Casting A Wider Net: An Inquiry into the Potential Prosecution of Corporate Agents for Crimes Involving Environmental Destruction before the International Criminal Court

by Michael T. Tiu, Jr.

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COURSE: Environmental Law and Regulation
PROFESSOR: Jessica Charles Lawrence, Ph.D.
Central European University
1051 Budapest, Nador utca 9
Hungary

Abstract

This thesis has been prompted by the statement in the *Policy Paper* released recently by the Office of the Prosecutor of the International Criminal Court ("ICC") which suggested an increasing focus by such office on crimes committed by means of, or which result in, environmental destruction, and the prosecution of persons liable for them. This thesis will inquire into the possibility of prosecuting corporate agents for such crimes at the ICC, and the presentation of how liability of executives and directors for crimes that involve environmental destruction can be demonstrated under the framework of the Rome Statute.

This thesis shall first define the important concepts, including the scope of the term 'environmental destruction'. Under an international law perspective, and employing legal analysis of the relevant legal instruments, this thesis will explore the subject matter jurisdiction of the ICC with respect to crimes that involve environmental destruction, and the extent of such jurisdiction's reach over corporations and their agents. Once this task is performed, this thesis examines how corporate agents, in making decisions for and acting on behalf of corporations, can be prosecuted under any of the modes of establishing criminal liability available under the Rome Statute.

In sum, this thesis argues that there is space in the crimes defined under the Rome Statute to hold corporate agents accountable for committing Rome Statute crimes through acts that involve or result in environmental destruction. This argument will then be supported by a discussion of the relevant materials, and by anticipating and addressing potential stumbling blocks, under both international criminal law and corporate law, of the potential prosecution of such corporate agents.

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Introduction

The consequences of environmental destruction pose significant threats to the health and survival of human beings, and to the international community as a whole. Various responses have been explored to address the destruction of the environment through accountability and prevention measures, and the use of international law has been one of such responses. Considering that many of the problems caused by the destruction of the environment have transnational and inter-generational effects, the international community deemed it fit to come together and forge solutions that now form part of what is called international environmental law.[1]

Nevertheless, international environmental law is not the only area of international law that may be explored and used to respond to the problem of environmental destruction. Calls have been made for international criminal law to provide protections to the environment through the mechanisms within such area of law,[2] particularly those that find and hold a person, who has committed an act or has contributed to the commission of an act that destroyed the natural environment, criminally liable.

Through the years of development of the legal responses to environmental destruction, it is important to point out that states have always used the criminal justice system to enforce their environmental laws.[3] By labelling and penalizing acts that involve or result in

[1] In his book, Principles of International Environmental Law, Philippe Sands describes 'international environmental law' as "compris[ing] those substantive, procedural and institutional rules of international law which have as their primary objective the protection of the environment", see Philippe Sands QC, Principles of International Environmental Law 15 (2nd ed. 2003). Similar to most of the fields in international law, international environmental law is comprised of treaties, customs, and similar sources.

[2] See, for example, Steven Freeland, Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court 34-44 (2015).

[3] Ricardo M. Pereira, Environmental Criminal Liability and Enforcement in European and International Law 46 (2015).

environmental destruction as crimes, the state makes characterizes such acts as public wrongs,[4] and harnesses the deterring[5] and stigmatizing effects of criminal law.[6]

The use of criminal law as a response is set within and alongside similar responses that are traditionally pursued through national law and other international law instruments. Under the national law instrumentality, there are statutes that define and penalize an environmental crime. These measures are seen positively because they shifted the focus from mere administrative dependence to a more proactive protection of the environment.[7] However, because the measure depends on the ideas and priorities of the states that formulate and pass them, they are neither consistent nor universal.[8]

There are also measures that protect the environment through criminal law on a regional level. The leading example of this is the European Union's ("EU") directive on the protection of the environment through criminal law.[9] However, in the same way that regional measures cover only a specific region because of commonalities, it is also said that these measures may also emphasize the differences between regions, and therefore do not do well to reinforce the international character of the conduct that is aimed to be punished.[10] Given the inadequacies of these two approaches, it is proposed that international law could fill in the gaps or would supply a better means to address the problem.

[4] Id.
[5] Id.; See also Stephen Tully, *International Environmental Law and Sustainable Development*, in International Corporate Legal Responsibility 425 (Stephen Tully ed., 2012).
[6] Pereira, supra, at 46; See also Joanna Kyriakakis, Corporations before International Criminal Courts: Implications for the International Criminal Justice Project, 30 LJIL 247 (2017).
[7] Freeland, supra, at 26 citing Michael G. Faure & Marjolein Visser, 'How to Punish Environmental Pollution? Some Reflections on Various Models of Criminalization of Environmental Harm', 3 European Journal of Crime, Criminal Law and Criminal Justice 316-317 (1995).
[8] Id.
[9] See Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, O.J. (L 328) 06 (EC).
[10] Freeland, supra, at 28.

The justification of the use of an international response is the reality that environmental destruction has trans-boundary effects which have significant consequences to the security of other countries, as well as to the international community as a whole. In this context, it is interesting to note why acts that involve environmental destruction, in themselves, are not independently criminalized under international law. The consequences of these crimes affect us all, and the means by which they are committed are certainly an affront on humanity[11] such that they can be considered *crimen contra omnes*, which is exactly the character of international crimes.[12] Even the Rome Statute speaks of addressing 'the most serious crimes of concern to the international community as a whole'[13] and, when we think of environmental destruction which involves causing damage to a matter that is part of an integrated system wherein humans thrive, it is puzzling how acts that make use of, or result in, environmental destruction are not seen as falling under this category.[14]

An examination of the possibility of an international criminal law response will not be taken seriously when the work does not consider one of the instruments that codified most of the basic principles of international criminal law – the Rome Statute of the International Criminal Court ("Rome Statute"). The Rome Statute entered into force on 01 July 2002.[15] It established the International Criminal Court ("ICC")[16] which was given the mandate to punish the "most serious crimes of concern to the international community."[17] With that function, it is

[11] Id., at 19
[12] Id.
[13] Rome Statute of the International Criminal Court, Preamble, para. 1, 2187 UNTS 90, 17 July 1998, entered into force 01 July 2002 ("Rome Statute").
[14] However, it must be noted that there have been efforts to punish environmental destruction under international humanitarian law, as illustrated in the proposal for a Fifth Geneva Convention.
[15] Id.
[16] Rome Statute art. 1.
[17] Rome Statute Preamble, para. 4.

hoped that the establishment of the ICC would "put an end to impunity for the perpetrators of these crimes and, thus, to contribute to the prevention of such crimes."[18]

Of course, the immediate reaction of those who are familiar with international criminal law and the ICC is that the court was established to punish violations of human rights and international humanitarian law through what are described as the 'core crimes'[19] namely, the crime of genocide,[20] crimes against humanity,[21] war crimes,[22] which includes the crime of causing excessive damage to the environment,[23] and the crime of aggression.[24] It is argued that these crimes do not contemplate acts that, for private ends, make use of, or result in, environmental destruction.

However, as with any development in any area of law, the Rome Statute and its mandate began to be seen as a possible venue for environmental justice, especially since any destruction to the environment could be linked to the suffering of human beings. Although this view is placed within the context of the prevailing anthropocentric approach to environmental protection,[25] this provides the necessary framework for this thesis to be able to evaluate the chances of advancing environmental justice within the rigid and focused field of international criminal law. The close linkages between the protection of the environment and that of human rights no longer allows international lawyers and policymakers alike the luxury to ignore an

[18] Rome Statute Preamble, para. 5.
[19] Rome Statute art. 5.
[20] Rome Statute art. 6.
[21] Rome Statute art. 7.
[22] Rome Statute art. 8.
[23] Rome Statute art. 8(2)(b)(iv).
[24] Rome Statute art. 8 *bis*.
[25] The difference between the anthropocentric view and the eco-centric view was articulated by Ricardo M. Pereira in this wise:

"The anthropocentric view suggests that the environment should be protected chiefly as a necessary means to protect human quality of life, while the 'eco-centric' approach requires that the natural environment per se is protected."

See Pereira, supra, at 51.

exploration of international criminal law and its function in holding persons who destroy the environment accountable, and in preventing further environmental destruction.

At first, the calls to prosecute persons at the ICC for acts involving environmental destruction did not specifically identify which persons should be prosecuted since many commentators maintain the idea that the ICC could only try and punish natural persons who committed punishable acts as state agents, or that the Rome Statute crimes require state involvement, particularly since the emergence of international criminal law has been tied to the responses of the devastation brought about by past or ongoing wars or armed conflicts. However, on 15 September 2016, the Office of the Prosecutor of the ICC (the "ICC Prosecutor") released the *Policy Paper on Case Selection and Prioritization* stating that the ICC Prosecutor "will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources…land grabbing or the destruction of the environment."[26]

The Policy Paper states further that in its case selection process, the ICC Prosecutor shall consider, among others, the manner by which the crime was committed with a consideration of the "existence of elements of particular cruelty, including…**crimes committed by means of, or resulting in, the destruction of the environment**."[27]

Of equal weight is the statement of the ICC Prosecutor that it shall assess the impact of crimes, in relation to gravity, with "particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land."[28] These

[26] Office of the Prosecutor, International Criminal Court, Policy Paper on Case Selection and Prioritisation, 15 September 2016 15, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf. (last accessed 08 December 2016).
[27] Id., at 14; emphasis and underscoring supplied.
[28] Id.

pronouncements, together with the ICC Prosecutor's statement that the "selection of cases for investigation within an existing situation should not be confused with decisions to initiate an investigation into a situation as a whole"[29] have been the cause of celebration for those organizations which have long advocated for the prosecution of crimes involving environmental destruction at the ICC.

The responses to the announcement were mostly optimistic and expansive.[30] The Washington Post, for example, speculates that the ICC Prosecutor could prosecute cases involving environmental damage or the misuse or theft of land as crimes against humanity and, in this regard, surmises that corporations and businesses would be involved in cases at the ICC, which is a court traditionally seen as dealing primarily with cases against dictators and warlords.[31] Bringing this point further, the Washington Post comments that this expansion of the ICC Prosecutor's focus would make the prosecution of individuals at corporations involved in environmental exploitation more likely.[32]

In The Conversation, Tara Smith posits that the move may lead to the "ICC investigating corporate officers and corrupt state officials who might conspire to kill or evict groups of indigenous people from their native land in order to exploit natural resources"[33] and that there might be a time when we might see businessmen joining the warlords in the list of persons prosecuted at the ICC.[34] Relating this statement to the set-up of most businesses, Smith

[29] Id.
[30] It must also be note that within these responses, there are also those who are more cautious in their assessment of this development. See, for example, John Vidal & Owen Bowcott, ICC widens remit to include environmental destruction cases, The Guardian (15 September 2016), https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases (last accessed on 08 December 2016).
[31] Adam Taylor, Is environmental destruction a crime against humanity? The ICC may about to find out., The Washington Post (16 September 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/09/16/is-environmental-destruction-a-crime-against-humanity-the-icc-may-be-about-to-find-laout/?utm_term=.0c74b801009a (last accessed on 08 December 2016).
[32] Id.
[33] Tara Smith, Why the International Criminal Court is right to focus on the environment, The Conversation (23 September 2016), http://theconversation.com/why-the-international-criminal-court-is-right-to-focus-on-the-environment-65920 (last accessed on 08 December 2016).
[34] Id.

argues that "[a] focus on these issues at the highest levels of international justice would make it clear that nobody can hide behind the corporate veil."[35]

These comments on the *Policy Paper* raise many questions as regards the meaning of the statements made by the ICC Prosecutor with respect to views on the jurisdiction of the ICC, as well as the persons who may be held to account for crimes which are 'committed by means of, or that result in, environmental destruction.' In a nutshell, given the statements of the ICC Prosecutor in the *Policy Paper*, the question asked is whether the optimistic view offered by the commentators may realistically come into fruition. To answer this question, one needs to examine whether or not any of the crimes defined in the Rome Statute may be used to prosecute a crime involving environmental destruction and, if so, whether or not corporate agents can be charged and prosecuted for such crimes.

This thesis deals exactly with these questions. In answering them, it is acknowledged that there is a recurring assessment that international criminal law, in general, and the Rome Statute, in particular, do not provide adequate mechanisms to punish persons who commit acts that destroy the environment.[36] Nevertheless, this thesis argues that, although only in limited instances, there is space for the potential prosecution of persons who commit such acts under the provisions of the Rome Statute, as complemented by the principles of customary international law.

Further, within this space, corporate agents may be prosecuted when, in making decisions for and acting in behalf of corporations, they commit acts or contribute to the

[35] Id.

[36] See Freeland, supra, at 221; Tara Smith, The Prohibition of Environmental Damage during the Conduct of Hostilities in Non-International Armed Conflict 1 (09 May 2013), https://aran.library.nuigalway.ie/bitstream/handle/10379/3523/Tara%20Smith%20-%20The%20Prohibition%20of%20Environmental%20Damage%20during%20the%20Conduct%20of%20Hostilities%20in%20Non-International%20Armed%20Conflict%20-%2009.05.13.PDF?sequence=1&isAllowed=y (last accessed on 30 March 2017).

commission of Rome Statute crimes that make use of, or result in, environmental destruction. In other words, this thesis answers the questions raised in the affirmative – that, in limited situations, there are Rome Statute crimes which may be used to prosecute corporate agents for acts involving environmental destruction.

The discussion in this thesis takes an international view of the problem, since the law and institution involved is international in character. Thus, while the examples used in different parts of this thesis may pertain to situations specific to a certain country, their illustrative function mostly support a point made in the context of international criminal law. In this regard, the methodology employed in this thesis is a straightforward legal analysis of international criminal law principles, as these are codified in the Rome Statute and other treaties, and interpreted or construed under customary international law materials. This means that an examination of the provisions of the Rome Statute and the relevant principles of international criminal law will involve a discussion the interpretation of the international criminal tribunals and courts, as well as by scholars of international law. This thesis will then build on these interpretations through an independent analysis of the law within the corpus of such sources, and with an effort to reimagine the application of the law despite the rigid framework of international criminal law.

To aid in the task of showing how the findings are arrived at, this thesis divides the discussion into chapters. Chapter 1 begins by defining important concepts such as the environment, and what is covered by the term 'environmental destruction'. Further, this chapter will broadly outline the general stumbling blocks one may encounter under the Rome Statute that could form part of the limitations noted in the main argument of this thesis. This is followed, in Chapter 2, by a discussion of the possible spaces for the prosecution of acts involving environmental destruction in the context of the core crimes in the Rome Statute, with

the exception of the crime of aggression. This chapter will also provide examples of the actions of corporations and corporate agents which may be considered as falling under any of the elements of the punishable acts under the Rome Statute. In Chapter 3, this thesis will describe the ways by which corporate agents may be held accountable under the Rome Statute, and this discussion will make use of the acts of corporations and corporate agents discussed in the previous chapter to illustrate the point that corporate agents may be prosecuted before the ICC. Thereafter, in Chapter 4, the thesis will outline its main findings after examining the Rome Statute. This chapter will also provide the link to the modes of liability relevant to corporate agents discussed in Chapter 4. Finally, the Conclusion will reiterate the main arguments that support the thesis, and reassess the landscape examined in this thesis by discussing the contribution of this thesis to the same.

Chapter 1. Defining the Environment, Its Destruction, and the Contours of General Rome Statute Limitations

1. *A definition of the natural environment and the meaning of its destruction*

In order to have a clear picture of what this thesis aims to do, it is important to define the most basic concept of the 'environment', or at least the contours of what it covers. To be more specific, the concept defined herein is that of 'natural environment', as the broad concept of the environment may also refer to human and social constructs which are not actually the subjects of this thesis.

While there is no uniform definition of the term 'natural environment' under international law, we can examine Article II of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ("ENMOD")[37] which, in defining 'environmental modification techniques', indirectly offers a definition of the natural environment as

> the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.[38]

The ENMOD's broad conception of the natural environment is implicitly recognized by Steven Freeland who, in proposing an amendment to the Rome Statute that would include a crime of 'crimes against the environment' under the jurisdiction of the ICC,[39] offered a

[37] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ("ENMOD"), 31 UST 333, 1108 UNTS 152, http://www.eisil.org/index.php?sid=4ails&id=829&t=link_details&cat=429.
[38] ENMOD art. II.
[39] Freeland, supra, at 239-283.

definition of the natural environment. Freeland defines 'natural environment' in his proposed Article 8 *ter* of the Rome Statute as follows:[40]

> (…)
>
> (e) "natural environment" includes those ecological, biological, and resource systems necessary to sustain the continued existence of all forms of human, animal, or plant life (…)[41]

This definition allows one to state that environmental destruction refers to the damaging of the environment, or more specifically, to acts that, whether intentional or not, "typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including the conservation of species."[42] To expound on the concept, Freeland also proposes to define environmental destruction in this wise:[43]

> (…)
>
> (f) "damage to the natural environment" includes but is not limited to circumstances that constitute a concrete end endangerment to human life or health, and may include any of the following:
>
> > (i) destruction or degradation of the marine environment, marine wildlife, or marine habitats;
> > (ii) destruction or degradation of terrestrial fauna and flora, or their habitats;
> > (iii) pollution of the atmosphere;
> > (iv) destructive climate modification;
> > (v) any other form of environmental destruction, degradation or harm of comparable gravity.

[40] Freeland, supra, at 245.
[41] Id. Note that he attempts to define the concept in a less anthropocentric way, in that he includes animal and plant life in the formulation.
[42] This is an indirect definition culled from the description of "effective protection" discussed in Pereira, supra, at 49 citing Directive 2008/99/EC of the European Parliament and of the Council recital 5.
[43] Freeland, supra, at 245-246.

This conception of environmental destruction is broader that the what is covered by an environmental crime which was defined by Mary Clifford as

> an act committed with the intent to harm or with the potential to cause harm to ecological and/or biological systems and for the purpose of securing business or personal advantage[44]

or the more comprehensive description by the Environmental Programme ("UNEP") and the International Police Office ("Interpol") of environmental crime as

> most commonly understood as a collective term to describe illegal activities harming the environment and aimed at benefitting individuals or groups or companies from the exploitation of, damage to, trade or theft of natural resources, including, but not limited to serious crimes and transnational organized crime.[45]

The framework of this thesis focuses on the concept of environmental destruction because of its functional broadness, particularly in view of the limits of the international law response being explored here. It would have been useful to adopt Clifford's definition and make explicit reference to an environmental crime as it already identifies the element of "securing of a business or personal advantage" which would make the task of linking culpability to corporations and their agents less difficult. However, the idea of the specific intent identified in the definition would limit this exploration in an already limited framework. Further, it would have also been helpful to use UNEP and Interpol's complete definition, but it also fails to recognize the harm caused to human beings, which is certainly a major discussion point in this thesis considering the purpose and the limitations provided in the Rome Statute.

[44] Pereira, supra, at 47 citing Mary Clifford, Environmental Crime: Enforcement, Policy and Social Responsibility 26 (1998).
[45] United Nations Environmental Programme and International Police Office (Nellemann, C., et. al., ed.), The Rise of Environmental Crime: A UNEP-INTERPOL Rapid Response Assessment 30, http://unep.org/documents/itw/environmental_crimes.pdf (last accessed on 09 December 2016).

With the foregoing definitions, we look at the broad conception of environmental destruction offered and examine it in the context of the response explored in this thesis. At this point, it is worth remembering that this idea of environmental destruction, or the acts constituting it, fits into the what the ICC Prosecutor stated as the expansion of focus to include 'crimes committed by means of, or resulting in, the destruction of the environment.'

2. *The context and the limitations of a response under the Rome Statute*

It is worth reiterating that it is important to explore an international criminal law response because of its specific relevance to the idea of accountability for environmental destruction, considering that international environmental law, in the form of treaties, are usually suspended during the situations of hostilities covered by measures under international criminal law and international humanitarian law, and if they in fact apply, they do not explicitly provide measures that address the damage causes to the environment during armed conflict.[46] This highlights the imperative of finding another avenue to bring about environmental justice, with the potential effect of deterring the commission of future acts that damage the environment.

In this connection, particularly with respect to impunity and accountability, corporations and their agents, particularly those who contribute to the commission of the offenses discussed in this thesis, often know, but ultimately ignore, the consequences of their actions. They ignore that the products they supply in times of war are used by governments to intentionally destroy the environment, and that this has devastating effects on both human

[46] Pierre-Marie Dupuy & Jorge E. Vinuales, International Environmental Law 352 (2016). However, there are a couple of exceptions to this rule. See, for example, the protective regime of the Convention on the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151, otherwise known as the World Heritage Convention.

beings and the natural environment itself.[47] It is not difficult to imagine that the products that form part of weapons of mass destruction, *i.e*. nuclear, biological, and chemical weapons, have lasting consequences on the environment.[48] This is egregious in itself.

However, considering the predominant idea of the function of the environment as serving the interests of human beings, the destruction of the environment also affects human security and human rights, and can be assessed as a violation of the Stockholm Declaration's[49] recognition of man's right to exercise his fundamental freedoms in an environmental that permits it.[50] Moreover, environmental destruction also causes or escalates conflict.[51] In explaining this point, Pierre-Marie Dupuy and Jorge Vinuales quote, in part, the World Commission on Environment and Development report entitled Our Common Future, thus:[52]

> The first step in creating a more satisfactory basis for managing the interrelationships between security and sustainable development is to broaden our vision. Conflicts may arise not only because of political and military threats to national sovereignty; **they may derive also from environmental degradation** and the pre-emption of development options.[53]

This makes it imperative to check the behavior of corporate actors who contribute to the destruction of the environmental and hide under the mantle of 'just doing business.'

In this connection, and before we proceed to locating the potential bases for exacting accountability for environmental destruction under the Rome Statute, it is well to note that

[47] Freeland, supra, at 8.
[48] Id.
[49] United Nations Conference on the Human Environment, Report of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1(1973), http://www.un-documents.net/aconf48-14r1.pdf (last accessed on 31 March 2017).
[50] Id.
[51] Freeland, supra, at 8.
[52] Dupuy and Vinuales, supra, at 339.
[53] Id., citing the Report of the World Commission on Environment and Development, Our Common Future, 10 March 1987, Chapter 11, para. 37; emphasis and underscoring supplied.

there are important provisions in the Rome Statute that could serve as limitations in the prosecution of crimes at the ICC.

First, the Rome Statute states that the ICC has jurisdiction *ratione temporis* thus:[54]

> Article 11
> Jurisdiction *ratione temporis*
>
> 1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
>
> 2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3.[55]

At its core, this provision means that only those acts alleged as having elements that constitute Rome Statute crimes occurring after 01 July 2002 can be prosecuted at the ICC. As a further limitation, only those crimes committed after a state that became a party after this said date may be prosecuted subject to the proviso in the same provision. What this means is that all those acts which made use of, or resulted in, environmental destruction prior to these relevant dates may not fall under the mechanism being discussed herein, even though such actions have resulted in a 'widespread, long-lasting, and severe' destruction to the environment with dire consequences to human beings.

A second limitation is the principle of complementarity which is the most basic rule in the entire structure of the Rome Statute. This principle is enshrined in the preamble of the Rome Statute which "[e[mphasiz[es] that the International Criminal Court established…shall be

[54] Rome Statute, art. 11
[55] Article 12, paragraph 3 provides as follows:

> 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

complementary to national criminal jurisdictions"[56] as well as in Article 1 which uses the same language to express the principle.[57] In explaining this principle, Otto Triffterer notes that:[58]

> The concept of complementarity addressed in article 1 is described in paragraph 10 of the Preamble, in articles 12-15, 17 and 18. According to these provisions complementarity means that national jurisdiction substituting the international community has in principle priority unless a "situation" is referred to the Court i.e. by the Security Council according to article 13(b) or the competent state is unwilling or unable genuinely to carry out the investigation or prosecution", article 17 para 1 (a).[59]

In other words, as Morten Bergsmo explains, "[t]he national criminal jurisdiction of States Parties have jurisdictional primacy vis-à-vis the Court...[and] [i]t…dictates that as long as a national criminal jurisdiction is able and willing to genuinely investigate and prosecute the matter which has come to the Court's attention, the Court does not have jurisdiction."[60] Essentially, this means that one cannot go directly to the ICC without exhausting domestic remedies, or ensuring that the preconditions to the exercise of jurisdiction in Article 12,[61] the rules for the exercise of jurisdiction in Article 13,[62] and the provisions for admissibility in Article 17[63] of the Rome Statute are satisfied.

Third, and perhaps more importantly, this thesis is being explored, particularly in reference to locating a provision that could be used to prosecute persons for committing crimes

[56] Rome Statute Preamble, para. 10.
[57] Rome Statute art. 1.
[58] Otto Triffterer, Article 1 The Court, in Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article (2nd ed.) 57 (Otto Triffterer ed., 2008).
[59] Id.
[60] Morten Bergsmo, Rome Statute of the International Criminal Court, in Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article (2nd ed.) 13 (Otto Triffterer ed., 2008).
[61] Rome Statute art 12.
[62] Rome Statute art. 13.
[63] Rome Statute art. 17.

involving environmental destruction, because of the principle of legality provided in Articles 22 and 23 of the Rome Statute:

> Article 22
> *Nullum crimen sine lege*
>
> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
>
> 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
>
> 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."[64]
>
> Article 23
> *Nulla poena sine lege*
>
> A person convicted by the Court may be punished only in accordance with this Statute.[65]

The principle of legality expressed in these twin provisions is considered an established norm of customary international law.[66] It is a basic principle in criminal law and traces its roots to the fundamental values of fairness and due process, particularly in the context of the pernicious consequences of being prosecuted for and convicted of committing a criminal offense. Susan Lamb describes that this principle is anchored on these basic attributes: "(a) the concept of a written law; (b) the value of legal certainty; (c) the prohibition on analogy; and (d) non-retroactivity."[67]

[64] Rome Statute art. 22.
[65] Rome Statute art. 23
[66] Susan Lamb, *Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law, in The Rome Statute of the International Criminal Court: A Commentary 734 (Antonio Cassese, Paola Greta & John R.W.D. Jones, eds., 2002).
[67] Id.

Considering the high standard required in the application of this principle, particularly the strict construction of acts punishable under the Rome Statute[68] and the clause "conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court",[69] it is important to be upfront and state that, under the present Rome Statute, there is no independently-defined and penalized 'crime against the environment' to speak of. With the exception of Article 8(2)(b)(iv) which explicitly refers to the punishment of causing excessive damage to the natural environment, the rest of the crimes defined under the Rome Statute have for their goal the punishment of individuals who have violated fundamental human rights and the laws on armed conflict.

This is the reason why this thesis' task is not to argue that there is an independent 'crime against the environment' under the Rome Statute that is just couched in different terms. Rather, this thesis will assess whether under the current framework of the Rome Statute, there are provisions which, although ultimately targeting the punishment of human rights violations, could also be used as a means to exact accountability for the punishment of environmental destruction committed by corporate agents. This is consistent with what the ICC Prosecutor calls 'crimes committed by means of, or resulting in, the destruction of the environment.'

Finally, it must be explained that the core crimes, like other crimes in various penal statutes, require the presence of two basic elements: (a) *actus reus*, which refers to the commission of the specific acts penalized under the provisions applicable to the core crime charged to have been committed,[70] and the (b) *mens rea*, the standard formulation of which is described in Article 30 of the Rome Statute:[71]

[68] Rome Statute art. 22, para. 2.
[69] Rome Statute art. 22, para. 1.
[70] Maria Kelt & Herman von Hebel, IV. What are Elements of Crimes?, in The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence 14 (Roy S. Lee ed., 2001).
[71] Rome Statute art. 30.

Article 30
Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purpose of this article, a person has intent where:

(a) In relation to conduct, the person means to engage in the conduct;
(b) In relation to a consequence, the person means to cause the consequence or is aware that it will occur in the ordinary course of events.

3. For the purpose of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

The element of *actus reus* is delved into in the next chapters as this thesis discusses the particular crimes which may be used as basis for the potential prosecution inquired herein. Such a discussion will also keep in mind the general standard of *mens rea* under Article 30, unless the provision requires a *dolo specialis* as that in the crime of genocide.

Chapter 2. The Rome Statute crimes involving environmental destruction

1. *War crimes and environmental destruction*

It is easiest to imagine environmental destruction in the context of a war. In the development of international law, the term armed conflict has been used in place of war, particular in the Rome Statute which also covers non-international armed conflict.

The law that governs the permissible and prohibited activities during or in the course of an armed conflict is traditionally referred to as *jus in bello*, or international humanitarian law.[72] While international humanitarian law primarily protects persons actively participating in the armed conflict, it also extends its reach to protect property that may come into the hands of the adversary.[73] In general, this field of law protects the "population, property, and pre-existing order of an occupied territory."[74] This, therefore, sets a potentially important link between the punishment of the perpetrators of war crimes and the environmental destruction caused by them.

This is particularly clear when viewed in light of the principle enunciated in the Declaration of St. Petersburg of 1868[75] which states that "the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy."[76] This means that parties to an armed conflict, including those from which they source their tools, are not allowed to use just any means in order to achieve their goals.[77] It is therefore reasonable to conclude that environmental destruction is part of what is being prevented here.

[72] Michael Cottier, Article 8 War Crimes, in Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article (2nd ed.) 305 (Otto Triffterer ed., 2008).
[73] Cottier, supra, at 306.
[74] Id.
[75] Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, entered into force Nov. 29/Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S. 297.
[76] Id., para. 2.
[77] Freeland, supra, at 59-60.

A war crime is a crime that is committed in the course of a war or armed conflict. In a broad sense, a war crime is committed through acts that constitute a violation of international humanitarian law, and if such act has been criminalized under treaty or customary international law.[78] For the purpose of this thesis, the second requirement is considered to have been fulfilled as war crimes are defined and punished under Article 8 of a treaty - the Rome Statute.

The provision notes that these war crimes must be "committed as part of a plan or policy or as part of a large-scale commission of such crimes."[79] The particularity of this focus implies that the ICC has jurisdiction over crimes committed in the course of an international armed conflict. Notably, however, the language of the provisions, and the character of Articles 8(2)(c)-(e), for example, do not exclude (and in fact imply) the application of the Rome Statute in those armed conflicts that are not international in character.[80] Nevertheless, the discussion of the provision is made with this distinction in mind for the sake of clarity. In this regard, it is important to make this distinction by stating that an international armed conflict "occurs when one or more States have recourse to armed force against another state"[81] while an armed conflict not of an international character, also known as a 'non-international armed conflict', is defined in Article 1(1) of Protocol II to the Geneva Conventions of 1949[82] as that

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to

[78] Cottier, supra, at 304-305.
[79] Rome Statute art. 8(1).
[80] Herman von Herbel, The Elements of War Crimes, in The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence 110 (Roy S. Lee ed., 2001).
[81] International Committee of the Red Cross ("ICRC"), How is the Term "Armed Conflict" Defined in International Humanitarian Law? 1 (March 2008), https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf (last accessed 30 March 2017).
[82] International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, http://www.refworld.org/docid/3ae6b37f40.html (last accessed on 05 April 2017).

> enable them to carry out sustained and concerted military operations and to implement this Protocol.[83]

Most of the acts punished under Article 8 of the Rome Statute already form part of international humanitarian law which is a "branch of public international law"[84] described by Jean Pictet as one that "owes its inspiration to a feeling for humanity and which is centered on the protection of the individual."[85]

A student of international law, aware of the many limitations in the field, would interpret this definition as likely precluding an argument that acts involving environmental destruction is part of what is being punished since the focus of the protection is the human being, without mention being made of the natural environment. However, our study of the competition of philosophies on the law reminds us that boundaries are often being pushed, and doctrines are constantly re-examined such that they eventually accommodate ideas which could not have been imagined as being covered by a certain concept in the past. In this regard, one could interpret a "feeling of humanity" as a concept that is broad enough to cover the application of a "humane" standard in our treatment of the environment. More importantly, the idea of being "centered on the protection of the individual" is not fully realized without the protection of the environment, considering that it is the natural environment that sustains the human being and allows him to exercise his protected freedoms. This is consistent with the anthropocentric view discussed earlier, *i.e.* that the protection of human beings who are adversely affected by armed conflict takes into account a host of aspects that, if not addressed, would precisely hinder the achievement of the goal. Thus, it has been argued that the objective

[83] Protocol II art. 1(1).
[84] Freeland, supra, at 51.
[85] Id., citing Jean Pictet, quoted in Yves Beigbeder, Judging War Criminals: The Politics of International Justice 1 (1999).

is broader in that the need for regulation is aimed at minimising the "horrors rendered on 'people, property and the environment' by war."[86]

The discussion that ensues surveys the provisions of Article 8 of the Rome Statute and locates the space for the prosecution of acts involving environmental destruction under this 'war crimes' regime. At this point, there is yet no focused discussion on the character and capacity of the perpetrator in order not to cause confusion as to the particular task for this chapter. Further, in this part of the chapter, the discussion will also begin with the provision that provides a clearer basis of prosecution because it makes explicit reference to the natural environment. Thereafter, other war crimes which may, by interpretation, be used as basis to prosecute crimes that make use of, or result in, environmental destruction will be examined.

1.1. *War crimes involving environmental destruction in international armed conflicts*

1.1.1. *The crime of causing excessive damage to the natural environment*

The provision in the Rome Statute that makes an explicit reference to the punishment of causing damage to the natural environment is Article 8(2)(b)(iv):[87]

> (…)
>
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
>
> (…)
>
> (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects

[86] Freeland, supra, at 53.
[87] Rome Statute art. 8(2)(b)(iv).

or **widespread, long-term and severe damage to the natural environment which would be clearly excessive** in relation to the concrete and direct overall military advantage anticipated; (…)[88]

Establishing this crime requires proof of the following elements:[89]

1. The perpetrator launched an attack.
2. The attack was such that it would cause…damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such…damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated
3. The perpetrator knew that the attack would cause…damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Before examining the requirements and the limitations under this provision, the first general comment that may confront one who wishes to prosecute using this provision is how it does not make it its primary aim to punish the damage to the environment *per se*, but only when it is excessive vis-à-vis a strategy to gain some military advantage. In other words, the punishment of causing damage to the environment is secondary to obtaining a military objective.[90] However, as stated at the onset, this is not a significant problem when the goal is only to locate a provision which may be able to, although indirectly, hold a perpetrator of a crime to account and be penalized for acts involving environmental destruction.

[88] Emphasis and underscoring supplied.
[89] Elements of Crimes of the International Criminal Court ("Elements of Crimes") art. 8(2)(b)(iv), ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000).
[90] Freeland, supra, at 206 citing Mark A. Drumbl, Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes, in The Environmental Consequences of War: Legal Economic, and Scientific Perspectives 623 (Jay E Austin and Carl E Bruch eds., 2000).

More significantly, this provision is a step forward because it breaks free from a completely anthropocentric approach as the language of the provision, arguably, does not make liability for excessive damage to the environment contingent on the death or injury to human beings.[91] Hence, the examination of the presence of the elements of the crime is relatively free of the task of gathering evidence of human suffering, and will also focus on how to show the extent of the damage caused to the environment.

Nevertheless, there are hurdles which must be overcome if one intends to prosecute on the basis of this provision. Under this provision and looking at the elements, causing damage to the environment may only be characterized as a war crime if the same is 'widespread, long-term, and severe', and if the acts do not comply with the principle of proportionality. While this provision clearly gives a space for prosecuting a war crime that involves environmental destruction, the requirements that must be fulfilled set a high bar. For one, since all three qualifiers of the damage are joined by the conjunction 'and', it means that all must be present at the same time. To aid in imagining how these may be fulfilled, one may refer to what Anthony Leibler suggests as the meaning of these terms in the context of the 1977 Additional Protocol I to the Geneva Conventions, to wit:[92]

> (1) 'Widespread': encompassing at least an entire region of several hundred kilometres;
> (2) 'Long-term': lasting for at least several decades;
> (3) 'Severe': causing death, ill-health or loss of sustenance to thousands of people, at present or in the future[93]

[91] Ryan Gilman, Expanding Environmental Justice after War: The Need for Universal Jurisdiction over Environmental War Crime, 22 Colo. J. Int'l Envtl. L. & Pol'y 448, 453 (2011). Note, however, that the definition of the term 'severe' in other instruments, like the ENMOD, may show that human injury should still be taken into account.

[92] Freeland, supra, at 87 citing Anthony Leibler, Deliberate Wartime Environmental Damage: New Challenges for International Law, 23 California Western International Law Journal 67, 105-6 (1992).

[93] The ENMOD also defines these terms, but the application of the same are limited to cases falling under the ENMOD.

Further, to be punished under this provision, the principle of proportionality[94] must have been violated such that the "perpetrator must have known that the attack would cause death, injury, or damage to the natural environment, of a clearly excessive nature in relation to the military advantage sought."[95] The application of this customary norm of international law, in the context of *jus in bello* rules[96] such as this particular provision in the Rome Statute should also take into account considerations of effects to the environment.[97] This was confirmed by the International Court of Justice ("ICJ") in the case concerning Legality of the Threat or Use of Nuclear Weapons[98] when it stated that:[99]

> 30. (…)
>
> The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality. This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that: "Warfare is inherently destructive of

[94] Freeland, supra, at 150-158; Articles 51(5)(b) and 57(2)(a)(iii) of Additional Protocol I provide, in part, as follows:

> Article 51 – Protection of the civilian population
>
> 5. Among others, the following types of attacks are to be considered as indiscriminate: …
> (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
>
> Article 57 – Precautions in attack…
> 2. With respect to attacks, the following precautions shall be taken:
> (a) those who plan or decide upon an attack shall: …
> (iii) refrain from deciding to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

[95] Roberta Arnold, (iv) Intentionally launching an attack in the knowledge of its consequences to civilian or the natural environment, in Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article (2nd ed.) 339 (Otto Triffterer ed., 2008).
[96] See Additional Protocol I.
[97] Freeland, supra, at 155.
[98] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports.
[99] Id., para. 30-31.

> sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."
>
> 31. The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol 1 provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals. These are powerful constraints for al1 the States having subscribed to these provisions. (…)

In this relation, the notion that environmental destruction as part of this war crime is supported by a customary norm of international law was asserted by an ICRC study in this manner:[100]

> The use of methods or means of warfare that are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.

Thus, the specific reference to damage to the natural environment here clearly provides a basis to prosecute persons who cause environmental destruction. However, the difficulty of doing so is obvious. In any case, it will not be difficult to imagine a situation which may constitute this war crime. One recalls that Agent Orange, a lethal herbicide used by the United States in the Vietnam War,[101] was produced and supplied by Monsanto upon the alleged commissioning by the US military.[102]The ecological effect of the use of Agent Orange, used

[100] ICRC, Rule 45. Causing Serious Damage to the Natural Environment, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule45 (last accessed on 30 March 2017). Note that the ICRC interpretation of norms may be persuasive, but not authoritative, considering that such is not one of the sources of international law enumerated in the ICJ Statute.
[101] Euan Black, Makers of Agent Orange to be tried for 'warcrimes' by a people's tribunal, Current Affairs, Southeast Asia Globe (13 October 2016), http://sea-globe.com/monsanto-war-crimes/ (last accessed on 05 April 2017).
[102] Id.

within the military operation called 'Operation Ranch Hand', was explained by Dr. Gary G. Kohls in this informative manner:[103]

> Operation Ranch Hand had actually been in operation since 1961, mainly spraying its poisons on Vietnam's forests and crop land. The purpose of the operation was to defoliate trees and shrubs and kill food crops that were providing cover and food for the "enemy".
>
> Operation Ranch Hand consisted of spraying a variety of highly toxic polychlorinated herbicide solutions that contained a variety of chemicals that are known to be (in addition to killing plant life) human and animal mitochondrial toxins, immunotoxins, hormone disrupters, genotoxins, mutagens, teratogens, diabetogens and carcinogens that were manufactured by such amoral multinational corporate chemical giants like Monsanto, Dow Chemical, DuPont and Diamond Shamrock (now Valero Energy). All were eager war profiteers whose CEOs and share-holders somehow have always benefitted financially from America's wars.
>
> (…)
>
> Agent Orange was the most commonly used of a handful of color-coded herbicidal poisons that the USAF sprayed (and frequently re-sprayed) over rural Vietnam (and ultimately – and secretly – Laos and Cambodia). It was also used heavily over the perimeters of many of its military bases, the toxic carcinogenic and disease-inducing chemicals often splashing directly upon American soldiers. (…)
>
> The soil in and around some of the US and ARVN (Army of the Republic of Viet Nam) military bases continue to have extremely high levels of dioxin. The US military bases where the barrels of Agent Orange were off-loaded, stored and then pumped into the spray planes or "brown water" swift boats are especially contaminated, as were those guinea pig "atomic soldiers" who handled the chemicals. The Da Nang airbase today has dioxin contamination levels over 300 times higher than that which international agencies would recommend remediation. (…)

This description of the effect caused by the use of Agent Orange in the attack is widespread, considering the large area which was affected (arguably a significant portion of one country or more countries); long-term, as the environmental damage have lasted for more than fifty years already; and severe, which could be shown by the thousands of people,

[103] Id.

particularly infants and children, who are suffering disabilities caused by such a chemical. Thus, a prosecutor who will be able to gather enough evidence to present this case, and in the context of an international conflict, could actually succeed in prosecuting, under any of the applicable modes of responsibility, corporate agents of companies like Monsanto.

1.1.2. *The crime of pillaging*

Aside from this war crime, there are other provisions in Article 8 of the Rome Statute that may be used to prosecute acts involving environmental destruction. A war crime which has more association with corporations and their agents than the rest is that defined in Article 8(2)(b)(xvi):[104]

> (…)
>
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely any of the following acts:
>
> (…)
>
> (xvi) Pillaging a town or place, even when taken by assault;

The elements of this war crime are as follows:[105]

> 1. The perpetrator appropriated certain property.
> 2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
> 3. The appropriation was without consent of the owner.

[104] Rome Statute art. 8(2)(b)(xvi).
[105] Elements of Crimes art. 8(2)(b)(xvi).

> 4. The conduct took place in the context of and was associated with an international armed conflict.
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Andreas Zimmerman, while noting that there is no official definition of the concept of "pillage",[106] defines it in this way:[107]

> …the unauthorized appropriation or obtaining of property in order to confer possession of it on oneself or on a third party against the will of the rightful owner. Accordingly, the definition embraces acts of plundering, looting, and sacking.

Defining pillage as essentially "theft during war",[108] James Stewart explains that this theft or exploitation of natural resources is punished as a war crime because it continues to be one of the main sources of financing for the perpetration of armed violence,[109] such that

> the sale of natural resources within conflict zones has not only created perverse incentives for war, it has also furnished warring parties with the finances necessary to sustain some of the most brutal hostilities in recent history.[110]

In this context, the participation of corporations and business in the pillaging of natural resources and the trade in the pillaged resources are important parts of the chain of actions that fuel the continuation and even the commencement of a new armed conflict. Further, it is not difficult to imagine how pillaging natural resources destroys the natural environment. Pillaging,

[106] Andreas Zimmerman, (xiii) Prohibited destruction, Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article (2nd ed.) 409 (Otto Triffterer ed., 2008).
[107] Id.
[108] James G. Stewart, Prosecuting the Pillage of Natural Resources 10, https://www.opensocietyfoundations.org/reports/corporate-war-crimes-prosecuting-pillage-natural-resources (last accessed on 30 March 2017).
[109] Id.
[110] Id.

whether extractive or non-extractive disturbs the system by which the components of the environment sustain themselves.

One view advanced with respect to the war crime of pillage under this provision is that it excludes isolated incidents of pillage considering that the crimes that are under the jurisdiction of the ICC are those that are in the character of the 'the most serious crimes of concern to the international community as a whole.'[111] However, this bleak view can be balanced by the fact that there is no mention in the Rome Statute nor in the Elements of Crime of this limitation.[112] Thus, given that the prohibition appears to cover all types of properties,[113] which include components of the natural environment, and limited only by the principle of military necessity, it is not unreasonable to conclude that this could also be used to prosecute offenders such as corporate agents who take part in the activities that constitute elements of the crime of pillaging. This is particularly supported by the assessment that there is no restriction with respect to the addressee of this prohibition, meaning that both combatants and/or non-combatants or civilians may be punished under this provision.[114]

A case that discussed the duty of the state with respect to controlling its agents is that of Armed Activities on the Territory of the Congo[115] wherein the ICJ ruled that Uganda, which was the occupying power of the Ituri district in the Democratic Republic of Congo ("DRC"), violated its obligation, to wit:

> 246. The Court finds that there is sufficient evidence to support the DRC's claim that Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering and exploitation of the DRC's natural resources. As already noted, it is apparent that, despite instructions from the Ugandan President to ensure that such

[111] Zimmerman, supra, at 409.
[112] Id.
[113] Id.
[114] Id., at 410.
[115] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168.

> misconduct by UPDF troops cease, and despite assurances from General Kazini that he would take matters in hand, no action was taken by General Kazini and no verification was made by the Ugandan Government that orders were being followed up (see paragraphs 238-239 above). In particular the Court observes that the Porter Commission stated in its Report that "[t]he picture that emerges is that of a deliberate and persistent indiscipline by commanders in the field, tolerated, even encouraged and covered by General Kazini, as shown by the incompetence or total lack of inquiry and failure to deal effectively with breaches of discipline at senior levels". (Also of relevance in the Porter Commission Report are paragraphs 13.1 "UPDF Officers conducting business", 13.5 "Smuggling" and 14.5 "Allegations against General Kazini"). It follows that by this failure to act Uganda violated its international obligations, thereby incurring its international responsibility. In any event, whatever measures had been taken by its authorities, Uganda's responsibility was nonetheless engaged by the fact that the unlawful acts had been committed by members of its armed forces (see paragraph 214 above).[116]

There is a criticism that the element of "private or personal use" limits the application of this provision in the protection of the environment during war time as it excludes the intention to destroy enemy property.[117] However, this is a positive assessment for the prosecution of corporate agents who, in acting for corporations, naturally aim to contribute in the pillaging for the private or personal use of these resources. This can be seen in situations of an international conflict wherein a state, which has gained control over an area of another, allows its corporate financiers, at the direction and determination of its directors or executives, to exhaust the area of its natural resources and similar properties, as a reward for its financial and other tactical support in the conduct of the hostilities.

[116] Id., para. 246; citations omitted.
[117] Aurelie Lopez, Criminal Liability for Environmental Damage Occurring In Times of International Armed Conflict: Rights and Remedies, 18 Fordham Environmental Law Review 231 (2006-2007).

1.1.3. *Environmental destruction in other war crimes within an international armed conflict*

Within the context of an international armed conflict, another provision which appears to punish environmental destruction is that of Article 8(2)(a)(iv):[118]

> (…)
>
> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> …
>
> (iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (…)

For a finding that this war crime has been committed, the following elements must be established:[119]

> 1. The perpetrator destroyed or appropriated certain property.
> 2. The destruction or appropriation was not justified by military necessity.
> 3. The destruction or appropriation was extensive and carried out wantonly.

The property referred to in this provision does not simply refer to any type of property, but those which are protected under the Geneva Conventions of 1949.[120] This particular construction limits the space of including causing damage to the environment as one of the acts

[118] Rome Statute art. 8(2)(a)(iv).
[119] Elements of Crimes art. 8(2)(a)(iv): War crime of destruction and appropriation of property.
[120] Knut Dorrman, (iv) "Extensive destruction and appropriation of property", in Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article (2nd ed.) 312 (Otto Triffterer ed., 2008).

covered by this war crime. However, there is room to argue this point when taken in light of Article 53 of Fourth Geneva Convention[121] which provides as follows:

> Any destruction by the Occupying Power or real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.[122]

Under this provision, one can make the argument that the damage to the environment, particularly an area or a natural resource that is specific and delimited, constitutes the real or personal property referred to. However, this is still a very narrow space and the difficulty of establishing the elements renders it unlikely that accountability for environmental destruction could be pursued here.

Further, the difficulty of exacting accountability under this provision is made even more so by the principle of military necessity,[123] as articulated in the second element of this war crime. This difficulty stems from how international criminal law courts have traditionally viewed and assessed military necessity. For example, in the case of *US v. List*,[124] otherwise known as the *Hostages Case*, the act of Lothar Rendulic, the commander-in-chief of the German troops in Norway in ordering and executing a 'scorched earth policy' which destroyed shelters and mean of subsistence which included parts of the natural environment,[125] was not deemed criminal by the United States Military Tribunal in Nuremberg which explained that:[126]

[121] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, http://www.refworld.org/docid/3ae6b36d2.html (last accessed on 05 April 2017).
[122] Fourth Geneva Convention art. 53.
[123] International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, http://www.refworld.org/docid/4374cae64.html (last accessed on 05 April 2017).
[124] The Hostages Trial (Trial of Wilhelm List and Others), United States Military Tribunal, Nuremberg, *The United Nations War Crimes Commission, Law Reports of Trials of War Criminals*, vol. VIII, 1949, pp. 34-76.
[125] Dupuy and Vinuales, supra, at 348 citing Hostage Case (US v. List), 11 TWC 759 (1950).
[126] Supra note 124.

> The evidence shows that the Russians had very excellent troops in pursuit of the Germans. Two or three land routes were open to them as well as landings by sea behind the German lines. The defendant knew that ships were available to the Russians to make these landings and that the land routes were available to them. The information obtained concerning the intentions of the Russians was limited. The extreme cold and the short days made air reconnaissance almost impossible. It was with this situation confronting him that he carried out the' scorched earth ' policy in the Norwegian province of Finnmark which provided the basis for this charge of the indictment.
>
> (…)
>
> There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But We are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist.[127]

Considering the difficulty of using this preceding provision as basis of a charge, it would be helpful to examine whether such a space can be found under Article 8(2)(b)(ii) which provides:[128]

> (b) Other serious violations of laws and customs applicable in international armed conflict, within the established framework of international law, namely any of the following acts:
>
> (…)
>
> (iii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (…)

[127] Dupuy and Vinuales, supra, at 348.
[128] Rome Statute art. 8(2)(b)(ii).

The elements of this war crime are as follows:[129]

> 1. The perpetrator directed an attack.
> 2. The object of the attack was civilian objects, that is objects which are not military objectives.
> 3. The perpetrator intended such civilian objects to be the object of the attack.

This is a broader provision in the sense that it does specifically refer to property protected under a specific treaty, but dwells from provisions from the whole corpus of 'laws and customs in international armed conflict.'[130] Thus, there is no requirement to satisfy the specific requirements in the treaty. Further, there is yet no clear definition on what constitutes 'civilian objects.' Given the flexibility of the concept, it can be argued that the environment or a portion of it can be construed as constituting a civilian object. This interpretation would be supported by the International Committee of the Red Cross' ("ICRC") draft 'Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict',[131] which provides, in part, as follows:

> (8) Destruction of the environment not justified by military necessity violates international humanitarian law…
>
> (9) The general prohibition to destroy civilian objects, unless such destruction is justified by military necessity, also protects the environment

From this material, it can be seen that there is a view that civilian objects can encompass the environment and that the destruction of the latter is deemed a destruction of the former which could be assessed as a violation of international humanitarian law. Together with the ICRC Study, various scholars have concluded that the natural environment is to be considered

[129] Elements of Crimes art. 8(2)(b)(ii): War crime of attacking civilian objects.
[130] Dorrman, supra, at 328.
[131] ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (30 April 1996), https://www.icrc.org/eng/resources/documents/article/other/57jn38.htm (last accessed on 30 March 2017).

as a civilian object.[132] However, this is countered by those who point out that it is precisely the 'nebulous character' of the natural environment that makes it difficult to be considered as a civilian object *per se*.[133]

The basic principle underpinning this war crime is the principle of distinction which is particularly pointed out in the second element with respect to civilian objects and military objectives. The content of this principle was earlier codified in Article 52 of General Protocol I[134] which states that:

> Article 52 – General protection of civilian objects
>
> 1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
>
> 2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[135]

As argued above, there is some space to advance the reasoning that the destruction of the natural environment as a civilian object may be covered by this provision. However, the principle of distinction does not help in supporting a regime of exacting accountability for environmental destruction under this provision because the broad definition of what a 'military objective' means that the natural environment may still be covered considering that the same may actually constitute an object which by its "nature, location, purpose or use, make an

[132] Freeland, supra, at. 141-149.
[133] Id.
[134] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, http://www.refworld.org/docid/3ae6b36b4.html (last accessed on 05 April 2017).
[135] Protocol I, art. 52.

effective contribution to military action." In any case, one can still make the argument and find support in this pronouncement in the the *NATO* Case:[136]

> Even when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure and natural environment with a consequential adverse effect on the civilian population.[137]

Another provision in the Rome Statute that would allow the prosecution of actor who destroys the environment is Article 8(2)(b)(v).[138] It punishes the following act:

> (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (…)

The elements of this war crime are as follows:[139]

> 1. The perpetrator attacked one or more towns, villages, dwellings or buildings.
> 2. Such towns, villages, dwellings or buildings were open for unresisted occupation.
> 3. Such towns, villages, dwellings or buildings did not constitute military objectives.
> 4. The conduct took place in the context of and was associated with an international armed conflict.
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

A reading of this provision allows one to think that the destruction of towns and villages would also mean the destruction of the natural of environment that form part thereof. Hence, such a war crime is included in this list. A situation like this may involve corporations who manufacture and supply ammunition to the combatants, or more directly, when the aggressor

[136] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (13 June 2000), http://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal (last accessed on 05 April 2017), as cited in Dupuy & Vinuales, supra, at 348.
[137] Id.
[138] Rome Statute art. 8(2)(b)(v).
[139] Elements of Crimes art. 8(2)(b)(v): War crime of attacking undefended places.

makes use of a private security company to reinforce its military, and such employees or corporate agents of the private security entity participate in the attack or bombardment.

On top of these provisions, Article 8(2)(b)(xiii) may also provide a leeway for prosecution when it includes, as a war crime:[140]

> (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; (…)

The elements of this war crime are:[141]

1. The perpetrator destroyed or seized a certain property.
2. Such property was property of a hostile party.
3. Such property was protected from that destruction or seizure under the internal law of armed conflict.
4. The perpetrator was aware of the factual circumstances that established the status of the property.
5. The destruction or seizure was not justified by military necessity.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of armed conflict.

The crucial element under this provision is the characterization of the term 'enemy property'. There is less difficulty in satisfying the requirement that the property be owned by the enemy or by a hostile party considering that any part of the natural environment or natural resource within the territory of an enemy, as defined in *jus in bello*, can considered as such. It is argued that it the concept more difficult to define is "property" which is not qualified under the said provision.[142] The debate regarding this concept is focused on whether property here means private property or government property, as such distinction is made under the 1907

[140] Rome Statute, art. 8(2)(b)(xiii).
[141] Elements of Crimes art. 8(2)(b)(xiii): War crime of destroying or seizing the enemy's property.
[142] Zimmerman, supra, at 398.

Hague Convention Respecting the Laws and Custom of War on Land.[143] Considering the absence of any definition with respect to property, there is, again, room to argue that includes the natural environment, which under this provision, should not be destroyed or seized.

Another set of war crimes which involve acts that, when committed, result in environmental destruction are those provided for in Articles 8(2)(b)(xvii) [144] and 8(2)(b)(xviii)[145] as follows:

> (xvii) Employing poison or poisoned weapons;[146]
>
> (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;[147]

The prohibition on the use of the weapons in warfare traces back to the 1863 Lieber Code[148] which provided that:

[143] Supra note 123.
[144] Rome Statute art. 8(2)(b)(xvii).
[145] Rome Statute art. 8(2)(b)(xviii).
[146] The elements of this crime are as follows:

> 1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
> 2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.
> 3. The conduct took place in the context of and was associated with an international armed conflict.
> 4. The perpetrator was aware of factual circumstances that established the existence of armed conflict.

[147] The elements of this crime are as follows:

> 1. The perpetrator employed a gas or other analogous substance of device.
> 2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.
> 3. The conduct took place in the context of and was associated with an international armed conflict.
> 4. The perpetrator was aware of factual circumstances that established the existence of armed conflict.

[148] Instructions for the Government of Armies of the United States in the Field, General Order No. 100, https://ihl-databases.icrc.org/ihl/INTRO/110 (last accessed on 05 April 2017).

> [t]he use of posion in any manner, be it to poison wells, or food, or arms is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.[149]

It is easy to imagine how the weapons which may involved, particularly chemical and toxic ones, would clearly damage the environment, with harmful and devastating effects lasting for many years. However, an examination of the Elements of Crimes reveals that destruction of the natural environment is not exactly the target of this provision. The second element of Article 8(2)(b)(xvii) describes a "substance" that "causes death or damage to health in the ordinary course of events, through its toxic properties." The "health" that is referred to here is that of human health, which means that threats to health of plants and animals are excluded. However, an argument can be made as to causation, in the sense that when the damage to the environment proximately causes the harm to the health of the human being, it could potentially be covered under this provision.

With respect to Article 8(2)(b)(xviii), one can find guidance on The 1925 Geneva Protocol[150] to argue that includes some protection to the environment, particularly flora and fauna when it provides a prohibition on the use of:

> (a) Any chemical agents of warfare – chemical substances, whether gaseous, liquid, or solid – which might be employed because of their direct toxic effects on man, animals or plants…[151]

[149] Lieber Code art. 70.
[150] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, entered into force on 08 February 1928, (1925) 94 LNTS 65.
[151] Id.

However, the same comment on Article 8(2)(b)(xvii) can be made in this provisions considering that its second element similarly speaks of a "gas, substance, or device" that "causes death or serious damage to health",[152] referring to human health.

1.2. *War crimes in non-international armed conflicts and environmental destruction*

At this point, we proceed to an examination of the provisions applicable to an armed conflict not of an international character.

In examining the relevance of these provisions to the punishment of environmental destruction, it is first pointed out that there is a similar provision on the prohibition of pillaging under Article 8(2)(e)(v) and the discussion above applies herein. It is worth noting, however, that this crime does not appear to be subjected to military necessity exception. In this respect, a prosecution for pillage under this provision would lead to the ICC to a consideration of the International Criminal Tribunal for the former Yugoslavia's ("ICTY") pronouncement in *Prosecutor v. Hadzihasanovic* [153] as follows:

> 53. The Chamber is of the view that, in the context of an actual or looming famine, a state of necessity may be an exception to the prohibition on the appropriation of public or private property. Property that can be appropriated in a state of necessity includes mostly food, which may be eaten in situ, but also livestock. To plead a defence of necessity and for it to succeed, the following conditions must be met: (i) there must be a real and imminent threat of severe and irreparable harm to life existence; (ii) the acts of plunder must have been the only means to avoid the aforesaid harm; (iii) the acts of plunder were not disproportionate and, (iv) the situation was not voluntarily brought about by the perpetrator himself.[154]

[152] Zimmerman, supra, at 398.
[153] *Prosecutor v. Hadzihasanovic and Kubura (Appeal Judgment)*, IT-01-47-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 April 2008, http://www.refworld.org/cases,ICTY,48aaefec2.html (last accessed on 05 April 2017).
[154] Id.

In this regard, Tara Smith assesses further that:[155]

> Pillage as an international crime has the potential to pierce the corporate veil to hold senior members of multi-national corporations criminally responsible for natural resource exploitation in non-international armed conflict.

Further, Article 8(2)(e)(xii) which punishes the destruction and seizure of property of an adversary subject to the principle of military necessity,[156] Article 8(2)(e)(xiii) which prohibits the employment of poison or poisoned weapon;[157] and Article 8(2)(e)(xiv) which penalizes the employment of asphyxiating, poisonous or other gases, and all analogous liquids, materials, or devices[158] are mirror provisions that apply in non-international armed conflicts.

1.3. *Potential prosecution under the war crimes regime*

Having surveyed these war crimes, one may assess that Article 8(2)(b)(iv) clearly provides for a basis to charge any perpetrator for a crime that involves environmental destruction. The war crime is explicit in making punishable acts which cause excessive damage to the natural environment. Further, it is arguable that there is less emphasis on human suffering and that this war crime is actually eco-centric, such that it would be less difficult to create a theory of accountability for crimes involving environmental destruction within the Rome Statute.[159] However, as noted above, the difficulty lies in the high bar set by the elements of

[155] Smith, supra, at 194.
[156] Rome Statute art. 8(2)(e)(xii).
[157] Rome Statute art. 8(2)(e)(xiii).
[158] Rome Statute art. 8(2)(e)(xiv).
[159] Gilman, supra.

the crime itself. In the same vein, it is noticeable that space can be located for the prosecution of environmental in the other war crimes discussed because of the ambiguity of the concepts and some of the elements included to establish the crime. This means that the ICC Prosecutor can marshal the facts and relevant principles of international criminal law to present a case that would convince the ICC that the specific situation actually constitutes a war crime under any of the relevant provisions. However, the enemy of this room for creativity is the principle of legality and the strict interpretation of ambiguous provisions in favour of the accused. Given these difficulties in the area of war crimes, this thesis proceeds to examine the other Rome Statute crimes.

2. *Crimes involving environmental destruction outside an armed conflict situation*

Aside from the war crimes defined under the Rome Statute, the provisions on the core crimes of 'genocide' and 'crimes against humanity' must be examined in order to locate further spaces for environmental destruction to be punished. The crime of aggression under Article 8 *bis* of the Rome Statute is not discussed herein because of the substantial limitation in the *chapeau* of the provision that renders liable only those persons "in a position effectively to exercise control over or to direct the political or military action of the State."[160] This makes it extremely difficult, if not impossible, for the prosecution of a corporate agent to satisfy such a requirement.

[160] Rome Statute art. 8 *bis*.

2.1. *The crime of genocide*

This thesis continues the examination with Article 6 of the Rome Statute which punishes the crime of genocide as follows:

> Article 6
> Genocide
>
> For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

From this list of acts, it is discernable that environmental destruction would be involved in acts that "[d]eliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part." In this regard, Aurelie Lopez suggests that[161]

> article 6(c) of the Rome Statute could provide the means to punish "environmental cleansing" which can be defined as the "deliberate manipulation and misuse of the environment so as to subordinate groups based on characteristics such as race, ethnicity, nationality, religion and so forth.[162]

This reinforced the argument made by Carl Bruch that the destruction of areas where

[161] Lopez, supra, at. 263.
[162] Id.

indigenous peoples reside, and on which environment their culture, customs, and survival depend, may be considered as genocide.[163] In making this argument, Bruch uses the example of the petition filed, in 1990, by the Sierra Club Defense Legal Fund, and the Ecuadorian NGO *Confederacion de Nacionalidades Indigenas de la Amazonia Ecuatorina* (CONFENIAE), before the Inter-American Commission on Human Rights (IACHR)[164] alleging, primarily that "oil exploration and development in the Ecuadorian Amazon would devastate the environment and lead to ethnocide of indigenous peoples living in the region."[165] While the IACHR did not formally recognize the petition, it conducted an investigation in the region and, in 1997, issued a report that, although did not address the issue of genocide squarely,[166]

> highlighted potential violations of fundamental human rights arising from oil exploration and development that over the previous twenty-five years had discharged more than 30 billion gallons of toxic wastes (including produced water wastes) and crude oil into the waterways and onto the land.[167]

A more optimistic take on the matter was expressed by Tara Weinsten who used the case of the March Arabs, and pointed out that the same had been considered as genocide by various sectors.[168] Weinstein summarized this case as follows:[169]

> Specifically, in regard to the environment, the marshes were drained as part of a systematic effort to "deliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part." Legal scholars have recognized that environmental destruction "particularly directed to areas on which indigenous peoples depend for their survival could be tantamount to genocide." By building the "third river," as well as four other drainage canals that served to direct the Tigris and Euphrates away from the marshes, the Iraqi regime inflicted on the Marsh Arabs conditions that led to their displacement and the destruction of their existence. The reed beds were

[163] Carl E. Bruch, 'All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict', 25 Vermont Law Review 695, 727 (2000-2001).
[164] Bruch, supra, at 727.
[165] Id.
[166] Id., at 728.
[167] Id.; citations omitted.
[168] Tara Weinstein, 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?', 17 Georgetown International Environmental Law Review 697, 714 (2004-2005).
[169] Weinstein, supra, at 717.

> burned or destroyed by defoliants while pollutants depleted the fish populations. As the marshes dried, the residents were denied fresh water, nutritious fish, vital reed beds to build shelter, boats, and design handicrafts for sale, and trade routes to sell their handicrafts, and as a result, suffered from starvation, cholera, and other diseases.' The Marsh Arabs were cut off from the natural resources of their marshes and were either forced to resettle or flee (often in fear for their lives).
>
> According to the U.S. State Department, "the draining of the marshes has led to the destruction of the Marsh Arabs' self-sufficient economy, the near-complete atrophy of the entire ecosystem, and the flight of tens of thousands of refugees, including 95,000 to a camp in Iran."" The vast majority of Marsh Arabs are now dispersed throughout Iraq and Iran, and their existence in the marshes has been essentially destroyed.

Despite the cases that provide hope for the possibility of charging corporate agents for committing the crime of genocide, it remains that the primary hurdle in the prosecution of this crime is the *dolos specialis* or the special genocidal intent specified, as the third element, thus: "[t]he perpetrator intended to destroy, in whole or in part, that national, ethnical, racial, or religious group as such."[170] If this intent is present and proved, and coupled with the *actus reus* of the deliberate infliction of the conditions specified in the elements of the crime, it can easily be perceived that such will include destroying the natural environment which, more often than not, is the source of livelihood or peoples' basic "conditions of life" that enable them to survive. However, this intent is difficult to prove, and it constitutes to high a threshold that the evidence gathering to prove such an intent would be to gargantuan a task. This difficulty would essentially defeat the purpose of prosecuting the environmental destruction as too long a time would have passed before the proceedings may even be initiated. What these points show, for genocide at least, is that, holistically, it may be possible to imagine more situations as constituting genocide. However, with respect to the satisfaction of the legal requirements, particularly the genocidal intent, the application will be severely constrained.

[170] Elements of Crimes art. 6.

2.2. *The crime of 'crimes against humanity'*

The high *mens rea* requirement in genocide is not present in crimes against humanity. Article 7 of the Rome Statute provides that:[171]

> Article 7
> Crimes against humanity
>
> 1. For the purpose of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The nature of the crimes that may consist in a crime against humanity reveals two broad features of the concept of "crimes against humanity".[172] The first feature looks into the crime as so heinous such that it is viewed as an attack on the very quality of being human.[173] This heinous character of the crime also leads to the second feature that sees it as an attack not just

[171] Rome Statute art. 7.
[172] Sean Murphy, *First report on crimes against humanity*, in International Law Commission sixty-seventh session 13, http://legal.un.org/docs/?symbol=A/CN.4/680 (last accessed on 09 December 2016).
[173] Id.

upon the immediate victims, but also against all humanity, and hence the entire community of humankind has an interest in imposing punitive sanction on those who perpetrate it.[174]

In connection with environmental destruction, Bruch advances the theory that "crimes against humanity could include widespread or systematic attacks that are made in a discriminatory manner on drinking water, food sources, and other environmental components directly affecting the life and physical well-being of a population."[175] According to him, one can imagine a scenario wherein **"**armed and paramilitary forces [poison] wells in a systematic attempt to remove a civilian population of a particular ethnicity or religion from an area."[176]

Further, Tara Weinstein cites the provision on "[o]ther inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health" as a possible space whereby acts could involve environmental destruction.[177] However, a prosecution under this charge requires the showing that the crime is of a "similar level of gravity" as the other enumerated crimes.[178] She theorizes that, the environmental destruction can be characterized as inhumane and as causing indignity to persons, similar to how the International Criminal Tribunal for Rwanda ("ICTR"), in Prosecutor v. Akayesu, "found the forced undressing of women a 'crime of similar gravity' because of the indignity forced on the women".[179] In the same vein, Weinstein argues that

> (…) by draining the marshes, Hussein deprived the Marsh Arabs not only of their dignity but also of their livelihood, as well as their culture itself. As a result of the draining of the marshes, the water became polluted and crusted with salt, which, in turn, limited drinking water and the ability to obtain food. The reed beds, fish stocks, and buffalo populations were also depleted such that the Marsh Arabs were no longer able to sustain their ancient way of living, leading

[174] Id.
[175] Bruch, supra, at 729.
[176] Id.
[177] Weinstein, supra, at 720; citations omitted.
[178] Id.
[179] Id.

> to the end of the Marsh Arab existence in the marshes. This suffering caused by the environmental attack is sufficient to fall under Article 12.
>
> To prove a crime against humanity, a prosecutor must also show that the attack was widespread, systematic, or pursuant to a State policy. As described above, various documents and letters found during the Kurdish rebellion indicate a specific plan to rid the marshlands of their residents. Pursuant to this policy approved by Hussein, Iraqi officials built rivers and canals between and around the Euphrates and Tigris to direct the water away from the area and dry out the ancient marshes. The cumulative effect of the draining over the ten-year period' was the destruction of the marshes and the Marsh Arabs.[180]

To reiterate, what clears the way for environmental destruction to be considered as forming part of crimes against humanity as a Rome Statute crime is the absence of a requirement to satisfy the challenging element of genocidal intent.[181] Nevertheless, there is still a hurdle because any "environmental damage which results in extermination, persecution, forcible transfer or other inhumane acts still remains subject to the *mens rea* requirement that the act be committed with the knowledge that it amounts to a widespread and systematic attack on the civilian population."[182] The advantage, though, is that this requirement is less stringent than genocidal intent as far as environmental damage is concerned because of the supposition that "if the foreseeable result of state, individual, or organizational action is to cause severe environmental degradation that destroys or harms civilians, a policy to continue such conduct may be deemed a policy to carry out that action – or "attack" as deemed by the [ICC] Statute."[183]

Within the crime itself, as defined in the Rome Statute, environmental destruction can be located in the definition of extermination which

> includes the intentional infliction of conditions of life, inter alia the deprivation

[180] Id., at 720-721.
[181] Murphy, supra, at 51.
[182] Id.
[183] Id.

> of access to food and medicine, calculated to bring about the destruction of part of a population.[184]

Further, Article 7(1)(d) which punishes and defines 'deportation or forcible transfer of population as

> Forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without ground permitted under international law

Under this paradigm, the example of the situation in South Sudan "where the water supply and land of communities were targeted to force their exodus in order to allow oil companies to take advantage of the natural resources" is illustrative.[185]

Another provision which could capture environmental destruction is Article 7(1)(h) which punishes persecution defined in Article 7(1)(g) as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or the collectivity." In this area, an organization or corporation engaged in the business of extracting oil and other minerals can do so with the intention of depriving the the local population of such resources and the general benefits of the natural environment within which the live. A specific example would be companies building pipelines in areas that are closely linked to the identity of a group, and that such building is excessive and disruptive that the local group or indigenous peoples are deprived of their only source of subsistence.

Finally, a catch-all provision in Article 7(1)(k) could also be used to punish these acts. Similarly, the great suffering included herein may contemplate a situation of corporations, acting in collusion with other hostile parties, destroying the natural environment to deprive

[184] Rome Statute art. 7(2).
[185] Smith, supra, at. 184.

persons of sources of subsistence and, in specific cases, pollute the waters and other areas that would cause extreme pain and suffering to the persons. Such scenario, of course, uses environmental destruction as a means to commit a crime against humanity.

2.3. *Spaces and borders under the crimes of genocide and crimes against humanity*

A look at the elements and the principles relevant to the crime of genocide and crimes against humanity would show that the absence of the requirement for an armed conflict gives the ICC prosecutor to imagine more current situations of corporations, whether colluding with states or acting on their own, which cause damage to the environment and suffering, even death, to people as falling under these Rome Statute crimes. However, this stringent requirement in war crimes is replaced by similarly strict elements in these two crimes, such as the intent requirement for genocide, and the widespread or systematic attack element for crimes against humanity. Nevertheless, it is argued that a situation is more likely to fall under any of these two crimes than in a war crime which specifically requires the context of an armed conflict.

Chapter 3. Linking Corporate Activity and the Core Crimes

History has shown us many instances that corporations, in the pursuit of their commercial and profit-seeking objectives, have contributed to, or participated in the commission of acts that constitute elements of Rome Statute crimes. Even taking into consideration that corporations have taken more steps to address actions that negatively impact the environment, it still remains that they are profit-seeking entities that, when confronted with a choice between gaining more profits and protecting the environment, would still decide in favor of the former. This motivation influences the decisions that corporate agents make, and often push them to knowingly commit acts that involve environmental destruction.

1. *Is there corporate criminal liability under the Rome Statute?*

The possible consequences of these acts often get ignored, particularly since, in the first place, it is difficult to prosecute corporate agents, let alone bring corporations before international criminal tribunals which do not have jurisdiction over them. This is not to say, however, that corporate complicity has not been recognized. In fact, in the negotiations leading to the establishment of the ICC through the Rome Statute, there was a proposal in the draft articles for the ICC to have jurisdiction over legal persons, i.e. corporations "committing or complicit in international crimes, 'whose concrete, real or dominant objective is seeking private profit or benefit'."[186]

Antony Anghie and B.S. Chimni, both scholars from the school of thought of the Third

[186] Joanna Kyriakakis, Corporations before International Criminal Courts: Implications for the International Criminal Justice Project, citing Working Paper on Article 23, Paragraphs 5 and 6, UN Doc A/CONF.183/C.I/WGGP/I.5/Rev. 2 (03 July 1998).

World Approaches to International Law articulate an important point that serves as an imperative to extend jurisdiction over corporations, particularly transnational ones.[187] They assert that current international criminal law practice of "individuating criminal responsibility for internal conflicts"[188] as "divorced from the global economic forces that structure local conditions of violence."[189]

This criticism, when coupled with the assertion that, in fact, the first sub-norm of international criminal law on the prohibition of conduct also applies to legal person, even though they may not be punished for it,[190] strengthens the proposal to extend the jurisdiction of the ICC over corporations which participate in the commission of any of the core crimes. In the end, however, the proposal to include such a provision in the Rome Statute did not succeed.[191] The proposal did not get enough votes to be included in the Rome Statute mainly because of the resistance of the State Parties who come from legal families that find the philosophy of criminal liability as inconsistent with the personality of a corporation which is only created by legal fiction. Since a legal entity like a corporation can only act through agents, the idea of corporate criminal liability is incompatible with the basic principle that criminal liability is personal in nature, particularly since most crimes require a particular *mens rea* as an element.

[187] Id., at 230.
[188] Id.
[189] Id., at 230-231.
[190] Volker Nerlich, Core Crimes and Transnational Business Corporation, 8(3) J Int Criminal Justice (2010) 895-908, 899 (2010).
[191] Kyriakakis, supra, at 222.

2. *Jurisdiction ratione personae and the agency of corporate representatives*

Thus, the traditional principle of individual and personal criminal responsibility was reinforced in Article 25 which states that the ICC only has jurisdiction *ratione personae* such only natural persons may held criminally liable under the Rome Statute.[192]

This limitation is the anchor of this thesis' task to exact accountability from corporations, albeit indirectly, through an inquiry on whether, at the basic level, their corporate agents may potentially be prosecuted at the ICC for acts that such agents commit in behalf of their principals – the corporations.

It is a basic idea in corporate law that corporations are persons created through legal fiction, and that they act through agents who are natural persons. Black's Law Dictionary defines an 'agent' as "one who is authorized to act for or in place of another."[193] More particularly, a 'corporate agent' is "[a]n agent authorized to act on behalf of a corporation; broadly, all employees and officers who have the power to bind the corporation."[194] In corporate law parlance, and for the purpose of this thesis, the corporate agents who can bind the corporation are the directors, who are tasked by the corporate constitutive documents to make the major decisions in the corporation, as well as the officers and employees to execute the policies made by the directors, and are often given some leeway to make decisions in the day-to-day operations of the corporation.

This concept of agency on the part of corporate representatives such as directors, officers, and employees, as well as the basic principles of international criminal law, provide the foundation for the traditional means of prosecuting corporations by "indict[ing] corporate

[192] Rome Statute, art. 25.
[193] Black's Law Dictionary (9th ed., 2009).
[194] Id.

representatives in an individual capacity for acts committed in the course of business operations."[195]

3. *May corporate agents be held liable under international criminal law?*

With respect to the liability of corporate agents, as private individuals, for international crimes, Stewart recalls that cases before international criminal law tribunals have already settled this point, thus:[196]

> The liability of civilians for war crimes was made clear after World War Two, when the Nuremberg Tribunal stated that "[i]nternational law... binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual."
>
> (…)
>
> A vast body of jurisprudence confirms that this reasoning is equally applicable to individual corporate representatives acting in a commercial capacity. After World War Two, the Nuremberg Judgment's conclusion that crimes against international law "are committed by men, not by abstract entities," was deployed to ensure that the corporate structure did not shield business representatives from individual criminal liability.[197]

While the focus of these statements are with respect to the inability of the corporate structure to shield industrialists and corporate agents from prosecution, these post World-War II cases also illustrate how the corporate agents are indicted based on the decisions they make and actions they take to advance corporate interests.

[195] Supra note 5.
[196] Stewart, supra, at 76.
[197] Id.

For example, Kyle Rex Jacobson summarized the role of corporate roles of the individual defendants in the *IG Farben* case, which was examined by the tribunal in the determination of the culpability for plunder and spoliation:

> In determining individual responsibility, the tribunal looked at the positions held in the company when the crimes were committed. The Farben defendants had differing responsibilities within the firm. Some were members of the company's *aufsichtsrat*, an entity much like a supervisory board of directors not involved in day-to-day administration; others were members of the *vorstand*, a group whose members actually managed the company. These *vorstand members* in turn managed different specific activities of the company. For example, each major Farben unit was usually personally supervised by an individual member of the Vorstand.[198]

In the Farben tribunal's assessment, the actions committed by the Farben defendants were similar to what the illegal plundering and pillaging that the German state agents did, and that such actions "included a 'studied design' to take property in order to build Farben a 'chemical empire through the medium of the military occupancy at the expense of the former owners."[199] This is the same case that charged corporate agents with the crime of mass murder for supplying poisonous gas used in the concentration camps.[200] Although, in the end, the defendants were not convicted on this count, the basis for the acquittal was the lack of sufficient knowledge that the poisonous gas would be sued to kill persons, and not a legal impossibility to convict corporate agents for mass murder, which now constitutes one of the acts punishable as a crime against humanity. It is noteworthy that this possibility is relevant considering that the supply of such poisonous gas, if used in an open area, could have easily made contact with the natural environment and destroy a significant portion of it.

[198] Kyle Rex Jacobson, Doing Business with the Devil: the Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes against Humanity, 56 *The Air Force Law Review* 167-231; 183 (2005); citations omitted.
[199] Id.
[200] Id., at 185.

Similarly, in the Krupp case, the corporate agents' roles within the corporate structure were explained, thus:[201]

> The lead defendant was Alfried Krupp, the "sole owner, proprietor, [and] active and directing head" of the company,'" the commercial purpose of which was the production of metals, particularly steel and iron, the mining or other acquisition of the raw materials for these metals, and the processing of these metals into war materials, including ships and tanks."* Similar to the Farben company, the Krupp company was governed principally by the *vorstand,* and individual members of the Krupp *vorstand* were personally involved in one or more subsidiaries. The Krupp *vorstand,* however, coordinated closely on the firm' s major undertakings.[202]

In this case, Alfred Krupp was convicted of plunder and spoliation, and together with those of the other defendants whose actions the tribunal referred to as the division of spoils.[203]

There are more examples of corporate participation in the commission of the the core crimes punished under the Rome Statute. In the case of *The Prosecutor v. Nahimana, Barayagwiza and Ngeze,* [204] the ICTR convicted Ferdinand Nahimana and Jean-Bosco Barayagwiza, founders and employees of the 'commercial broadcasting facility' [205] *Radio Télévision Libre des Mille Collines* , of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide and persecution and extermination as crimes against humanity for broadcasting hate-filled messages that "brand[ed] Tutsis as the enemy and Hutu opposition members as accomplices."[206] Notably, this case illustrates how corporate agents who, in the exercise of functions which they argued to be within their prerogatives as decision-makers in a media company.

[201] Id., at 186.
[202] Id.
[203] Id.
[204] *Prosecutor v. Barayagwiza et al.*, Case No. ICTR-99-52-T, Judgment and Sentence, (December 3, 2003).
[205] Stewart, supra, at. 78.
[206] See Sophia Kagan, The "Media case" before the Rwanda Tribunal: The Nahimana et al. Appeal Judgement (24 April 2008), http://www.haguejusticeportal.net/index.php?id=9166 (last accessed on 30 March 2017).

These cases illustrate how corporate agents used the corporate vehicle in participating in the commission of Rome Statute crimes. They also, however, emphasize the basic rule in international criminal law that only natural persons may be held criminally liable. In this regard, Doug Cassel aptly states that corporate agents, as human beings, are no less subject to international criminal law than are other individuals.[207]

4. *Modes of liability for corporate agents under the Rome Statute*

In inquiring whether corporate agents can be prosecuted for crimes involving environmental destruction discussed in Chapter 2, it is appropriate recognize that there is an issue with respect to the "remoteness of the participation of corporate agents, particularly since their actions are "physically, structurally and/or causally distant from the physical perpetrator(s) of the crimes."[208] The literature, however, provides us with the view that direct participation in the crimes is not necessary to establish the criminal liability of corporate officers and managers.[209] This theory of "intermediate responsibility" may be used to argue for the potential prosecution of corporate agents in at least three ways.

4.1. *Command responsibility*

First, there is a theory of command responsibility that the ICC Prosecutor may use to prosecute a corporate agent, particularly an executive or a superior, with respect to acts that

[207] Doug Cassel, Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, 6 Nw. J. Int'l Hum. Rts. 304, 306 (2008).
[208] Norman Farrell, Attributing Criminal Liability to Corporate Actors some Lessons from the International Tribunals, 8(3) *Journal of International Criminal Justice* 876 (2010).
[209] Julia Graff, Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo, American University Washington College of Law, https://www.wcl.american.edu/hrbrief/11/2graff.pdf (last accessed on 23 February 2017).

partake of the elements of crimes that make use of or involve environmental destruction.[210] Article 28(b) of the Rome Statute, provides for the criminal liability of civilian superiors as opposed to the military commanders subject of Article 28(a), thus:[211]

> With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

This provision requires the prosecutor to establish that the civilian superior, such as a corporate executive of a corporation working with a government committing the core crime, may be held liable if he or she "knew" or "consciously disregarded information" which would have revealed that his subordinates, like his employees, committed a Rome Statute crime.[212] The language of the provision does not distinguish between structures in government and those within corporations. Thus, this provision can apply to corporate executives and other senior corporate agents.

Further, in order for liability to be found under this provision, knowledge on the part of the civilian superior, or the conscious disregard of information, should be shown.[213] It is also

[210] Id., at 25.
[211] Rome Statute art. 28(b).
[212] Graff, supra, at 3.
[213] Id.

an important task to establish that a superior-subordinate relationship exists for this provision to be made the basis of prosecution.[214] Nevertheless, this is not a difficult task in the context of a highly hierarchical corporation wherein decisions are made at the top and implementation flows to the bottom. In proving this element, evidence which may consist in corporate documents and communications may be shown to demonstrate the margin of discretion of the agent, but whose actions would nevertheless be attributable to the superior.

As it stands, however, the prosecution of a corporate agent based on this theory is still difficult to pursue. The burden of proof itself in criminal prosecutions, particularly in international criminal law, is too strict that it will be difficult to overcome. Fortunately, this scenario is not entirely unprecedented. In the case of *Prosecutor v. Musema*,[215] Alfred Musema, a director of the Gisovu Tea Factory in the Rwandan Préfecture of Kibuye,[216] was charged before and convicted by the ICTR for genocide; extermination constitutive of a crime against humanity; and rape constitutive of a crime against humanity in the context of the massacres in Rwanda.[217] In relation to his authority over his subordinates, the ICTR pronounced, to wit:

> The Chamber finds that it has been established beyond reasonable doubt that Musema exercised *de jure* authority over employees of the Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory, even if those duties were performed outside factory premises. The Chamber notes that Musema exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory. The Chamber notes that Musema was in a position, by virtue of these powers, to take reasonable measures…to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes. The Chamber finds that Musema exercised *de jure* power and *de*

[214] Id.
[215] The Prosecutor v. Musema, Judgment and Sentence, Case No. ICTR-96-13-A, The International Criminal Tribunal for Rwanda, http://hrlibrary.umn.edu/instree/ICTR/MUSEMA_ICTR-96-13/MUSEMA_ICTR-96-13-A.html (last accessed on 23 February 2017).
[216] Cecile Aptel and Jamie Williamson, A Commentary on the Musema Judgment rendered by the United Nations International Criminal Tribunal for Rwanda, Melbourne Journal of International Law 2, http://law.unimelb.edu.au/__data/assets/pdf_file/0009/1679400/Aptel-and-Williamson.pdf (last accessed on 23 February 2017).
[217] Id.

facto control over Tea Factory employees and the resources of the Tea Factory.[218]

4.2. *Co-perpetration or joint criminal enterprise*

The second theory under which corporate agents may be prosecuted is that of "co-perpetration" which is described as a situation where "an accused act with others to commit a crime, a form of collective criminal action referred to…as joint criminal enterprise."[219] In the corporate context, this joint criminal enterprise would arise in a situation where a corporation and agents of a government decide to act on a common objective of forcibly removing the local people in the area of their lawful residence in order to facilitate the corporations use or extraction of a natural resource.[220] When thinking about co-perpetration, one can look to the example in South Sudan which was discussed in relation to crimes against humanity.[221]

However, from the term itself - co-perpetration or joint criminal enterprise - the challenge of proving that the actors, including the corporate agents shared a common criminal purpose is apparent.[222] In criminal law, intent to commit a crime is the most difficult to prove, and this is not made easy by usual the remoteness of the contribution of the corporate agent. Thus, a prosecutor would still be hard-pressed to pursue this strategy in trying to exact accountability on the part of corporate agents.

[218] Supra note 215, p. 880.
[219] Id., at 876.
[220] Id., at 879.
[221] Tara Smith, Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law 52 *from:* The Ashgate Research Companion to International Criminal Law, 23 May 2013,52. Critical Perspectives Routledge.
[222] Farrell, supra, at 879.

4.3. *Aiding and Abetting or Accomplice Liability*

Given the challenges in the first two theories, the prosecutor turns to the most-discussed theory which looks to the liability of corporate agents for "aiding and abetting" the commission of human rights violations. This theory is referred to as that of accomplice liability.

Like all other crimes, liability from aiding and abetting requires the proving the criminal conduct (*actus reus*) and the actor's *mens rea*.[223] Under international criminal law, there is less contention in the definition of *actus reus* which had been described by the ICTY as consisting of rendering "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[224] Going above this standard, the Rome Statute appears to require a stricter standard in that Article 25(3)(a) speaks of control, such that a corporate agent must have had the power to start and stop the commission of the crime.[225] In any case, this difference can be resolved by simply viewing the ICTY standard as that developed under customary international law, and the one in the Rome Statute is statutory and is therefore required only in that particular provision.

The more contentious debate refers to the test to be applied in determining *mens rea*, particularly whether what is required for liability to attach is mere *knowledge* of the principal crime, or if it must be established that the aider and abettor, in this case the corporate agent, shared the *purpose* of facilitating the crime.[226] The Rome Statute seems to settle this debate when it provides, in its Article 25, that aiding and abetting is done for the "purpose of facilitating the commission of such a crime."[227]

[223] Cassel, supra, at 308.
[224] Id.
[225] Farrell, supra, at 880.
[226] Cassel, supra, at 304.
[227] Rome Statute art. 25.

This purpose test has been interpreted in two ways[228] and both interpretation lead to a requirement of the full *mens rea*, similar to the actual perpetrator of the crime. This, again, presents a difficulty on the part of the prosecutor. This purpose test in the Rome Statute has been criticized as not reflective of the customary international law, as developed in the ICTY and ICTR, which only used a knowledge standard in determining the liability of the aider and abettor.[229] Nevertheless, the hope is that the assessment that the purpose does not "mean the exclusive or even primary purpose" as a "secondary purpose, including one inferred from knowledge of the likely consequences, should suffice" would be adapted by the ICC which has yet to settle the interpretation of this test.[230]

From the foregoing discussion, it is clear that the Rome Statute clearly covers the possibility of prosecuting corporate agents for acts that may constitute Rome Statute crimes. The provisions in the Rome Statute, in its definition of crimes and in the absence of any distinction between military and civilian authorities in a number of these provisions, envisage a possible case which may involve corporate agents are charged through any of the means discussed in this chapter. Furthermore, after having shown this, it will now be shown how such corporate agents may potentially be prosecuted for such Rome Statute crimes the commission of which involve environmental destruction.

[228] In Farrell, p. 882, Norman Farrell explains that, "[o]ne interpretation is that the aider and abettor must share the intent of the principal perpetrator, while another is that it "requires the aider and abettor to intend to assist in the commission of the crime."
[229] Farrell, supra, at 887.
[230] Cassel, supra, at 312.

Chapter 4. Connecting the Dots Between the Rome Statute Crimes, Environmental Destruction, and the Potential Prosecution of Corporate Agents for Core Crimes

Early in its discussion, this thesis has made a caveat that the current provisions of the Rome Statute do not define and penalize an independent crime against the environment. The core crimes in the Rome Statute seek to punish human rights violations as well as acts which contravene norms and treaty provisions in international humanitarian law. This is the backdrop with which we conducted an examination of the Rome Statute provisions to locate potential bases for the prosecution of crimes that involve acts of environmental destruction. Considering that if, in fact, the charges for these crimes are brought against corporate agents, the end itself will be the punishment of the commission of core crimes. Thus, the assessment is that this will only indirectly hold corporate agents accountable for participating in the commission of crimes that make use of, or result in environmental destruction.

A criticism can certainly be made that the goal should have been to acknowledge the gaps and inadequacy of the current framework, and then propose an amendment to the Rome Statute. This is certainly what many of the scholars in this area of law are doing.[231] However, this thesis was written with the more basic acknowledgement that developments in international criminal law, post-establishment of the ICC, have slowed down. Further, given the contentious process of drafting the Rome Statute, and the current situation wherein states have made comments that the legitimacy of the ICC is at a low because of its alleged biases in its case selection, it is more realistic to find spaces within the current framework to address situations which may already fall under the crimes discussed above, and under the jurisdiction of the ICC.

[231] See Freeland supra, and Smith supra.

In articulating the nexus between the core crimes and the potential prosecution of corporate agents, one needs only to be reminded that international criminal law allows for the prosecution of individuals, even when they are not part of or acting in behalf of a state. To illustrate, the example of a war crime committed in the context of an armed conflict not of an international character to see that non-state agents may be prosecuted before the ICC. This means that there is no barrier to the prosecution of corporate agents should they be proven to have committed the crimes discussed herein and assessed as may be committed by means of, or resulting in, environmental destruction. In order to pursue this prosecution, the prosecutor, as discussed in Chapter 3, need only marshal the facts and the evidence to support a case based on any of the theories of intermediary liability outlined in this thesis.

The discussion will be incomplete, however, when the barriers which corporate law may independently pose are not presented. First, one can argue that there is a conceptual incompatibility between imposing the criminal liability on corporate agents for acts actually made in the interest of the corporation. The central idea of agency is the relationship between the principal and the agent and how, subject to the showing of certain requirements, the acts of the agent bind the principal and make the same liable.[232] In this regard, the legal anomaly can be said to reside in the theory that the act of the agent was not his personal act. The corporate agent would argue that his acts should be imputed to the corporation, and just because the corporation may not be punished under international criminal law does not mean that the agent should bear the consequences of an act which was ultimately that of the corporation. This point on imputability was argued by Volker Nerlich by using this illustration:[233]

[232] William Klein, J. Mark Ramseyer & Spehen M. Bainbridge, Business Associations, Cases and Materials on Agency, Partnerships, LLCs, and Corporations (9th ed.) 31-62 (2015). For a discussion on the general principles of agency, particularly the fiduciary principle, see Deborah A. DeMott, Fiduciary Obligation, Agency and Partnership 2-12, 57 (1991).
[233] Nerlich, supra, at 900.

> And indeed, it is sometimes argued that crimes such as rape by their very nature cannot be committed by legal persons. Two reasons could be advanced for such an argument: first, it may seem difficult to imagine that a legal person be held responsible for acts that require direct and personal interaction between the perpetrator and his or her victim. How can a corporation rape or torture? Conceptually, however, such an argument is easily dismissed. Clearly, an abstract entity cannot physically carry out an act of murder, rape or torture. But neither can it sign a fraudulent tax declaration. The responsibility of corporations, therefore, is always derived from conduct of natural persons and is, as such, imputed liability. If this is accepted, it appears possible to attribute any conduct of a natural person to a legal person, including conduct amounting to rape, etc.[234]

Considering that the corporate agent was acting in the interest of the corporation, it would be an injustice if he would be punished for an act that was his duty to do, particularly is he was acting in the best economic interest of the corporation. However, this argument can easily be dismissed by the basic understanding that criminal acts are always an exception to the use of any legal entity and its separate personality as a shield against liability. Since criminal acts violate public values, in this case, those which are of significance to the international community as a whole, there should be no shield as this fosters the culture of impunity that the measure is trying to curb.

Second, it is basic in corporate governance that most of the major decisions are made by a board of directors whose discretion are protected by the business judgment rule. This rule is a "standard of judicial review for director conduct"[235] which "shields individual directors from liability for damages stemming from decisions" made in their capacity as corporate agents.[236] In this context, the board of directors, as a collective, who makes decisions and acts

[234] Id.
[235] Dennis J. Block, Nancy E. Barton, & Stephen A. Radin, The Business Judgment Rule: Fiduciary Duties of Corporate Directors Volume I (5th ed.) 4 (1998).
[236] Id., at 6.

for the company, is considered the corporate agent. Thus, one encounters the difficulty of satisfying the jurisdiction *ratione personae* of the ICC. Even if it is argued that all the directors will be charged for committing the acts which constitute the single crime, there is the difficulty of calibrating the responsibilities of the directors, and the ICC prosecutor could end not being able to present a case against any of them. This 'spreading' and 'individuating' of responsibility for a decision made or action taken by a group of persons is a significant barrier. Nevertheless, this barrier does not make it impossible to still pursue a case against one or two directors, particularly when corporate records and other evidence can identify and assign specific acts to any of them.

Third, in the study of corporate law, one recalls the theory that a corporation is simply a nexus of contracts. This means that, as Charles O'Kelley recalls, "most organizations are simply legal fictions which serve as a nexus for a set of contracting relationships among individuals." [237] These contracts which meet at the corporation will include indemnity agreements or similar contracts which may provide a corporate agent a way out of the prosecution. Although this does not present a concrete barrier for the prosecution, there will be legal questions that could arguably be prejudicial questions that the ICC does not have jurisdiction to resolve.

Lastly, the corporation will almost always act to protect its own interests. Hence, when a corporate agent is prosecuted for a Rome Statute crime, all a corporation has to do is to find a replacement since its legal status will remain intact, provided domestic remedies are not used to force its dissolution. In other words, there is a question with respect to the usefulness of the

[237] Charles R.T. O'Kelley, Coase, Knight, and the Nexus-of-Contracts Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate, 35 Seattle U. L. Rev. 1247, 1247-1248 (2011-2012); citations omitted.

response as the corporation can easily "throw a corporate agent under the bus" and go on in conducting its business.

These barriers presented by corporate law are questions which could complicate a potential prosecution and may push the ICC prosecutor to take a more conservative approach. Nevertheless, the absence of the ICC prosecutor's control over these corporate law issues would exactly be the reason why she may still pursue the prosecution of corporate agents. All the prosecutor needs to establish, for the purpose of what this thesis argues, is that a Rome Statute crime involving environmental destruction has been committed, and the corporate agents can be shown to have participated in its perpetration. Considering this, it is unlikely that the ICC Prosecutor will concern herself with these corporate law issues which, as noted, even the ICC may not be able to resolve.

Moreover, as discussed, corporate agents, can actually be held liable anyway for committing acts the liability for which considers mainly the "agency" or the "independent assessment" of the perpetrator. This means that if the agent knows that the act is illegal, and does it anyway, he cannot use the corporation to shield himself from liability. This, of course, is consistent with the traditional view that criminal liability is personal since it is the natural person who discerns whether the commission of an act would expose him to such liability.

Thus, although a tall order, both the potential stumbling blocks established by international criminal law and general corporate law may be addressed to make way for the potential prosecution of corporate agents who commit Rome Statute crimes involving environmental destruction.

Conclusion

This thesis began by pointing out the significance of addressing environmental destruction by using international criminal law to hold persons, particularly corporate agents, acting in behalf of corporations, accountable for their acts that contribute to such destruction. More specifically, this thesis argues that there are spaces in the crimes defined in the Rome Statute for the prosecution of acts that involve environmental destruction, even though such spaces only allow the indirect punishment of such acts. Furthermore, the potential prosecution of such crimes could include corporate agents who, under any of the modes of liability in the Rome Statute, have contributed to the perpetration of the Rome Statute crimes which involve environmental destruction.

In Chapter 1, this thesis defined the important concepts of the natural environment and its destruction in order to set out clearly the aim and scope of the acts which are to be addressed when this thesis makes mention of 'acts involving environmental destruction.' This is also in view of the formulation in the *Policy Paper* which makes use of the phrase 'crimes committed by means of, or result in, environmental destruction. Thereafter, a preliminary discussion was made on the general principles in the Rome Statute which could serve as the 'first layer' stumbling blocks to the potential prosecution examined herein. In this regard, this thesis assumed, in the meantime, that these requirements have been met in order to proceed to an exploration of the Rome Statute crimes which may provide a platform to punish acts involving environmental destruction at the ICC.

Thus, in Chapter 2, this thesis discussed the various war crimes, the crime of genocide, and the crimes against humanity, examined their elements, and scrutinized which of these crimes are more likely to support an optimistic view that there are indeed core crimes which may be used to hold corporate agents who perpetrate crimes involving environmental

destruction to account. This thesis noted that crimes by corporations, like those which involve collusion and action with combatants by supplying armaments and participating in the hostilities, in the context of an attack, may amount to the crime of causing excessive damage to the natural environment defined in Article 8(2)(b)(iv) of the Rome Statute. Other war crimes may also be interpreted to include elements that enable the indirect punishment of environmental destruction by filing charges based on them. However, aside for the particular elements which are difficult to prove, the use of these war crimes provisions would only be in very limited circumstances because of the need to show the armed conflict nexus.

Thus, this thesis was prompted to look into the other crimes of genocide and crimes against humanity which seem to be more open to interpretations that accommodate acts involving environmental destruction. In particular, these crimes are more likely to cover contemporary examples of corporate environmental crimes such as the supply and use of chemicals and other weapons that kill human beings and injure the environment, or those crimes that involve the pollution of the sources of sustenance of peoples such that they are either severely injured or deprived of the means to live. However, these two crimes also present their own challenges, *i.e*. the specific intent requirement for genocide, and the context element for crimes against humanity, which elements are difficult to prove. Nevertheless, in all these core crimes, this thesis was able to discuss how the various elements can be analyzed to contemplate and cover acts involving environmental destruction.

Chapter 3, thereafter, reminded us that, despite the ICC's lack of jurisdiction over corporations because of the adoption of the principle of *ratione personae*, the Rome Statute actually does include corporate agents within its reach. In fact, the various modes of liabilities in the Rome Statute contemplates crimes which may perpetrated with the contribution or aid of corporate agents in the pursuit of the interests of the corporations they represent. Considering

this, Chapter 4 performed the task of reiterating the argument that, indeed, there is cause to be optimistic that the ICC Prosecutor can cast a wider net and prosecute corporate agents for crimes involving environmental destruction before the ICC. However, aside from the limitations under the Rome Statute discussed in the earlier chapters, there may also be issues in corporate law applicable to corporate agents which may complicate the ICC prosecutor's theory and push her to take a conservative approach ending in the leaving out of corporate agents from the indictment. However, in the end, this thesis showed that those challenges may be overcome by going back to the fundamental principle that the corporate veil may not be used to shield corporate agents for committing Rome Statute crimes that involve environmental destruction.

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