

# ENHANCING ACCOUNTABILITY FOR ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL LAW: ECOCIDE AS A LEGAL FULFILMENT OF ECOLOGICAL INTEGRITY

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*The proposal to include ecocide as the fifth crime in the Rome Statute of the International Criminal Court ('Rome Statute') is part of ongoing efforts by jurists aimed at enhancing environmental protection through international criminal law. If adopted, the crime would be the first standalone environmental crime under the Rome Statute. Its proponents view it as a powerful liability norm for dealing with the humanitarian, ecological and structural aspects of environmental damage that together threaten international peace and security. Its accommodation into the Rome Statute would necessitate changes to the substantive provisions of the Statute. In light of the controversial change, this article raises questions about its feasibility as a criminal liability norm and concludes that the crime of ecocide represents an appropriate legal response to environmental damage. This argument is anchored on the ecological integrity framework understood as a grundnorm for international law.*

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## I INTRODUCTION

The international criminal law framework established under the *Rome Statute of the International Criminal Court* ('*Rome Statute*') was inaugurated with the goal to punish the 'most serious crimes of international concern',<sup>1</sup> where seriousness is determined by the fact that such crimes 'threaten the peace, security and wellbeing of the world'.<sup>2</sup> In a study commissioned by the United

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<sup>1</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 1, 5 ('*Rome Statute*').

<sup>2</sup> *Rome Statute* Preamble.

Nations, environmental degradation that results in ‘large-scale death or lessening of life chances’<sup>3</sup> was identified as one of the main threats to international security especially due to its potential to undermine ‘[s]tates as the basic unit of the international system’.<sup>4</sup> Despite the linkage between environmental degradation and peace and security, the current international law framework lacks an environmental crime to punish mass environmental damage that results in harm to human beings and destruction of ecosystems.<sup>5</sup> Efforts to develop such a norm of liability for this purpose have been ongoing. The proposal to recognise ecocide as a fifth crime of the *Rome Statute* is part of these efforts.

For over a period of 40 years, UN bodies have on different occasions considered the possibility of recognising ecocide either as a method of genocide or as a standalone international crime.<sup>6</sup> However, on none of those occasions has the idea been brought to fruition. The push for a crime of ecocide has received fresh impetus through several initiatives. Some of the initiatives include the work of the Ecocide Project of the University of London,<sup>7</sup> together with environmental activists such as Polly Higgins through her ‘Eradicating Ecocide’ campaign,<sup>8</sup> and forums such as Mission LifeForce.<sup>9</sup> In recent years, the most vivid articulation of the crime has been in the form of a proposal submitted to the International Law Commission by Higgins. She defines ecocide as:

[T]he extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.<sup>10</sup>

Higgins’ proposal would entail several novel additions to the *Rome Statute*. For example, in calling for the adoption of a norm that would punish ‘destruction, damage to or loss of ecosystem(s)’,<sup>11</sup> the proposal casts environmental harm in terms of an ecological crisis as opposed to the often-employed description of harm simply as environmental damage.<sup>12</sup> This aspect of the proposed crime is borne out of the need for liability norms that acknowledge that human beings are environmentally embedded beings whose wellbeing cannot be independent of the ecosystems which they are a part of. This position can be contrasted with the prevailing ontology characterised by the dichotomy

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<sup>3</sup> Anand Panyarachun et al, *A More Secure World: Our Shared Responsibility — Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change*, UN GAOR, 59<sup>th</sup> sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) 12.

<sup>4</sup> Ibid.

<sup>5</sup> Bronwyn Lay et al, ‘Timely and Necessary: Ecocide Law as Urgent and Emerging’ (2015) 28 *Journal Jurisprudence* 431, 431–2.

<sup>6</sup> Polly Higgins, Damien Short and Nigel South, ‘Protecting the Planet: A Proposal for a Law of Ecocide’ (2013) 59 *Crime Law and Social Change* 251, 256–8.

<sup>7</sup> Damien Short, *Ecocide Project* (2019) Directory of Research and Expertise <<https://research.sas.ac.uk/search/research-project/60/ecocide-project/#project-summary>> archived at <<https://perma.cc/SQ3R-FFXP>>.

<sup>8</sup> See *Eradicating Ecocide, Home* (2018) <<http://eradicatingecocide.com>>.

<sup>9</sup> Mission LifeForce, *About Mission LifeForce* <<https://www.missionlifeforce.org/mission-lifeforce>>.

<sup>10</sup> Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (Shepherd-Walwyn, 2010) 63.

<sup>11</sup> Ibid.

<sup>12</sup> See Higgins, Short and South, above n 6, 256.

between nature and society. As such, the proposal represents the antithesis of the prevailing anthropocentric orientation of international law. In this regard, Higgins' work is part of the broader discourse on the need for reforms to international environmental norms and institutions from a perspective informed by foundational values other than those that undergird international law currently.

Similarly, Laurent Neyret has proposed a crime of ecocide defined as the commission of specific intentional acts that 'threaten the security of the planet and are committed as part of a widespread or systematic action'.<sup>13</sup> It is noteworthy that Neyret's proposal captures the idea that both the ecological and the human dimensions of environmental damage are a threat to the security of the planet.<sup>14</sup> By delineating the goal of protecting the 'security of the planet' as the objective of such a crime, Neyret proposes a type of liability norm that would reflect the ecological ramifications of environmental harm not limited to redressing harm caused to humans.

Like Higgins, Tim Lindgren ties the effectiveness of the international criminal framework as an instrument for environmental protection to its ability to address environmental damage as a structural offence.<sup>15</sup> In his view, ecocide is a structural offence because it is characterised not only by ecological harm, but also by social and cultural injustices.<sup>16</sup> Lindgren draws on an analysis of the experiences which societies that follow alternative life-systems have had with corporate environmental damage to underline how prioritisation of economic growth and wealth maximisation under the capitalistic political economy undermines socio-ecologic wellbeing. Lindgren defines 'alternative life-systems' as modes of living that are distinguishable from those of highly industrialised nations.<sup>17</sup> He observes that historically, those societies' experiences with corporate environmental damage have resulted not only in physical and ecological harm, but also in destruction of their cultures.<sup>18</sup> In view of the multidimensional character of environmental damage viewed through the prism of the experiences of such societies, Lindgren contemplates a 'radically framed international crime of ecocide that can also reach its genocidal effects'<sup>19</sup> as a way of enabling international criminal law's response to reflect the 'graveness of ongoing ecological, social, and cultural destruction'.<sup>20</sup>

Overall, proponents of ecocide advance an argument for a crime that targets environmental damage as a multifaceted socio-ecological phenomenon enabled both by substantive limitations of criminal liability rules and by limitations attributable to the values and assumptions that undergird international law. As such, adoption of the crime as an international norm would not only entail amendments to the substantive provisions of the *Rome Statute*, but also

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<sup>13</sup> Laurent Neyret, *D'es écocrimmes à l'écocide: Le droit pénal au secours de l'environnement* (Bruylant, 2015) 1, 288, cited in Lay et al, above n 5, 434.

<sup>14</sup> Cited in Lay et al, above n 5, 434–5.

<sup>15</sup> Tim Lindgren, 'Ecocide, Genocide and the Disregard of Alternative Life-Systems' (2018) 22 *International Journal of Human Rights* 525, 531.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid* 527.

<sup>18</sup> *Ibid* 526.

<sup>19</sup> *Ibid* 527.

<sup>20</sup> *Ibid.*

necessitate the introduction of foundational values that differ from those that ground international law generally and international criminal law in particular. Due to the controversial nature of the changes it would entail, the sentiment expressed by some that the time is not yet ripe for including ecocide in the *Rome Statute*, is not surprising.<sup>21</sup> Importantly, given a history marked mostly by its rejection from being recognised as an international law norm,<sup>22</sup> any likelihood of its recognition as a fifth crime will require convincing grounds.

Proponents argue that because support for ecocide law can already be discerned from a variety of legal sources, the recommendation to adopt a crime of ecocide does not constitute a radical departure from the principles of international law.<sup>23</sup> They point to the jurisprudence of international, regional and national courts, where the application of concepts such as the public interest doctrine can be seen as an acknowledgement of a duty of care owed by everyone to protect the earth.<sup>24</sup> By this logic, ecocide's goal of imposing obligations on states, corporations and individuals for the destruction of ecosystems is a natural extension of this development.<sup>25</sup> Furthermore, it has been argued that support for ecocide emanates from the fact that the crime would represent an apotheosis of eco-crimes already existing under international law as the 'final normative threshold beyond which it is illegal to cross'.<sup>26</sup>

So far, scholarly works advancing the case for ecocide have made considerable contributions in clarifying its meaning, its purpose and in explaining what its substantive elements should be. If ecocide stands a chance at being the fifth crime in the *Rome Statute*, solutions to those issues are required. In light of this need, this article examines the extent to which the crime of ecocide would fulfil the tenets of ecological integrity as a grundnorm for international law.<sup>27</sup> This examination draws primarily on the substantive elements of the crime as defined by Higgins. It concludes that, while the contemplated substantive legal changes to the *Rome Statute* would be contentious, when considered against the tenets of ecological integrity as a grundnorm for international law, the crime is an appropriate legal response to environmental damage understood as a humanitarian, ecological and systemic problem.

The discussion herein proceeds as follows: Part II introduces the ecological integrity framework in order to articulate its tenets as the framework for assessing international law's adequacy to respond to global environmental challenges and for guiding reforms towards achieving better environmental

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<sup>21</sup> Alessandra Mistura, 'Is There Space for Environmental Crimes under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework' (2018) 43 *Columbia Journal of Environmental Law* 181, 226.

<sup>22</sup> For an abridged history, see Higgins, Short and South, above n 6, 257–62.

<sup>23</sup> Lay et al, above n 5, 451, 446–7.

<sup>24</sup> Ibid 443.

<sup>25</sup> Higgins, *Eradicating Ecocide*, above n 11.

<sup>26</sup> Lay et al, above n 5, 447.

<sup>27</sup> Klaus Bosselmann, 'The Rule of Law Grounded in the Earth: Ecological Integrity as a Grundnorm' in Laura Westra and Mirian Vilela (eds), *The Earth Charter, Ecological Integrity and Social Movements* (Routledge, 2014) 3.

protection goals.<sup>28</sup> Ecological integrity is used here in a manner that is functionally equivalent to a constitutional right to a clean and healthy environment found in many domestic legal systems and as an apex environmental norm to justify and guide radical transformations of laws and institutions in the advancement of environmental protection goals. Part III highlights the main proposals and efforts made to reform the substantive aspects of international criminal law in order to advance its effectiveness to respond to environmental damage. As the discussion will show, to the extent that they fail to reflect the exigencies that ecological integrity places on international criminal law, these efforts have not gone far enough. This limitation is emblematic of international law's lack of a grounding framework constituted of a value system that would support the types of legal reforms needed to respond to contemporary environmental challenges. Since 'no law can ever replace or alter the moralities and perceptions that it is guided by',<sup>29</sup> the need for a paradigm shift that allows for the operationalisation of a different set of values distinct from those that have shaped the current rules is apparent. An analysis of the legal aspects of the crime of ecocide follows in Part IV. Here, the article identifies substantive changes to the *Rome Statute* that would be necessitated by the introduction of a crime of ecocide are identified. The crime of ecocide would necessitate many substantial changes to the *Rome Statute*. This article does not set out to offer a comprehensive analysis of each and every one of these issues.<sup>30</sup> Rather, it focuses on four points which bear on the crime's potential to advance environmental protection through international criminal law. It shall be demonstrated here that in light of the present law and practice, the proposed changes impugn the feasibility of the crime as an addition to the *Rome Statute*. Nonetheless, when viewed through the prism of the ecological integrity framework, the changes represent necessary areas of reform in order to make international criminal law an effective instrument for upholding a commitment both to ecological limits, to economic development and to human wellbeing.<sup>31</sup> This is followed by a short conclusion in Part V that reflects on how the substantive changes to the *Rome Statute* necessitated by the crime of ecocide align with the ecological integrity framework.

## II ECOLOGICAL INTEGRITY AS A FRAMEWORK FOR REFORMING INTERNATIONAL CRIMINAL LAW

Environmental damage has generally been assessed in terms of its local humanitarian and ecological impacts. Increased awareness of the interconnectedness of the environment as a global resource necessitated the development of frameworks to assess the humanitarian and ecological impacts of environmental damage on a global scale. The planetary boundaries framework

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<sup>28</sup> Rakhyun E Kim and Klaus Bosselmann, 'Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law' (2015) 24 *Review of European Comparative & International Environmental Law* 194.

<sup>29</sup> Klaus Bosselmann, 'Losing the Forest for the Trees: Environmental Reductionism in the Law' (2010) 2 *Sustainability* 2424, 2425.

<sup>30</sup> See Gwynn MacCarrick, 'Amicus Curiae to the International Monsanto Tribunal on the Question of Ecocide', Amicus Curiae Submission to the *International Monsanto Tribunal in The Hague*, October 2016, 66.

<sup>31</sup> See Bosselmann, 'The Rule of Law Grounded in the Earth', above n 27

has emerged as a popular framework for explaining the seriousness of environmental crisis on a planetary scale in scientific terms. The framework identifies nine thresholds to demarcate a geological epoch characterised by stable Earth system processes and an epoch marked by instability of Earth systems processes, which can ‘trigger non-linear, abrupt environmental change within continental- to planetary-scale systems’.<sup>32</sup> Scientists have warned that four out of the nine planetary boundaries include climate change, loss of biosphere integrity, land-system change and altered biogeochemical cycles.<sup>33</sup> Though scientists cannot say with certainty what the consequences of exceeding those planetary boundaries are,<sup>34</sup> research predicts that exceeding planetary boundaries can lead to planetary ecological collapse where the Earth systems processes are destabilised to such an extent that they can no longer support survival of life on Earth as they did in the more stable Holocene geological epoch.<sup>35</sup>

The description above paints a picture of the seriousness of the environmental problems to which international law as a system of environmental governance is expected to respond. Based on the planetary boundaries trope, the challenge relates specifically to ‘*how* to introduce the idea of planetary biophysical limits to international law, or, more broadly, the governance of States and corporations’.<sup>36</sup> Scholars have answered the call for such a framework through the development of several governance frameworks that aim to ground law on a value system that recognises ecological limits to economic, political and social institutions.<sup>37</sup> Some of the more recent ones include ‘the rule of ecological law’,<sup>38</sup> ‘ecological sovereignty’,<sup>39</sup> ‘ecocentric rule of law’<sup>40</sup> and ‘global environmental constitutionalism’.<sup>41</sup> Such efforts are informed by the realisation that ‘[l]aw cannot continue to comfortably rest on foundations that evolved under the harmonious Holocene’.<sup>42</sup> At a deeper level, these concepts identify the limitation of international law as not simply its lack of responsive legal rules but

<sup>32</sup> Johan Rockström et al, ‘Planetary Boundaries: Exploring the Safe Operating Space for Humanity’ (2009) 14 *Ecology and Society* 32.

<sup>33</sup> See Will Steffen et al, ‘Planetary Boundaries: Guiding Human Development on a Changing Planet’ (2015) 347 *Science* 736.

<sup>34</sup> See *ibid*; Rockström et al, above n 2.

<sup>35</sup> Stockholm Resilience Centre, *The Nine Planetary Boundaries* <<http://www.stockholmresilience.org/research/planetary-boundaries/planetary-boundaries/about-the-research/the-nine-planetary-boundaries.html>>.

<sup>36</sup> Kim and Bosselmann, above n 28, 195 (emphasis in original).

<sup>37</sup> See *ibid*.

<sup>38</sup> Geoffrey Garver, ‘The Rule of Ecological Law: The Legal Complement to Degrowth Economics’ (2013) 5 *Sustainability* 316 <<https://doaj.org/article/f9009fad5d844723818467b1a6590cd7>> archived at <<https://perma.cc/3GF6-93RV>>.

<sup>39</sup> Peter Boulot, ‘A New Legal Paradigm: Towards a Jurisprudence Based on Ecological Sovereignty’ (2012) 8 *Macquarie Journal of International and Comparative Environmental Law* 1, 1.

<sup>40</sup> Louis J Kotzé and Duncan French, ‘The Anthropocentric Ontology of International Environmental Law and the *Sustainable Development Goals*: Towards an Ecocentric Rule of Law in the Anthropocene’ (2018) 7 *Global Journal of Comparative Law* 5.

<sup>41</sup> Louis J Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Brill Nijhoff, 2016).

<sup>42</sup> *Ibid* 7.

rather one of lack of foundational ethics to challenge and transform the assumptions that underlie its regulation of environmental issues.<sup>43</sup>

Ongoing efforts aimed at the recognition of an international human right to a clean and healthy environment are also in response to the need for a framework constituted of a set of values that can enable international law to transcend its inherent limitations and become more responsive to global environmental problems.<sup>44</sup> However, since the right is not yet recognised as a *jus cogens* norm, it not able to provide an authoritative framework for assessing international law's response to environmental challenges or guiding necessary reforms to it. Thus, until such a right becomes part of international law, there remains a need for a framework that can provide grounding for re-orientation of international law towards achieving environmental protection goals.

Although similar in their realisation of the need to reform international law in a manner that is responsive to the seriousness of present global environmental challenges, they differ to the extent that they espouse divergent points of departure for addressing the limitations of both international law and environmental law. However, they can be distinguished conceptually from one another because of the differing focal points that they assume for tackling the factors that undermine environmental problems. Some propose a re-thinking of value systems that undergird legal and institutional responses to environmental problems in order to achieve the environmental objective contemplated within them. For example, the notion of ecological integrity challenges the value system undergirding the anthropocentric laws.<sup>45</sup> Others provide an analytical framework for assessing the sufficiency of environmental regulatory regimes in light of contemporary environmental problems of the Anthropocene.<sup>46</sup> Yet others aim at defining what the objectives of environmental governance at the international and national legal systems should be and how they should be aligned. For example, under the ecological integrity framework, Klaus Bosselmann proposes a realignment of policy objectives to be served by environmental governance such that 'the natural environment is universal and comes first, human social organization exists within it and comes second and economic modelling only exists within both, neither in parallel nor above them'.<sup>47</sup>

This article applies the concept of ecological integrity as a framework for analysing the adequacy of substantive legal reforms within international criminal law and the extent to which it can support an argument in favour of the feasibility of ecocide. Ecological integrity is defined as 'the continued healthy or proper functioning of ... global- and local-scaled ecosystems and their ongoing provision of renewable resources and environmental services'.<sup>48</sup> Ecological integrity is not yet recognised as a legally binding concept of international law. Its persuasive force, however, stems from two factors. First, it expresses more

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<sup>43</sup> Bosselmann, 'Losing the Forest for the Trees', above n 29, 2425.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid 2430.

<sup>46</sup> Kotzé and French, above n 41.

<sup>47</sup> Bosselmann, 'The Rule of Law Grounded in the Earth', above n 27, 3–11.

<sup>48</sup> Brendan Mackey, 'Ecological Integrity — A Commitment to Life on Earth' in Peter Blaze Corcoran, Mirian Vilela, and Alide Roerink (eds), *The Earth Charter in Action: Toward a Sustainable World* (KIT, 2005) 65, 66.

vividly the types of values needed to undergird reforms to both international and national regulatory frameworks in response to contemporary environmental problems. Secondly, it explains how such values can be operationalised to affect the type of social re-ordering necessary for the realisation of its tenets in practice.

Ecological integrity proceeds from the premise that international law and jurisprudence are founded on, and continue to espouse, values that have facilitated the present ecological crisis.<sup>49</sup> As Bosselmann argues, environmental law's failure to confront the realities of contemporary environmental problems is a function of the dominant 'economic rationality' animated by 'dualism, anthropocentrism, materialism, atomism, greed, and economism'.<sup>50</sup> These values have found expression not only in environmental law, but also in international law. For example, over time, the international legal order has created rules that confer and consolidate certain privileges for the corporate entity as the protagonist in global capitalism. As an example, the espousal system which allowed home states to bring a claim on behalf of a corporation whose interests had been injured by the conduct of a host nation was replaced by the international investor-state arbitration regime.<sup>51</sup> The arbitration regime uprooted the espousal system by granting corporations a right to bring claims directly against host nations.<sup>52</sup> By making corporations direct beneficiaries of treaties, this development conferred claimant corporations with equal status to the respondent state.<sup>53</sup> Additionally, the investor-state arbitration regime does not provide individuals with equivalent standing to bring claims directly against states or against corporations.<sup>54</sup> The consolidation of corporate privilege through the instrumentality of international law could explain the reticence demonstrated by the international legal order to subject corporations to direct accountability for environmental harm and human rights violations.

Another limitation of international law arises from its anthropocentric orientation characterised by the view that the natural environment is a passive entity and exists to serve human ends.<sup>55</sup> This is evident in human rights law for example, where the environment is conceived of mostly as an instrument for fulfilling the human rights to life, health and culture of the present and future generations of humans.<sup>56</sup> While the idea of protection of human wellbeing is an important purpose for law generally, the issue with anthropocentrism is its disregard of the fact that humans are environmentally-embedded beings. Because of their environmental embeddedness, the wellbeing of humans cannot be achieved in isolation from the protection of the wellbeing of nature.<sup>57</sup>

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<sup>49</sup> Bosselmann, 'Losing the Forest for the Trees', above n 29, 2434.

<sup>50</sup> *Ibid* 2430.

<sup>51</sup> José E Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 *Santa Clara Journal of International Law* 1, 12.

<sup>52</sup> *Ibid* 13.

<sup>53</sup> *Ibid* 13–15.

<sup>54</sup> *Ibid*.

<sup>55</sup> Bryan G Norton, 'Environmental Ethics and Weak Anthropocentrism' (1984) 6 *Environmental Ethics* 131, 133.

<sup>56</sup> For example, the expression of the enlightened anthropocentrism is the argument that the 'right to environment is no more than the right to life itself'. See, eg, Hilario G Davide Jr, 'The Environment as Life Sources and the Writ of *Kalikasan* in the Philippines' (2012) 29 *Pace Environmental Law Review* 592, 595.

<sup>57</sup> See Garver, above n 38.

Anthropocentrism is also implicated in the limitless exploitation of environmental resources for economic development for the benefit of humans. The principle of sustainable development was developed to balance between economic development on the one hand and environmental protection on the other hand. In practice however, sustainable development has failed to achieve this intended goal. This outcome is due in part to the fact that the principle has been interpreted in a manner that prioritises economic development over environmental protection.<sup>58</sup> Furthermore, while the principle espouses a noble goal of finding a balance between competing policy objectives, it fails to clarify which among these objectives should be prioritised whenever a conflict between them arises. Unavoidably, economic development cedes space to environmental concerns only to the extent that such concerns do not encroach on the economic development goals of humans.<sup>59</sup>

In light of this reality, Bosselmann argues that ecological integrity should be treated as a *grundnorm* ‘against which all other legal norms can be assessed and validated’.<sup>60</sup> On this understanding, ecological integrity would serve both as a standard for assessing international criminal law’s adequacy to respond to global environmental problems and as a guiding framework for reforming it in order to achieve better environmental protection goals.<sup>61</sup> Ecological integrity is an articulation of a principle that human economic activities should be limited by a non-negotiable commitment to ecological limits and to human wellbeing as part of the community of life as the values undergirding law.<sup>62</sup> When operationalised, it implies a realignment of the way in which society is organised so that

the natural environment is universal and comes first, human social organization exists within it and comes second and economic modelling only exists within both, neither in parallel nor above them.<sup>63</sup>

What does ecological integrity imply for international law generally and norms of accountability in international criminal law in particular? As a *grundnorm*, the concept can serve as a framework for assessing international criminal law’s adequacy to respond to contemporary global environmental problems. This can be achieved by examining the extent to which international criminal law upholds values embodied by the ecological integrity framework. These values include ecological limits to economic development and the respect of humans as ecologically embedded beings. As an embodiment of a new ecological rationality, it can provide an appropriate paradigm to justify reforms to international criminal law that reflects the values it embodies. For international criminal law, ecological integrity implies the development of rules of accountability that encompass previously excluded conduct by previously

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<sup>58</sup> Cintia Mara Miranda Dias, *Sustainable Development: The Anthropocentric Epistemology* (Paper presented at Rio 02: World Climate & Energy Event, 2002) 201.

<sup>59</sup> This view was clearly enunciated by the International Court of Justice: ‘[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development’. See *Gabčíkovo-Nagyymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 78, [140].

<sup>60</sup> Kim and Bosselmann, above n 29, 205 (citations omitted).

<sup>61</sup> Bosselmann, ‘The Rule of Law Grounded in the Earth’, above n 27.

<sup>62</sup> See *ibid.*

<sup>63</sup> *Ibid* 4.

excluded actors in recognition of the urgency with which any system of regulation should respond to global environmental problems. Flowing from the realignment of priorities it envisions, ecological integrity lays bare the need for standards that place states, individuals and corporations under the duty to abide by an ecological rule of law while abandoning dogmatic adherence to limitations that may be imposed by the classical understanding of international legal personality.<sup>64</sup> This means that international law must open up principles that have been deemed settled, such as those that insist against direct accountability for corporations under international law.

Ecological integrity denotes an obligation for the development of laws that prevent or deaccelerate the deterioration of the integrity of Earth Systems such that 'if an environmental law norm is not sufficient in either preventing the decay of Earth system integrity; and/or maintaining Earth system integrity; and/or enhancing Earth system integrity, it would be ineffective'.<sup>65</sup>

Ecological integrity also calls for laws that address environmental damage as a socio-ecological phenomenon. This means that international criminal laws relevant to environmental protection must recognise the reality that environmental damage results in harm to human beings. As environmentally embedded beings, humankind's relation to ecosystems on which it depends for survival is one of profound interdependence. This calls for reform of laws that are committed narrowly to anthropocentrism towards an orientation that treats human wellbeing as indispensable and inseparable from the wellbeing of the ecosystems. To further advance the value of respect for human beings, ecological integrity could also make possible development of rules designed in such a way as to eliminate burdensome procedural and substantive legal barriers that prevent access to appropriate remedies to environmental damage. Their social embeddedness necessitates the development of laws that confront the privileging of powerful actors whose interaction and exploitation of environmental resources lead to the disintegration of cultural identities and the social fabric of communities which are defined by the communities' relationship with the environment.<sup>66</sup> This necessitates legal obligations on states and non-state actors in recognition of the need for reform. Finally, laws undergirded by ecological integrity permit the establishment of institutions for effective enforcement of environmental law.

### III MISSING THE MARK: PROPOSALS FOR REFORMS TO SUBSTANTIVE PROVISIONS OF THE *ROME STATUTE* RELEVANT TO ENVIRONMENTAL PROTECTION

This Part highlights the main recommendations for reforms to the substantive provisions of the *Rome Statute* that have made advances to enhance the effectiveness of international criminal law's ability to protect the environment. These include recommendations to adopt a 'green' interpretation of the existing

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<sup>64</sup> See *ibid.*

<sup>65</sup> Louis J Kotzé and Duncan French, 'A Critique of the Global Pact for the Environment: A Stillborn Initiative or the Foundation for *Lex Anthropocenae*?' (2018) 18 *International Environmental Agreements: Politics, Law and Economics* 811, 830–1 <<https://doi.org/10.1007/s10784-018-9417-x>> archived at <<https://perma.cc/3EHD-SFM6>>.

<sup>66</sup> Lindgren, above n 15.

*Statute* crimes and calls for the recognition of new types of environmental crimes. The proposals and efforts are then juxtaposed against the tenets of ecological integrity to highlight the extent to which they correspond to the requirements placed on the system by global environmental challenges.

#### A *Green Interpretation of Substantive Provisions of the Rome Statute*

‘Green’ interpretation of the *Rome Statute* refers to an approach of construing the provisions of the *Statute* in an evolutive manner so as to provide a legal basis for the International Criminal Court (‘ICC’) to punish environmentally damaging conduct.<sup>67</sup> This view assumes that even though the provisions’ express goal may not be to punish environmental crimes as such, a ‘green’ interpretation could unleash embedded environmental concerns more definitively into the international criminal law framework. The most relevant provisions for this purpose are art 6 on genocide, art 7 on crimes against humanity and art 8 on war crimes.<sup>68</sup>

The provisions relating to the crime of genocide do not mention environmental destruction as a method of genocide.<sup>69</sup> However, based on a ‘green’ interpretation a perpetrator could still be punished for genocide if their environmentally damaging conduct is deliberately intended to result in ‘conditions of life calculated to bring about its physical destruction in whole or in part’ of a group or groups.<sup>70</sup> This language creates indirect scope for punishing environmental damage as a crime where the conduct in question constitutes ‘deliberate deprivation of resources indispensable for survival’.<sup>71</sup> This reading hearkens to the position, championed by proponents of ecocide, that ecocide should be treated as a method of genocide.<sup>72</sup>

Even if a ‘green’ interpretation of art 6 were possible, the article does not provide a promising legal basis for accountability because of the high mens rea threshold it requires for conviction. Conviction requires proof of specific genocidal intent,<sup>73</sup> which is defined as the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group’.<sup>74</sup> A considerable number of commentators have argued that genocidal intent — the essence of *dolus specialis* — ‘is very difficult, if not impossible, to prove’.<sup>75</sup> This is because of the practical difficulties of ascertaining the perpetrator’s subjective state of mind and

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<sup>67</sup> See, eg, Donald K Anton, ‘Adding a Green Focus: The Office of the Prosecutor of the International Criminal Court Highlights the “Environment” in Case Selection and Prioritisation’ (2017) 31 *Australian Environment Review* 346.

<sup>68</sup> See *ibid*; *Rome Statute* arts 6–8.

<sup>69</sup> *Rome Statute* art 6.

<sup>70</sup> *Ibid* art 6(c).

<sup>71</sup> *Report of the Preparatory Commission for the International Criminal Court: Addendum 2*, UN Doc PCNICC/2000/1/Add.2 (2 November 2000) 7 (*ICC Elements of Crimes*’).

<sup>72</sup> See especially Lindgren, above n 15; Martin Crook and Damien Short, ‘Marx, Lemkin and the Genocide–Ecocide Nexus’ (2014) 18 *International Journal of Human Rights* 298.

<sup>73</sup> *Rome Statute* art 6.

<sup>74</sup> *Ibid*; *ICC Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2, 6–7.

<sup>75</sup> Katherine Goldsmith, ‘The Issue of Intent in the *Genocide Convention* and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach’ 5 *Genocide Studies and Prevention: An International Journal* 238, 242.

thought process to support a finding ‘that the perpetrator’s intention was to destroy the group, in whole or in part’.<sup>76</sup>

Article 7(1)(k) can provide a basis for accountability where environmental damage constitutes ‘inhumane acts’ resulting in ‘great suffering, or serious injury to body or to mental or physical health’ to a civilian population.<sup>77</sup> The phrase ‘inhumane acts’ has been described as a catch-all provision that can be interpreted in a way that accommodates peacetime environmental damage.<sup>78</sup> However, this would be subject to the qualification that the underlying inhumane act must have been committed ‘as part of a widespread or systematic attack directed against any civilian population’<sup>79</sup> and ‘pursuant to or in furtherance of a State or organizational policy’.<sup>80</sup> The question of what constitutes an ‘organisation’ for the purpose of deriving an organisational policy has remained a controversial one.<sup>81</sup> The ICC has adopted a modernist definition, according to which the term means ‘any organisation that has the capability to perform acts that infringe on basic human values’.<sup>82</sup> This definition expands the possibility that the crimes against humanity provisions could be successfully used to punish environmental damage committed by a corporation.

One of the main limitations of the provisions on crimes against humanity is that their application is limited only to cases where environmental damage results in humanitarian harm.<sup>83</sup> This means that conduct resulting in pure ecological damage would not trigger the ICC’s intervention. In neglecting the ecological dimension of environmental damage, the crime fails to reflect the notion that effective protection of human beings from environmental damage is dependent on protection of the ecosystems on which their survival depends.

Article 8(2)(b)(iv) is the only article of the *Rome Statute* that expressly mentions environmental destruction as part of its constituent elements. Under this provision, a perpetrator is guilty of a war crime by causing ‘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>84</sup> The recognition that environmental damage can be a significant consequence of war represents an ecocentric orientation to international criminal law.<sup>85</sup> The article’s main limitation is that it sets a very high threshold for

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<sup>76</sup> Ibid.

<sup>77</sup> *Rome Statute* art 7(1)(k); *ICC Elements of Crimes* UN Doc PCNICC/2000/1/Add.2, 17.

<sup>78</sup> Caitlin Lambert, ‘Environmental Destruction in Ecuador: Crimes against Humanity under the *Rome Statute*?’ (2017) 30 *Leiden Journal of International Law* 707, 726–7.

<sup>79</sup> *Rome Statute* art 7(1).

<sup>80</sup> Ibid art 7(2)(a).

<sup>81</sup> Mathias Holvoet, ‘The State or Organisational Policy Requirement within the Definition of Crimes against Humanity in the *Rome Statute*: An Appraisal of the Emerging Jurisprudence and the Implementation Practice by ICC States Parties’ (ICD Brief 2, International Crimes Database, October 2013) 1.

<sup>82</sup> Ibid 7.

<sup>83</sup> Lambert, above n 78, 713.

<sup>84</sup> *Rome Statute* art 8(2)(b)(iv).

<sup>85</sup> Jessica C Lawrence and Kevin Jon Heller, ‘The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the *Rome Statute*’ (2007) 20 *Georgetown International Environmental Law Review* 61, 61–2.

conviction by requiring proof of ‘widespread, long-term and severe damage’.<sup>86</sup> Furthermore, because it only applies in cases where environmental damage occurs in the course of an international conflict, it effectively precludes cases where environmental damage occurs during peacetime or in the course of a non-international conflict.<sup>87</sup> The limitations restrict the punitive and deterrence benefits of criminal liability only to a handful of serious environmental damage cases. In doing so, it fails to offer the robustness needed of environmental protection laws as contemplated under the ecological integrity framework.

A recent attempt to extend the ‘green’ approach to interpreting the *Rome Statute* came in 2016 when the Office of the Prosecutor (‘OP’) published a Policy Paper on Case Selection and Prioritisation (‘Policy Paper’).<sup>88</sup> In the Policy Paper, the OP announced that it would henceforth prioritise the investigation and prosecution of crimes that satisfy a gravity threshold. The gravity threshold would be satisfied by proof, inter alia, that a particular *Statute* crime had been committed by means of, or that has resulted in, inter alia, ‘the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land’.<sup>89</sup> Though not binding, the Policy Paper’s focus on environmental harm as relevant to the OP’s decision to prosecute has improved the possibility of entrenching a ‘green’ approach to interpreting the *Rome Statute*. The OP’s move has been welcomed because of its potential to enhance the ICC’s ability to deliver justice to victims of environmental harm and to produce incidental benefits in terms of environmental protection and combating climate change.<sup>90</sup> However, since the Policy Paper is not a binding legal instrument, its potential to improve environmental protection is still an open question. Though a signifier of an awareness of the importance of environmental damage as criminality, the Policy Paper’s intended treatment of environmental concerns does not imply any substantive legal changes to *Statute* crimes that would transcend their limitations as highlighted above.

Overall, ‘green’ interpretation reflects the disharmony that exists between the factual realities of global ecological challenges and law’s response to them. Specifically, the legal responses to environmental challenges highlighted in this section fail to reflect the changes contemplated under the ecological integrity framework in a number of ways. First, ‘green’ interpretation does not address legal barriers that undermine accountability for environmental damage such as the lack of a legal basis for direct corporate accountability for crimes. Second, in so far as it fails to treat environmental damage as an independent ground for liability, a ‘green’ interpretation does not challenge the marginal treatment with

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<sup>86</sup> Tara Smith, ‘Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law’ in William A Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2013) 54.

<sup>87</sup> See *ibid* 52–7.

<sup>88</sup> Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’ (Policy Paper, International Criminal Court, 15 September 2016) <[https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf)> archived at <<https://perma.cc/2XPK-NYW6>>.

<sup>89</sup> *Ibid* 14 [41].

<sup>90</sup> Luigi Prospero and Jacopo Terrosi, ‘Embracing the “Human Factor”: Is There New Impetus at the ICC for Conceiving and Prioritizing Intentional Environmental Harms as Crimes against Humanity?’ (2017) 15 *Journal of International Criminal Justice* 509.

which environmental concerns have been afforded under current international criminal law and practice. Third, by focusing mainly the humanitarian consequences of environmental damage, 'green' interpretation fails to address the ecological dimension of environmental damage.

### B *Proposals for Recognition of New Environmental Crimes under the Rome Statute*

Proposals for new crimes are premised on the belief that the current *Rome Statute* crimes are limited in substantive scope, making them inadequate to address the kinds of environmental damage that characterise the present ecological crisis.<sup>91</sup> A recent proposal is the recommendation to include 'grave crimes against the environment' as a standalone environmental crime in the *Rome Statute*.<sup>92</sup> An earlier proposal called for the recognition of a crime of 'geocide' defined as the 'destruction of any species or the serious impairment of any part of the global environment should be seen as geocide, which deprives humans of their right to a healthy environment'.<sup>93</sup> Both 'grave crimes against the environment' and geocide are intended to give the ICC authority over acts committed by legal and natural persons.<sup>94</sup> Given the significant contribution of corporate actors to global environmental problems, the inclusion of legal persons within the gamut of international criminal liability would provide an avenue to 'end to the *de facto* immunity which multinational corporations enjoy for the most serious environmental damage'.<sup>95</sup>

To the extent that they are intended to punish environmental damage committed both in peacetime and in wartime that results in human and ecological harm, both crimes are similar to Higgins' definition of ecocide. However, their main distinguishing feature from ecocide is their proposed mens rea threshold for both crimes. In contrast to ecocide, the mens rea for grave crimes against the environment would be 'objective recklessness'.<sup>96</sup> Under this standard, an offender would be liable 'if they commit the *actus reus* while the prohibited results were clearly foreseeable for a reasonable person'.<sup>97</sup> The mens rea threshold for geocide would be 'the intentional destruction, in whole or in part, of any of portion of the global ecosystem',<sup>98</sup> with intent defined 'to include not only the mens rea standard of intent from criminal law but also the standard of intent from tort law, namely, desire or knowledge with substantial certainty'.<sup>99</sup> While Regina Rauxloh contemplates an environmental crime whose mens rea is *dolus eventualis*, conviction for geocide would require a higher mens rea

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<sup>91</sup> Regina Rauxloh, 'The Role of International Criminal Law in Environmental Protection' in Francis N Botchway (ed), *Natural Resource Investment and Africa's Development* (Edward Elgar, 2011) 423, 432–4.

<sup>92</sup> *Ibid* 448.

<sup>93</sup> Lynn Berat, 'Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law' (1993) 11 *Boston University International Law Journal* 327, 343.

<sup>94</sup> Rauxloh, above n 91, 423, 449; Berat, above n 93, 344.

<sup>95</sup> Rauxloh, above n 91, 450.

<sup>96</sup> *Ibid* 449.

<sup>97</sup> *Ibid*.

<sup>98</sup> Berat, above n 93, 343.

<sup>99</sup> *Ibid*.

threshold, namely, proof of indirect or oblique intent. Ecocide, on the other hand, would be a strict liability crime.

The question that may arise here is whether there is scope within international criminal law for a crime of strict liability. One of the main considerations in favour of a crime of strict liability is its relatively stronger deterrent effect on the types of conduct that are likely to cause or worsen contemporary global environmental challenges. One could argue that environmental crimes requiring proof of *mens rea* in the form of intention, recklessness or negligence could equally serve this role. However, some studies show that strict liability crimes offer a deterrent benefit that other crimes may not offer. The deterrent effect of a crime emanates mainly from the ability of a crime to create ‘certainty of punishment’,<sup>100</sup> which is in turn tied to the relative ease with which the prosecution can prove wrongdoing. Strict liability can enable the prosecution to circumvent some practical difficulties that arise in cases where a crime requires proof of intent or other types of *mens rea*.<sup>101</sup> Easing the prosecution’s burden has the potential to heighten the certainty of punishment, thereby increasing a crime’s deterrent effect. Ultimately, such a crime would work best in securing deterrence, an outcome that aligns better with the need to respect absolute ecological limits envisioned under the ecological integrity framework.

#### IV SUBSTANTIVE ELEMENTS OF THE CRIME OF ECOCIDE: IMPLICATIONS AND FEASIBILITY WITHIN THE ECOLOGICAL INTEGRITY FRAMEWORK

As the discussion in Part III reveals, efforts to reform international criminal law fall short of the type of legal transformation needed to deal with the present global environmental problems. This Part highlights the substantive amendments that would be required in order to accommodate ecocide within the *Rome Statute*. As the discussion will show, the changes raise controversial issues for the current law, practice and assumptions underlying the *Statute*’s provisions. Such controversies pose a challenge to the feasibility of the crime of ecocide as a potential addition to the *Rome Statute*. As such, the proposed changes are considered in reference to the tenets of the ecological integrity framework. This is done to advance the argument that the changes constitute necessary and timely reforms for international criminal law as a response to present global environmental problems.

##### A *Direct Accountability for Corporate Criminal Conduct*

The crime of ecocide as proposed by Higgins seeks to provide a legal basis for punishing ecosystem damage arising ‘by human agency or by other causes’.<sup>102</sup> The phrase ‘other causes’ can be interpreted to mean that other actors whose conduct is not covered within the scope of the *Rome Statute* would be held directly accountable for environmental damage. Such actors include corporations and states. Proponents of the crime of ecocide acknowledge the role

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<sup>100</sup> Daniel S Nagin, ‘Deterrence in the Twenty-First Century’ (2013) 42 *Crime and Justice: A Review of Research* 199, 199.

<sup>101</sup> *Ibid.*

<sup>102</sup> Polly Higgins, *Earth is our Business: Changing the Rules of the Game* (Shepherd-Walwyn, 2012) 3.

of corporations in some of the most egregious incidences of environmental damage as one of their main motivations for championing the recognition of the crime.<sup>103</sup> Direct corporate accountability would necessitate an amendment to art 25 of the *Rome Statute*, which gives the ICC authority only over human actors.<sup>104</sup>

The question of whether corporations should be amenable to the jurisdiction of the Court was considered during the Rome Diplomatic Conference. Subsequently, it was decided that the Court's authority would be limited to punishing crimes committed by individuals.<sup>105</sup> As David Scheffer explains, several factors influenced this outcome. First, due to the traditional practice of international criminal tribunals as forums for trying individuals, there was no sufficient experience in international law and practice to provide an instructive reference point for designing the relevant provisions for direct corporate accountability in the *Rome Statute*.<sup>106</sup> Scheffer further explains that such a provision would have posed a challenge to the enforcement of the ICC's judgments pursuant to the complementarity principle.<sup>107</sup> Since most domestic legal systems lacked legal frameworks allowing criminal corporate accountability at that time, determination of admissibility pursuant to art 17 would be impracticable.<sup>108</sup> However, as Scheffer observes, in the years following the coming into force of the *Rome Statute*, the number of states that recognise direct criminal accountability for corporations under their domestic laws has increased.<sup>109</sup> This development could be taken to indicate that the practical challenges of assessing admissibility are not likely to be as much of a disabling hurdle as they would have been at the time that the *Rome Statute* was negotiated.

The developments within national criminal law have happened alongside a similar shift in civil law as is evident from the enactment of laws recognising a variety of frameworks for enterprise liability to enable accountability for multinational companies.<sup>110</sup> One can discern a progressive awareness of the need to modify traditional approaches to regulating corporations by adopting dynamic reforms which address the types of governance challenges that arise due to the nature of contemporary corporate structures.

Whether corporations can be subjected to direct accountability for ecocide under international criminal law elicits the question of whether corporations are subjects of international law. Under the classical view of international law, legal

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<sup>103</sup> See, eg, Jennifer Huseman and Damien Short, "'A Slow Industrial Genocide': Tar Sands and the Indigenous People of Northern Alberta" (2012) 16 *International Journal of Human Rights* 216. See also Vanessa Schwegler, 'The Disposable Nature: The Case of Ecocide and Corporate Accountability' (2017) 9(3) *Amsterdam Law Forum* 71; Audrey Crasson, 'The Case of Chevron in Ecuador: The Need for an International Crime against the Environment' (2017) 9(3) *Amsterdam Law Forum* 29.

<sup>104</sup> David Scheffer, 'Corporate Liability under the *Rome Statute*' (2016) 57 *Harvard International Law Journal* 35, 38.

<sup>105</sup> Per Saland, 'International Criminal Law Principles' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999) 189.

<sup>106</sup> See Scheffer, above n 104.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> See, eg, Janet Dine, 'Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?' (2012) 3 *Journal of Human Rights and the Environment* 44.

subjectivity or legal personhood is a precondition for direct accountability for violations of international law.<sup>111</sup> On this view, only states as proper subjects of international law may be subjected to direct obligations or be entitled to claim direct benefits under international law.<sup>112</sup> Since corporations do not possess international personhood, they are neither direct bearers of obligations nor direct beneficiaries of rights under international law. Consequently, corporations are only indirectly accountable through the operation of the state responsibility doctrine.<sup>113</sup> Corporations may also be held indirectly accountable for international crimes under art 25 of the *Rome Statute* relating to the individual accountability of corporate officers.<sup>114</sup> Indirect accountability through the state responsibility doctrine has so far proven inadequate for holding corporations accountable for violations of international law.<sup>115</sup>

On the classical view of international law, direct corporate liability for ecocide is legally impossible because of the lack of a normative basis for direct accountability for legal persons. There are, however, commentators who hold the view that direct corporate accountability for violations of international law need not be hinged on international personhood. Describing the concept of legal subjectivity as ‘sterile’, ‘indeterminate’ and ‘unhelpful’, Andrew Clapham states that ‘[i]nternational law can attach to certain non-state actors at all times irrespective of their links to the state’.<sup>116</sup> Clapham rejects the position that legal subjectivity is a precondition for international human rights pointing to evidence that ‘customary international law, international treaties, and certain non-binding international instruments already create human rights responsibilities for non-state actors’.<sup>117</sup> Clapham suggests that transnational corporations can be subjected to direct accountability under international law on other grounds, such as their being simply ‘subjects of interest’.<sup>118</sup> Clapham’s position is shared by, Rosalyn Higgins, the former President of the International Court of Justice, who has advocated replacing the concepts of subject/object as applied to differentiate between states and non-state actors with the trope participants of international law.<sup>119</sup>

Scholars have identified several reasons why rejecting legal subjectivity as the sole normative basis is appropriate and necessary. It has been argued that legal subjectivity for corporations has the potential to facilitate developments that could erode international law’s capability to protect humans as the intended

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<sup>111</sup> See Eric de Brabandere, ‘Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System’ in Jean d’Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 268.

<sup>112</sup> See *ibid.*

<sup>113</sup> See Danwood Mzikenge Chirwa, ‘The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights’ (2004) 5 *Melbourne Journal of International Law* 1.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 29.

<sup>117</sup> *Ibid.* 21.

<sup>118</sup> *Ibid.* 28.

<sup>119</sup> See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 50.

beneficiaries of international human rights.<sup>120</sup> To demonstrate this, Anna Gear points to the development of ‘corporate humanity’, a concept that refers to the ability of corporations to assert human rights protections that are usually reserved for human beings for their own protection.<sup>121</sup> Gear sees corporate humanity as the natural outcome of equating corporations to persons without taking into account the fundamental differences that exist between human beings and corporations.<sup>122</sup> Human beings are corporeal and vulnerable beings, susceptible to disease, death and emotional distress from many sources including environmental damage.<sup>123</sup> By contrast, corporations are disembodied legal entities that do not possess similar traits. Thus, extending subjectivity to them opens the door for corporations to co-opt the language of human rights to advance their goals of wealth maximisation and to do so in ways that are inimical to human wellbeing. Such an outcome, Gear asserts, is antithetical to the purpose of human rights that are protected in domestic legal systems and international law.<sup>124</sup>

The outcome of the *Citizens United v Federal Election Commission* case is illustrative of the practical and legal significance of extending personhood to corporations without taking into account the essential differences between natural and legal persons.<sup>125</sup> More specifically, the case demonstrates that when legal subjectivity is extended to corporations in a manner similar to how it applies to human beings, it can provide a legal basis for corporations to demand freedoms through the lens of human rights.

In the international legal order, the international investor–state arbitration regime exemplifies the range of possibilities that international personhood could open up for corporations.<sup>126</sup> Under this, corporations can challenge a host state’s policy measures taken by a host nation where such measures are considered to be in breach of the provisions of a particular investment treaty that protects the corporation’s interests.<sup>127</sup> This is the case even where the impugned policy measure was taken to protect human rights guaranteed in a particular host nation’s constitution. A corporation’s challenge to a host nation’s policy measure may be firmly supported by the principle of *pacta sunt servanda*, which requires parties to a treaty to execute their obligations and do so in good faith.<sup>128</sup> In most cases, investment treaties are usually protected by the restrictive language of stabilisation clauses, which may effectively curtail the host state’s ability to take measures pursuant to its international human rights obligations — even in

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<sup>120</sup> See Anna Gear, ‘Challenging Corporate “Humanity”: Legal Disembodiment, Embodiment and Human Rights’ (2007) 7 *Human Rights Law Review* 511.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> The concept of vulnerability referred to here has been expounded mainly in feminist literature. See, eg, Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1.

<sup>124</sup> Gear, above n 120.

<sup>125</sup> *Citizens United v Federal Election Commission*, 558 US 310 (2010). See also Alvarez, above n 51, 11.

<sup>126</sup> Alvarez, above n 51, 11.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.* 29.

circumstances where the measures have been necessitated by the conduct of the complainant corporation itself.<sup>129</sup>

The benefits currently enjoyed by investors under the investor–state arbitration regime are not necessarily traceable to corporate personhood. Nonetheless, the fact that corporations already enjoy those benefits demonstrates the range of possibilities that could flow from affording corporations equal status with states under international law. It is quite possible that corporate personhood could facilitate the extension of ‘corporate humanity’ to the investor–state arbitration regime allowing corporations to invoke corporate human rights as defences against host states. On this point, José E Alvarez warns that corporate personhood may obscure the fact that even though corporations may be functionally equivalent to humans and states, they are, nevertheless, dissimilar in essential ways such that any efforts to equate them to states or humans would be misguided.<sup>130</sup>

The foregoing discussion shows that instead of advancing accountability for violations of international law, international corporate personhood has the potential to produce the opposite outcome. What is needed therefore is an alternative approach for assessing the circumstances that would allow direct accountability. As Alvarez remarks, ‘[i]nternational lawyers should spend their time addressing which international rules apply to corporations rather than whether corporations are or are not “subjects” of international law’.<sup>131</sup> This call can be heeded through the development of legal approaches to direct corporate accountability. One of the ways in which such an approach can be developed is by drawing on legal developments on direct corporate accountability applied in domestic legal systems.<sup>132</sup> Ultimately, if direct corporate accountability for violations of international law can be detangled from the precondition of international legal personhood, inclusion of a crime of ecocide that applies to corporations in the *Rome Statute* is feasible.

### B Peacetime Environmental Damage

With an exception of war crimes provided for under art 8(b)(iv), all the other *Rome Statute* crimes are applicable to punish conduct that is committed in peacetime.<sup>133</sup> As discussed above however, while art 7 relating to crimes against humanity can apply to peacetime environmental damage, its application is limited only to cases where environmental harm results in humanitarian atrocities.<sup>134</sup> Article 6 provisions relating to genocide may also apply to peacetime environmental harm, but it sets a high mens rea threshold that would present a challenging hurdle for prosecuting ecocide.<sup>135</sup> An appropriate international environmental crime is one that would decouple accountability for

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<sup>129</sup> See Andrea R Shemberg, ‘Stabilization Clauses and Human Rights’ (Report 45234, The World Bank, 2009): A research project conducted for IFC and the United Nations Special Representative to the Secretary-General on Business and Human Rights.

<sup>130</sup> See Alvarez, above n 51.

<sup>131</sup> Ibid 31.

<sup>132</sup> See, eg, Cristina de Maglie, ‘Models of Corporate Criminal Liability in Comparative Law’ (2005) 4 *Washington University Global Studies Law Review* 547.

<sup>133</sup> *Rome Statute* art 8(b)(iv).

<sup>134</sup> See Lambert, above n 78, 718.

<sup>135</sup> *Rome Statute* art 6.

environmental damage from the war nexus but also address limitations of the other crimes.

The proposed crime of ecocide is geared precisely towards this goal. This is evident from language that suggests that ecocide would provide a legal basis for liability for environmental harm committed in peacetime as in wartime. This is supported by the fact that some of the most serious incidences of environmental damage occur during peacetime. The devastating oil spill in the Niger Delta, the Deepwater Horizon oil spill off the Gulf of Mexico and the pollution suffered by residents of Lago Agrio in Ecuador are appropriate examples of peacetime incidences of environmental damage that have resulted in serious and long-term humanitarian and ecological harm.<sup>136</sup> Furthermore, the present climate change crisis is the cumulative result of conduct that occurs both in peacetime and wartime. Thus, to confine the Court's mandate to wartime environmental harm is evidence of international criminal law's disharmony with the reality of contemporary environmental challenges.

One of the risks of extending the ICC's mandate to peacetime environmental harm is the likelihood of opening up the Court to a flood of frivolous litigation. The drafters of the *Rome Statute* were careful to include language that limited the authority of the ICC to the 'most serious crimes of international concern'.<sup>137</sup> In order to remain within the boundaries contemplated by the *Statute* drafters, there is a need for clarity regarding the appropriate threshold for peacetime environmental damage that would trigger the jurisdiction of the ICC. Higgins envisions a case in which the Court's jurisdiction is limited to conduct that amounts to 'extensive destruction, damage to or loss of ecosystem(s) of a given territory'.<sup>138</sup> The word 'extensive' connotes the idea that the ICC's intervention will be limited to situations where the alleged environmental damage is serious, where seriousness is determined in reference to extent, duration and impact on life and ecosystem(s).<sup>139</sup> Similarly, Mark Gray recommends that, to be described legally as ecocide, ecological damage must be 'serious, and extensive or lasting', result in 'international consequences' and constitute 'waste'.<sup>140</sup> The first criterion would ensure that the provisions on ecocide are not abused through its invocation for every type of ecological damage. The second would allow accountability only where such damage results in negative consequences to the interests and values of the global community. The third criterion would require that the acts causing ecological damage be deliberate, reckless or wanton.<sup>141</sup>

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<sup>136</sup> See, eg, Jerome Nriagu et al, 'Health Risks Associated with Oil Pollution in the Niger Delta, Nigeria' (2016) 12 *International Journal of Environmental Research and Public Health* 346; Business & Human Rights Resource Centre, 'Texaco/Chevron Lawsuits (Re Ecuador)' on *Business & Human Rights Resource Centre* (30 August 2018) <<https://www.business-humanrights.org/en/texacochevron-lawsuits-re-ecuador>> archived at <<https://perma.cc/Q39W-SAFW>>; Cameron H Ainsworth, et al, 'Impacts of the Deepwater Horizon Oil Spill Evaluated Using an End-to-End Ecosystem Model' (2018) 13 *PLOS ONE* 1 <<https://doi.org/10.1371/journal.pone.0190840>>.

<sup>137</sup> *Rome Statute* art 1.

<sup>138</sup> Higgins, *Eradicating Ecocide*, above n 10.

<sup>139</sup> Higgins, *Earth is Our Business*, above n 102, 162.

<sup>140</sup> Mark Allan Gray, 'The International Crime of Ecocide' (1995) 26 *California Western International Law Journal* 215, 216.

<sup>141</sup> *Ibid* 218.

Additionally, Higgins has proposed developing descriptions of the types of consequences that would constitute ecocide.<sup>142</sup>

The idea of extending the ICC mandate to cover peacetime environmental harm implicates the challenges of making the ICC a suitable forum for environmental adjudication both in terms of competency and in terms of capacity. Expanding the ICC's mandate to ecocide would require significant resources that may strain the ICC's ability to deliver justice in a competent and timely fashion. Given the scope of the ICC's current mandate and attendant workload, the question may arise as to whether the ICC can provide the centralised and systematised environmental adjudication required for effective environmental protection. On this point, one could argue that instead of overloading the ICC with such a mandate, a more practicable option may be the creation of an international environmental court where environmental adjudication can be handled in a centralised manner. However, if the experience of creating international courts is anything to go by, the creation of an international environmental court would be an equally, if not more, difficult goal to attain owing to the difficulties of balancing competing interests and priorities between states and other actors.<sup>143</sup> For example, whilst the creation of the ICC was first proposed during the Paris Peace Conference in 1919, it took over half a century for the Court to be established.<sup>144</sup> Similarly, proposals for establishment of a World Environmental Court or an International Court for the Environment, which were first made in 1980, are yet to come to fruition.<sup>145</sup>

One of the ways in which the capacity and competence question can be addressed within the current setup could be through the establishment of a special environmental chamber and a specialised environmental department within the Prosecutor's office.<sup>146</sup> Such an institutional arrangement would ensure that investigation and adjudication of allegations of ecocide are streamlined. As with many environmental adjudication forums at the national, regional and international levels, the ICC's environmental competence would be improved incrementally within the proposed environmental chamber.

The peacetime question does raise several challenging issues for international criminal law as it now stands. Nonetheless, it would not stand to reason to confine the ICC's mandate within its present bounds. Some of the most serious instances of environmental damage have happened over extended periods in countries that enjoy relative peace. The outcome has been extensive, long-term and often irreversible, leading to reduced social and cultural wellbeing and destruction of ecosystems.<sup>147</sup>

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<sup>142</sup> Higgins, *Earth is our Business* above n 102, 157. Higgins refers to s 2 of the Preamble of the proposed 'Ecocide Act': at app 2.

<sup>143</sup> Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press, 2009) 16–17.

<sup>144</sup> See Harry M Rhea, 'Paris 1919 and Rome 1998: Different Treaties, Different Presidents, Different Senates, and the Same Dilemma' (2011) 20 *Translational Law & Contemporary Problems* 411, 411–12.

<sup>145</sup> Stephens, above n 143, 56–62.

<sup>146</sup> Paul Garlick, 'The Supranational Environmental Justice Foundation in Venice — A Not So New Kid on the Block' (2013) 4 *New Journal of European Criminal Law* 506, 509.

<sup>147</sup> See, eg, Business & Human Rights Resource Centre, above n 136.

### C Non-Human Life as a Victim of Environmental Crime

The provisions relating to environmental damage in the *Rome Statute* are directed mainly towards addressing humanitarian harm. The focus on the humanitarian dimension of environmental damage is emblematic of the prevailing anthropocentric ontology shaping international law that relegates non-human life to a purely utilitarian function.<sup>148</sup> The proposed crime of ecocide casts environmental damage as a problem that results in both humanitarian and ecological consequences. The crime proposes that liability should be imposed in cases where ‘the extensive damage to, destruction of or loss of ecosystem(s)’,<sup>149</sup> severely diminishes the peaceful enjoyment of such ecosystem(s) by inhabitants within the territory where the ecosystem is located or in another territory.<sup>150</sup> The use of the term ‘inhabitants’ can be construed to encompass both humans and non-human life.

The idea of protecting non-human life as such is not new to international law. Numerous international treaties impose criminal liability for harm to certain species of animals. For example, as early as 1911, the *Convention for the Preservation of Fur Seals in the North* came into force.<sup>151</sup> Other conventions focus on the protection of polar bears,<sup>152</sup> oceans and marine environment<sup>153</sup> and so on. Even though such treaties recognise the need to protect non-human life, they adhere to the reductionist problem of environmental law. Reductionism entails the development of environmental laws that aim to protect constituent parts of ecosystems resulting in compartmentalisation and fragmentation of environmental law.<sup>154</sup> Though this approach has had its benefits, it is limited to the extent it fails to recognise the profound interconnectedness that characterises ecosystems, of which humans are only a part. Put differently, international law lacks an ecosystems approach to environmental protection. In contrast to the prevailing reductionist approach of international law, the crime of ecocide seeks to introduce an ecosystems approach by contemplating criminal liability for ‘extensive damage to, destruction of or loss of ecosystem(s)’.<sup>155</sup>

It is one thing to have an international norm that embeds an ecological paradigm into international criminal law, and quite another to bring its intended goals to fruition. Proponents of the crime acknowledge the need for restorative

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<sup>148</sup> See Louis J Kotzé and Duncan French, ‘The Anthropocentric Ontology of International Environmental Law and the *Sustainable Development Goals*: Towards an Ecocentric Rule of law in the Anthropocene’ (2018) 7 *Global Journal of Comparative Law* 5.

<sup>149</sup> Higgins, *Earth is our Business*, above n 102, 159.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Convention between the United States and Other Powers Providing for the Preservation of Fur Seals*, signed 7 July 1911, 37 Stat 1542. The treaty was determined in 1941 but was revived through the *Interim Convention on Conservation of North Pacific Fur Seals*, signed 9 February 1957, 314 UNTS 105.

<sup>152</sup> See, eg, *Agreement on the Conservation of Polar Bears*, signed 15 November 1973, 27 UST 3918 (entered into force 26 May 1976).

<sup>153</sup> See, eg, *International Convention for the Prevention of Pollution from Ships*, opened for signature 11 February 1973, 1340 UNTS 184 (entered into force 3 October 1983), as amended by *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973*, opened for signature 1 June 1978, 1340 UNTS 62 (entered into force 2 October 1983).

<sup>154</sup> Bosselmann, ‘Losing the Forest for the Trees’, above n 29, 2425.

<sup>155</sup> Higgins, *Earth is our Business*, above n 102, 159.

justice as a prerequisite to adequate protection of non-human life.<sup>156</sup> This would require a paradigm shift from the current framework that is dedicated to providing corrective and reparative justice for human victims of crime. Under art 75, victims are entitled to receive reparations in the form of compensation, restitution and assistance from the funds obtained through fines and forfeitures.<sup>157</sup> The obligation to make reparations is borne primarily by the perpetrator of a crime, and only after a guilty finding is made.<sup>158</sup> Where the individual has no assets to satisfy an order for reparations, the Court may direct an order to the Victim Trust Fund,<sup>159</sup> which can provide reparations from the additional funds from voluntary contributions from donors.<sup>160</sup> Unlike the other international criminal tribunals before it, corrective and reparative justice is one of the distinguishing characteristics of the Court. This development was considered both groundbreaking and vital in conferring the Court with the ability to secure justice for victims of crime.<sup>161</sup> Despite the potential, the Court's ability to provide adequate corrective and reparative justice in a timely fashion is hampered by several factors such as the length of time that victims wait in order to receive reparations.<sup>162</sup>

The introduction of a new category of victims will undoubtedly also bring its own set of challenges. In theory, it is possible to transpose some of the current provisions on reparations to accommodate justice for non-human life. For example, the Court can be empowered to impose fines and order forfeitures of property from individuals and corporate perpetrators whose conduct results in serious harm to ecosystems. The amount of fines and extent of forfeitures would reflect the moral repugnancy of the conduct in question. Borrowing from art 79, a designated Ecosystem Trust Fund could be established to receive funds collected through fines, forfeitures and voluntary contributions made by donors for the purpose of ecosystem rehabilitation. In order to facilitate enforcement, a rule similar to r 98(4) could be developed to facilitate coordination between a particular interested state and the Ecosystem Trust Fund. An interested state in this case means the state in whose geographic jurisdiction a damaged ecosystem is located. Funds for ecosystem rehabilitation can be made available from the Ecosystem Trust Fund to a pre-approved national organisation in the interested state that has the capacity to carry out the ecosystem rehabilitation. The national

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<sup>156</sup> Ibid 160.

<sup>157</sup> *Rome Statute* art 79; International Criminal Court, *Regulation of the Trust Fund for Victims*, 4<sup>th</sup> plen mtg, UN Doc ICC-ASP/4/Res.3 (3 December 2005).

<sup>158</sup> *Rome Statute* art 77.

<sup>159</sup> International Criminal Court, *Establishment of a Fund for the Benefit of Victims of Crimes within the Jurisdiction of the Court, and of the Families of Such Victims*, 3<sup>rd</sup> plen mtg, UN Doc ICC-ASP/1/Res.6 (adopted 9 September 2002) ('*Establishment of a Fund for Victims of Crimes*'). Further clarification on the operation of these provisions can be found in the *Rules of Procedure and Evidence*: International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 98.

<sup>160</sup> International Criminal Court, *Establishment of a Fund for Victims of Crimes*, UN Doc ICC-ASP/1/Res.6, para 8.

<sup>161</sup> See Claus Kress and Göran Sluiter, 'Preliminary Remarks' in Antonio Cassese, Paolo Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) vol 2, 1823, 1824.

<sup>162</sup> See, eg, Luke Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward?' (2017) 21 *International Journal of Human Rights* 1204.

organisation could be an environmental protection agency of the state in whose jurisdiction damage occurred or where the destroyed ecosystem is located.

The proposed institutional changes are perhaps the most daunting challenge to the feasibility of the crime of ecocide. Nonetheless, the idea of using international criminal law norms to redress harm to non-human life is an acknowledgement of the importance of treating the ecological dimension of environmental damage with the seriousness it deserves. This is one of the ways in which international criminal law can reflect the reality that both human and non-human life exist in a relationship of profound interdependence and interconnectedness as members.

#### D A Strict Liability Crime

The default rule on the required mental element for conviction of any of the crimes under the *Rome Statute* is set under art 30, which provides that, '[u]nless 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'.<sup>163</sup> This language limits conviction to cases where direct intent and oblique intent, is proved.<sup>164</sup> Accordingly, recklessness and negligence are excluded as a basis for conviction. In setting a high mens rea threshold for conviction, art 30 also embodies the principle of no liability without fault — considered a cornerstone of criminal law.<sup>165</sup>

Some commentators have interpreted the phrase 'unless otherwise provided' to mean that exceptions to art 30 can be allowed in the form of a mental element that is lower or higher than the one set out in art 30.<sup>166</sup> In theory, such an interpretation could provide a basis for including other types of fault that are not expressly recognised under art 30 including recklessness, negligence, strict liability and absolute liability. However, the phrase 'otherwise provided' has been taken to mean that only those exceptions to art 30 that are derived from sources within the *Statute*. These sources include arts 6–8, Elements of Crimes and the sources referred to in art 21.<sup>167</sup> Those who oppose this approach argue for a less restrictive approach whereby sources outside the *Statute* such as customary international law can furnish exceptions to art 30.<sup>168</sup> In interpreting the *Rome Statute*, the Court has taken a restrictive position that limits the sources of exceptions to art 30 only to those derived from arts 6–8 and the Elements of

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<sup>163</sup> *Rome Statute* art 30.

<sup>164</sup> Sarah Finnin, 'Mental Elements under Article 30 of the *Rome Statute* of the International Criminal Court: A Comparative Analysis' (2012) 61 *International and Comparative Law Quarterly* 325, 328.

<sup>165</sup> *Ibid.*

<sup>166</sup> Gerhard Werle and Florian Jessberger, "'Unless Otherwise Provided": Article 30 of the *ICC Statute* and the Mental Element of Crimes under International Criminal Law' (2005) 3 *Journal of International Criminal Justice* 35, 43–7.

<sup>167</sup> Thomas Weigend, 'The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR and the ICC: An Overview' (Paper presented at Nouvelles Études Pénales, Association Internationale de Droit Penal, Siracusa, Italy, 28 November 2004 – 3 December 2004) 319. See also Roger S Clark, 'The Mental Element in International Criminal Law: The *Rome Statute* of the International Criminal Court and the Elements of Offences' (2001) 12 *Criminal Law Forum* 291.

<sup>168</sup> Clark, above n 167, 321.

Crimes.<sup>169</sup> None of the sources referred to by the court support strict liability as a basis for conviction. To accommodate ecocide within the *Rome Statute* would necessitate either an amendment to art 30 or the development of an independent provision that defines ecocide as a strict liability crime. Such an independent provision would constitute an express exception to art 30.

Even though a crime of ecocide can be included as an exception to art 30, the question still remains what factors might support the feasibility of such an amendment. A crime of strict liability would entail a departure from what has long been considered a cornerstone principle of criminal law, that '[a]n individual is culpable, not just because she participated in criminal acts or transactions, but also because she made a blameworthy moral choice to do so'.<sup>170</sup> Additionally, because strict liability offences are often justified on the need to serve broader social goals,<sup>171</sup> a strict liability international crime represents the use of international criminal sanctions to serve utilitarian ends through deterrence. The use of criminal sanctions for utilitarian goals is considered by some as being not only antithetical to the retributistic foundations of criminal law, but may equally be unfair to an accused who loses the protection afforded by the assumption of innocence.<sup>172</sup> These considerations are partly responsible for the limited use of strict liability in a majority of domestic legal systems, where strict liability tends to be restricted mainly to welfare and regulatory types of offences meant to punish behaviour that poses risks to public safety and welfare, and for which where proof of mens rea as a precondition for liability may be impractical.<sup>173</sup>

Arguments against a strict liability offence should be considered alongside those in support of such a crime. As one commentator has argued, the argument often reiterated in the context of international criminal law is misleading because strict liability offences are widely used in many Anglo-American legal systems and their use is not always limited to regulatory type offences.<sup>174</sup> The idea of restricting the purpose of international criminal law to retributivist purposes has received some pushback by scholars who believe that criminal law can serve purposes in addition to retribution.<sup>175</sup> Some of these scholars have argued that criminal law can serve both retribution and deterrence.<sup>176</sup> In addition to deterrence, others believe that international criminal law can serve transnational justice purposes as well.<sup>177</sup> Others point to evidence that shows that the current international criminal law framework already serves other goals that are not

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<sup>169</sup> Finnin, above n 164, 354. See also Werle and Jessberger above n 166, 45–6.

<sup>170</sup> James G Stewart, 'The End of "Modes of Liability" for International Crimes' (2012) 25 *Leiden Journal of International Law* 165, 175.

<sup>171</sup> See Richard G Singer, 'Resurgence of Mens Rea: III — The Rise and Fall of Strict Criminal Liability' (1989) 30 *Boston College Law Review* 337, 389–408.

<sup>172</sup> See *ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> See Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart, 2009) 87.

<sup>175</sup> See Margaret M deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal of International Law* 265, 303.

<sup>176</sup> *Ibid.* 302.

<sup>177</sup> See, eg, Martti Koskeniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1.

strictly retributistic. For example, in addition to the goal of ending impunity — a retributivist goal — the ICC's role is usually coined in terms of advancing international peace and security — a utilitarian purpose.<sup>178</sup> The *Rome Statute* also seeks to advance restorative justice through the provisions that aim to provide reparations to victims of crimes.<sup>179</sup> It has further been argued that since deterrence and retribution are often 'undermined by the ICC's inability to prosecute the vast majority of international crimes',<sup>180</sup> the ICC should aim to serve an expressive function.<sup>181</sup> An expressive function entails choosing to prosecute crimes to advance certain fundamental global norms.<sup>182</sup>

The import of these insights is that the ICC's role is not limited to retribution and deterrence. Thus, the crime of ecocide which aims to serve retributistic and deterrent functions can be appropriately accommodated within the ICC's framework. Furthermore, because the acts that constitute ecocide are likely to produce severe and irreversible ecological damage, embedding deterrence within the international criminal law framework is a necessary legal response.<sup>183</sup> Embedding deterrence in international criminal law is one of the ways in which adherence to an ecological bottom-line of sustainability of ecosystems can be actualised.<sup>184</sup> Essentially, deterrence would sharpen the ability of international law to prevent ecological damage from happening in the first place.<sup>185</sup>

Strict liability could also raise concerns relating to the likely injustice of over-punishing an actor by imposing liability for conduct that is not accompanied by culpability. Such a concern could be addressed through a definition of strict liability that is structured in such a way as to moderate the risk of unjust consequences. Experiences from domestic legal systems on approaches to strict liability would be instructive. For example, instead of construing a crime as a strict liability crime in the strict sense, some domestic courts have treated strict liability crimes as crimes that simply impose a rebuttable presumption of culpability on the defendant. In this sense, the accused person retains a right to raise any appropriate defences.<sup>186</sup> Other jurisdictions distinguish between strict liability offences for which certain defences may be raised and absolute liability offences for which no defence may be raised.<sup>187</sup> A distinction may also be made between individuals and corporate defendants in applying strict liability so that only corporate defendants would be subjected to strict liability. Such a distinction may be justified on the grounds that

corporations operate within spheres of such potential danger and such power (in terms of economic resources and influence) that there is no social unfairness in

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<sup>178</sup> Ibid 294, 307, 311.

<sup>179</sup> *Rome Statute* art 75.

<sup>180</sup> deGuzman, above n 175, 315.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid 270, 312.

<sup>183</sup> Ricardo M Pereira, *Environmental Criminal Liability and Enforcement in European and International Law* (Brill Nijhoff, 2015) 118.

<sup>184</sup> See Kim and Bosselmann, above n 28.

<sup>185</sup> Pereira, above n 183.

<sup>186</sup> See Laurie L Levenson, 'Good Faith Defenses: Reshaping Strict Liability Crimes' (1993) 78 *Cornell Law Review* 401, 421.

<sup>187</sup> Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 4<sup>th</sup> ed, 2003) 160–5.

holding them to a higher standard than individuals when it comes to criminal liability.<sup>188</sup>

Additionally, since strict liability is favoured more in cases where the offence does not result in a custodial sentence, it is a more appropriate standard for corporate liability because corporations have no physical body that can be imprisoned.<sup>189</sup>

## V CONCLUSIONS

This article sought to assess how the crime of ecocide as a potential addition to the *Rome Statute* would advance ecological integrity. It has shown that if adopted, the proposed crime would enhance international law's ability to protect the environment by ensuring accountability for perpetrators of environmental damage. It has been demonstrated that, when viewed through the lens of ecological integrity as a grundnorm for international law, the current substantive aspects of international criminal law relevant to environmental protection do not measure up to the demands of contemporary global environmental challenges. In theory, ecocide is an appropriate criminal liability response to these challenges. Despite its potential, the substantive aspects of the crime raise challenging legal, practical and philosophical questions for international law generally, and international criminal law in particular, which may raise doubt as to the feasibility of the crime.

The substantive legal changes that are required to accommodate ecocide within the *Rome Statute* may appear radical at first glance. However, when viewed through the prism of ecological integrity, it is clear that ecocide is both an appropriate and necessary addition to the *Rome Statute*. Direct corporate accountability would signify law's expression of ecological limits to economic growth. Similarly, the idea of punishing harm caused both to humans and ecosystems accords with ecological integrity's call for the respect of human wellbeing as part of a unitary community of life. This aspect of the law signifies a moderation to the anthropocentric orientation that has characterised international criminal law's response to environmental damage. Furthermore, a crime of strict liability would advance the law's deterrent effect, a goal that could contribute to deaccelerating the pace at which planetary thresholds are being crossed.

Even then, in light of other institutional, political and structural problems faced by the ICC, the inclusion of the crime would not be a panacea for environmental protection. Thus, efforts to strengthen the ICC's role as a forum for environmental protection through development of new norms of accountability should be pursued alongside efforts to address its structural, procedural and legitimacy challenges. As it stands now, while a few national systems recognise a crime of ecocide,<sup>190</sup> national legal systems could still lead the way by adopting such a crime at the national level. Unlike international law, national legal orders remain comparatively better placed to accommodate such

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<sup>188</sup> Ibid 163.

<sup>189</sup> Ibid.

<sup>190</sup> See *Eradicating Ecocide, Existing Ecocide Laws* <<http://eradicatingecocide.com/the-law/existing-ecocide-laws/>> archived at <<https://perma.cc/2E8R-4QNB>>.

reforms because most of them recognise a right to a clean and healthy environment and the development of a norm can serve as a framework to justify far reaching reforms to improve environmental outcomes. Developments at the national level could contribute to galvanising consensus at the international level. Borrowing from national legal systems which recognise a constitutional environmental norm, the prospects of an international crime of ecocide would be improved by the existence of a legally binding overarching environmental norm to justify and guide the kinds of reforms necessitated by a crime of ecocide. Ecological integrity is well suited for this purpose.