

2016

Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court's Mandate to Prosecuting Environmental Crimes?

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Payal Patel *Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court's Mandate to Prosecuting Environmental Crimes?*, 14 Loy. U. Chi. Int'l L. Rev. 175 (2016).

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EXPANDING PAST GENOCIDE, CRIMES AGAINST HUMANITY,
AND WAR CRIMES: CAN AN ICC POLICY PAPER EXPAND
THE COURT'S MANDATE TO PROSECUTING
ENVIRONMENTAL CRIMES?

Payal Patel*

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Destroying rainforest for economic gain is like burning a Renaissance painting to cook a meal.

-Edward O. Wilson

I. Introduction

In September 2015, Michelle Campos, her father, and grandfather were executed during an attack that displaced 3,000 indigenous people in the resource-rich Mindanao region of the Philippines from their homes, in order to gain easy access to the region's coal, nickel, and gold reserves.¹ The Campos family was killed by paramilitaries who were protecting mining companies involved; the government did nothing to help.² Environmental crimes and land grabbing like what the Campos family experienced have become an acceptable business practice across the globe. Companies and governments are forcing their business

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¹ *On Dangerous Ground*, GLOBAL WITNESS (June 20, 2016), <https://www.globalwitness.org/en/reports/dangerous-ground/>.

² *Id.*

agendas on innocent individuals, destroying peoples' homes, spiritual lands and ways of life. Recently, there has been a global call to take more action against those who commit environmental crimes, by prosecuting environmental wrongdoers in international forums and making clear that the commission of crimes against the environment will not be tolerated. Subsequently, on September 15, 2016, the Office of the Prosecutor for the International Criminal Court ("ICC" or "the Court") published a Policy Paper on Case Selection and Prioritization ("Policy Paper"), outlining a list of new priorities that would be investigated by the Office of the Prosecutor to be brought before the Court, including environmental crimes and land grabbing.

While the Policy Paper is an ambitious step in the right direction for environmental justice, it may not be enough. A crucial caveat in criminalizing the destruction of the environment, illegal exploitation of resources, and land-grabbing is the complexity in proving fault, which makes prosecution in the ICC ill-suited for the black and white stigmatization that the international criminal justice system requires.³ The ICC is a punitive retributive justice court that could symbolically punish environmental criminals but cannot effectively promote environmental security.⁴ This leads to the question: is the expanded scope of the ICC to include environmental crimes just an empty gesture?

This article explores the feasibility of the ICC as a forum to prosecute environmental crimes. The article will first establish the background of the ICC, its limited ability to prosecute environmental crimes or land grabbing and the call for international jurisprudence to punish those who harm the environment. The second section will discuss the Policy Paper and the addition of priorities for upcoming sessions. The third section will analyze the infrastructural limitations of the ICC that restrict the ICC's ability to prosecute environmental crimes and how environmental crimes could fit into the three core crimes of the ICC: genocide, crimes against humanity, and war crimes. Finally, the last section will discuss alternatives to prosecuting environmental crimes in the Court.

Overall, this article will show that while the Policy Paper is an ambitious step in the right direction for international environmental justice, the ICC is not the appropriate forum for the prosecution of environmental crimes. The restrictions upon the Court render it unsuitable for punishing ecological wrongdoers and land grabbers for the environmental harms they commit. The Policy Paper will likely not be able to live up to the hype.

II. Background

The ICC was established to prosecute individuals from developing and unstable countries that lack the mechanisms and jurisprudence necessary to internally

³ Frederic Megret, *The Problem of an International Criminal Law of the Environment*, 36 COLUM. J. ENVTL. L. 195, 218 (2011) (discussing the problems with the ICC as an institution to prosecute environmental crimes).

⁴ Mark A. Drumbl, *International Law Weekend Proceedings: International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?*, 6 ILSA J. INT'L & COMP. L. 305, 331 (2000).

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bring these perpetrators to justice.⁵ The Court's primary purpose is to sanction the most serious of international crimes.⁶ The ICC codifies the belief that certain international wrongdoings must be criminalized and stigmatized.⁷ As such, the ICC helps hold accountable those who disturb efforts to establish long-term peace, stability, and equitable development.⁸

The Court follows a complementarity principle by first deferring to national judicial institutions, military commissions, court martial proceedings and other domestic courts before prosecuting an action.⁹ The belief is that state forums should first attempt to deal with internal issues before the ICC takes action. Due to complementarity, only twenty-three cases have been brought before the Court.¹⁰ In general, the ICC has jurisdiction to take action if a crime occurs in a country that has ratified the Rome Statute or if the perpetrator who committed the crime originates from a ratifying country.¹¹ Additionally, the ICC can investigate cases referred to it by the United Nations ("U.N.") Security Council.¹² Due to its dependence on the cooperation of individual states and the U.N. Security Council, the ICC has been criticized for its inability to independently bring cases to trial.¹³ The court has also been said to lack teeth because many countries with powerful international corporations are not under its jurisdiction.¹⁴ Furthermore, the ICC has been criticized for being unable to prosecute crimes that occur during peacetime since its prosecutorial focus has been on war crimes, crimes against humanity, and genocide.¹⁵

⁵ *CEOs Can Now Be Prosecuted Like War Criminals at The Hague*, TELESUR (Sept. 16, 2016), <http://www.telesurtv.net/english/news/CEOs-Can-Now-Be-Prosecuted-Like-War-Criminals-at-the-Hague-20160916-0013.html> [hereinafter TELESUR]. See also Peter Sharp, *Prospects for Environmental Liability in the International Criminal Court*, 18 VA. ENVTL. L.J. 217, 243 (1999), for more information on the development of the ICC and the Rome Statute.

⁶ Symposium, *The International Response to the Environmental Impacts of War: Afternoon Panel – Accountability and Liability: Legal Tools Available to the International Community*, 17 GEO. INT'L ENVTL. L. REV. 616, 624 (2005) [hereinafter Geo. Int'l Symposium]. See also United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, Preamble, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter *Rome Statute*].

⁷ Geo. Int'l Symposium, *supra* note 6; *Rome Statute*, *supra* note 6.

⁸ About Page, INT'L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Feb. 17, 2017) [hereinafter ICC About Page].

⁹ Geo. Int'l Symposium, *supra* note 6; *Rome Statute*, *supra* note 6, art. 1.

¹⁰ ICC About Page, *supra* note 8.

¹¹ John Vidal & Owen Bowcott, *ICC Widens Remit to Include Environmental Destruction Cases*, THE GUARDIAN (Sept. 15, 2016), <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases> (discussing the expansion of the ICC to permit it to remit cases concerning environmental destruction. Currently, the ICC has jurisdiction over 124 countries). See also *Rome Statute*, *supra* note 6, art. 12.

¹² Vidal & Bowcott, *supra* note 11; See also *Rome Statute*, *supra* note 6, art. 13(b).

¹³ TELESUR, *supra* note 5.

¹⁴ TELESUR, *supra* note 5 (for example, China, India, Russia, Cuba and Indonesia have neither signed nor ratified the Rome Statute. Additionally, the United States, Israel and Sudan have stated their intention to not become of the court).

¹⁵ Geo. Int'l Symposium, *supra* note 6; See also Press Release, Global Witness, *Company Executives Could Now be Tried for Land Grabs and Environmental Destruction*, (Sept. 15, 2016), <https://www.globalwitness.org/en/press-releases/company-executives-could-now-be-tried-land-grabbing-and-environ>

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In recent years, there has been a push from international non-governmental organizations, environmental groups, and civil activities for the Court to shift focus to environmental wrongdoings. Actions that harm the environment are traditionally considered regulatory or statutory violations of administrative laws; they are not yet considered separate crimes under various state or supranational criminal statutes.¹⁶ Instead, environmental harms are considered consequences to other crimes, such as those that occur during wartime. For example, Protocol I of the Geneva Convention prohibits “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”¹⁷ However, this provision, as is often the case with many environmental crimes, was meant to regulate war crimes and not environmental crimes; therefore, it comes as no surprise that the provision has not resulted in any criminal convictions.¹⁸

The ICC’s jurisdiction to prosecute environmental crimes is limited to crimes occurring after the Prospects for Environmental Liability in the International Criminal Court was adopted in 1998.¹⁹ Article 8(2)(b)(iv) is the only instance where the Rome Statute addresses environmental wrongdoings.²⁰ An environmental war crime under Article 8(2)(b)(iv) could be prosecuted if the crime satisfies three elements.²¹ First, the *actus reus* must be widespread, severe and cause long-term environmental damage.²² Second, the *actus reus* cannot have been committed as part of a concrete or direct military advantage.²³ Finally, the *mens rea* of act must be intentional.²⁴

There are many limitations to prosecuting environmental war crimes under this provision of the Rome Statute.²⁵ The provision only applies to international armed conflict or non-international conflicts where there is protracted armed conflict between the government and armed groups.²⁶ Additionally, ICC jurisdiction is only restricted to war crimes occurring within current ICC member states that are “committed as a part of a plan or policy or as part of a large-scale commis-

mental-destruction-historic-move-international-criminal-court-prosecutor/ [hereinafter Global Witness Press Release].

¹⁶ Megret, *supra* note 3, at 200 (discussing the different types of treaties and how they criminalize certain types of behavior that disadvantage the environment).

¹⁷ *Id.* at 197. See also Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 35(3), June 8, 1977, 1125 U.N.T.S. 3.

¹⁸ Megret, *supra* note 3, at 197-99.

¹⁹ Vidal & Bowcott, *supra* note 11; see also Geo. Int’l Symposium, *supra* note 6.

²⁰ Ryan Gilman, *Expanding Environmental Justice After War: The Need for Universal Jurisdiction Over Environmental War Crimes*, 22 COLO. J. INT’L ENVTL. L. & POL’Y 447, 453 (2011); *Rome Statute*, *supra* note 6, art. 8(2)(b)(iv).

²¹ Geo. Int’l Symposium, *supra* note 6, at 625; *Rome Statute*, *supra* note 6, art. 8(2)(b)(iv).

²² Geo. Int’l Symposium, *supra* note 6, at 625; *Rome Statute*, *supra* note 6, art. 8(2)(b)(iv); see also Gilman, *supra* note 20.

²³ Geo. Int’l Symposium, *supra* note 6, at 625.

²⁴ *Id.*

²⁵ Geo. Int’l Symposium, *supra* note 6, at 626.

²⁶ *Id.* at 627; see also Gilman, *supra* note 20, at 455; see also *Rome Statute*, *supra* note 6, art. 8(2)(f).

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sion of such crimes.”²⁷ Furthermore, the environmental crime often must take place during armed conflict, and not follow the armed conflict separately and distinctly.²⁸ Article 8(2)(b)(iv) can only impose criminal sanctions on the most invidious of perpetrators because the perpetrator must know that his actions will cause environmental damage.²⁹ A perpetrator against whom an environmental war crime action is brought need only show that she did not know that her actions would cause “widespread, long-term and severe” damage to absolve herself from criminal responsibility.³⁰ Effectively, this eliminates land grabbing as falling within ICC jurisdiction as a war crime, since land rights are not universal and fall distinctly within the scope of domestic and local laws. Therefore, no charges have been successfully filed under the Article.³¹

In reality, most environmentally harmful acts do not occur during times of war but rather times of peace. Land grabbing is becoming increasingly common during peacetime. With the help of governments, private corporations are taking control of vast areas of land to uncover and exploit natural resources.³² “Chasing communities off their land and trashing the environment has become an accepted way of doing business in many resource-rich yet cash-poor countries.”³³ More importantly, these crimes are being committed under the justification that they are essential to “community development.”³⁴ In the name of development, conflicts over natural resources are turning deadly.³⁵ In 2015, at least three people were killed per week while defending their land, forests, and rivers from government and business entities with interests in big agriculture, mining, drilling, and toxic dumping.³⁶ Over the last ten years, corporations and governments have taken away tens of millions of hectares of land from their rightful owners.³⁷ Land grabbing disproportionately affects minority populations, who lose their natural homes, traditional practices and places of spiritual significance, subse-

²⁷ Geo. Int’l Symposium, *supra* note 6, at 627; *see also* Gilman, *supra* note 20, at 455; *see also* Mark A. Drumbl, *Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes*, 22 *FORDHAM INT’L L.J.* 122, 125 (1998) [hereinafter *Waging War*].

²⁸ Geo. Int’l Symposium, *supra* note 6, at 627.

²⁹ *Waging War*, *supra* note 27, at 130.

³⁰ Gilman, *supra* note 20, at 455-56.

³¹ *Id.* at 453.

³² TELESUR, *supra* note 5.

³³ *Id.* (describing the crime of land grabbing through Gillian Caldwell, the executive director at Global Witness).

³⁴ *Land Grabbers May End Up In The Hague: Global Diligence Welcomes The ICC Prosecutor’s New Case Selection Policy*, GLOBAL DILIGENCE (Sept. 15, 2016), <http://www.globaldiligence.com/2016/09/15/land-grabbers-may-end-up-in-the-hague-global-diligence-welcomes-the-icc-prosecutors-new-case-selection-policy/> [hereinafter GLOBAL DILIGENCE].

³⁵ Global Witness Press Release, *supra* note 15.

³⁶ Global Witness Press Release, *supra* note 15; *see also* *On Dangerous Ground*, *supra* note 1; *see also* *International Criminal Court Turns Attention To Environmental Destruction, Protecting Indigenous People From Land-Grabs*, SUSTAINABLEBUSINESS.COM (Sept. 16, 2016), <http://www.sustainablebusiness.com/international-criminal-court-turns-attention-environmental-destruction-protecting-indigenous-people-land-grabs/> [hereinafter *ICC Turns Attention to Environmental Destruction*].

³⁷ *ICC Turns Attention to Environmental Destruction*, *supra* note 36.

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quently causing the destruction of their cultural identities.³⁸ Consumer practices do little to protect landowners. Traders and investors are often not required to confirm that the products they buy, such as palm oil, rubber or gold, are legally or ethically sourced.³⁹ In rural communities in Africa, Asia, and Latin America, land rights are lacking, even though traditionally, families have held this land for generations.⁴⁰ Some businesses even rely on corrupt politicians to gain land concessions or unethical security forces to illegally displace residents off the land for which they are attempting to take claim.⁴¹ Businesses can do this without fear of prosecution because no international body has stopped them. Due to this blind spot in international criminal justice, violence and theft related to land rights are common.

Many international organizations have been campaigning for years to have the ICC investigate and prosecute environmental crimes committed by both the companies that perpetrate them and the governments that grant them permission.⁴² More specifically, these organizations have focused on stopping land grabbers and natural resource extractors from evicting millions in whatever illegal and violent ways necessary.⁴³ Resorting to bullying and violence is now an acceptable way to do business in countries rich with natural resources but poor in judicial protections land ownership rights.⁴⁴ Organizations are urging the international community to end these practices by holding the wrongdoers accountable.

Recognizing the many limitations to the ICC's ability to prosecute non-war crimes, the Office of the Prosecutor announced, in the Policy Paper of 15 September 2016 that it will begin to prioritize crimes that occur during peacetime.⁴⁵ These crimes include illegal dispossession of land, illegal exploitation of natural resources and environmental destruction.⁴⁶ The Prosecutor made specific reference to land grabbing.⁴⁷

III. Discussion

The announcement by the Prosecutor to expand the scope of its investigations is said to be a revolutionary step in international justice.⁴⁸ Specifically, there is a belief that the shift in focus will reshape how international business is done since company executives, politicians and individuals can now be prosecuted under

³⁸ GLOBAL DILIGENCE, *supra* note 34.

³⁹ Global Witness Press Release, *supra* note 15.

⁴⁰ *Id.*

⁴¹ GLOBAL DILIGENCE, *supra* note 34.

⁴² Global Witness Press Release, *supra* note 15.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Vidal & Bowcott, *supra* note 11.

⁴⁸ Global Witness Press Release, *supra* note 15.

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international law for environmental crimes they commit in the name of business development.⁴⁹ It is believed that those that seize land, destroy forests, and poison water will soon be tried alongside war criminals.⁵⁰

Although the Policy Paper references land grabbing and environmental destruction, the Court is not extending its formal jurisdiction to include these offenses as official crimes.⁵¹ The Court, in fact, is not recognizing any new crimes as part of this increased policy.⁵² Investigations must somehow fall within existing offenses sanctioned by the Court, but with a new wider lens.⁵³ Reinhold Gallmetzer, one of the ICC working group members who drafted the Policy Paper, stated that the purpose of the expansion was to exercise jurisdiction in a broader context. The ICC can now investigate environmental crimes that reach the necessary threshold to constitute genocide, war crimes, or crimes against humanity.⁵⁴ For example, forcible transfers of a population can be considered a crime against humanity and if the forcible transfer is committed as a result of or as a precursor to land grabbing, the land grabbing can also be considered a crime against humanity on its own for which the individual responsible can be charged.⁵⁵

The Court's attempt to prosecute environmental crimes is not novel. In 2009 and 2010, then current-ICC Prosecutor Luis Moreno Ocampo obtained arrest warrants against Sudanese president, Omar Al-Bashir.⁵⁶ Bashir was charged with acts of genocide, war crimes, and crimes against humanity based on his involvement with or in the water pump and well contamination in Darfur as a method to target and kill certain groups in the region.⁵⁷ However, the focus of Bashir's crimes was on their effects on the civilian population and not on the environmental damage caused. The environmental ramifications of his actions, as will likely be the case with any future prosecutions by the ICC, were overshadowed by the impacts of his crimes on humans.

Although the Office of the Prosecutor is ambitiously trying to include environmental crimes as part of its repertoire, its ability to succeed in prosecuting ecological crimes will be limited for the various reasons described below. The following discussion will highlight how the ICC is not the best forum to prose-

⁴⁹ Global Witness Press Release, *supra* note 15.

⁵⁰ *Id.*

⁵¹ Vidal & Bowcott, *supra* note 11.

⁵² *ICC Turns Attention to Environmental Destruction*, *supra* note 36.

⁵³ Vidal & Bowcott, *supra* note 11.

⁵⁴ Aonghus Heatley, *Environmental Crimes by Companies Will Now be Prosecuted at the International Criminal Court*, E2 L. BLOG (Oct. 3, 2016), <http://www.gtlaw-environmentalandenergy.com/2016/10/articles/international-environmental-crimes-by-companies-will-now-be-prosecuted-at-the-international-criminal-court/>.

⁵⁵ Vidal & Bowcott, *supra* note 11.

⁵⁶ Tara Smith, *The International Criminal Court Will Start Prosecuting People Who Commit Crimes Against the Environment*, BUS. INSIDER (Sept. 23, 2016), <http://www.businessinsider.com/international-criminal-court-prosecution-crimes-against-environment-2016-9>.

⁵⁷ *Id.* (while Bashir continues to evade arrest, the step towards his prosecution was a positive one for the Court).

cute environmental crimes and if they are pursued, how, in light of the status of the core crimes, the Court will be unable to put the environment first.

IV. Analysis

The ICC is ill-equipped to prosecute environmental crimes for multiple reasons. First, the Court will likely not give as much attention to environmental crimes as compared to other ICC core crimes.⁵⁸ Second, ICC Judges and Prosecutors do not have the environmental expertise or the funds to effectively prosecute and judge environmental crimes.⁵⁹ Third, ICC sanctions and punishments are not well suited to correct environmental harms.⁶⁰ Finally, the Rome Statute itself does not integrate environmental crimes into its scope to successfully achieve justice.⁶¹

A. Environmental crimes are not given as much importance as other core crimes.

The Policy Paper may not end up having as profound an effect on environmental justice as has been suggested because it may not actually become a priority for the Office of the Prosecutor. Without the creation of a new core crime specific to the environment, the Prosecutor will have to pursue environmental crimes in furtherance of other crimes currently within the scope of the Rome Statute. As discussed below, environmental crimes will only be a secondary priority when compared to crimes that affect human life, such as crimes against humanity, genocide, and war crimes. To look at ecological crimes this way is anthropocentric; it deemphasizes the impacts of environmental attacks that do not immediately adversely affect the human population.⁶² By requiring that crimes meet additional criteria to be prosecuted by the Court, the importance of the environmental crime itself is decreased. Furthermore, the ICC is at the mercy of the states that fund its activities and therefore, priority will be placed where funders so chose. The ICC must pay international salaries to prosecutors and judges, which funding countries may find too steep to prosecute environmental crimes.⁶³ The environmental crime will not be prosecuted as a primary action, but rather as a byproduct of another crime that the perpetrators have committed.

Additionally, the Policy Paper's seventh clause suggests that the ICC may simply be attempting to induce national judiciaries to prosecute environmental

⁵⁸ Drumbl, *supra* note 4, at 326.

⁵⁹ *Id.*

⁶⁰ *Id.* at 326-27.

⁶¹ *Id.* at 326.

⁶² Megret, *supra* note 3, at 210.

⁶³ David J. Sheffer, Dir., Ctr. for Int'l Human Rights, Nw. Univ. Sch. of Law, Remarks at the Loyola University Chicago School of Law International Law Review Symposium: War Wounds: The Role of International Criminal Justice in Rebuilding the Rule of Law (Feb. 3, 2017).

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crimes internally.⁶⁴ The Policy Paper mentions that the Office is not required to investigate all alleged criminal acts that are brought before it.⁶⁵ In following the ICC's policy of complementarity, the Policy Paper may be a push for national judicial systems to attempt prosecuting environmental crimes within their borders first, before the ICC contemplates investigation.⁶⁶ While it explicitly mentions environmental crimes and land grabbing, the Policy Paper also reiterates that it is unable to pursue all deserving cases and that it will work with States to prosecute crimes of international importance. A careful reading of the Policy Paper may suggest that the increased priority list is nothing more than wishful thinking and a push for others to do what it cannot.

Another problem with the glamorization of the Policy Paper is that, based on the structure of the ICC as an institution, there is a real possibility that no environmental charges will be brought. After a crime occurs, the Office of the Prosecutor must look to see if there is sufficient evidence to bring an investigation, by reviewing the gravity of the offense and whether the Court can serve justice to the victims.⁶⁷ In reality, cases often do not make it past this preliminary examination stage.⁶⁸ Since the ICC's inception, only a few dozen cases have ever made it to the next stage, at which point the case is left idle until a full-fledged investigation commences.⁶⁹ It is not until the investigation stage that the full arsenal of the ICC's resources and legal power are used.⁷⁰ While there are many crimes that deserve attention from the ICC, the decision to investigate is partly based on the gravity of the crime, which the Policy Paper states is assessed based on the number of direct and indirect victims, the extent of the damage caused, and the bodily or psychological harm that occurs.⁷¹ Specific facts are taken into account to determine the gravity of a crime including killings, rapes, other gender-based crimes, crimes against children, persecution and the imposition of conditions of life on a group.⁷² In assessing the gravity of crimes, there is no mention of environmental harm as a criterion used in the assessment. Therefore, while environmental crimes are listed as a priority, it is likely these crimes will struggle to keep the Prosecutor's attention. Crimes affecting human populations

⁶⁴ Phoebe Braithwaite, *Environmental Crimes Court Warrant International Criminal Court Prosecution*, INTER PRESS SERV. NEWS AGENCY (Oct. 1, 2016), <http://www.ipsnews.net/2016/10/environmental-crimes-could-warrant-international-criminal-court-prosecutions/>.

⁶⁵ Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, Int'l Crim. Ct. (Sept. 15, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [hereinafter *OTP Policy Paper*].

⁶⁶ *Id.*

⁶⁷ *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> (last visited Feb. 17, 2017).

⁶⁸ Chandara Yang et al., *Kem Ley Murder May Become Part of ICC Case Against Cambodian's 'Ruling Elite'*, RADIO FREE ASIA (Sept. 6, 2016), <http://www.rfa.org/english/news/cambodia/kem-ley-murder-may-become-09062016145507.html>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *OTP Policy Paper*, *supra* note 65.

⁷² *Id.*

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will still be considered more deserving of international attention when compared to man-made environmental deterioration.

There is also a serious question as to whether the Office of the Prosecutor even has the single-handed authority to expand the scope of the ICC's mandate to review environmental crimes at all.⁷³ This Policy Paper is not the first time the Office of the Prosecutor claimed it was increasing its priorities but did not follow through. In 2003, the Office made a similar mention about selecting cases based on economic factors; however, no charges were subsequently filed under the increased policy.⁷⁴ The September 15, 2016, Policy Paper, therefore, may similarly only be symbolic.

B. The ICC does not have the knowledge or resources to prosecute environmental crimes.

ICC Judges and Prosecutor are not experts on the environment. Amongst other factors, judges are elected based on their moral character and experience in either criminal law or international law.⁷⁵ Prosecutors are elected based on factors such as competence and managerial experience.⁷⁶ Neither group has the requisite scientific expertise to have a live and fruitful discussion about environmental crimes in a way that would allow Judges to make an educated and informed decision as to the culpability of a perpetrator in committing an ecological wrongdoing.⁷⁷ ICC judges deal with the prosecution of mass killers and rapists, perpetrators of genocide and torturers but they are not equipped to deal with environmental harms.⁷⁸ For fair access to justice, these parties would need to develop knowledge in scientific issues, which would cost the Court significant time and money. Therefore, as ICC judges and prosecutors are not well educated in environmental issues, the ability of the ICC to seek justice for these crimes is limited. In contrast, if environmental crimes were litigated in a specialized forum, prosecutorial costs would be reduced and there would be a greater guarantee of due process.⁷⁹

Another forum, similar to that of the Council of Europe's Convention on the Protection of the Environment Through Criminal Law, would be better able to prosecute these crimes. This forum is specialized in the environment and its divisions have the requisite environmental knowledge to effectively prosecute

⁷³ Eva Vogelvang, Assoc., Knoops' Advocate, Remarks at the Loyola University Chicago School of Law International Law Review Symposium: War Wounds: The Role of International Criminal Justice in Rebuilding the Rule of Law (Feb. 3, 2017).

⁷⁴ Cristina Maza, *ICC Move Fuels Debate on Cambodian Case*, THE PHNOM PENH POST (Sept. 19, 2016), <http://www.phnompenhpost.com/national/icc-move-fuels-debate-cambodian-case>.

⁷⁵ *The Judges of the Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/iccdocs/PIDS/publications/JudgesEng.pdf> (last visited Feb. 17, 2017).

⁷⁶ *ICC: Q&A on the International Criminal Court Prosecutor Election Process*, HUM. RTS. WATCH (Aug. 12, 2011), <https://www.hrw.org/news/2011/08/12/icc-qa-international-criminal-court-prosecutor-election-process>.

⁷⁷ Geo. Int'l Symposium, *supra* note 6, at 628.

⁷⁸ *Id.*

⁷⁹ Drumbl, *supra* note 4, at 327.

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environmental crimes.⁸⁰ Additionally, the Council has jurisdiction over corporate offenders and natural persons; it can also require perpetrators to reinstate the environment.⁸¹ Other approaches to litigating environmental issues are discussed in Section V. Without the restorative or injunctive remedies that can only be understood and developed through proper education on environmental issues, the ICC will be limited in its ability to effectively prosecute crimes and deter future perpetrators from land grabbing or causing environmental deterioration.

C. The ICC's jurisdiction and sanctions are not well suited for environmental crimes.

The ICC's jurisdiction is limited to individuals and as such, no state liability can be imposed.⁸² States are complacent in land grabbing and other environmental crimes, allowing and sometimes even helping private corporations displace populations or make living conditions unbearable.⁸³ It is difficult to prosecute environmental crimes committed by governments because of the limitations of public international law; states can invoke sovereignty to avoid international interference in natural resources management or state regulation.⁸⁴

The ICC relies on member states to prosecute international crimes. The Office of the Prosecutor is subject to political support and therefore can only serve effectively where there is political will.⁸⁵ The Prosecutor will, therefore, look for cases where it has a high chance of success and can have a profound impact, in essence only going after individuals who are the most responsible.⁸⁶ Therefore, timing is everything.⁸⁷ The U.N. Security Council referral system limits the ICC's ability to prosecute because permanent members of the Security Council have the ability to veto the referral.⁸⁸ Since the United States, Russia and China have not ratified the Rome Statute, there is a higher chance that one of these permanent members will veto referrals to the ICC because the referral may adversely impact their interests in the country of the responsible individual.⁸⁹

The problems with states controlling the ability of the ICC to prosecute international environmental crimes can be analogized to the tragedy of the commons.⁹⁰ States are interested in protecting the environment and punishing those

⁸⁰ Drumbl, *supra* note 4, at 327.

⁸¹ *Id.* at 327-28.

⁸² Geo. Int'l Symposium, *supra* note 6, at 628.

⁸³ Megret, *supra* note 3, at 213.

⁸⁴ *Id.* at 204-05.

⁸⁵ Alex Whiting, Professor of Practice, Harvard Law Sch., Remarks at the Loyola University Chicago School of Law International Law Review Symposium: War Wounds: The Role of International Criminal Justice in Rebuilding the Rule of Law (Feb. 3, 2017).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Braithwaite, *supra* note 64.

⁸⁹ *Id.*

⁹⁰ Megret, *supra* note 3, at 214. See Garrett Hardin, *The Tragedy of the Commons*, 162 AM. ASS'N FOR THE ADVANCEMENT SCI. 1243 (1968), for more information on the tragedy of the commons.

culpable for damage only to the extent that they are no more burdened than any other states in this plight.⁹¹ Each individual state would prefer that another state carry the burden of sanctioning perpetrators so as to not disadvantage its own development or make it less attractive for corporate investment or other activities in its interests.⁹² In these cases, certain states unequally bear the burden and so nothing gets done.⁹³ Therefore, international sanctions punishing environmental crimes should not operate similarly to how domestic laws, which relies on governments to bring a complaint, punish behavior.⁹⁴ There should be an independent body that dictates whether and how ecological crimes are going to be prosecuted. Because the ICC does not currently have the ability to act entirely independently from state governments, the Court is limited in how successful it will actually be in prosecuting perpetrators of ecological deterioration.⁹⁵

For example, if a land grabbing Corporation A is working with the Government of State X to acquire land in State X, it will be difficult to prosecute Government X or Corporation A because Government X has an interest in protecting itself and the Corporation. Further difficulty ensues if other states have a relationship with Government X that they may not want to jeopardize for the sake of protecting the victims of Corporation A's land grabbing scheme. This hypothetical lines up with the later discussed Cambodian case, which hopes to receive ICC consideration after private and government actors failed to protect Cambodian landowners from land grabbing by Cambodia's ruling elite. In prosecuting environmental crimes, there could be an accountability problem that the structure of the ICC cannot overcome.

Furthermore, environmental crimes are not always inter-state or political.⁹⁶ As described above, there are often private and economic dimensions to environmental crimes and with the involvement of multinational corporations, assigning responsibility in a way that the Court can prosecute can be difficult.⁹⁷ Multiple actors involved in the commission of the environmental crime can be problematic in terms of territorial jurisdiction, coordination, and localization.⁹⁸ States may offer their territory for illegal environmental activities or may be involved in other corruption schemes that make prosecuting environmental crimes within that particular state ineffective.⁹⁹ Therefore, having jurisdiction over a multinational corporation that has the support of a state can render the Court unable to prosecute the perpetrators of environmental crimes.

One major criticism of the new policy is that even if the Court prosecutes land grabbers, it will still not be enough to rehabilitate the damage and restore justice.

⁹¹ Megret, *supra* note 3, at 214.

⁹² *Id.*

⁹³ *Id.* at 215.

⁹⁴ *Id.* at 205.

⁹⁵ *Rome Statute*, *supra* note 6, art. 12.

⁹⁶ Megret, *supra* note 3, at 212.

⁹⁷ *Id.* at 212-13.

⁹⁸ *Id.* at 213.

⁹⁹ *Id.*

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Prosecuting those responsible for causing environmental damage may make the victims whole, or repair the destruction because the ICC is limited in the sentences and sanctions it can apply.¹⁰⁰ Additionally, a Fiduciary Fund foreseen in the Rome Statute may not be effective in repairing damage because even though the funds can be used to repair the environment, it is more likely that funds will be allocated to compensate human victims.¹⁰¹ The ICC's mandate runs in contradistinction to other mechanisms that extend liability to perpetrators, since the ICC specifically prosecutes international crimes.¹⁰² Other forms of extending liability, such as the tort-based liability or compensation commissions discussed below, would be more effective since they would provide a damage award in response to the individual perpetrator's impact to the environment, funds which can be used in rehabilitation efforts.¹⁰³ The Policy Paper references truth-seeking mechanisms, reparation programs, institutional reform and other justice institutions as playing an important role in the adjudication of these serious crimes, all of which may be more successful forums for punishing and sanctioning environmental crimes.¹⁰⁴

Other methods of punishment, such as compensation-based awards, may be more effective in restoring justice and acting as a deterrent to future perpetrators.¹⁰⁵ For example, after the 1991 Gulf War, the UN Security Council created a Compensation Commission (UNCC) funded by the sale of Iraqi oil to compensate victims and finance environmental reparations.¹⁰⁶ The UNCC adopted mass tort litigation approaches to settle claims associated with the war to compensate for the damage done to the Kuwaiti environment and public health.¹⁰⁷ A compensation-based sanction would ensure that the damages paid by perpetrators were used to restore the environment affected by the harm. It would introduce a much-needed flexibility for punishing environmental perpetrators by promoting remedies that were individually tailored to the effects of the specific crime. However, the ICC may not have the infrastructure necessary to follow through with this method.

D. The Rome Statute does not well integrate environmental crimes into its scope.

With the exception of Article 8(2)(b)(iv), the Rome Statute does not directly reference the environment.¹⁰⁸ The principles outlined in the Rome Statute cannot

¹⁰⁰ Smith, *supra* note 56.

¹⁰¹ Marcos A. Orellana, *Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad*, 17 *GEO. INT'L ENVTL. L. REV.* 673, 695 (2005).

¹⁰² Geo. Int'l Symposium, *supra* note 6, at 623.

¹⁰³ *Id.* at 624.

¹⁰⁴ *OTP Policy Paper*, *supra* note 65.

¹⁰⁵ Smith, *supra* note 56.

¹⁰⁶ *Id.*

¹⁰⁷ Drumbi, *supra* note 4, at 308.

¹⁰⁸ Sharp, *supra* note 5, at 218.

be easily interpreted to include the environment.¹⁰⁹ First, the Statute does not allow for analogous interpretations of the law and all ambiguities are construed in favor of the accused; meaning that environmental crimes must fit within the current criteria or they are not pursuable.¹¹⁰ Most crimes also require a knowledge intent, or *mens rea*, and would not necessarily encompass wanton or reckless acts that cause environmental damage. This is directly in contradiction with the precautionary principle of environmental responsibility, which requires preventative steps to avoid damage even when there is uncertainty over the consequences of environmental acts.¹¹¹ The Rome Statute is not meant to prosecute ecological crimes.

The Policy Paper did not create new crimes specific to the environment. Recently, there has been mention of a new crime such as “ecocide” or “geocide” which could develop a criminal sanction for environmental cleansing.¹¹² Ecocide could criminalize a current act on behalf of future generations.¹¹³ Under “geocide” or “ecocide,” harming the natural environment is a breach of the duty to care and a breach of tortious and delictual conduct that when done willfully, recklessly or negligently, constitutes a crime.¹¹⁴ States can commit ecocide through their activities or policies, by failing to regulate activities under their control or by causing or permitting environmental damage to be caused, either directly by a governmental body or indirectly by an individual or entity acting under state control.¹¹⁵ Individuals and organizations can also commit ecocide.¹¹⁶

The Rome Statute implicitly gives the Court the authority to develop new core crimes beyond those originally outlined in the Statute, and therefore the Court could have instituted new environmental crimes.¹¹⁷ This, however, would have presented international governance problems with non-member states and states for which these new core crimes are unacceptable.¹¹⁸ There must be international consensus for the addition of new core crimes. Since there is no international consensus on the creation of a universal environmental crime, a new crime is unlikely to ever develop.¹¹⁹ Without punishing environmental manipulation and misuse, the Policy Paper will be limited.¹²⁰

The way environmental harms are compared to other types of criminal acts is problematic.¹²¹ While there is no way to suggest that there was a benefit to the

¹⁰⁹ Orellana, *supra* note 101, at 691.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Geo. Int’l Symposium, *supra* note 6, at 627.

¹¹³ Megret, *supra* note 3, at 203.

¹¹⁴ Drumbl, *supra* note 4, at 324-25.

¹¹⁵ Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT’L L.J. 215, 219 (1996).

¹¹⁶ Drumbl, *supra* note 4, at 221.

¹¹⁷ Sharp, *supra* note 5, at 227.

¹¹⁸ *Id.*

¹¹⁹ Geo. Int’l Symposium, *supra* note 6, at 628.

¹²⁰ *Id.* at 627.

¹²¹ Megret, *supra* note 3, at 221.

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commission of a traditional ICC core crime a defendant may be able to conjure up some defense of communal benefit.¹²² There is no benefit to society from the commission of mass murder but a corporation's executive may be able to argue that the taking over some land for mining or agribusiness increased food supply or jobs.¹²³ If perpetrators are able to communicate to the ICC that they committed these crimes in furtherance of a benefit to society, it will become increasingly difficult to view environmental crimes in the same light as ICC core crimes.

The way the Policy Paper is written suggests that environmental crimes are meant to fit within the preexisting core crimes within the ICC's jurisdiction.¹²⁴ The three main crimes that the ICC prosecutes are genocide, crimes against humanity, and war crimes. Fitting environmental crimes into these three existing crimes is possible but difficult. No matter how successful, it is likely that the environmental aspects of the crime will be a secondary consideration when compared to the other acts that are under investigation.

1. Genocide

To prove genocide under the Rome Statute, one must show that acts were committed with the intent to destroy a national, ethnic, racial or religious group.¹²⁵ The greatest challenge to include environmental degradation in genocide prosecution is the intent or knowledge element of the crime.¹²⁶ It is not enough to show that the executive of a transnational corporation knowingly engaged in an environmentally harmful act in a way that may displace or injure an indigenous population - to convict based on genocide, there must be a specific intent to destroy the population as well.¹²⁷ This is even more difficult to prove, as the Rio Declaration recognizes a right to sustainable development, which allows acceptable levels of environmental degradation in the name of progress.¹²⁸ Therefore, a country or corporation that, by its actions, causes fatal environmental harm in the name of development has a defense to say their actions were justified for the benefit of society.¹²⁹

¹²² Megret, *supra* note 3, at 221.

¹²³ *Id.*

¹²⁴ *OTP Policy Paper, supra* note 65.

¹²⁵ See *Rome Statute, supra* note 6, art. 6 (genocide is defined in the Rome Statute as "any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious mental or bodily harm to members of the group; (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.").

¹²⁶ Sharp, *supra* note 5, at 234.

¹²⁷ *Id.*

¹²⁸ *Id.* (the Rio Declaration is an international document outlining 27 principles intended to guide sustainable development). See U.N. Secretary General, *Rio Declaration on Environment and Development: Application and Implementation*, ¶2, U.N. Doc. E/CN.17/1997/8 (Feb. 10, 1997), for more information.

¹²⁹ Sharp, *supra* note 5, at 234.

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The goal of prosecuting genocide is generally to punish those who take away life, but cultural integrity also receives protection as a juridical value.¹³⁰ The Court may be able to prosecute acts of genocide that threaten the existence of certain groups by environmental degradation.¹³¹ For example, subjecting a group of peoples to conditions that destroy their vital living space can be considered genocide, as would be the case with an indigenous community that is materially or spiritually tied to its habitat.¹³² However, environmental degradation may not physically destroy a population but instead destroy its cultural identity, as would be the case if an indigenous community had to resettle off their sacred land or integrate and assimilate with a new civilization.¹³³ Therefore, the ecological harm may not rise to the level necessary to prosecute the perpetrator as committing an act of genocide. Additionally, the Rome Statute requires a *mens rea* for a criminal conviction and proving a direct intent or motive to commit genocide will not include convictions for environmental destruction that comes as part of progress or development or for when environmental destruction is only a byproduct.¹³⁴

This problem can be illustrated through the extinction of the Ache indigenous group in Paraguay in the 1970s, when the Paraguayan Government used transactional corporations to promote oil exploration on the Ache's ancestral land, causing the cultural group to slowly die out.¹³⁵ While the Government and transnational corporation's actions met the definition of genocide, there was no evidence that proved "intent to destroy."¹³⁶ Therefore, the environmental destruction these groups clearly committed could not be prosecuted as genocide. If a perpetrator were to knowingly pollute a water source, poison fields or destroy a habitat in order to remove a group and take over their land, the Rome Statute's definition of genocide would be met and there may be some level of environmental protection.¹³⁷ The fatal problem lies in waiting until the level of environmental degradation reaches those that mimic genocide in order to prosecute the crime; this is too high a threshold and limits the efficacy of deterrence efforts.¹³⁸ Without a specific intent to destroy and without waiting until the damage is irreversible, prosecuting environmental crimes as genocide can prove to be difficult.

¹³⁰ Orellana, *supra* note 101, at 691.

¹³¹ *Id.* at 692.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Orellana, *supra* note 101, at 692.

¹³⁵ Sharp, *supra* note 5, at 234.

¹³⁶ *Id.* at 234-35.

¹³⁷ *Id.* at 235.

¹³⁸ Megret, *supra* note 3, at 210.

2. *Crimes Against Humanity*

Crimes against humanity are acts knowingly committed against a civilian population.¹³⁹ There is more flexibility to include environmental crimes under the definition of crimes against humanity than exists within the definition of genocide since the scienter element of a specific intent to destroy is not required.¹⁴⁰ Of the various types of crimes against humanity, there are two that could best be used to prosecute environmental crimes: extermination and deportation or forcible transfer of population. Extermination is “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.”¹⁴¹ For example, in the 1990s, Saddam Hussein, in hopes of destroying the Marsh Arab community in southern Iraq, diverted the Tigris and Euphrates rivers to drain the marshes in Mesopotamia in retaliation of an uprising in the area.¹⁴² Deportation or forcible transfer of population is the “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.”¹⁴³ To knowingly destroy a human habitat can be considered a forceful displacement of a group of persons “from an area in which they are lawfully present.”¹⁴⁴ Finally, if these acts do not fit under the two preceding crimes against humanity, they can also be considered crimes against humanity as “inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health.”¹⁴⁵

Crimes against humanity are meant to protect the civilian population.¹⁴⁶ These crimes are only connected to the environment by implication or indirectly.¹⁴⁷ While the intent behind an environmentally harmful act may not be to destroy a people, a culture or a habitat, if a continuous and foreseeable result from the harm is that a people, a culture or a habitat will be destroyed, the result can make the act criminal.¹⁴⁸ Any potential economic justification for the exer-

¹³⁹ *Rome Statute*, *supra* note 6, art. 7 (crimes against humanity are defined as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity. . . ; (i) enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”). *See also* Sharp, *supra* note 5, at 237.

¹⁴⁰ Sharp, *supra* note 5, at 237.

¹⁴¹ *Id.*

¹⁴² Smith, *supra* note 56 (this crime could not be prosecuted by the ICC because it took place before 2002); *see generally* Tara Weinstein, *Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?*, 17 *Geo. Int'l Envtl. L. Rev.* 697 (2005).

¹⁴³ Sharp, *supra* note 5, at 237; *see also* Orellana, *supra* note 101, at 693.

¹⁴⁴ Sharp, *supra* note 5, at 239.

¹⁴⁵ *Id.*

¹⁴⁶ Orellana, *supra* note 101, at 693.

¹⁴⁷ *Id.*

¹⁴⁸ Sharp, *supra* note 5, at 239.

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cise of the right to development does not mitigate a callous disregard for natural life or integrity.¹⁴⁹ For example, in the Cambodian case discussed below, any defense suggested that the land grabbing was in pursuit of economic development would likely not justify the displacement of approximately 350,000 persons.

Despite the fact that many different acts can constitute crimes against humanity, environmental crimes can be difficult to fit into its realm.¹⁵⁰ Crimes against humanity must “shock the conscience of mankind,” a requirement that is generally meant for actions whose results are grave to humankind and not the natural environment.¹⁵¹ The problem is that harm to the environment may be too remote, widespread or difficult to prove and therefore will not fit within these generally accepted principles.¹⁵² Nevertheless, of the three core crimes that the ICC prosecutes, crimes against humanity may be the best suited for the prosecution of environmental crimes, even though it may still be difficult to do without a direct correlation between the environmental harm and the result on a human population.

3. War Crimes

The ICC’s jurisdiction extends over all war crimes specified by the Rome Statute and in particular to those “committed as part of a plan or policy as a part of a large-scale commission of such crimes.”¹⁵³ While there are many definitions of war crimes in the Rome Statute, only one addresses environmental damage specifically. Article 8(2)(b)(iv) defines a war crime as “intentionally launching an attack in the knowledge that such attack will cause. . . 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.”¹⁵⁴ There are multiple readings of this definition. The first reading criminalizes “widespread, long-term and severe damage to the natural environment.”¹⁵⁵ A more strict reading would require “widespread, long-term and severe damage to the natural environment which is not justified by military necessity.”¹⁵⁶ Yet another reading would require the knowledge to be excessive in relation to the anticipated advantage and thus would require the employment of a balancing test.¹⁵⁷ The problem is that there is no guidance on exactly when actions taken that adversely affect the environment become criminal.¹⁵⁸

¹⁴⁹ Sharp, *supra* note 5, at 239.

¹⁵⁰ Megret, *supra* note 3, at 208.

¹⁵¹ *Id.* at 209.

¹⁵² *Id.*

¹⁵³ Sharp, *supra* note 5, at 240.

¹⁵⁴ *Id.* at 240-41.

¹⁵⁵ *Id.* at 241.

¹⁵⁶ Sharp, *supra* note 5, at 241.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

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The Rome Statute's preparatory works on the inclusion of environmental war crimes show that the integrity of the environment is a secondary matter to military considerations.¹⁵⁹ Environmental harms being committed, as a byproduct of war, are not unusual. Between 1962 and 1971, twelve million gallons of Agent Orange was sprayed over almost ten percent of present-day South Vietnam, destroying between fourteen and thirty-three percent of Vietnamese forests and exposing civilians and soldiers to defoliants that caused physical and mental disability in future generations of children.¹⁶⁰ During the 1991 Gulf War, Iraq ignited Kuwait's oil wells causing the dumping of oil into the Persian Gulf, subsequently leading to the contamination of Kuwait's water supply.¹⁶¹ NATO aerial bombardments of the Federal Republic of Yugoslavia under Operation Allied Force caused the destruction of a petrochemical, fertilizer and refinery complex that discharged oil, gasoline, and dichloride in the Danube river, emitting toxic gasses and pollution downstream into the Black Sea.¹⁶² None of these actions were prosecuted as environmental war crimes.

Moreover, there is no jurisdiction to sanction armed forces that cause environmental insecurity by testing weapons, mobilizing forces or supervising the disarmament process.¹⁶³ If individuals do not inform themselves that their actions are destructive to the environment, they can use their ignorance as a defense against war crimes.¹⁶⁴ The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), Geneva Conventions and Protocol I of the Hague Convention have all been insufficient to establish individual or state liability for the environmental harms they commit because these conventions only protect the environment when the environmental harm is indirectly or implicitly accompanied by military action.¹⁶⁵ Even though environmental war crimes are explicitly mentioned in international law, there have been little to no successful prosecutions of the same.

V. Proposal

Based on the above analysis, prosecuting environmental crimes under the Rome Statute may not be as successful as supporters of the Policy Paper believe it to be. Companies who invest in certain countries without understanding the environmental impacts of their actions will now risk being complicit in the commission of ICC core crimes, but only if their actions reach the level that is required by the Statute.¹⁶⁶ Associated activities from land grabbing, such as deforestation, can potentially be prosecuted, but only if they destroy a popula-

¹⁵⁹ Orellana, *supra* note 101, at 694.

¹⁶⁰ Drumbl, *supra* note 4, at 308.

¹⁶¹ *Id.*

¹⁶² *Id.* at 309.

¹⁶³ Drumbl, *supra* note 4, at 314.

¹⁶⁴ *Id.* at 323.

¹⁶⁵ Orellana, *supra* note 101, at 683.

¹⁶⁶ Vidal & Bowcott, *supra* note 11.

tion.¹⁶⁷ The only real impact that the Policy Paper has on international justice is that the ICC is showing company executives and investors that, steps are being taken to show that no one will be able to hide behind a corporate veil and commit atrocities during peacetime in the name of progress or development.¹⁶⁸ Whether criminal action will be taken or the Policy Paper is just a symbolic gesture, it is one of the first steps towards creating an accountability mechanism for ecological wrongdoers.

It can be quite complicated to bring an action against a corporation or government for an environmental crime because the prosecution must prove a definitive relationship between the entity and the specific environmental damage it caused.¹⁶⁹ The ICC is planning on assessing the impact of the crimes, inter alia, through the victim's increased vulnerability, the terror instilled because of the crime and the social, economic and environmental damage inflicted because of a defendant's actions.¹⁷⁰ The commission of these crimes will be assessed through:

the means employed to execute the crime, the extent to which the crimes were systematic or resulted from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, the existence of elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination held by the direct perpetrators of the crimes, the use of rape or other sexual or gender-based violence or crimes committed by means of, or resulting in, the destruction of the environment or of protected objects.¹⁷¹

But, in order for this to work, the ICC must send a case to the investigation stage.

An initial first case under the expanded ICC focus comes from Cambodia. The Policy Paper does not necessarily make land grabbing a crime per se but allows mass forcible evictions from the land grabbing to be perceived as a crime against humanity during peacetime.¹⁷² The timing of the Policy Paper coincides with the filing of a case of mass human rights violations related to land seizures in Cambodia.¹⁷³ Business leaders in the country, working with the kleptocratic Cambodian government, have been systematically stealing land.¹⁷⁴ Based on the

¹⁶⁷ Vidal & Bowcott, *supra* note 11.

¹⁶⁸ Smith, *supra* note 56.

¹⁶⁹ Farron Cousins, *Could the International Criminal Court Start Prosecuting Climate Crimes?*, DESMOG (Oct. 1, 2016), <https://www.desmogblog.com/2016/10/01/could-international-criminal-court-prosecute-climate-crimes> (for example, to obtain a verdict in a lawsuit, a plaintiff or prosecutor would have to show that Company X created Product Y, which was directly and solely responsible for the damage alleged. If there are any other influences, which are extremely common and likely, the entire suit can be negated).

¹⁷⁰ Cousins, *supra* note 169.

¹⁷¹ *Id.*

¹⁷² Vidal & Bowcott, *supra* note 11.

¹⁷³ Global Witness Press Release, *supra* note 15.

¹⁷⁴ *Id.*

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logic of the Policy Paper, Richard Rogers, a partner of the international criminal law firm Global Diligence, filed a case with the ICC on behalf of 10 Cambodians.¹⁷⁵ The case alleges that since 2002, the Cambodian ruling elite – spanning from government officials to the military – have committed mass human rights violations in order to gather wealth and power by forcibly evicting almost 350,000 from their land.¹⁷⁶ The ICC Prosecutor is said to be taking two to three environmental cases seriously, for which decisions as to whether the Office will bring charges will be made by the end of this current year.¹⁷⁷ This case was unprosecuted in Cambodia because the government found the allegations to be politically motivated and based on fake statistics.¹⁷⁸ It is thought that because of the lack of action taken in Cambodia, this is one of the few environmental cases under consideration by the Court.

However, the ICC may not be the proper place to enforce environmental crimes. Because many crimes that take place are not inter-state or international, perhaps the ICC should follow its traditional rationale and defer to individual states to punish environmental crimes. Many countries currently include environmental rights within their legislation. The African Charter on Human and People's Rights states, "all peoples shall have the right to a general satisfactory environment favorable to their development."¹⁷⁹ The Brazilian Constitution recognizes that "everyone is entitled to an ecologically balanced environment which is an asset of everyday use to the common man and essential to the healthy qualify of life; this imposes a duty on the government and the community to protect and preserve it for the present and future generations."¹⁸⁰ The Namibian Constitution imposes an active responsibility on the State to maintain ecosystems, ecological processes and biological diversity in the country and also ensure national resources are used in a sustainable way that benefits present and future citizens.¹⁸¹ The problem, which is beyond the scope of this article, is that many states do not prosecute violations of these rights.¹⁸² If the ICC and the international community continue to lead by example, domestic or other transnational forums may be better suited to deal with the environmental harm that multinational corporations cause.

Certain environmental disasters within the ICC's jurisdiction come to mind as potentially chargeable events. For example, the ICC can investigate environmental crimes committed as part of the Lebanon Jiyeh Power Station bombing in 2006, which caused one of the largest oil spills in the Mediterranean Sea or the release of toxic materials during the 2008-2009 conflict in Gaza, that led to mass

¹⁷⁵ Vidal & Bowcott, *supra* note 11.

¹⁷⁶ *Id.*

¹⁷⁷ Yang et al., *supra* note 68.

¹⁷⁸ Christ Arsenault, *International Court to Prosecute Environmental Crimes in Major Shift*, REUTERS (Sept. 15, 2016), <http://www.reuters.com/article/us-global-landrights-icc-idUSKCN11L2F9>.

¹⁷⁹ Sharp, *supra* note 5, at 231.

¹⁸⁰ *Id.* at 231-32.

¹⁸¹ *Id.* at 232.

¹⁸² *Id.* at 233.

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soil and water contamination.¹⁸³ The ICC may be able to look at the *Deepwater Horizon* explosion in the Gulf of Mexico, of which BP, TransOcean, and Halliburton may have been criminally responsible.¹⁸⁴ Current and former Exxon officials may be prosecuted for covering up the company's contribution to climate change, caused by its CO2 emissions after the company knowingly and willfully hid these dangers from the public despite its own scientific findings that put liability and responsibility on Exxon.¹⁸⁵

Despite the number of cases that could theoretically be prosecuted, prosecuting environmental crimes is easier said than done. In February 2016, a BP rig supervisor was found not guilty of violating the Clean Water Act after the *Deepwater Horizon* spill.¹⁸⁶ Additionally, a Hungarian court acquitted over a dozen Mal Corp employees in January 2016 for their part in a toxic red sludge spill from a 2010 reservoir burst that killed ten people.¹⁸⁷

However, there is still a possibility that domestic courts are the best venue to prosecute environmental crimes. In June 2015, a Dutch court returned a verdict ruling that the Netherlands had a legal duty to lower CO2 emissions for the current and future generations.¹⁸⁸ The judge's decision set precedent; it was the first to establish a duty of care to future generations as a method of establishing climate justice.¹⁸⁹ If ecocide was made an international crime against peace in more countries, additional progress could be made.¹⁹⁰

The international community can also learn a lesson from Guatemala and the efforts made in the country to protect the environment. In July 2016, the country became the first in the world to dedicate a court responsible for adjudicating crimes against nature, or ecocide.¹⁹¹ The Environmental Crimes Court has gathered momentum and has already ruled against palm oil corporation Empresa Reforestadora de Palma de Petén SA (REPSA) after the company was charged with ecocide.¹⁹² In this case, REPSA's negligent practices of polluting the La Pasión River, by dumping the pesticide Malathion into it, caused the deaths of millions of fish and other wildlife.¹⁹³ A coalition of grassroots groups operating

¹⁸³ Smith, *supra* note 56 (asserting that the ICC would not be able to prosecute the crimes since these states have not ratified the Rome Statute).

¹⁸⁴ Cousins, *supra* note 169.

¹⁸⁵ *Id.*

¹⁸⁶ Brittany Felder, *ICC to Focus on Environmental Crimes*, JURIST (Sept. 16, 2016), <http://www.jurist.org/paperchase/2016/09/icc-to-focus-on-environmental-crimes.php>; see also *United States of America v. Robert Kaluza*, No. 2:12-CR-00265 (E.D. La.), AUSA Jennifer Saulino.

¹⁸⁷ Felder, *supra* note 186.

¹⁸⁸ Femke Wijdekop, *Stopping the Sixth Extinction: Ecocide Law*, SALT (Sept. 29, 2015), <http://www.wearesalt.org/stopping-the-sixth-extinction-ecocide-law/>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *On Dangerous Ground*, *supra* note 1.

¹⁹² *Guatemala's Environmental Crimes Court Hears First Case*, SUSTAINABLEBUSINESS.COM (Jan. 19, 2016), <http://www.sustainablebusiness.com/guatemala39s-environmental-crimes-court-hears-first-case-55448/>.

¹⁹³ *Id.* (La Pasión river runs for approximately 300 miles in Guatemala's northern regions, and is the home various bird, mammal and fish species. It also supports tens of thousands of individuals who live

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as the Commission for the Defense of Life and Nature filed the action on behalf of the environment and the decision against REPSA was upheld at the appellate level.¹⁹⁴ The coalition's success was only possible because Guatemala recognized the crime of ecocide.¹⁹⁵ Similarly, without recognizing such a crime, there is no international recourse mechanism to establish justice for the environmental damage done.

VI. Conclusion

The Policy Paper is of symbolic and precedential value; it suggests that environmental crimes are going to be taken seriously in the future. It is a step in the right direction. However, with the prohibitive *mens rea* requirements necessary to prosecute environmental crimes, it will be difficult to prosecute anything other than "intentional inflictions of environmental harm," resulting in largely unprosecuted negligent and reckless damage.¹⁹⁶ Ecological crimes still must fit within the definitions of genocide, crimes against humanity and war crimes and this can be limiting. The legal infrastructure that protects land rights is lacking. A stronger architecture to protect land ownership rights is necessary to ensure corporations are held accountable for their global trade practices. The hope with the expanded scope of the ICC is to consider traditionally under-prosecuted crimes.¹⁹⁷ However, the ICC is likely not going to be the right forum to adjudicate these crimes. Limitations in structure and accessibility mean that environmental crimes will always be a secondary priority to other crimes that are committed in conjunction and as a result, more practical and accessible solutions are needed. While the Policy Paper may be a warning to company executives and investors that their bullying on the environmental playground will no longer be tolerated, the reality is that the existing infrastructure is not enough.

along the banks. The Guatemala National Council for Protected Areas estimates that REPSA's toxins affected 23 fish species and 21 bird, reptile and mammal species).

¹⁹⁴ *Guatemala's Environmental Crimes Court Hears First Case*, *supra* note 192.

¹⁹⁵ *Id.*

¹⁹⁶ Drumbl, *supra* note 4, at 332.

¹⁹⁷ Vidal & Bowcott, *supra* note 11.