



**PROSECUTION OF ENVIRONMENTAL CRIMES  
OCCURRING IN ARMED CONFLICTS IN AFRICA.**

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# TABLE OF CONTENTS

## Contents

TABLE OF CONTENTS .....	i
DECLARATION OF ORIGINALITY .....	iii
APPROVAL .....	iv
DEDICATION .....	v
ACKNOWLEDGEMENT .....	vi
LIST OF AUTHORITIES .....	vii
LIST OF ABBREVIATIONS .....	x
ABSTRACT .....	xi
INTRODUCTION .....	1
Background.....	1
Statement of the research problem.....	6
Objective of the Research .....	7
Research Questions.....	7
Theoretical framework.....	8
a) Retributive justice .....	8
b) Deterrence Theory .....	10
Literature review.....	12
i) Environmental crimes .....	12
ii) Crimes Under ICC .....	13
iii) Nature of armed conflicts .....	14
iv) Complementarity of ICC and domestic courts .....	15
v) Access to environmental justice.....	16
vi) Criminal law on environment .....	17
vii) Immunity against prosecution in environmental crimes .....	18
Gaps.....	20
Justification of the Research Study.....	20
Research methodology.....	20
Chapter Breakdown .....	21
NATURE OF ENVIRONMENTAL CRIMES IN ARMED CONFLICTS.....	22
Introduction .....	22
Nature of Armed Conflicts .....	22
<i>Types of armed conflicts</i> .....	22
<i>Means and mode of War</i> .....	23
<i>Actors in armed conflict</i> .....	26
Environmental crimes occurring in armed conflicts: focus on Africa .....	28
Nexus between environment protection and armed conflict.....	33
<i>Armed conflict and human rights safeguard</i> .....	33
<i>Environment as human right</i> .....	35
Conclusion.....	38
CHAPTER THREE .....	39
LIABILITY FOR ENVIRONMENTAL CRIMES .....	39
Introduction .....	39
Criminal versus civil liability .....	39
Individual liability .....	40
Vicarious liability .....	42
<i>Liability of Corporations</i> .....	42
<i>State Responsibility</i> .....	43
Command Responsibility.....	45
Standard of Proof.....	45
Immunity against environmental crimes.....	47
Enforcement of warrants.....	47
Conclusion.....	48
CHAPTER FOUR .....	49
PROSECUTION OF CRIMES BY ICC.....	49
Introduction .....	49
Conclusion.....	60

CHAPTER FIVE .....	61
FINDINGS, CONCLUSION, ANALYSIS AND RECOMMENDATION.....	61
Introduction .....	61
Findings .....	61
Conclusion .....	62
Analysis .....	63
Recommendation .....	64
BIBLIOGRAPHY .....	66

## **DECLARATION OF ORIGINALITY**

I do hereby declare that this is my original work. It has not been submitted for award of a degree or any other academic credit in any other University. This is in partial fulfillment of the requirements for Degree of Bachelor of Law (LLB) at the University of Nairobi Law School. I also declare that any references made to texts, articles, journal articles, papers, websites and journals, and any other pertinent materials have been duly acknowledged in this paper. I understand that any false claim in respect of this work shall result in disciplinary action, in accordance with the University Plagiarism Policy.

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## **APPROVAL**

The thesis titled **Prosecution of Environmental Crimes Occurring in Armed Conflicts in Africa** was done under my supervision and the same is submitted to **The University of Nairobi, School of Law** for examination with my approval as the candidate's supervisor.

Signed:  Date: 3<sup>RD</sup> OCTOBER, 2022

Supervisor: **DR. KARIUKI MUIGUA**

## **DEDICATION**

I dedicate my thesis to Mr. and Mrs. Peter Endoo and to my late sisters Margaret Cheptoo Endoo and Leah Cheruto Endoo.

## **ACKNOWLEDGEMENT**

I wish to acknowledge and appreciate the efforts of those who saw to it that this thesis is accomplished. I thank the Almighty God, the giver of life and good health for granting me the strength to complete this study. Many thanks to my family for their unending support to see that I complete school. Finally, I thank my supervisor Dr. Kariuki Muigua for giving me the opportunity to be my supervisor and tirelessly supervising my work at every stage, any loopholes in the study are mine entirely.

## **LIST OF AUTHORITIES**

### **CONSTITUTIONS**

The Constitution of Kenya, 2010

THE Constitution of Ecuador, 2008

### **CONVENTIONS**

1. Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, 1998
2. Annex to the Nagoya Protocol on Access and Benefit Sharing, 1995
3. Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes and their Disposal, 1989
4. Cartagena Protocol on Biosafety to the Biodiversity Convention, 2000
5. Convention on Biological Diversity, 1992
6. International Convention on the Prevention of Pollution from Ships (MARPOL), 1973
7. London Convention on Dumping, 1972
8. Montreal Protocol on Substances that Deplete the Ozone Layer, 1987
9. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998
10. Stockholm Convention on Persistent Organic Pollutant, 2001
11. The International Law Commission and the Draft Code of Crimes against the Peace and Security of Mankind
12. Washington Convention on International Trade in Endangered Species of Fauna and Flora (CITES), 1973
13. World Charter of nature, 1982
14. Convention on the Prevention of Military or any other hostile use of Environmental Modification Techniques
15. Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014 (Malabo Protocol)
16. Geneva Convention
17. Addition Protocol
18. Rome Statute, 1998

### **STATUTES**



- i. Climate Change Act, No. 11 of 2016
- ii. Environment (Management and Co-ordination) Act, No. 8 of 1999
- iii. The Geneva Conventions Act 1968

## **REGULATIONS**

- i. The Environmental (Impact Assessment and Audit) Regulations, 2003

## **LIST OF CASES**

- i) ACHPR Comm No. 1551 96 (2001); Aaaddaney, M., Human Rights and the Environment under African Union Law, (Springer Nature, 2020) p. 477.
- ii) Advisory Opinion on the Legal Consequences of the Construction of a Wall by Israel in the Occupied Palestinian Territory (2004) 43 ILM 1009
- iii) Advisory Opinion on the Legality of Use of Weapons
- iv) African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, Order, March 2013. AfCHPR, Application No. 004/2011
- v) African Commission on Human and Peoples' Rights v. Libya, Order of Provisional Measures, (March 2013) AfCHPR, Application No. 002/2013 –
- vi) African Commission on Human and Peoples' Rights v. Republic of Kenya, Judgment, May 2017
- vii) African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights
- viii) Case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).
- ix) Constitutional Rights Project, Civil Liberties Organization and Interights (on behalf of Ken Saro-Wiwa Jr.) v Nigeria, (October 1998) ACHPR, Communications 137/94-139/94-154/96-161/97
- x) Continental Shelf (Libyan Arab Jamahiriya/Malta) Judgment, [1985] *ICJ Rep* at p 29, para 27
- xi) Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-oI/o9-oI/II-373.
- xii) Democratic Republic of Congo v Burundi Rwanda and Uganda ACHPR, Communication 2227/99 (2003).
- xiii) European Parliament resolution of 17 December 2015 on the protection of the Virunga National Park in the Democratic Republic of Congo (2015/2728(RSP))

- xiv*) Factory At Chorzów, Germany v Poland, Judgment, Claim for Indemnity, Merits, Judgment No 13, (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928).
- xv*) Flores v. Southern Peru Copper Corp., 414 F.3d 233, 343 F.3d 140 (2d Cir. 2003)
- xvi*) Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehova v DRC, 5 ACHPR, 25/89 – 47/90 – 56/91-100/93
- xvii*) Friends of the Earth, Inc v Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000)
- xviii*) Gabcikovo v Nagymaros 1997, 37 I.L.M 162.
- xix*) Kedar Bakhta Shresth and Others v HMG Department of Transportation Management and Others Writ No. 3109
- xx*) Palestinian Wall Case Advisory Opinion
- xxi*) Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-T
- xxii*) Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, 3 July 2002
- xxiii*) Prosecutor v. Tihomir Blas̃kic', 2000, Case No. IT-95-14, at 333.
- xxiv*) Resoluition on Human Rights in conflict Situations – ACHPR/Res.332 (EXT.OS/XIX)2016
- xxv*) Shrimp and Turtle case Appellate Body, 37 I.L.M. 834(1998.)
- xxvi*) Social and Economic rights Action Center and Center for Economic and Social Rights vs Nigeria, ACHPR Com No. 1551 96/ (2001)
- xxvii*) Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan, 279/03-296/05, African Commission on Human and Peoples' Rights, May 2009
- xxviii*) The Prosecution v Al Hassan Ag Abdoul Aziz Ag Moamedag Mahmoud (ICC-01/12/18)
- xxix*) The Prosecutor v Bosco Ntaganda ICC-01/04-02/06
- xxx*) The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamedag Mahmoud (ICC-01/12-01/18)
- xxxi*) The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15.
- xxxii*) United States v. Hansen, 262 F.3d 1217 (11th Cir. 2001),

## **LIST OF ABBREVIATIONS**

EAC	THE EAST AFRICA COMMUNITY TREATY
EIA	ENVIRONMENTAL IMPACT ASSESSMENT
IFC	INTERNATIONAL FINANCE CORPORATION
MNCS	MULTI-NATIONAL CORPORATIONS
SDGS	SUSTAINABLE DEVELOPMENT GOALS
SEA	SUSTAINABLE ENVIRONMENTAL ASSESSMENT
SGR	STANDARD GAUGE RAILWAY
SIA	SOCIAL IMPACT ASSESSMENT
UN	UNITED NATIONS
UNDP	UNITED NATIONS DEVELOPMENT PROGRAMME
WTO	WORLD TRADE ORGANIZATION

## **ABSTRACT**

Environmental protection has been a contemporary topic in international law in the backdrop of devastating climate change. Efforts on environmental protection and conservation is through environmental justice. International law has traditionally accorded liability to parties for breach of obligations, requiring them to indemnify the offended state. However, there have been no criminalization and prosecution of crimes perpetrated despite their severe impact on the environment that are beyond the limits imposed by International Environmental Law. International Criminal Law focuses on effects of crimes perpetrated on human population. The developments in the jurisprudence indicate the need and benefits to however hold individuals and companies criminally liable for crimes whose impact severely damage the environment and violate human rights. This research considers environmental harms occurring during armed conflicts in Africa, appreciating the multiple facets of the issues in armed conflict in Africa. It discusses a number of environmental damages that occur during armed conflicts. In determining the possibility of prosecution of such crimes, the research examines the nexus between environmental and criminal law in the international sphere. It also considers the vastness and the delicate natural resources and the role of states in Africa and the efforts in enduring development and growth, protecting development and balancing generational equity. The first chapter gives a background of armed conflicts and in Arica and justification for the paper. It extensively covers related literature review touching on the subject. Chapter two critically examines the nature of armed conflicts, consequent environmental crimes and their impact on the environment. Chapter three compares international criminal law being governing law on prosecution of crimes under customary litigation used in transnational environmental law. Chapter four discusses liability in civil claims as compared to individual/state liability in criminal offences. Chapter five concludes by analyzing the research and making recommendations.

# CHAPTER ONE

## INTRODUCTION

### Background

The ICC has begun to keenly prosecute crimes committed against the environment. The cases against destruction of property in Mali are among the first of environmental crimes presented before the ICC.<sup>1</sup> Following the destruction of property during armed conflicts in Mali,<sup>2</sup> the alleged leader Mr. Al Hassan AG Abdoul was on 31<sup>st</sup> March 2018 surrendered to the International Criminal Court. He was charged for the international crimes committed<sup>3</sup> in Timbuktu by the Malian authorities.<sup>4</sup>

The international community has vehemently condemned attacks on cultural heritage sites.<sup>5</sup> As from 2012 January, the armed groups of Al Qaeda were alleged to forcefully be in control of the city of Timbuktu.<sup>6</sup> Among other perpetrations, Al Hassan is accused of participating, while using force, to disfigure Islamic Mausoleums in Timbuktu through the Islamic Police Forces, resulting to destruction of artifacts protected under the UNESCO.<sup>7</sup> Contrary to tradition prosecution, the Office of the Prosecutor sought to prosecute the accused persons for environmental crimes.<sup>8</sup>

The World Charter for Nature<sup>9</sup> reiterates the fundamental objective of the UN as upholding international peace and security,<sup>10</sup> requiring every person to protect to the environment, particularly during armed conflicts.<sup>11</sup> Under the Charter, there are five proclaimed principles

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<sup>1</sup> The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamedag Mahmoud (ICC-01/12-01/18)

<sup>2</sup> Brosché, Johan, Mattias Legné, Joakim Kreutz, and Akram Ijla. "Heritage under attack: motives for targeting cultural property during armed conflict." *International Journal of Heritage Studies* 23, no. 3 (2017): 248-260

<sup>3</sup> Sturma, P. "The Rome Statute of the ICC at its Twentieth Anniversary", Brill, 2019 (accessed on 2<sup>nd</sup> December, 2021)

<sup>4</sup> <https://www.icc-cpi.int/pages/item.aspx?name=pr1376> accessed in 29 January, 2019; Hegla Turku, *The Destruction of Cultural Property as a Weapon of War: ISIS in Syria and Iraq* (Springer, 2017)

<sup>5</sup> Brodie, N. 2015. "Syria and its Regional Neighbors: A Case of Cultural Property Protection Policy Failure?" *International Journal of Cultural Property*. 22(2-3):317-335.

<sup>6</sup> Chauzal, Grégory, and Thibault van Damme. "The roots of Mali's conflict." *Moving beyond the* (2015).

<sup>7</sup> BBC, 1<sup>st</sup> July, 2012 'Islamists vow to smash every mausoleum in Timbuktu' from <https://www.bbc.com/news/world-africa-18665522> accessed in March, 2019.

<sup>8</sup> Mistura, Alessandra. "Is There Space for Environmental Crimes under International Criminal Law: The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework." *Colum. J. Envtl. L.* 43 (2018): 181.

<sup>9</sup> United Nations Environment Programme, World Charter for Nature: United Nations General Assembly Resolution 37/7, of 28 October 1982 (UNEP, 1982).

<sup>10</sup> Gillman, H. "American Constitutionalism: Combined Volumes I and II", Oxford Press

<sup>11</sup> Vietti, Francesca, and Todd Scribner. "Human insecurity: Understanding international migration from a human security perspective." *Journal on Migration and Human Security* 1, no. 1 (2013): 17-31.

for conservation designed to guide and judge human conduct on nature. It provides that the use of force should not be such that it causes harm on the environment.<sup>12</sup>

Environment can be defined as the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odor, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.<sup>13</sup> Environmental crimes are acts that convene treaty obligations against the environment. Environmental crimes may be within one state or be committed in more than one state.<sup>14</sup>

It is without doubt clean environments are pivotal for anyone to enjoy fundamental rights.<sup>15</sup> This has been extensively coded in international instruments. Unfortunately, environmental concerns compete parallel along other factors such as economic, political, trade and other anthropocentric needs.<sup>16</sup> Inclusion of provisions on environmental protection in international instruments promotes development. Gradually, principles on environmental protection have been infused in other facets of international law.<sup>17</sup>

Armed conflicts in Africa have been disastrous to the natural environment.<sup>18</sup> Briefly, there have been unending conflicts in Congo, Nigeria, Sudan, South Sudan and Somalia on natural resources.<sup>19</sup> African countries are yet to recover from the colonial struggles. In addition, other factors driving conflicts in Africa include politics and ethnic-related disputes. Many efforts have been put in protecting the human factor such as the refugees, leaving the natural environment to suffer. The perpetrators remain at large.<sup>20</sup>

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<sup>12</sup> Prue Taylor, *An Ecological Approach to International Law: Responding to the Challenges of Climate Change* (Routledge, 2008) 109.

<sup>13</sup> Micheal Faure and Willemien Du Plessis, *The Balancing of Interests in Environmental Law in Africa*(PULP, 2011) 169.

<sup>14</sup> Lorraine Elliot, WilliamH. Schaedla, *Handbook of Transnational Environmental Crime*. ( Edward Elgar Publishing, 2016) 458

<sup>15</sup> Frank Fischer *Citizens, Experts, and the Environment: The Politics of Local Knowledge*. Duke University Press, 2000

<sup>16</sup> Masum, Ahmad, Seeni Mohamed Nafees, Mohd Zakhiri Md Nor, Kyaw Hla Win Ahmed, and Md Hassan. "The Right to Development versus Environmental Protection: With Special Reference to the Malaysian Federal Constitution." *Advanced Science Letters* 23, no. 9 (2017): 9072-9075.

<sup>17</sup> Dinah Shelton, Alexandre Charles Kiss, United Nations Environment Programme, *Judicial Handbook on Environmental Law* (UNEP/Earthprint, 2005) 36

<sup>18</sup> Ityavyar, Dennis A., and Leo O. Ogba. "Violence, conflict and health in Africa." *Social Science & Medicine* 28, no. 7 (1989): 649-657.

<sup>19</sup> Adano, Wario R., and Fatuma Daudi. "Links between climate change, conflict and governance in Africa." *Institute for Security Studies Papers* 2012, no. 234 (2012): 20.

<sup>20</sup> United Nations publications, *World Migration Report, 2018*. (United Nations Publications, 2018)

International law makes provision that any breach of international obligations amounts to an internationally wrongful act.<sup>21</sup> These obligations are fundamental the breach of which amount to recognition as a crime. States have an obligation to protect and safeguard the wellbeing of human beings through upholding a clean and healthy environment.<sup>22</sup>

Under international law, a person or a state is in breach of international obligation, they are responsible in their respective capacities to punishment.<sup>23</sup> This was further recognized in the Nuremburg War crimes Tribunal.<sup>24</sup> Such responsibility arises whether the harms arose from their actions or omissions.<sup>25</sup> The threshold to apportion responsibility is to prove that the perpetrators had knowledge of their actions and that the same would impact on the environment.<sup>26</sup>

Contemporary nature of armed conflicts directly has without doubt caused effect on the environment. The International Humanitarian Law are mechanisms that protect the environment from harm are diverse.<sup>27</sup> However, contemporary armed conflicts attract non-state actors, terrorist and organized groups. These groups engage in environmental crimes exploit natural resources for personal gain.<sup>28</sup> These groups have posed great danger on peace and security.<sup>29</sup> Noting that there is non-regulation and such groups have been using force, they have greatly benefited from lack of stringent regulations. In the end, this creates imbalance in the environmental market. This is marred further by regulatory failures.

Even with international legal regulatory framework, environmental crimes continue to occur. For instance, in Iraq, due to contamination of water, people living in Iraq's Southern region suffer loss from salt water contamination of the River Tigris, damage which according to UN could be permanent.<sup>30</sup> This has increased economic and security challenges in Busra. Over

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<sup>21</sup> Dinah Shelton, *Remedies in International Human Rights Law*, (Oxford University Press, 2015).

<sup>22</sup> ICHRP *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (ICHRP, 2002)

<sup>23</sup> Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press, 2016)

<sup>24</sup> Kai Ambos, *Treatise on International Criminal Law: Volume 1: Foundations and General Part*, OUP Oxford, 2013) 102.

<sup>25</sup> James Larry Taulbee, *International Crime and Punishment: A Guide to the Issues: A Guide to the Issues* (ABC-CLIO, 2009) 10.

<sup>26</sup> Antonio Cassese, *International Criminal Law*, OUP Oxford, 2013.

<sup>27</sup> Elizabeth Mrrema, Carl Bruch, Jordan Diamond, UNEP, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (UNEP/Earthprint, 2009).

<sup>28</sup> Vanhullebush, M., "The Law of International Humanitarian Relief in Non-International Armed Conflicts, Brill, 2021 p. 493

<sup>29</sup> UN Security Council Resolution S/RES/2195 (2014).

<sup>30</sup> Al-Ansari, Nadhir. "Management of water resources in Iraq: perspectives and prognoses." *Engineering* 5, no. 6 (2013): 667-684

4000 people were forced to flee their homes in April 2018 due to water crisis that crippled agriculture which is the main economic activity of rural population along 250 km river.<sup>31</sup> Looking at such environmental crimes, it is thus no longer a question of whether it is possible to prosecute criminal crimes. Rather, the discussion around contemporary environmental issues is about how and where the crimes should be prosecuted.

In determining punishment, several factors come into play.<sup>32</sup> For instance, the gravity of the offence will determine the severity of sanctions.<sup>33</sup> The impact on the environment is also put into consideration.<sup>34</sup> In times of armed conflicts, the impacts are far reaching as the environment is the worst hit and is exposed to harm. Traditionally, under international law, liability has been only civil law concept. It has been the practice in international law that where there has been an environmental harm, the polluter is condemned to recompense. Whereas people may benefit from a crime, the negative impact falls on the environment and society thus a need to prosecute.<sup>35</sup>

International criminal law tribunals have developed concepts of individual criminal responsibility.<sup>36</sup> Recent developments in Rome Statute sharply consider level of participation. International law on Crimes places the proximity of an individual in the occurrence of armed conflict, whether as commanders or merely acting under instructions.<sup>37</sup>

Environmental crimes refer to the targeted destruction with intent to harm or with potential injury on ecological systems thus violating legal provisions of the ecosystem in order to deprive a group of people the full enjoyment.<sup>38</sup> Ordinarily, unlike core crimes under the ICC requiring intent, environmental crimes require strict liability. Environmental crimes are crimes of consequences rather than a specific intent.<sup>39</sup> Environmental justice may be achieved through prosecution of criminal activities against the environment. As internationally wrongful acts, the International Criminal Court (ICC) as established by Rome Statute, may hear and determine

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<sup>31</sup> Barzegar, Kayhan. "Iran's Foreign Policy in Post-Invasion Iraq." *Middle East Policy* 15, no. 4 (2008): 47-58.

<sup>32</sup> Cryer, Robert, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst. *An introduction to international criminal law and procedure*. Cambridge University Press, 2007.

<sup>33</sup> Lehav, J. *Israel Yearbook on Human Rights*, Volume 50, BRILL, 2020.

<sup>34</sup> Carsten Stahn, *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), 941.

<sup>35</sup> Alina Baciuc, Yamrot Negussie, Amy Geller, James N Weinstein, *Communities in Action: Pathways to Health Equity* (National Academies Press, 2017)

<sup>36</sup> Sliedregt E. *Individual Criminal Responsibility in International Law* (OUP Oxford, 2012) 5, 19.

<sup>37</sup> Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer Science & Business Media, 2008)

<sup>38</sup> Department of Economic and Social Affairs, *Achieving Sustainable Development and Promoting Development Cooperation: Dialogues at the Economic and Social Council* (United Nations Publications, 2008)

<sup>39</sup> Greene, Anastacia, 'The Campaign to Make ecocide an International Crime: Quixotic Quest or Moral Imperative?' (2019) 30 *Fordham Env'tl rev* 1



such criminal offences. The Office of the Prosecutor of the ICC, in recognition of the impact on environmental harm, published a Policy Paper on Case Selection and Prioritization in 2016.<sup>40</sup> The Policy Paper considers the assessment of impact and prosecution of harm on natural resource destruction.<sup>41</sup> This policy brings with it a paradigm shift on the nature of crimes under the Rome Statute traditionally focused on the harm occasioned on people rather than the environment.<sup>42</sup> Even so, environmental crimes will be confined within the four crimes under the Rome Statute.<sup>43</sup>

To realize Agenda 21 and its further implementation, state cooperation is needed to hold accountable environmental crimes' perpetrators.<sup>44</sup> The adoption of the Declaration on Sustainable Development<sup>45</sup> exhibits the willingness of states to be collectively responsible in the protection of the environment.<sup>46</sup>

Environmental crimes have been considered by other institutions.<sup>47</sup> A reading of Article 24 of African Charter on Human and Peoples Human provides for a framework of environmental destruction constituting human rights violation that can guide ICC in analysis of similar cases.<sup>48</sup> The African Commission on Human and Peoples' Rights in the case of *Social and Economic Rights Action Center and Center for Economic and Social Rights versus Nigeria*,<sup>49</sup> found that Nigeria breached its obligation. In this case, the Nigerian Army had attacked, burned and destroyed Ogoni villages.<sup>50</sup> The charter generally obligates states to respect, protect and fulfill.

Similarly, the European Commission on Human Rights have considered statutory interpretation of human rights that include environmental considerations and poses a comparative example

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<sup>40</sup> International Criminal Court, *Office of the prosecutor: Policy Paper on case Selection and Priotitisation*. (OTP, 2016).

<sup>41</sup> Anton, Don. "Adding a Green Focus: The Office of the Prosecutor of the International Criminal Court Highlights the 'Environment' in Case Selection and Prioritisation." (2016).

<sup>42</sup> Skander A. G., *United Security Council Referrals to the International criminal Court*, BRILL, 2019

<sup>43</sup> Klamberg, Mark. *Commentary on the Law of the International criminal Court*. (torkel Opsahl academic Epublisher, 2017) 29

<sup>44</sup> Committee on Fisheries, Food and Agriculture Organization of the United Nations, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Food and Agriculture Organization of the United Nations, 2001)

<sup>45</sup> Jorge E. Vinuales, *The Rio Dclaration on Environment and Development: A commentary*.(OYP, 2015) 13.

<sup>46</sup> Peter Hardi, Terrence John Zdan, *Assessing Sustainable Development: Principles in Practice*. (International Institute for Sustainable Development, 1997).

<sup>47</sup> Elizabeth Mrema, Carl bruch, Jordan Diamond, UNEP, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (UNEP/Earthprint, 2009)

<sup>48</sup> Jalloh Charles, Kamari M Clarke, Vincent Nmehielle, *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (Cambridge University Press, 2019) 55-220.

<sup>49</sup>ACHPR Comm No. 1551 96 (2001); Aaaddaney, M., *Human Rights and the Environment under African Union Law*, (Springer Nature, 2020) p. 477.

<sup>50</sup> Eva Brems, Ellen Desmet, *Integrated Human Rights in Practice: Rewriting Human Rights Decisions* (Edward Elgar Publishing, 2017) 414

with similar threshold of proof from which ICC can draw from.<sup>51</sup> It recognizes Human rights and environment as mutually enforcing.<sup>52</sup> The Inter-American Commission Human Rights, have referred to Article 23 of the America declaration on the Rights and Duties of Man which provides for the right to communal property over their lands, territories and natural resources.<sup>53</sup>

Prosecution of perpetrators of criminal actions will develop jurisprudence in protecting rights on behalf of the rights holder.<sup>54</sup> According to the theory of Christopher Stone,<sup>55</sup> the environment reserves the right to quiddity, preservation and regeneration.<sup>56</sup>

### **Statement of the research problem**

Contemporary armed conflicts have shifted from the traditional self-determination conflict to economic related and the desire to control trade.<sup>57</sup> Proceeds from environmental crime are deemed to be highly profitable. Between 2014 and 2016, there is an increase of approximately 26% on the estimated monetary value gained from environmental crimes. These rates have continued to increase exponentially.<sup>58</sup>

As at 2020 sophisticated technology has enhanced commission of environmental crimes. The said conflicts are blind to pertinent environmental issues like climate change on climate and the vulnerable ecosystem. Enjoyment of fundamental human rights by communities is as a result inhibited. Achieving Sustainable Development Goals is designed to ensure that natural resources are widely used by the present generation for equal use for the generations to come are subdued as resources waste away during armed conflicts.<sup>59</sup> It is perceived that in commission of environmental crimes, there is no victim. Owing to the grave impact of harm on the environment, the need for compensation alone under the polluter pays principle does not

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<sup>51</sup> William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2<sup>nd</sup> eds., Oxford University Press, 2016)

<sup>52</sup> Savaresi, Annalisa, and Juan Auz. "Climate change litigation and human rights: pushing the boundaries." *Climate Law* 9.3 (2019): 244-262.

<sup>53</sup> Department of Economic and Social Affairs, *State of the World's Indigenous Peoples*. (United Nations Publications, 2009)

<sup>54</sup> *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U. S. 167 (2000),

<sup>55</sup> Bridget lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer, 2018)

<sup>56</sup> Constitution of Ecuador, 2008;

<sup>57</sup> De Waal, Alex, and Sarah MH Nouwen. "The necessary indeterminacy of self-determination: Politics, law and conflict in the Horn of Africa." *Nations and nationalism* 27.1 (2021): 41-60.

<sup>58</sup> Nellemann, C. (Editor in Chief); Henriksen, R., Kreilhuber, A., Stewart, D., Kotsovou, M., Raxter, P., Mrema, E., and Barrat, S. (Eds). 2016. *The Rise of Environmental Crime – A Growing Threat To Natural Resources Peace, Development And Security*. A UNEP-INTERPOL Rapid Response Assessment; [https://:www.unep.org](https://www.unep.org) (accessed on 12<sup>th</sup> July, 2018).

<sup>59</sup> Wassie, Simachew Bantigegn. "Natural resource degradation tendencies in Ethiopia: a review." *Environmental systems research* 9.1 (2020): 1-29.

deter offender.<sup>60</sup> Corporations factor in compensation in their profits but continue to harm the natural environment.<sup>61</sup> The Polluter Pays does not narrow down to a responsible individual.<sup>62</sup>

Stern criminal prosecution is therefore needed to ascertain accountability of environmental crimes perpetrators for their intentional breach of law.<sup>63</sup> The role of the environment for the human wellbeing and in line with sustainable development may not be underestimated.<sup>64</sup> Through prosecution, individuals shall be held criminally responsible for their action and it will enhance compliance of laws.<sup>65</sup>

## **Objective of the Research**

Generally, the objective of the research is to find out the ability of criminal acts committed during armed conflicts will be prosecuted. Specifically, the objectives are to: -

- i. To critically examine the nature of environmental criminal acts committed during armed conflicts.
- ii. To assess the international Criminal court's capacity to prosecute environmental crimes
- iii. To examine the extent of liability in environmental related crimes.

## **Research Questions**

Significance of the study seek

- i. What is the nature of environmental crimes perpetrated during armed wars?
- ii. What is the ability of the international Criminal court to prosecute environmental crimes
- iii. To what extent is the liability for environmental related crimes.

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<sup>60</sup> Chola, Shivi. "Analysis of Criminal Law application in Environmental Offences."

<sup>61</sup> Jacoby, Gady, et al. "Corporate governance, external control, and environmental information transparency: Evidence from emerging markets." *Journal of International Financial Markets, Institutions and Money* 58 (2019): 269-283.

<sup>62</sup> Schwartz, Priscilla. "The polluter-pays principle." *Research handbook on international environmental law*. Edward Elgar Publishing, 2010.

<sup>63</sup> Zhang, Bo, et al. "A new environmental protection law, many old problems? Challenges to environmental governance in China." *Journal of Environmental Law* 28.2 (2016): 325-335.

<sup>64</sup> Carranza, Daniela M., et al. "Socio-environmental conflicts: An underestimated threat to biodiversity conservation in Chile." *Environmental Science & Policy* 110 (2020): 46-59.

<sup>65</sup> O'Sullivan, Julie. "Is the Corporate Criminal Enforcement Ecosystem Defensible?." *The Journal of Corporation Law* 47 (2022): 4.

## Theoretical framework

This paper is grounded on two theories that explain the usefulness of prosecution of environmental crimes. The theories demonstrate the aim of criminalization and prosecution of crimes.

### a) Retributive justice

The proponent of this theory is H.L.A Hart.<sup>66</sup> This theory rests on moral principles.<sup>67</sup> It *shares* the belief that individuals who commit wrongdoing, particularly serious crimes, should be punished even if doing so would result in no benefit to the environment. According to this Hart, offenders of serious crimes, morally deserve corresponding penalties.<sup>68</sup> It also asserts that punishing offenders is essentially morally good for a lawful legitimate punisher. This theory prohibits the punishment of innocent or disproportionate punishments on wrongdoers.<sup>69</sup> Harts proposes three tenets of punishment: a person may be punished only if he has voluntarily done something wrong; the punishment must match or be equivalent to the offence; and the justification for punishment is the moral justness of returning suffering moral evil voluntarily done.<sup>70</sup> The punishment that is meted is taken to be morally justifiable.<sup>71</sup>

This theory may be contrasted with the utilitarian or consequentialist theories of punishment based on aversion and incapacity that argue that it is always or nearly always illegal either to impose punishment on individuals who have done no wrong or to inflict disproportionately heavy sanctions on those who have done some harm.<sup>72</sup> However, it is claimed that while retributivism is a necessary prerequisite for punishment, consequentialist arguments supply the justifications for punishment. This theory has been criticized on the basis that it justifies punishment better than consequentialism. However, retributive justice system looks at the moral good principle.<sup>73</sup>

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<sup>66</sup> Safranek, Bridget Marie. *St. Thomas Aquinas and HLA Hart on the Philosophy of Punishment*. The Catholic University of America, 2020.

<sup>67</sup> Lenta, Patrick. "Transitional Justice and Retributive Justice." *Ethical theory and moral practice* 22.2 (2019): 385-398.

<sup>68</sup> Hoskins, Zachary. "Hybrid theories of punishment." *The Routledge Handbook of the Philosophy and Science of Punishment*. Routledge, 2020. 37-48.

<sup>69</sup> Lee, Youngjae. "Proportionality in Punishment." *The Palgrave Handbook of Applied Ethics and the Criminal Law*. Palgrave Macmillan, Cham, 2019. 549-569.

<sup>70</sup> Carlsmith, Kevin M., John M. Darley, and Paul H. Robinson. "Why do we punish? Deterrence and just deserts as motives for punishment." *Journal of personality and social psychology* 83.2 (2002): 284.

<sup>71</sup> Binder, Guyora. "Punishment theory: Moral or political?." *Buffalo Criminal Law Review* 5.2 (2002): 321-372.

<sup>72</sup> Bagaric, Mirko, and Kumar Amarasekara. "The errors of retributivism." *Melb. UL Rev.* 24 (2000): 124.

<sup>73</sup> Dolinko, David. "Some thoughts about retributivism." *Ethics* 101.3 (1991): 537-559.

The archetypal error for which punishment is justified is a deliberate violation of another person's fundamental rights. According to Feinberg, the dimension of *mens rea* is also important in deciding whether conduct can serve as an acceptable foundation for punishment.

He contends that when the level of responsibility increases from intent and knowledge through recklessness to negligence, it becomes increasingly difficult to justify a punitive reaction to any rights abuses, injury, or inchoate step toward such a response. The distinction between utilitarian and retributive conceptions of punishment is generally stated to be that the former is progressive looking to the good that punishment may achieve, whilst the latter is retrospective, aiming to do justice for what a wrongdoer has done.<sup>74</sup>

There must be four elements in the form of punishment.<sup>75</sup> First, it must exact some type of penalty or hardship on the person being punished, or at the very least eliminate a benefit that the person would otherwise enjoy. Second, the punisher must do it on purpose, not by mistake or as a byproduct of achieving another target. Third, the hardship or loss must be inflicted in response to an unlawful act or omission. Fourth, the hardship or loss must be imposed, at least in part, as a way of sending a message of criticism or censure for what is seen to be an unlawful conduct or omission.<sup>76</sup>

This argument is based on the idea that there may be genuine proportionate punishments that any actual punishment may exceed, regardless of how small the scale of punishment on which it based.

The ICC is a punitive retributive justice court that could symbolically punish environmental criminals.<sup>77</sup> The principle of *nulla poena sine lege* dictates that there can only be a punishment where there is a law.<sup>78</sup> This theory may not serve the presently because environmental crimes is not included as a crime under the ICC for it to be punished without regard of the whether of not the environment benefits.<sup>79</sup> However, punishment for a wrongdoing in the ambit of war

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<sup>74</sup> Hudson, Barbara. *Understanding justice*. McGraw-Hill Education (UK), 2003.

<sup>75</sup> Schulhofer, Stephen J. "Harm and punishment: A critique of emphasis on the results of conduct in the criminal law." *U. Pa. L. Rev.* 122 (1973): 1497.

<sup>76</sup> Packer, Herbert. *The limits of the criminal sanction*. Stanford university press, 1968.

<sup>77</sup> Cusato, Eliana Teresa. "Beyond Symbolism Problems and Prospects with Prosecuting Environmental Destruction before the ICC." *Journal of International Criminal Justice* 15.3 (2017): 491-507.

<sup>78</sup> Hall, Jerome. "Nulla poena sine lege." *The Yale Law Journal* 47.2 (1937): 165-193.

<sup>79</sup> Gilligan, Michael J. "Is enforcement necessary for effectiveness? A model of the international criminal regime." *International Organization* 60.4 (2006): 935-967.

crimes is justified. This theory is criticized for but not effectively promoting environmental security because it only focuses on punishment of the wrongdoer.<sup>80</sup>

### **b) Deterrence Theory**

This origin of this theory may be traced back to the classical writings of Thomas Hobbes (1588–1678), Cesare Beccaria (1738–1794), and Jeremy Bentham (1748–1832) in protest of the legal policies and spiritualistic explanations of crime.<sup>81</sup>

The proponents of this theory state that people decide whether to comply or break the law after weighing the benefits and consequences of their conduct.<sup>82</sup> It is based on three distinct elements: severity, certainty, and celerity. It is believed that the harsher the punishment, the more probable it is that a logically reasoning human being will refrain from unlawful conduct. It is unfair if the punishment is excessively severe, and less severe will not deter.<sup>83</sup> It also notes that the purpose of certainty of punishment is to guarantee that punishment occurs whenever a crime is committed.<sup>84</sup>

Deterrence may be general or specific.<sup>85</sup> The punishment of offenders by the state emphasized the significance to those who are yet to engage in a criminal activity.<sup>86</sup> Thus, punishment historically was carried out in public for other members of the public to witness the pain. On the other hand, specific deterrence is directed to individual's offenders.<sup>87</sup>

In the *Leviathan*, Hobbes describes men as neither good nor bad who are creatures of own volition to want and fight for things for self-interest. He appreciates that men are rational being to detect that which is good and that self-interest impact of the right of others. "Under social contract, he states that individuals authorize the sovereign to apply force to enforce social

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<sup>80</sup> Hampton, Jean. "Correction harms versus righting wrongs: The goal of retribution." *Ucla L. Rev.* 39 (1991): 1659.

<sup>81</sup> Banarjee, Subrata. "Philosophy of Punishment in Criminology: A Historical Review."

<sup>82</sup> Malu, Linus Nnabuike. "The International Criminal Court and Conflict Prevention: Reflections on the Impact of the Court on Deterrence in Kenya." *International Journal of Peace Studies* 21.2 (2016).

<sup>83</sup> Paternoster, Raymond. "The deterrent effect of the perceived certainty and severity of punishment: A review of the evidence and issues." *Justice Quarterly* 4.2 (1987): 173-217.

<sup>84</sup> Paternoster, Raymond. "How much do we really know about criminal deterrence." *J. crim. l. & criminology* 100 (2010): 765.

<sup>85</sup> Stafford, Mark C., and Mark Warr. "A reconceptualization of general and specific deterrence." *Journal of research in crime and delinquency* 30.2 (1993): 123-135.

<sup>86</sup> Gibbs, Jack P. "Crime, punishment, and deterrence." *The Southwestern Social Science Quarterly* (1968): 515-530.

<sup>87</sup> Johnson, Robert, Sandra McGunigall-Smith, and Claire Callahan. "Can I get a witness? Thoughts on witnessing executions." *The Prison Journal* 93.1 (2013): 11-33.

contract. Hobbes contended that the penalty for crime must be greater than the advantage derived from the transgression.”

In 1764, Cesare Bonesana, Marchese Beccaria, published, *Dei Delitti e delle Pene* (On Crimes and Punishments), in which he questioned the state’s authority to punish crimes. People, being rationally self-interested, will not commit crimes if the consequences of committing crimes outweigh the rewards of participating in undesirable acts.” Beccaria stated that: “punishments are unjust when their severity exceeds what is necessary to achieve deterrence.” It is only under law as conditions that societies are unified.<sup>88</sup>

According to Jeremy Bentham,<sup>89</sup> a contemporary of Beccaria, morality is that which encourages “the greatest happiness of the greatest number”. “In 1780, he authored, *An Introduction to the Principles of Morals and Legislation*, which contained his renowned principle of utility.<sup>90</sup> It remains to be seen how simple it is to demonstrate the effectiveness of deterrence.

The retributive punishment and deterrence theories are theories of punishment that are aimed at correcting a wrong.

This principle is useful to deter organizations and corporations, mostly who are pollutants, from committing environmental crimes.<sup>91</sup> Prosecution by ICC will deter such parties because they fear being categorized as war criminals. Secondly, this theory extensively denotes a duty of care especially in cases involving corporations. The law will force them to consider the consequences of their decisions and their actions.<sup>92</sup> Being an offence whose requirement is strict liability, the element of lack of knowledge cannot be a ground for defence. Parties will be careful because environmental crimes will be concerned with effects rather than intent.<sup>93</sup>

Traditionally, international environmental law, unlike international criminal law, can be said to be ‘soft law’. However, the regime of hard law in criminal law is required to deter criminal

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<sup>88</sup> Beccaria, C. (1963). On crimes and punishments (introduction by H. Paolucci, Trans.). New York: Macmillan. (Original work published 1764)

<sup>89</sup> Bentham, J. (1948). An introduction to the principles of morals and legislation (with an introduction by W. Harrison, Ed.). New York: Macmillan.

<sup>90</sup> Ihekwoaba D. Onwudiwe, Jonathan Odo, and Emmanuel C. Onyeozili, “DETERRENCE THEORY”. Available at: <https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf> (Accessed on 8<sup>th</sup> September 2019)

<sup>91</sup> White, Rob. "Prosecution and sentencing in relation to environmental crime: Recent socio-legal developments." *Crime, law and social change* 53.4 (2010): 365-381.

<sup>92</sup> Sailesh Mehta & Prisca Merz. *Ecocode – A New Crime Against Peace?*, 17 ENVTL L. REV. 1 (2015)

<sup>93</sup> Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT’L.J. 215, 216, (1996)

offences and enforce environmental treaties. This will deter the deliberate cost/analysis debate for profits by corporations in the expense of environmental pollution.<sup>94</sup>

## Literature review

### i) Environmental crimes

Krieke, E. coins the concept of environcide and defines it as intentionally or unintentionally damaging, destroying, or rendering inaccessible environmental infrastructure. In his book, he promotes the analysis of mass violence of actions that directly against victims such as burning fields.<sup>95</sup>

In ‘*Environmental terrorism: Not yet an International Crime*’, Rose<sup>96</sup> discusses how coerced political behavior has contributed to harms deliberately inflicted upon the natural environment. He defines environmental terrorism as acts that deliberately and specifically target the natural environment.<sup>97</sup> He faults the lack of international law to criminalize environmental terrorism. In his article, he proposes that the United Nations Environment Assembly.

Hughes<sup>98</sup> states that the resulting legal regime in *jus ad bellum* has been strained for the reason that it is not sufficient to address contemporary challenges or it undermines actors who seek exception to the strict limits of state conduct.

Muscat<sup>99</sup> notes that cultural property has been largely targeted by belligerents. In her article, she has elaborated the efforts of UNESCO on cultural heritage and further states how ICC can shape protection of such environment.<sup>100</sup>

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<sup>94</sup> Schulhofer, Stephen J. "Criminal justice discretion as a regulatory system." *The Journal of Legal Studies* 17.1 (1988): 43-82

<sup>95</sup> Krieke, S., () “*Scorched Earth: Environmental Warfare as a Crime Against Humanity and Nature*,” *Genocide Studies and Prevention: An International Journal*: Vol. 15: Iss. 3: 123–126

<sup>96</sup> *corched Earth: Environmental Warfare as a Crime Against Humanity and Nature*,” *Genocide Studies and Prevention: An International Journal*: Vol. 15: Iss. 3: 123–126

<sup>97</sup> Schofield, Timothy. "The environment as an ideological weapon: a proposal to criminalize environmental terrorism." *BC Env'tl. Aff. L. Rev.* 26 (1998): 619.

<sup>98</sup> David Hughes and Yahli Shereshevsky, Something is Not Always Better than Nothing: Problematizing Emerging Forms of Jus Ad Bellum Argument, 53 *Vanderbilt Law Review* 1585 (2021)

<sup>99</sup> Muscat, Marcie M., "Legal Frameworks for Protecting Cultural Heritage in Conflict Zones" (2020). *CUNY Academic Works*.

<sup>100</sup> Milligan, Ashlyn. "Targeting cultural property: The role of international law." *Journal of Public & International Affairs* 19 (2008).



Polly Higgins in *Eradicating Ecocide: Exposing the corporate and political practices destroying the planet and proposing the laws needed to eradicate ecocide*<sup>101</sup> defines ecocide as the extensive destruction, damage to or loss of ecosystems of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by inhabitants of that territory has been severely diminished. This definition was later expanded by Higgins to include acts or omissions committed in peace or conflicts by a person within the course of state, corporate or any entity's action which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystems such that the peaceful enjoyment is severely diminished and so as to establish seriousness, impacts must be widespread, long term and severe.<sup>102</sup>

Kelsey<sup>103</sup> argues that Paris Agreement has failed to singlehandedly address environmental crimes. She proposes that an amendment to the Rome Statute will support environmental protection. She argues that although this may take a while, states may use domestic tools such as domestic laws and ESG measures to curb pollution and emission of greenhouse gases. She concedes that the Paris Agreement and the ICC leaves out big pollutants who are not members states. She agrees that the ICC will be beneficial as it will target individuals.<sup>104</sup> It however, cannot go for members states in times of peace.

## **ii) Crimes Under ICC**

In "*Essence of Crimes against Humanity Raised by Challenges at ICC Author*," Robinson<sup>105</sup> argues on the justification for the policy element and focuses on crimes that affect peace as to their prosecution. The book also concerns itself on the harms by entities that have a responsibility to protect and ensure proper allocation. The author proposes that worst cases are those that should be left for the ICC.

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<sup>101</sup> Higgins, Polly. *Eradicating Ecocide: exposing the corporate and political practices destroying the planet and proposing the laws to eradicate ecocide*. Shepard-Walwyn (IPG), 2016.

<sup>102</sup> Setiyono, Joko. "Ecocides as a Serious Human Rights Violation: A Study on the Case of River Pollution by the Palm Oil Industry in Indonesia." (2021).

<sup>103</sup> Kelsey ferris, 'The World's Big Tech Threat That Is Not Being Taken Seriously: Ecocide and the Inadequacies of international environmental Law' (2021) 21 J Int'l

<sup>104</sup> Buhaug, Halvard, Nils Petter Gleditsch, and Ole Magnus Theisen. "Implications of climate change for armed conflict." *Washington, DC: World Bank* (2008).

<sup>105</sup> Darryl Robinson, *Essence of Crimes against Humanity Raised by Challenges at ICC* (EIJL)

Lopez,<sup>106</sup> in the journal discusses prohibition of environmental war crimes under Rome Statute. She looks at the existing Legal Framework governing armed conflict also provides some protection for these laws.<sup>107</sup> According to her, the Geneva conventions do not however balance the interest of all environmental conservation. She admits that the “Convention on the Prevention of Military or Any Other Hostile Use of Environmental Modification Techniques Convention prohibits environment misuse helps cure the deficiency in the transnational conventions and protocols.”<sup>108</sup>

“In *Customary international Humanitarian law*,<sup>109</sup> Henckaerts and Doswald-Beck argue that the Law of War prohibits the employment of techniques or means of warfare that are designed to or may be anticipated to inflict widespread, long-term and severe harm to the natural environment, jeopardizing the population’s existence.”

### **iii) Nature of armed conflicts**

According to Steven Freeland,<sup>110</sup> significant environmental destruction has occurred during armed conflicts. In his analysis on whether the existing international criminal court and in extent of its competence to deal with environmental damages. He states that the environment is key to the fulfillment of fundamental rights and any despoliation of the environment is catastrophic to ecology and human population. He notes that deliberate destruction was an aim to achieving strategic goals such as threat in human security as the environment is the most vulnerable to the aims or weapons of warfare. He further suggests that is only inevitable that intentional environmental harm during armed wars should be regulated since recognition of individual rights and notions of environmental rights are increasingly being recognized. The nature of crimes offends international community.

According to the UNSC 1992, their report concluded that war could still exist if people cannot access natural resources even in circumstances when military conflicts are absent.<sup>111</sup> Instability

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<sup>106</sup> Aurelia Lopez (criminal liability for Environmental damage Occurring in times of Non-International Armed Conflicts: Rights and Obligations; Fordham Environmental Law Review Vol 18 No 2 Spring 2007),

<sup>107</sup> 4 GCs and 3 Additional protocols

<sup>108</sup> Solf, Waldemar A. "Protection of civilians against the effects of hostilities under Customary International Law and under Protocol I." *Am. UJ Int'l L. & Pol'y* 1 (1986): 117.

<sup>109</sup> Customary International Humanitarian Law Jean-Marie Henckaerts, Louise Doswald-Beck, Carolin Alvermann International Committee of the Red Cross Cambridge University Press, 2005

<sup>110</sup> Steven Freeland (Human Right, the Environment and Conflict: Addressing Crimes against the Environment).

<sup>111</sup> Ross, Michael L. "What do we know about natural resources and civil war?." *Journal of peace research* 41.3 (2004): 337-356.

in the economy, society, humanitarian aid, and the environment endanger international peace and security.<sup>112</sup>

#### **iv) Complementarity of ICC and domestic courts**

Nimigan, in *The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity'*,<sup>113</sup> appreciates the steps taken by the African union under the Malabo Protocol. Complementarity is fundamental to the Rome Statute of the International Criminal Court (ICC). Article 17 of the Rome Statute establishes a complementary connection between the ICC and domestic legal systems, however, but makes no reference to regional or ad hoc jurisdictions.<sup>114</sup> Prospects for incorporating regional jurisdictions into the principle of complementarity dependent on a positive judicial interpretation of the principle and well-defined duties at each level.

According to Kirshce,<sup>115</sup> holding individual or state responsible- in the international Military Tribunal's decision stated that international law-imposed duties and liabilities upon abstract entities. International law can be enforced through individual responsibility. The ICC investigates and prosecutes rather than states. Under the principle of state responsibility, the state may bear some obligation. He distinction by ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts expounds on the circumstances which state obligation arises.

In the article, *Protection of the Environment in International armed Conflict*, Yoram *et al.* discusses that proportionality requires the collateral harm not to be inordinate in comparison to the expected real and immediate military benefit.<sup>116</sup> He argues that here the target is sufficiently important; a greater degree of risk to the environment may be justified." While Discussing the 1991 Gulf War setting fire to oil wells, Yoram criticizes the threshold placed by AP I requiring the damage to be widespread, long term and to natural environment severe. He further notes that international customary law has been recorded. ENMOD Convention does not require the three conditions to be met cumulatively yet it lacks clarity of language.

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<sup>112</sup> Nevitt, Mark. "Is Climate Change a Threat to International Peace and Security?." *Mich. J. Int'l L.* 42 (2020): 527.

<sup>113</sup> Nimigan, Sarah. "The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity'." *Journal of International Criminal Justice* (2019).

<sup>114</sup> Nimigan, Sarah. "The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity'." *Journal of International Criminal Justice* 17.5 (2019): 1005-1029.

<sup>115</sup> Judge Philippe Kirsch, *Applying the principles of Nuremberg in the ICC* (Washington University, 2006)

<sup>116</sup> Yoram Dinstein (protection of the Environment in International armed Conflict: J.A Frowein and R. Wolfrum (eds), Max planck Yearbook of UN Law, Vol. 5 2001, 523-549, 2001 Netherlands).

According to Schmid,<sup>117</sup> should the ICC prosecute environmental crimes, the domestic courts will equally follow. She states that generally, states adopt the interpretation of the Rome statute in determining serious crimes of international concern. She notes that the ICC is a good starting point in criminalizing environmental crimes.

#### v) Access to environmental justice

Avi Brisman in *Crime-Environment Relationship and environmental justice* broadens the definition of environmental justice as being not only distribution of environmental hazards across classes and taxes but also with “social transformation directed towards meeting human beings and enhancing the quality of life”.<sup>118</sup> He examines the complex relationship between environment and crimes wherein he opines that the relationship provides a structure for environmental justice.

The author in *The Logic and Limits of Environmental Criminal Law in the Global Setting : Brazil and US – Comparisons, Contrasts and Questions in search of a robust Theory*” acknowledges that environmental criminal law is evolutionary in response to the public’s desire to have legal systems that better reflect the public’s environmental protection goal.<sup>119</sup> He makes comparison of the legal systems in US and Brazil which he describes the environmental criminal law and enforcement as being unfair and counterproductive. He also discusses the “normative functions of the state regulation of environmental protection in the era of spreading globalization.

Shover and Routhe in *Environmental Crime and Justice* notes that criminal prosecution of environmental offenders occurs infrequently.<sup>120</sup> “The increasing globalization of economic relationships makes more difficult and further challenges the regulatory oversight of increasingly transnational corporations.” He however states that there has been evolution in legislation across the world to include criminal penalties for broad range of harmful environmental acts rather than prevention.

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<sup>117</sup> Evelyne Schmid, Taking Economic, Social and Cultural Rights Seriously in international Criminal Law. Cambridge Univ. Press (2015), 65.

<sup>118</sup> “Avi Brisman in *Crime-Environment Relationship and environmental justice* - June 2007 Seattle Journal for social Justice Volume 6 Issue 2”

<sup>119</sup> “*The Logic and Limits of Environmental Criminal Law in the Global Setting : Brazil and US – Comparisons, Contrasts and Questions in search of a robust Theory* – Robert Blomquist , Tulano Environmental law Journal Vol. 25 No1 (Winter 2001) 83-98”

<sup>120</sup> Neal Shover and Aaron S routhe in *Environmental Crime and Justice* vol. 32 (2005) pp 321-371 The University of Chicago.

Rob White extensively discusses the element of risk assessment in determining environmental harm.<sup>121</sup> He argues that environmental harm is contentious issue owing to the difference in material class interests in contemporary capitalist society. He further notes that the rationale and process of risk categorization with regard to environmental harm are different as the targets of risk assessment and tend to be activities and events. Risk assessments are in themselves complicated as ecological systems are complex and it sometimes does not consider historical events.

White faults the capitalists for concentration of economic power and the legal system praised to protect private property rights for capital accumulation. At global level, such concentration determines what falls as harmful or criminal, for the benefit of transnational companies. He proposes that any decisions on environmental assessment should be open to public scrutiny, to re-conceptualize eco-rights which is an expansion of human and environmental concerns (environment and community rights) inclusion of third parties to give evidence in cases, internationalization of action (use all laws and NGOs to address environmental issues) and to balance democracy and administrative mechanisms.<sup>122</sup>

#### **vi) Criminal law on environment**

Faure *et al.* note that “in the economic study of law, much emphasis has been placed on the control of environmental pollution (emission standards and emission trading and taxation).”<sup>123</sup> He views environmental law as being an administrative law and to a large extent, criminal law. “He provides an overview of how environmental criminal law have been influenced by economics of crime, and questions whether civil liability is able to deter environmental pollution.” He argues that civil law does not guarantee full compensation of the victim as criminal law on the other hand deters.

Generally civil law limits the probability of detecting perpetrators as compensation does not point out to an individual. He notes further that criminal law protects classical interests such as hath property and honour as well as ecological values. They argue that in the economy theory, a crime is conducted after the perpetrator a crime is considered the ability to arrest conviction and expected maximum sentence. He however notes that that criminal law is the ultimate remedial that should not be used too quickly. He enquires that liability should apportioned to

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<sup>121</sup> Rob Whit Criminality, risk and Environmental harm, Griffith Law review (1999) ol 8 (2), in this article White

<sup>122</sup> United Nations, *Globalization and the State: Challenges for Economic Growthand Human Development* (UN, 2004)

<sup>123</sup> Law and Economic of Environmental Crime: a Survey (Micheal G. Faure, marjolein visser, May 2003).

other individual citing on behalf of corporation, the corporation or both; following the fact that most offences are committed by corporations.

*Dushimimana* in *States' Cooperation with the International Criminal Tribunal for Rwanda* notes that Cooperation by governments or international organizations is essential for the acquisition of evidence as well as to the custody and transfer of accused individuals.<sup>124</sup> This assistance is also necessary in the relocation of critical witnesses or implementation of Tribunal-issued punishments. The willingness of governments to give essential assistance will primarily decide the Rwanda Tribunal's capacity to carry out its mission.

This is however diminished by the concept of sovereignty where sovereignty granted a state the right or competence to choose the nature of its own institutions, to secure and provision for their functioning, to enact laws of its own choosing and to enforce their observance without accountability to its people or the international community. However, the modern idea of sovereignty includes the notion of responsibility. State must be accountable not just to its citizens, but also to the international community as a whole.

Similarly, In the Barayagwiza case, the issue of national law has reemerged. In march of 1997, Judge Aspegren issued a transfer order requesting Cameroon hand up Jean-Bosco Barayagwiza to the ICTR. Cameroon delayed in bringing Barayagwiza, before the court for indictment owing to time-consuming extradition processes, and the Prosecutor could not bring Barayagwiza before the Court for prosecution until ninety-six days later.

The Judge was forced to reject the indictment against Barayagwiza and order his immediate release due to the lengthy interval between the issuing of the transfer order and the indictment. States have also refused to cooperate with International Tribunals citing security, among others. In the Barayagwiza case, Rwanda chose to discontinue cooperation with the ICTR because it was dissatisfied with the Tribunal's decision.

### **vii) Immunity against prosecution in environmental crimes**

Iverson states that the emerging reasoning of the ICC, Article 98 of the Rome Statute does not preclude the issuing of a warrant of arrest for an incumbent.<sup>125</sup> In contrast, the African Union

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<sup>124</sup> *States' Cooperation with the International Criminal Tribunal for Rwanda*  
L. Dushimimana, *National University of Rwanda. Rwanda Journal, Series B: Social Sciences, Volume 1 No 1, 2013*

<sup>125</sup> *The Continuing Functions of Article 98 of the Rome Statute* Jens M. Iverson University of Leiden, *Goettingen Journal of International Law*.

Commission disagrees with the conception of Article 98. It argues that the provision bans such arrest warrants, it regards the existing jurisprudence as virtually misreading Article 98, without purpose. He exhibits the continued function of immunities deriving from Article 98(2) agreements, and customary immunities relating to property and individuals.

In *Does President Al Bashir Enjoy Immunity from Arrest?*<sup>126</sup> Paola Gaeta states that it is critical to distinguish what is legitimate for the ICC under the Rome Statute and whether it is legal for other countries apart from Sudan to implement the warrant against Al Bashir under customary international law.

Nybondas discusses command responsibility.<sup>127</sup> She notes that it has been decided that the concept of superior responsibility applies where there is little or no proof that the superior engaged in the planning, initiating or ordering of a breach, and therefore, when the ‘primary basis of responsibility cannot be applied,’ cannot be applied.

She outlines three elements are emphasized for proof of superior responsibility; command and control over those who committed the crime, knowledge of the commission of a crime and the power to prevent or punish the offenders. She cites the *Čelebići* case, in which the Trial Chamber agreed to the conceptualization of three constitutive elements for superior responsibility: the existence of a superior-subordinate relationship; the superior knew or had reason to know that the criminal act was about to be or had been committed; and the superior failed to take the appropriate and reasonable actions to counter the crime.

Robinson notes that where superiors ‘knew or had cause to know’ that his subordinates had committed a crime, or consciously disregarded information or were about to commit such violations, they ought to be held accountable.<sup>128</sup> In the Kordić case, the Trial Chamber determined that Kordić did not meet the criteria ‘effective control’ which has become the most important prerequisite of superior responsibility. The fact that the accused had significant influence over events in Central Bosnia did not establish a level of control necessary to hold a person accountable under the doctrine of superior responsibility. As a result, the Trial Chamber affirmed the decision in the *Čelebići* case.

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<sup>126</sup> P. Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’, 7 *Journal of International Criminal Justice* (2009) 2, 315-332..

<sup>127</sup> Maria Nybondas., *The Relationship Between Individual Criminal And Command Responsibility* - January 2004.

<sup>128</sup> Robinson, D., 2012. How command responsibility got so complicated: a culpability contradiction, its obfuscation, and a simple solution. *Melb. J. Int'l L.*, 13, p.1

## **Gaps**

From the relevant literature review, there are gaps as to the threshold of environmental crimes that ought to be determined by the ICC. We note that international law fails to effectively provide for procedures to deliver criminal culpability for transnational environmental crimes or for hostile operations against the environment. The Rome Statute remains silent on environmental crimes as distinct crimes. Counterterrorism Conventions criminalize only offences against civilians and as such excludes environmental related crimes. The research therefore expounds on the need of having environmental crimes included as a separate crime in the relevant international statutes.

From the literature review, it appears that there are pieces of legislations, domestic and international, that has criminalized environmental harm. Some have in the long run contributed to the prohibition of violence against the environment. Most, if not all, suffer weak state governance or legalization that which otherwise is unacceptable. . Importantly, prosecution will be used as a tool to fight environmental injustice.

This is not adequate – you have to address gaps based on each category and then cumulatively show how your research will fill in this gap.

## **Justification of the Research Study**

The research seeks to contribute to the scholarly work in the research study that already exists in the area, although varied. It will be helpful to the academia as well as in advising policies. The legislators will also benefit from the research as they have an obligation to make laws.

## **Research methodology**

The research is based on qualitative analysis which is from secondary sources including textbooks, online sources, articles, judicial precedence and Journal articles.<sup>129</sup> The research does not rely on any primary method of data collection because of the vastness of the research which is based on literature. The research will also examine international best practices for sustainable economic development. International cases on sustainable development and

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<sup>129</sup> Mugenda Olive & Mugenda Abel, *Research methods: Quantitative and Qualitative Approaches*(African Center for Technology Studies, 1999)



international instruments will form the subject of best practices as the research seeks to identify how to achieve economic development that is sustainable.

## **Chapter Breakdown**

This study will be divided into five distinct chapters as follows: -

### **Chapter One**

This chapter sets out the introduction problem statement, justification, research questions; the theoretical and conceptual frameworks, literature review, research methodology and the chapter outline.

### **Chapter Two**

This chapter examines the nature of environmental crimes during armed conflicts. It discusses the intricacies of armed conflicts and its interplay in environmental crimes. Giving example of armed conflicts in Africa, the chapter focuses on how environmental harm is occasioned during armed conflicts.

### **Chapter Three:**

This chapter analyzes liability of environmental crimes and seeks to consider the individual that should be culpable for prosecution. It discusses international concepts on state responsibility, command responsibility and immunity among others

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### **Chapter Four:**

This chapter discusses prosecution of environmental crimes by the ICC. It considers the mandate, jurisdiction, challenges and opportunities for the ICC as a trial court for environmental crimes as an international crime in light of the provisions of the Rome Statute.

### **Chapter Five:**

This chapter has the summary of findings, conclusion and recommendations in respect to prosecution of environmental crimes by the ICC.

## CHAPTER TWO

### NATURE OF ENVIRONMENTAL CRIMES IN ARMED CONFLICTS

#### Introduction

This chapter discusses the nature of environmental crimes that occur during armed conflicts. It begins by discussing the aspect of armed conflicts and the environmental issues that arise during armed conflict. This chapter draws focus on armed conflicts that occur in Africa, while exemplifying some environmental crimes occurring in Africa in and after armed conflicts. It outlines and evaluates various international and regional laws governing the protection of environment as a human right. Environment suffers the impacts of armed conflicts during and after they occur, some of which have continued to impact on different generations.

#### Nature of Armed Conflicts

##### *Types of armed conflicts*

Armed conflicts refer to armed combat involving at least two or more actors.<sup>130</sup> These are regulated by International Humanitarian law.<sup>131</sup> It recognizes armed conflicts to include International Armed Conflicts and Non-International Armed Conflicts.<sup>132</sup> Under International humanitarian Law, war is governed under *jus ad bellum* and the law governing war conduct is *jus in bello*.<sup>133</sup>

Emerging debate pushes for international Humanitarian Law to extend to both civil and political war situations.<sup>134</sup> The competing interests arise when states argue that it infringes on their sovereignty. Nonetheless, there have been various agreements that have sought to govern in situation of belligerency.<sup>135</sup> Article 3 of the Geneva Convention reiterates that even in non-international armed conflicts, some essential humanitarian standards pertaining to civilian protection will apply to anyone taking part in the conflict.

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<sup>130</sup> Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*. (OUP, 2012) 72.

<sup>131</sup> Willmott, Deidre. "Removing the distinction between international and non-international armed conflict in the Rome Statute of the International Criminal Court." *Melb. J. Int'l L.* 5 (2004): 196.

<sup>132</sup> Kubo Macak, *Internationalized Armed Conflicts in International Law*. (OUP Oxford, 2018)

<sup>133</sup> Dr. U C Jha, *International Humanitarian Law: The Laws of War*. (Vij Books India Pvt Ltd, 2011) 1-2.

<sup>134</sup> Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press, 2010) 13.

<sup>135</sup> Taylor Seybolt, *Humanitarian Military Intervention: The Conditions for Success and Failure* (Oxford University Press, 2007).

Conflicts in Tigray and Darfur are examples of territorial and boundary related conflicts. According to Article 1(4), armed wars in which peoples struggle for self-determination against colonialist and foreign domination<sup>136</sup> as well as racist regimes as was in South Africa's apartheid.<sup>137</sup> However, there are still a huge number of actual and prospective conflicts that do not come under the expanded definition and they will be subject to the comparatively more limited measures contained in the Additional Protocol II."<sup>138</sup>

### ***Means and mode of War***

St Thomas Aquinas further refined the doctrine of just war by giving conditions for stating that only sovereign rulers were entitled to resort to force to defend the interests of the state, the cause must be just and there had to be proportionality in the use of force and no malice or cruelty in the waging of a war.<sup>139</sup> Following the Treaty of Westphalia, 1648, the concept of fair war vanished from the international law.<sup>140</sup> States are autonomous and equal, one state has no jurisdiction to decide whether or not another state's reason was just.<sup>141</sup>

The provisions of Protocol II are substantially more limited than those relating to international armed wars. Nonetheless, the Protocol provides important safeguards for civilians, as well as the injured, ill and shipwrecked.<sup>142</sup>

Article 2(4) forbids the use of force against territorial sovereignty, political autonomy, or aggression that is counter to the UN goals and only permissible in circumstances specified in the Charter. It categorically provides that the main objective is to maintain stability. The Security Council has sanctioned the use of force within Chapter VII on six occasions.<sup>143</sup> Furthermore, the UN has on various occasions issued measures that stop short of authorizing the use of force.<sup>144</sup>

The role of law in determining the means and mode of war is aimed at minimizing the risks and impacts of war.<sup>145</sup> Other than targets that due to their nature, locality, purpose, or usage

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<sup>136</sup> General Assembly Resolution 3103 (1973)

<sup>137</sup> Lindy Heineken, *South Africa's Post-Apartheid Military: Lost in Transition and Transformation* (2021) Springer International Publishing

<sup>138</sup> Tim Hiller, *Sourcebook on Public International Law* (Cavendish Publishing, 1998)

<sup>139</sup> Alexander Moseley, *A Philosophy of War* (Algora Publishing, 2007) 13.

<sup>140</sup> Malcolm Shaw, *International Law* (Cambridge University Press, 2014)953

<sup>141</sup> Alina Kaczorowska-Ireland, *Public International Law*, (Routledge, 2010) 696)

<sup>142</sup> John Carey, William Dunlap, Pritchard, *International Humanitarian Law*. (BRILL, 2003)

<sup>143</sup> Trevor Findlay, *The Use of Force in UN Peace Operations*. (SIPRI, 2002)

<sup>144</sup> Frauke Lachenmann, Rüdiger Wolfrum, *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*. (Oxford University Press, 2017)

<sup>145</sup> Micheal Scmitt, *Essays on Law and War at the Fault Lines* (Springer Science & Business Media, 2011).

contribute significantly to military operations and whose elimination, capture or elimination for military advantage, the law prohibits actions relating to non-military objectives.<sup>146</sup>

International norms ban the use of weapons which are dangerous to both health and the environment.<sup>147</sup> The 1899 Hague Conference culminated in three Hague Declarations. Declaration 2 forbids the use of some asphyxiating gases, while Declaration 3 forbids the use of explosive bullets. The so-called dum-dum bullets which were meant to expand in the body after impact, was prohibited by the Declaration.<sup>148</sup> The Protocol on Prohibitions or Restrictions on The Use of Incendiary Weapons states that any ammunitions that is intended to set fire to things or to inflict burn injury to people via the action of flame, heat, or a compound created by a chemical reaction of materials placed on the target. Protocol II applies to the use on land mines including some used on beaches and waterway crossings, with the exception of mines used at seas or in inland water systems.<sup>149</sup>

Biological and chemical weapons differ from other munitions in that they only affect living stuff and are directed against big populations than individual soldiers. Article 23 of the Hague Regulations Respecting the Laws and Customs of War on Land bars the use of toxins or poisoned ammunitions. Although the Regulations are widely accepted as customary international law, it is uncertain whether the ban on the use of poison extends to gas. In 1986, the UN Security Council passed a resolution condemning Iraq's use of chemical munition which was seen as a blatant breach of the Geneva Gas Protocol. There is currently a Biological Weapons Convention 1972 and Chemical Weapons Convention 1992, that ban manufacturing and stockpiling of particular weapons, however they do not address their employment in armed conflicts or civilian survival. It has been alleged that Iraq's purposeful spilling of oil into the Persian Gulf during the Gulf War in 1991 violated these rules.<sup>150</sup>

The Commission for Conventional Armaments, 1948 characterized ammunition of mass destruction as atomic explosion weapons, radio-active substance, and some deadly biochemical weaponry.<sup>151</sup> The General Assembly then broadened the concept to encompass any future weapons with properties equivalent to the atomic bomb. Relatedly, the international norms

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<sup>146</sup>Jens David Ohlin, Larry May, Claire Oakes Finkelstein, *Weighing Lives in War*. (OUP, 2017) 29.

<sup>147</sup> Emily Crawford, Alison Pert, *International Humanitarian Law*. (Cambridge university press, 2015) 221.

<sup>148</sup> Tim Hillier, *Sourcebook on Public International Law*. (Routledge, 1998) 629.

<sup>149</sup> William H. Boothby, *Weapons and the law of Armed Conflict*. (Oxford University press, 2016) 194.

<sup>150</sup> Knut Dorman, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, 2003).

<sup>151</sup> Martin, Susan, *Weapons of Mass Destruction in Sohail H. Hashmi, Steven P. Lee Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives*'' (Cambridge University Press, 2004) 16.

functions on two levels in addressing nuclear weapons. First, there are constraints on nuclear weaponry manufacturing and ownership such as the Treaty on the Non-Proliferation of Nuclear Weapons of 1963 that limits the number of governments that can build and acquire nuclear munitions.<sup>152</sup>

Further, ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons Case*<sup>153</sup> is key. The Court noted that states that appeared before it either agreed or did not oppose, that their freedom to act was limited by the relevant rules, notably humanitarian law, as did the other states that participated. The Court recognized that the safeguard of the ICCPR does not stop during war, save as provided by Article 4 of the Covenant, which allows some elements to be waived during national crises. The Court considered customary international law to see if a limitation on the threat or deployment of nuclear weapons arises from it.<sup>154</sup>

Article 55 of the Geneva Protocol I Additional to the Geneva Conventions of 1949 requires parties to minimize extensive and substantial environmental harm and bans the use of munition and war strategies that 'may be expected to cause' such damage and thus jeopardize civilian health.<sup>155</sup> The UN Convention 1977 forbids military strategies that alters "the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space." Part of the debate is that this convention also applies to nuclear weapons.<sup>156</sup>

According to Article 24 of the Charter, the Security Council bears the main responsibility for ensuring international stability. The Security Council has the authority to impose binding sanctions on member States. Article 25 provides that the Members of the United Nations commit to adopt and implement the Security Council decisions in conformity with the current Charter. Under article 42 of the Charter, authorizes the Security Council to take measures as needed to preserve or restore world peace and stability. This is inclusive of the permission for usage of military action against an aggressor. The Security Council's resolutions are bound to follow the above provisions with respect to Article 25 of the Charter. Article 24(2) requires the Council to "... *act in accordance with the principles and purposes of the United Nations.*" In

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<sup>152</sup> Harsh V Pan, *Handbook of Nuclear Proliferation*. (Routledge, 2012).

<sup>153</sup> [1996] ICJ Rep 226

<sup>154</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta) Judgment*, [1985] ICJ Rep at p 29, para 27

<sup>155</sup> Michael Bothe, Karl Josef Partsch, Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*. (Martinus Nijhoff Publishers, 1982)

<sup>156</sup> Micheal Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, (Cambridge University Press, 2013).

the *Palestinian Wall Case*<sup>157</sup>, the ICJ ruled that the Security Council's jurisdiction in maintaining global stability was 'primary' and not 'exclusive'. Article 53 grants the Security Council authority to empower regional bodies like the African Union to adopt enforcement steps.

The right to self-defense is perhaps the most noticeable exception to the general rule on the prohibition on the use of force.<sup>158</sup> Nothing in the Charter, according to Article 51 limits a member state's right to self-defense if they are attacked, until the Security Council acts. Self-defense gives states the legal foundation for reaction to another state's illegal use of force, where other states do not act accordingly. When correctly applied, the concept will justify state conduct that involves both unilateral usage of force and violation of territorial integrity, which would otherwise be prohibited. Nonetheless, the force employed should be appropriate to the aggressors.<sup>159</sup>

Various countries argue that humanitarian intervention is an exception to the limitation on the usage of force. The majority have happened in settings when the humanitarian purpose is at best matched, if not overwhelmed, by a desire to support socio-political and economic tools of the status quo. As a result, 'humanitarian intervention' is frequently used as a pretext for a violation of Article 2(4).<sup>160</sup>

### ***Actors in armed conflict***

Traditionally, armed conflicts were among two state parties.<sup>161</sup> The Combatants were known to be under leadership, having set, obvious and distinguishing symbols, publicly carrying munition, and adhering to the rules of war.<sup>162</sup> The cornerstone of these laws is that fighters engage, and if caught, they are guaranteed Prisoner of War (POW) privilege. The civilians, should also be safeguarded against assault.<sup>163</sup> Conflicting parties are permissible targets while

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<sup>157</sup> Advisory Opinion on the Legal Consequences of the Construction of a Wall by Israel in the Occupied Palestinian Territory (2004) 43 ILM 1009

<sup>158</sup> Terry D. Gill, Dieter Fleck, *The Handbook of the International Law of Military Operations* (Oxford University Press, 2011)

<sup>159</sup> Richard A. Falk, *The Vietnam War and International Law, Volume 3: The Widening Context* (Princeton University Press, 2015) 139.

<sup>160</sup> Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010)

<sup>161</sup> David K. Linnan, *Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues* (London, Greenwood publishing company, 2008), 224.

<sup>162</sup> Rain Liivoja, Tim McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge, 2016)

<sup>163</sup> Jennifer Elsea, *Treatment of "battlefield Detainees" in the War on Terrorism* (Nova Publishers, 2003), 127

attacks on civilians is not.<sup>164</sup> Article 52 of the Protocol outlaw bans civilian targets and Article 57 requires combatants to take all conceivable steps to ascertain that the objects of the attack are military targets, and to refrain from attack that may result in incidental civilian casualties that are excessive as compared to the military advantage acquired.<sup>165</sup>

International humanitarian law assumes that armed groups are organized and should act in compliance with the law.<sup>166</sup> In contrast, many African armed conflicts have seen insurgencies who operating irregular military forces and illegal political organizations. They are formed to counter state military agents or protect own independence.<sup>167</sup> They are hinged on factors such as poverty, human rights violations, bad governance, corruption or ethnic marginalization.<sup>168</sup>

Insurgents may employ guerilla in exhausting the adversary.<sup>169</sup> They do not defend sovereignty od state borders but operate in illegitimate spheres.<sup>170</sup> In violation of the law of war, insurgents use human shield, recruit civilians, pursue deceitful ideologies and control their civilian population areas.<sup>171</sup>

Insurgent groups may cover international territories whose vastness resonates to control and complex criminal networks.<sup>172</sup> Africa harbours Islamists groups such as Boko Haram in Nigeria and Al Shabab in East Africa region which linked to Al Qaeda in Middle East.<sup>173</sup> In order to support their operations, insurgent groups fight for and control resources. More membership is believed to be a social resource.<sup>174</sup> They comprise of men, women and children recruited forcefully or joining voluntarily. it is estimated that 4,500 children in Sierra Leone were forced

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<sup>164</sup> Janina Dill, *Legitimate Targets?: Social Construction, International Law and US Bombing* (Cambridge University Press, 2015) 79.

<sup>165</sup> Elizabeth Wilmschurst, *International Law and the Classification of Conflicts* (OUP, 2012)

<sup>166</sup> Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, Cambridge, 2005

<sup>167</sup> Micheal. L. Gross, *The Ethics of Insurgency: A Critical Guide to Just Guerrilla Warfare* (Cambridge University Press, 2015)

<sup>168</sup> Annan, N., 2014. Violent Conflicts and Civil Strife in West Africa: Causes, Challenges and Prospects. *Stability: International Journal of Security and Development*, 3(1)

<sup>169</sup> Kleffner Jann, *The Applicability of International Humanitarian Law to Organized Groups*, International review of the Red Cross, volume 93 Number 882 (2011)

<sup>170</sup> Ian F. W. Beckett, *Modern Insurgencies and Counter-Insurgencies: Guerrillas and Their Opponents since 1750* (London and New York: Routledge, 2001)

<sup>171</sup> UN, *Handbook on children recruited and Exploited by terrorist and Violent Extremist Groups: The Role of the Justice System* (2017)

<sup>172</sup> Karen Ballentine, "Beyond Greed and Grievance: Reconsidering the Economic Dynamics of Armed Conflict," in ed. Karen Ballentine and Jake Sherman, *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (Boulder and London: Lynne Rienner, 2003) 271

<sup>173</sup> Olanrewaju, John (2015) *Globalization Of Terrorism: A Case Study Of Boko Haram In Nigeria*. International Journal of Politics and Good Governance, VOLVI (6). pp. 1-22. ISSN ISSN: 0976 – 1195

<sup>174</sup> Sudhir Venkatesh, *Gang Leader for a Day: A Rough Sociologist Takes to the Streets* (New York: Penguin, 2008)

to fight for Revolutionary united Front between 1992 and 1993. Insurgents totally disregard the law.

These large numbers operating in a local base strain resources and impact more harm on the environment.

Like state actors, guerillas and insurgents have basic command structure using force to achieve its objective. These groups lack formal responsibility but the growth of these groups has resulted to their recognition in contemporary armed conflicts. These groups emerge from extreme insecurity and are determined to protect communities and territories.<sup>175</sup>

Despite there being international framework for protection of human rights and especially on environment, insurgent groups have total disregard. Protected sites are exploited by such groups. For example, Virunga National Park served as a battleground for Kivu War and armed groups exploited it despite it being an protected cite.<sup>176</sup> Insurgents have changes the war from the traditional civil war to destruction of property.<sup>177</sup>

### **Environmental crimes occurring in armed conflicts: focus on Africa**

Environmental crime covers acts that breach environmental legislation and cause significant harm or risk to natural resources and human health.<sup>178</sup> In The African context, most known areas of environmental crimes that occur during armed conflicts are the illegal emission or discharge of substances into air, water or soil, the illegal trade in wildlife, illegal trade in ozone-depleting substances and the illegal shipment or dumping of waste.<sup>179</sup> Environmental Terrorism targets deliberately and specifically, the natural environment to damage environmental assets which may be in form of pollution, poisons, resource extraction, or burning so as to coerce a political behaviors.<sup>180</sup>

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<sup>175</sup> G. Simpson "Explaining Endemic Violence in South Africa" cited in Winton, "Urban Violence," 166

<sup>176</sup> European Parliament resolution of 17 December 2015 on the protection of the Virunga National Park in the Democratic Republic of Congo (2015/2728(RSP))

<sup>177</sup> Kaldor, M. (2012). *New and Old Wars: Organised Violence in a Global Era*. (3rd ed). Cambridge: Polity Press

<sup>178</sup> Luttenberger, Axel, and Lidija Runko Luttenberger. "Challenges in regulating environmental crimes." *Book of* (2017): 213.

<sup>179</sup> White, R. (2018). *Transnational environmental crime: Toward an eco-global criminology*. Willan.

<sup>180</sup> Dalby, S. (2009). *Security and environmental change*. Polity.



The 2016 Revised African Convention on the Conservation of Nature and Natural Resources makes provision on protection of environmental protection especially in times of armed conflicts. It obligates parties to take every necessary step to protect the environment against harm.<sup>181</sup> It urges parties to refrain from using means and methods of warfare that would cause widespread and long-term effects on the natural environment.<sup>182</sup> Similarly, parties are prohibited from using the environment as means of combat reprisal.<sup>183</sup> States are encouraged to restore and rehabilitate areas damaged in armed conflicts.<sup>184</sup> States are obligated to cooperate in implementing rules and measures to protect the environment in times of armed conflicts.<sup>185</sup>

According to a 2016 UNEP Report states that environmental crimes are among the most profitable transnational criminal activities.<sup>186</sup> It notes that environmental crimes are increasing at a rate of 7% annually. This is supported by the increased number of armed groups and the enlarged transnational criminal enterprise.<sup>187</sup>

### *Crimes against wildlife*

The Convention on International Trade in endangered Species is designed to prevent trafficking of wildlife and its products. China and Thailand are accused of being great beneficiaries of the illegal trade.<sup>188</sup> These countries may be linked to the ongoing armed conflicts through their multinational corporations.<sup>189</sup> Armed groups in Africa have capitalized in poaching as a revenue source for their activities.<sup>190</sup> They also traffic wildlife and bushmeat. Wildlife protection suffers poaching and illegal trade in Africa as it benefits from a transnational criminal network.<sup>191</sup> The Mozambican National resistance has been accused of poaching

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<sup>181</sup> Addaney, Michael, Michael Gyan Nyarko, and Elsabe Boshoff. "Protection of the Environment and Natural Resources during Armed Conflicts in Africa." *Chinese Journal of Environmental Law* 3.1 (2019): 85-115.

<sup>182</sup> Article 15, Additional Protocol I.

<sup>183</sup> Kentaro, Charlyn. "The environment as a casualty of war: the role of the African union regulatory framework towards securing environmental protection during armed conflicts." (2013).

<sup>184</sup> Evans, Christine, and E. Christine Evans. *The right to reparation in international law for victims of armed conflict*. No. 91. Cambridge University Press, 2012.

<sup>185</sup> Orakhelashvili, Alexander. *Akehurst's Modern Introduction to International Law*. Routledge, 2018.

<sup>186</sup> UNEP, A., & ASSESSMENT, I. R. R. (2016). *The Rise of Environmental Crime*. Nairobi: UNEP.

<sup>187</sup> Singer, P. W. (2001). Corporate warriors: The rise of the privatized military industry and its ramifications for international security. *International security*, 26(3), 186-220.

<sup>188</sup> Dudley, N., Stolton, S., & Elliott, W. (2013). Wildlife crime poses unique challenges to protected areas. *Parks*, 19(1), 7-12.

<sup>189</sup> Le Billon, P. (2001). The political ecology of war: natural resources and armed conflicts. *Political geography*, 20(5), 561-584.

<sup>190</sup> Kideghesho, J. R. (2016). The elephant poaching crisis in Tanzania: a need to reverse the trend and the way forward. *Tropical Conservation Science*, 9(1), 369-388.

<sup>191</sup> Haas, T. C., & Ferreira, S. M. (2015). Federated databases and actionable intelligence: Using social network analysis to disrupt transnational wildlife trafficking criminal networks. *Security Informatics*, 4(1), 1-14.

elephants.<sup>192</sup> Similarly, in DRC, the Lord's Resistance Army and other local militia have been poaching elephants.<sup>193</sup> It is likely that beneficiaries of illegal training form corporations and allegiances in order to control this resource.

Armed conflicts hinder wildlife habitats which is lost from overpopulation, overdependence, waste, willful destruction. Migration of refugees results to overpopulation and destruction of habitats. It takes a long while before it regenerates.<sup>194</sup>

To combat this, the organization traffic and the Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora established an intergovernmental taskforce with the main function of facilitating cooperative activities in/among member states in carrying out violations of national laws pertaining to illegal trade of wild fauna and flora.

### *Crimes against water*

Armed conflict threaten water pollution and the right to safe drinking water. Pollution may occur due to oil leakages and chemicals that ,contaminate water. During the Second World War, the attack on Pearl Harbour resulted to oil leakages that destroyed aquatic habitats.<sup>195</sup> On the other hand, the Rwandan genocide in 1994 resulted to pollution of water bodies. This is because a lot of dead bodies were discarded in water bodies whereas decayed bodies were washed to water bodies.<sup>196</sup>

Mining and pollution from its have largely contributed to water pollution and dependent species. Pollution has threatened quality of water resources. A case of Ghana's illegal mining has resulted to pollution of the Fena River.<sup>197</sup> It is feared that heavy metals such as lead may seep into surface and underground water and thus endanger aquatic lives.<sup>198</sup>

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<sup>192</sup> Anderson, B. and Jooste, J., 2014. *Wildlife poaching: Africa's surging trafficking threat*. NATIONAL DEFENSE UNIV FORT MCNAIR DC AFRICA CENTER FOR STRATEGIC STUDIES.

<sup>193</sup> Namanya, Patience Gulu. "The abducted girls of the Lord's Resistance Army." *Africa Conflict Monthly Monitor* 2013.10 (2013): 66-72.

<sup>194</sup> George-ukpong, I. (2012). *Nature Under Siege: Portrait of Environmental Crisis in the Niger Delta*. Author House.

<sup>195</sup> Saadoun, I. M. (2015). Impact of oil spills on marine life. *Emerging pollutants in the environment-current and further implications*, 10, 60455.

<sup>196</sup> Low, S. (2008). The Impact of a Massive Population Movement on Environmental Health in Goma, Zaire 1994.

<sup>197</sup><sup>197</sup> Andrews, N. (2015). Digging for survival and/or justice?: The drivers of illegal mining activities in western Ghana. *Africa Today*, 62(2), 3–24.

<sup>198</sup> Tsuma, William. *Gold Mining in Ghana: Actors, alliances and power*. Vol. 15. LIT Verlag Münster, 2010.

Water shortage threatens the human wellbeing. The ICRC report that after the breakout of the conflict in Sahel region, people in Burkina Faso have been unable to access water. This is coupled with the tough climatic changes and resulting drought.<sup>199</sup>

### *Crimes against fauna*

Most insurgent groups in Africa, especially in DRC, Uganda and South Sudan and based in forests.<sup>200</sup> First and foremost, the presence of armed groups in forests have converted it to a battle ground. Resultantly, the natural habitat suffers from pressure.<sup>201</sup>

Deforestation remains a challenge in the fight against climate change. In Kenya, there is the illegal trade of sandalwood.<sup>202</sup> Another direct impact on the environment by armed groups is reduction of forest covers in areas where there are extractives. Indeed, extractives are a source of revenues and armed groups have wanted to control such trade, necessitating cutting of trees.<sup>203</sup> Similarly, armed groups in Africa are accused of heavy illegal timber trade. DRC and Tanzania are leading in illegal trade of exotic endangered trees.<sup>204</sup> Somalia has seen the increased trade of charcoal to other continents. There have been efforts in international law to protect forest habitats and to increase forest covers so as to combat climate change. The Forest Principles is a non-binding statement of Principles to promote management, conservation and sustainable development of forests.<sup>205</sup> The 1994 Convention to Combat Desertification aims at addressing the continued impact of climate change remains a source of and ground for exacerbating conflicts. Protection of biodiversity during armed conflict is difficult. The Convention on Biological Diversity and the Ramsar protection lack special legal protection during armed conflicts.<sup>206</sup>

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<sup>199</sup> <https://www.icrc.org/en/document/burkina-faso-water-scarcity-conflict> (accessed on 11/11/22)

<sup>200</sup> Haenlein, C., & Smith, M. L. R. (Eds.). (2017). *Poaching, wildlife trafficking and security in Africa: myths and realities*. Taylor & Francis.

<sup>201</sup> Roessler, P., & Verhoeven, H. (2019). *Why comrades go to war: liberation politics and the outbreak of Africa's deadliest conflict*. Oxford University Press, USA.

<sup>202</sup> Bunei, Emmanuel K. "The hunt for the precious wood: Illegal trade of sandalwood as an international criminal enterprise in Kenya." *Society and Business Review* (2017).

<sup>203</sup> Springate-Baginski, O., Thein, A. K., Neil, A., Thu, W. M., & Doherty, F. (2014). Democratising timber: an assessment of Myanmar's emerging 'Forest law enforcement, governance and trade' (FLEGT) process. *Forest Policy and Economics*, 48, 33-45.

<sup>204</sup> Andersson, A., & Gibson, L. (2018). Missing teeth: Discordances in the trade of hippo ivory between Africa and Hong Kong. *African Journal of Ecology*, 56(2), 235-243.

<sup>205</sup> Mekhlouf, O. (2021, June). International Legal protection of forests in the context of sustainable development. In *IOP Conference Series: Earth and Environmental Science* (Vol. 779, No. 1, p. 012131). IOP Publishing.

<sup>206</sup> Langberg, L. D. (2010). *Hotspots: Biological Diversity and Conflict: To what extent does international humanitarian law provide legal protections for biological diversity within conflict zones?* (Master's thesis).

### *Crimes against cultural properties*

During the colonial times, colonialists made expeditions and took away rich heritage during war or as gifts.<sup>207</sup> Under the Convention on the Protection of Cultural property in the Event of Armed conflict defines cultural property as property of great importance of the cultural heritage of a people and it includes buildings and centers containing such movable or immovable property.<sup>208</sup> The protection of cultural properties is premised on the principle that damage to cultural property of any people is damage to cultural heritage of all mankind.<sup>209</sup> Cultural property is protected from theft, pillage or misappropriation. Destruction of cultural property during armed conflict to intimidate people or any other military purpose is prohibited.<sup>210</sup> The war in Mali resulted to destruction of cultural property that saw the prosecution in the *Al Mahido Case*.<sup>211</sup> Between 2013 and 2019, Africa reported 729 cases of destruction on cultural property.<sup>212</sup>

### *Crimes against hazardous waste*

Hazardous wastes are deemed to have no direct victim. Over the last year, the African continent has experienced illicit hazardous waste disposal wastes from Illegal companies, terrorists and organized groups which enter through porous borders in large quantities.<sup>213</sup> The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal<sup>214</sup> seeks to reduce the movement of hazardous waste between nations and their transfer to less developed nations. South Africa is alleged of engaging in nuclear trafficking with suspected involvement of organized crime.<sup>215</sup> A reported case associated with nuclear trafficking is the theft of uranium enriched to almost 20% from a research reactor in DRC in

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<sup>207</sup> Abungu, G. (2016). Illicit Trafficking and Destruction of Cultural Property in Africa: A Continent at a Crossroads. In: Charney, N. (eds) *Art Crime*. Palgrave Macmillan, London.

<sup>208</sup> Toman, J. (2017). *The protection of cultural property in the event of armed conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection*. Routledge.

<sup>209</sup> 1954 Hague Convention; 1977 Additional Protocols

<sup>210</sup> Pudovochkin, Y., & Rusanov, G. (2017). Crimes against cultural values as a basis of international criminal responsibility. *Collection Papers Fac. L. Nis*, 75, 235.

<sup>211</sup> The Prosecutor V Ahmed Al faqi Al mahdi ICC-01/12-01/15

<sup>212</sup> Assessing crimes against Cultural property 2020, The International Criminal Police Organization, September, 2021.

<sup>213</sup> Dimah, A. (2001). Transboundary Shipment of Hazardous Wastes to Sub-Saharan Africa: A Challenge for the Nigerian Foreign Policy. *Journal of Sustainable Development in Africa*, 3(1), 57-77.

<sup>214</sup> 1989

<sup>215</sup> Zaitseva, L. (2007). Organized Crime, Terrorism and Nuclear Trafficking; Strategic Insights, v. 6, issue 5 (August 2007). *Strategic Insights*, v. 6, issue 5 (August 2007).

mid-1990s.<sup>216</sup> the challenge that remains snare is the mining of minerals and selling in black market.<sup>217</sup>

The 1990 Rotterdam Convention aims at promoting a shared responsibility between exporting and importing countries so as to protect human health and the environment from harmful effects of certain chemicals and pesticides by controlling and monitoring trade.<sup>218</sup>

### *Crimes against air pollution*

Many armed groups in Africa are highly mechanized. There has been increased proliferation of arms from resource revenue and to expand their networks. The extensive testing and use of flammable bombs have a lasting impact on air quality. Civilian areas in Darfur have been heavily bombed to clear villages in 2014. Inevitably, the environment suffers from toxins released to the atmosphere as a result of ashes in armed conflicts. Parties to Convention on Persistent Organic Pollutants have an obligation to ensure that persistent organize pollutants that remain intact in the environment for long period protect human health and the environment.

## **Nexus between environment protection and armed conflict**

### *Armed conflict and human rights safeguard*

Various fundamental rights are infringed during armed conflicts.<sup>219</sup> International instruments have sought to limit human suffering during armed conflicts. Various conventions and international rules collectively address and protect human rights violation.<sup>220</sup> Humanitarian Law provides safeguard and compassionate treatment of those who are not participating in the conflicts and those who are captured as Prisoners of Wars.<sup>221</sup> Inclusion of human rights provision under IHL instruments is to ensure continued safeguard of fundamental rights during

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<sup>216</sup> Louise Shelley, "Emerging Trends in Nuclear Smuggling: The Links Between Criminals and Terrorists," paper delivered at the conference Terrorism, Transnational Networks and WMD Proliferation: Indications and Warning in an Era of Globalization, Monterey, California, July 25-27, 2006

<sup>217</sup> Friedrich Steinhaeusler and Lyudmila Zaitseva, "Uranium Mining and Milling: Material Security and Risk Assessments," International Journal of Nuclear Governance, Economy and Ecology (IJNG2E) I, no. 3

<sup>218</sup> Jansen, K., & Dubois, M. (2014). Global pesticide governance by disclosure: Prior informed consent and the Rotterdam convention. *Transparency in Global Environmental Governance: Critical Perspectives*, 107-131.

<sup>219</sup> Haidi Willmot, Ralph Mamiya, Marc Weller, Scott Sheeran, Protection of Civilians (OUP, 2016)

<sup>220</sup> Cees de Rover, To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Force, (International Committee of the Red Cross, 1998)

<sup>221</sup> Dörmann, Knut. "The legal situation of "unlawful/unprivileged combatants"." *International Review of the Red Cross* 85, no. 849 (2003): 45-74

conflicts. Both Geneva Conventions in Article 3 recognize the need to protect persons not taking part in war as well as those who are injured or ill who should be rescued and attended.<sup>222</sup>

Nonetheless, Article 75 of Protocol I specify specific rights for persons, whereas Article 1 expressly mentions the Martens clause.<sup>223</sup> According to the Martens clause, civilians and adversaries 'remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience' in cases not covered by relevant Conventions and Protocols.<sup>224</sup>

Although during armed confrontations, there may be instance when human rights may be derogated. Article 2 ICCPR establishes rights that can at no given time be derogated.<sup>225</sup> This includes murder, torture of all kinds, corporal punishment, mutilation, inhumane treatment and taking hostages.

In respect to children rights, the minimum age prescribed is 15 years for recruitment by governments and not less than 18 years for armed groups. The Optional Protocol to the Convention on the Rights of the Child, 2002 prohibits compulsory enlistment of children below 18 years into national military forces and armed organizations.<sup>226</sup> For instance, article 8(2)(e) (vii) of the Rome Statute and article 3(a) of the Worst Forms of Child Labor Convention (no. 182) (1999) 16 is instrumental. Article 1 and 2 of the 2000 Optional Protocol on the Convention on the Rights of the Child, has established 18 as an acceptable minimum age for active engagement in armed warfare.<sup>227</sup> In contrast, the African Charter on the Rights and Welfare of the Child, which defines minors as anybody under the age of 18, requires nations to take all necessary steps to prevent children from being used in armed warfare and to desist from enlisting them.

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<sup>222</sup> Abresch, William. "A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya." *European Journal of International Law* 16, no. 4 (2005): 741-767.

<sup>223</sup> Hayashi, Mika Nishimura. "The Martens clause and military necessity." In *The Legitimate Use of Military Force*, pp. 143-168. Routledge, 2016

<sup>224</sup> Meron, Theodor. "The humanization of humanitarian law." *American Journal of International Law* 94, no. 2 (2000): 239-278

<sup>225</sup> Lester R. Kurtz, Jennifer Turpin, *Encyclopedia of Violence, Peace, and Conflict*, Volume 1 (Academic Press, 1999) 175

<sup>226</sup> Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1998)

<sup>227</sup> Thorsten Bonacker, Christoph, *Victims of International Crimes: An Interdisciplinary Discourse* (Springer Science & Business Media, 2013)

Perpetrators of crimes during armed conflicts must be treated fairly as required in Article 14 and 15 of the ICCPR. When a rebellious group opts to undertake trials, it must establish a judicial structure to carry out judgment and sanction.<sup>228</sup>

### *Environment as human right*

International Human Rights Law is a body of law that controls the safeguard human rights. The UN Charter's preamble recognizes protection of core liberties, dignity and value of the people, and the equal right of everyone without regard to race, sex, language, or religion.<sup>229</sup> The UDHR, ICESCR, and ICCPR reiterate the protection of environmental liberties as human rights.<sup>230</sup> The African Charter on Human and Peoples' Rights provides for social, economic and cultural rights on an equal footing with civil and political rights.<sup>231</sup> The African Commission Socio-Economic Rights in *SERAC v Nigeria*<sup>232</sup> it passed Resolution 300 on Right to Water Obligations as a right protected in the Charter.<sup>233</sup> Similarly, in *Communication of COHRE v Sudan*,<sup>234</sup> the Commission held that destruction of homes and poisoning of water wells by armed groups amounted to violation of human rights.<sup>235</sup>

The Maputo Protocol encompasses the rights of women to respect for her dignity and protection from violence. Women are most vulnerable during armed conflicts due to sexual exploitation, displacement and other inhumane treatment.<sup>236</sup> Undeniably, in almost all armed conflicts in Africa, women are raped and tortured. The Rwandan Tribunal convicted war criminals for rape cases.<sup>237</sup> Women play a central role in protecting the natural environment and for family and

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<sup>228</sup> Sivakumaran, Sandesh. "Courts of armed opposition groups: fair trials or summary justice?." *Journal of International Criminal Justice* 7, no. 3 (2009): 489-513

<sup>229</sup> Sands, Philippe, and Jacqueline Peel. *Principles of international environmental law*. Cambridge University Press, 2012

<sup>230</sup> Coomans, Fons. "The extraterritorial scope of the international covenant on economic, social and cultural rights in the work of the United Nations Committee on economic, social and cultural rights." *Human Rights Law Review* 11, no. 1 (2011): 1-35.

<sup>231</sup> Murray, R. (2000). *The African Commission on Human and Peoples' Rights and International Law*. Hart Publishing.

<sup>232</sup> Social and Economic Rights Action Centre (SERAC) & Another v Nigeria (2001) AHRLR 60 (ACHPR 2001).

<sup>233</sup> Ibe, S. (2007). Beyond justiciability: Realising the promise of socio-economic rights in Nigeria. *African Human Rights Law Journal*, 7(1), 225-248.

<sup>234</sup> *udan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, 279/03-296/05, African Commission on Human and Peoples' Rights, May 2009

<sup>235</sup> Ssenyonjo, M. (2011). Analysing the economic, social and cultural rights jurisprudence of the African commission: 30 years since the adoption of the African charter. *Netherlands Quarterly of Human Rights*, 29(3), 358-397.

<sup>236</sup> Abreham, M. (2021). The Legal Protection of Internally Displaced Women from Sexual and Gender-Based Violence in Ethiopia. *Hawassa UJL*, 5, 61.

<sup>237</sup> Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-T

community development.<sup>238</sup> There has been no woman who has been individually charged for international crimes because they are largely victims. Recognition of this human rights under International Humanitarian law enhances protection of women during armed conflicts.<sup>239</sup>

The African Charter of the Rights and Welfare of the Child obligates states to ensure that children are protected during armed conflict and from the effects of armed conflicts.<sup>240</sup> While it bans child soldiers, it also makes provision of internally displaced children affected by armed conflicts.

It guarantees freedoms and rights that apply both during war and peace. In reference to conflict, the rights manifest in conventional armed conflicts and political tension actions.<sup>241</sup> Noteworthy, under the African Charter, there is no derogation of human rights in situations of emergencies. In the instance of African conflicts, many children soldiers were recruited to join armed groups in Congo<sup>242</sup> and South Sudan.

Environmental rights are part of human rights treaties. Through environmental justice, efforts have been made to ensure resources are equitably shared.<sup>243</sup> This also includes the right to an effective remedy which is both a human rights and environmental law question. One of the fundamental human rights is the right to clean, healthy and sustainable environment. The United Nation General Assembly adopted Resolution 76/300. It recognizes sustainable development and protection of the environment for the wellbeing and full enjoyment of all human rights for present and future generations. The resolution was adopted at a time when people are called to address climate change, biodiversity conservation and address pollution.

The International Covenant on Civil and Political Rights (ICCPR) also provides that there must be adequate remedies where human rights are infringed upon either locally or internationally.<sup>244</sup> The African Commission on Human and People's Rights in the case of *Thomas Kwoyelo v*

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<sup>238</sup> Moser, C., Moser, C. O., & Clark, D. F. (Eds.). (2001). *Victims, perpetrators or actors?: Gender, armed conflict and political violence*. Palgrave Macmillan.

<sup>239</sup> Rehn, E., & Sirleaf, E. J. (2009). Focus: Women, Gender and Armed Conflict. *Gender Policy*.

<sup>240</sup> Betancourt, T. S., Borisova, I. I., Williams, T. P., Brennan, R. T., Whitfield, T. H., De La Soudiere, M., ... & Gilman, S. E. (2010). Sierra Leone's former child soldiers: A follow-up study of psychosocial adjustment and community reintegration. *Child development*, 81(4), 1077-1095.

<sup>241</sup> Resoluion on Human Rights in conflict Situations – ACHPR/Res.332 (EXT.OS/XIX)2016

<sup>242</sup> United Nations, Comprehensive Review of Peacekeeping Operations and All Their Aspects, A/59/710; Watchlist on Children and Armed Conflict, Struggling to Survive: Children in Armed Conflict in the Democratic Republic of Congo, April 2006

<sup>243</sup> Donald K. Anton, Dinah L. Shelton, Environmental Protection and Human Rights. (Cambridge University Press, 2011) 94.

<sup>244</sup> Dinah Shelton, Alexandre Charles Kiss, United Nations Environment Programme, Judicial Handbook on Environmental Law (UNEP/Earthprint, 2005) 24.



*Uganda*, held that IHRL and IHL may be applicable in cases of extra-territorial conflicts so as to assess extent of violations. In applying IHRL, traditionally it is only applicable to state actors. However, non-state actors are held liable as some of the laws form customary norms.

the African Human Rights systems insists on the provision of remedies for any violation of fundamental rights, including the right to information.<sup>245</sup> Environmental instruments frequently proclaim the need for effective remedies.<sup>246</sup> Principle 10 of the Rio Declaration states thus: “effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. The Revised African Convention on Nature and Natural Resources in its preamble acknowledges certain principles of International Environmental law.<sup>247</sup>

Agenda 21 gives a directive to governments and legislators to ensure access to justice to all individuals and groups that are legitimately affected, and to establish effective legal redress procedures to address any violation of environmental rights.<sup>248</sup> UNCLOS also provides for timely and adequate compensation or any appropriate relief for any harm resultant from the pollution of marine environments within their territories (Art. 235(2)).<sup>249</sup> Equal access to remedies is viewed as a major category of the implementation of the polluter pays principle as it broadens the extent to which polluter accountability is applied.<sup>250</sup>

Regionally, the 1981 *African Charter on Human and Peoples Rights* was the first international legal framework that expressly pioneered the recognition on the right clean and healthy environment. The *Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights* expressly provided for the right to a healthy environment (Art. 11). In *Compare Flores v. Southern Peru Copper Corporation*,<sup>251</sup> the Court of Appeal in US held that the “right to life” and “right to health” were not definitive so as to be considered part of the customary international law. Thus, they could not be legally enforced as part of the environmental rights. The Supreme Court of Nepal in *Kedar Bhakta Shrestha & Others v.*

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<sup>245</sup> Desgagne, Richard. "Integrating environmental values into the European Convention on Human Rights." *American Journal of International Law* 89, no. 2 (1995): 263-294

<sup>246</sup> Shelton, Dinah. "Human rights and the environment: what specific environmental rights have been recognized." *Denv. J. Int'l L. & Pol'y* 35 (2006): 129.

<sup>247</sup> Dokun Oyeshola, O. P. "An Exploration of Polluter-pays Principle of International Environmental Law Mechanism for Confronting Environmental Pollution in Nigeria." *Dominican University Journal of Humanities (DUJOH)*: 45.

<sup>248</sup> Robinson, Nicholas A. "Enforcing environmental norms: Diplomatic and judicial approaches." *Hastings Int'l & Comp. L. Rev.* 26 (2002): 387.

<sup>249</sup> Stephen J. Turner, Dinah L. Shelton, Jona Razzaque, Owen McIntyre, James R. May, *Environmental Rights: The Development of Standards*. (Cambridge University Press, 2019) 185.

<sup>250</sup> Kevin A. Baumert, *Building on the Kyoto Protocol: Options for Protecting the Climate*. (World Resources Institute, 2002)

<sup>251</sup> *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 343 F.3d 140 (2d Cir. 2003)

*HMG, Department of Transportation Management & Others*, also recognized the right to a healthy environment from an interpretation of the *Vienna Convention for the Protection of the Ozone Layer* and the Rio Conference on Environment and Development.<sup>252</sup>

## Conclusion

The AU Agenda 2023 lists justice, rule of law and human rights as a necessary pre-condition for a peaceful and conflict free societies.<sup>253</sup> To protect environmental harm, states must promote the rule of law and counter non-state actors who commit environmental crime. Although there exists a litany of environmental treaties on certain specific issues, there lacks a specifically codified international treaty that deals with environmental issues, specifically, on environmental crimes.<sup>254</sup> There is also no specific court touching on environmental issues wholesomely. Climate change remains a source and result of armed conflict in Africa.<sup>255</sup> In the Lake Chad Basin, there are increased conflicts due to competing interest on the water resources.<sup>256</sup> The interaction of the effects of climate change and the and the socio-economic and political vulnerabilities increase the risk of conflicts.

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<sup>252</sup> KHADKA, ARJUN KUMAR. *Right to Water in Nepal: A Legal and Policy Perspective*. Diss. Faculty of Law, Tribhuvan University Kathmandu, Nepal, 2021.

<sup>253</sup> Börzel, Tanja A., and Thomas Risse. *Effective governance under anarchy: Institutions, legitimacy, and social trust in areas of limited statehood*. Cambridge University Press, 2021.

<sup>254</sup> Alexander, William L., et al. "Environmental justice ethnography in the classroom: Teaching activism, inspiring involvement." *Human Organization* 80.1 (2021): 37-48.

<sup>255</sup> Mobjörk, M., Krampe, F. and Tarif, K., 'Pathways of climate insecurity', SIPRI Policy Brief, Nov. 2020

<sup>256</sup> Douville, H. K. et al., 'Water cycle changes', eds V. Masson-Delmotte and P. Zhai, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2021)

## CHAPTER THREE

### LIABILITY FOR ENVIRONMENTAL CRIMES

#### Introduction

Environmental accountability is a tool for environmental protection that is used to avoid and compensate for environmental harm. It encourages individuals to take responsibility for their actions. This chapter discusses the concept of criminal liability at individual, collective and state levels. In this chapter, liability refers to the responsibility apportioned to a person for a wrongful action.<sup>257</sup> This chapter discusses the legal contrasting issues on criminal and civil liability and how they will be beneficial in environmental accountability.<sup>258</sup>

#### Criminal versus civil liability

In Civil claims, one to claim any redress or bring forth an action on environmental harm, they must have sufficient interest in the matter.<sup>259</sup> This can be either through proof of injury directly resultant from the environmental action complained of. Such injury may be in terms of aesthetic, conservation or recreational interests.<sup>260</sup> Transboundary environmental pollution generally complicates the adjudication of disputes, especially where an activity occurs in one jurisdiction, but the resultant injury is felt in another jurisdiction.<sup>261</sup> On Limitation of Actions, legal claims on environmental injustice tend to be initiated long after the injury has occurred.<sup>262</sup> This necessitates the need for statutes of limitations. Courts have adopted the “discovery” rules where the harm that has occurred to the environment, requires further scientific inquiry and

Under environmental law, the polluter pays principles provide that a person is required to pay for the harm.<sup>263</sup> To prevent harm, international environmental law has evolved such as to create

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<sup>257</sup> Nollkaemper, André, and Dov Jacobs. "Shared responsibility in international law: a conceptual framework." *Mich. J. Int'l L.* 34 (2012): 359.

<sup>258</sup> Cohen, Mark A. "Environmental crime and punishment: Legal/economic theory and empirical evidence on enforcement of federal environmental statutes." *J. Crim. L. & Criminology* 82 (1991): 1054.

<sup>259</sup> UNEP, Compendium of judicial decisions on matters related to environment: National decisions, Volume 1. (UNEP/UNDP/Dutch Joint Project on Environmental Law and Institutions in Africa, 1998)

<sup>260</sup> Environmental Law Institute, *Environmental Law Reporter: A Project of the Environmental Law Institute.* (The Institute, 1994).

<sup>261</sup> IUCN Environmental Law Centre, *International Union for Conservation of Nature and Natural Resources. Commission on Environmental Law, Draft International Covenant on Environment and Development.* (IUCN, 2000).

<sup>262</sup> Janet S. Kole, Stephen Spitz, Stephanie Nye, *Environmental litigation* (Section of Litigation, American Bar Association, 1999) 117

<sup>263</sup> Michael G. Faure, Willemien Du Plessis, *The Balancing of Interests in Environmental Law in Africa.* PULP, 2011, 28.

incentives.<sup>264</sup> However, the pollution that occurs on the environment may not be merely reversed through compensation.<sup>265</sup> The principle of polluter pays also remains abused by corporations who have the capacity to gain profits over the liability of pollution. Punitive measures generally are in form of fines or restoration and it never premises on an individual.<sup>266</sup>

In the *Chorzow Factory* case (1928) the PCIJ<sup>267</sup> the Court concluded that the key tenet under the concept of an illegal conduct – a principle that appears to be created by global practice, specifically determinations by arbitral tribunals – is that compensation must, to the greatest extent possible, erase all the unlawful conduct and to restitute.<sup>268</sup>

In contrast, criminal law apportions liability and proceeds to punish perpetrators.<sup>269</sup> The Rome Statute provides in Article 23 that a person is criminally liable if the crime committed is within jurisdiction. A person is only liable for crimes committed after the Statute's entry into force. The ICC is premised on individual criminal liability and only individuals will be held liable either than states and/or organizations. The Rome Statute employs an equal application over state and non-state actors as well as corporate heads. Criminal law seeks to punish an action or omission committed.<sup>270</sup> In such circumstances, the criminal activity lies in the perpetrator's failure to act.

## **Individual liability**

The term individual responsibility means the accountability of persons for conduct including genocide, war crimes and crimes against humanity. Anyone found responsible is liable for punishment.<sup>271</sup> The Statute punishes an individual, whether or not he was acting individually, jointly with another person or through a third party.<sup>272</sup>

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<sup>264</sup> David Kenneth Leary, Balakrishna Pisupati, *The Future of International Environmental Law*. United Nations University, 2010

<sup>265</sup> Michael Faure, Michael G. Faure, *Prevention and Compensation of Marine Pollution Damage: Recent Developments in Europe, China and the US*. Kluwer Law International B.V., 2006

<sup>266</sup> Dent Jr, George W. "Limited liability in environmental law." *Wake Forest L. Rev.* 26 (1991): 151.

<sup>267</sup> *Factory At Chorzów, Germany v Poland*, Judgment, Claim for Indemnity, Merits, Judgment No 13, (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928).

<sup>268</sup> Daniel L. M. Kennedy, James D, Southwick, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec*, Cambridge University Press, 2002. 658.

<sup>269</sup> Jonathan Herring, *Criminal Law: The Basics*. Routledge, 2009.

<sup>270</sup> Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Analysis*. Springer Science & Business Media, 2013.

<sup>271</sup> Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, UN Doc. A/1316 (1950)

<sup>272</sup> Danner, A. M., & Martinez, J. S. (2005). Guilty associations: Joint criminal enterprise, command responsibility, and the development of international criminal law. *Calif. L. Rev.*, 93, 75.

Article 25 of the Rome Statute details regulation of personal criminal accountability.<sup>273</sup> This Article considers all crimes under the Statute. It apportions liability where a person takes part in, abets, commences, solicits or facilitates such a crime.<sup>274</sup> Environmental crimes in the Statute have not been specifically provided in the Statute but form part of the definition in war crimes and crimes against humanity. Given, most environmental crimes in Africa are through direct individuals, joint armed groups or multinational corporations who aide and abet commission of crimes.<sup>275</sup> Whereas crimes committed within international norms are often undertaken with the collaboration of a larger group, nevertheless, recent developments w provides that a person may be held culpable for crimes that they are responsible for and can only be punished for them.<sup>276</sup>

A perpetrator is still responsible in principal even where the same is committed through others.<sup>277</sup> Hence, it is crucial to mention that perpetration-by-means necessitates tight control by individuals behind the direct offender. Such control is typically seen in the instance of a well-organized criminal hierarchy.<sup>278</sup>

Historically, leaders and organizers who participated in design and implementation or execution or conspired to perpetrate a wrong were held accountable for the actions of others.<sup>279</sup> Initial trials of perpetrators did not care about much distinction of persons and their degree of participation thus the use of the unified perpetrator model. On the contrary, Article 25 (3) now looks at action, directing, inciting and aiding and abetting as ways of involvement. This is also true for joint commissions.

The Gabcíkovo-Nagymaros Project,<sup>280</sup> points to where an aggrieved State has the right to seek remedies from a State that has undertaken an internationally unlawful conduct for the harm caused. The criterion within the Genocide Convention for preventing and sanctioning genocide perpetrated in Bosnia and Herzegovina, is whether there is an adequate direct and coherent

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<sup>273</sup> Gerhard Werle, Individual Criminal Responsibility in Article 25 ICC Statute (Journal of International Criminal Justice, 2007), 5, 953-975

<sup>274</sup> McGregor, M. A. (2009). Ending corporate impunity: how to really curb the pillaging of natural resources. *Case W. Res. J. Int'l L.*, 42, 469.

<sup>275</sup> Bekou, O., & Shah, S. (2006). Realising the potential of the international criminal court: the African experience. *Human Rights Law Review*, 6(3), 499-544.

<sup>276</sup> Danner, Allison Marston, and Jenny S. Martinez. "Guilty associations: Joint criminal enterprise, command responsibility, and the development of international criminal law." *Calif. L. Rev.* 93 (2005): 75.

<sup>277</sup> Clapham, Andrew, and Scott Jerbi. "Categories of corporate complicity in human rights abuses." *Hastings Int'l & Comp. L. Rev.* 24 (2000): 339.

<sup>278</sup> Jain, Neha. "The control theory of perpetration in international criminal law." *Chi. J. Int'l L.* 12 (2011): 159.

<sup>279</sup> Article 6, Nuremberg charter; Feinberg, Joel. "Collective responsibility." *The Journal of Philosophy* 65, no. 21 (1968): 674-688.

<sup>280</sup> Hungary/Slovakia I.C.J. Reports 1997, p. 81, para. 152.

causal link between the wrongful conduct, the breach of responsibility to prevent, and the loss sustained. However, the court stated that monetary compensation is not an adequate form of restitution for the failure of the commitment to avoid genocide, and held that a declaration for failure of the respondent to comply would amount in itself appropriate satisfaction.

### **Vicarious liability**

A person may be held responsible for the illegal activities of another. Because vicarious liability crimes are a type of no-fault liability, this transfer of criminal culpability happens whether or not any of the defendants was aware they were violating a law.

### ***Liability of Corporations***

Under the "responsible corporate official" doctrine, corporate officials are held responsible for their action or omission in criminal activity. If it found that there is a link between an official and the unlawful action,<sup>281</sup> they can be held accountable even though they are not directly involved in or aware of the criminal behavior. Without any personal complicity or awareness, guilt is assigned and jail term can be enforced."<sup>282</sup>

Courts of law, in criminal liability, have affixed liability on individuals in corporations and the positions they hold in the said companies.<sup>283</sup> This is so because, even though corporations are legal persons, they cannot be *persons* under criminal law. According to a 2002 UN report, a number of European multinationals corporations were accused of supporting the Liberian Conflict as they purchased diamonds and timber.<sup>284</sup>

Generally, the international legal system is state centered. Corporations lack legal status. The non-binding effect of international instruments. Therefore, the lack of mandatory rules and responsibilities, efficient monitoring or enforcement sanctions makes it difficult to hold corporates accountable. It is argued that there exists a gap in not prosecuting a corporate an entity because some of the crimes could not be committed by the said individuals in their own

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<sup>281</sup> Lang, Josephine Chinying. "Legislative, regulatory and juridical dilemmas in environmental auditing." *Eco-Management and Auditing: The Journal of Corporate Environmental Management* 6, no. 3 (1999): 101-114.

<sup>282</sup> Foerschler, Ann. "Corporate criminal intent: toward a better understanding of corporate misconduct." *Calif. L. Rev.* 78 (1990): 1287.

<sup>283</sup> Brickey, Kathleen F. "Criminal Liability of Corporate Officers for Strict Liability Offenses--Another View." *Vand. L. Rev.* 35 (1982): 1337.

<sup>284</sup> Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, U.N. Doc. S/2002/1146 (Oct. 16, 2002)

capacities.<sup>285</sup> The current customary international law is yet to impose any legal obligation upon corporates.<sup>286</sup> Corporates can escape liability for lack of an effective international enforcement mechanisms against corporations.<sup>287</sup>

In Africa, mining is debatably good for development. This has however been a source of conflicts in many parts of Africa. Oil mining along the Niger Delta has negatively impacted the mangrove ecosystem and contributed to pollution. The Hague Court of Appeal held that Shell's Nigeria and its subsidiary were liable for oil spillage as they breached their obligation of due diligence.<sup>288</sup> Similarly, in Brazil, mining companies have been faulted for the impacts arising from tailings storage facilities. The biggest ore mine is owned by a UK multinational. While it brings local revenue, taxes and royalties, tailings have caused water shortage and destroyed natural habitats.<sup>289</sup> The Brazilian Public Prosecution Service files asuit against the multinationals for different social, economic and environmental compensation.<sup>290</sup>

### ***State Responsibility***

States may be liable through actions of the leadership and institutions for brutal violations under international law.<sup>291</sup> States are responsible for unlawful use of force. It may be argued that the Convention was primarily concerned with the criminal prosecution and sanction of people, rather than with the duty of States.<sup>292</sup> The Convention's focus on the duties and individual responsibilities precludes any prospect of States being held accountable and responsible in the case of a violation of the obligations represented.<sup>293</sup>

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<sup>285</sup> Clapham, A. (2008). Extending international criminal law beyond the individual to corporations and armed opposition groups. *Journal of International Criminal Justice*, 6(5), 899-926.

<sup>286</sup> Wood, M., & Stthoeger, E. (2022). *The UN Security Council and International Law*. Cambridge University Press.

<sup>287</sup> Bueno, Nicolas, and Claire Bright. "Implementing human rights due diligence through corporate civil liability." *International & Comparative Law Quarterly* 69.4 (2020): 789-818.

<sup>288</sup> <https://www.business-humanrights.org/en/latest-news/nigeria-in-landmark-verdict-dutch-court-rules-shell-nigeria-responsible-for-niger-delta-oil-spills-royal-dutch-shell-violated-its-duty-of-care/> (accessed on 10/11/22)

<sup>289</sup> <https://www.pwyp.org/pwyp-news/brazilians-suffering-in-the-shadow-of-mining-denied-benefits-from-company-payments-new-study-shows/>

<sup>290</sup> <https://esajournals.onlinelibrary.wiley.com/doi/10.1002/eap.1461> (accessed on 10/11/22)

<sup>291</sup> Ramesh Thakur, Petrus Adrianus Maria Malconten, *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*. United Nations University Press, 2004

<sup>292</sup> Martin Dixon, Robert McCorquodale, Sarah Williams, *Cases & Materials on International Law*, Oxford University Press, 2016, 539.

<sup>293</sup> E. van Sliedregt, *Individual Criminal Responsibility in International Law*, OUP Oxford, 2012, 6.

Article 58 of the Articles on the Responsibility of States for Internationally Wrongful Acts,<sup>294</sup> affirms uniformity in application of the law to all individuals.<sup>295</sup> ILC highlighted the that the Articles did not tackle the issue of any person operating on behalf of a State's individual duty under international law.<sup>296</sup>

States have a commitment to prevent violation and commission of crimes.<sup>297</sup> A state will therefore be responsible where such action and omission is evidenced. The Court in the *Genocide Case* affirmed that the member parties are obliged by the Convention's responsibility not to commit genocide or other crimes specified in Article III via instruments or people or organizations whose behaviour is traceable to them.<sup>298</sup> Thus, whenever a State institution or a person or organization whose conduct are legally traceable to the State, performs any acts prohibited by Article III of the Convention, the State bears the international responsibility.<sup>299</sup> In comparison, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs.<sup>300</sup>

States, on the other hand, cannot be held liable for extraterritorial factors<sup>301</sup> based on sovereignty which prohibits state interference with the rights of another.<sup>302</sup> In respect to environmental crimes, the state have a prime obligation of protecting and promoting human rights. Responsibility arises from breach or non-compliance- with treaty provisions. Stats have also the responsibility to control and regulate private operators. States are also expected to take necessary steps using domestic laws to punish for environmental crimes.

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<sup>294</sup> (Annex to General Assembly resolution 56/83, 12 December 2001).

<sup>295</sup> Béatrice I. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes*. BRILL, 2009, 230.

<sup>296</sup> United Nations, Yearbook of the International Law Commission 2002, Volume 2, Part 2, United Nations Publications, 2009, 51.

<sup>297</sup> Rosenberg, Sheri P. "Responsibility to protect: A framework for prevention." *Global Resp. Protect* 1 (2009): 442.

<sup>298</sup> Morten Bergsmo, Emiliano J. Buis, *Philosophical Foundations of International Criminal Law: Foundational Concepts*. Torkel Opsahl Academic EPublisher, 2019.

<sup>299</sup> Bert Swart, A. H. J. Swart, Alexander Zahar, Göran Sluiter, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*. OUP Oxford, 2011, 251.

<sup>300</sup> Elizabeth Wilmsurst, *International Law and the Classification of Conflicts*. OUP Oxford, 2012, 61.

<sup>301</sup> Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, OUP Oxford, 2010



## Command Responsibility

Criminal responsibility may be apportioned on command leaders who fail to prevent commission of international crimes or who fail to punish perpetrators under them.<sup>303</sup> This doctrine forms part of customary international law. As was held by ICTY in *Celibic case*,<sup>304</sup> command responsibility does not involve strict liability. A person is held responsible when they are in effective control, they had knowledge of their actions<sup>305</sup> and that they wilfully failed to take any reasonable and necessary<sup>306</sup> steps.<sup>307</sup> In the *Dominic Ongwen case*,<sup>308</sup> the ICC convicted the accused for 61 counts as he was the Commander of Lord's Resistance Army (LRA) under Article 28

## Standard of Proof

It should be noted that crimes against humanity was a codification of customary international law committed during war or peace. It is therefore conceivable for the Office of the Prosecutor to prosecute any such environmental crimes perpetrated during peacetime.

Under criminal law, *actus rea* and *mens rea* must be proved. However, when proving intent to break laws or obtaining proof of guilt beyond reasonable doubt is problematic, strict criminal liability may be used. In strict liability, it is not necessary to prove the mental intent. If reliance is to be placed on *mens rea*, the objective of prosecuting environmental crimes will be defeated..

The Office of the Prosecutor must discharge the burden of proof established in law.<sup>309</sup> Traditionally, criminal requirement is the *actus reus* and *mens rea*. In prosecuting environmental crimes under the ambit of international Criminal Law, crimes against humanity or as a war crime, the mental requirement is intent with knowledge. The *actus reus* is the systemic course of events. The Rome Statute in Article 30 dictates the standard of proof as *mens rea*, that is to mean, the person meant to engage and intends to cause the consequence or is aware that it will occur in the ordinary course of events.

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<sup>303</sup> Cassese, Antonio, and Gaeta, Paola. *Cassese's International Criminal Law*. Revised by Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell, and Alex Whiting. 3rd ed. Oxford: Oxford University Press, 2013

<sup>304</sup> *Celibic's Case*, Case No. IT-96-21-A, 20 February 2001

<sup>305</sup> *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, 3 July 2002

<sup>306</sup> *Prosecutor v. Tihomir Blas'kic'*, 2000, Case No. IT-95-14, at 333.

<sup>307</sup> Cryer, Robert, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshurst. *An Introduction to International Criminal Law and Procedure*. 2d ed. Cambridge, UK: Cambridge University Press, 2010.

<sup>308</sup> *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15.

<sup>309</sup> case of Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*).

Culpability for omissions appears to be more difficult when the *actus reus* is simply a byproduct of the accused's action.<sup>310</sup> The Yugoslavia and the Rwanda Tribunals have repeatedly declared that even in these instances, culpability might come from omission.<sup>311</sup>

As breach of treaty obligations, it has been argued that environmental offences ought to be proved not as of criminal law as such, but on a balance of probabilities. However, looking at severity of the offences, environmental crimes ought to be proved beyond reasonable doubt, just like in criminal cases.

A look at environmental harm is that, unlike ordinary crimes that are unacceptable, the question is on degree rather than kind.<sup>312</sup> In such instances, liability is apportioned to a person for failure to exercise due diligence. It however remains a debate as to whether there is need to regulate strict liability or to have this principle excluded entirely.<sup>313</sup> It is believed that Strict liability encourages and stimulates compliance with law. In such cases, parties may submit materials ranging from documentary evidence to video and expert evidence to prove any environmental crime. The court then makes determination on the admissibility of evidence. This becomes a challenge where there is no scientific certainty due to the inadequacy of conclusive evidence to show a direct cause and effect relationship between the environmental action in issue vis-à-vis the harm occasioned. Therefore, it is critical that the law should not be applied arbitrarily without considering the nature of the harm that may result from certain environmental activities, which can only be proven by appropriate evidence.<sup>314</sup>

Some authors argue that where strict proof is not applicable, negligence can be used instead. Negligence will seek to prove if the perpetrator conducted due diligence or taken such reasonable steps to avoid occasioning harm. It is paramount that for environmental crimes, the intent be changed, so as it encompasses situations where the extent of damage went beyond the intent and caused severe and lasting harms on the environment.

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<sup>310</sup> Robinson, Paul H. "Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?." In *The Structure and Limits of Criminal Law*, pp. 3-28. Routledge, 2017.

<sup>311</sup>Eva Rieter, Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication, Intersentia, 2010

<sup>312</sup> Richard Lazarus 'Assimilating environmental protection into legal rules and the problem with environmental crime' (1994) 27 *Loyola LA LR* 867 at 882

<sup>313</sup>Gage & Tucker, *Environmental due diligence handbook*. Government Institutes, 1991

<sup>314</sup> United States. Congress. Senate. Committee on Environment and Public Works. Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety, *Clean Air Act: Ozone and Particulate Matter Standards: Hearings Before the Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety and the Committee on Environment and Public Works, United States Senate, One Hundred Fifth Congress, First Session, Part 2*. (U.S. Government Printing Office, 1997).

## Immunity against environmental crimes

Responsibility under criminal law ignores the laws on immunity of state officials.<sup>315</sup> The commission of a crime in violation of international law does not absolve anyone of guilt while acting as the Head of State or accountable Government official.<sup>316</sup> Similarly, where a person acted in accordance with the orders of his administration or a superior does not absolve him of guilt within international law, if an ethical choice was available to him. States have been accused of promoting immunity against corporations by legally limiting destruction to the environment through offsetting measures.<sup>317</sup>

## Enforcement of warrants

States retain the obligation for enforcing warrants of arrest in all situations. The ICC was established on two pillars.<sup>318</sup> The Court itself is the judicial pillar. States are responsible for the operation of the ICC which includes the implementation of Court rulings.<sup>319</sup> The failure of the ICC to have mechanisms as well as being the challenges of largely uncooperative international community remain pertinent issues in enforcement.<sup>320</sup>

Through the UN mechanisms such as commission, prosecution and punishment of environmental crimes may proceed as the UN has means through which it can facilitate.<sup>321</sup> This may be through the Security Council's authority or the courts established thereon. The UNEP Guidelines serve as a valuable example for the worldwide activities required to increase compliance and implementation. They now require a thorough assessment and should be added to the Governing Council's regular agenda.<sup>322</sup>

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<sup>315</sup> Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*. Martinus Nijhoff Publishers, 2014.

<sup>316</sup> Sadat, Leila Nadya. "Heads of state and other government officials before the International Criminal Court: the uneasy revolution continues." *The Elgar Companion to the International Criminal Court*. Edward Elgar Publishing, 2020. 96-127.

<sup>317</sup> <https://www.wrm.org.uy/bulletin-articles/the-green-economy-giving-immunity-to-criminals> (accessed on 9/11/22)

<sup>318</sup> Rastan, Rod. "Testing co-operation: the international criminal court and national authorities." *Leiden Journal of International Law* 21, no. 2 (2008): 431-456.

<sup>319</sup> Abtahi, Hirad, and Steven Arrigg Koh. "The emerging enforcement practice of the International Criminal Court." *Cornell Int'l LJ* 45 (2013): 1.

<sup>320</sup> Danner, Allison Marston. "Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court." *American Journal of International Law* 97, no. 3 (2003): 510-552.

<sup>321</sup> C. Nellesmann, *The Rise of Environmental Crime: A Growing Threat to Natural Resources, Peace, Development and Security*, United Nations Environment Programme, 2016.

<sup>322</sup> W. Bradnee Chambers, Jessica F. Green, *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms*. United Nations University Press, 2005, 87.

## Conclusion

A responsibility to act arises from the international legal obligation to defend specific interests, such as things or individuals in custody.<sup>323</sup> When all these interests are threatened, the required person must step in. Failure to act in certain instances violates a legal obligation to intervene, resulting in responsibility for omission. Criminal liability against environmental crimes help to properly hold people accountable.<sup>324</sup> The server punishment will in turn deter perpetrators of environmental crimes from destruction of the environment.<sup>325</sup>

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<sup>323</sup> Dan Kuwali, *The Responsibility to Protect: Implementation of Article 4(h) Intervention* Martinus Nijhoff Publishers, 2011, 417

<sup>324</sup> Mwanza, Rosemary. "Enhancing accountability for environmental damage under international law: Ecocide as a legal fulfilment of ecological integrity." *Melbourne Journal of International Law* 19.2 (2018): 586-613.

<sup>325</sup> Al-Dlabeeh, Abedalrzag, et al. "The Role of International Criminal Law in Violations of the Environment During Armed Conflict." *Journal of Environmental Management & Tourism* 13.3 (2022): 643-648.

## CHAPTER FOUR

### PROSECUTION OF CRIMES BY ICC

#### Introduction

This chapter analyzes international criminal law and its application on environmental crimes by examining whether environmental crimes can be prosecuted in the ICC. It begins by examining the mandate and jurisdiction of ICC. It then examines whether the ICC has jurisdiction over environmental crimes. It further discusses the crime of ecocide as a proposed fifth crime to the Rome Statute. This chapter considers the opportunities, challenges and alternatives of prosecuting environmental crimes before the ICC.

#### Mandate of the ICC

Under international criminal law, a person may be brought before an international or regional tribunal with powers to hear and punish them for serious crimes.<sup>326</sup> The mandate of the court is to end impunity for serious crimes.<sup>327</sup> It stands for international community's commitment that 'most serious crimes of concern of crimes to the international community as a whole must not go unpunished and their effective prosecution must be ensured'.<sup>328</sup> The ICC is the first independent permanent court that tries persons accused of genocide, crimes against humanity and war crimes. In the preamble of the *Codes and Crimes Against the Peace and Security of Making*, ICC's core focus is to promote justice and prevent commission of crime.<sup>329</sup>

The ICC is established as under Article 1 with powers to adjudicate over crimes of international concern, indicated in the Rome Statute. It has complementary jurisdiction to domestic courts.<sup>330</sup> This may be contrasted with other tribunals that were established by specific Statutes for specific circumstances such as the ICTY and ICTR.<sup>331</sup>

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<sup>326</sup> Herbert R. Reginbogn, Christoph Safferling, *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference*. (Walter de Gruyter, 2011).

<sup>327</sup> S. Freeland, Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court (2015),

<sup>328</sup> Preamble of the Rome Statute

<sup>329</sup> Jeßberger, Florian, and Julia Geneuss. "Peace and Punishment: Reflections from the Perspective of International Criminal Law." *The Quest for Core Values in the Application of Legal Norms*. Springer, Cham, 2021. 289-304.

<sup>330</sup> William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*. Oxford University Press, 2010, 58.

<sup>331</sup> Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History*, Transnational Publishers, 1998.

According to the Statute, the Court has international legal personality. It also has such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes. Such functions and powers may be exercised on any matters within the territories of member states and non-members through a special agreement.<sup>332</sup> Matters may be referred to ICC by states, through the UNSC or upon investigations of the prosecutor<sup>333</sup>

## Jurisdiction of the ICC

The ICC's jurisdiction and functioning provided under the Rome Statute. The Court's jurisdiction is operationalized through ratification by member states of the United Nations.<sup>334</sup> The court lacks a universal jurisdiction and it is subject to a state's consent.<sup>335</sup> A state may agree to *ad hoc* jurisdiction over crimes on its territory. Taiwan has made an application under Article 12(3) but this may not be applicable as it Lam argues that Taiwan is not recognized entity.<sup>336</sup> The ICC can also only determine over crimes committed after 2002 when it was established. The numerous crimes in Democratic Republic of Congo since 1993 cannot thus be taken to the ICC.<sup>337</sup> The ICC Prosecutor rejected claims brought by Ecuador for toxic wastes dumped in 1960s.<sup>338</sup>

Primarily, the court has jurisdiction over genocide, crimes against humanity, war crimes and the war of aggression.<sup>339</sup> Such jurisdiction is limited and recognizes the offences as being the most serious. After the Second World War, the International Military Tribunal at Nuremberg was formed and it became the pioneer court to prosecute against crimes against humanity.<sup>340</sup>

The subjects under the jurisdiction of the ICC are individuals.<sup>341</sup> It ensures that the most responsible individuals are punished for their actions and/or omissions. Even though ICC's

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<sup>332</sup> Schuster, Matthias. "The Rome Statute and the crime of aggression: A Gordian knot in search of a sword." In *Criminal Law Forum*, vol. 14, no. 1, p. 1. Springer Science & Business Media, 2003.

<sup>333</sup> Khan, Asif, Shaukat Hussain Bhatti, and Muhammad Abid Hussain Shah Jillani. "An overview on individual criminal liability for crime of aggression." *Liberal Arts & Social Sciences International Journal (LASSIJ)* (2021).

<sup>334</sup> M. Cherif Bassiouni, William A. Schabas, *The Legislative History of the International Criminal Court*. BRILL, 2016, 28.

<sup>335</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (2013),

<sup>336</sup> Lam, Sze Hong. "Should the ICC Accept Taiwan's Delegation of Ad Hoc Criminal Jurisdiction? A Debate on Taiwan's Functional Statehood in the Context of Article 12 (3) of the Rome Statute." *A Debate on Taiwan's Functional Statehood in the Context of Article 12.3* (2022).

<sup>337</sup> Mupendana, Pierre Claver. "NECESSITY AND DIFFICULTIES TO ESTABLISH A REPRESSIVE SYSTEM FOR INTERNATIONAL CRIMES COMMITTED IN THE DRC." *Actual Problems of International Relations* 1.150 (2022): 31-46.

<sup>338</sup> Request to the Office of the Prosecutor of the ICC from the Legal Representatives of the Victims, 'Communication: Situation in Ecuador', 23 October 2014

<sup>339</sup> Ogunnoiki, Adeleke Olumide. "International Criminal Court (ICC) Prosecution of Africans for War Crimes and Crimes against Humanity: A Witch-Hunt." *African Journal of Law, Political Research and Administration* (2019): 1-15.

<sup>340</sup> A. Cassese et al., *Cassese's International Criminal Law* (201:3)

<sup>341</sup> R. McLaughlin, 'Improving Compliance: Making Non-State International Actors Responsible for Environmental Crimes', (2000) 11 *Colorado Journal of International Environmental Law and Policy* 377

jurisdiction excludes corporates or non-state actors,<sup>342</sup> it can prosecute individuals from corporates as was the case in *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* where Sang was a radio Presenter at Kass FM.<sup>343</sup> The ICC can exercise its jurisdiction over individual actors who are nationals of its member states.<sup>344</sup>

The ICC cannot also institute cases against states and corporations. International Criminal Law is designed to hold individuals accountable.<sup>345</sup> The Specialized courts have determined cases touching persons working as corporations. The *Prosecutor v Nahimana, Barayagwiza and Ngeze* the first two accused were convicted as members of steering committee of a radio station, on behalf of RTLM the natural person, that incited people for genocide.<sup>346</sup> In the case of Charles Taylor, the Specialized Court of Sierra Leone also considered the trafficking of diamonds as business director.

The ICC is prompted in order to prosecute a matter through referral by a state. The situations in DRC, CAR, Uganda and Mali are examples of cases referred by states. The UN Security Council has power under Article VII to refer a situation. The Prosecutor has discretionary powers to institute proceedings, although this is subject to judicial approval. The case of Kenya was referred to the Court when the Office of the Prosecutor exercised its *proprio motu* powers and initiated investigations.

The ICC does not have primary jurisdiction over cases and it can only admit cases where a given state is unable to prosecute.<sup>347</sup> The ICC can only admit a matter based on the gravity of the offence and instances where a state is unwilling and unable to prosecute.<sup>348</sup> The ICC will also not prosecute a matter if the same was tried in the domestic court.

### ***Jurisdiction over environmental crimes***

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<sup>342</sup> D. Scheffer, 'Corporate Liability under the Rome Statute', (2016) 57 Harvard International Law Journal 35, at 36

<sup>343</sup> Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/II-373.

<sup>344</sup> Citeroni, Nicole. "International economic crimes in the Rome Statute? Reflections on multilevel enforcement of international criminal law." *Studies on Enforcement in Multilevel Regulatory Systems*. Nomos Verlagsgesellschaft mbH & Co. KG, 2022.

<sup>345</sup> Bonnitcha, Jonathan, and Robert McCorquodale. "The concept of 'due diligence' in the UN guiding principles on business and human rights." *European Journal of International Law* 28.3 (2017): 899-919.

<sup>346</sup> Media Case, ICTR-99-52)

<sup>347</sup> Principle of Complementarity.

<sup>348</sup> S. SaCouto and K.A. Cleary, 'The Gravity Threshold of the International Criminal Court', (2008) 23 American University International Law Review 807, at 8i i.

The Rome Statute does not expressly make a provision of the crime against the environment. A reading of Article 8 on war crimes provides that a person will have committed a war crime where such person knowingly launches an attack causing 'widespread, long-term and severe damage' to the natural environment. Although relevant, it is limiting as far as temporal jurisdiction is concerned.<sup>349</sup> To overcome the limitation of acceptance of jurisdiction of prosecuting environmental crimes, there is room in interpreting Article 7 on crimes against humanity so as to include environmental harm as a crime against humanity.<sup>350</sup>

Another issue for determination is whether ICC can prosecute peace-time environmental destruction committed by non-state actors.<sup>351</sup> Environmental harm occurs outside wartime. Definition under war crimes is restrictive on temporal aspects. Prosecuting an environmental crime as a crime against humanity will be applicable even after war as the damage is always widespread and long-term.<sup>352</sup>

On crimes against humanity, extermination and forceful deportation or forcible transfer of population<sup>353</sup> are two main acts that are relevant for the prosecution of environmental crimes as was in *Ntaganda case*.<sup>354</sup> It was proposed in the Draft Code of Offences Against the Peace and Security of Mankind,<sup>355</sup> that deportation and forcible transfer included 'serious and intentional harm to the human environment, cultural property and human assets such as the environment. Proving systematic actions and great suffering may be a hurdle.<sup>356</sup>

The 2016 Office of The Prosecutor of the International Criminal Court Policy paper prioritizing Cases for Prosecution that Involve Damage to the Environment refocused the crimes against the environment in light of the damage on the social, economic and environmental harm inflicted on the local community. It sought to prosecute illegal exploitation of natural resources, arm trafficking, human trafficking, terrorism, financial crimes, land grabbing or destruction of

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<sup>349</sup> Ryan Gilma, *Expanding Environmental Justice after war: The Need for Universal Jurisdiction over war Crimes*, 22 COLO. J. INT'L ENVTL. L. & POL'Y 447, 451-458.

<sup>350</sup> Crook, Martin, Damien Short, and Nigel South. "Ecocide, genocide, capitalism and colonialism: Consequences for indigenous peoples and global ecosystems environments." *Theoretical Criminology* 22.3 (2018): 298-317.

<sup>351</sup> Naqvi, Yasmin, and Olufemi Elias. "Chemical Weapons and Non-State Actors." *International Humanitarian Law and Non-State Actors*. TMC Asser Press, The Hague, 2020. 115-148.

<sup>352</sup> Edwards, Holli. "International law and terrorism: the case of ISIS." *Handbook of Terrorism and Counter Terrorism Post 9/11*. Edward Elgar Publishing, 2019.).

<sup>353</sup> Sergio Pecanha and Jeremy White, *Satellite Images Show more Than 200 Rohingya Villages Burned in Myanmar*, NY Times (Sept. 18, 2017); Rome Statute Article 7 (2) (b) and (d).

<sup>354</sup> The Prosecutor v Bosco Ntaganda ICC-01/04-02/06

<sup>355</sup> U.N. Doc. A/cn.4/389 (1986)

<sup>356</sup> Mathew Lippman, *International law and Human Rights Edition: Crimes Against Humanity*, 17 B.C> THIRD WORLD L.J. 171.



the environment.<sup>357</sup> Cases are to be selected based on the gravity of harm., degree of responsibility and potential charges. This being a policy paper, is nonetheless subject to ICC's current jurisdiction.

Criminal law is intended to mete punishment for crime committed whether knowingly or otherwise. It is intended to deter occurrence of such actions either through imprisonment or payment of fines.<sup>358</sup> Primarily, there is need to ascertain the gravity of the offence.<sup>359</sup> Where the crime is very severe, including the extent of environmental harm, these shall be considered when imposing the relevant sanctions.<sup>360</sup> In some instances, there could be a consideration on the ability of payment so as to ensure that the penalty is proportionate to redressing the harm occasioned.<sup>361</sup>

In respect to environmental crimes, it may be argued that both punishment and compensation may not reinstate the environment to the position it was in, but through prosecution and eventually punishment will deter commission of serious environmental crimes. The impacts of environmental crimes are grave to the wellbeing of the ecosystem. Prosecution may be justified on the grounds that it is more effective than just compensation.<sup>362</sup>

Also, the penalty should not be too high so as to promote legal compliance and to redress the environmental harm adequately.<sup>363</sup> No offender should profit from its misdeeds. Where there are sanctions, they ought to be proportional to the value of the environmental harm caused and the overall effects of such harm to the society and economy. Additionally, offenders should be made to pay restorative costs like cleaning up, as a mandatory sanction. Various multinational agreements including *UNCLOS* promote the need for proportional penalties to act as deterrence.<sup>364</sup> The member states have an obligation of ensuring compliance through

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<sup>357</sup> Alessandra Mistura, *Is There Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor policy Paper on Case Selection and Prioritization on the Current legal Framework*, 43 colum. J. Env'tl. L. 181, 220 (2018)

<sup>358</sup> Wasserstrom, Richard A. "Strict liability in the criminal law." *Stan. L. Rev.* 12 (1959): 731.

<sup>359</sup> White, Rob. "Prosecution and sentencing in relation to environmental crime: Recent socio-legal developments." *Crime, law and social change* 53, no. 4 (2010): 365-381.

<sup>360</sup> *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001),

<sup>361</sup> Daniel Druckman, oran R. Young, Paul Stern, *Global Environmental Change: Understanding the Human Dimensions*. National Academies Press, 1991.

<sup>362</sup> Eva Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication*. (Intersentia, 2010)

<sup>363</sup> Dinah Shelton, Alexandre Charles kiss & Christopher G. Weeramantry, *Judicial Handbook on Environmental Law*. UNEP/Earthprint, 2005

<sup>364</sup> Mitchell, Ronald B. "Regime design matters: intentional oil pollution and treaty compliance." *International organization* 48, no. 3 (1994): 425-458.

implementation of preventive measures and equally, sanctioning offenders.<sup>365</sup> Others like the *Bamako Convention* provide for higher penalties as punishment and deterrence against illegal trafficking.<sup>366</sup> Member states must also primarily investigate any alleged environmental harm.<sup>367</sup>

### **Environmental Crimes under other international courts and tribunals**

The ICJ is established by the UN Charter to hear disputes involving states. This court does not hear individuals. Both states must submit to its jurisdiction. The downside is that the polluting state may decline to. It not being a criminal court, it cannot issue sentences. Only opinions are binding on states. The ICJ provides a cure to apportion civil liability to corporations who cannot be presented before the International Criminal Court. In the case of *The Gambia v Myanmar*, the Gambia filed against the genocide perpetrated systematically by Myanmar military forces. The court established that The Gambia had no real rights but a mere organization that lacks standing at ICJ.

The African Commission on Human and People's Rights passed a resolution calling on Sudan (Darfur), Malawi, Eritrea, Chad, Republic of Guinea, Mauritania and Democratic Republic of Congo to respect the provisions of the African Charter on Human and People's Rights and provisions of International Humanitarian Law. Only 11 Africans are yet to domesticate the Geneva Conventions.<sup>368</sup> The Commission is established under the African Charter to protect and promote human rights. Complaints may be made to the Commission through complaints, the DRC filed a claim in 2003.<sup>369</sup> The Commission may make Provisional measure against states with complaints before it to prevent irreparable harm against individuals.<sup>370</sup> Where a request is not complied with, it may refer to the African Court for determination.<sup>371</sup> The commission may also exercise the provision of Article 58(1) of the Charter and conduct in-

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<sup>365</sup> Lin Sun & Lal Kurukulasuriya, *UNEP's New Way Forward: Environmental Law and Sustainable Development*. UNEP/Earthprint, 1995

<sup>366</sup> Neil Boister, *An Introduction to Transnational Criminal Law*, Oxford University Press, 2018, 209.

<sup>367</sup> UNEP, *Environment and Trade: A Handbook*. UNEP/Earthprint, 2000; 1994 *Lusaka Agreement on Cooperative Enforcement Operations directed at Illegal Trade in Wild Fauna and Flora*.

<sup>368</sup> Kenya: The Geneva Conventions Act 1968;

<sup>369</sup> ACHPR, Communication 2227/99 democratic Republic of Congo v Burundi Rwanda and Uganda (2003). Communication may be made by an individual as was in the case against Chad in communication 74/92.

<sup>370</sup> ACHPR, Communications 137/94-139/94-154/96-161/97 International Pen, Constitutional Rights Project, Civil Liberties Organization and Interights (on behalf of Ken Saro-Wiwa Jr.) v Nigeria, (October 1998).

<sup>371</sup><sup>371</sup> AfCHPR, Application No. 002/2013 – African Commission on Human and Peoples' Rights v. Libya, Order of Provisional Measures, (March 2013)

depth analysis and submit to the Head of Assembly of Heads of States and Governments.<sup>372</sup> The decisions of the Commission are not legally binding and may not effectively address prosecution of environmental crimes.

The African Court on Human and People's Right is established by the Protocol to the African Charter. The Court and the Commission enjoy a complementarity relationship. There are no rules guiding the Commission on referral of cases to the Court. The Court is also criticized for lacking specialized prosecutors as was in the Libyan case.<sup>373</sup>

The African Union's Malabo Protocol,<sup>374</sup> establishes a future African Criminal Court. Other than the four international crimes in the Rome Statute, the Protocol has included additional 10 crimes.<sup>375</sup> These crimes are deemed as partly international or partly transnational. as a regional court, it implies that there is greater clarity or action. The formation of the court has been critiqued as a backlash to ICC's focus on Global South in exclusion of Global North.<sup>376</sup>

Ntozintle<sup>377</sup> proposes establishment of African Climate Change Environment Court under the UNFCCC framework and Kyoto Protocol. Peggy Kalas<sup>378</sup> argues that there being international environmental instruments that seek to provide global solutions, there is need to have a judicial means of enforcing the law so as to accommodate all participants other than states. This will ensure centrality, address forum shopping, promote transparency of proceedings and consistency and facilitate enforcement.

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<sup>372</sup> 5 ACHPR, 25/89 – 47/90 – 56/91-100/93: Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Temoins de Jehova v DRC, paras. 5 & 15, 18th Ordinary Session, October 1995)

<sup>373</sup> AfCHPR, Application No. 004/2011 – African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, Order, March 2013.

<sup>374</sup> African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted at the Twenty-Third Ordinary Session of the Assembly of Heads of State and Government Held in Malabo, Equatorial Guinea, 27 June 2014)

<sup>375</sup> 1) genocide, 2) crimes against humanity, 3) war crimes, 4) the crime of unconstitutional change of government, 5) piracy, 6) terrorism, 7) mercenarism, 8) corruption, 9) money laundering, 10) trafficking in persons, 11) trafficking in drugs, 12) trafficking in hazardous wastes, 13) illicit exploitation of natural resources and 14) the crime of aggression.

<sup>376</sup> Charles Chernor Jalloh, 'The Nature of the Crimes in the African Criminal Court' (2017) 15 J Int'l Crim Just 799

<sup>377</sup> Jobodwana Z. Ntozintle, 'Africa, Global Warming and Climate Change Environmental Court' (2011) 8 US-China Law Review 217

<sup>378</sup> Peggy R. Kalas. International Environmental Dispute Resolution and the Need for Access by Non-State Entities, 12 COLO. J. INT'L ENV'TL. L. & POL'Y 191, 229-30 (2001).

According to Hinde,<sup>379</sup> there was a proposal in 1989 to establish an International Environmental Court under the Draft Treaty for Establishment of an International Court. For Environment, to resolve disputes through arbitration, mediation and judicial decisions. This would promote coherent environmental law through judicial decisions and elevate importance of environmental matters.<sup>380</sup> Although a specialized court would have a central place to address several environmental issues in different treaties, it is worth noting that states may be undesirable because of the confrontational nature of court decisions. This Convention remedies gaps in international law and will promote environmental protection from

Human Rights Tribunals could potentially hear cases involving environmental crimes.<sup>381</sup> This is because they have focused on human rights. Tribunals also have a limited scope and they have specialized treaties and obligations<sup>382</sup> such as the Special courts of ICTY and ICTR.<sup>383</sup>

### **The crime of ecocide**

A proposal to the UN Law Commission in 2010 by Polly Higgins sought to amend the Rome Statute so as to introduce a fifth offence called ecocide for determination by the ICC. The crime of ecocide was first coined during the 1972 Stockholm conference, where state parties condemned the Vietnam War. The conference however focused on many other things and environmental crimes occurring in armed conflicts did not feature glaringly. The conference formed principles governing international environmental law. Principle 6 stated that the discharge of quantities in such big quantities or concentrations as to exceed the capacity of the environment to render it harmless ought to be stopped to ensure that serious damage is not inflicted on the ecosystem.<sup>384</sup>

In 1973, professor Falk published a proposed International convention on the Crime of Ecocide. It required the criminal intent "to disrupt or destroy, whole or in part, a human ecosystem". This proposed Convention listed a number of actions that would amount to ecocide. While

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<sup>379</sup> Susan M. Hinde, Note, The International Environmental Court: Its Broad Jurisdiction as a Possible Fatal Law, 32 HOFSTRA L. REV. 727, 731-32 (2003).

<sup>380</sup> Paul Stein, Down under Perspective of the Environmental Court Project, SUPREME COURT OF NEW SOUTH WALES,

<sup>381</sup> Cavallaro, James L., and Stephanie Erin Brewer. "Reevaluating regional human rights litigation in the twenty-first century: the case of the Inter-American Court." *American Journal of International Law* 102.4 (2008): 768-827.

<sup>382</sup> ICTY, ICTR

<sup>383</sup> Mackenzie, Ruth, and Philippe Sands. "International courts and tribunals and the independence of the international judge." *Harv. Int'l LJ* 44 (2003): 271.

<sup>384</sup> Richard, A. Falk, *Environmental Warfare and Ecocide: Facts, Appraisal and Proposals*, 9 Belgian Rev. Intl.L. 1, 1 (1973).

considering Falk's article, the UN Sub-Commission discussed proposals to include ecocide and cultural genocide into the Genocide Convention of 1948

Since 1984, the draft proposals excluded Article 26 which made a proposal for punishment of environmental crimes. States argued about the required intent, which at the time was willful intent. It was improved in 1991 to be willful and severe. It was not voted by states in 1996 because states did not want to be liable even during peace time. Under Article 8(b)(iv) on War Crimes, a perpetrator may thus be held liable for war crimes. This provision is however limited to only war crimes. Environmental crimes outside war cannot be considered by ICC as such. It should be noted that the standards to prove war crimes is very high and all three elements must be proved.<sup>385</sup>

Ecocide targets ascertainable actions by humans as harms caused by hurricanes and volcanic eruptions may not always be attributable to individual actions. The threshold of ecocide crimes is *widespread* meaning that it encompasses an area on the scale of several hundred kilometers, lasts for a period of months and involves significant disruption and harm to human wellbeing, natural and economic resources or other assets.<sup>386</sup> Even with an international criminal court, it is lacking in international law for

Universal Jurisdiction connotes that state parties ratifying ecocide will have to pursue prosecutions in their own legal systems. It is feared that including ecocide could trivialize serious crimes such as genocide. These words should however have their own definition and should not be intended to replace the other. According to the 2021 Expert Panel's Proposed Ecocide Amendment, newly determined intent by for ecocide is that of "wanton" specifically meaning "with reckless disregard for damage which could be clearly excessive in relation to the social and economic benefits anticipated."<sup>387</sup>

Ecocide may be included in the Rome statute upon Amendment. This means that a state must propose the amendment as is intended by the republic of Vanuatu. At least 82 countries must vote in favour for it to be included as an amendment,. This procedure in itself may take long and be rejected in the long-run.

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<sup>385</sup> 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).

<sup>386</sup> The Understanding regarding Article 1 of the Convention on the prohibition of Military or any other Hostile use of Environmental Modification Techniques (ENMOD) UN Doc A/31/2 (1976)

<sup>387</sup> See Whosirskey

As at the time of Nuremburg Trials, all core crimes under the ICC had been banned by Conventions. Ecocide appears to be a very new crime outside the context of historical conventions. It lacks a widely accepted definition and has not been recognized as a crime under international law. Creating the fifth crime under ICC is helpful to developing countries to protect themselves from polluters and protect against transnational environmental harms as corporations may undermine domestic courts.

### **Limitations, challenges and opportunities for ICC**

There are many challenges facing the ICC as a forum that can prosecute environmental crimes. First, most of the states that are accused of serious pollution of the environment are not member states to the Rome Statute.<sup>388</sup> The Paris Agreement is faulted for not binding the largest polluters in the planet for being non-members states. This position also applies to the ICC which is only applicable to the 122 members states and environmental protection in non-party members is out of its ambit.<sup>389</sup> Even where a state is a party to the statute, the purview of the court is as far as the Rome Statute can permit and subject to state party consenting.<sup>390</sup> The responsibility of prosecuting a crime primarily lies on states and is dependent on their willingness. Kenya in 2015 filed a Declaration of Non-Acceptance of Jurisdiction of the ICC.<sup>391</sup>

The challenge for prosecuting environmental crimes at ICC is the rather slow nature of investigations to ascertain harm and responsibility since harm may take a while to materialize.<sup>392</sup> Proving environmental harm may take while as environmental impacts take long to manifest. It may also be an uphill task to prove actual number of victims to measure the degree as it affects inter-generations.<sup>393</sup>

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<sup>388</sup> Minha, Donna. "The Possibility of Prosecuting Corporations for Climate Crimes Before the International Criminal Court: All Roads Lead to the Rome Statute?." *Mich. J. Int'l L.* 41 (2020): 491.

<sup>389</sup> Schabas, William A. *Relationships between International Criminal Law and Other Branches of International Law*. BRILL, 2022.

<sup>390</sup> Sekulow, Jay, and Robert Ash. "The Issue of ICC Jurisdiction Over Nationals of Non-Consenting, Non-Party States to the Rome Statute: Refuting Professor Dapo Akande's Arguments." *Non-Party States to the Rome Statute: Refuting Professor Dapo Akande's Arguments (November 7, 2019)* (2019).

<sup>391</sup> [https://www.icc-cpi.int/sites/default/files/2015\\_NV\\_Kenya\\_Declaration\\_article15bis-4.pdf](https://www.icc-cpi.int/sites/default/files/2015_NV_Kenya_Declaration_article15bis-4.pdf) (accessed on 7/11/22)

<sup>392</sup> Storaas, Margrethe Voll. *Ecocide, a crime against peace?*. MS thesis. 2019.

<sup>393</sup> Chiarini, Giovanni. "Ecocide: From the Vietnam War to International Criminal Jurisdiction? Procedural Issues In-Between Environmental Science, Climate Change, and Law." *Procedural Issues In-Between Environmental Science, Climate Change, and Law (April 1, 2022)*. *Cork Online Law Review* (2022).

ICC lacks resources to prosecute and lacks the expertise to prosecute environmental crimes. These are crimes that may need to be proved by scientific data. The court lacks judges, experts and prosecutors with expertise in Environmental law.<sup>394</sup>

In the meantime, Domestic Laws may be instrumental in criminalization of ecocide at national level. This immediately helps to stop an ongoing offence, when many countries recognize it, it will be recognized as a norm under customary international law.

It will be interesting to see the ICC open opportunities for reparations and award victims of environmental harm.<sup>395</sup> Part 7 of the Rome Statute makes provision for Penalties. The court may impose fines or forfeit proceeds directly or indirectly obtained from a crime without infringing the rights of third parties. Most importantly, the Statute establishes a Trust Fund for the benefit of victims of crimes within the jurisdiction of the court- and families of such victims. Managed according to criteria determined by Assembly of Parties. The court in *The Prosecutor versus Germain Katanga*<sup>396</sup> did make an order for reparation. The ICC is yet to award a non-legal person. However, judges have discretion to consider eco-centric reparations. In *The Prosecutor v Ahmad Al Faqi Al Mahdi*, the ICC awarded individual, collective and symbolic reparations to the community of Timbuktu. In *the case of the Kichwa Indigenous People of Sarayaku*,<sup>397</sup> the Inter-American court awarded reparations. The African Court also awarded reparations in the *Ogiek Case*.<sup>398</sup>

It is feared that the nature of the ICC to just punish rather than protect the environmental security will be a futile effort to expand the Statute.<sup>399</sup> The world is facing a crisis climate change issues. A combative mechanism such as prosecution may not pay attention to environmental conservation.<sup>400</sup>

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<sup>394</sup> van Deursen, Joris, and Nina Eggens. "Environmental crimes in International Law: An exploration of the possibilities for criminalization of ecocide." (2021).

<sup>395</sup> Dutton, Anne, and Fionnuala Ní Aoláin. "Between reparations and repair: Assessing the work of the ICC Trust Fund for victims under its assistance mandate." *Chi. J. Int'l L.* 19 (2018): 490.

<sup>396</sup> ICC-01/04-01/07

<sup>397</sup> **IACtHR Series C No 245 (27 June 2012)**

<sup>398</sup> African Commission on Human and Peoples' Rights v. Republic of Kenya, Judgment, May 2017

<sup>399</sup> Keenan, Patrick J. "International Criminal Law and Climate Change." *BU Int'l LJ* 37 (2019): 89.

<sup>400</sup> Tignino, Mara. "Corporate human rights due diligence and liability in armed conflicts: The role of the ILC Draft Principles on the protection of the environment and the Draft Treaty on business and human rights." *TIGNINO, Mara. Corporate human rights due diligence and liability in armed conflicts: The role of the ILC Draft Principles on the protection of the environment and the Draft Treaty on business and human rights. Questions of International Law* (2021).

ICC lacks jurisdiction over legal persons such as corporations.<sup>401</sup> The armed conflicts in Africa have been influenced by multinationals who engage in illegal trading.<sup>402</sup> To cure this, ICC may grant itself express jurisdiction and amend the Rome Statute. Because of the lengthy process of amending the Rome Statute and the lack of adequate resources, the ICC should prioritize only serious crimes.<sup>403</sup>

## Conclusion

The evolution of crimes against environment does not rule out its prosecution under ICC. If ICC begins to prosecute environmental crimes, many domestic courts will follow suit. Bringing environmental crimes under a core crime will enable the prosecutor prove both *actus reas* and *mens re*. it signifies the seriousness of environmental crimes. A regional African Court will serve Africa only but environmental crimes are global, thus the need for prosecution before ICC.

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<sup>401</sup> de Leeuw, Lydia. "Corporate agents and individual criminal liability under the Rome statute." *State Crime Journal* 5.2 (2016): 242-267.

<sup>402</sup> Arduino, Alessandro. *The Footprint of Chinese Private Security Companies in Africa*. No. 2020/35. Working Paper, 2020.

<sup>403</sup> Schreurs, Fien. "Revisiting the Possibility of Corporate Criminal Responsibility in International Criminal Law: Amending Article 25 of the Rome Statute to Include Legal Entities Within the Jurisdiction of the ICC." *Available at SSRN 3700432* (2020).



## CHAPTER FIVE

### FINDINGS, CONCLUSION, ANALYSIS AND RECOMMENDATION

#### Introduction

This chapter gives a conclusion on the discussions above on environmental issues. It also briefly analyzes the pertinent issues and makes recommendations.

#### Findings

The research study has revealed that environmental crimes exist and pose a greater danger to the environmental protection. It is noted that there is little effort on environmental crimes as it is perceived as a victimless entity. This exacerbated by the fact that the world is now a global village. The study further notes that there is need to effect prosecution against environmental crimes. This will apportion criminal liability and deter criminals. However, there is need to relook at the legal and regulatory framework. The study finds that Rome Statute is not explicit on environmental crimes as distinct crimes to be determined by the ICC. However, the Office of The Prosecutor in the ICC has developed framework to guide prosecution and this is a progressive step.

It is the finding of this research that other prosecution of environmental crimes reveal the seriousness and threat to the human and natural environment.<sup>404</sup> Whether tried within the core crimes of the Rome Statute or under the proposed crime of ecocide, environmental accountability will be taken seriously both at international and domestic levels.

Other than the International Criminal Court, the proposal for an environmental international court also will assist to address environmental crimes. This is based on the ground that

During armed conflicts, displaced civilians tend to overpopulate a region. During the Rwanda Genocide, the population occupied the Virunga National Park.<sup>405</sup> This resulted to use of natural resources such as firewood as a source of fuel for two years.<sup>406</sup> This resulted to deforestation.

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<sup>404</sup> Drumbl, Mark A. "Waging war against the world: the need to move from war crimes to environmental crimes." *Fordham Int'l LJ* 22 (1998): 122.

<sup>405</sup> Magnarella, Paul. *Justice in Africa: Rwanda's Genocide, Its Courts and the UN Criminal Tribunal: Rwanda's Genocide, Its Courts and the UN Criminal Tribunal*. Routledge, 2018.

<sup>406</sup> Lynch, Maureen. "Reducing environmental damage caused by the collection of cooking fuel by refugees." *Refuge* 21 (2002): 18.

On the other hand, armed groups benefit from illegal trade to finance and fund their activities.<sup>407</sup>

## Conclusion

Punishment can achieve retribution and deterrence for commission of crimes.<sup>408</sup> Retributive justice is aimed at promoting the moral good whereas deterrence is to prevent further commission.<sup>409</sup> The mode of penalty will be determined by the severity of the offence among other factors.

The aim of the OTP is to represent the actual level of criminality that has occurred in different circumstances in order to ensure that the most serious crimes committed do not go unpunished, in collaboration with competent national authorities.<sup>410</sup> However, discretionary powers of the office may pose as a challenge in achieving the same.

The Rome Statute establishes the International court which dictates its jurisdiction of the ICC and scope. Whereas it proscribes four core offences, environmental crimes as distinct crimes can only be brought as subhead of the crimes stipulated under the Rome Statute.

Legal jurisprudence has developed to clearly clarify human and human ethics.<sup>411</sup> The laws that govern armed conflicts have provided for the respect of several categories of persons in war. The international community has encouraged countries to uphold human rights, given the spike in the number of refugees in various parts of the globe. However, environmental ethics begs for much more to be done and in so doing, imposes criminal law for further implementation of environmental law. Environmental ethics dictates that whereas the human needs must be satisfied, the protection of environment must be upheld.<sup>412</sup>

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<sup>407</sup> Ganesan, Arvind, and Alex Vines. "Engine of war: resources, greed, and the predatory State." *Human Rights Watch, World Report* (2004): 301-24.

<sup>408</sup> Terance D. Miethe and Hong Lu, *Punishment: A Comparative Historical Perspective*, Cambridge University Press, 2005.

<sup>409</sup> Anthony Tirado Chase, *Routledge Handbook on Human Rights and the Middle East and North Africa*, Taylor & Francis, 2016, 334.

<sup>410</sup> Bartłomiej Krzan, *Prosecuting International Crimes: A Multidisciplinary Approach*, BRILL, 2016

<sup>411</sup> Enrico Pattaro, *A Treatise of Legal Philosophy and General Jurisprudence*, Springer Science & Business Media, 2007, 88.

<sup>412</sup> Isidor Wallimann, *Environmental Policy is Social Policy – Social Policy is Environmental Policy: Toward Sustainability Policy*, Springer Science & Business Media, 2014

## Analysis

Environmental crimes may in some instances not be fatal. Compensation by the state and under public law is therefore given significant importance where there is damage to human health and property, among others.<sup>413</sup>

Collaboration and coordinated responses are key in ensuring that there is proper implementation of environmental protection taking into considering the contemporary issues in armed conflicts such as technology.<sup>414</sup> Because the places most affected by environmental crimes are also countries with fewest resources to solve them, major donor help is thus required to achieve the needed level of expertise.<sup>415</sup>

There is need for collection of information and intelligence and sharing the same as far as environmental crimes are concerned.<sup>416</sup> States may in some circumstances be unable to reveal information that may be prejudicial to its national security. Efficient dissemination on information may also be curtailed by actors based on the structures of disseminations.<sup>417</sup> Such information which may be acted upon can be withheld due to complex confidentiality matters. Alternatively, information may be at times be sanitized or sidelined.

There is need for agreements for regional enforcement which allow for shared jurisdictional competence may aid in addressing the restrictions of dividing enforcement mandates between distinct jurisdictions, particularly where cross-border gangs are active and capable of exploiting territorial boundaries.<sup>418</sup>

It is also noteworthy that international law should make provision on addressing environmental crimes that occur outside local boundaries, through cross-boundary enforcement and legislation to ensure effective punishment of criminals.<sup>419</sup> However, states may enter into Agreements

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<sup>413</sup> Steven C. Driellak, *Environmental Crime: Evidence Gathering and Investigative Techniques*. Charles C Thomas Publisher, 2018, 520.

<sup>414</sup> Matthew, Richard A., Oli Brown, and David Jensen. *From conflict to peacebuilding: the role of natural resources and the environment*. No. 1. UNEP/Earthprint, 2009.

<sup>415</sup> Badenoch, Nathan. "ENVIRONMENTAL GOVERNANCE." (2002).

<sup>416</sup> Carter, David L., and Jeremy G. Carter. "Intelligence-led policing: Conceptual and functional considerations for public policy." *Criminal justice policy review* 20, no. 3 (2009): 310-325.

<sup>417</sup> Dawes, Sharon S. "Interagency information sharing: Expected benefits, manageable risks." *Journal of Policy Analysis and Management* 15, no. 3 (1996): 377-394.

<sup>418</sup> Bassey, Celestine Oyom, and Oshita O. Oshita, eds. *Governance and border security in Africa*. African Books Collective, 2010.

<sup>419</sup> Falk, Richard A. "International Jurisdiction: Horizontal and Verticle Conceptions of Legal Order." *Temp. LQ* 32 (1958): 295.

with other states or agree to establish transborder agencies for purposes of preventing environmental crimes from occurring.

## **Recommendation**

The study contributes to the development of consistent legislation on environmental responsibility. It also addressed the specific issue of national responsibility frameworks in the case of extraterritorial environmental harm.

The following recommendations:

### Short term recommendations

- i. There should be policies and statements by corporation on environmental crimes and their consequences and the punitive actions that may be taken.
- ii. State authorities and departments ought to undertake audits, policies and other preventive measures for ensuring environmental compliance.
- iii. Recognition of environmental crimes as a severe danger to peace and sustainable development and promote the environmental rule of law at all levels to avoid environmental degradation.”
- iv. Prioritize action against environmental crime, which urgently requires an immediate, dedicated and persistent global response
- v. Promote transparency and accountability

### Long term recommendations

- i. The necessity for increased exchange of information and analysis on the impact of organized crime in the environment, democracy, development and security among member states and the UN security
- ii. Strengthen methods of collecting data, analysis and sharing on the role of natural resource exploitation in conflicts and security across key areas, in peacekeeping missions, punitive measures, committees and across the UN in general, in order to inform comprehensive responses aimed at securing peace, stability and sustainable development.

- iii. Create new international, national and regional environmental crime enforcement teams, as well as border liaison offices, to share intelligence in order to create probes and interventions targeting offenders.
- iv. Criminal profiling is essential for targeted enforcement actions and should be made continuous.
- v. States should develop plans, programmes and strategies to provide capacity building and information on enforcement on environmental law.

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