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# Crafting a Standard: Environmental Crimes as Crimes Against Humanity Under the International Criminal Court

*By Jessica Durney\**

## Abstract

This paper will craft a framework through which the International Criminal Court (“ICC”) could begin prosecuting individuals for crimes against humanity under the Rome Statute for their actions against the environment. Despite the lack of environmental considerations in the prima facie language of the Rome Statute, the definition of “crimes against humanity” can be used to prosecute individuals who utilize environmental destruction to target specific groups. This, coupled with the ICC’s recent stated shift in focus on prosecuting cases resulting in “the destruction of the environment,” opens the door to a new era of environmental justice in international criminal law. To craft a framework for prosecuting environmental harms as crimes against humanity, this paper will analyze the statutory allowance for environmental destruction in the Rome Statute, outline other international tribunals to demonstrate how human rights have evolved to incorporate environmental destruction, and utilize current examples of attacks on the environment to harm targeted groups to demonstrate the admissibility of the ICC’s jurisdiction. Ultimately, this framework can establish protections for the environment through the ICC’s anthropocentric prosecutorial system and help set precedence for environmental justice at the international level.

## Introduction

On September 15, 2016, the International Criminal Court (“ICC”) Prosecutor Fatou Bensouda published a Policy Paper announcing a shift in focus toward assessing crimes that result in “the destruction of the environment or of protected objects.”<sup>1</sup> The assessment of the impact of the alleged crime would consider the

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1. OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION, para. 40, (hereinafter “2016 Policy Paper”) [https://www.icc-cpi.int/items/Documents/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/items/Documents/20160915_OTP-Policy_Case-Selection_Eng.pdf) [<https://perma.cc/UY3N-C62R>].

“environmental damage inflicted on the affected communities.”<sup>2</sup> Within this framework, the Prosecutor noted that the ICC would give “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.”<sup>3</sup> This Policy Paper, which will “serve as a key guiding instrument for the Office of the Prosecutor in its selection and prioritisation of cases for investigation and prosecution,”<sup>4</sup> presents an important and potentially seismic shift in the way the ICC and the global community looks at environmental harm. An inclusion of environmental degradation within evaluations of human rights violations “should send a warning shot to company executives and investors that the environment is no longer their playground,” argues Alice Harrison, an adviser at the international environmental watchdog NGO, Global Witness.<sup>5</sup>

While it indeed poses an exciting opportunity to hold accountable the previously untouchable, the vagueness of the Policy Paper and the novelty of the notion means that the international community is left guessing *exactly how* environmental harm will be considered in tandem with the ICC’s prosecution framework under the Rome Statute. The Court has jurisdiction to prosecute individuals for “the most serious crimes of concern to the international community as a whole,” including genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>6</sup> These are not the typical areas of law through which enterprising legal minds have attempted to penalize environmental harms.

This paper will craft a framework through which the ICC could begin prosecuting individuals for crimes against humanity through their actions against the environment. The Rome Statute operates under an inherently anthropocentric view of “harm,” meaning that the remit extends only to actions negatively affecting *people*, and that actions polluting or degrading the environment alone will not fit the remit of the ICC. This is a frustrating limitation in the fight to protect the environment. Despite this limitation, the broadening of the ICC’s remit to include this language and the subsequent cases brought before the ICC could create a far-reaching rippling effect. Many States follow the Rome Statute definitions to implement international crimes into their own domestic legislation, so establishing an interpretation allowing for prosecution of environmental destruction from the

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2. *Id.* at para. 41.

3. *Id.*

4. OFFICE OF THE PROSECUTOR, PRESS RELEASE (Sept. 15, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1238> [<https://perma.cc/TA4P-QXVW>].

5. John Vidal and Owen Bowcott, *ICC widens remit to include environmental destruction cases*, THE GUARDIAN (Sept. 15, 2016), <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases> [<https://perma.cc/WH9U-7YA4>].

6. Rome Statute of the International Criminal Court, Part II, Art. 5(1), 17 July 1998, (hereinafter “Rome Statute”).

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ICC could reach into domestic adjudication.<sup>7</sup> Here is an opportunity to establish a legal precedent that intentional harm to the environment which deprives people of their life is a violation of human rights. Enterprising legal minds could utilize this precedent to affect change at both the international and domestic levels. By breaching conventional notions of international criminal law to include environmental considerations, the ICC could pave a path for other courts—both with international and domestic jurisdiction—and expand the frontier for environmental justice.

Part I of this note will outline the traditional understanding of the ICC's remit and how it ultimately lacks the ability to prosecute purely environmental harms. Part II will shift to demonstrate how environmental harms have gained international attention, and have been the focus of other universal jurisdiction laws to prosecute wrongdoers. Finally, Part III will combine the knowledge and precedent from these cases with the ICC's recent Policy Paper, and outline a framework the Court can use under its new prioritization of harms against the environment as a foundation for prosecution for crimes against humanity. Two current examples demonstrate the potential application of this framework: the Rohingya crisis in Myanmar, and issues of widespread land grabbing in Cambodia. Ultimately, this framework will establish protections for the environment through the ICC's anthropocentric prosecutorial system, and ensure that those who harm the environment are held accountable.

### **Part I: The Rome Statute: An Unconventional Route for Seeking Environmental Redress**

While there are institutional limitations to crafting a framework to protect the environment under the ICC's jurisdiction, the Rome Statute has room in its interpretation to incorporate specific instances of environment harm as a "crime against humanity." Its two great limitations stem from two aspects inherent to the statute. First, the ICC's jurisdiction derives solely from the Rome Statute, which makes extremely limited explicit mention of environmental crimes. Second, while the recent 2016 Policy Paper expresses a shift in focus and concentration on environmental destruction, the ICC is not expanding the number of core crimes it will prosecute.<sup>8</sup> Thus, any case brought before the ICC must still constitute a violation of one of the four existing crimes within the ICC's jurisdiction. The best avenue of the four core crimes is Article 7, "crimes against humanity," under which the Prosecutor must prove the required actus reus and mens rea elements.<sup>9</sup>

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7. Evelyne Schmid, *TAKING ECONOMIC, SOCIAL AND CULTURAL RIGHTS SERIOUSLY IN INTERNATIONAL CRIMINAL LAW*, Cambridge Univ. Press (2015), at 65, noting that "... because of the complementarity mechanism of the ICC, many states follow the Rome Statute definitions when they implement international crimes in domestic legislation. The Rome Statute is thus a useful starting point to understand the elements of international crimes . . ."

8. 2016 Policy Paper, *supra* note 1, at 3, noting that "This is an internal document of the Office and as such, it does not give rise to legal rights."

9. Rome Statute, *supra* note 6, art. 7 requires the actus reus of an "attack" and a mens rea of "directed against any civilian population, with knowledge of the attack."

### A. Inherent Statutory Limitations

The Court derives its jurisdiction from the Rome Statute, an international treaty ratified in 2002 that established four internationally recognized crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>10</sup> There are two limitations inherent from the outset. First, the *prima facie* language of the Statute contains only one single mention of the word “environment,” and it is contained in a provision that requires an incredibly specific set of circumstances. Individuals may be prosecuted for violating “war crimes” for:

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 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.<sup>11</sup>

Such attack must also be “committed as part of a plan or policy or as part of a large-scale commission” of such actions during wartime.<sup>12</sup> This list of required elements and a temporal limitation tied to times of war makes this an incredibly narrow window of opportunity for prosecution. This is arguably the reason why no case has ever been brought before the ICC relying on these claims, and only a handful have been brought in any international criminal tribunal.<sup>13</sup> Otherwise, the Rome Statute does not mention environmental harm. Furthermore, the crux of each of the established core crimes turns on the effects on humans, making the law inherently anthropocentric. Broadly, this limitation represents the greatest obstacle to prosecuting environmental crimes, but one that this note does not attempt to solve. Instead, this paper argues that the Rome Statute can be interpreted to include consideration of environmental harm used as a tool to violate human rights as a crime against humanity.

### B. Opportunities for Broader Interpretation: Crimes Against Humanity

The Rome Statute defines “crimes against humanity” as specific acts “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>14</sup> The Statute further defines

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10. Rome Statute, *supra* note 6, art. 5(1). The Rome Statute has left “crimes of aggression” undefined, and it is beyond the scope of this article to consider potential environmental crimes that could fit within a potential definition.

11. Rome Statute, *supra* note 6, art. 8(2)(b)(iv).

12. Rome Statute, *supra* note 6, art. 8(2)(b)(iv).

13. Ryan Gilman, *Expanding Environmental Justice after War: The Need for Universal Jurisdiction over Environmental War Crimes*, 22 COLO. J. INT’L ENVTL. L. & POL’Y 447, 451–458.

14. Rome Statute, *supra* note 6, art. 7(1).

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“widespread or systematic” and “attack directed against any civilian population” as “a course of conduct involving the multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>15</sup> Of the eleven defined acts constituting crimes against humanity, there are two that are most relevant to the prosecution of environmental crimes: extermination and deportation or forcible transfer of population. Upon first reading, there are several limitations in using crimes against humanity to prosecute environmental harms. The actus reus that constitutes the environmental harm must be “systematic” in that it occurs more than once.<sup>16</sup> The mens rea requires a level of intent in committing the harm as part of a grander scheme against a specific group.<sup>17</sup> This is particularly troublesome, as many environmental harms (and indeed harms more generally) happen as singular events and stem from economic motivations, such as attempting to avoid regulations to maximize profits. Additionally, the mens rea required for prosecution is intent with “knowledge,” though the Statute allows for awareness of the consequences “in the ordinary course of events” to meet this threshold.<sup>18</sup> Finally, the act must “shock the conscience of mankind,” a label generally reserved for “actions whose results are grave to humankind and not the natural environment.”<sup>19</sup>

There are two enumerated actions constituting crimes against humanity in which environmental harms could fit: extermination and deportation or forcible transfer of population. The Rome Statute defines extermination as “the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.”<sup>20</sup> Perpetrators who destroy or interfere with the natural environment with the purpose of destroying a particular group would fit under this category. An example, which will be explored further in Part III, is the systematic burning of farmland, crops, and villages of Rohingya Muslims to drive them out of the majority-Buddhist Myanmar.<sup>21</sup>

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15. Rome Statute, *supra* note 6, art. 7(2)(a).

16. Matthew Lippman, *International Law and Human Rights Edition: Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 263.

17. *Id.* at 262.

18. Mohammed Saif-Ailden Wattad, *The Rome Statute & Captain Planet: What Lies Between ‘Crimes Against Humanity’ and the ‘Natural Environment’?* 19 FORDHAM ENVTL. L. REV. 265, 277.

19. Payal Patel, *Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court’s Mandate to Prosecuting Environmental Crimes?*, 14 LOY. U. CHI. INT’L L. REV. 175, 192, citing Frederic Megret, *The Problem of an International Criminal Law of the Environment*, 36 COLUM. J. ENVTL. L. 195, 218 (2011).

20. Rome Statute, *supra* note 6, art. 7(2)(b).

21. Sergio Peçanha and Jeremy White, *Satellite Images Show More Than 200 Rohingya Villages Burned in Myanmar*, N.Y. TIMES (Sept. 18, 2017), [https://www.nytimes.com/interactive/2017/09/18/world/asia/rohingya-villages.html?\\_r=0](https://www.nytimes.com/interactive/2017/09/18/world/asia/rohingya-villages.html?_r=0) [http://perma.cc/6F45-68YJ].

Deportation or forcible transfer consists of “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”<sup>22</sup> This language was first proposed by a Special Rapporteur in the Draft Code of Offences Against the Peace and Security of Mankind, created in 1989.<sup>23</sup> In the draft code, the Special Rapporteur specifically adds to the previous analysis of deportation or forcible transfer from the 1954 draft, incorporating “serious and intentional harm to vital human assets, such as the human environment,” and “cultural property and other vital human assets, such as the environment.”<sup>24</sup> While this would seem to allow more room within the traditional remit for environmental harm, the Special Rapporteur then further elaborates that crimes against humanity are “distinguished by motive,” in that they are prompted by “ideological, political, racial, religious or cultural intolerance and strike at a person’s innermost being, i.e. his convictions, beliefs or dignity.”<sup>25</sup> Further, the “systematic” language limits the harms to those that are “a recurrent practice or plan,” and inherently not “isolated acts . . . not encompassed in the text.”<sup>26</sup> Land-grabbing would best fit under this classification of crimes against humanity, and indeed there has been some movement previously to bring the Cambodian government to the ICC for systematically seizing farmland, as will be discussed in Part III.<sup>27</sup>

Crimes against humanity present the broadest avenue for prosecuting environmental harms. However, while there are ample opportunities to connect actions against the natural environment with the subsequent negative effects on humans, the statutory requirements of “systematic” actions with the specific intent to “caus[e] great suffering” present institutional hurdles to many of the more common environmental harms. Such limitations will limit the actors subject to prosecution and exclude actions that are isolated.

## **Part II: A Shift in International Human Rights Tribunals Brings Environmental Destruction into the Conversation**

There are emerging trends in international courts that give rise to opportunities to build on the traditional remit of the ICC to allow incorporation of

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22. Rome Statute, *supra* note 6, art. 7(2)(d).

23. Draft Code of Offences Against the Peace and Security of Mankind, Fourth Report, Mr. Doudou Thiam, Special Rapporteur, U.N. Doc. A/CN.4/398 (1986)

24. Matthew Lippman, *International Law and Human Rights Edition: Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 262.

25. *Id.*, citing Draft Code of Offences Against the Peace and Security of Mankind, *supra* note 16 at 87.

26. *Id.* at 263, noting that “The systematic element requires a recurrent practice or plan while the mass-scale component is directed at the number affected. Isolated acts—no matter how atrocious—are not encompassed within the text.”

27. Chris Arsenault, *Cambodian land grabs are ‘crime against humanity’, lawyers tell ICC*, REUTERS (Oct. 7, 2014), <https://www.reuters.com/article/us-foundation-cambodia-landgrabs/cambodian-land-grabs-are-crime-against-humanity-lawyers-tell-icc-idUSKCN0HW1R420141007> [<https://perma.cc/Q3W8-NRMV>].

environmental harms. This note will focus on the three international human rights tribunals—the African Commission on Human and Peoples’ Rights, the European Court on Human Rights, and the Inter-American Commission on Human Rights—which have all started incorporating environmental damage into considerations of human rights violations. The African Commission in particular has adopted enumerated protections for the people regarding the environment. The European Court and the Inter-American Commission have used similar human rights protections to the Rome Statute and broadened their interpretation to incorporate environmental harms into the analysis. Each of these tribunals offer lessons to the ICC as it seeks to broaden its remit to consider the “environment damage inflicted on the affected communities,”<sup>28</sup> 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.”<sup>29</sup>

#### A. The African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights provides a framework of environmental destruction constituting human rights violation that can guide the ICC’s analysis in similar cases. Article 24 of the African Charter of Human and Peoples’ Rights states, “all peoples shall have the right to a general satisfactory environment favorable to their development.”<sup>30</sup> Though never more fully defined in the Charter, the African Commission on Human and Peoples’ Rights first assessed this right nearly twenty years after the Charter was adopted in *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*.<sup>31</sup> In this particularly ground-breaking case, the Commission held that Nigeria had violated the Ogoni indigenous peoples’ human rights through its actions both in failing to protect or prevent and by actively attacking the Ogoni peoples’ environment.<sup>32</sup> A Nigerian-owned oil company had exploited Ogoni land for oil, contributed to air pollution, and disposed of toxic waste into the land and water, all without the consent of the Ogoni peoples, and without following the permitting process by the Nigerian government.<sup>33</sup>

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28. 2016 Policy Paper, *supra* note 1, at para. 41.

29. *Id.*

30. African Charter of Human and Peoples’ Rights, Par. I, ch. 1, Article 24 (Oct. 21, 1986), *available at* [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) [<https://perma.cc/ABJ4-X7SQ>].

31. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 155/96 (2001) [hereinafter “the Ogoni case”] at para. 52, *available at* <https://hrlibrary.un.edu/africa/comcases/155-96.html> [<https://perma.cc/V498-Z3T5>]. The African Charter established the Commission in Part II, Ch. I, Article 30, to “promote human and peoples’ rights and ensure their protection in Africa.”

32. *Id.*

33. *Id.* at paras. 2-6.

Furthermore, the Nigerian Army had attacked, burned, and destroyed Ogoni villages in response to building protests against the environmental destruction, leaving thousands homeless.<sup>34</sup>

The Commission ruled that this constituted a violation of the African Charter on Human and Peoples' Rights.<sup>35</sup> Nigeria had an obligation to "take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."<sup>36</sup> Nigeria had not only failed to fulfill this obligation, but also "exacerbate[d] the situation" by engaging in aggressive conduct.<sup>37</sup> In reaching this conclusion, the Commission assessed the Charter's general requirements to "respect," "protect," and "fulfill" the enumerated human rights, the specific language of Article 24, and other international treaties and holdings from other international tribunals to hold that Nigeria's actions constituted a violation.<sup>38</sup>

As a starting point, the African Charter's explicit enumerated right of people to a "general satisfying environment" demonstrates that the global community is moving toward incorporating environmental harms—insofar as they negatively affect people—into international criminal law. This alone is instructive for the ICC. This right had been criticized for being "vague and ambiguous," lacking in any definition of either "satisfying" or "environment."<sup>39</sup> However, the Commission's holding against Nigeria illuminated the scope of the right as a "protection for human beings, the environment and the relationship shared between them," providing precedent for greater accountability for actions along the Niger Delta.<sup>40</sup> The Commission held that "participat[ing] directly in the contamination of the environment through air, water and soil pollution . . . adversely affect[ing]

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34. *Id.* at para. 7.

35. Specifically, Articles 2, 4, 14, 16, 18(1), 21 and 24—the rights to freedom from discrimination, life, property, health, protection of family and vulnerable groups, free disposal of wealth and resources, and a general satisfactory environment.

36. *Id.* at para. 52.

37. *Id.* at para. 54.

38. *Id.* at paras. 52 and 57, citing to Article 12 of the International Covenant on Economic, Social and Cultural Rights, which "requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene"; the Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 19, 1988, Series C, No. 4, holding that "when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens"; and the European Court of Human Rights, *X and Y v. Netherlands*, 91 ECHR (1985) (Ser. A) at 32, requiring an "obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person."

39. Morné Van Der Linde, *Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication*, 3 AFRICAN HUMAN RIGHTS LAW JOURNAL 167, (2001) available at [http://www.ahrlj.up.ac.za/van-der-linde-m-louw-l#\\_ftnref13](http://www.ahrlj.up.ac.za/van-der-linde-m-louw-l#_ftnref13) [<https://perma.cc/U53N-8WZD>].

40. *Id.*

the health of the Ogoni people” alone could constitute a violation of human rights is important—dispelling concerns that Article 24 rights could not be argued in isolation, but rather required them to be attached to other violations of rights.<sup>41</sup> Furthermore, the African Commission’s holding that Nigeria’s conduct facilitating the destruction of Ogoni land amounted to “massively and systematically violat[ing]” the rights of the Ogoni people<sup>42</sup> is an example of actions that can amount to the ICC’s threshold standards of “widespread” and “systematic” intentional acts against a specific community. Finally, the Commission’s willingness to draw on other international tribunals—both the Inter-American Commission and the European Court—further cement an important precedent that the ICC can look to other tribunals to seek analysis of particular situations.<sup>43</sup>

### B. The European Court of Human Rights

The European Court of Human Rights demonstrates an evolution in statutory interpretation of human rights that includes environmental considerations and poses a comparative example with similar procedural thresholds of proof from which the ICC can draw. Though the European Court lacks explicit protection for or right to a healthy environment like the African Charter, the Court recognizes that human rights and the environment are “mutually reinforcing,” and that the environment “is protected by international law despite the absence of a general framework convention.”<sup>44</sup> The Court has adopted an “evolutive approach” interpreting the Convention’s enumerated rights as a “living constitution” in light of “social context and changes in society.”<sup>45</sup> As such, the Court has held that “adverse environmental factors” can violate certain human rights guaranteed by the European Convention, such as the right to life, the right to a respect for private and family life, the right to a fair trial and court access, the right to information, the right to an effective remedy, and the right to a peaceful enjoyment of possessions.<sup>46</sup> It is important to note that the European Convention makes no mention of environmental harm, nor was there a legal definition of “environment” at the time it was created.<sup>47</sup> However, the Court has evolved to not only consider

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41. *Id.*

42. The Ogoni Case at para. 59.

43. There is precedence for international tribunals citing to other tribunals. For a report of the European Court of Human Rights citing to the Inter-American Instruments of Human Rights (both the Court and the Commission) 59 times, see European Court of Human Rights, Research Report (2016), [http://www.echr.coe.int/Documents/Research\\_report\\_inter\\_american\\_court\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf) [<https://perma.cc/MW5W-EVEA>].

44. COUNCIL OF EUROPE, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT (2012), at 31 and 7, [http://www.echr.coe.int/LibraryDocs/DH\\_DEV\\_Manual\\_Environment\\_Eng.pdf](http://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf) [<https://perma.cc/M6DM-VB55>].

45. *Id.* at 31.

46. *Id.* at 8, citing to Articles 2, 8, 6, 10, 13 of the European Convention, and Article 1 of Protocol 1 of the Social Charter, respectively.

47. COUNCIL OF EUROPE, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 44, at 15–16 (2012).

environmental damage as a violation of rights enumerated in the Convention, but also now lists the prevention of environmental harm as part of the interpretation of State's "positive obligations."<sup>48</sup> The Court has held that States have a "positive obligation" to guarantee that the rights of the Convention are not violated through "dangerous activities" utilizing the environment to negatively affect people, even through actions performed by private parties.<sup>49</sup>

Similar to the Rome Statute's requirements, the European Court considers the "harmfulness of the dangerous activities and the foreseeability of the risks to life," along with whether "causal links exist[] between the activity and the negative impact on the individual and whether the adverse effects have attained a certain threshold of harm."<sup>50</sup> The Court determines whether the threshold has been met by assessing "all the circumstances of the case" including the "intensity and duration" of the harm, the physical and/or mental harm, and the "general environmental context."<sup>51</sup> This echoes the ICC's procedural steps to decide whether sufficient evidence exists that the "gravity" of the crime warrants an investigation. The ICC looks to both "qualitative and quantitative" factors, including the number of victims, the extent of damage, the physical and/or psychological harm that occurs, and the "geographical or temporal spread" of the acts.<sup>52</sup> Finally, the European Court requires a similar level of mens rea for conviction—that the State has knowledge that harm will occur from their action (or inaction, as is the case with the positive duty). However, "knowledge" may be proven in the environmental harm context if the State "knew—or ought to have known—that there was a real and immediate risk to the lives of the people living near" the dangerous activity.<sup>53</sup>

### C. Inter-American Commission of Human Rights

The Inter-American Commission expanded protections beyond the enumerated rights to provide indigenous peoples with the right to communal property over their lands, territories, and natural resources, further demonstrating the broadening of human rights in relation to the environment. Article XXIII of

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48. *Id.* at 18.

49. *Id.*

50. *Id.* 18–20.

51. *Id.* at 20.

52. 2016 Policy Paper, *supra* note 1, paras. 37–38.

53. COUNCIL OF EUROPE, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 44, at 37 (citing to *Öneryıldız v. Turkey* [GC], paragraph 101, holding that "the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip. They consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals (see paragraphs 92-93 above), especially as they themselves had set up the site and authorized its operation, which gave rise to the risk in question."; *available at* <http://www.globalhealthrights.org/wp-content/uploads/2013/02/ECtHR-2004-Oneryildiz-v-Turkey.pdf> [<https://perma.cc/SEH8-JMY9>]).

the American Declaration of the Rights and Duties of Man and Article 21 of the American Convention on Human Rights (the sources of law for the Commission) enumerate the right to property, but like the European Convention, neither instrument explicitly protects the environment.<sup>54</sup> However, the Inter-American Commission has broadened the scope of this right to give emphasis on protecting the land rights of indigenous peoples. The Commission interprets human rights as “evolving standards . . . in the light of developments in the field of international human rights law . . . as evidenced by treaties, custom and other relevant sources of international law.”<sup>55</sup>

As such, and in accordance with evolving standards of indigenous peoples’ rights, the Commission has held that the right to property holds particular significance to indigenous groups “because [it] is a fundamental basis for the development of indigenous communities’ culture, spiritual life, integrity and economic survival.”<sup>56</sup> The Commission has held that “territory” includes “the use and enjoyment of its natural resources,” which is further defined broadly as “air, land, water, natural gas, coal, oil, petroleum, minerals, wood, topsoil, fauna, flora, forests and wildlife.”<sup>57</sup> In addition to requiring states to uphold and protect the rights established, the Commission requires that the state ensure the “actual existence of an efficient guarantee of the free and full exercise of human rights,” specifically “in relation to their territorial rights,” and requiring “concrete measures to make the right effective.”<sup>58</sup> This emphasis on the relationship between indigenous groups and the land manifests such that “the recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival and for maintaining the community’s integrity.”<sup>59</sup> The Commission recognizes that lack of access to the land can “produce conditions of extreme poverty for the affected indigenous communities”: therefore, a State’s lack of

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54. Am. Declaration of the Rts. and Duties of Man, Ninth Int’l Conf. of Am. Sts. art. XXIII, 1948, “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home”; Am. Convention on Hum. Rts. art. XXI, 1969, O.A.S.T.S. No. B-32, “Right to Property. 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.”

55. Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources*, OEA/Ser.L/V/II. Doc.56/09, Dec. 30, 2009, Chapter II, para. 8.

56. *Id.* at para. 2.

57. *Id.* at paras. 2 and 41.

58. *Id.* at para. 44, citing to I/A Court H.R., Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29th, 2006. Series C No. 146, par. 167. I/A Court H.R., Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, par. 142.

59. *Id.* at para. 56, citing to IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, para. 16.

action in protecting these rights “expose[s] indigenous and tribal peoples to precarious or sub-human living conditions in the fields of access to food, water, dignified housing, basic utilities and health[.]”<sup>60</sup> This constitutes “subjecting them to situations of extreme unprotectedness, which entail[s] violations of their rights.”<sup>61</sup>

This “evolutionary interpretation of human rights” protections for specific groups of peoples is a conglomeration of Commission-made interpretations of the American Convention and the American Declaration’s right to property, and demonstrates the use of a specific group’s context and history to rationalize deviating from enumerated human rights definitions.<sup>62</sup> Such an example aligns with the ICC’s criteria for prioritization: accounting for specific pressing issues, adapting to the most significant issues “of concern to the international community as a whole,” while balancing the most efficient use of the ICC’s limited resources.<sup>63</sup> Adopting the Inter-American Commission’s interpretation to focus on the impact of crimes in which “environmental damage inflicted on the affected communities,” the ICC can utilize their new Policy Paper’s shift to giving particular consideration of crimes “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.”<sup>64</sup>

The recent holdings of the three major international human rights tribunals shed light on emerging norms in including environmental harm at least for their anthropocentric consequences. The ICC can learn from the African Commission’s recent interpretation of peoples’ right to a “general satisfactory environment”<sup>65</sup> to be violated by a state “participat[ing] directly in the contamination of the environment through air, water and soil pollution” such that it “adversely affects the health” of a particular group of people. The European Court and Inter-American Commission, while lacking in a similarly enumerated environmental right, have both demonstrated broad interpretations of existing human rights that

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60. *Id.* at para 57, citing I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, par. 164; and IACHR, Democracy and Human Rights in Venezuela. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, paras. 1076-1080.

61. *Id.*

62. *Id.* at para. 59, noting that “Consistent with its evolutionary interpretation of human rights guarantees in Inter-American instruments, the IACHR has held that ‘Article 21 of the American Convention recognizes the right to property of members of indigenous communities within the framework of communal property,’ and that the right to property under Article XXIII of the American Declaration ‘must be interpreted and applied in the context of indigenous communities with due consideration of principles relating to the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources.’”

63. 2016 Policy Paper, *supra* note 1, at paras. 12, 35, and 49.

64. *Id.* at para. 41.

65. African Charter of Human and Peoples’ Rights, Par. I, ch. 1, Article 24 (Oct. 21, 1986) available at [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) [<https://perma.cc/4K3P-NT5K>].

encompass environmental destruction as a violation of those rights. Further, the European Court's procedural considerations on the level of harm caused by the dangerous activity, the foreseeability and knowledge of the perpetrator, and the causal link between the act and the harm, mirror the ICC's procedural threshold requirements.<sup>66</sup> Finally, the Inter-American Commission presents a novel expansion of right to property protections that take into account previous historical and societal context to better protect indigenous peoples' land as a reflection of their ancestral territory. Together, these progressions of human rights protections support the ICC's 2016 Policy Paper's new focus shift, and present guideposts for traversing new potential cases crimes against humanity as a vehicle to obtain justice for environmental destruction.

### Part III: Applying A New Standard for Environmental Crimes

This note has demonstrated that the Rome Statute creates the possibility to prosecute environmental destruction as a means of extermination or forcible deportation under crimes against humanity. Such an interpretation and focus aligns with the movement of other international human rights tribunals. Using the language of the Rome Statute and the lessons learned from the African Commission, European Court, and Inter-American Commission, this final section will examine how the ICC could prosecute individuals for crimes against humanity for their actions in Myanmar and Cambodia.

#### A. The "Extermination" of Rohingya Muslims in Myanmar

As mentioned in Part I, individuals in the Myanmar government have allegedly been specifically targeting an ethnic religious minority, using tactics such as attacking and burning villages, homes, and farms; physically attacking, beating, stabbing, and shooting the villagers; and forcing survivors to flee on foot to the neighboring border of Bangladesh.<sup>67</sup> Human rights advocates estimate that the attacks have killed thousands of people, and have forced over four hundred thousand Rohingya Muslims to flee for their lives to Bangladesh, creating a "humanitarian crisis" as the country attempts to handle the influx of persecuted refugees.<sup>68</sup>

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66. COUNCIL OF EUROPE, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 44, at 18–20.

67. Testimony of Daniel P. Sullivan, Senior Advocate for Human Rights Refugees International, House Committee on Foreign Affairs Subcommittee on Asia and the Pacific: "Burma's Brutal Campaign Against the Rohingya" [hereinafter "Sullivan Testimony"] (Sept. 27, 2017) at 1, available at <http://docs.house.gov/meetings/FA/FA05/20170927/106434/HHRG-115-FA05-Wstate-SullivanD-20170927.pdf> [<https://perma.cc/A5ZT-FX8B>].

68. *Id.* at 4, see also Feliz Solomon, *Myanmar's Crisis, Bangladesh's Burden: Among the Rohingya Refugees Waiting for a Miracle*, TIME (Nov. 23, 2017), <http://time.com/5031342/bangladesh-myanmar-rohingya-refugee-crisis/> [<https://perma.cc/WGD2-KK5N>] (for more on the resulting harms from the forced transfer to Bangladesh, which is beyond the "extermination" elements of this paper).

As outlined in detail in Part I, for an act to constitute a crime against humanity as an “extermination” under Article 7(1)(b), an individual must be found to have (1) “killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population,” (2) the conduct must have “constituted, or took place as part of, a mass killing of members of a civilian population, (3) such conduct must be “part of a widespread or systematic attack directed against a civilian population,” and (4) the individual must have “[known] that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”<sup>69</sup> Human rights advocates have alleged that Myanmar military leader Senior General Min Aung Laing is “directly responsible for the crisis,” noting first-hand accounts showing that the burning of villages and environmental destruction has been perpetrated by Myanmar soldiers in Army uniform.<sup>70</sup> If the prosecutors can confirm the allegations against the military leader, the intentional burning of homes and farmland leading to the deaths of at least one person satisfies the first element.<sup>71</sup> There is ample evidence of fires and destruction being purposefully focused only on Rohingya villages, skipping over non-Rohingya villages.<sup>72</sup> This, coupled with the reports of internal domestic policies skewed to disfavor and discriminate against the ethnic minority (restricting the “basic freedoms to marry, have children, practice religion, work, or to move freely”) demonstrate a particularly “widespread” and “systematic” targeting of this particular ethnic minority, satisfying the second and third elements. Finally, while there is a solid case for “knowing” that death will result from burning down a village, the ICC has rules that “if a continuous and foreseeable result” of the harm “is that a people, a culture or habitat will be destroyed,” the actions satisfy the “knowing” element for extermination.<sup>73</sup>

### B. The “Deportation or Forcible Transfer” of Civilians in Cambodia

Land grabbing in Cambodia has been addressed by the international criminal and environmental academic community previously, even in the context of the ICC

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69. I.C.C., Elements of Crimes, art. 7(1)(b) “extermination” [hereinafter “Elements of Crimes”] (2011), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> [<https://perma.cc/324C-KGXU>].

70. Sullivan Testimony at 5.

71. The author recognizes that this is a significant “if,” but the purpose of this paper is not quite to advocate the specific prosecution for either the Rohingya or Cambodian cases. Rather, it is to demonstrate the avenues down which the ICC can tread to begin prosecuting such cases—that it is capable and seemingly willing to do so.

72. Sullivan Testimony at 2, *see also*, Council on Foreign Rel., *The Rohingya Crisis* (Dec. 7, 2017), <https://www.cfr.org/backgrounder/rohingya-crisis> [<https://perma.cc/BU32-C5ER>].

73. Payal Patel, *Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court’s Mandate to Prosecuting Environmental Crimes?*, 14 LOY. U. CHI. INT’L L. REV. 175, 191 (2016).

and the Rome Statute.<sup>74</sup> Some policy experts even credit the 2015 Communication to the ICC from international lawyer Richard Rogers from Global Diligence on behalf of Cambodian victims as the tipping point, leading ICC Prosecutor Fatou Bensouda to publish her 2016 Policy Paper.<sup>75</sup> Regardless, over 2.6 million hectares of land in Cambodia had reportedly been “grabbed,” taken from the farmers who owned the land and leased to private companies as “Economic Land Concessions.”<sup>76</sup> That amounts to a staggering seventy-three percent of the nation’s arable land.<sup>77</sup> In his Comment to the ICC, Rogers alleges that the “Ruling Elite”—a small number of senior members of the Cambodian ruling government, executive officials in the State security forces, and government-connected business leaders—have perpetrated human rights violations against Cambodian civilians through forcible transfer, a crime against humanity under the Rome Statute.<sup>78</sup> He alleges that 770,000 people have been forcibly transferred away from their homes and ancestral land under threat of “brutal violence, trumped-up criminal charges and other forms of persecution,”<sup>79</sup> with indigenous communities facing particular hardship.<sup>80</sup> To quell the uprising and societal unrest arising from forcible removals from the land, “dissidents” have reportedly been “assassinated, murdered, beaten-up, subjected to trumped-up charges and illegal detention, and persecuted due their opposition to the Ruling Elite.”<sup>81</sup>

As outlined in greater detail in Part I, under Article 7(1)(d), “deportation or forcible transfer of population” consists of five elements: (1) that the perpetrator

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74. *Id.* at 193, *see also* Luigi Proserpi & Jacopo Terrosi, *Embracing the ‘Human Factor’*, 15 J. INT’L CRIM JUSTICE 509 at n.10 (2017) for a longer list of secondary articles regarding Cambodian “land concessions” and “land grabs,” and Human Rights Watch, *Joint Letter to UNHRC on Human Rights Situation in Cambodia* (Aug. 20, 2015), <https://www.hrw.org/news/2015/08/20/joint-letter-unhrc-human-rights-situation-cambodia> [<https://perma.cc/7N2K-LK95>].

75. Global Diligence, *Land Grabbers May End Up In The Hague: Global Diligence Welcomes The ICC Prosecutor’s New Case Selection Policy* (Sept. 15, 2016), <http://www.globaldiligence.com/2016/09/15/land-grabbers-may-end-up-in-the-hague-global-diligence-welcomes-the-icc-prosecutors-new-case-selection-policy/> [<https://perma.cc/8Q29-43FM>]. *See also*, Global Diligence, *Communication Under Article 15 of the Rome Statute of the I.C.C., The Commission of Crimes Against Humanity in Cambodia* (2014), [https://www.fidh.org/IMG/pdf/executive\\_summary-2.pdf](https://www.fidh.org/IMG/pdf/executive_summary-2.pdf) [<https://perma.cc/6SPK-ML28>].

76. Testimony of Richard Rogers, U. S. Cong., House Committee on Foreign Affairs Subcommittee on Asia and the Pacific, *Property Rights and Development in Southeast Asia* (Aug. 21, 2015), at 3, <http://docs.house.gov/meetings/FA/FA05/20150821/103858/HHRG-114-FA05-Wstate-RogersR-20150821.pdf> [<https://perma.cc/M2TX-FETJ>].

77. *Id.* at 4.

78. Global Diligence, *The Commission of Crimes Against Humanity in Cambodia*, at para. 3 (2014).

79. *Id.* at 6–7.

80. *Id.* at 8, arguing that “Of the estimated 190,000 minorities, more than half may have already been forcibly excluded from communal and ancestral land. Due to their particular dependence on and cultural attachment to land, the land grabbing has devastated their livelihood and threatened their ethnic identity.”

81. *Id.* at 10.

deport[] or forcibly transfer[], without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts,” (2) that those deported were “lawfully present” in the area, (3) that the perpetrator knew that those deported were lawfully present, (4) the conduct was committed as “part of a widespread or systematic attack directed against a civilian population,” and (5) that the perpetrator “knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”<sup>82</sup> In his Communication, Rogers lists a table with 72 events of forcible transfer affecting “thousands of Cambodians,” who were legally present on land either owned by the families or else belonging to indigenous groups as ancestral land, satisfying elements 1 and 2.<sup>83</sup> That the attacks were supported by members of the government and the forceful nature of the attacks (10 of the 72 evicted events were accompanied by the murder of at least one person) evidence the perpetrators’ knowledge of the legal status of the people from whom they grabbed the land. The Communication points to the “massive number of victims and the geographical reach” of the actions against civilian groups, coupled with the “organized nature and reoccurring pattern of criminal conduct,” which satisfies elements 4 and 5.<sup>84</sup>

For both the Rohingya crisis and the Cambodian land grab crisis, the actions against the environment—whether in targeted burning and destruction of land as an “extermination,” or the “deportation” of Cambodian citizens under threat of force—were used in tandem with other extreme tactics to either target a specific group or the general civilian population. On its face, these cases stand as possible ICC investigations in light of the recent Policy Paper’s intended shift to prosecuting crimes “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.”<sup>85</sup> Additionally, the examples from the African Commission, the European Court, and the Inter-American Commission strengthen the argument for greater will from the international community to address these issues within the human rights framework. Specifically, the ICC can draw upon the African Commission’s willingness to draw on other international tribunals in its analysis of the potential extermination and alleged forcible transfer;<sup>86</sup> the European Court’s similar mens rea requirements to allow “knowledge” proven for either “extermination” or “deportation” as “knew—or ought to have known—that

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82. Elements of Crimes, *supra* note 69, art. 7(1)(d) “Crime against humanity of deportation or forcible transfer of population.”

83. Global Diligence, *The Commission of Crimes Against Humanity in Cambodia*, at para. 19 (2014).

84. *Id.* at para. 21.

85. 2016 Policy Paper, *supra* note 1, at para. 41.

86. There is precedence for international tribunals citing to other tribunals. For a report of the European Court of Human Rights citing to the Inter-American Instruments of Human Rights *see* EUROPEAN COURT OF HUMAN RIGHTS, RESEARCH REPORT (2016), [http://www.echr.coe.int/Documents/Research\\_report\\_inter\\_american\\_court\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf) [<https://perma.cc/ABY5-PT54>].

there was a real and immediate risk to the lives of the people living near” the activities perpetrated;<sup>87</sup> and finally, the Inter-American’s example of “evolving standards . . . in the light of developments in the field of international human rights law”<sup>88</sup> to use the decades of Cambodian land grab suffering to rationalize deviating from enumerated human rights definitions.<sup>89</sup>

## Conclusion

The emerging trends in international jurisprudence and the growing amount of scholarship regarding environmental harms is leading to a shift in the way that the global community thinks about crime. The ICC Policy Paper presents an opening for a substantive and tangible step in holding accountable actors who utilize their power and disregard the environment at the expense of others. Though the ICC’s traditional remit via the Rome Statute presents institutional hurdles through high thresholds of voluntary actions and specific intent, there is space within the definition of “crimes against humanity” to incorporate environmental harm. This opening, combined with the global shift in attention to environmental harm, will allow for the ICC to begin prosecuting individuals for their actions against nature. Crimes against humanity as it was defined was meant to expand and grow with the consciousness of the global community. Other international tribunals have seized on this, adopting an evolving approach to interpreting human rights violations in light of “social context and changes in society.”<sup>90</sup> With the 2016 Policy Paper, a platform was created for elevating deliberate harm against the environment to a violation of human rights.

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87. COUNCIL OF EUROPE, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 44, at 37, citing to *Öneryıldız v. Turkey* [GC], para. 101.

88. Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources*, OEA/Ser.L/V/II. Doc.56/09, Dec. 30, 2009, Chapter II, para. 8.

89. *Id.* at para. 59.

90. COUNCIL OF EUROPE, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 44, at 31.

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