamental difference from international criminal law in its traditional sense.²⁸

This Note follows the above-mentioned approach and defines international criminal law as the body of international law governing the criminal responsibility of individuals for crimes under international law.²⁹

B. The Notion of International Crimes

The definition of international criminal law adopted above inevitably raises the issue concerning when, exactly, an offense can be considered a “crime under international law.” In this respect, two different approaches have been advanced.

According to the first approach, an offense is a crime under international law if: (i) it entails the criminal responsibility of the individual; (ii) the provision breached by the individual is part of international law; and (iii) the offense is punishable under international law, regardless of whether it also constitutes a crime under the domestic criminal system.³⁰ Under this approach, therefore, the source of the criminal prohibition is international law itself, as it directly defines the crime and provides for the punishment of the responsible individual.³¹

26. See Doudou Thiam (Special Rapporteur), *First Rep. on the Draft Code of Offenses Against the Peace and Security of Mankind*, ¶ 32, U.N. Doc. A/CN.4/364 (Mar. 18, 1983).

27. CRYER, *supra* note 13, at 3–4.

28. BROOMHALL, *supra* note 17, at 12.

29. For more information, see *supra* note 18.

30. See WERLE, *supra* note 17, at 29; see also BROOMHALL, *supra* note 17, at 10; CRYER ET AL., *supra* note 13, at 5.

31. See Robert Cryer, *The Doctrinal Foundations of International Criminalization*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS* 107, 108 (M. Cherif Bassiouni ed., 3d ed. 2008).

At the present stage, the only crimes that would satisfy the above-mentioned description are the ones currently falling under the ICC's jurisdiction, which are: (i) aggression, (ii) crimes against humanity, (iii) war crimes, and (iv) genocide. In practice, such crimes are commonly referred to as "core crimes," in order to highlight the intrinsic gravity that characterizes them, as well as the severe impact that they cause on the international community as a whole.³²

Such core crimes entail the breach of international law provisions that are essential to the peaceful coexistence of the members of the international community.³³ Therefore, holding only the State responsible for the breach of such international law provisions would not be enough to ensure the protection of the injured value.³⁴ In order to restore international peace, international law requires that the breach of the relevant international obligation must be qualified as an international crime and that the individual responsible for the breach should be held criminally liable for his or her actions.³⁵

Not included in this category of international crimes are those offenses that, albeit defined under international law, are prosecuted pursuant to national laws.³⁶ These offenses are also known as "transnational crimes" or "crimes of international concern."³⁷ Here, international law provides not for the direct criminal responsibility of the perpetrator, but rather, for "an indirect system of interstate obligations generating national penal laws."³⁸ In other words, with respect to transnational crimes, a rule of international law requires the States to enact domestic criminal legislation for the punishment and the prosecution of certain conducts perceived as harmful to the international community.³⁹ The criminal liability of the individual, however, arises only on the

32. *Id.*

33. Marcos Orellana, *Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad*, 17 *GEO. INT'L ENVTL. L. REV.* 673, 689 (2005)

34. *Id.*

35. *Id.*

36. *Id.*

37. See Cryer, *supra* note 31, at 109.

38. Boister, *supra* note 25, at 962; see also RICARDO M. PEREIRA, *ENVIRONMENTAL CRIMINAL LIABILITY AND ENFORCEMENT IN EUROPEAN AND INTERNATIONAL LAW* 115–16 (2015).

39. This is the approach adopted by the international environmental law conventions that will be examined below. See *infra* Part III.B.

basis of the national legislation enacted by the State in compliance with its international obligations, not under international law itself.

International rules requiring domestic criminalization of certain conduct⁴⁰ are usually treaty-based. Over time, States have entered into a plurality of so-called “suppression conventions,” imposing obligations on the State parties to prohibit and criminalize certain unlawful behaviors, such as torture,⁴¹ hijacking,⁴² certain drug crimes,⁴³ or acts of terrorism.⁴⁴

In summary, under the first restrictive approach, international crimes are only the so-called “core crimes,” that is genocide, war crimes, crimes against humanity, and aggression. Indeed, in relation to these crimes, the criminal responsibility of the individual arises directly under international law, which describes the criminal conduct and requires that the same be punished. On the contrary, “transnational crimes” are not international crimes. Here, the source of the criminal prohibition is not the international legal order, but the national law of each State, which criminalizes the relevant conduct in compliance with its international obligations.⁴⁵

In opposition to this restrictive approach, a second approach considers both “core crimes” and “transnational crimes” as part of international criminal law. International crimes, therefore, are all crimes whose material elements are defined by international law, whether customary or treaty-based, regardless of whether criminalization is imposed directly under international law or indirectly pursuant to the State’s domestic law.⁴⁶

40. The term “conduct” includes both actions and omissions.

41. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4.1, Dec. 10, 1984, 1465 U.N.T.S. 85 (“Each State Party shall ensure that all the acts of torture are offences under its criminal law.”).

42. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 3, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 (“Each Contracting State undertakes to make [the offences defined under Article 1 of the same Convention] punishable by severe penalties.”).

43. See Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3.1, Dec. 20, 1988, 1582 U.N.T.S. 164 (“Each Party shall adopt such measures that may be necessary to establish as criminal offences under its domestic law [the crimes listed in the same article]”).

44. See International Convention for the Suppression of Terrorist Bombings art. 4, Dec. 15, 1997, 2149 U.N.T.S. 256.

45. Cryer, *supra* note 31, at 109.

46. See O’KEEFE, *supra* note 17, at 56.

Such an approach, however, does not appear entirely convincing. While international law may certainly impose on States the obligation to prosecute “transnational crimes,” it will rarely provide for a complete and accurate description of their material elements. The obligation to criminalize arising from international conventions is usually framed in general terms. It is then left to the domestic law of the State to set out with greater detail and specificity the material elements of the crime, including the description of the conduct, the required mental state, and the punishment to be imposed.

The relationship between Article VIII of Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”)⁴⁷ and the Endangered Species Act (“ESA”),⁴⁸ a U.S. domestic law, provides an example of this structure. Article VIII of CITES requires the State parties to “penalize trade in, or possession of” the *specimens* protected by the convention itself.⁴⁹ “Trade” is defined under CITES as “export, re-export, import and introduction from the sea.”⁵⁰ CITES does not provide a definition for the term “possession.”

The ESA, which implements CITES at the U.S. domestic level, describes in greater detail and specificity all prohibited conducts criminalized by CITES. The ESA provides that it is unlawful to, among others, import, export, take, possess, sell or offer to sell, deliver, carry, transport, and ship any of the species identified by the Secretary of Interior or the Secretary of Commerce pursuant to Section 4.⁵¹ It then sets out detailed definitions of what the aforementioned conducts entail. For example, “take” is defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct.”⁵² “Import,” instead, means “to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States.”⁵³ The ESA also specifies the mental element required for criminal liability to arise, stating

47. Convention on International Trade in Endangered Species of Wild Fauna and Flora art. VIII, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

48. Endangered Species Act of 1973 § 9, 16 U.S.C. § 1538 (2016).

49. See CITES, *supra* note 47, art. VII(1)(a).

50. See CITES, *supra* note 47, art. I(c).

51. Endangered Species Act §§ 4, 9.

52. Endangered Species Act § 3(14).

53. *Id.* § 3(7).

that punishment will apply to anyone that “willingly” violates the provisions of the Act,⁵⁴ as well as the applicable penalties.⁵⁵

The basis for the criminalization of the conducts prohibited under CITES, therefore, is not international law but, rather, the ESA, as it specifically identifies all the conditions for criminal punishment to be imposed. The same analysis, moreover, may be carried out with respect to other offences to be criminalized pursuant to the above-mentioned “suppression conventions.”

In light of the above, it appears more appropriate to consider only “core crimes” as international crimes directly criminalized and punished under international law, as the criminalization and punishment of transnational crimes necessarily requires the enactment by each State of specific and detailed domestic laws.

C. The Interaction Between Treaties and Custom as Sources of International Criminal Law

As a branch of international law, international criminal law is derived from the same sources,⁵⁶ as identified under Article 38 of the Statute of the International Court of Justice.⁵⁷ International treaties and international custom, therefore, will provide for the substantive elements of an international crime—to be understood according to the definition provided above⁵⁸—as well as the procedural rules governing prosecution. For the purpose of this Note, it is necessary to briefly address the relationship between international treaties and customary rules of international law. Indeed, both can act as sources of criminalization and description of international crimes without necessarily providing for an identical definition of the same crime.

International treaties represent the most important source of international criminal law. This is because they are characterized—

54. *Id.* § 11(b).

55. *Id.*

56. See ANTONIO A. CASSESE, *INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY* 4 (2011); see also Dapo Akande, *Sources of International Criminal Law*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 41, 41 (Antonio A. Cassese ed., 2009).

57. More specifically, Article 38 of the Statute of the International Court of Justice identifies the sources of international law in the following: (i) international conventions, (ii) custom, and (iii) general principles of law recognized by civilized nations; with all of them placed on an equal footing. Statute of the International Court of Justice, art. 38.1(a)–(c). In addition, Article 38 also refers to judicial decisions and writing of publicists. *Id.* art. 38.1(d). These, however, are to be considered only as a subsidiary means for determining the law. *Id.*

58. See *supra* Part II.B.

at least in theory—by their clarity, precision, explicit character, and by the circumstance that they unequivocally embody the will of the parties over a certain issue.⁵⁹ Within the applicable international criminal law treaties, the Rome Statute assumes paramount importance, as it sets out, among others: (i) the personal, temporal and subject-matter boundaries of the ICC’s jurisdiction;⁶⁰ (ii) the general principles with which the Court has to comply;⁶¹ and (iii) the procedural rules governing the process before the same.⁶²

Also relevant in the field of international criminal law are those treaties which establish and define other international crimes subject to the jurisdiction of an international tribunal, and whose scope may sometimes overlap with the provisions of the Rome Statute. This is the case, for example, with respect to Common Article 3 of the Geneva Conventions, the breach of which constitutes a war crime under the Rome Statute.⁶³ Similarly, the Genocide Convention sets out the definition of the crime of “genocide,” which has also been identically adopted in the Rome Statute.⁶⁴

Notwithstanding doubts advanced by certain international law scholars,⁶⁵ customary international law can also be considered as a source of international criminal law.⁶⁶ Therefore, custom may serve as a source for the identification of new international

59. See Bruno Simma & Andreas Paulus, *Le Rôle Relatif des Différentes Sources du Droit International Pénal (Dont les Principes Généraux de Droit)*, in DROIT INTERNATIONAL PÉNAL 55, 59 (Hervé Ascensio, Emmanuel Decaux and Alain Pellet eds., 2000).

60. See Rome Statute, *supra* note 5, Part II.

61. *Id.* Part III.

62. *Id.* Part V & Part VI.

63. *Id.* art. 8.2(c); see also Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

64. *Id.* art. 6; see also Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

65. Doubts as to the possibility to consider custom as source of international criminal law are mainly connected to the nature of custom as an unwritten source of the law, arising from State practice and *opinio iuris*, and the principle of legality that informs the international criminal law system. See Mirjam Skrk, *The Notion of Sources of International Criminal Law*, in CONTEMPORARY DEVELOPMENTS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF BUDISLAV VUKAS 879, 891–92 (Rudiger Wolfrum et al. eds., 2015); see also BIRGIT SCHLÜTTER, DEVELOPMENTS IN CUSTOMARY INTERNATIONAL LAW 296 (2010).

66. SCHLÜTTER, *supra* note 65, at 893. In this respect, primary importance must be attributed within the international law system to peremptory norms of customary international law (*jus cogens*). Vienna Convention on the Laws of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. These are rules accepted and recognized by the international community as a whole as norms from which no derogation is permitted and that, as such, are vested with a higher rank than general customary law. *Id.*

crimes,⁶⁷ as well as applicable defenses from criminal liability.⁶⁸ As it originates from States' behavior repeated over time, custom allows international criminal law to evolve independently from the provisions expressly accepted by the States through the adherence to international conventions.⁶⁹

International treaties and customary international law are also sources that the ICC is obligated to apply in the adjudication of the cases pending before it.⁷⁰ Both, however, are in a subsidiary position to the Rome Statute itself and other sources of law, such as the Elements of Crime as adopted by the ICC to further specify the material elements of the crimes subject to its jurisdiction,⁷¹ or the Rules of Procedure and Evidence that regulate the proceeding before the ICC.⁷²

The Rome Statute is notable in that it clearly sets out the relationship between these two sources of law. Article 10 of the Rome Statute specifically provides that “[n]othing [in Part 2 of the Rome Statute, which sets out the jurisdiction of the ICC] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”⁷³

67. For example, the International Criminal Tribunal for the Former Yugoslavia (the “ICTY”) in the *Furundžija* case affirmed that the prohibition of rape and sexual assault in armed conflict evolved through customary international law. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 168 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

68. In the *Erdemović* case, the ICTY stated, “no rule may be found in customary international law regarding the availability or the non-availability of duress as a defense to a charge of killing innocent human beings.” Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 55 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

69. *See* Rome Statute, *supra* note 5, art. 10.

70. *See* Statute of the International Court of Justice, art. 38.1.

71. *See* INT’L CRIMINAL COURT, ELEMENTS OF CRIMES (2011).

72. *See* Rome Statute, *supra* note 5, art. 21.1(a)–(b). In this respect, this article mentions both “*applicable treaties*” and “*the principles and rules of international law.*” *Id.* Although the wording used by the Rome Statute is not identical to the ones adopted by Article 38 of the ICJ Statute, there is general agreement among scholars that the term “*rules of international law*” must be interpreted as including customary rules of international law. *See* Margaret McAuliffe deGuzman, *Article 21—Applicable Law*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 701, 707–08 (Otto Triffterer ed., 2d ed. 2008); *see also* WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 390–91 (2010) (stating that Article 21 of the Rome Statute should be interpreted according to the authoritative text provided by Article 38 of the ICJ Statute).

73. Rome Statute, *supra* note 5, art. 10.

Accordingly, the definition of an international crime under the Rome Statute and subject to the prosecution of the ICC does not affect the definition of the same crime under customary international law.⁷⁴ This means that a definition of a crime provided under the Rome Statute may well change over time and that new international crimes may develop, due to the emergence of a new rule of customary international law. However, in this scenario, issues of jurisdiction will inevitably arise, as the custom-defined international crimes will fall outside the scope of jurisdiction of the ICC. In order for these crimes to be tried before the ICC, therefore, a specific amendment to the Rome Statute will be required so as to include them within the Court's jurisdiction.

D. Conclusions

On the basis of the analysis set out in the previous paragraphs, international criminal law has been defined as “the body of international law governing the criminal responsibility of individuals for crimes under international law.”⁷⁵ In turn, “crimes under international law” have been identified as those offenses that are directly defined and punished under international criminal law. At the present stage, the only crimes that satisfy this definition are the “core crimes” subject to the jurisdiction of the ICC: genocide, crimes against humanity, war crimes, and the crime of aggression.⁷⁶ The description of such crimes, however, may be subject to changes over time. Indeed, State practice repeated over time may give rise to a new rule of customary international law, providing for new international crimes or amending the current definition of the “core crimes” as provided under the Rome Statute.⁷⁷

74. See SCHLÜTTER, *supra* note 65, at 290; see also Otto Triffterer, *Article 10, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL COURT*, *supra* note 72, at 531, 534–36 (stating that “[t]heoretically, the development of changes in humanitarian law, for instance defining new crimes against humanity—not yet falling within the jurisdiction of the Court—, cannot be blocked by the Statute”).

75. See *supra* Part II.A.

76. See *supra* Part II.B.

77. See *supra* Part II.C.

III. INTERNATIONAL ENVIRONMENTAL CRIMES

In order to determine what treatment environmental crimes receive under the current framework of international criminal law, the preliminary issue of what, exactly, are “environmental crimes” must be addressed. It is first necessary to determine whether international law provides a general definition of this term. In the event that the search for a general definition should prove impossible, it will be subsequently necessary to examine each specific conduct of threat or harm to the natural environment prohibited by criminal provisions provided under (i) international environmental law and (ii) international criminal law.

A. Environmental Crimes: Is a Definition Necessary?

The search for a comprehensive definition of environmental crimes appears to be extremely arduous, if not even outright impossible. The inherent difficulty of the task is highlighted by the fact that no definition of the term can be retrieved from international conventions.⁷⁸ Indeed, the only international instrument that comes close to providing such a definition is the Council of Europe Convention on the Protection of the Environment through Criminal Law (the “COE Convention”).⁷⁹ The COE Convention lists five detailed categories of crimes posing a threat, or harm, to the environment and requires their criminalization at the domestic level.⁸⁰ However, the relevance of

78. See M. Jambozorg et al., *Challenges Ahead of Codification of Environmental Crimes Indices as an International Crime*, 12 INT'L J. ENVTL. SCI. TECH. 3719, 3723 (2015).

79. *Id.*

80. Convention on the Protection of the Environment Through Criminal Law art. 2, 4, Nov. 4, 1998, E.T.S. 172 [hereinafter COE Convention] (Article 2 requires the criminalization of: “(a) the discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water which: (i) causes death or serious injury to any person, or (ii) creates a significant risk of causing death or serious injury to any person; (b) the unlawful discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water which causes or is likely to cause their lasting deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants; (c) the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (d) the unlawful operation of a plant in which a dangerous activity is carried out and which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; and (e) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous

the definition provided under the COE Convention is severely impaired by the fact that the Convention is only regional in its application and has not yet entered into force.

In addition to the definition adopted by the COE Convention, there is no shortage of proposals for the definition of the term “environmental crimes,” advanced either by scholars or international organizations. However, even among the suggested definitions, there is still no general agreement on the precise meaning of “environmental crime.”⁸¹

In this respect, some scholars have defined “environmental crime” as, *inter alia*: (a) any act “committed with the intent to harm or with a potential to cause harm to ecological and/or biological system and for the purpose of securing business or personal advantage;”⁸² or (b) an unauthorized act or omission that: (i) violates the law and is therefore subject to criminal prosecution and criminal sanctions; (ii) harms or endangers either the life or health of individuals or the environment itself; and (iii) serves the interests of either corporations or individuals.⁸³

Other scholars have altogether rejected the terminology of “environmental crime,” adopting instead the term “green crime.” This is usually defined as any activity causing environmental

radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants.” Criminalization of other offenses or, alternatively, the imposition of administrative sanctions is required by Article 4 with respect to: “(a) the unlawful discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water; (b) the unlawful causing of noise; (c) the unlawful disposal, treatment, storage, transport, export or import of waste; (d) the unlawful operation of a plant; (e) the unlawful manufacture, treatment, use, transport, export or import of nuclear materials, other radioactive substances or hazardous chemicals; (f) the unlawful causing of changes detrimental to natural components of a national park, nature reserve, water conservation area or other protected areas; and (g) the unlawful possession, taking, damaging, killing or trading of or in protected wild flora and fauna species.”).

81. See UNEP-INTERPOL, *THE RISE OF ENVIRONMENTAL CRIME: A GROWING THREAT TO NATURAL RESOURCES, PEACE, DEVELOPMENT AND SECURITY* 7 (Christian Nelleman et al. eds., 2016).

82. MARY CLIFFORD, *ENVIRONMENTAL CRIME: ENFORCEMENT, POLICY AND SOCIAL RESPONSIBILITY* 26 (1998) (also suggesting an alternative definition of environmental crime as “any act that violates an environmental protection statute”).

83. YINGYI SITU & DAVID EMMONS, *ENVIRONMENTAL CRIME: THE CRIMINAL JUSTICE SYSTEM’S ROLE IN PROTECTING THE ENVIRONMENT* 3 (2000).

damage, either directly or indirectly, regardless of whether a provision of law has been breached.⁸⁴

Among the definitions advanced by international organizations, the International Police Organization's ("INTERPOL") Strategic Plan for the years 2009–2010 defines environmental crime as "a breach of a national or international environmental law or treaty that exists to ensure the conservation and sustainability of the world's environment, biodiversity or natural resources."⁸⁵ Similarly, the United Nation Environment Programme ("UNEP") uses the term "environmental crime" to refer to a varied group of illegal activities harming the environment and aimed at benefitting individuals and corporations.⁸⁶

All of the above-mentioned definitions, however, are more descriptive, rather than prescriptive in character, as they are rather vague when describing the substantive elements that a behavior should satisfy to be qualified as an environmental crime. In addition, there is a substantial lack of clarity over what such substantive elements should be. For example, it is not entirely clear whether a conduct that endangers the environment also needs to benefit individuals or corporations in order to constitute an environmental crime.

Most importantly, though, the ineffectiveness of the suggested definitions is highlighted by the fact that their own authors seem to attach to them a merely descriptive nature. In most instances, the definitions proposed are immediately followed by the enumeration of those offenses generally considered to constitute environmental crimes and whose criminalization is required under applicable international treaties.⁸⁷

The lack of a general definition of "environmental crime" should not come as a surprise, as the broad terms in which the above-mentioned proposals have been drafted render them unsuitable to serve as a basis for criminal responsibility. Indeed, one of the pillars of criminal law everywhere is the principle of *nullum crimen sine lege*, which entails the need for a specific legal definition of the prohibited conduct, so as to prevent the possibility of expanding

84. See NANCY FRANK & MICHEAL J. LYNCH, CORPORATE CRIME, CORPORATE VIOLENCE: A PRIMER 81–82 (1992).

85. See INTERPOL, ENVIRONMENTAL CRIME PROGRAMME: STRATEGIC PLAN 4 (2009–2010).

86. See UNEP-INTERPOL *supra* note 81, at 17.

87. See *id.* at 17; see also INTERPOL, *supra* note 85, at 4.

the criminal norm to behaviors not expressly considered by the norm itself.⁸⁸ A general definition of “environmental crime” would likely breach such principle, as it poses a high risk of vagueness and potential over-breadth of coverage.⁸⁹ If such a definition were to be theoretically adopted, then the most advisable solution would be to follow the approach of the COE Convention, which enumerates the specific conducts subject to criminal prosecution.⁹⁰

In practice, any attempt to provide for a definition of the term “environmental crime” would result in a merely theoretical exercise. As such, it appears more useful to focus the analysis on the provisions of international law attaching criminal responsibility to certain behaviors damaging or posing a threat to the environment. The aim is to ascertain when the criminal responsibility that arises from such provision follows directly from international law, thus falling into the realm of the so-called core crimes, or when it arises only indirectly, as is the case with transnational crimes.

B. Criminalization Under Multilateral Environmental Conventions

There are several specific conducts that are relevant under international criminal law, such as illegal trade in wildlife, illegal logging, illegal trade in hazardous waste, smuggling of ozone depleting substances, and illegal, unreported and unregulated (“IUU”) fishing.⁹¹ As their criminalization and prosecution inevitably calls for international cooperation, the aforementioned conducts are the subject of “inter-jurisdictional” criminal law, as defined above.⁹² However, they are also relevant under traditional

88. See Mauro Catenacci, *The Principle of Legality*, in 2 *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 85, 85 (Flavia Lattanzi & William Schabas, eds., 1999).

89. See ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 63–64 (2009); see also, JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 31–32 (1947).

90. See COE Convention, *supra* note 80.

91. Such behaviors are also usually considered “environmental crimes” in common language. See Lorraine Elliott & William H. Schaedla, *Transnational Environmental Crimes: Excavating Complexities—An Introduction*, in *HANDBOOK OF TRANSNATIONAL ENVIRONMENTAL CRIME* 3–4 (Lorraine Elliott & William H. Schaedla eds., 2016); Rob White, *Environmental Theft and Trafficking*, in *ROUTLEDGE HANDBOOK OF TRANSNATIONAL CRIMINAL LAW* 280, 282 (Neil Boister & Robert J. Curry eds., 2015); Puneet Pathak, *International Environmental Crime: A Growing Concern of International Environmental Governance*, 13 *U.S.-CHINA L. REV.* 382, 383 (2016); see also ENVTL. INVESTIGATION AGENCY, *ENVIRONMENTAL CRIME: A THREAT TO OUR FUTURE I* (2008); ROYAL INST. OF INT’L AFFAIRS, *INTERNATIONAL ENVIRONMENTAL CRIME: THE NATURE AND CONTROL OF ENVIRONMENTAL BLACK MARKETS* 5 (2002).

92. See *supra* Part II.A.

international law, because international environmental law conventions usually require their criminalization and prosecution.

CITES is the governing instrument with respect to illegal trade in wildlife. Its stated aim is to protect species of wild fauna and flora whose conservation is endangered by international trade.⁹³ In this respect, Article VIII of CITES provides for the obligation of the State parties to “take appropriate measures to enforce [the provisions of the Convention] and to prohibit trade in specimens in violations thereof.”⁹⁴ Article VIII further specifies that such measures can include also the penalization of “trade in, or possession of, such specimens, or both”⁹⁵ and “the confiscation or return to the State of export of such specimens.”⁹⁶ The provisions of CITES may also serve as a basis for the criminalization of illegal logging of timber, in the event that the relevant species of flora is listed in one of the Appendices of the Convention.⁹⁷

As for the illegal trade of hazardous waste, the most relevant international instrument is the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the “Basel Convention”),⁹⁸ which sets out the rules and obligations for the State parties with respect to the international trade of hazardous wastes. Similar to CITES, the Basel Convention imposes on State parties the duty to “take appropriate legal, administrative and other measures to implement and enforce the provisions”⁹⁹ of the Basel Convention, including “measures to prevent and punish

93. In this respect, CITES provides a different degree of protection depending on the Appendix in which a species is listed. In particular, with respect to the species listed in Appendix I, meaning “all species threatened with extinction which are or may be affected by trade,” trade is absolutely prohibited, unless the requirements under Article III CITES are met. *See* CITES, *supra* note 47, art. II(1), (3). With respect to the species listed in Appendix II, meaning “all species which although not necessarily threatened with extinction may become so unless trade in specimens is subject to strict regulation in order to avoid utilization incompatible with their survival,” trade can be allowed, provided that it is not detrimental to the survival of the species and the specimen was not obtained in breach of the laws of the exporting state. *Id.* art. II(2), (4). Finally, “Appendix III shall include all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of the other Parties in the control of trade.” *Id.* art. II(3).

94. *Id.* art. VIII(1).

95. *Id.* art. VIII(1)(a).

96. *Id.* art. VII(1)(b).

97. *See id.* art. I.

98. Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126 [hereinafter Basel Convention].

99. *See id.* art. 4.4.

conduct in contravention⁹⁹100 of its articles. In addition, the Basel Convention expressly states that the illegal trafficking of hazardous wastes—meaning, the trade of waste not in compliance with the provisions of the Basel Convention¹⁰¹—shall be considered criminal.¹⁰²

The smuggling of ozone-depleting substances is, instead, indirectly tackled by the Montreal Protocol on Substances that Deplete the Ozone Layer (the “Montreal Protocol”).¹⁰³ Article 4 effectively prohibits the trade of ozone-depleting substances between a State that is a party to the Montreal Protocol and a non-party.¹⁰⁴ However, no provision of the Montreal Protocol obligates the State parties to prosecute and criminalize trade of ozone-depleting substances occurring in breach of its provision. Rather, the only recourse against the illegal trade is through the compliance and implementation mechanisms provided in the same Montreal Protocol.¹⁰⁵

The situation is different with respect to IUU fishing because there is no international environmental convention explicitly providing for the obligation of member States to impose criminal sanctions for such activity. For example, the UN Convention on the Law of the Sea (“UNCLOS”) only provides for the duties of the State parties to (i) exercise their right to fish in the high seas subject to their international obligations and (ii) cooperate for the conservation of living resources.¹⁰⁶ A potential basis for criminal

100. *Id.*

101. *See id.* art. 9.1 (providing that illegal traffic occurs in the event of any transboundary movement of hazardous or other wastes carried out: (a) without notification to all States concerned; (b) without the consent of a State concerned; (c) with consent obtained from States concerned through falsification, misrepresentation or fraud; (d) not in conformity in a material way with the documents; (e) in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in breach of the Basel Convention and of general principles of international law).

102. *See id.* art. 4.3.

103. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3 [hereinafter Montreal Protocol].

104. *See id.* art. 4.

105. *See id.* art. 8. In this respect, Article 8 of the Montreal Protocol provides that the first Meeting of the Parties will adopt the procedures and mechanisms for determining the non-compliance by a Party to the provisions of the Protocol, as well as the consequences to be attached to such non-compliance. *Id.*

106. *See* United Nation Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. In particular, Article 116 provides for the right of each State party to engage in fishing on the high seas, subject only to: “(a) their treaty obligations;” and “(b) the rights and duties as well as the interests, of coastal States.” *Id.* art. 116. Article 118,

prosecution could be identified in Article 117 of UNCLOS, which provides for the duty of the States to “take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.”¹⁰⁷ It would then be entirely plausible to also include in such measures national criminal laws concerning the prosecution of IUU fishing, as it prejudices the conservation of living resources of the high seas. The protection of marine species from IUU fishing through criminalization could also be ensured through Article VIII of CITES.¹⁰⁸ However, in this case the marine species to be protected would need to be listed in one of the Appendices of the Convention.

What results from the above-mentioned survey is a varied picture. On the one side, there are those offenses, the criminalization of which is required under international law (e.g. trade of endangered species under CITES and trade of hazardous waste under the Basel Convention). On the other side, there are behaviors, not necessarily entailing criminal prosecution at the international level, the impacts of which could be so serious and destructive for the environment that transnational efforts must be undertaken in order to put an end to them (e.g. smuggling of ozone-depleting substances under the Montreal Protocol and IUU fishing).

Those behaviors that must be criminalized under international law are essentially the so-called transnational crimes discussed above.¹⁰⁹ Indeed, both CITES and the Basel Convention require the State parties to implement domestic legislation criminalizing illegal trade in endangered species and illegal trade of hazardous waste.¹¹⁰ In these cases, criminal prosecution will arise only indirectly from international law, as the primary source of responsibility for the individual committing the offense will be the national criminal law adopted by the State in compliance with its

instead, provides for the duty of the State parties to cooperate in the conservation and management of living resources in the areas of the high seas, including, among others, through the establishment of sub-regional or regional fisheries organizations. *Id.* art. 118.

107. *Id.* art. 117.

108. *See* CITES, *supra* note 47, art. VIII.

109. *See supra* Part II.B.

110. *See* CITES, *supra* note 47, art. VIII; *see also* Basel Convention, *supra* note 98, art. 4.3.

international obligations.¹¹¹ As a consequence, and in light of the definition of international crime encompassing only crimes arising directly under international law, such criminal activities cannot be properly considered international crimes.

The same conclusion must be reached with respect to the second category of conducts, where international law does not provide a basis for criminalization. Reference is made to a wide range of human activities, such as IUU fishing and illegal mining,¹¹² which do not raise environmental concerns in and of themselves, but rather, with respect to the modalities in which they are carried out. In relation to fishing, for example, it is generally recognized as a right of States under international law.¹¹³ It is only when fishing is carried out using techniques that might take a significant toll on the sustainability of the marine environment that the necessity to intervene to regulate its performance arises, in order to avoid environmental degradation. In this respect, the criminalization of the abovementioned activities would be of residual usefulness, as the recourse to administrative and regulatory provisions,

111. CITES and the Basel Convention are not the only international instruments to impose on the State parties the duty to criminalize a certain conduct. Indeed, similar duties, albeit formulated in different terms, also appear, for example in the following conventions: (i) International Convention for the Regulation of Whaling art. 9, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (providing for the obligation of each Contracting Government to “take appropriate measures to ensure the application of the provisions of this Convention and the punishment of infraction against said provisions”); (ii) Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircrafts art. 15.3, Feb. 15, 1972, 932 U.N.T.S. 3 (providing that “[e]ach Party shall take in its territory appropriate measures to prevent and punish conduct in contravention of the provisions of this Convention”); (iii) the Convention for the Prevention of Marine Pollution from Land-Based Sources art. 12.1, Jun. 4, 1974, 1546 U.N.T.S. 119 (providing that “[e]ach Contracting Party undertakes to ensure compliance with the provisions of this Convention and to take in its territory appropriate measures to prevent and punish conduct in contravention of the provisions of the present Convention.”); (iv) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere art. 5.1, Oct. 12, 1940, 161 U.N.T.S. 193 (“The Contracting Governments agree to adopt, or to propose such adoption to their respective appropriate law-making bodies, suitable laws and regulations for the protection and preservation of flora and fauna.”); (v) the International Convention for the Prevention of Pollution from Ships art. 6, November 2, 1973, 34 U.S.T. 3407, 1340 U.N.T.S. 184 (providing that any contravention to prohibition to discharge oil from a ship shall be an offense punishable under the law of the relevant State party in its territory); and (vi) the Convention on the Physical Protection of Nuclear Materials art. 7.1, Mar. 3, 1980, T.I.A.S. 11080, 1456 U.N.T.S. 101 (providing that the intentional commission of one of the activities listed therein “shall be made a punishable offense by each State party under its national law”).

112. See UNEP-INTERPOL, *supra* note 81, at 15.

113. See, e.g., UNCLOS, *supra* note 106, art. 56.1(a).

specifically regulating their performance, could be sufficient to adequately address the arising environmental concerns.

C. Criminalization Under International Criminal Law

Conducts posing a threat or causing damage to the environment are granted limited relevance under international criminal law, when they occur in the context of the so-called core crimes:¹¹⁴ (i) genocide, (ii) crimes against humanity, and (iii) war crimes.

1. Genocide

Genocide is defined under Article 6 of the Rome Statute, which replicates *verbatim* the definition of the crime adopted under the Convention for the Prevention and Punishment of the Crime of Genocide.¹¹⁵ In particular, genocide might be deemed to have occurred when:

Any of the following acts [are] committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part; (d) [i]mposing measures intended to prevent births within the group; or (e) [f]orcibly transferring children of the group to another group.¹¹⁶

The connection between conducts causing environmental damage and genocide is not immediately evident, as the Rome Statute does not mention the environment anywhere in Article 6. However, episodes of environmental destruction could become indirectly relevant in the context of the conducts listed therein.

Reference is made, first of all, to Article 6(b) of the Rome Statute. It is possible to envisage the destruction of the natural environment as an act causing “serious bodily or mental harm” to a

114. See *supra* Part II.B.

115. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277; see also Rome Statute, *supra* note 5, art. 6. Such definition has been deemed to also reflect the description of genocide under customary international law. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 161 (Feb. 20).

116. See Rome Statute, *supra* note 5, art. 6.

specific national, ethnical, racial, or religious group.¹¹⁷ Such reading is theoretically allowed by the lack of limitations in the identification of conducts suitable of producing severe physical or mental harm on the victims. The Elements of the Crimes adopted by the ICC¹¹⁸ expressly provide that the relevant “conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment,”¹¹⁹ thus suggesting that relevance may be attributed also to other activities not expressly listed in such exemplification, including those resulting in environmental destruction.

Alternatively, environmental damage could become relevant under Article 6(c) of the Rome Statute, which punishes the deliberate infliction of “conditions of life calculated to bring about [the] physical destruction” of the group.”¹²⁰ In this respect, “conditions of life” is meant to include, without limitation, acts of “deliberate deprivation of resources indispensable for survival”¹²¹ or “systematic expulsion from homes.”¹²² It is then possible for environmental damage to represent the cause of the systematic expulsion of a population from its native territory. In addition, “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction” might also include the worsening of health conditions caused by environmental destruction or degradation.¹²³

The connection between genocide and the impacts of environmental damage is especially evident with respect to the case of certain indigenous communities, characterized by an “intricate and fragile dependence on their natural habitat.”¹²⁴ In these instances, the indigenous people’s dependence on their natural habitat is so profound that “any interference with it would

117. *See id.*

118. *See supra* Part II.C.

119. *See* INT’L CRIMINAL COURT, *supra* note 71, art.6.b element 1 n. 3.

120. *See* Rome Statute, *supra* note 5, art. 6(c).

121. *See* INT’L CRIMINAL COURT, *supra* note 71, art. 6.c element 4 n.4.

122. *Id.*

123. *See* Rome Statute, *supra* note 5, art. 6(c); INT’L CRIMINAL COURT, *supra* note 71, art. 6.c element 4 n.4.

124. *See* R.S. Pathak, *The Human Rights System as a Conceptual Framework for International Environmental Law*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 205, 233 (Edith Brown Weiss ed., 1992).

constitute an assault on their existence.”¹²⁵ For example, the occurrence of a full-scale genocide carried out through the destruction of the environment has been alleged in relation to the treatment received by certain Native Americans tribes. The dumping of toxic wastes in reservations has taken a massive toll on the health and life conditions of many Native Americans,¹²⁶ so much so as to lead some authors to refer to the phenomenon as a real “environmental genocide.”¹²⁷

A significant worsening of the life conditions of indigenous populations has also been provoked by the environmental destruction caused by extractive activities, especially uranium mining and subsequent waste disposal processes. The Navajo tribes in the Four Corners regions¹²⁸ have been exposed to the effects of radiation from uranium exposure ever since the 1940s.¹²⁹ As a result, several studies¹³⁰ have shown how the members of Navajo tribes have been subject to higher rates of “lung cancer, tuberculosis, pneumoconiosis, and other respiratory diseases,” even after 25 years since their last significant exposure.¹³¹ More recently, reference to a full scale “environmental genocide” has been used to

125. *Id.*; see also Orellana, *supra* note 33, at 692 (“[T]he various acts of genocide defined in the Rome Statute permit an interpretation that protects groups whose existence is threatened by environmental degradation.”).

126. See, e.g., Michael J. Lynch & Paul B. Stretesky, *Native Americans and Social and Environmental Justice: Implications for Criminology*, 38 SOC. JUST. 104 (2012); see also Brenden Rensink, *Genocide of Native Americans: Historical Facts and Historiographic Debates*, in 8 GENOCIDE OF INDIGENOUS PEOPLES 15 (Samuel Totten & Robert K. Hitchcock, eds., 2011).

127. See Daniel Brook, *Environmental Genocide: Native Americans and Toxic Waste*, 57 AM. J. ECON. & SOC. 105 (1998). The author maintains that the dumping of toxic waste in reservations is nothing more than a new technique used by the U.S. government and private corporations alike to perpetrate the genocide against Native Americans. He argues that both U.S. government and private companies engaged in waste management have been exploiting the material poverty of Native American tribes, by offering them millions of dollars to host waste facilities in their territories. *Id.* at 106. The unauthorized and illegal dumping of waste taking place on their territory also worsens the situation of Native American tribes. *Id.* at 108; see also Lynch & Stretesky, *supra* note 126, at 114 (stating that the social, economic and environmental injustices affecting Native Americans amount to “a long-term act of genocide”).

128. That is, southwest Colorado, northwestern New Mexico, northeastern Arizona, and southeastern Utah.

129. See Lynch & Stretesky, *supra* note 126, at 112.

130. For a comprehensive summary, see *id.*

131. *Id.* at 112.

refer to the danger posed by fracking chemicals to the lives and health of the members of the Standing Rock Sioux tribe.¹³²

The highlighted connection between environmental damage and genocide, however, seems restricted to a theoretical level. In practice, the cause of environmental damage is not sufficient to constitute, by itself, a conduct relevant for the commission of the crime of genocide. This possibility is faced with an immediate and unassailable obstacle, represented by the subjective element required with respect to genocide. In this respect, Article 6 of the Rome Statute requires that the relevant conduct be carried out “with the intent to destroy” the relevant group as such.¹³³ This direct *mens rea* requirement, however, is considered too restrictive to encompass episodes of environmental damage occurring for the purpose of attaining economic development, such as the ones caused by extractive activities, or caused by negligence.¹³⁴

This does not mean, however, that environmental considerations should not come into play in the prosecution of genocide. Environmental destruction or degradation might be relevant when considered jointly with other actions, which show a clear intent to destroy a national, ethnical, racial, or religious group.

For example, water contamination has been one of the elements considered by the ICC in issuing a second arrest warrant against the Sudanese President Omar Hassan Al Bashir, indicted on the grounds of having committed, among others, genocide against the population of Darfur.¹³⁵ The ICC determined that the acts of contamination of water pumps, together with the forcible transfer and resettlement, had deliberately inflicted on the Fur, Masalit, and Zaghawa tribes in Darfur conditions of life designed to bring

132. See, e.g., *Standing Rock Sioux Pediatrician: Threat from Fracking Chemicals is “Environmental Genocide,”* DEMOCRACY NOW!, (Oct. 18, 2016), https://www.democracynow.org/2016/10/18/standing_rock_sioux_pediaticrician_threat_from [<https://perma.cc/Z3BA-ZVJY>]. Regardless of whether fracking could actually amount to “environmental genocide,” several studies have highlighted the considerable negative impacts that this practice may have on the environment and human health. UNEP has noted that, notwithstanding the proper use of technology, fracking may still entail the risk of air, soil and water contamination, water usage competition, ecosystem damage, habitat and biodiversity impacts, and fugitive gas emissions. See *Gas Fracking: Can We Safely Squeeze the Rocks?*, UNEP (November 2012), https://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?article_id=93 [<https://perma.cc/8JDC-JZZN>].

133. Rome Statute, *supra* note 5, art. 6.

134. See Orellana, *supra* note 33, at 692.

135. Prosecutor v. Al Bashir, ICC-02/05-01/09, Second Decision on the Prosecution’s Application for a Warrant of Arrest (Jul. 12, 2010).

about their physical destruction.¹³⁶ In so doing, it suggested that environmental damage could actually be attributed a limited relevance, in conjunction with other elements, in determining whether genocide has been committed.

2. Crimes Against Humanity

The Rome Statute does not provide for a general and comprehensive definition of “crimes against humanity.” Rather, Article 7 adopts an enumerative approach, stating that any of the behaviors listed therein, if committed “as a part of a widespread or systematic attack directed against any civilian population”¹³⁷ either in times of war or peace,¹³⁸ constitutes a crime against humanity. The article then lists eleven conducts, all reflecting the understanding of the notion of crime against humanity under customary international law.¹³⁹ As with the crime of genocide, Article 7 does not mention conducts of damage or destruction of the natural environment. This should not come as a surprise, considering that the prosecution of crimes against humanity is mainly aimed at ensuring the protection of civilian populations.¹⁴⁰

The protection of the environment might, however, become indirectly relevant when its destruction is used as an instrument to commit one of the crimes listed by the Rome Statute. Environmental destruction could be considered for the purpose of ascertaining the perpetration of the crime under Article 7.1(b) of the Rome Statute.¹⁴¹ This latter statute punishes the conduct of “extermination,” defined as “the intentional infliction of conditions of life . . . calculated to bring about the destruction of part of a population,”¹⁴² thus recalling that same conduct which has already been examined with respect to genocide.¹⁴³

Environmental damage or degradation could also be the instrument used to implement the “[d]eportation or forcible

136. *See id.* ¶¶ 38–40.

137. *See* Rome Statute, *supra* note 5, art. 7.

138. *See* Rodney Dixon, revised by Christopher K. Hall, *Article 7—Chapeau*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 72, at 168, 168.

139. *Id.* at 169; *see also* Rome Statute, *supra* note 5, art. 7.

140. *See* Orellana, *supra* note 33, at 693.

141. Rome Statute, *supra* note 5, art. 7.1(b).

142. *Id.* art. 7.2(b).

143. *See supra* Part III.C.1.

transfer of population.”¹⁴⁴ As specified in the Elements of Crimes,¹⁴⁵ forcible transfer does not necessarily entail the use of force against civilian population. As such, the destruction of the victims’ homeland through environmental degradation (*e.g.*, degradation caused by the systematic dumping of toxic waste or by the spill or leakage of hazardous substances) could represent conduct relevant for the purpose of the crime of forcible transfer of population.

Another possibility is to consider environmental degradation in light of Article 7.1(g),¹⁴⁶ which punishes the crime of persecution. This is defined as the “intentional and severe deprivation of fundamental rights contrary to international law” against any identifiable group.¹⁴⁷ In this respect, the deliberate destruction of natural habitat, and the subsequent denial of access to clean water or food, could represent a “severe deprivation of fundamental rights” for the purpose of the crime of persecution.¹⁴⁸

Lastly, Article 7 sets out a catchall provision, covering all “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”¹⁴⁹ An act is of “similar character” if it presents the same nature and gravity of the conducts listed in Article 7.1.¹⁵⁰ However, no rule has been established in order to determine how the “similarity” requirement should be evaluated in practice, thus leaving the door open to the adoption of a case-by-case approach.¹⁵¹ As such, given the flexibility of this provision, it is

144. Rome Statute, *supra* note 5, art. 7.1(d).

145. See INT’L CRIMINAL COURT, *supra* note 71, art. 7.1.d element 1 n. 12 (specifying that the term “forcibly” refers to any kind of threat of force or coercion, whether caused through “fear of violence, duress, detention, psychological oppression or abuse of power . . . or by taking advantage of a coercive environment”). In particular, other acts of coercion have been identified in death threats and acts of persecution, such as “depriving members of a group of employment, denying them access to schools and forcing them to wear a symbol of their religious identity.” Christopher K. Hall, *Article 7—“Prohibited Movements of Population”* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 72, at 247, 249–50.

146. Rome Statute, *supra* note 5, art. 7.1(g).

147. *Id.* art. 7.2(g).

148. Steven Freeland, *Human Rights, the Environment and Conflict: Addressing Crimes Against the Environment*, 2 INT’L J. ON HUM. RTS. 112, 129 (2005).

149. Rome Statute, *supra* note 5, art. 7.1(k).

150. See INT’L CRIMINAL COURT, art. 7.1.k element 2 n.30.

151. See, *e.g.*, Prosecutor v. Bagilshema, Case No. ICTR 95-1-A-T, Judgment, ¶ 92, (Jun. 7, 2001). Acts deemed similar to the crimes against humanity listed under Article 7 are, for example: (i) forcible transfer of population; (ii) serious physical or mental injury; (iii)

possible to envisage cases in which acts of environmental destruction reach such a nature and gravity so as to be considered “similar” to the conducts relevant under Article 7.¹⁵²

The possibility to prosecute episodes of environmental degradation under the category of crimes against humanity has not been extensively discussed,¹⁵³ although proposals have been advanced in relation thereto. In this respect, several authors have highlighted how the *mens rea* of crimes against humanity would be easier to prove, as only the knowledge that the environmental damage was part of a widespread and systematic attack against the civilian population would be required, rather than the intent required for the perpetration of genocide.¹⁵⁴

In addition, crimes against humanity are susceptible to include activities of a lesser degree of gravity than those required under the crime of genocide. Thus, the category of crimes against humanity appears more suitable to prosecute acts of environmental destruction, such as the performance of extractive activities or the disposal of hazardous wastes, carried out for the purpose of economic development.¹⁵⁵

3. War Crimes

The only explicit mention of the environment in the Rome Statute appears in Article 8.2(b)(iv), under the heading “War Crimes.” This article expressly criminalizes the conduct of “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

biological, medical or scientific experiments; (iv) forced prostitution; (v) other acts of sexual violence; and (vi) acts of sexual violence to and mutilation of a dead body that caused mental suffering to eye-witnesses. See Machteld Boot, revised by Christopher K. Hall, *Article 7—“Other Inhumane Acts,”* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 72, at 230, 231.

152. See Freeland, *supra* note 148, at 129.

153. See Peter Sharp, Note, *Prospects for Environmental Liability in the International Criminal Court*, 18 VA. ENVTL. J. 217, 237 (1999).

154. *Id.*; see also Tara Smith, *Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law*, in THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES 45, 51 (William A Schabas et. al. eds., 2013); Freeland, *supra* note 148, at 129.

155. See Smith, *supra* note 154, at 52.

relation to the concrete and direct overall military advantage anticipated.”¹⁵⁶

This Article is the only section in the Rome Statute where relevance is attributed to the environment in and of itself. Indeed, this provision is essentially “ecocentric”¹⁵⁷ or “biocentric,”¹⁵⁸ meaning that the environment is considered for its intrinsic value, regardless of any relevance that it may have in connection with human interests and activities. This approach is the opposite of genocide or crimes against humanity, where conducts of environmental destruction may become relevant only for the detrimental consequences that they can have on human life and health. Notwithstanding the major shift from the approach adopted for the other crimes under the Rome Statute, Article 8.2(b)(iv) still suffers from several shortcomings, which severely impact its practical effectiveness.¹⁵⁹ The first limitation arises from the fact that the application of this provision is limited to environmental damages caused within the context of an armed conflict. Second, also in the event of armed conflicts, environmental damage will be relevant as a war crime only if it meets significantly high substantive requirements.¹⁶⁰

Article 8 requires that the attack must be “widespread, long-term and severe.”¹⁶¹ If environmental damage does not meet such standards, it will not give rise to a war crime and the individual that caused it will not be subject to criminal responsibility. However, there is one further complication: there is no agreed upon definition—not even in the ICC’s Elements of Crime—of the terms “widespread,” “long-term,” or “severe.”

The most authoritative source on the interpretation of the terms of Article 8 is the 1991 Draft Code on Crimes against the Peace and

156. Rome Statute, *supra* note 5, art. 8.2(b)(iv). The wording used by the Rome Statute is identical to the one contained in Article 35.3 of the Additional Protocol I to the Geneva Convention, which prohibits the use of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

157. See Matthew Gillett, *Environmental Damage and International Criminal Law*, in SUSTAINABLE DEVELOPMENT, INTERNATIONAL CRIMINAL JUSTICE, AND TREATY IMPLEMENTATION 73, 78 (Sébastien Jodoin & Marie-Claire Cordonier Segger eds., 2013).

158. See Stephen McCaffrey, *Criminalization of Environmental Protection*, in INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS, *supra* note 31, at 1013, 1019.

159. See Orellana, *supra* note 33, at 694.

160. *Id.*

161. Rome Statute, *supra* note 5, art. 8.2(b)(iv).

Security of Mankind adopted by the ILC,¹⁶² which punishes “willful and severe damage to the environment.”¹⁶³ In this respect, the ILC specified that the three main characteristics of the environmental damage referred to, respectively, “the extent or intensity of the damage, its persistence in time, and the size of the geographical area affected by the damage.”¹⁶⁴ The ILC also specified that the word “long-term” should be interpreted as referring to “the long-lasting nature of the effects and not the possibility that the damage would occur a long time afterwards.”¹⁶⁵ The commentary given by the ILC, however, does not provide any clear and objective parameter to determine when, exactly, environmental damage may become relevant as a war crime.

The situation is further complicated by the circumstance that Article 8.2(b)(iv) adds another substantive condition for prosecution, by requiring that the attack be contrary to the principle of proportionality.¹⁶⁶ The attack on the environment, therefore, must be clearly excessive in relation to the concrete and direct overall military advantage to be anticipated.

The vagueness of the substantive requirements provided by the Rome Statute considerably prejudices the possibility to seek indictment and successful prosecution for environmental damages caused in the context of an armed conflict.¹⁶⁷ The lack of clarity and specificity of the provision also make it difficult to determine which acts of environmental destruction during wartimes may be excluded from prosecution under the Rome Statute. For example, the environmental damage caused during the Gulf War, when Iraq intentionally bombed over 700 Kuwaiti oil wells and subsequently spilled millions of barrels of oil, is generally thought to fall within the scope of applicability of Article 8.2(b)(iv) of the Rome Statute.¹⁶⁸ However, such conclusion is not universally accepted, as certain authors have doubts as to whether the damage caused by

162. See Gillett, *supra* note 157, at 78.

163. Int'l Law Comm'n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/46/10, at 97 (1991).

164. *Id.* at 107.

165. *Id.*

166. Rome Statute, *supra* note 5, art. 8.2(b)(iv).

167. See Freeland, *supra* note 148, at 129–30; Smith, *supra* note 154, at 55; Sharp, *supra* note 153, at 241–42.

168. See Sharp, *supra* note 153, at 242; see also PEREIRA, *supra* note 38, at 120–21.

Iraq satisfies the “long term” and “severe” requirements provided under international law.¹⁶⁹

D. Conclusions

As anticipated at the beginning of this Part, determining the treatment of environmental crimes under international law is not an easy task. In the absence of a general agreed upon definition of the terms setting out the material and mental elements of such crimes, the analysis necessarily requires a case-by-case approach. In turn, this approach requires examining all conducts of environmental destruction or degradation provided under international law, so as to determine whether any of them could be considered as a “crime under international law.”¹⁷⁰

Such analysis has shown that conduct provided under international environmental law treaties (*e.g.*, CITES, Montreal Protocol. etc.) are better qualified as “transnational crimes.” They are qualified this way because the ultimate source of criminalization and prosecution lays not in the international legal framework, but in the domestic law of each State party to the relevant convention.¹⁷¹ Only the conduct of environmental destruction and degradation within the description of the core crimes provided under the Rome Statute could be properly qualified as “environmental crimes under international law.” Thus, in light of the importance that the Rome Statute grants to the environment, the space that “environmental crimes” occupy within the international criminal law system is extremely limited.¹⁷²

IV. ENHANCING ENVIRONMENTAL PROTECTION UNDER INTERNATIONAL CRIMINAL LAW: FUTURE DEVELOPMENTS

The above analysis shows that the space for the criminalization of conducts resulting in the destruction of the environment under international criminal law is extremely restricted. For the most part, international environmental law delegates the criminal protection of the environment to the State parties to multilateral

169. See KAREN HULME, *WAR TORN ENVIRONMENT: INTERPRETING THE LEGAL THRESHOLD* 170–75 (2004).

170. See *supra* Part III.A.

171. See *supra* Part III.A.

172. See *supra* Part III.C.

environmental treaties. The crimes thus prosecuted are, in fact, national crimes, regardless of the fact that they require international cooperation for their prevention and punishment.

As for the protection of the environment afforded by the Rome Statute, it has been correctly noted that it “is not an environmental document.”¹⁷³ Limited relevance is attributed to the environment exclusively within the context of the core crimes falling under the jurisdiction of the ICC. However, on the one side, the strict substantive requirements provided under the Rome Statute, in relation to both the material description and the mental element of the core crimes, make it extremely difficult to successfully bring prosecution for episodes of environmental destruction within the context of genocide, crimes against humanity, and war crimes.¹⁷⁴ On the other side, with the exception of Article 8.2(b)(iv), the limited consideration that the Rome Statute grants to the environment depends exclusively on the circumstance that environmental destruction is used as an instrument for the perpetration of genocide or crimes against humanity.¹⁷⁵

The lack of attention of international criminal law with respect to episodes of environmental destruction is disheartening, especially in light of the catastrophic consequences that the deterioration of environmental conditions may cause not only on human life and health but also on the delicate balance that characterizes the Earth as our global ecosystem. Awareness of the shortcomings of international criminal law with respect to the protection of the environment has, however, grown in recent years. International organizations and civil society representatives are clearly pushing towards a reformation of the system, so as to expand the scope of international criminal law beyond its current limits and to allow the prosecution of conducts resulting in environmental destruction.¹⁷⁶

The publication of the OTP’s Policy Paper seems to fit into these general efforts of reformation. This Part first discusses the impact of the Policy Paper on the expansion of the current scope of the ICC’s jurisdiction, so as to include the prosecution of environmental crimes. It subsequently examines the possibility to

173. See Sharp, *supra* note 153, at 218.

174. See *supra* Part III.C.

175. See *supra* Part III.C.1 and Part III.C.2.

176. See, e.g., Reinhold Gallmetzer, *Prosecute Climate Crimes*, UN ENV’T (March 2017), <http://web.unep.org/ourplanet/march-2017/articles/prosecute-climate-crimes> [<https://perma.cc/J2ET-APJJ>].

extend the ICC's jurisdiction through customary international law and the amendment of the description of the "core crimes" as currently provided under the Rome Statute. Lastly, this Part examines the proposals of reform that have been advanced by legal scholars advocating for the introduction of "ecocide" as a fifth core crime falling under the jurisdiction of the ICC.¹⁷⁷

A. The Impact of the Policy Paper on the ICC's Jurisdiction

The explicit aim of the Policy Paper is to provide the rules and principles guiding "the exercise of prosecutorial discretion in the selection and prioritization of cases for investigation and prosecution."¹⁷⁸ The Policy Paper fits into the general legal framework governing the OTP, as set out by the Rome Statute and other applicable law provisions. Reference is made, in particular, to the ICC's Rules of Procedure and Evidence,¹⁷⁹ which provide the procedural framework within which proceedings before the ICC must be conducted. Reference is also made to the internal regulations and policies adopted by the OTP itself¹⁸⁰ and, namely (i) the Regulations of the Office of the Prosecutor (the "OTP Regulations") and (ii) the policy papers issued by the OTP on the basis of the OTP Regulations, clarifying the scope and the modalities of application of the OTP Regulations themselves. Among the various policy papers issued by the OTP from time to time, particularly important for the purpose of this paper is the Policy Paper on Preliminary Examinations,¹⁸¹ which sets out the

177. See *infra* Part IV.B.2.

178. See OFFICE OF THE PROSECUTOR, *supra* note 1, at 3.

179. Assembly of State Parties to the Rome Statute of the International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, at 10 (Sept. 3-10, 2002) [hereinafter Rules of Procedure and Evidence].

180. The legal basis for the issuance, by the OTP, of internal regulations and policies has been identified in both the Rome Statute, under Article 42.2, and Rule 9 of the Rules of Procedure and Evidence. See Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, reg. 1.1 (Apr. 23, 2009). With respect to the former, Article 42.2 provides, among others, that "[t]he Prosecutor shall have full authority over the management and administration of the Office," thus implicitly serving as a basis for the exercise of the regulatory powers of the Prosecutor itself. Rome Statute, *supra* note 5, art. 42.2. Rule 9, instead, expressly provides for the power of the Prosecutor to "put in place regulations to govern the operations of the Office." Rules of Procedure and Evidence, *supra* note 179, at 23.

181. See OFFICE OF THE PROSECUTOR INT'L CRIMINAL COURT, POLICY PAPER ON PRELIMINARY EXAMINATIONS (2013) [hereinafter POLICY PAPER].

criteria that the OTP must follow in assessing whether to initiate an investigation.¹⁸²

1. Independence, Discretion and the Assessment of Gravity

The Policy Paper has a direct impact on how the OTP's functions should be carried out, including how the OTP should evaluate the gravity requirement to be satisfied for the purpose of prosecuting a crime falling under the ICC's jurisdiction.

The framework created by the interaction among the different sources of law applicable to the OTP centers on the fundamental principle of independence,¹⁸³ which informs the prosecutorial action in all of its stages. The main implication of the substantial independence characterizing the OTP is the recognition of the wide discretion that it can exercise at both the investigation and the prosecution stage of the proceedings before the ICC.

The exercise of prosecutorial discretion is, obviously, not unlimited, as it still has to comply with the substantive and procedural limitations provided under the Rome Statute. The most fundamental restraint arises from the subject matter of the ICC's jurisdiction.¹⁸⁴ The powers of investigation and prosecution of the OTP are necessarily restricted to situations and cases in which only core crimes provided under the Rome Statute appears to have been committed.¹⁸⁵ Beyond this substantial limitation, and

182. *Id.* at 2.

183. In this respect, Article 42.1 of the Rome Statute expressly provides that the OTP "shall act independently as a separate organ of the Court," responsible for carrying out activities of investigation and prosecution, and that its members "shall not seek or act on instructions from any external source," with respect to the selection and prioritization of specific cases, whether to proceed or not with full investigations or prosecution, or the modalities according to which investigations should be carried out. *See* Rome Statute, *supra* note 5, art. 42.1; *see also* Morten Bergesmo & Frederik Harhoff, *Article 42—The Office of the Prosecutor*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 72, at 971, 973–74.

184. In addition to limitations arising from the subject matter jurisdiction of the ICC, it is also important to recall those arising from the temporal jurisdiction of the Court, *see* Rome Statute, *supra* note 5, art. 11, and its jurisdiction *ratione personae*, *see id.* art. 12.

185. The Rome Statute distinguishes between "situations" and "cases," depending on the stage in which the action of the OTP is required. Situations usually are considered at the very first stage of the process before the ICC, i.e. the referral stage, when the Prosecutor receives information on events in which crimes within the jurisdiction of the ICC might have been committed. There are currently 10 situations under investigation at the ICC, referred either by the UN Security Council (i.e. situation in Darfur, Sudan; situation in Libya) or by a State (i.e. situation in the Central African Republic; situation in Uganda; situation in the Democratic Republic of Congo) or in relation to which investigations have been initiated by

in addition to other procedural restrictions imposed by the Rome Statute to the Prosecutor's activities,¹⁸⁶ the exercise of prosecutorial discretion is also constrained by the assessment of the gravity requirement, to be carried out following strict guidelines.

The Rome Statute references the element of gravity multiple times. Indeed, the Preamble clearly stresses the need for "the most serious crimes of concern to the international community as a whole" not to go unpunished.¹⁸⁷ In addition, gravity is one of the main elements assessed by: (a) the Court, in determining whether a case is admissible for prosecution pursuant to Article 17.1(d) of the Rome Statute¹⁸⁸ and (b) the Prosecutor, in determining whether to initiate an investigation, either under Article 15.3 or under Article 53 of the Rome Statute.¹⁸⁹ In this case, the Prosecutor will have to

the OTP *motu proprio* (i.e. situation in Georgia; situation in Cote d'Ivoire; situation in Kenya). If, after having investigated a situation, the Prosecutor determines that there is a reasonable basis to believe that a crime within the jurisdiction of the ICC has actually been committed, then a case arises, which will be subject to further investigations by the Prosecutor. Needless to say, within a given situation, there might be more than one case concerning the commission of a core crime under the Rome Statute. As it has been noted, however, the line between such situations and cases is not always clear, as it does not make sense to define a situation in the absence of potential cases relevant for the ICC's jurisdiction. See William Schabas, *Selecting Cases and Charging Crimes*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 365, 367 (Carsten Stahn ed. 2015).

186. For example, procedural limitations are imposed at the referral stage, depending on the subject informing the Prosecutor on the existence of a situation deserving investigation. In this respect, information on a situation relevant under the Rome Statute may be provided through a referral by: (a) the Security Council, (b) a State, or (c) any other source, in which case the Prosecutor shall initiate investigations *motu proprio*. See Rome Statute, *supra* note 5, art. 13–14. In this latter case, the exercise of prosecutorial discretion in the initiation of the investigation is subject to strict substantive and procedural safeguards, as the Prosecutor must: (i) analyze the seriousness of the information received by external sources, in order to determine whether there is a reasonable basis for investigation, see Rome Statute, *supra* note 5, art. 15.2–3, and (ii) if it determines that there is a reasonable basis for investigation, submit to the Trial Chamber a request for authorization of an investigation, see Rome Statute, *supra* note 5, art. 15.3.

187. *Id.* recital 4.

188. See *id.* art. 17.1(d). In addition to the compliance with the gravity requirement, the admissibility of a case is subject to compliance with: (a) the principle of complementarity, meaning that the case will be inadmissible if the same is already under investigation or is being prosecuted by a State having jurisdiction, and (b) the principle of *ne bis in idem*, meaning that the case will be inadmissible if the person responsible has already been tried for the relevant crime. *Id.* art. 17.1(a)–(c).

189. See *id.* art. 15.3. This article does not explicitly reference gravity. However, Rule 48 of the Rules of Procedure and Evidence provides that, in determining whether there is a reasonable basis to proceed with an investigation *motu proprio*, the Prosecutor shall consider the elements provided under Article 53.1, including the gravity requirement in its double layer further described. See Article 48, Rules of Procedure and Evidence, *supra* note 179. It

carry out a double evaluation of the gravity standard, first as an element of admissibility under Article 17(d), as referenced by Article 53.1(b)¹⁹⁰ and, subsequently, as a standalone requirement under Article 53.1(c).¹⁹¹

In all of the cases mentioned above, gravity must be evaluated by taking into account the same elements. Regulation 29 of the OTP Regulations provides generally that, in assessing the gravity for the purposes of initiating an investigation under Article 15 and Article 53 of the Rome Statute, the Prosecutor shall consider, among others: (a) the scale, (b) the nature, (c) the manner of commission, and (d) the impact of the potential crimes.¹⁹² The weight and consideration to be attributed to each of these elements has been further specified by the OTP in the Policy Paper on Preliminary Examinations. In this respect, the Prosecutors expressly stated that the standards for the assessment of gravity as a requirement for the initiation of an investigation should be applied identically in the assessment of gravity within the context of an admissibility evaluation.¹⁹³

With respect to the specific elements to be considered in the assessment of gravity and their evaluation, the Policy Paper on Preliminary Examinations further provides that: (i) the scale of the crime must be determined in light of, *inter alia*, the number of the victims and the extent of the damage caused by the crime, including from a temporal and geographical perspective;¹⁹⁴ (ii) the nature of the crime refers to the specific elements of each relevant offense (e.g., killings, persecutions, crimes involving sexual violence, or crimes against children);¹⁹⁵ (iii) the manner of commission may be evaluated, *inter alia*, on the basis of “the means employed to execute the crime, the degree of participation and intent of the perpetrator . . . the extent to which the crimes were systematic or result from a plan or organized policy . . . and

appears, therefore, that there is no substantial difference in the evaluation to be carried out by the Prosecutor in determining whether to initiate an investigation. Indeed, the elements to be assessed are identical both under Article 53.1 and under Article 15.3, which, however, provides for additional procedural guarantees in light of the fact that, in this case, an investigation is initiated by the Prosecutor *motu proprio*.

190. *See id.* art. 53.1(b).

191. *See id.* art. 53.1(c).

192. Regulations of the Office of the Prosecutor, *supra* note 180, reg. 29.2.

193. *See* POLICY PAPER, *supra* note 181, at 15.

194. *Id.*

195. *Id.*

elements of particular cruelty;¹⁹⁶ and (iv) the impact of the potential crimes committed in a situation should include the consideration of the suffering endured by the victims and their increased vulnerability.¹⁹⁷

The analysis set out above, therefore, shows that the exercise of the OTP's discretion in the investigation and prosecution of situations and cases is strictly channeled, first of all, by the provisions of the Rome Statute and the ICC Rules of Procedure and Evidence. In addition, the OTP's discretion must also comply with its own internal regulations and policy, so as to ensure "clarity and predictability regarding the manner in which [the OTP] applies the legal criteria set out in the [Rome] Statute."¹⁹⁸

2. The Policy Paper's Impact

The Policy Paper fits squarely into the framework described in the previous Part IV.1. In particular, it builds on the Policy Paper on Preliminary Examinations in order to specify how, after having investigated a specific situation, all of the cases identified within the same are to be selected and prioritized for the purpose of further investigation and prosecution.¹⁹⁹ In this respect, the selection and prioritization of cases is to be carried out in light of three criteria, the gravity of the crimes allegedly committed being the most important for the purpose of the analysis carried out in this Note.²⁰⁰

In the assessment of gravity, the Prosecutor shall apply the standards provided under Regulation 29 of the OTP Regulations, as interpreted pursuant to the Policy Paper on Preliminary Examinations.²⁰¹ However, the Policy Paper significantly intervenes on the consideration to be attributed to the manner of commission and the impact of the crimes, as criteria to be considered in the assessment of gravity. More specifically, the Policy Paper provides that: (i) the manner of commission of a crime, for the purpose of determining its gravity, "may be assessed in light of, *inter alia*, the means employed to execute the crime . . . including . . . crimes

196. *Id.* at 15–16.

197. *Id.* at 16.

198. *Id.* at 5.

199. See OFFICE OF THE PROSECUTOR, *supra* note 1, at 3–4.

200. The other criteria considered by the Policy Paper are, respectively: (a) "the degree of responsibility of the alleged perpetrator[];" and (b) the charges to be brought against the responsible individual. *Id.* at 12.

201. *Id.* at 13.

committed by means of, or resulting in, the destruction of the environment;²⁰² while (ii) “[t]he impact of the crime may be assessed in light of, *inter alia*, . . . the environmental damage inflicted on the affected communities.”²⁰³ In this respect, the Prosecutor is required to prioritize the investigation and prosecution of crimes that are committed through, or that result in, the destruction of the environment, including that caused by the illegal exploitation of natural resources.²⁰⁴

It follows, therefore, that, if one of the core crimes already falling within the jurisdiction of the ICC is committed through environmental destruction, or if the environmental destruction caused by the perpetrator causes a significant distress on the victim, then the investigation and prosecution of such crime should be given precedence over the investigation and prosecution of other crimes not entailing episodes of environmental degradation.

The Policy Paper clearly shows the OTP’s intention to focus on the prosecution of crimes entailing the destruction of the environment. However, the consequences that such intention could have in practice should not be overstated. Indeed, it is important to stress that the Policy Paper is merely an internal document, aimed at guiding the exercise of the OTP’s discretion in the selection and prosecution of cases. It does not in any way alter the ICC’s current jurisdiction, which remains limited to the prosecution of the core crimes.²⁰⁵

Notwithstanding the issuance of the Policy Paper, the relevance attributed by the Rome Statute to episodes of destruction of the environment, illegal exploitation of natural resources or illegal dispossession of land,²⁰⁶ therefore, remains limited to cases in which these activities represent the means or instrument to commit genocide, crimes against humanity, or the war crime under Article 8.2(b)(iv).

B. Expanding the Consideration of Environmental Crimes

Regardless of its limited practical impact, the Policy Paper certainly has the merit of reinvigorating and re-launching the legal

202. *Id.* at 13–14.

203. *Id.* at 14.

204. *Id.*

205. *See supra* Part III.C.

206. *See* OFFICE OF THE PROSECUTOR, *supra* note 1, at 5.

discourse of the treatment that the environment receives under the current framework of international criminal law, highlighting a pressing need of reformation to ensure a more effective criminal protection for episodes of environmental destruction. Several theoretical options could be advanced and examined in order to achieve this result. This subpart focuses on (i) the role that international customary law may have in redefining core crimes as currently designed, and (ii) the possibility to introduce a crime of “ecocide” subject to the jurisdiction of the ICC.

1. The Role of Custom in Changing the Scope of Core Crimes

A first approach could rely on Article 10 of the Rome Statute, which expressly provides that the description of the crimes as provided therein is without prejudice to any different definition that such crimes might have under customary international law.²⁰⁷

On the basis of this provision, it is possible to argue that a crime could actually have two entirely different descriptions, one arising from customary international law and the other provided under the Rome Statute. While the latter would remain set and unchanged unless an amendment to the Statute is adopted, the former could evolve over time, due to changes in State practice and *opinio juris* of the members of the international community. It could then be possible to envisage a customary development of new definitions of “genocide,” “crimes against humanity,” and “war crimes,” all also considering criminal conducts of environmental degradation or destruction.

Such an approach, however, appears destined to remain confined to theoretical discussions. Setting aside the inherent difficulty to ascertain the development of customary international law,²⁰⁸ leaving the definition of criminal conducts to custom would raise serious concerns, especially with respect to the compliance of such definitions with the principle of legality, which requires criminal offenses to be described in clear and specific terms.

In addition, even assuming that the issues arising from the compliance with the principle of legality could be overcome, and thus supposing that the newly-developed customary norm provided for a detailed and unambiguous description of the relevant

207. See *supra* Part II.C.

208. As this would require an assessment of the existence of both uniform State practice and *opinio juris*.

criminal conduct, another insurmountable procedural issue would surface. Indeed, the jurisdiction of the ICC would remain limited to the prosecution of crimes as currently described under the Rome Statute, with the inevitable consequence that there would be no international tribunal with the competence to try and prosecute new international environmental crimes arising from customary international law.

2. The Case for Ecocide

In light of the insuperable challenges faced when trying to attribute relevance to environmental damage and degradation within the current definition of the core crimes under the Rome Statute, some authors have suggested abandoning the wording “environmental crimes” to embrace the notion of “ecocide,” to be considered as the fifth core crime against peace falling under the ICC’s jurisdiction.²⁰⁹

The concept of “ecocide” is not new in legal discourse, as it was first used to refer to episodes of massive destruction of the environment during wartimes.²¹⁰ It didn’t take long to realize, however, that in the vast majority of cases severe, long-term, and irreversible damage to the natural environment was caused not by military activities in times of war, but rather, by lawful, albeit highly hazardous, activities carried out during peacetime.²¹¹

The thrust for criminalization of ecocide became more pressing after the occurrence of major environmental disasters in the performance of lawful and ultra-hazardous activities. Nuclear accidents,²¹² oil spills,²¹³ and major industrial incidents²¹⁴ all

209. See POLLY HIGGINS, ERADICATING ECOCIDE 61 (2d ed. 2015).

210. See generally *supra* Part III.C.3.

211. See PEREIRA, *supra* note 38, at 116–17; see also Ludwik A. Teclaff, *Beyond Restoration—The Case of Ecocide*, 34 NAT. RES. J. 933, 934 (1994).

212. This is the case of the Chernobyl incident in 1986 or the Fukushima incident in 2011. For more information on the Chernobyl accident, see IAEA ET AL., *CHERNOBYL’S LEGACY: HEALTH, ENVIRONMENTAL AND SOCIO-ECONOMIC IMPACTS AND RECOMMENDATIONS TO THE GOVERNMENTS OF BELARUS, THE RUSSIAN FEDERATION AND UKRAINE*, (2d ed. 2003-2005). For more information on the Fukushima incident, see Yeo Hoon Park, *International Legal Implications of the Fukushima Daiichi Nuclear Power Plant Incident*, 1 ASIAN L. J. 2 (2011).

213. Including, for example, the Torrey Canyon oil spill in 1967, the Amoco Cadiz disaster in 1978, the Exxon Valdez spill in 1989 and, more recently, the Deepwater Horizon disaster in 2010. For an overview of these incidents and their legal implications, see Luisa Rodriguez-Lucas, L., *Compensation for Damage to the Environment per se under International Civil Liability Regimes*, in *LA MISE EN OEUVRE DU DROIT DE L’ENVIRONNEMENT* (Sandrine Maljean-Dubois & Lavanya Rajamani, 2011).

highlight the potential irreversible consequences that environmental damages could produce on Earth's ecosystems and call for the adoption of measures, including criminal prosecution, to prevent and react to the massive scale destruction of the environment.

In this context, members of academia advanced new definitions of the notion of "ecocide" in order to cover all potential environmental damages arising from lawful activities carried out by corporations. For example, "ecocide" has been interpreted to mean "the extensive destruction, damage to 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."²¹⁵ Direct and indirect sources of ecocide have been identified in several ultra-hazardous activities, such as nuclear testing, extractive industries, dumping of hazardous chemicals and waste, emission of pollutants, and war.²¹⁶ At the same time, attempted definitions of "ecocide" have been accompanied by requests for criminalization of such conduct before the ICC, on the grounds that massive-scale, irreversible, and widespread destruction of the natural environment amounts to "a crime against peace" and security of mankind.²¹⁷

While the notion of "ecocide" is remarkable in that it focuses on the damage suffered by the environment in and of itself, regardless of the activity that caused it, there are several objections that can be raised with respect to its criminalization.

The first challenge concerns the lack of agreement with respect to the *mens rea* required for the commission of the crime. In this respect, it has been suggested to construe ecocide as a crime of strict liability, not requiring proof of either intent or negligence by part of the responsible individual,²¹⁸ in light of the fact that many environmental disasters are committed without intention and are

214. For example, the Bhopal disaster in India, in 1984. See Edward Broughton, *The Bhopal Disaster and its Aftermath: A Review*, ENVTL. HEALTH, May 2005, at 1.

215. HIGGINS, *supra* note 209, at 62–63. A similar proposal defines "ecocide" as "the significant damage to or destruction of an ecosystem to such an extent that peaceful enjoyment of a part of the planet will be substantially diminished." Sailesh Mehta & Prisca Merz, *Ecocide—A New Crime Against Peace?*, 17 ENVTL. L. REV. 3, 3 (2015).

216. HIGGINS, *supra* note 209, at 63.

217. *Id.* at 62; see also Jacqueline Hellman, *The Fifth Crime Under International Criminal Law: Ecocide?*, in REGULATING CORPORATE CRIMINAL LIABILITY 273 (Dominik Brodowski et al. eds., 2014); Mehta & Merz, *supra* note 215, at 3.

218. See HIGGINS, *supra* note 209, at 68–69.

mostly the result of accidents. However, it cannot be ignored that the whole criminal system created by the Rome Statute is centered on the subjective element of “intent” and that it appears highly unlikely that States would be willing to abandon the intention requirement, or at least the recklessness requirement, in favor of strict liability.²¹⁹

Doubts have also been raised with respect to the ascertainment of the degree of causation between the activity allegedly causing the damage, and the damage itself, for the purpose of attaching criminal liability. Especially in the context of certain episodes of environmental destruction,²²⁰ it might be extremely difficult, if not impossible, to establish causation between the relevant human activity and the damage provoked with a sufficient degree of certainty, so as to impose criminal responsibility.²²¹

Additionally, not all environmental damages are so extensive, grave, and irreparable, such that the damages severely diminish the peaceful enjoyment of the inhabitants of the affected territory. Accordingly, the introduction of the crime of “ecocide” could potentially leave unpunished grave episodes of environmental damages that are not so widespread and serious.²²²

Other doubts concerning the possibility to criminalize ecocide arise from the circumstance that international law is already evolving in order to address the consequences of environmental damage arising from lawful activities, albeit through modalities other than the establishment of criminal liability for crimes under international law. Several international conventions already provide for the States’ obligations to criminalize the performance of lawful activities not in compliance with the rules and the standards set out under international law,²²³ thus showing a clear

219. See PEREIRA, *supra* note 38, at 118.

220. This is the case of environmental destruction brought about by climate change, which are caused by a plurality of interrelated human activities.

221. On this topic, see Geoff Gilbert, *International Criminal Law is not a Panacea—Why Proposed Climate Change ‘Crimes’ Are Just Another Passenger on an Overcrowded Bandwagon*, 14 INT’L CRIM. L. REV. 551, 555–56 (2014).

222. See PEREIRA, *supra* note 38, at 118 (Noting that “most cases of environmental damage are not sufficient to destroy the planet as a whole; rather it is the accumulation of different acts of environmental damage and pollution that endangers the life in the planet.”).

223. For example, the 1973 Convention for the Prevention of Pollution from Ships, as amended by its 1978 Protocol, expressly provides that any violation of the requirements set forth therein “shall be prohibited and sanctions shall be established therefor under the law

preference for criminalization through the establishment of transnational crimes.²²⁴

There is, however, a more compelling reason to rule out the possibility to criminalize ecocide. The inclusion of ecocide within the category of core crimes under the ICC's jurisdiction would require a significant amendment to the Rome Statute and, at a prior stage, the general agreement between the members of the international community on the existence and the definition of such crime. Such agreement, however, appears unlikely in light of the current framework of international criminal law.

V. CONCLUSION

In recent decades, the need to ensure an effective and comprehensive protection of the environment has only become more pressing. The significant efforts that have been made by the international community have led to the adoption of conventions and treaties aimed at, among others, ensuring the protection of the global climate, the reduction of pollution, and the protection of biodiversity.

These remarkable developments in the field of international environmental law, however, have not yet reached the traditional system of international criminal law. Indeed, the ICC remains concerned exclusively with the prosecution of the core crimes already subjected to its jurisdiction, where the space attributed to the criminalization and prosecution of conducts resulting in environmental damage is extremely limited. The issuance of the Policy Paper does not alter the current framework, as it merely sets out internal guidelines governing the exercise of prosecutorial discretion in the selection and prioritization of cases falling within the ICC's jurisdiction.

Several attempts have been made to increase the extent of the consideration attributed to environmental destruction under international environmental law, one of them being the development of a new crime of "ecocide." For the time being, however, such attempts appear to have only theoretical

of the Administration of the ship concerned wherever the violation occurs." International Convention for the Prevention of Pollution from Ships, *supra* note 111, art. 4.1.

224. See *supra* Part III.B.; *supra* note 111.

importance, mainly because of the high level of uncertainty and disagreement surrounding the field.

If this is the scenario that we are facing right now, one cannot but wonder if it is even possible to refer to “environmental crimes” under international criminal law. Indeed, the approach favored by international law is to delegate prosecution of conducts entailing the destruction of the environment to the national criminal system of each State, while directly seeking punishment of only “the most serious crimes of international concern”²²⁵ that constitute an attack against the peace and security of mankind.

While there is no doubt that, in the future, ecocide could be included in such group of crimes, the time is not yet ripe for such change to occur. As such, environmental protection will still be delegated to the criminal law of each State and will suffer from the inevitable political manipulation that will ensue.

225. See Rome Statute, *supra* note 5, art. 1.