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Working Title: Addressing Environmental Harm in Conflicts within Africa: Scope for International Criminal Law?

By

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Abstract

International criminal law has flourished in recent years, with the emergence of several international criminal tribunals and developing a substantial body of jurisprudence, substantive and procedural rules but there is no existing international criminal tribunal with special jurisdiction over environmental crimes. While several international criminal law scholars have questioned the utility of international criminal law in relation to environmental harm, this paper argues that international criminal law has an important role in environmental protection. Various international criminal tribunals have in the past been either reluctant to investigate major environmental and cultural crimes or have adopted a cautious approach in the interpretation of these crimes. However, in 2016, the Office of the Prosecutor in International Criminal Court (ICC) released a new policy which broadened the focus of its investigations to give particular consideration to crimes relating to the 'destruction of the environment', 'exploitation of natural resources' and the 'illegal dispossession' of land. This paper has two key parts. The first undertakes a careful analysis of the jurisprudence from various international criminal tribunals to determine the extent to which they addressed environmental harm in conflicts within the African region. This is followed by an examination of the *Protocol on the Statute of the African Court of Justice and Human Rights* (Malabo Protocol) and its potential to enshrine international criminal accountability for damage to the environment. At the core of this paper is the question to what extent can international criminal law accommodate and effectively address environmental crimes committed within the context of armed conflicts in Africa? The paper contends that international criminal law provides a potential means for addressing environmental harm indirectly through progressive interpretation of genocide, war crimes and crimes against humanity, and directly within Africa through the provisions of the Malabo Protocol.

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I. Introduction

The effects of modern war on biodiversity and the environment has been increasingly well-documented.[1] In Africa, illegal exploitation of natural resources such as oil, diamonds, timber and minerals have fuelled several conflicts in the region including in Sierra Leone, Liberia, Congo and Sudan.[2] The conflict in the Democratic Republic of Congo (DRC) between 1995 and 2006 resulted in the decimation of the elephant and hippopotamus populations slaughtered by the Mai Mai rebel militia on an industrial scale.[3] The impact of armed conflicts in DRC and Central African Republic between 1970s-1990s were so severe on the elephant populations that the previous estimated population of about 10,000 is now reported to have essentially disappeared.[4] Some of the negative environmental impact of conflicts in Africa include deforestation, loss of wildlife and biodiversity, arms production pollution, and soil and water pollution.[5] UN Security Council Resolution 1856 on the *Situation Concerning the Democratic Republic of Congo* recognised the link between illegal exploitation of natural resources and the proliferation and trafficking of arms as key factors exacerbating conflicts in the Great Lake regions of Africa.[6] In 2009, a study on the impact of armed conflicts on the environment by the United Nations Environment Programme, concluded that lack of governance is a major reason why armed conflicts have continued to cause significant damage to the environment.[7] As a result of armed activities 23 national parks and nature reserves in Africa have been listed by UNESCO to be in danger.[8] There is, therefore, a need to address environmental crimes in the context of armed conflict in Africa, given the erga omnes obligation that arises from some environmental crimes.[9]

International criminal law has flourished in recent years, with the emergence of several international criminal tribunals and developing a substantial body of jurisprudence, substantive and procedural rules. It has been able to achieve a track record of application to non-international armed conflicts in Africa with successful convictions entered for crimes including

[1] Michael J. Lawrence et al., *The Effects of Modern War and Military Activities on Biodiversity and the Environment*, 23(4) Environmental Reviews 443 (2015).
[2] In its Judgment on the *Lubanga* Case, the ICC determined that the exploitation of natural resources in the Itura region fanned the flames of the armed conflict in the DRC. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC- 01/ 04- 01/ 06- 2842, Judgment Pursuant to Article 74 of the Statute (March 14, 2012); See also Rene L. Beyers et al., *Resource Wars and Conflict Ivory: The Impact of Civil Conflict on Elephants in the Democratic Republic of Congo - The Case of the Okapi Reserve*, 6(11) PLoS ONE (2011); Janet Nackoney et al., *Impacts of Civil Conflict on Primary Forest Habitat in Northern Democratic Republic of the Congo 1990–2010*, Biol. Conserv. (2014), https://langint.pri.kyoto-u.ac.jp/ai/intra_data/JanetNackoney/NackoneyJ2014-BC.pdf
[3] Kevin Bales, *Blood and Earth: Modern Slavery, Ecocide, and the Secret to Saving the World*, 39-41 (2016).
[4] U. C. Jha, *Armed Conflict and Environmental Damage*, 103 (2nd ed. 2014).
[5] Negasi Solomon et al., *Environmental Impacts and Causes of Conflict in the Horn of Africa: A Review*, 177 Earth-Science Review 284-290 (2018); Rene L. Beyers et al., *Resource Wars and Conflict Ivory: The Impact of Civil Conflict on Elephants in the Democratic Republic of Congo - The Case of the Okapi Reserve*, 6(11) PLoS ONE (2011).
[6] See United Nations Security Council, *Resolution 2136 - Democratic Republic of* Congo (30 January 2014) 2, UN Doc S/RES/2136 (2014).
[7] United Nations Environmental Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, 8, (2009).
[8] See UNESCO website, at <http:// whc.unesco.org/ en/ danger/ > accessed 4 July 2020.
[9] See Ulrich Beyerlin & Thilo Marauhn, *International Environmental Law*, 282-289 (1st ed. 2011).

war crimes, crimes against humanity and genocide by the ICC, ICTR and SCSL.[10] However, there is no existing international criminal tribunal with special jurisdiction over environmental crimes. The framers of the ICC Statute limited the scope of the court's jurisdiction to genocide, war crimes and crime against humanity. According to Frédéric Mégret, some of the impediments to the emergence of an international environmental crime include the nature of the context (international Law), the nature of the protected interest (environment) and the nature of the project (criminal law).[11] While many sympathise with the need to address environmental harm, some are critical of the idea of incorporating the crime of ecocide into the Statute of the ICC.[12] International human rights law has made a lot more progress in addressing environmental harm, including creating a framework for environmental harm by corporations,[13] than international criminal law.

Despite the above challenges, the ICC has a limited ability to prosecute environmental criminal offences as part of war crimes where an attack causes 'widespread, long-term and severe damage to the natural environment which would clearly be excessive in relation to the concrete and direct overall military advantage anticipated.'[14] This limits the ICC's jurisdiction to wartime environmental harm. In addition, the above provision only applies to international armed conflicts and does not offer any protection for non-international armed conflicts which have mostly being the case in Africa. There is therefore need for this provision to be amended to apply to non-international armed conflicts and this paper argues that international criminal law has an important role in environmental protection in Africa. Various international criminal tribunals have in the past been either reluctant to investigate major environmental and cultural crimes or have adopted a cautious approach in the interpretation of these crimes. However, in 2016, the Office of the Prosecutor in the International Criminal Court (ICC) released a new policy which broadened the focus of its investigations to give particular consideration to crimes relating to the 'destruction of the environment', 'exploitation of natural resources' and the 'illegal dispossession' of land.

This paper adopts the conceptualisation of the environment by Patricia Birnie and Allan Boyle which refers to flora, fauna, soil, water (fresh and sea), landscape, cultural heritage, ecosystems

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[10] See for example Prosecutor v. Issa Hassan Sesay et al, Case No. SCSL-04-15-T, Judgment (Mar. 2, 2009); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC- 01/ 04- 01/ 06- 2842, Judgment Pursuant to Article 74 of the Statute (March 14, 2012); Prosecutor v. Germain Katanga, Case No. ICC- 01/ 04- 01/ 07, Judgment Pursuant to Article 74 of the Statute (Mar. 7, 2014); Prosecutor v. Ferdinand Nahimana, Case No. ICTR- 99- 52- T, Judgment (Dec. 3, 2003).

[11] Frédéric Mégret, *The Challenge of an International Environmental Criminal* Law 1-22 (5 April 2010), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1583610_code372721.pdf?abstractid=1583610&mirid=1

[12] Mark Notaras, *Should Ecocide Be Deemed a Crime against Peace?*, OUR WORLD (3 May 2010), https://ourworld.unu.edu/en/should-ecocide-be-deemed-a-crime-against-peace; Peter Sharp, *Prospects for Environmental Liability in the International Criminal Court*, 18 VA. Envtl. LJ 217 (1999);
Mohammed Saif-Alden Wattad, *Rome Statute & Captain Planet: What Lies between Crime against Humanity and the Natural Environment*, 19 Fordham Environmental Law Review 266 (2009).

[13] See Nadia Bernaz, *Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?* J. Bus. Ethics **117,** 493–511 (2013); Jernej Černič, *Corporate Accountability for Human Rights*, *in* In The Business and Human Rights Landscape: Moving Forward, Looking Back 193-218 (Jena Martin & Karen Bravo 2015); See also *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises* (OEIGWG Chairmanship Revised Draft 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf

[14] Rome Statute of the International Criminal Court (last amended 2010) art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. (entered into force on July 1, 2002).

and the climate, and includes dependent human socio-economic systems, health and welfare.[15] I engage with the concept of the environment as understood in several legal regimes that address natural resources, biodiversity, pollution and wastes, deforestation and endangered species. Part II undertakes a careful analysis of the jurisprudence from various international criminal tribunals to determine the extent to which they addressed environmental harm in conflicts within the African region. I focus on the jurisprudence of three key tribunals: The ICC, the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda. The analysis in this paper is limited only to the subject matter jurisdiction of the Courts. Part III examines the *Protocol on the Statute of the African Court of Justice and Human Rights* (Malabo Protocol) and its potential to enshrine international criminal accountability for damage to the environment. At the core of this paper is the question to what extent can international criminal law accommodate and effectively address environmental crimes committed within the context of armed conflicts in Africa? The paper contends that international criminal law provides a potential means for addressing environmental harm indirectly through progressive interpretation of genocide, war crimes and crimes against humanity, and directly within Africa through the provisions of the Malabo Protocol.

II. International Criminal Law and Environmental Crimes.

There are several international treaties that seek to protect the environment during armed conflict. However, most of these treaties only attract state responsibility under international law rather than individual criminal responsibility.[16] Also, these treaties are in general philosophically anthropocentric by focusing on protecting human beings from atrocities and only incidentally protect the environment for its utilitarian survival benefits to human being.[17] This is in contrast to the eco-centric view which seeks to protect the environment in its own right, independent of the use for which human beings may exploit it.[18] Nevertheless, several international treaties, cases from international criminal tribunals, and the prospects of an 'African Criminal Court' are emerging, albeit limited, avenues for prosecuting damages to the environment under international criminal law. The analysis here will focus on those international treaties that attract some individual criminal responsibility.

[15] Patricia Birnie and Allan Boyle, *International Law and the Environment* 3-4 (2002).

[16] Some examples include U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994); Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973, 1340 U.N.T.S (entered into force Oct. 2, 1983); African Convention on the Conservation of Nature and Natural Resources (Revised), adopted March 7, 2017, https://au.int/en/treaties/african-convention-conservation-nature-and-natural-resources-revised-version; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, *opened for signature* June 21, 1993, ETS No.150.

[17] See Rosemary Mwanza, *Enhancing Accountability for Environmental Damage Under International Law: Ecocide as a Legal Fulfilment ff Ecological Integrity*, 19(2) Melbourne Journal of International Law 589-597 (2018). See also Louis J. Kotzé and Duncan French, *The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of law in the Anthropocene*, 7 Global Journal of Comparative Law 5 (2018).

[18] Louis J. Kotzé and Duncan French, *The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of law in the Anthropocene*, 7 Global Journal of Comparative Law 5 (2018).

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2.1. Additional Protocols to the Geneva Conventions

Article 35 of Protocol Additional to the Geneva Conventions (Protocol I) prohibits methods and means of warfare that is intended or expected to cause 'widespread, long-term and severe damage to the natural environment.'[19] Similarly, Article 55 of Protocol I prohibits attacks against the natural environment as a means of retaliation and protects it against 'widespread, long-term and severe damage.'[20] However, the applicability of these provisions to conflicts within Africa is very limited given that they apply only to international armed conflicts whereas the conflicts in Africa are mostly of a non-international nature or civil war.[21]

Article 14 of Protocol Additional to the Geneva Conventions (Protocol II) prohibits attacks that would 'destroy, remove or render useless … foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.'[22] However, not only does this provision not qualify as a grave breach,[23] but also only applies anthropocentrically when connected to starvation of civilians as a method and means of warfare.[24] An eco-centric view for the protection of the environment was rejected during the treaty negotiations for AP II in 1975. Australia's proposal to introduce a specific provision for the protection of the natural environment and to prohibit the destruction of the environment in both international and non-international armed conflict was unsuccessful.[25]

The Protocols to the Geneva Conventions provide very limited protection for the environment. Nevertheless, these provisions impose individual criminal responsibility and subsequent treaties and international law cases have increasingly referred to the need to protect the environment in the context of armed conflict as examined below.

2.2. Article 8 (2)(b)(iv) of the Rome Statute

The Rome Statute which was adopted in 1998 established the International Criminal Court (ICC) and provided a broad framework for enforcing international humanitarian norms. It gives the court subject matter jurisdiction over four core crimes of genocide, crimes against humanity, war crimes and the crime of aggression.[26] The destruction of the environment could arguably in certain circumstance be prosecuted under these categories of crimes as examined

[19] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) art. 35, *opened for signature* June 8, 1977, 1125 U.N.T.S(entered into force Dec. 7, 1978).
[20] *Id.* art. 55.
[21] See Linus Nnabuike Malu, *The International Criminal Court and Peace Processes: Côte d'Ivoire, Kenya and Uganda* 75-91 (2019).
[22] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) art. 14, *opened for signature* June 8, 1977, 1125 U.N.T.S(entered into force Dec. 7, 1978).
[23] Carl E. Bruch, *The Environmental Law of War: All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict*, 25 Vt. L. Rev. 695, 722 (2001).
[24] AP II, *supra* note 22.
[25] See Australia, Statement at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts ('CDDH') (Geneva 1974– 77), as cited in Matthew Gillett, *Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict* in Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices 240 (Carsten Stahn, Jens Iverson, and Jennifer S. Easterday 2017).
[26] Rome Statute art 5, *supra* note 14.

below. While the Rome Statute is not an environmental criminal law document per se, it does provide some explicit protection for the environment in armed conflict and since 2016 there has been a shift in the policy of the Prosecutor in the ICC to investigate crimes relating to the 'destruction of the environment', 'exploitation of natural resources' and the 'illegal dispossession' of land.[27] Article 8(2)(b)(iv) of the Rome Statute explicitly protects the natural environment in armed conflict by prohibiting the:

> Intentionally [launching of] an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects *or widespread, long-term and severe damage to the natural environment* which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. [28] [emphasis added].

According to Jessica Lawrence and Kevin Heller, the above provision represents a significant advancement for environmental protection in international law and, in theory, 'could provide the nonhuman environment with previously unprecedented protection.'[29] One of the reasons for this is that unlike earlier environmental provisions, individual criminal responsibility under Article 8(2)(b)(iv) for damage to the natural environment is not conditioned to injury to human beings. The use of the language 'or' rather than 'and' in the above provision implies damage to the environment can be prosecuted in its own rights provided it is widespread, long-term and severe, and equally disproportionate in relation to the anticipated military advantage.[30]

However, while Article 8(2)(b)(iv) has been recognised as the first 'eco-centric' environmental war crime, the prospects for prosecuting this crime at the ICC has be hindered by several factors including definitional issues for key terms of the Article, the strict requirement for intent, jurisdictional and other institutional limitations of the ICC. [31] Regarding definitional issues for example, there was no definition for the key terms 'widespread, long-term and severe damage' or 'natural environment'. The principle of legality as a key principle of criminal law requires that the elements of crimes should be specific and the objective elements of the crime and requisite *mens rea* are outlined clearly and in detail. It is difficult to predict what type of environmental damage would satisfy the requirement of 'widespread long-term and severe'.

One major barrier of Article 8(2)(b)(iv) to addressing environmental damage caused by armed conflicts within Africa is the jurisdictional limitation. This provision only applies to international armed conflicts making it almost certainly inapplicable to the serious conflicts within Africa which have almost entirely been non-international, with no individual criminal accountability for damage to the natural environment. None of the 12 armed conflicts within Africa identified in the Rule of Law in Armed Conflicts (RULAC) database are international

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[27] International Criminal Court, *Policy Paper on Case Selection and Prioritisation* 14 (15 Sept. 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.
[28] Rome Statute, *supra* note 14, art 8(2)(b)(iv).
[29] Jessica C. Lawrence & Kevin Jon Heller, *The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute*, 20 Geo. Int'l Envtl. L. Rev. 61 (2007).
[30] One version of Article 8(2)(b)(iv) which was proposed during the negotiations for the Rome Statute criminalised damage to the environment without any proportionality qualifications to it. See Draft Statute for the International Criminal Court, p. 16, U.N. Doc. A/CONF.183/2/Add. 1 (1998).
[31] Lawrence & Heller, supra note 29, at 94-95.

armed conflict.[32] The lack of individual criminal responsibility for damage to the environment in the context of non-international armed conflict supports the call by many scholars for the an amendment to the Rome Statute that would at the very least extend the application of Article 8(2)(b)(iv) to non-international armed conflict.[33] This sentiment was very much present during the negotiations for Additional Protocol II applicable to non-international armed conflicts. Australia had proposed that the destruction of the environment in the draft article should be prohibited both under international and non-international armed conflict, but this proposal was rejected.[34]

This paper acknowledges that the Rome Statute does not provide direct environmental protection in the context of non-international armed conflict and re-echoes the need for reform to address this legal vacuum. However, the Rome Statute provides some indirect protection to the environment in the context of non-international armed conflict and there is an opportunity for a broader or 'greener' interpretation of the core crimes within the Rome Statute that could provide individual criminal accountability for damage to the environment during non-international armed conflict.

2.3. Indirect Environmental Protections in the context of Non-International Armed Conflict

There are several conducts causing environmental damage in the context of non-international armed conflict that may attract individual criminal responsibility under the Rome Statute. Damage to the environment, depletion of natural resources and other crimes against the environment can arguably be prosecuted as part of war crimes, genocide or crimes against humanity. This section examines specific provisions and jurisprudence from the ICC that would provide the possibility for a broader interpretation of the above crimes to provide individual criminal accountability for environmental damage in the context of non-international armed conflict.

2.3.1. War Crimes

Article 8 of the Rome Statute defines a war crime as 'grave breaches of the Geneva Conventions of 12 August 1949.'[35] It is a criminal violation of the customary laws of war.[36] The relevant prohibitions applicable to non-international armed conflict include pillaging a town or place,[37] ordering the displacement of civilian population for reasons related to the conflict[38] and destroying or seizing the property of an adversary, subject to military

[32] See Rule of Law in Armed Conflict (RULAC), *Conflicts*, available at http://www.rulac.org/browse/conflicts.
[33] See Steven Freeland, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court, Supranational Criminal Law* (2015); Lawrence & Heller, supra note 29, at 95.
[34] Matthew Gillett, *supra* n 25, at 240.
[35] Rome Statute, *supra* note 14, art 8.
[36] For a detailed discussion of the definition of a war crime see Oona A. Hathaway et al, *What is a War Crime?* 43(1) Yale Journal of International Law 53-113 (2019).
[37] Rome Statute, *supra* note 14, art 8(e)(v).
[38] Id. at art. 8(e)(viii).

necessity.[39] Pillaging for example is seen as an environmental based crime[40] and has been used interchangeable with the words 'spoliation', 'plunder', and 'looting' in the academic discourse. It is defined as the 'forcible taking of private property by an invading or conquering army from the enemy's subjects'[41] for private or personal use.[42] In 2003, the UN Security Council condemned the plunder and illegal exploitation of the natural resources in the Democratic Republic of Congo.[43] Jurisprudence from the Special Court for Sierra provide some precedence on how individuals can indirectly be prosecuted and held criminal accountable for damage to the environment in the context of non-international armed conflict as part of war crimes.

The tribunal in case of *Charles Taylor*[44] made a good attempt to create a connection between war crimes and the pillage of natural resource. Pillage was one of 11 counts for which Charles Taylor, former president of Liberia, was charged with. In this case, the Trial Chamber noted that the crime of pillage includes instances of '"organised" and "systematic" seizure of property from protected persons as well as to "acts of looting committed by individual soldiers for their private gain."'[45] As part of what was referred to as 'Operation Pay Yourself', the tribunal found that there was looting of civilian property by soldiers in several districts in Sierra Leone on a large scale and in an indiscriminate manner.[46] Charles Taylor was convicted for aiding and abetting the crime of pillage by providing practical support including weapons, military personnel, operational and moral support, that substantially led to the commission of the crime.[47] In the case of *Prosecutor v. Sesay (Issa Hassan) and ors*, the Trial Chamber held the accused persons responsible for a similar crime of pillage involving looting and destruction of civilian property, on the basis of joint criminal enterprise[48]. In making a determination on the gravity of the criminal acts, the tribunal adopted a anthropocentric view focusing, among other things, on the number of victims, the impact of the pillage on victims and degree of suffering, and the considerable negative impact on the economy and development of the affected communities.[49] These cases demonstrate that it is possible to prosecute and convict the environmental crime of pillage in the context of a non-international armed conflict.

The natural resources of Sierra Leone, especially the diamond trade, played a vital role in fuelling the civil war and the term 'blood diamond' is notably connected to the armed conflict

[39] Id. at art. 8(e)(xii).
[40] See Olivia Radics and Carl Bruch, *The Law of Pillage, Conflict Resources, and Jus Post Bellum* in Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices 145 (Carsten Stahn, Jens Iverson, and Jennifer S. Easterday 2017).
[41] *Black's Law Dictionary* (10th ed. 2015) – Definition also adopted by the ICRC.
[42] See International Criminal Court, *Elements of Crimes* art. 8(2)(b)(xvi), https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.
[43] S.C. Res. 1493, ¶ 28 U.N.Doc. S/RES/1493 (July 28, 2003).
[44] Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-1-T, Judgment (May 18, 2012).
[45] AFRC Case, Prosecutor v Brima (Alex Tamba) and ors, Case No SCSL-04-16-T, SCSL-04-16-T-613, Judgment, ¶¶ 750-757 (June 20, 2007).
[46] Prosecutor v Taylor (Charles Ghankay), Case No. SCSL-03-1-T, Judgment, ¶¶ 533-546 (April 26, 2012).
[47] Id. at ¶¶ 6921-6937.
[48] Prosecutor v Sesay (Issa Hassan) and ors, Case No. SCSL-04-15-T, Sentencing judgment,¶¶ 173-178 (April 8, 2009); See also the case of *Prosecutor v Brima (Alex Tamba) and ors*, the court found Alex Brima, Santigie Kanu, and Ibrahim Kamara guilty of pillage during the Sierra Lean civil war see AFRC Case, Prosecutor v Brima (Alex Tamba) and ors, Case No. SCSL-04-16-T, Judgment, ¶ 2113 (June 20, 2007).
[49] Prosecutor v Sesay (Issa Hassan) and ors, Case No. SCSL-04-15-T, Sentencing Judgment, ¶¶ 173-178 (April 8, 2009).

in Sierra Leone. The report by the Panel of Experts appointed pursuant to UNSC Resolution 1306 concluded that there existed a link between illicit diamond trade and arms trade to the rebel forces in Sierra Leone.[50] Despite this finding, the SCSL construed the crime of pillaging more narrowly and did not charge any person for pillaging of the natural resources like diamond as part of its war crime prosecution, but rather focused exclusively on pillaging of civilian property. A similar approach has been adopted by the ICC. In the case of *Prosecutor v Germain Katanga*, the Trial Chamber found that as a matter of fact, pillage was used in the conflict as a method of warfare and a form of '"pay", "booty" or gain for the attackers'.[51] Germain Katanga was found guilty of pillage, as part of war crime pursuant to article 8(2)(e)(v) of the Rome Statute, for extensive destruction of civilian property including houses, food, and animals.[52] However, the illegal exploitation of natural resources which provokes and sustains the conflict has not yet been addressed by the ICC. The prospects for prosecution for looting of 'blood diamonds' and pillaging of natural resources as part of war crime committed in the Sierra Leone civil war became likely following the arrest of Michel Desaedeleer in 2015 in connection with a Belgian federal investigation.[53] Among other things, he was charged with war crimes for pillage involving the illicit trade of diamonds during the Sierra Leone civil war. However, the prospect for prosecution was lost when Desaedeleer died in Belgian custody while awaiting trial.

2.3.2. Crime against Humanity

According to Jessica Durney, crimes against humanity provide the broadest opportunity for the ICC to prosecute environmental crimes.[54] This reflects some of the opinions in the 1985 Report by the UN Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection that advocated for ecocide to be included as a crime against humanity.[55] Article 7 of the Rome Statute provides a list of specific actions that would constitute 'crimes against humanity' if committed as part of a 'widespread or systematic attack directed against any civilian population, with knowledge of the attack'[56] and 'pursuant to or in furtherance of a State or organizational policy to commit such attack'.[57]

There has been increasing rise in the number of prosecutions for crime against humanity in the ICC including the *Situation in the Republic of Kenya*,[58] *Situation in Libya*[59] and the

[50] *Report of the Panel of Experts appointed Pursuant to UNSC Resolution 1306 (2000) Paragraph 19 in Relation to Sierra Leone* 150-151 (December 2000), https://mondediplo.com/IMG/pdf/un-report.pdf.
[51] Prosecutor v Germain Katanga, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, ¶ 519 (March 7, 2014).
[52] Id. at ¶ 1691.
[53]Taegin Reisman, *Death of a Middleman Thwarts Blood Diamonds Case* (October 5, 2016), https://www.ijmonitor.org/2016/10/death-of-a-middleman-thwarts-blood-diamonds-case/
[54] Jessica Durney, *Crafting a Standard: Environmental Crimes as Crimes Against Humanity Under the International Criminal Court* 24(2) Hastings Environmental Law Journal 412-430 (2018).
[55] *Benjamin Whitaker (Special Rapporteur) Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* ¶ 33, UN ESCOR, Human Rights SubCommission on the Prevention of Discrimination and Protection of Minorities, 38th Sess., UN Doc. E/CN.4/Sub.2/1985/6 (1985).
[56] Rome Statute, *supra* note 14, art. 7(1).
[57] Id.
[58] See The Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (January 29, 2012).
[59] The Prosecutor v. Saif Al-Islam Gaddafi, Case No. ICC-01/11-01/11-2, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi (June 27, 2011).

Situation in Cote d'Ivoire,[60] although these have not directly addressed environmental crimes. More so, grave human rights abuses committed by the *Boko Haram* Islamist group in Nigeria have been categorised as potential crimes against humanity by the ICC Prosecutor but did not investigate any potential environmental crimes in the context of that conflict.[61]

There is philosophical justification for conceptualising environmental crimes as crimes against humanity,[62] but the analysis in this paper is limited to the legal questions. While Article 7 does not explicitly mention the environment, three of the eleven acts constituting crimes against humanity ('extermination', 'deportation or forcible transfer of population' and 'other inhumane acts') provide possible avenues to address environmental harm, although the anthropocentric nature of Article 7 presents a challenge to directly prosecuting environmental crimes as a crime against humanity.

i. Extermination

The destruction of the environment may be considered for prosecution under Article 7 of the Rome Statute where it is used as an instrument to destroy a group of people. Extermination is defined as 'the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.'[63] It is possible that the burning of farmland, crops, towns, destruction of livestock and natural resources for the purpose of destroying part of a population can be prosecuted as a crime against humanity. There are several examples where indigenous and vulnerable populations have either been killed or have had their way of life destroyed because of damage to their natural habitat which may have been of strategic value to the perpetuator including for profitable use. For example, the forest area inhabited by the Ache' Indians was destroyed with the intention to remove them from the land,[64] to the extent that the group is now believed to be extinct.[65] The scotched earth policy in the Darfur region in Sudan by former Sudanese president, Omar Al Bashir which was environmentally destructive, has been argued as constituting extermination as a crime against humanity.[66] In 2016, the ICC Prosecutor developed a new policy that gave special consideration to the prosecution of crimes within the Rome Statute 'committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.'[67] There is therefore an increasing focus on prosecuting destruction to the environment

[60] Situation in the Republic of Côte d'Ivoire, Case No. ICC-02/11-14-Corr, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire" (Nov. 15, 2011).
[61] International Criminal Court, *Report on Preliminary Examination Activities 2018* 216-228 (Dec. 5, 2018), https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf.
[62] David N Otieno and Maureen Okoth, *Conceptualizing Environmental Crimes as Crimes Against Humanity: A Philosophical Justification* (2015), https://bit.ly/339uqbp.
[63] Durney, *Supra* note 54, at 412-430.
[64] M Munzel, *The Aché Indians: Genocide in Paraguay,* IWGIA Internal Document No. 11 (International Work Group for Indigenous Affairs, Copenhagen 1973).
[65] Sharp, *supra* note171, at 234-35. See also the case of the Marsh Arabs in Iraq where the state attempted to destroy the group by targeting and destroying the natural environment the group had relied on for their survival for millenia see Aaron Schwabach, *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts* 15 Colorado J of Int'l Environmental L and Pol 1 (2004).
[66] *Situation in Darfur, Sudan: Prosecutor v al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶¶ 95-97 and 170 (March 4, 2009).
[67] *Policy Paper on Case Selection and Prioritisation, supra* note 27, ¶ 41.

as part of the crime against humanity pursuant to Article 7 of the Rome Statute. Durney has argued that this new policy can be applied to the systematic burning of farmland, crops and villages of Rohingya Muslims and to the widespread land grabbing in Cambodia as crimes against humanity.[68] Nevertheless, in each of these cases, the *mens rea* for the crime would need to be established. In the case of extermination under Article 7, what is required is intent with 'knowledge' that the 'perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population'.[69] This is less challenging than the *mens rea* for genocide which requires proving genocidal intent.

ii. Deportation or forcible transfer of population

Another opportunity for environmental damage to fall within the net of crimes against humanity is in relation to deportation or forcible transfer of population under article 7(1)(d) of the Rome Statute. This crime is defined as 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.'[70] According to the Internal Displacement Monitoring Centre (IDMC), Africa has experienced more conflict related displacement than any other continent with about 1.5million people displaced in 2018 by conflict alone.[71] Drawing from the ICC Prosecutor's new policy on prioritisation of cases, destruction of the environment, illegal exploitation of natural resources or illegal dispossession of land can be prosecuted if they are the means by which the deportation or forcible transfer of population as a crime against humanity is committed. Land grabbing by foreign corporations is a major phenomenon in many parts of Africa which often results in the displacement of indigenous communities.[72] In 2011, an Italian business man in Senegal was handed over 20000 hectares by the Senegalese government to grow sweet potatoes and sunflowers to produce biofuels for European cars despite the fact that the project would displace entire villages and destroy grazing lands for cattle.[73] In the context of Cambodia, Richard Rogers has argued that widespread land grabbing falls under this category of crimes against humanity with 770,000 people adversely affected as a consequence including by forcibly displacement.[74]

When the means for survival including land, cattle and other natural resources are denied or destroyed during armed conflict, living conditions become unsustainable resulting in displacement which some have argued have resulted in more deaths than direct killings.[75] This massive displacement of people imposes strain on the environment. For example in Cameroon, a displacement camp reduced the grazing land that had previously been available

[68] Durney, *Supra* note 54, at 425-429.
[69] Elements of Crimes, *Supra* note 42, at art. 7(1)(b).
[70] Rome Statute, *supra* note 14, art. 7(2)(d).
[71] Internal Displacement Monitoring Centre (IDMC), *Africa Report on Internal Displacement* 13 (IDMC 2019), https://www.internal-displacement.org/sites/default/files/publications/documents/201912-Africa-report.pdf.
[72] Taiwo Ajala, *Examining the legal safeguards against the environmental impact of land grabbing in African countries: A critical review of Nigerian environmental law* 20(1) Environmental Law Review 3-15 (2018).
[73] Joan Martinez-Alier et al., *The many faces of land grabbing: Cases from Africa and Latin America* 7, EJOLT Report No. 10 (March 2014).
[74] Global Diligence, *Communication Under Article 15 of the Rome Statute of the International Criminal Court The Commission of Crimes Against Humanity in Cambodia July 2002 to Present* 7 (Oct. 7, 2014).
[75] Luke Moffett, *Accountability for Forced Displacement in Democratic Republic of Congo and Uganda before the International Criminal Court*, 2 African Journal of International Criminal Justice, 129, 130 (2015).

to the local population.[76] In the Niger Delta region of Nigeria where armed conflict is rife, oil spillage in the sea by Shell has deprived thousands of fishermen of their source of livelihood and clean water.[77] However, it is a requirement that the harm to the environment be part of a 'widespread' or 'systematic' attack against a civilian population. Isolated acts involving destruction to the natural environment, illegal exploitation of natural resources or dispossession of land, would not meet this requirement. Luke Morfotte has criticised the ICC for failing to consider the economic motivations behind forced displacement in the context of the DRC and Uganda. He argues this was part of a plan or policy to remove neighbouring clans from their natural environment for the purpose of acquiring their land and exploiting their natural resources.[78] In 2014, the Extraordinary Chamber in the Courts of Cambodia (ECCC), where the two accused persons were convicted for the forced transfer of at least 2 million people, thousands of whom died as a result of food shortage, lack of water and medical care.[79] There is need for the ICC to address this form of forced displacement within conflicts in Africa through a progressive interpretation of the crime against humanity in Article 7 of the Rome Statute. The 2016 policy by the ICC Prosecutor represents an important shift by seeking to prioritise cases involving environmental harm.

iii. Other Inhumane Acts

Furthermore, Article 7 of the Rome Statute can provide a basis for addressing environmental damage where such damage constitutes 'other inhumane acts' subject to (i) the harm occurring as part of 'a widespread or systematic attack directed against any civilian population' and (ii) the harm was 'pursuant to or in furtherance of a state or organisational policy'.[80] Several legal issues arises in applying this provision to prosecute environmental harm including what specific acts are prohibited, the intent requirement and what constitutes an 'organisation' when determining an organisational policy. The terms 'other inhumane acts' has been read broadly by the ICTR to include 'acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity'[81] This is consistent with some academic literature[82] and the ICC noted in the case of *Prosecutor v Katanga* that this would cover serious violations of basic human rights drawn from principles of international human rights law and that the purpose of including 'other inhumane acts' in the Rome Statute was to provide the flexibility to address serious violations of human rights.[83]

Widespread deforestation, destruction of crops, illegal exploitation of natural resources, and contamination of land and water, are arguably all serious violations of basic human rights 'of a similar character' to other conduct outlined in Article 7 and could amount to crimes against

[76] *Africa Report on Internal Displacement*, *supra* note 71, at 44.
[77] Amnesty International, *Briefing: Shell Own up, Pay up, Clean Up* (December 2012), https://www.amnesty.org.uk/files/shell_briefing_2012_lores.pdf
[78] Moffett, *supra* note 75, at 131.
[79] Prosecutor v Nuon Chea and Khieu Samphan, Case No. 002/19-09-2017/ECCC/TC, Case 002/01 Judgement, ¶ 1053 (7 August 2014).
[80] Rome Statute, *supra* note 14, art. 7(1)(k).
[81] Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement, ¶ 151 (May 21, 1999); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgement, ¶ 91 (June 7, 2001).
[82] Bernhard Kuschik, *Humaneness, Humankind and Crimes Against Humanity*, 2 Goettingen J. Intl. L. 501, 502-10 (2010).
[83] Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 31-32, 446-449 (Sept. 30, 2008).

humanity. These are mostly violations of economic, social, and cultural rights, which Evelyn Schmid has argued, may constitute crimes against humanity. She expresses the link between violations of ESC rights and crimes against humanity arguing that devastating instances of preventing access to food and stealing of livestock could potentially be addressed under the umbrella of 'other inhumane acts' pursuant to Article 7(1)(k).[84] They result in a serious attack upon human dignity and can cause serious physical or mental suffering to the affect population.[85] For example, deforestation and loss of biodiversity has a negative impact on the natural ecosystem with possible health consequences. The UN Committee on ESC rights has stated that deforestation and the illicit trade of wood from forest is a threat to the environment and that 'environmental hygiene' is an element of the right to health under article 12 (2)(b) of the ICESCR.[86] In 2019, a joint report by the Institute for Health Policy Studies, Amazon Environmental Research Institute and Human Rights Watch found that deforestation related fires had a significant negative impact on public health including respiratory illnesses.[87] In addition, the Committee on ESC rights has stated that 'impunity for human rights violations and the illegal exploitation of the country's natural resources … constitute major obstacles to the enjoyment of economic, social and cultural rights.'[88] This would imply that damage to the environment which severely impacts on ESC rights can potentially amount to crime against humanity such as the case in Southern Sudan where the water supply of rural communities was targeted, prompting their displacement from the area and allowing corporations to exploit the natural resources in the abandoned area.[89] In the AFRC case, the Appeals Chamber held that the prohibition against 'other inhumane' acts should not be restrictively interpreted.[90] This opens up the possibility for widespread environmental damage resulting in serious human rights violations to be prosecuted.

Another legal issue to consider is the intent requirement. Article 7(1)(K) requires that the inhumane act be committed 'intentionally'. Actual or constructive knowledge to cause serious physical or mental suffering would meet this requirement although the perpetrator is not required to possess knowledge of all the aspects of the attack and may indeed knowingly commit the act for ulterior motives.[91] When confirming the Charges against Laurent Gbagbo, the Pre-Trial Chamber indicated that awareness of the consequences of the actions would be sufficient *mens rea* for 'other inhumane acts'.[92] While the motive for an operation may have

[84] Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* 160-162 (2015)
[85] Rome Statute, *supra* note 14, art. 7(1)(k).
[86] Office of the High Commission for Human Rights, 'Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' Report No. 1 (December 2013) ¶¶ 12-16.
[87] Andre Albuquerque Sant'Anna and Rudi Rocha, 'Health Impacts of Deforestation-Related Fires in the Brazilian Amazon' (2019) Nota Técnica n. 11, IEPS 1-10, https://www.hrw.org/sites/default/files/media_2020/08/Health%20Impacts%20of%20Deforestation-Related%20Fires%20in%20the%20Amazon_EN_0.pdf
[88] Office of the High Commission for Human Rights, 'Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' Report No. 1 (December 2013) ¶ 14
[89] The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-95, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ¶ 7 (July 12, 2010).
[90] AFRC Case, Prosecutor v. Brima (Alex Tamba) and ors, Case No. SCSL-2004-16-A, Appeal judgment, ¶ 185 (February 22, 2008).
[91] *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea* ¶ 1135 , UN Human Rights Council, A/HRC/25/CRP.1 (7 February 2014).
[92] Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges against Laurent Gbagbo, ¶¶ 235-236 (12 June 2014).

been for profit, it may be a crime against humanity where the perpetuator was aware that their action would result widespread damage and serious physical and mental suffering to the civilian population.

Continuous and knowing toxic waste dumping in many indigenous communities within Africa resulting in death, environmental and other significant health problems to a significant part of the population is certainly inhumane and can potentially be prosecuted as a crime against humanity. For example in Somalia, the dumping of radioactive and other toxic wastes on the shores of Somalia which started in the 1980s continued and helped fuelled the civil war in Somalia, had devastating health consequences and reflected a pattern of toxic colonialism and increased profitable illicit trade of toxic waste in Africa.[93] The United Nation Environmental Programme in its 2005 report on Somalia concluded that 'contamination from the waste deposits has thus caused health and environmental problems to the surrounding local fishing communities including contamination of groundwater…the health problems include acute respiratory infections, dry heavy coughing and mouth bleeding, abdominal haemorrhages, unusual skin chemical reactions, and sudden death after inhaling toxic materials'.[94] Dumping of the above toxic wastes in Somalia inflicted physical and mental suffering and are serious violations of basic human rights 'of a similar character' to others outlined in Article 7.

In *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, the African Commission on Human and Peoples' Rights in a ground-breaking ruling, held that the Nigerian government had violated the rights of the Ogoni Indigenous peoples in the Niger Delta region of Nigeria where there is an ongoing conflict.[95] The government had actively attacked the environment of the Ogoni people, using the Nigerian army to burn and destroy Ogoni villages as a response to their protests against environmental destruction by an oil company which resulted in air pollution, exploitation of Ogoni land for oil, and disposal of toxic waste into Ogoni land and water.[96] Thousands of Ogoni people were rendered homeless as a result of the destruction carried out on their land by the Nigerian army. This decision provides an instructive guide for the ICC to prosecute environmental crimes given that the violations were massive and systematic similar to the ICC standard of 'widespread' and 'systematic'.[97] Also, the violations imposed serious physical and mental suffering on the Ogoni people given the finding that the 'contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, increased risk of cancers, and neurological and reproductive problems'[98] on the Ogoni people. This has been a major environmental concern

[93] See Matiangai Sirleaf, *Prosecuting Dirty Dumping in Africa* in The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges, 553-589 (Charles Jalloh, Kamari Clarke, & Vincent Nmehielle 2019); Lassana Kone, *The Illicit Trade of Toxic Waste in Africa: The Human Rights Implications of the New Toxic Colonialism* (July 31, 2014), http://dx.doi.org/10.2139/ssrn.2474629

[94] United Nations Environmental Programme, *After the Tsunami: Rapid Environmental Assessment* 134 (Feb. 25, 2005), https://bit.ly/39FLpTK.

[95] The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), https://www.escr-net.org/sites/default/files/serac.pdf [hereinafter "the Ogoni case"]; See also Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Case No. 276/2003, African Commission on Human and Peoples' Rights (4 February 2010).

[96] *The Ogoni Case*, Supra note 95, at ¶¶ 2-6, 52,

[97] See Durney, *Supra* note 54, at 420-421.

[98] The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, supra note 95, at ¶ 2.

to many Africa states to the extent that prosecuting illegal trade in hazardous waste is included as an international crime in the Malabo Protocol[99] establishing the African Court of Justice and Human and Peoples' Rights (ACJHR) with jurisdiction of international crimes (discussed in detail in the last section of this paper).

Lastly, for any environmental damage to be prosecuted as part of Article 7(1)(K), the damage must be 'pursuant to or in furtherance of a State or organisational policy'.[100] What kind of entity would constitute an 'organisation' for the purpose of this article has been the subject of academic debate.[101] One of the arguments against a broad interpretation of this provision is that it would extend the ICC's jurisdiction by bringing in possible new situations and by so doing undermine its mission as a court of last resort.[102] This narrow view limits the state or organisational policy requirement to entities that are states or 'state-like' organisations. This view was amplified by Judge Kaul in his dissenting opinion in the *Situation in the Republic of Kenya.*[103] He opined that to be an 'organisation' for the purpose of Article 7 of the Rome Statue, the entity should 'partake of some characteristics specific to the State'[104]

Based on the above view, it would be difficult to hold non-state actors like terrorist organisations, political parties and corporations accountable under international criminal law for atrocities they commit including widespread destruction of the environment. Advocates for a broader interpretation of state or organisational policy requirement argue that such a narrow interpretation would constrain the ability of international criminal law to respond to systematic or widespread attacks against civilians committed by non-state actors who do not possess a state-like characteristic.[105]

The ICC has adopted a progressive definition of the term to include 'any organisation that has the capability to perform acts that infringe on basic human values',[106] taking into account the following:

i. whether the group is under a responsible command, or has an established hierarchy;
ii. whether the group possesses, in fact, the means to carry out a widespread or systematic against a civilian population;
iii. whether the group exercises control over part of the territory of a State;

[99] African Union, *Protocol on the Statute of the African Court of Justice and Human Rights*, (1 July 2008) [hereafter referred to as Malabo Protocol).
[100] Rome Statute, *supra* note 14, art. 7(1)(k).
[101] Mathias Holvoet, *The State or Organisational Policy Requirement within the Definition of Crimes Against Humanity in the Rome Statute: An Appraisal of the Emerging Jurisprudence and the Implementation Practice by ICC States Parties*, 2 ICD Brief, 1-15 (2013).
[102] Id. at 9.
[103] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09, Dissenting Opinion of Judge Hans-Peter Kaul, ¶ 51 (March 31, 2010).
[104] Id.
[105] See Marcello Di Filippo, *Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International* Crimes, European Journal of International Law, 567 (2008); Matt Halling, *Push the Envelope –Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity*, 23 Leiden Journal of International Law 827, 833 (2010).
[106] 8 Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09, ¶¶ 90-93 (March 31, 2010).

iv. whether the group has criminal activities against the civilian population as a primary purpose;
v. whether the group articulates, explicitly or implicitly, an intention to attack a civilian population;
vi. whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.[107]

This broad definition was utilised by the ICC to prosecute crimes against humanity in three cases namely *Situation in the Republic of Kenya*,[108] *Situation in Libya*[109] and *the Situation in Cote d'Ivoire.*[110] This has also enabled investigations for crimes against humanity and the gross human rights abuses committed by *Boko Haram* and other non-state actors in Nigeria, DRC, Uganda and Central African Republic.[111] The above broad definition opens up the possibility that corporations having relevant institutional structure and capacity can qualify as an 'organisation' and be prosecuted for damage to the environment caused by their policies such as illegal exploitation of natural resources and illicit trade of toxic waste that result in serious physical or mental suffering.

2.3.3. Genocide

The first codification of the crime of Genocide under international law was in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) adopted in 1948 by the UNGA.[112] It embodies principles of customary international law[113] and has been ratified or acceded to by 152 states including 135 African states (as of July 2020).[114] According to Article II of the Genocide Convention, the crime of genocide occurs when certain acts are committed with 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[115] The actions that would fall within this definition include:

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;

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[107] Id. at ¶ 93; This interpretation was reinforced by the ICC in Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 33 (Jan. 23, 2012).
[108] Id.
[109] The Prosecutor v. Saif Al-Islam Gaddafi, Case No. ICC-01/11-01/11-2, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi (June 27, 2011).
[110] Situation in the Republic of Côte d'Ivoire, Case No. ICC-02/11-14-Corr, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire" (Nov. 15, 2011).
[111] See International Criminal Court, *Situations under Investigation* at https://www.icc-cpi.int/pages/situation.aspx
[112] Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 UNTS 277 (entered into force Jan. 12, 1951).
[113] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Separate Opinion of Judge Weeramantry, 640, 648 (11 July 1996), https://www.icj-cij.org/files/case-related/91/091-19960711-JUD-01-05-EN.pdf.
[114] United Nation Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide *As of July 30, 2020), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en
[115] Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 112, art. II.

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c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.[116]

The above definition has been adopted verbatim by various international and hybrid tribunals including the ICC,[117] ICTR,[118] and ICTY[119]. Article 1 of the Genocide Convention makes clear that Genocide can be committed during peace time or war time. For the purpose of prosecuting environmental damage, the most relevant action listed above will be (c) also captured by Article 6(c) of the Rome Statute to the effect that the deliberate infliction on a group '*conditions of life* calculated to bring about its physical destruction in whole or in part' [emphasis added] would amount to genocide.[120] The question here is whether damaging the environment with the deliberate intention of creating conditions of life that will bring about the physical destruction of a group could be prosecuted as genocide. The term 'conditions of life' is defined to include the 'deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.'[121] Arguably, a calculated and deliberate destruction of natural resources could be employed as a means of achieving the total or partial destruction of a national, ethnic, racial or religious group. A 2020 report by the Commission on Human Rights in South Sudan found that starvation was deploy as a method of warfare in the conflict in South Sudan and that thousands of civilians were intentionally deprived of objects indispensable to their survival including food.[122] The report found that both parties to the conflict deliberately and intentionally interfered with the capability of aid organisations to deliver vital foodstuffs to communities in need.[123]

One of the first attempts to explore using environmental damage as an underlying act for Genocide pursuant to Article 6 (c) of the Rome Statute was in the *Application for a Warrant of Arrest against President Omar Al-Bashir* (First Arrest Warrant),[124] former Sudanese President. Among other things, President Omar Al-Bashir was charged with Genocide pursuant to Article 6(c) for deliberately inflicting on the Fur, Masalit and Zaghawa ethnic groups conditions of life calculated to bring about their physical destruction.[125] To establish the link between environmental damage and the crime of genocide, the Prosecutor argued that the perpetrators carried out severe environmental degradation and depletion of natural resources of the Fur, Masalit and Zaghawa ethnic groups by destroying their means of

[116] Id.
[117] Rome Statute, *supra* note 14, art. 6.
[118] UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994, art. 2.
[119] UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993, art. 4.
[120] Rome Statute, *supra* note 14, art. 6 (c).
[121] Elements of Crimes, *Supra* note 42, at p. 3.
[122] Human Rights Council, '"There is nothing left for us": starvation as a method of warfare in South Sudan"' UN Doc A/HRC/45/CRP.3 (5 October 2020), ¶ 11.
[123] Human Rights Council, '"There is nothing left for us": starvation as a method of warfare in South Sudan"' UN Doc A/HRC/45/CRP.3 (5 October 2020), ¶ 128.
[124] Situation in Darfur, Sudan: Prosecutor v. al Bashir, *supra* note 66.
[125] Prosecutor v. Omar Al-Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, ¶ 93 (March 4, 2009).

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survival, poisoning their water sources, and stealing livestock.[126] This, the Prosecutor argued, was a designed policy by the Government of Sudan (GoS) to deprive the targeted group of water needed for survival, with the goal to ensure that those not killed directly in the war would not be able to survive,[127] and resulted in forcible displacement of a substantial part of groups targeted.[128] However, the Pre-trial Chamber initially dismissed this charge of Genocide finding that 'although there [were] reasonable grounds to believe that GoS forces at times contaminated the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked, there [were] no reasonable grounds to believe that such a contamination was a core feature of their attacks.[129]

In a Separate and Dissenting Opinion by Judge Anita Usacka, she observed that the charge of Genocide had to be analysed in 'the context of Darfur's harsh terrain, in which water and food sources are naturally scarce, and shelter is of utmost importance.'[130] She called for the recognition of the destruction of the 'means of survival' as an important consideration and concluded that evidence of destruction of food supplies, food sources, water supplies and water sources, provided reasonable grounds to believe that the means of survival of the ethnic groups had been systematically destroyed and that the groups were subjected to conditions calculated to bring about their destruction.[131] She found reasonable grounds to believe that Omar Al-Bashir had the required genocidal intent to be charged with Genocide.[132] In the second ICC arrest warrant decision for Omar Al-Bashir, the Pre-Trial Chamber agreed with the above conclusion made by Judge Usacka, finding that:

> 'the acts of contamination of water pumps and forcible transfer coupled by resettlement by member of other tribes, were committed in furtherance of the genocidal policy and that the conditions of life inflicted on the Fur, Masalit and Zaghawa groups were calculated to bring about the physical destruction of a part of those ethnic groups.'[133]

The above interpretation creates a scope for possible prosecution of environmental damage as an act underlying the crime of genocide, where the relevant action involves a deliberate destruction of natural resources which are indispensable for human survival as a means of achieving the destruction of a specific population. However, while this may represent a

[126] Prosecutor v. Omar Al-Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, ¶ 110 (March 4, 2009).
[127] Id.
[128] Situation in Darfur, ICC-02/05-157-AnxA, Public Redacted Version of the Prosecutor's Application under Article 58, 14 July 2008, paragraphs 14 and 15, http://www.icc-cpi.int/iccdocs/doc/doc559999.pdf; in the case of the tribunal recognised that forcible transfer of population can be considered as a crime of Genocide where it materially leads to the physical and biological destruction of the population, resulting in the separation of the members of the population and the impossibility for them to reconstitute themselves as a group. See Prosecutor v Blagojević (Vidoje) and Jokić (Dragan), Judgment, Case No IT-02-60-T, ICL 173 (ICTY 2005), para 657.
[129] Prosecutor v. Omar Al-Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, ¶ 93 (March 4, 2009).
[130] Prosecutor v. Omar Al-Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, Separate and Partly Dissenting Opinion of Judge Anita Usacka, ¶¶ 98-102 (March 4, 2009).
[131] Id.
[132] Id. at ¶¶ 98-99.
[133] The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, ¶¶ 38-39 (July 12, 2010).

progressive interpretation of the crime of genocide, it is still anthropocentric and falls short of recognising 'ecocide' as an act of genocide. Another challenge in prosecuting environmental damage as a crime of genocide is the high *mens rea* threshold required for conviction. Specific intent by the perpetrator to physically destroy, in whole or in part, a national, ethnical, racial or religious group (genocidal intent) must be proven and random actions targeting members of the protected group would not satisfy this requirement.[134] This poses a significant hurdle when attempting to prosecute transnational corporations. For example, while dumping of toxic wastes in the earlier examples of Nigeria and Somalia may severely impact the health of the indigenous communities and even kill the population, proving that the act was undertaken with that specific intent to destroy the group may be difficult. Also, the scope of application is limited to physical and biological destruction and does not apply to cultural genocide ('the destruction of both tangible (such as places of worship) as well as intangible (such as language) cultural structures.')[135] In the case of *Prosecutor v Vidoje Blagojević and Dragan Jokić*, the tribunal held that the term 'destroy' in the definition of genocide does not include cultural genocide, stating that the 'destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.'[136] This implies that it would be difficult to prosecute for genocide where the damage to the environment only results in the destruction of the cultural or religious identity of a group of people.

III. The Annex to the Malabo Protocol and the 'African Criminal Court'

In June 2014, the African Union (AU) Assembly met in Malabo, capital of Equatorial Guinee, and adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol).[137] The Malabo Protocol merges the African Court of Justice and the African Court on Human and Peoples' Rights to create the African Court of Justice and Human and Peoples' Rights (ACJHR). According to the Statute of ACJHR, the Court will have three sections namely a General Affairs Section, a Human Rights Section and an International Criminal Law Section.[138] The introduction of an international criminal law section of ACJHR represents a novel and significant step to create a Court with intra-African jurisdiction over international crimes, generally referred to as the 'African Criminal Court'. The Malabo Protocol and the Statute of the ACJHR annexed to it will come into force after ratification by 15 AU member states. As of May 2019, 15 states have signed the treaty and it will only come into force after it has been ratified by 15 member states. [139]

There are ongoing debates about the impact that such a court would have on international criminal justice. Some have argued the court would undermine the jurisdiction of ICC and shield African Heads of states from accountability for international crimes whereas others argue

[134] Id. at ¶ 1.
[135] See Leora Bilsky, Rachel Klagsbrun, *The Return of Cultural Genocide?*, 29(2) European Journal of International Law 373, 374 (2018).
[136] Prosecutor v Blagojević (Vidoje) and Jokić (Dragan), Case No IT-02-60-T, Judgment, ¶ 657 (Jan. 17, 2005).
[137] *Protocol on the Statute of the African Court of Justice and Human Rights*, *supra* n 99,
[138] *Protocol on the Statute of the African Court of Justice and Human Rights* (Annex), *supra* n 99, art. 16.
[139] African Union, *List of Countries which have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, https://bit.ly/39OhusH.

it would complement the ICC and provide 'African solutions to African problems'[140] The perception of the ICC by African leaders as disproportionately targeting African states, especially following the indictments of Presidents Omar Al-Bashir and Uhuru Kenyatta, accelerated the adoption of the Malabo Protocol.[141] However, the Statute annexed to the Malabo Protocol represents a significant develop for the protection of the environment. In addition to the four core crimes within the jurisdiction of the ICC, it incorporates within the criminal jurisdiction of the court two crimes damaging to the environment namely the trafficking in hazardous wastes and the illicit exploitation of natural resources.[142] It also expand the definition of genocide, crimes against humanity, and war crimes, provide for corporate criminal liability and address damage to natural resources, environmental or cultural heritage by terrorism. The analysis in this section will focus on the crimes in Articles 28G, 28L and 28L*Bis* of the Statute of ACJHR and the extent to which they protect the environment.

3.1. Article 28G – Terrorism

According to Article 28G of the Statute of the ACJHR, terrorism means any unlawful act that 'endangers the life, physical integrity or freedom of, or cause serious injury or death to…or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage'.[143] An act would be unlawful for the purposes of Article 28(G) if it violates national criminal law, AU Law or African regional economic community law, or international law.[144] The recognition of acts causing damage to natural resources, environmental or cultural heritage is a significant step in addressing environmental damage within African states. The mental elements of this crime include a special intent or motive by the perpetuator to (i) intimidate, put fear, coerce or induce a government, body, institution, public or (ii) disrupt public service, delivery of essential service or create a public emergency or (iii) create general insurrection in a state.[145]

The above definition is drawn almost verbatim from the Article 1 of the 1999 OAU Convention on the Prevention and Combating of Terrorism , although the Malabo Protocol goes Notably, Article 28(G) does not apply to struggles against colonialism, occupation, aggression, and domination by foreign forces.[146] This implies that damage to natural resources and environmental heritage within these context will have no accountability as terrorism within the African Criminal Court, even if a particular conduct satisfies the physical and mental elements of the crime. More so, the scope of Article 28(G) is apparently limited to

[140] For some of this debate see Dire Tladi, *Immunities (Article 46Abis)* in The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges 590-618 (Charles Jalloh, Kamari Clarke, and Vincent O. Nmehielle 2019).
[141] Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* 8 (2016), http://ilawyerblog.com/wp-content/uploads/2016/05/Report-Malabo Protocol.pdf.
[142] See *Protocol on the Statute of the African Court of Justice and Human Rights* (Annex), *supra* n 99, art. 28L and 28L*bis*; The African Criminal Court would also have jurisdiction to try the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs.
[143] See *Protocol on the Statute of the African Court of Justice and Human Rights* (Annex), *supra* n 99, art. 28G (A);
[144] Ibid.
[145] See *Protocol on the Statute of the African Court of Justice and Human Rights* (Annex), *supra* n 99, art. 28G (A) (1)-(3).
[146] See *Protocol on the Statute of the African Court of Justice and Human Rights* (Annex), *supra* n 99, art. 28G (C).

terrorism acts perpetuated outside the context of an armed conflict.[147] This arguably has the potential to address acts of terrorism damaging natural resources and environmental heritage committed during peacetime whereas acts of terrorism committed during an international or non-international armed conflict may be prosecuted as part of war crime. In addition, unlike other international criminal law provisions which require damage to me 'severe' 'widespread or systematic' or 'serious'[148], the Annex to the Malabo Protocol is broader and covers any 'damage' to natural resources, or environmental or cultural heritage. The destruction of cultural heritage by terrorist organisations operating in Africa including landscape, archaeological sites, monuments and other cultural objects could be prosecuted under this provision as act of terrorism.

3.2. Article 28L – Trafficking in Hazardous Wastes

The dumping of hazardous waste in Africa by Western European companies has been a problem since the 1980s despite the lack of proper waste management systems in many states in Africa. While the nature of these toxic wastes in the past had included nuclear, pharmaceutical, and pesticides, in recent years there has been a 'tsunami' of electronic wastes.[149] Trade in hazardous waste is noted to have become more profitable than trafficking in drugs, human, and arms.[150] These have devasting environmental and health consequences. In 2006, in addition to pollution, 20 people were killed and thousands of others poisoned by an illegal dump of 500 tons of chemical muds in Abidjan, Cote d'Ivoire, by a Greek-owned tanker.[151] Similarly, the continuous dumbing of radioactive and other toxic waste materials by Italian companies on the shores of Somalia resulting in significant pollution and health issues including respiratory infections, dry heavy coughing and mouth bleeding, abdominal haemorrhages, unusual skin chemical reactions, and sudden death after inhaling toxic materials.[152] Consequently, AU member States have made several attempts to criminalise trafficking in hazardous wastes, arguably more so in AU than in other regional mechanisms.

In May 1988, the Organisation for African Unity (Now AU) unanimously adopted a motion declaring that 'The dumping of nuclear and industrial wastes in Africa is a crime against Africa and the African people.'[153] On 22 March 1989, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) was adopted, making trafficking in hazardous waste an offence with responsibility under public international law. Article 11 of the Basel Convention encouraged member states to enter regional arrangements to prohibit trafficking in hazardous wastes to less developed countries.[154] In response to this, the AU adopted the Bamako Convention on the Ban of the

[147] See *Protocol on the Statute of the African Court of Justice and Human Rights* (Annex), *supra* n 99, art. 28G (D)
[148] See Rome Statute, *supra* note 14, arts. 7 and 8(2)(b)(iv); United Nations, *Draft comprehensive convention against international terrorism*, UN Doc A/59/894, https://www.ilsa.org/Jessup/Jessup08/basicmats/unterrorism.pdf.
[149] See Kone, Lassana, *supra* note 93.
[150] Id. at 1.
[151] Id. at 5.
[152] United Nations Environmental Programme, *supra* note 94, at 134.
[153] OAU Council of Ministers' Resolution on Dumping of Nuclear and Industrial Waste in Africa (1988), reproduced in C. Heyns "Human Rights Law in Africa" 342 (2004).
[154] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal art. 11, *opened for signature* March 22, 1989, 1673 U.N.T.S 57 (entered into force May 5, 1992).

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Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa. It required State parties, among other things, to criminalise within their jurisdiction, the importation of all hazardous waste into Africa and the dumping of hazardous wastes at sea, internal waters and waterways.[155]

Article 28L(1) of the Statute of the ACHPR represents one of the first direct attempt to make trafficking in hazardous wastes a crime under international criminal law, attracting individual criminal responsibility. The crime of trafficking in hazardous waste is defined as:

> any import or failure to re-import, transboundary movement, or export of hazardous wastes proscribed by the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted in Bamako, Mali, in January 1991.[156]

What constitutes 'hazardous wastes' for the purpose of Article 28L(1) is defined in Article 28L(2) and draws on the definition in the Bamako Convention and from the domestic legislation of State parties. Martin Heger considers reliance on domestic legislation for a definition of 'hazardous waste' in the Statute of ACHPR to be problematic and may result in inconsistency in the definition of the crimes across different states.[157] Given the prevalence of illegal trafficking of hazardous wastes in Africa and the devastating environmental and health impact, the criminalisation in Article 28L is, symbolically, an important step towards ensuring criminal accountability for environmental damage. There seem to be some connection between terrorism and trafficking in hazardous wastes. Not only have terrorists used trafficking in hazardous wastes to finance terrorist activities, exposing the public to hazardous or radioactive substance would satisfy the *actus reus* for the crime of terrorism under article 28G.[158]

3.3. Article 28L*Bis* – Illicit Exploitation of natural Resources.

The illicit exploitation of natural resources has been a defining characteristic of many of the armed conflicts in Africa including in Sierra Leone, Liberia, Angola, Central Africa Republic and DRC. The impact on the environment can be severe including destruction of natural flora and fauna, increased health hazards, increased risk of natural disasters, ecological disturbances, and pollution of air, water and land.[159] Natural resources has provided the motivation and means for many of the conflicts in Africa and also help to sustain many of these conflicts. The abundance of natural resources in DRC including diamonds, gold, copper, cobalt, timber, coffee and oil enabled the conflict and played a role in the commission of massive human rights violations. A 2010 report by the Office of the High Commissioner for

[155] Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa art. 4, *opened for signature* Jan. 30, 1991, (entered into force April 22, 1998).
[156] *Protocol on the Statute of the African Court of Justice and Human Rights* (Annex), *supra* n 99, art. 28L (1).
[157] Martin Heger, *Trafficking in Hazardous Wastes (Article 28L) and Illicit Exploitation of Natural Resources (Article 28Lbis)* in The African Criminal Court: A Commentary on the Malabo Protocol 132 (G. Werle and M. Vormbaum 2017).
[158] African Model Anti-Terrorism Law, (endorsed 30 June–1 July 2011) F.
[159] See for example Babagana Gutti et al, *Environmental Impact of Natural Resources Exploitation in Nigeria And the Way Forward* (2)(2) Journal of Applied Technology in Environmental Sanitation 95-102 (2012).

Human Rights found that the military expenditures of Rwanda and Uganda between 1998 and 2002 were financed by the illegal exploitation of natural resources in DRC.[160] The gravity of such illegal exploitation of natural resources has led the UN Security Council in numerous instances to impose sanctions against individuals and entities involved in the trade of illicit natural resources including in DRC and Central Africa Republic, and in other instances diamond sanctions against Sierra Leon, Angola, and Liberia.[161]

Article 28L*Bis* of the Statute of the ACJHR represents one of the first attempt to criminalise the illicit exploitation of natural resources at the international level. According to Article 28L*Bis,* the crime of 'illegal exploitation of natural resources' is committed if certain actions 'are of a serious nature affecting the stability of a state, region or the Union'.[162] The *actus reus* of the commission of the crime require an agreement to exploit natural resources (a) in violation of the principle of peoples' sovereignty over their natural resources; (b) in violation of the legal and regulatory procedures of the State concerned; (c) through corrupt practices; (d) that is clearly one-sided; (e) without any agreement with the State concerned; (f) without complying with norms relating to the protection of the environment and the security of the people and the staff; and (g) in violation of the norms and standards established by the relevant natural resource certification mechanism.[163] There is some overlap between the war crime of pillage discuss earlier and the crime of illicit exploitation of natural resources. This overlap was captured in the 2016 ICC Prosecutor's policy on prioritisation of cases which seeks to give special consideration to the prosecution of crimes within the jurisdiction of the court committed by means of illegal exploitation of natural resources.[164]

However, there are some potentially problematic aspects of Article 28L*Bis.* For example, it seeks to criminalise violations of regulations or procedures on environmental governance which were not originally intended to be punished in criminal law. In addition, the provisions of Article 28L*Bis* have been criticised for being overly broad and for failing to define the mental elements required for the commission of the crime and other key terms used in defining the crime including 'serious nature' and 'affecting the stability'.[165] This has the potential to result in multiple interpretation of the same term and undermining the requirement of specificity in relation to crimes. Moreover, the modes of responsibility for crimes within the Statute of the court as outline in Article 28N have been questioned to the extent that they apply to the environmental crimes within the Statute. The criminalisation of preparatory acts or the

[160] Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003* (August 2010) ¶ 768

[161] See UNSC Resolution 2134 (2014) , *Central Africa Republic* (28 January 2014) UN Doc S/RES/2134 (2014); UNSC Resolution 2136, *Democratic Republic of* Congo (30 January 2014) UN Doc S/RES/2136 (2014); UNSC resolution 1306 (2000) of 5 July 2000 (Sierra Leone); UNSC Resolution 1173, *The Situation in Angola* (12 June 1998); UNSC Resolution 1521, *The Situation in Liberia* (22 December 2003) UN Doc S/RES/1521; (Security Council Report, *UN Sanctions: Natural Resources* (November 2015)

[162] *Protocol on the Statute of the African Court of Justice and Human Rights* (Annex), *supra* n 99, art. 28L*bis.*

[163] Ibid.

[164] See also J.G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (Open Society Justice Initiative Publication 2011).

[165] Daniëlla Dam & James G. Stewart, *Illicit Exploitation of Natural Resources - Art. 28L Bis of the Malabo Protocol* in in The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges 590-618 (Charles Jalloh, Kamari Clarke, and Vincent O. Nmehielle 2019).

attempt to commit an environmental crime is seen to be unnecessary at the international level[166] and technically problematic.[167]

In addition, Article 46Abis exempts current Heads of States and other senior state officials from prosecution for crimes within the jurisdiction of the Court. This provision is inconsistent with the position in the Statutes of other international criminal tribunals[168] and risks allowing impunity on the environment by Heads of States and senior state official to escape criminal accountability. Many scholars and practitioners have criticised this provision of the Statute of the ACJHR, although Dire Tladi argues that this is not inconsistent with customary international law.[169]

Nevertheless, Articles 28L and 28L*Bis* represent a significant milestone in enshrining an international crime which is eco-centric (as oppose to anthropocentric) by seeking to protect the environment in its own right rather than for its utilitarian survival benefits to human being. Moreover, Article 46(C) of the Statute of the ACJHR enshrines corporate liability making it possible to directly hold corporations criminal accountable for their involvement in the trafficking of hazardous wastes or the illicit exploitation of natural resources within Africa. However, there remain significant political, financial and other practical challenges before the Statute can come into force and for the ACJHR to function effectively.[170]

Conclusion

The 2016 policy by the ICC Prosecutor gave a new momentum to the prosecution of environmental damage by the ICC. As argued in this paper, while the ability of the ICC to directly prosecute environmental damage is limited by its subject matter jurisdiction, there are avenue for progressive interpretation of its core crimes. However, these possibilities to address environmental damage within the subject matter jurisdiction of the ICC is depended on an anthropocentric interpretation of the core crimes. Attempts to include the crime of mass destruction of ecosystems (ecocide), geocide or environmental degradation within the scope of the ICC's jurisdiction were rejected by the framers and have till date been unsuccessful.[171] International criminal law can and needs to respond more to addressing damage to the

[166] Martin Heger, *Trafficking in Hazardous Wastes (Article 28L) and Illicit Exploitation of Natural Resources (Article 28Lbis)* in The African Criminal Court: A Commentary on the Malabo Protocol 134-135 (G. Werle and M. Vormbaum 2017).
[167] See Ben Saul, 'The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights' in The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges (Charles Jalloh, Kamari Clarke, and Vincent O. Nmehielle 2019).
[168] See Statute of the International Criminal Tribunal for Rwanda, *supra*, note 118, art. 6; Rome Statute, *supra* note 14, art. 27; Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 119, art. 7.
[169] Dire Tladi, *Immunities (Article 46Abis)* in The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges 590-618 (Charles Jalloh, Kamari Clarke, and Vincent O. Nmehielle 2019).
[170] For details on these challenges Matiangai Sirleaf, *supra* note 93, at 553-589.
[171] Anastacia Greene, *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?*, 30(3) Fordham Environmental Law Review 1 (2019); Christopher H. Lytton, *Environmental Human Rights: Emerging Trends in International Law and Ecocide*, 13 Environmental Claims Journal 73 (2000); Peter Sharp, *Prospects for Environmental Liability in the International Criminal Court*, 18 VA. Envtl. LJ 217 (1999); Mohammed Saif-Alden Wattad, *Rome Statute & Captain Planet: What Lies between Crime against Humanity and the Natural Environment*, 19 Fordham Environmental Law Review 266 (2009); Frédéric Mégret, *The Case for a General International Crime against the Environment*, in Sustainable Development, International Criminal Justice, and Treaty Implementation 50-70 (Sébastien Jodoin & Marie-Claire Cordonier Segger 2013).

environment. The Malabo Protocol represents a significant attempt to directly address environmental damage within Africa by enshrining Trafficking in hazardous wastes and the illicit exploitation of natural resources as an international crime attracting individual criminal responsibility. These crimes have in many instances provided the means and motivation for many of the conflicts in Africa as well as sustained them over time. Despite the practical challenges for the Malabo Protocol coming into force and the potential interpretive problems in relation to the environmental crimes, it represents an important development for the protection of the environment and for corporate criminal responsibility under international law.

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