



Parliamentarians for Global Action
Parlamentarios para la Acción Global
Action Mondiale des Parlementaires
برلمانيون من أجل التحرك العالمي

Modernising the International Criminal Court: Crimes against the Environment, Trafficking in Human Beings, Hybrid Justice and Corporate Accountability^{1*}

Parliamentarians for Global Action

^{1*} This report was done thanks to the following individuals who, as students of Harvard Law School, contributed to the research and drafting of this report: Molly Ma JD '18, Katerina Simonova LLM '19, Etienne Martins LLM '19, Samantha Lint JD '20, Johanna Lee JD '21, Justin Fishman JD '21, Rebecca Tweedie JD '21, Alexander Guerin JD '21, Emma Broches JD '20, Sondra Anton JD '22, Celeste Kmiotek, JD '20, Stephanie Gullo JD '22, Nicolas Luongo JD '20, Chetna Beriwalla JD '22, Fraciah Njoroge LLM '20, Ji Soo Park JD '22, Isha Jain LLM '20, Rebekah Carey JD '22, Matthew P. Farrell, JD '21, Alexia Tizzano, Carr Center Fellow, Jung Min (Jasmine) Shin, JD '21, Olivia Klinkum LLM '22, Hannah Allen LLM '22, Yang Ding JD '22, Anoush Baghdassarian JD'22, Mustafaen Kamal LLM '22, Anum Mesiya LLM '22.

The authors wish to acknowledge the contributions from Juan Pablo Calderon Meza and Romina Morello, as supervising attorneys for Harvard Law School's Advocates for Human Rights. The students' work was further reviewed by Anthony Abato (environmental crimes), Shirleen Chin (environmental crimes), Philippa Greer (hybrid chambers), Frederika Schweighoferova (trafficking in human beings) and Ana Pena (drug trafficking). The views expressed herein are those of the author alone and do not reflect the views of the International Criminal Court.

Table of Contents

<i>I. Introduction</i>	<i>1</i>
<i>II. Amendments to the Structure of the ICC</i>	<i>3</i>
A. Creation of a Hybrid Chamber	3
1. Definition and Overview of Previous Hybrid Chambers.....	4
a. Extraordinary Chambers in the Courts of Cambodia.....	5
b. Other international courts and tribunals.....	6
2. Risks and Benefits of a Hybrid Chamber at the ICC.....	7
a. Risks presented by a hybrid chamber.....	7
b. Benefits of a hybrid chamber.....	8
3. Logistics of the Proposed Selection Process.....	11
a. Considerations for composition.....	11
b. Traditional selection process: Multilateral nomination and election.....	12
c. Typical hybrid selection process: Unilateral appointment.....	13
d. Alternative ad hoc selection processes: Appointment by ICC judges or UN body.....	13
4. Amendments Necessary to Create a Hybrid Chamber.....	14
<i>III. Expansion of The ICC’s Subject-Matter Jurisdiction</i>	<i>17</i>
A. Crimes Against the Environment	18
1. Introduction.....	18
2. Current Methods of Enforcement.....	20
3. Adding Ecocide to the Jurisdiction of the ICC.....	23
B. Trafficking in persons	30
1. Recent trends of human trafficking in light of the migration crisis.....	32
2. Premiers Responsables: States.....	34
3. Jurisprudence of other International Tribunals and Regional Human Rights Courts...	35

4.	Prosecuting Human Trafficking under Existing Provisions of the Rome Statute	39
a.	Satisfying the crimes against humanity chapeau elements	39
b.	Specific acts under crimes against humanity	41
b.1	Enslavement	41
b.2	Other inhumane acts	42
c.	Practical implications	43
5.	ICC Recent Practices and Developments	45
6.	Amendment to the Rome Statute	46
7.	Conclusions	49
IV.	<i>Expansion of the ICC's Personal Jurisdiction.....</i>	51
A.	Corporate Accountability.....	51
1.	Proposed Solutions to Lack of Accountability for Corporations.....	52
a.	International proposals for corporate accountability	52
2.	Proposed Amendments to the Rome Statute.....	55
a.	Personal jurisdiction amendment.....	55
b.	Complementarity amendment.....	55
c.	Amendment on <i>mens rea</i> of corporations.....	56
d.	Amendment on penalties.....	58
e.	Reparations amendments	59
3.	Implementing Corporate Accountability in the ICC.....	61
a.	Practical measures for implementation	62
b.	If no amendment, victims, TFV, and even the convicted person could try novel avenues to seek contribution for reparations from liable corporate actors	62
b.1	Impleading corporate actors to appear in reparations at the ICC.....	63
b.2	Seeking contribution of corporate actors at local courts.....	63
V.	<i>Acknowledgements</i>	67

I. INTRODUCTION

1. The International Criminal Court (ICC or Court) must evolve to enhance its legitimacy, efficacy, and ability to tackle the challenges of today's world. Besides war crimes, genocide, crimes against humanity, and the crime of aggression, we face further atrocities in times of peace due to the environmental and migration crisis, which is closely intertwined with human trafficking; abuses perpetrated and facilitated by corporate actors- that cannot be held to account for atrocities due to the ICC's personal jurisdiction-; a lack of state cooperation with the ICC, also derived from the misperception of the ICC by certain States as foreign and hostile actor judging other States' nationals.
2. Expanding the Court's jurisdiction through amending the Rome Statute would help address these realities and deliver deterrence and justice for criminal acts that are not necessarily encompassed by the current practice of the Court.
3. The following challenges currently faced by the Court could be addressed by this project:
 - i) The growing lack of State cooperation and the misperception of the ICC as a foreign and hostile judicial institution;
 - ii) Loss of relevance in parts of the world where atrocious criminal activity does not necessarily fall within the Court's subject matter jurisdiction, that is, regions where the prevailing criminality comes from environmental crimes and human trafficking stemming from the environmental and migration crisis.
 - iii) Lack of procedural venues to adjudicate criminal and/or civil liability of entities, impose fines and/or award reparations from corporate gains obtained through the commission of atrocious crimes;
4. By amending the Rome Statute, the Assembly of State Parties (ASP) could expand the subject-matter jurisdiction of the ICC to include crimes against the environment and trafficking in human beings; it could also expand the Court's personal jurisdiction to make corporations liable for crimes or, at least, for reparations; and it could develop closer ties and increase trust with State parties to the Rome Statute by creating a hybrid chamber with a composition of national and international judges.
5. However, the power of this idea is stillborn absent a movement to achieve it. Movements have more power. A strong and growing campaign in respect of crimes against the environment constituting ecocide is already underway at the time of publishing, which this report hopes to

contribute to. However, the debate concerning hybrid justice, corporate accountability and human trafficking has yet to crystallise into full-blown movements at this time. This document aims to lay the foundation for movements for these three amendments and spark a coalition of States parties and civil society to amend the Rome Statute in respect of all four issues.

6. This project is the genesis of potential amendments of the Rome Statute to (A) create a hybrid trial chamber within the Court, with a mixed composition of international and national judges, (B) expand the Court's jurisdiction to address the offences of ecocide and human trafficking, and (C) expand its personal jurisdiction to hold corporations liable under criminal and civil liability or at least the latter at the reparations stage. This project also suggests ways in which the current statutory framework of the ICC could be used to tackle the abovementioned challenges.

II. AMENDMENTS TO THE STRUCTURE OF THE ICC

A. Creation of a Hybrid Chamber

6. A hybrid chamber is one with a combination of domestic and international judges. The concept of a hybrid chamber is distinct from that of a hybrid court or tribunal. The latter refers to the overall hybrid institution and may include mixed composition and jurisdiction, encompassing both national and international aspects, usually (but not exclusively)² operating within the jurisdiction where the crimes occurred. In contrast, a hybrid chamber refers specifically to the judicial body assigned to adjudicate a matter. To allow for the composition of hybrid chambers in the ICC, we propose that amendments to the Rome Statute are considered in order to incorporate the appointment and participation of *ad hoc* judges.

7. Article 39 of the Rome Statute allows the Court to establish new Pre-Trial and Trial chambers as it deems efficient. However, these chambers are composed only of judges from the Pre-Trial and Trial divisions, respectively, all of whom are appointed for nine-year terms in accordance with Article 36. Pursuant to Article 122, an amendment of an institutional nature could be proposed by any State Party to allow for the participation of *ad hoc* judges. Such an amendment must then receive unanimous support or, in the absence of consensus, a two-thirds majority vote in the ASP for its adoption and immediate entry into force.³

7. This approach is designed to create flexibility and allows the Court and the ASP discretion in confronting the various issues raised in this paper and elsewhere. This report does not consider other, potentially more controversial, proposals such as requiring a state appointing *ad hoc* judges to pay those judges' salaries.

8. There have been various examples of hybrid international, or quasi-international, criminal tribunals and mechanisms. Additionally, there are several permanent international and regional courts (such as the International Court of Justice (ICJ), European Court of Human Rights (ECtHR), and Inter-American Court of Human Rights (IACtHR)) that have provided for the appointment of

² For instance, the Special Tribunal for Lebanon is headquartered in The Hague, The Netherlands, with a field office in Beirut, Lebanon. See *About the STL*, Special Tribunal for Lebanon, <https://www.stl-tsl.org/en/about-the-stl> (last visited 21 February, 2020).

³ Article 122, Rome Statute of the International Criminal Court art 36, July 1, 2002, A/CONF.183/9 [hereinafter "Rome Statute"].

ad hoc judges, which opens the possibility of including judges from a country where an incident arguably amounting to Rome Statute crimes takes place.

9. Article 31 of the Statute of the ICJ provides for the appointment of an *ad hoc* judge when a state is a party in proceedings before the court but is not represented by a national judge on the court.⁴ The party can decide whether or not it wants to appoint an *ad hoc* judge, and the *ad hoc* judge does not have to be of the same nationality as the party. The IACtHR is normally composed of seven judges who are nationals of the member states.⁵ However, in a given case, if one of the parties has its nationality represented on the bench, any other party may appoint an *ad hoc* judge. If neither of the parties is represented on the bench, both may call *ad hoc* judges.⁶ From a public international law viewpoint, the creation of a hybrid chamber at the ICC may not be classically referred to as a traditional “hybrid chamber”, in the same manner in which the ICJ’s integration of an *ad hoc* judge by each of the parties to a controversy or dispute does not categorise the judicial chamber as a hybrid chamber.

1. Definition and Overview of Previous Hybrid Chambers

10. While this proposal only considers a mixed composition of international and national judges on the bench, there are several models of hybrid tribunals and courts that exist or have existed at the international level. Hybrid courts have historically differed widely in terms of their mode of establishment, their legal bases, and substantive and procedural legal operation.⁷ They commonly exhibit certain features such as location in the country where crimes were committed, *ad hoc* creation in response to particular situations, involvement by the United Nations, funding based on voluntary contributions, and non-compulsory cooperation by third-party states.⁸ A common defining feature of the hybrid courts and tribunals to date is that they have panels of both domestic and international judges.⁹

⁴ United Nations, Statute of the International Court of Justice, 18 April 1946 (ICJ Statute), art. 31.

⁵ Organization of American States, Statute of the Inter-American Court art. 4, October 1979, Resolution No.448.

⁶ *Id.*, art. 10.

⁷ See Sarah M. H. Nouwen, ‘Hybrid courts’: *The Hybrid Category of a New Type of International Crimes Courts*, 2 Utrecht L. Rev 190, 213 (2006).

⁸ *Id.*

⁹ See Law on the Establishment of the Extraordinary Chambers arts. 9 new, 20 new, 27 October 2004, NS/RKM/1004/006 [hereinafter “ECCC Statute”]; Statute of the Special Court for Sierra Leone art. 12, 2000 [hereinafter “SCSL Statute”]; Attachment: Statute of the Special Tribunal for Lebanon art. 8, 2007, S/RES/1757 [hereinafter “STL Statute”]; On the Establishment of a Transitional Judicial Service Commission § 22, 6 June 2000, UNTAET/REG/2000/15 [hereinafter “SPSC Statute”]. See also Portant Creation, Organisation et Fonctionnement de

a. Extraordinary Chambers in the Courts of Cambodia

11. The Extraordinary Chambers in the Courts of Cambodia (ECCC) stands out amongst hybrid tribunals as the participation of the Cambodian judiciary in the proceedings and the presence of Cambodian national staff alongside foreign personnel through the organs of the court has enhanced the sense of involvement of the Cambodian people in the court's cases. By collecting and exchanging information, the ECCC has strengthened the national justice system and its capacity. The ECCC has experienced high levels of acceptance and support in its communities.¹⁰

12. The ECCC has a majority of Cambodian judges in each chamber.¹¹ It has a Pre-trial Chamber with five judges (three judges are Cambodian, one of whom is the President) and the Supreme Court Chamber with seven judges (four of whom are Cambodian, with one serving as the President). The ECCC has achieved a high degree of public attendance and victim engagement in trial proceedings.¹² It did so through intense efforts including a weekly radio program¹³ and outreach programme, along with domestic media coverage facilitated by the court's in-country setting.¹⁴ The court also made advances in interpretation and transcription of its three working languages (English, French and Khmer), and implemented physical accommodations for aging detainees.¹⁵ More substantively, commentators have noted that, despite the relative inexperience of national judges on international criminal law,¹⁶ the ECCC has allowed legitimate legal challenges and attempted to follow established norms of accountability and due process.¹⁷ It has contributed to a number of substantive law developments through the issuance of the trial judgment in Case 002/02 against Nuon Chea and Khieu Samphan, specifically regarding the identification

la Court Penale Speciale [for the Special Court of the Central African Republic], arts. 11-14, Loi Organique No. 15-003; Statute of the Extraordinary African Chambers (Unofficial Translation by Human Rights Watch), art. 11, 2 September 2013; On Specialist Chambers and Specialist Prosecutor's Office [for the Kosovo Specialist Chambers] arts 25-28, Law No.05/L-053.

¹⁰ See Mackenzie et al., *The Manual on International Courts and Tribunals*, pp. 216-17 (2010). The ECCC applies domestic law concerning homicide, torture and religious persecution. See Cesare P. R. Romano, *Mixed Criminal Tribunals (Sierra Leone, East Timor, Kosovo, Cambodia)*, Max Planck Encyclopedia of Public International Law § 49 (2006).

¹¹ ECCC Statute, *supra* note 9, arts. 9 new, 20 new.

¹² See U.N. Secretary-General, Khmer Rouge trials, ¶ 28, U.N. Doc. A/67/380 (September 19, 2012).

¹³ *Id.* at ¶ 29.

¹⁴ See John D. Ciociari & Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, 35 Mich. J. Int'l L. 369, 420-23.

¹⁵ See U.N. Secretary-General, *supra* note 12, at ¶¶ 41-42.

¹⁶ At the end of the Khmer Rouge's elimination campaign, less than a dozen trained legal professionals remained in Cambodia. See Peter J. Hammer, *Killing the Khmer Rouge*, 7 J. Int'l Inst. (2000).

¹⁷ See Ciociari, *supra* note 14, at 380.

of targeted groups, male victims of rape in the context of forced marriage, and the *mens rea* standard of indirect intent or *dolus eventualis*.¹⁸ Compared to domestic courts, the ECCC also demonstrated greater transparency and resistance to political interference.¹⁹

b. Other international courts and tribunals

13. The Special Panels for Serious Crimes in East Timor (East Timor Tribunal) was structured to include two international judges and one Timorese judge,²⁰ and stands out for its efficiency.²¹ This is evidenced by the fact that over the course of four years, it indicted almost 400 people and convicted 48 individuals in 35 trials.²² The East Timor Tribunal otherwise received sparse praise, with the notable exception of a relatively glowing United Nations report.²³ That report applauded the East Timor Tribunal for ensuring accountability, generally conforming to international standards, providing an effective forum for victims, establishing an accurate historical record through numerous and high-quality judgments, engaging the community in restorative justice processes, and providing an alternative to private retribution. However, few other commentators have made such strongly positive assessments, and some have strongly criticized the report's approach and findings.²⁴

14. The Special Court for Sierra Leone (SCSL), succeeded by the Residual Special Court for Sierra Leone (RSCSL), had two trial chambers with three judges each. One judge was nominated

¹⁸ See Case 002/2, Case File No. 002/19-09-2007/ECCC/TC, Judgement, (Extraordinary Chambers in the Courts of Cambodia, 16 November 2018).

¹⁹ See Heather Ryan & Laura McGrew, Open Soc'y Just. Initiative, Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia 35 (Kelly Askin & David Berry eds., 2016).

²⁰ Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 N.Y.U. J. Int'l L. & Pol. 1013, 1030 (2009).

²¹ Caitlin Reiger & Marieke Wierda, Int'l Ctr. for Transitional Just., The Serious Crimes Process in Timor-Leste: In Retrospect 3 (2006). However, this report does note that such efficiency must be viewed in light of factors such as the smaller scale of issues as compared to the ICTY, and the failure to prosecute those most responsible. *Id.*

²² *Id.*, at 3.

²³ See U.N. Secretary-General, Letter Dated 24 June 2005 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2005/458 (26 May 2005). *But see e.g.* Justice Denied for East Timor, Human Rights Watch, <https://www.hrw.org/legacy/backgrounders/asia/timor/etimor1202bg.htm>; Lia Kent, *Interrogating the "Gap" Between Law and Justice: East Timor's Serious Crimes Process*, 34(4) Hum. Rts. Quarterly 1021 (November 2012); Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 Harv. Hum. Rts. J. 245 (2003).

²⁴ See, e.g., David Cohen, East-West Ctr., Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor 107 (2006) ("In light of the failures referred to above, the persistent attempt by the UN to label its justice process a success because of the large number of convictions and the completion of all pending cases by the target date of 20 May 2005 is unconvincing. The willingness of the Commission of Experts to endorse such conclusions calls into question the impartiality of their report."); David Cohen, *Seeking Justice On The Cheap: Is The East Timor Tribunal Really A Model For The Future?*, 61 AsiaPacific Issues (2002).

by the Sierra Leone government, and the remaining two judges were nominated by the UN Secretary-General.²⁵

15. The Special Tribunal for Lebanon has four Lebanese judges and seven international judges. There is a majority of international judges in each chamber: Pre-Trial (one international judge), Trial (one Lebanese judge, two international judge), and Appeals (two Lebanese judges, three international judges). In addition, there are two alternative judges (one Lebanese judge, one international judge), who may be assigned by the President of the Special Tribunal to replace a judge who is unable to continue sitting.²⁶

16. The International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), succeeded by the UN International Residual Mechanism for Criminal Tribunals (IRMCT), were established by the UN Security Council acting under Chapter VII of the United Nations Charter. These *ad hoc* international criminal tribunals were not constituted as hybrid mechanisms and were exclusively international in nature. Some have criticized the ICTY and ICTR for not including judges from the States affected,²⁷ despite having the ability to appoint judges *ad litem*.²⁸

2. *Risks and Benefits of a Hybrid Chamber at the ICC*

a. **Risks presented by a hybrid chamber**

17. A hybrid chamber might open the Court to the due process critique that a judge from the same state as a defendant might be biased in favour of, or against, that defendant, depending on the political climate following atrocity crimes. This critique could be mitigated by Articles 36(3)(a) and 41(2)(b) of the Rome Statute, which provides that “judges shall be chosen from among persons of high moral character, impartiality and integrity,”²⁹ and permit the Prosecutor to “request the disqualification of a judge [if their impartiality might be in doubt],” respectively.³⁰ In instances where a defendant might argue that having a national judge is likely to result in bias against them,

²⁵ Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 Chi. J. Int'l L. 482, 508 (2016).

²⁶ STL Statute, *supra* note 9, art. 8.

²⁷ Leigh Swigart, *The National Judge: Some Reflections on Diversity in International Courts and Tribunals*, 42 McGeorge L. Rev. 223, 230 (2010).

²⁸ Tom Dannenbaum, *Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must be Reversed*, 45 Cornell Int'l L. J 77, 95 (2012).

²⁹ Rome Statute, *supra* note 3.

³⁰ *Id.*, art. 41.

particularly if the judge was appointed by a new government following elections or regime change, Article 41(2)(b) of the Rome Statute offers recourse given that “the person being investigated or prosecuted may request the disqualification of a Judge” for lack of impartiality.³¹

18. Hybrid tribunals tend to receive mixed assessments.³² Substantive critiques have focused on the disjuncture between the international nature of the tribunals and the domestic nature of the parties involved,³³ that is, a perception of justice being provided by outsiders with external views may be irreconcilable with the views of the concerned domestic communities. A hybrid chamber at the ICC might face similar critiques, and this could be aggravated further by the fact that the chamber would be embedded within the broader international structure of the Court.

19. A new chamber would come with increased costs or require reallocating resources within the ICC. The Court would also need to adapt to new procedures for selecting judges, which might come with inefficiencies at first. These problems, especially in light of contemporary critiques of the ICC and of hybrid tribunals, might cause certain States Parties to feel that the institution had become bloated or inefficient.³⁴

b. Benefits of a hybrid chamber

20. On the other hand, allowing for hybrid chambers in the ICC could motivate States Parties to engage more readily with the court, incentivize non-party states to join, and accomplish the ICC’s principal goal of ensuring criminal accountability.

21. Establishing hybrid chambers could help to rectify perceived failings and encourage new engagement or re-engagement with the ICC. Having a national judge take part in proceedings would indicate respect for state sovereignty and an institutional effort to be more representative,

³¹ *Id.*, art. 41.

³² *See supra* paragraphs 10-15.

³³ Such criticisms have manifested in countless ways, for example in relation to the lack of legitimacy in the situation countries (*see, e.g.*, Marko Milanović, *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*, 47 *Georgetown J. Int’l L.* 1321, 1325 (2016)); the ICC’s relationship with Global South countries, particularly in Africa, and the resultant power dynamics (*see, e.g.*, Asad G. Kiyani, *Third World Approaches to International Criminal Law*, 109 *Am. J. Int’l L.* 255, 255 (2016)); and the practical difficulties in enforcing its mandate given states’ internal politics (*see, e.g.*, Courtney Hillebrecht & Scott Straus, *Who Pursues the Perpetrators?: State Cooperation with the ICC*, 39 *Hum. Rts. Quarterly* 162, 163 (2017)).

³⁴ *See, e.g.*, Andrew Murdoch, UK Statement to the ICC Assembly of States Parties 17th Session, 5 December 2018. (“But as an Assembly of States Parties to the Statute, we cannot bury our heads in the sand and pretend everything is fine when it isn’t. The statistics are sobering. After 20 years, and 1.5 billion Euros spent we have only three core crime convictions. [...] The time has come for States to take a fundamental look at how the Court is operating.”).

two areas which the Court has been accused of lacking despite its principle of complementarity.³⁵ It could also serve to promote knowledge-transfer and strengthen the capacity of domestic judicial systems through the engagement of national judges in international criminal proceedings that adhere to international standards. Efforts to promote sovereignty, increased representation amongst judges and stem perceived biases in case selection could also give States Parties an incentive to submit individuals to the ICC and to refer situations to the hybrid chamber.³⁶ The latter point is of particular importance given that the ICC has faced criticism for its reliance on the cooperation of States Parties to the Rome Statute and the UN Charter to effect its arrest warrants.³⁷ Indeed, over a decade since the ICC issued a warrant for Mr. Omar al-Bashir over atrocities in Darfur,³⁸ recent developments suggest that he may be transferred to the ICC by the Sudanese government on the condition that the possible prosecution proceeds *in situ* in Khartoum, rather than The Hague, or in a hybrid ICC/Sudanese chamber.³⁹

22. A hybrid chamber within the ICC would help to “guarantee lasting respect for and the enforcement of international justice,”⁴⁰ and advance key institutional features.⁴¹ For example, the participation of national judges could increase the use of a language of the incident state during trials, facilitating national media coverage and making the proceedings seem closer to home for the relevant population. The participation of national judges at the ICC might also curtail

³⁵ See e.g. Christopher Rossi, *Hauntings, Hegemony, and the Threatened African Exodus from the International Criminal Court*, 40.2 Hum. Rts. Q. 369 (2018) (considering complaints of institutional bias against African states in the ICC); Felipe Villamor, *Philippines Plans to Withdraw From International Criminal Court*, N.Y. Times, 14 March 2018 (President Rodrigo Duterte accused the ICC of showing a “propensity for failing to give due respect” to the sovereignty of the Philippines).

³⁶ A similar policy underlies Article 31 ¶¶ 2-3 of the Statute of the International Court of Justice. ICJ Statute, *supra* note 4, art. 31.

³⁷ See e.g. Courtney Hillebrecht and Scott Straus, *Who Pursues the Perpetrators? State Cooperation with the ICC*, 39.1 Hum. Rts. Q. 162 (2017); Erika De Wet, *The Implications of President Al-Bashir’s Visit to South Africa for International and Domestic Law*, 13.5 J. Of Int’l Crim. Just. 1049 (2015).

³⁸ See *ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan*, International Criminal Court https://www.icccpi.int/pages/item.aspx?name=icc+issues+a+warrant+of+arrest+for+omar+al+bashir__+president+of+sudan (last visited 21 February 2020).

³⁹ See *Sudan Announces Intention to Have al-Bashir and Others “Appear” Before the ICC*, Just Security, 13 February 2020.

⁴⁰ Rome Statute, *supra* note 3, Preamble.

⁴¹ See *About the ICC*, International Criminal Court, <https://www.icc-cpi.int/about> (last visited 10 March 2020) (listing “Trials are fair” and “Victims’ voices are heard”—codified in articles 64(2) and 68 respectively of the Rome Statute—among the key features of the Court).

suggestions that the ICC subordinates domestic reconciliation in favour of international prosecution.⁴²

23. Moreover, a hybrid chamber could help reinforce domestic systems by further encouraging national judges that might one day be called to sit in the chamber to seek expertise in their field. Given the increased possibility of serving at the ICC, judges from various jurisdictions would have increased incentive to engage with the international legal system, and to develop professional networks that would facilitate the exchange of ideas. This also aligns with the principle of positive complementarity espoused by the ICC.⁴³

24. A hybrid chamber could create a more specialized chamber. For example, in situations where the Court has jurisdiction on the basis of the place where the crime took place, a national judge appointed to the bench might be expected to have expertise in the specific language skills and background knowledge of the state in which the situation arose. Such specification could help to make the hybrid chamber more focused and efficient.

25. Likewise, in situations where the Court's jurisdiction stems from the basis of the accused's nationality, but not the territory where the alleged crimes took place, having a national judge from the State of the accused's nationality serving on the hybrid bench could similarly foster greater insight and specialization within the chamber. However, the latter scenario appears rather unlikely from a practical standpoint, as the consistent practice of the Office of the Prosecutor has thus far oriented the selection of situations and cases on the basis of a pre-existing territorial jurisdiction of the ICC, which allows the Prosecutor to identify multiple alleged perpetrators, regardless of their nationality, including those allegedly bearing the greatest responsibility for the most serious crimes committed in a given situation.

⁴² See Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60.1 Harv. Int'l L.J. 1, 37 (2019) ("The language of the Rome Statute may imply that the ICC should not treat as sufficient a domestic alternative [...] devoted to forgiveness and reconciliation, rather than individual accountability for criminal violations through prosecutions.").

⁴³ The preamble to the Rome Statute stipulates that the Court is subject to complementarity. In the 2006 Report on Prosecutorial Strategy, the Office of the Prosecutor indicated that "the Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation." Office of the Prosecutor, *Report on Prosecutorial Strategy*, International Criminal Court, 14 September 2006. Current Prosecutor Fatou Bensouda has not indicated any departure from this approach—as such, we may presume that this cooperative spirit endures, and would see the ICC come alongside states to ensure that they would be prepared to contribute to the hybrid chamber, building up the national system at the same time.

3. Logistics of the Proposed Selection Process

a. Considerations for composition

26. The ICC currently has three judicial divisions: Pre-Trial (three judges per chamber), Trial (three judges per chamber), and Appeals (five judges).⁴⁴ Article 39 of the Rome Statute gives the court discretion to establish new Pre-Trial and Trial chambers as it deems efficient.⁴⁵ These chambers are composed only of judges from the Pre-Trial and Trial divisions, respectively. While this does not include the Appeals Chamber, it is desirable to have one Appeals Chamber that will consistently settle law for both the hybrid and non-hybrid chambers.

27. A proposed hybrid chamber would accordingly come into play at the Pre-Trial and/or Trial levels and would mirror their composition with three judges. In either a hybrid Pre-Trial or Trial chamber, only one national judge would be specially appointed as an *ad hoc* judge, while the other two judges could be appointed from amongst the permanent judges of the ICC. In contrast to the ECCC model of having a majority of national judges, this proposal adopts the structure of the relatively successful East Timor and SCSL hybrid tribunals.⁴⁶ This is largely because of the challenges and costs of recruiting and funding multiple *ad hoc* judges. It is also in line with the Rome Statute, which discusses representation and forbids having more than one judge with the same nationality employed at the ICC at once.⁴⁷ This further avoids challenges encountered at the ECCC, such as irreconcilable divisions along international/national lines.⁴⁸

28. This process should account for major values such as transparency and non-discrimination in the selection process, diversity and competence of judges, and judicial independence. Three feasible options for selection are the traditional election process for international judges, the traditional hybrid selection of judges, and alternative *ad hoc* processes.⁴⁹

⁴⁴ See *Judicial Divisions*, International Criminal Court, <https://www.icc-cpi.int/about/judicial-divisions/Pages/default.aspx> (last visited 10 March 2020).

⁴⁵ Rome Statute, *supra* note 3.

⁴⁶ The East Timor tribunal was praised for its efficiency despite other critiques, and given the importance of efficiency in the ICC, it is a valuable reference point. See *supra* FN 21.

⁴⁷ Rome Statute, *supra* note 3, art. 36(7)-(8).

⁴⁸ *Dead End at Cambodia's Khmer Rouge Tribunal: Next Steps for the UN*, Open Society Justice Initiative, April 29, 2020.

⁴⁹ In the event that a judge of the same nationality as a defendant brought before the hybrid chamber was already serving on the Court, they might be required to join that chamber on the grounds that appointing an *ad hoc* national judge of the same nationality would violate Article 36(7) of the Rome Statute ("No two judges may be nationals of the same State." Rome Statute, *supra* note 3, art. 36).

b. Traditional selection process: Multilateral nomination and election

29. The traditional selection of judges at the ICC is governed by Article 36 of the Rome Statute. Briefly, Article 36 provides for a minimum of 18 judges “chosen from among persons of high moral character, impartiality and integrity,” who may be nominated by any State Party to the Rome Statute, and subsequently elected by a two-thirds majority of the ASP.⁵⁰ Following the traditional process could bolster the legitimacy of a hybrid chamber,⁵¹ and would require relatively few logistical adjustments.⁵² For hybrid chambers, national judges could be elected via a slightly modified method in which States Parties could only nominate candidates from the relevant state. This process could be assisted by a specific mandate of an Advisory Committee on Nomination, set up by the ASP in pursuance of Article 36, Rome Statute.⁵³ Such a mandate could be conferred by the ASP Bureau on behalf of the entire Assembly.

While the traditional process creates transparency at the election stage, the secrecy with regards to nominations persists.⁵⁴ In theory, it could be argued that this opens the door to nepotism and politicization, and for states to use the process to further their own goals even when those goals may be at odds with the aims of the Court.⁵⁵ This risk is heightened when the pool of candidates at the nomination level is limited to those from one state. However, this risk could be mitigated, for example by requiring that candidates meet national standards for eligibility that accord with international standards, demonstrate competence through writing samples and tests, and pass a conflict of interest check. States could also be required to publish their calls for candidates and to nominate at least three eligible candidates,⁵⁶ similar to the regulation on nominations for the Judges of the ECtHR.

⁵⁰ *Id.*

⁵¹ See Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16.2 Chi. J. Int'l L. 482 (2016) (“Legitimacy is particularly crucial for hybrid courts. As a practical matter, absent any police force, these courts are [vulnerable to being ignored].”).

⁵² If national judges for the hybrid chambers were appointed using the traditional method outlined in Article 36 of the Rome Statute—which assumes a nine-year, non-renewable term—it is plausible that the total number of judges at the ICC would need to be increased. This could be accomplished under Article 36(2), which provides for an increase in the total number of judges if a proposal to that effect by the Presidency is supported by a two-thirds vote in the ASP.

⁵³ Rome Statute, *supra* note 3, art. 36(4)(c).

⁵⁴ See Mackenzie et al., *Selecting International Judges: Principle, Process, and Politics*, 64 (2010) (“There is no uniformity in the steps leading to nomination and it is often difficult to discern the decisive factor (or factors) that led to a particular decision.”).

⁵⁵ See *id.* at 65.

⁵⁶ See Michael Bohlander, *Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and Other International Criminal Courts*, 12.4 New Crim. L. Rev. 529, 540-42 (2009) (suggesting ‘fixes’ for the traditional selection process of the ICC).

c. Typical hybrid selection process: Unilateral appointment

30. The most common practice in hybrid tribunals has been for national judges to be appointed unilaterally by the implicated state,⁵⁷ with relatively little insight into the decision.⁵⁸ This would likely be the most politically palatable method for appointing *ad hoc* national judges at the ICC. To ensure transparency, legal expertise, and judicial independence, this method could be modified to require that the implicated State Party adhere to the requirements of Article 36 of the Rome Statute in making its selection,⁵⁹ and submit to the ASP at least three eligible national candidates on the basis of a Public Call for Applications, similar to the procedure that Member States of the Council of Europe must undertake for the judicial nominations to the ECtHR.

d. Alternative ad hoc selection processes: Appointment by ICC judges or UN body

31. The national judges for a hybrid chamber at the ICC could be selected on an *ad hoc* basis through current ICC judges' selection or a UN body appointment or the ASP.

32. Selection by ICC judges would see a committee of sitting judges at the ICC carry out a search and vetting process. One advantage of this selection process is that it would likely see highly competent judges enter the chamber since ICC judges are amongst the best-positioned actors to assess whether a potential candidate is qualified to serve on a hybrid court. This method would potentially also avoid some of the politicization engrained in the traditional ASP election process.⁶⁰ In doing so, it could help ensure the independence of the judiciary. This would be particularly true with regards to the incident state, where political interference in the selection of judges might otherwise be especially severe. From the point of view of citizens in the implicated state, as well

⁵⁷ See, e.g., ECCC Statute, *supra* note 9, art. 11 new (national judges are appointed by the Cambodian Supreme Council of the Magistracy); SCSL Statute, *supra* note 9, art. 12 (the Government of Sierra Leone appoints the national judges); Portant Creation, Organisation et Fonctionnement de la Court Penale Speciale *supra* note 9, art. 21. *But see*, STL Statute, *supra* note 9, art. 9(3) (judges are appointed by the Secretary-General, as set out in art. 2 of the agreement between the United Nations and the Lebanese Republic); Statute of the Extraordinary African Chambers, *supra* note 8, art. 11 (Senegalese judges are nominated by the Senegalese Minister of Justice but appointed by the Chairperson of the African Union Commission); On the Establishment of a Transitional Judicial Service Commission arts 2, 11, 3 December 1999, UNTAET/REG/199/3 (The Commission, of mixed composition, recommends candidates to the Transitional Administrator, who then appoints or rejects the candidate); On Specialist Chambers and Specialist Prosecutor's Office, *supra* note 9, art. 28 (an independent selection panel assesses and selects judges).

⁵⁸ Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harv. Int'l L. J. 271, 277-278 (2003). ("In practice, the nomination and election of judges to international courts and tribunals are politicized processes, subject to little transparency, and to widely varying level nomination mechanisms at the national level.").

⁵⁹ Specifically, Article 36(3), (4)(a), and (8)(b).

⁶⁰ See Bohlander, *supra* note 56 at 540-42.

as civil society actors and states, appointment by ICC judges might appear insular. In order to address such concerns, ICC judges could accept nominations or applications, publicize vacancies and the search process, and enumerate selection criteria, among other measures to ensure a competitive and transparent process. However, ICC judges might still face limited resources in terms of time, support staff, and money.

33. Appointment by a UN body would depend on the particular UN organ appointing a judge. The process could range from appointments made at the discretion of the Secretary-General, such as, to some extent, in the ECCC,⁶¹ to appointments by vote of the General Assembly, with appointments by special committees falling somewhere in between. One advantage of this method is that the UN's prominence in the public eye creates potential for accountability,⁶² and the institution would likely continue its long-term efforts to achieve diversity, particularly with regards to gender parity, and other legitimating values.⁶³ However, appointment by a UN body might pose many of the same challenges to transparency as selection by ICC judges, while appointment by the General Assembly could see politicization become an even greater issue than in the case of traditional ASP elections. This latter point is especially important as, outside of the Security Council's authority to refer situations under Article 13(b) of the Rome Statute,⁶⁴ the ICC is a distinct and independent entity; granting the UN power to appoint judges may affect at least the appearance of such independence.

4. Amendments Necessary to Create a Hybrid Chamber

34. As noted above, Article 39 of the Rome Statute allows for the establishment of new Pre-Trial and Trial Chambers.⁶⁵ However, these chambers are composed only of judges from the Pre-Trial and Trial divisions, all of whom are appointed for nine-year terms in accordance with Article

⁶¹ The Supreme Council of the Magistracy appoints at least five individuals of foreign nationality to act as foreign judges upon nomination by the Secretary-General of the United Nations. The appointment is not made at the discretion of the Secretary-General. Once judges have been approved by the Supreme Council, the President of each Chamber can also replace a foreign judge as needed. *See* ECCC Statute, *supra* note 9, arts. 10 new-13.

⁶² As one relevant example of international scrutiny of the UN, the Open Society Justice Initiative has requested the UN to cease funding the ECCC over political interference. *See Dead End at Cambodia's Khmer Rouge Tribunal: Next Steps for the UN*, *supra* note 47.

⁶³ For example, the U.N. Sustainable Development Goals, which were adopted in 2015, including gender equality and reduced inequalities, but also include "peace, justice and strong institutions" and "partnerships for the goals." Sustainable Development Goals, United Nations, <https://sustainabledevelopment.un.org/?menu=1300> (last visited 22 May 2020).

⁶⁴ Rome Statute, *supra* note 3, art. 13(b).

⁶⁵ *Id.*, art. 39.

36. Because this is not compatible with the goals of a hybrid chamber that appoints judges on an *ad hoc* basis (since *ad hoc* judges would not be permanent judges *stricto sensu*), it is likely not possible to create a hybrid chamber without amending the Rome Statute. Article 122 provides the vehicle for an amendment of an institutional nature to be proposed by any State Party. This must then receive unanimous support or, in the absence of consensus, a two-thirds majority vote in the ASP for its adoption and immediate entry into force.⁶⁶

35. In accordance with Article 3, the Rome Statute empowers the Court to sit elsewhere than in The Hague, and pursuant to Article 4, the Statute stipulates that “the Court may exercise its functions and powers, as provided for in the Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.”⁶⁷ The above provisions provide a legal basis for the establishment of chambers, especially Trial Chambers, that may integrate *ad hoc* Judges and receive assistance from expert personnel to transfer to the ICC the necessary knowledge and ability to exercise its functions in any given territorial State in a meaningful and legitimate way. However, in order to give full effect to the letter and spirit of the extremely important norms of Articles 3(3) and 4(2) of the Rome Statute, there would be a need to make some institutional and procedural adjustments to the ICC normative framework in order to incorporate the *sui generis* judicial function to be exercised by *ad hoc* Judges.

36. The main purpose of having an *ad hoc* Judge in a given situation and case would be to ensure that the ICC would have all know-how and ability to interact with domestic authorities in charge of hosting an ICC Chamber of their territories “as if” it were an organ of the domestic jurisdiction (e.g. a High Court with competence on criminal matters) and, above all, to acquire the best possible level of experience and expertise to exercise its functions on the territory of any State Party (or other State), regardless of the decision to conduct part of the proceedings *in loco*.

37. Article 39 of the Rome Statute should be amended to allow for the creation of hybrid trial chambers in addition to ordinary trial chambers, with an additional sub-paragraph being added to Paragraph 2 (b) to allow for the creation of a hybrid trial chamber or pre-trial chamber with only two judges from the corresponding division and a third judge appointed on an *ad hoc* basis.⁶⁸ It should specify that multiple hybrid chambers in addition to ordinary trial and pre-trial chambers

⁶⁶ *Id.*, art. 122.

⁶⁷ *Id.*, art. 3, 4.

⁶⁸ *Id.*, art. 39.

are permissible and should set out the appointment mechanism for judges to hybrid chambers, in addition to the service, qualifications, nomination and election requirements regarding *ad hoc* judges.

35. Since *ad hoc* judges would not fall under the definition of permanent ICC Judges, textual modifications to the Rome Statute at Article 34(b), Article 35(1) and (2) and Article 37(1) would not be necessary, since there would be no need to clarify that the respective divisions may include *ad hoc* judges, that “full-time” service may mean service on only one case, or to exclude vacancies created by the departure of an *ad hoc* judge. While Article 34(b) could be altered to clarify that the divisions may include *ad hoc* judges, the existing language does not preclude this interpretation.⁶⁹ Similarly, Article 35(1) and (2) could be amended to clarify that “full-time” service may mean service in only one case, but this is not precluded.⁷⁰

36. However, the distinct Articles of Part 4 of the Rome Statute would require amendment in certain respects in order to detail how the provisions related to the independence of judges (Article 40), excusal and disqualification of judges (Article 41), solemn undertaking (Article 45), removal from office (Article 46), disciplinary measures (Article 47), privileges and immunities (Article 48) and salaries, allowances and expenses (Article 49) would apply to *ad hoc* judges appointed to hybrid chambers. Critical to the principle of legality before the ICC, *ad hoc* judges would also need to be bound by the applicable law provisions contained in Article 21 of the Rome Statute. Additional modifications to the ICC normative framework may be undertaken in respect of the Rules of Procedure and Evidence and the Regulations of the Court.

37. Creating a hybrid chamber will necessitate a number of amendments to the Rome Statute, which will require significant analysis and political will. That being said, given a hybrid chamber’s potential ability to increase the perceived legitimacy of the ICC without major practical drawbacks, the idea certainly merits further consideration and substantive review.

⁶⁹ *Id.*, art. 34.

⁷⁰ *Id.*, art. 35.

III. EXPANSION OF THE ICC'S SUBJECT-MATTER JURISDICTION

38. One of the biggest challenges during the Rome Statute negotiations was agreeing on the crimes to be covered under the Court's subject-matter jurisdiction. The 1994 draft of the Rome Statute required treaty crimes to "constitute exceptionally serious crimes of international concern." While the annexes to the Rome Statute that referred to the possible crimes to be included under the Rome Statute included treaties such as the four 1949 Geneva Conventions;⁷¹ the 1977 Additional Protocol I;⁷² and conventions against illicit drug trafficking, on the crime of apartheid, against torture, and on various terrorist acts, a distinction was drawn between "customary crimes" and "treaty crimes" under international law. The ICC's jurisdiction was eventually limited to the first category.⁷³ The final draft of the Rome Statute only included jurisdiction over genocide, war crimes, and crimes against humanity, along with the most recent addition of the crime of aggression.

39. Over 20 years later, the world has changed. Treaty-based crimes, i.e. crimes encoded in international law in treaties and conventions, are normally investigated, prosecuted, enforced and punished by States. The world is now more interconnected than ever before, and yet enforcement remains siloed. This patchwork system has left loopholes for perpetrators and has been unsuccessful in bringing many to justice.

40. If the ICC were to gain jurisdiction over these crimes, it would add another layer of enforcement on top of State authorities, who bear the primary obligation to investigate and prosecute due to the principle of complementarity.

41. Some might argue that the ICC can already, under its legal framework, investigate and prosecute some transnational criminality. However, it is important to consider that the ICC's

⁷¹ International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; ICRC, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; ICRC, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 13; ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

⁷² ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

⁷³ See, Rome Statute, *supra* note 3.

current subject-matter jurisdiction requires specific high thresholds (for example, the existence of an armed conflict for war crimes, or widespread or systematic attacks against the civilian population for crimes against humanity) as well as specific definitions that may not encompass most incidences of crimes against the environment or human trafficking.

42. These crimes and the possible expansion of the Court’s jurisdiction to encompass them are discussed below.

A. Crimes Against the Environment

1. Introduction

43. The Australian wildfires of 2019 and 2020 killed 33 people, burned 10 million hectares,⁷⁴ and killed or displaced three billion animals.⁷⁵ Experts estimate that the loss of trees in the Amazon during the Fall 2019 wildfires equated to the emission of 440 million tons of carbon dioxide into the atmosphere—more than the annual total emitted by the United Kingdom.⁷⁶ On January 11 2020, at least ten people died in the United States through a combination of tornadoes, snowstorms, and flooding.⁷⁷ The smog in Bangkok in January 2020 was nearly double the amount considered healthy by the government.⁷⁸ Across the globe, a litany of environmental harms are escalating. The irreparable harm to the environment is taking a toll on civilians and, unless reversed, will result in the extinction of 25% of species within the next decade,⁷⁹ accompanying accelerating global warming.⁸⁰

44. The extent to which individuals are responsible for these harms is slowly emerging. The president of Brazil, Jair Bolsonaro, plans to open the Amazon rainforest to commercial mining and agriculture, threatening both the land and the indigenous communities that rely on it.⁸¹ A complaint

⁷⁴ *Australia fires: A visual guide to the bushfire crisis*, BBC News, 31 January 2020.

⁷⁵ World Wide Fund for Nature Australia, *Australia’s 2019-2020 Bushfires: the wildlife toll* (interim report) 2020.

⁷⁶ Roland Hughes, *Amazon fires: What’s the latest in Brazil*, BBC News, 12 October 2019.

⁷⁷ Nicholas Bogel-Burroughs, *10 Die in Storm as Tornadoes and Squalls Pummel U.S.*, N.Y. Times, 11 January 2020.

⁷⁸ Busaba Sivasomboon, *Unhealthy levels of smog choke Thai capital for over a week*, AP News, 20 January 2020.

⁷⁹ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), *Report of the Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on the work of its seventh session*, IPBES/7/10/Add.1 (29 May 2019).

⁸⁰ Convention on Biological Diversity, *Zero Draft Of The Post-2020 Global Biodiversity Framework*, CBD/WG2020/2/3, (6 January 2020).

⁸¹ Leonardo Benassatto, *Brazil’s answer to Greta Thunberg wants help protecting Amazon rainforest and its tribes*, Reuters, 17 January 2020; and Brazil’s lower house passes bill contested by conservation groups, Al Jazeera, 13 May 2021.

against Mr Bolsonaro accusing him of committing crimes against humanity for the role he has played in the deforestation of the Amazon was filed with the International Criminal Court in October 2021. Lawsuits against oil companies are revealing that their CEOs were aware of the threats to the environment that their industry posed for decades, but worked to conceal the details.⁸² The harms caused by adults over the course of decades are taking a toll, yet it is the world's children who are filing lawsuits to fight for their own protection.⁸³ Working within the constraints of the current systems is simply not resulting in transformative change, and time is running out. In the words of Greta Thunberg, "the rules have to be changed".⁸⁴ International individual accountability for crimes against the environment to stop this offending before the harm it causes is irreversible is necessary.

45. The best way to protect global environmental causes is to prosecute and punish the individuals responsible for ecocide, and the most effective way to do so might be at the international level.

46. Current enforcement methods are reliant on criminal laws ill-suited for the unique harms of ecocide or rely on civil remedies and sanctions that lack the teeth of criminal prosecution. Within individual criminal responsibility, many of the individuals responsible for harms are located outside the country where the harms are felt,⁸⁵ creating the potential for impunity gaps wherein that country is unable to secure personal jurisdiction and the country of the individual has little incentive to initiate proceedings. In addition, harms, and particularly those caused by foreign actors, are more likely to occur in Global South communities,⁸⁶ which already have fewer domestic resources to hold powerful foreign actors accountable. Making ecocide an international crime would allow domestic bodies to try individuals when they are able, preserving complementarity, but would also allow recourse for those states unable or unwilling to hold perpetrators accountable.

⁸²Murtaza Hussain, *Imperial Oil, Canada's Exxon Subsidiary, Ignored Its Own Climate Change Research For Decades, Archive Shows*, The Intercept, 8 January 2020.

⁸³Drew Kann, *Greta Thunberg and 15 other children filed a complaint against five countries over the climate crisis*, CNN, 23 September 2019.

⁸⁴Greta Thunberg, TEDxStockholm, November 2018.

⁸⁵This includes the Deepwater Horizon oil Spill, the Niger Delta oil pollution, Chevron's oil dumping in Ecuador, Vedanta's mining and deforestation in tribal territory, and many more incidents. See, e.g., *Ten worst 'ecocides'*, The Guardian, 4 May 2010.

⁸⁶See, e.g., Carmen Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 Santa Clara J. Int'l L. 151 (2015).

47. The importance of the environment is increasingly recognised by States. The Paris Agreement, which enjoys near-universal support, explicitly states that States' environmental and human rights obligations overlap.⁸⁷ The UN Framework Convention on Climate Change, ratified by over 160 States, likewise notes that "Parties should protect the climate system for the benefit of present and future generations of humankind".⁸⁸ The inclusion of these statements demonstrates the growing recognition of the need for environmental protection. Yet despite this support, recent reports from the United Nations Environment Programme indicate that "climate action so far has been characterized by weak promises, not yet delivered".⁸⁹

48. The criminalization of ecocide by the expansion of the ICC's jurisdiction to cover this crime would emphasize the grave impacts of environmental harm and the need to stop the actions and practices that are causing the harm. These impacts range from the direct, such as the eradication of populations of forest-dwelling animals as a result of forest fires exacerbated by climate change and unmitigated by government intervention,⁹⁰ to the indirect, such as forced displacement in order to facilitate resource exploitation,⁹¹ or increased risk of interstate conflict in climate-sensitive regions.⁹² Criminalizing crimes against the environment constituting ecocide under the Rome Statute would align with the increasing recognition by States of a prohibition on environmental harm, and would support domestic systems in enforcing accountability for acts resulting in such harm through an alternate mechanism (in keeping with the ICC's commitment to complementarity).

2. *Current Methods of Enforcement*

49. In part due to political disagreements, there is not yet an international consensus as to what constitutes an environmental crime.⁹³ International organisations ranging from the International Police Organization (INTERPOL) to the United Nations Environment Programme (UNEP) have

⁸⁷ United Nations Climate Change (UNFCCC), Paris Agreement, 2015 [hereinafter "Paris Agreement."].

⁸⁸ *Id.*, art 1.1.

⁸⁹ United Nations Environment Programme, Emissions Gap Report 2021: The Heat Is On - A World of Climate Promises Not Yet Delivered (2021), Foreword; see also United Nations Environment Programme Adaptation Gap Report 2021: The gathering storm - Adapting to climate change in a post-pandemic world (2021).

⁹⁰ See e.g. Jessie Yeung, *Australia's deadly wildfires are showing no signs of stopping. Here's what you need to know*, CNN 13 January 2020.

⁹¹ See e.g. Kenya: *Indigenous peoples targeted as forced evictions continue despite government promises*, Amnesty International 9 August 2018.

⁹² Annie Sneed, *The Risk of Conflict Rises as the World Heats Up*, The Scientific American 22 July 2019.

⁹³ Alessandra Mistura, *Is There Space for Environmental Crimes under International Law?*, Columbia J. of Env'tl. L. 196 (2018). (Noting that there is no established definition from international conventions).

all issued their own criteria.⁹⁴ Rather than classifying environmental harms according to individual crimes such as poaching, deforestation, or pollution, “ecocide” groups all harms against the environment into one crime.⁹⁵

50. Many States already criminalise harm to the environment and have joined international treaties that either lay out environmental obligations⁹⁶ or prohibit misconduct resulting in environmental harms.⁹⁷ However, the most common forms of enforcement are the so-called “soft” approaches, which are regulatory and administrative in nature. Regulatory actions typically take the guise of, among other methods, permits, “Environmental Impact Assessment” reports, incentives and regulatory fines.⁹⁸ Violations of regulatory rules generally “do not require demonstration of intent to violate”, they “are regarded by many as substantially less serious than criminal acts, and they generally carry minor civil penalties.”⁹⁹ The favored regulatory approach in the European Union (EU) countries involves market-based strategies, particularly “Cap and Trade” or “Pollution Taxes”, like taxing fertilizers, gasoline and pollution.¹⁰⁰ Many countries in Europe favor development banks and incentive-based strategies.¹⁰¹ Administrative and regulatory

⁹⁴ *Id.*

⁹⁵ See, e.g., *What is ecocide?*, Ecocide Law, <https://ecocidelaw.com/ecocide-law-2/> (last visited 4 May 2020).

⁹⁶ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal criminalises the disposal of certain banned substances. The Convention on International Trade in Endangered Species (“CITES”) also contains some criminal implementation provisions, as does the International Convention for the Regulation of Whaling. The International Convention for the Prevention of Pollution from Ships, the International Convention for the Prevention of Pollution of the Sea by Oil, and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, all contain liability prohibitions in respect of ocean pollution. Similarly, the members of the Council of Europe have signed the Convention on the Protection of Environment through Criminal Law (1988) (see also EU directive (2008)). See also Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (L 152/1).

⁹⁷ Vietnam was the first country to adopt a law of ecocide in 1990 as constituting a crime against humanity. Since then, Russia, Armenia, Belarus, Republic of Moldova, Ukraine, Georgia, Kyrgyzstan, and Tajikistan have also included it. In other states, like EU member states, certain activities that breach environmental legislation and cause significant harm or risk to the environment and human health are to be treated as criminal offences. These offences include illegal trade in wildlife, illegal trade in ozone-depleting substances, dumping and illegal transportation of hazardous waste, and illegal emission or discharge of substances into air, water or soil. However, in most ICC States Parties, criminal prosecution for environmental crimes is rare. Neal Shover & Aaron S. Routh Source, *Environmental Crime*, 32 *Crime & Just.*, Vol. 321, 321-371 (2005).

⁹⁸ Mistura, *supra* note 93. For instance, in Ghana, administrative departments frequently run environmental audits, and in Uganda there are special environmental police under the auspices of the Ministry of Water and Environment. *Enforcement of Environmental Law: Good Practices from Africa, Central Asia, ASEAN Countries and China*, UNEP, 2014

⁹⁹ Shover, *supra* note 97, at 324.

¹⁰⁰ Paul R. Portney, *Market-Based Approaches to Environmental Policy: a ‘refresher course’*, in 2 *The RFF reader in environmental and resource policy* 15. (Wallace E. Oates, ed., 2006).

¹⁰¹ *Id.*

approaches depend in part on the source of the obligations (for example, whether they derive from statutes or from a constitution), resulting in such differences between countries' policies.

51. The second approach to environmental harm is civil enforcement, which generally takes the form of civil litigation. Some countries encourage the use of civil remedies to enforce compliance with environmental requirements.¹⁰² Other countries have focused on enhancing environmental procedural rights by providing “access to information, public participation, and access to justice.”¹⁰³ Still other countries and bodies have implemented judicial and legal education programs.¹⁰⁴

52. In existing international criminal law, no binding treaties attach liability to environmental harm on its own, and so it is only a criminal offense as it relates to an existing crime. The 1991 Draft of Code of Crimes against Peace and Mankind by the International Law Commission considered including “wilfully causing or ordering the causing of widespread, long-term and severe damage to the natural environment,” but the consensus was that such crimes could be included under crimes against humanity or war crimes if they were severe enough.¹⁰⁵ The Rome Statute currently provides jurisdiction over some environmental damage *per se*, and over some environmental damage as underlying acts of some other crimes, but this jurisdiction is limited.¹⁰⁶ In practice, few indictments for environmental crimes have arisen under the auspices of these provisions.

53. Currently, States deal with environmental issues using soft approaches such as administrative, consensual, and regulatory measures. However, these approaches allow perpetrators to skirt responsibility by exploiting loopholes in treaty regulations and obligations,¹⁰⁷

¹⁰² Enforcement of Environmental Law, *supra* note 98, at 20.

¹⁰³ Marianela Cedeño Bonilla, et al., Environmental Law in Developing Countries: Selected Issues, Volume II 5 (2004). This includes, for example, Uganda, Zambia and South Africa. *Id.*

¹⁰⁴ Enforcement of Environmental Law, *supra* note 98, at 20. In 2019, the Asian Development Bank co-hosted the Asia Pacific Judicial Conference on Environmental and Climate Change Adjudication on environmental law. See Irum Ahsan, Gregorio Rafael P. Bueta & Briony Eales, *The Many Firsts of the Asia Pacific Judicial Conference on Environmental and Climate Change Adjudication*, International Union for the Conservation of Nature (IUCN), 13 February 2019.

¹⁰⁵ For how ecocide could qualify as war crimes or crimes against humanity, see generally R. Pereira, *After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?*, Crim Law Forum (2020).

¹⁰⁶ See for example Article 8(2)(b)(iv).

¹⁰⁷ See Kimberley Brown, *Most Countries Have Environmental Regulations. Very Few Actually Abide By Them*, Pac. Standard, 29 January 2019.

and allow the individuals most responsible (notably, corporate executives) to avoid accountability.¹⁰⁸ Domestic regulations may not always accurately reflect the standards necessary to adequately protect the environment per scientific consensus,¹⁰⁹ while the non-criminal nature of soft approaches means that perpetrators may decide to incorporate potential fines into their cost/benefit analyses of whether to make the changes needed to comply with such regulations.¹¹⁰ Domestic approaches may be particularly ineffective with respect to corporate actors, which may attempt to engage in forum shopping: moving proceedings from one state to another that also has jurisdiction but whose laws are more favourable. Criminal prosecution at the ICC could not only prove a much stronger deterrent to various actors, but also limit the ability of perpetrators to exploit differences in domestic legal regimes.

3. *Adding Ecocide to the Jurisdiction of the ICC*

54. The crimes of environmental harms constituting ecocide are comparable to those of the other crimes within the ICC's jurisdiction, and the Court is a well-suited venue to hear such crimes. The OTP is adept at investigating crimes with large and potentially unwieldy bodies of evidence, and its staff could be chosen or trained to develop a high level of expertise in environmental crimes that may be lacking at the domestic level. It is also familiar with evidentiary standards that apply to widespread and potentially multistate harms. For example, the ICC has looked to witness testimony to establish the chapeau element of crimes against humanity, namely a "widespread or systematic attack."¹¹¹ In *Ntaganda*, which involved war crimes and crimes against humanity, the Court looked to establish proof of patterns through lists and analyses of attacks on a series of occasions, using witness testimony, UN Special Reports, and related reports.¹¹² In the context of ecocide, establishing the crime could then include witness testimony to the effects of the crime

¹⁰⁸ See *Corporate impunity is common & remedy for victims is rare: Corporate Legal Accountability Annual Briefing*, Bus. & Hum. Rts. Res. Ctr., April 2017.

¹⁰⁹ "For example, some laws lack procedures for transparent and science-based standard-setting, concrete implementation mechanisms, provisions for coordination among different parts of government, provisions for judicial review or provisions for monitoring, inspection, civil enforcement, or adequate penalties." *Environmental Rule of Law: First Global Report*, UNEP, January 2019.

¹¹⁰ G. Nelson Smith III, *No Longer Just a Cost of Doing Business: Criminal Liability of Corporate Officials for Violations of the Clean Water Act and the Resource Conservation and Recovery Act*, 53 La. L. Rev. 122, 133 (1992).

¹¹¹ *Prosecutor v. Francis Yirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, paras 189-229 (29 January 2012).

¹¹² *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Judgment, paras 25-30 (8 July 2019).

(comparable to the chapeau elements), as well as expert analyses of testimony and reports to establish a pattern.

55. Recognizing the need for the ICC’s involvement in accountability for environmental crimes, the OTP published a policy paper in 2016 that included a declaration of a renewed focus on environmental crimes through prosecuting damage to the environment under existing crimes.¹¹³ Though there was no formal expansion of the ICC’s jurisdiction, the policy paper stated that the OTP would assess existing crimes in a broader context that emphasized environmental destruction and land-grabbing.¹¹⁴ The case selection process looked to the gravity of crimes as well as¹¹⁵ “[t]he impact of the crimes [...] in light of, *inter alia*, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and *environmental damage* inflicted on the affected communities.”¹¹⁶ The Paper also mentioned the environment in the context of weighing the gravity of the crime and the manner of its commission.¹¹⁷

56. The focus in the Policy Paper on environmental damage has not yet been put into practice. While several communications involving land-grabbing have been submitted to the OTP,¹¹⁸ the OTP continues to generally focus its investigations on crimes that take place during armed conflict, or in the wake of political or military misconduct. Investigations have also continued to assess gravity primarily in terms of human impact. In fact, the OTP Policy Paper notes, “However, given that many cases might potentially be admissible under article 17, the Office may apply a stricter test when assessing gravity for the purposes of case selection than that which is legally required for the admissibility test under article 17.”¹¹⁹ When looking at gravity, it seems likely that environmental crimes will only be a secondary priority when compared to crimes that affect human

¹¹³ Office of the Prosecutor, Policy Paper on case selection and prioritisation, International Criminal Court, 15 September 2016, para. 41 [hereinafter “OTP Policy Paper on case selection”].

¹¹⁴ *Id.*, para. 7.

¹¹⁵ *Id.*, para. 34.

¹¹⁶ *Id.*, para. 41.

¹¹⁷ *Id.*, para. 37.

¹¹⁸ For example, there was “a Communication brought by Global Diligence LLP on behalf of the victims (“Filing Victims”) before the OTP in October 2014, which “alleged that widespread and systematic large-scale land grabbing [was] conducted by the Cambodian ruling elite since the year 2000 by way of illegally seizing and re-allocating millions of hectares of valuable land (and leading to the displacement of over 60,000 victims) for exploitation or speculation by its members and foreign investors amounted to crimes against humanity as defined under Article 7 of the ICC Statute.” See Pereira, *supra* note 105.

¹¹⁹ See OTP Policy Paper on case selection, *supra* note 113, para. 36.

life directly.¹²⁰ By requiring that crimes meet additional criteria to be prosecuted by the Court, the importance of the environmental crime itself is decreased.

57. Because actors in environmental crimes are often corporate entities, and the ICC does not have jurisdiction over legal persons, there exists an impunity gap regarding accountability of corporate actors such that the OTP cannot pursue such actors for violations despite their significant contributions to environmental harm.¹²¹ Even in the absence of these considerations, the Rome Statute limits the realisation of the Policy Paper’s proposals, as the Statute is not structured to facilitate prosecution of environmental crimes.

58. While the impacts of environmental harm can be just as severe as those of the core crimes and so merit accountability within the Rome Statute, the narrow circumstances in which it could be prosecuted under the three core crimes compel a distinct crime of ecocide. Further, the thresholds for the Rome Statute’s core crimes would require a *mens rea* that the environmental crime was committed with the knowledge that it would impact a human population,¹²² which is a difficult standard to meet.

59. *Evidence.* Evidence for ecocide will be unique from the other core crimes by nature of the focus on what is harmed; rather than victim testimony, it will require testimony from witnesses as to the changes to the environment, and testimony from experts as to the science behind the changes. Certain aspects of this will still be in line with what is already used. For example, pattern evidence could show the effects of emissions just as it is used to establish the “widespread and systematic”

¹²⁰ The OTP Policy Paper (2016) lays out various factors that the OTP will look to for gravity, many of which are focused on human suffering, such as number of victims, extent of bodily and psychological harms caused, intensity of crimes, means employed to execute the crimes, and the systematic nature of the crimes. While the OTP also states that one of the factors it will consider in assessing the impact of crimes is “social, economic and environmental damage inflicted, this is only one of many factors the OTP assess for gravity, and most factors are centered on the human impact and harm caused by the act, rather than the extent of the environmental damage itself See OTP Policy Paper on case selection, *supra* note 113, paras 35-41.

¹²¹ See *infra* Section IV.

¹²² “The *mens rea* requires a level of intent in committing the harm as part of a grander scheme against a specific group. This is particularly troublesome, as many environmental harms (and indeed harms more generally) happen as singular events and stem from economic motivations, such as attempting to avoid regulations to maximize profits. Additionally, the *mens rea* required for prosecution is intent with “knowledge,” though the Statute allows for awareness of the consequences “in the ordinary course of events” to meet this threshold. Finally, the act must “shock the conscience of mankind,” a label generally reserved for “actions whose results are grave to humankind and not the natural environment.” Jessica Durney, *Crafting a Standard: Environmental Crimes as Crimes Against Humanity Under the International Criminal Court*, 24 Hastings Env’tl. L. J. 413 (2018).

nature of attacks under the chapeaux elements of crimes against humanity.¹²³ While evidence regarding *mens rea* will be dependent on the standard used, the Court will be able to adapt the evidence used to show intent elsewhere.

60. *Causation.* Crimes like pollution and resource degradation that contribute to acid rain, ozone depletion, global warming, or air pollution have a major impact on the environment, but the disconnect between the impact and the actions of specific actors makes it difficult to establish a causal relationship. Focusing on ecocide, rather than environmental crimes more broadly, will address one of the main issues of prosecuting under the existing framework: namely, establishing the causal link between actors, their impact on the environment, and the environmental impacts' resulting effects on individuals. However, related to the evidentiary issues, establishing causation will still require significant scientific analysis of how individual action creates harm. While, for example, explicit policies of deforestation may provide clear causation, other cases may require, for example, proof of how lowering environmental regulations results in increased dangerous emissions, and thus dangerous levels of pollution.

61. *Unique Needs.* Environmental crimes, unlike the core crimes, require particular scientific and, often, corporate knowledge and expertise. Prosecutors and judges at the Court may lack such expertise in environmental issues and scientific knowledge, so it would take time and money to educate them on environmental issues in order to produce effective jurisprudence. The ICC currently does not allow for legal actions against corporations as legal persons, and rarely attempts prosecuting corporate executives,¹²⁴ who are often responsible for environmental harms.

62. *Mens rea.* Article 30 of the Rome Statute requires both intent and knowledge, and Article 30(2)(b) requires intent to cause the result. However, it is unlikely that potential perpetrators would have set out to harm the environment as an end in itself; it is more likely that ecocide would be collateral damage to other, potentially legal actions. A *dolus eventualis* standard would be best suited to address the unique requirements of an ecocide mens rea by encapsulating behaviour that

¹²³ See, e.g., Prosecutor v. Bosco Ntaganda, Judgment, *supra* note 111, paras 692-693. ("whether a series of repeated actions seeking to always produce the same effects on a civilian population were undertaken and, in doing so, it may consider whether: (i) identical acts took place or similarities in criminal practices can be identified; (ii) the same modus operandi was used; or (iii) victims were treated in a similar manner across a wide geographic area.")

¹²⁴ For example, in opening the case on crimes committed in the Democratic Republic of Congo, the ICC Prosecutor chose not to indict any corporate executives. See Julia Gaff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, 11 Hum. Rts. Br. 23 (2004).

knowingly puts the environment at risk, while excluding behaviour that is genuinely not known to result in ecocide. This will also overcome the evidentiary difficulties of proving actors specifically intended the result with instead proving that the intent was foreseeable.

63. *Penalties.* Additionally, sanctions from international criminal law may not be effective in remedying harms and deterring behaviour in the environmental context. The Rome Statute's penalties, outlined in Article 77, are limited to imprisonment, fines, and forfeiture of the proceeds of the crime.¹²⁵ However, other types of sanctions, such as remediation and injunctions, are arguably better suited to deal with environmental harms. Additionally, the wide range of actors involved in environmental cases, from states to corporations, rather than merely individuals, are not currently within the ICC's jurisdiction.¹²⁶ Without a provision for corporate liability (discussed below), corporate entities would only be able to be held liable via the individual criminal liability of their head officers.

64. *Sovereignty.* Additionally, as expected with any expansion of the jurisdiction of the Court, States will likely raise sovereignty issues. The only other crime to be added through amendment, aggression, was met with considerable wariness from States,¹²⁷ which is displayed in the limited jurisdiction the ICC maintains; the ICC only has jurisdiction when both relevant States have ratified the aggression amendment, or through a Security Council resolution.¹²⁸ As with aggression, potential perpetrators to ecocide could be physically removed from the territory where the harm occurred, which would make domestic enforcement less likely. They are also more likely to be private citizens than those charged with aggression (which requires a control over or direction of political or military action),¹²⁹ which may slightly lower State's aversion to the amendment. Regardless, it is likely that an amendment will need to make certain capitulations, and particularly if it wants support from State Parties with a significant global corporate presence.

65. A recent milestone in the movement to expand the ICC's jurisdiction to ecocide has been the legal definition of ecocide proposed by an independent panel of experts convened by the Stop

¹²⁵ Rome Statute, *supra* note 3, art. 77.

¹²⁶ For discussion on the ICC's limitations to natural persons, *see* Rome Statute, *supra* note 3, art. 25(1).

¹²⁷ *See, e.g.,* Harold H. Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 Am. J. Int'l L. 257 (2015); Alex Whiting, *Crime of Aggression Activated at the ICC: Does it Matter?*, Just Security, 17 December 2017.

¹²⁸ Rome Statute, *supra* note 3, art. 15*bis*.

¹²⁹ Rome Statute, *supra* note 3, art. 8*bis*.

Ecocide Foundation in June 2021. The panel of 12 experts, co-chaired by Phillipe Sands QC and Dior Fall Snow, collaborated on the project for six months, and took into account the results of a public consultation on the subject of ecocide, which generated 402 responses. The panel proposed the following additions to the Rome Statute:¹³⁰

A. Addition of a preambular paragraph 2 bis

Concerned that the environment is daily threatened by severe destruction and deterioration, gravely endangering natural and human systems worldwide,

B. Addition to Article 5(1)

(e) The crime of ecocide.

C. Addition of Article 8 ter

Article 8 ter

Ecocide

1. For the purpose of this Statute, “ecocide” means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.

2. For the purpose of paragraph 1:

a. “Wanton” means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;

b. “Severe” means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;

c. “Widespread” means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;

d. “Long-term” means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;

¹³⁰ Stop Ecocide Foundation “Independent Expert Panel Legal Definition of Ecocide: Commentary and Core Text” (June 2021).

e. “Environment” means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.

66. The report provides a useful commentary together with the proposed amendment. This explains that the Panel sought to draw from existing authorities in international treaties and customary law, as well as international court and tribunal practice.

67. The structure of proposed Article 8 ter reflects that of Article 7 of the Statute, with the crime set out and followed by defined terms. Two thresholds are contained in the definition. First, there must be a substantial likelihood that the conduct will cause severe and either widespread or long-term damage to the environment. Secondly, the act must be unlawful (under international or national law) or wanton. For an act to be wanton, it must be undertaken with “reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated”. A proportionality test is thus introduced for this limb of the threshold, similar in wording to clauses (2)(a)(iv) and (2)(b)(iv) of Article 8 of the Statute. Finally, the panel recommended a *mens rea* of recklessness or *dolus eventualis*, “requiring awareness of a substantial likelihood of severe and either widespread or long-term damage”. This, rather than the higher default *mens rea* in article 30 of the Statute, would apply to the crime of ecocide. The focus is on endangerment of the environment and does not require a finding of material harm.

68. This proposed amendment is commendable. At first glance it is notable that no examples of behaviour which would constitute ecocide are listed, as they are for war crimes, genocide and crimes against humanity. On one hand, listing examples may make the support for this amendment more difficult and controversial to obtain. On the other, state parties might be hesitant to support the amendment if they think it is unclear how far reaching the legal threshold tests might be. However, the clear and dual thresholds for liability ought to reduce any concerns that the provision could be unduly far reaching.

69. In order for the proposed amendment to be added to the Rome Statute, one or more member states of the ICC would need to submit the proposed amendment to the Secretary General of the United Nations. Two types of votes would then be required: over half of the members of the ICC, and a two thirds majority of state parties to the Rome Statute.¹³¹ Strategic advocacy to capitalize

¹³¹ E Van Trigt “A legal definition of ecocide” Peace Palace Library, (15 July 2021).

on the current momentum to criminalise ecocide will be critical in the coming months and years to achieve a nomination and two successful votes. Several countries have already expressed strong support for the movement. Vanuatu sparked the movement at the state level by calling for a “serious discussion” of the inclusion of ecocide as an international crime at a meeting of the International Criminal Court in December 2019.¹³² The Maldives also said the “time is ripe” for consideration of an ecocide amendment.¹³³

Varying degrees of support have been expressed by other states including Samoa, Bangladesh, Belgium, Finland, France and the United Kingdom.¹³⁴ At the 16th UN Climate Change Conference of Youth, one of the policy demands of the Global Youth Statement was to governments to “implement legal sanctions for actions and crimes against the environment (including ecocide), especially those coming from big corporations and fossil-fuel companies”.¹³⁵ All in all, there is reason for optimism that ecocide will in the near to medium future be criminalised under the Rome Statute. This proposal also relates to the proposal to bring corporate actors within the ICC’s jurisdiction, discussed further below in this report.

B. Trafficking in persons¹³⁶

70. Trafficking in persons is one of the gravest violations of human rights that affects every country of the world. With annual profit as high as \$150 billion,¹³⁷ it represents the world’s third largest and most profitable crime after illicit drug and arms trafficking.¹³⁸

71. For an act to constitute a crime of trafficking in human beings, three basic elements are needed: an *action* (“recruitment, transportation, transfer, harbouring or receipt of persons”) by certain *means* (“threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”), for

¹³² The Climate Docket “Vulnerable Nations Call for Ecocide to Be Recognized As an International Crime” December 6 2019.

¹³³ I.d.

¹³⁴ See Stop Ecocide International “Leading States, Key Dates” as at 2 February 2022.

¹³⁵ Stop Ecocide Foundation “Stop Ecocide International At COP26”.

¹³⁶ The terms trafficking in human beings, human trafficking and trafficking in persons will be used interchangeably throughout this report.

¹³⁷ International Labour Organization, profits and poverty: The economics of forced labour (2014), 12.

¹³⁸ ECPAT International, ‘The trafficking of children for sexual purposes: One of the worst manifestations of this crime’, 06 August 2018, available at: <https://www.ecpat.org/news/trafficking-the-third-largest-crime-industry-in-the-world/>

the *purpose of exploitation* (which “includes at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”).¹³⁹

72. While no country is exempted from its widespread occurrence, the trafficking in human beings is mostly prevalent in Africa, followed by Asia and the Pacific.¹⁴⁰ The United States’ 2019 Trafficking in Persons Report continues to list Libya, Somalia and Yemen as special cases due to their high levels of impunity and lack of governmental or judicial accountability mechanisms, resulting in high numbers of trafficking of women and children.¹⁴¹

73. According to a report by the International Labour Organization in partnership with the United Nations (UN) Migration Agency, over 40 million people were victims of modern slavery in 2016 alone.¹⁴² This number includes 25 million people in forced labour—encompassing forced labour exploitation, forced sexual exploitation of adults, commercial sexual exploitation of children, and state-imposed forced labour—and 15 million people in forced marriage.¹⁴³ Of this 40 million, the report estimates that 71 percent of modern slavery victims are women and girls, where one in four victims is a child.¹⁴⁴

74. Despite the high number of victims worldwide, the UN Office on Drugs and Crime (UNODC) reported that only slightly fewer than 25,000 victims were actually detected in 97 reporting countries in 2016, the latest year documented up to date.¹⁴⁵ Despite the criminalisation of all forms of human trafficking in 168 domestic legislations worldwide,¹⁴⁶ the numbers provided above demonstrate the insufficiency of the existing legal frameworks and their enforcement in curbing the crime effectively. In addition, the increasing recent flows of migrants and the

¹³⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 15 November 2000, 2237 U.N.T.S. 319 [hereinafter “UN Trafficking Protocol”].

¹⁴⁰ International Labour Organization, Global Estimates of Modern Slavery: Forced Labour and Forced Marriage (2017), 10

¹⁴¹ U.S. Dep’t of State, Office to Monitor and Combat Trafficking in Persons, Trafficking in Persons Report, 509-13 (June 2019).

¹⁴² See *supra* note 130 (ILO) at 5.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ United Nations, Global Report on Trafficking in Persons 2018, available at: https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf, at 7.

¹⁴⁶ US Department of State, 2019 Trafficking person report (June 2019) 6.

restricting measures adopted by States in response only exacerbated the situation, demonstrating the need for an international mechanism in tackling this widespread crime.

75. Under the current international legal framework, the ICC is the only international permanent judicial body capable of adjudicating crimes to individuals beyond the remits of domestic jurisdictions. Therefore, the following section explores the possibility of prosecuting some elements of human trafficking under the current framework of the Rome Statute system with the potential reference to the jurisprudence of other international criminal tribunals and regional courts. Moreover, in order to effectively hold accountable all those participating in the different stages or modalities of human trafficking, it explores the feasibility of amending the Rome Statute to include the crime of human trafficking, as defined under the UN Trafficking Protocol, either as a separate underlying act of crimes against humanity, or as a new stand-alone core crime.

1. Recent trends of human trafficking in light of the migration crisis

76. The prolonged conflicts in Syria, Iraq and Afghanistan as well as the crises in the Horn of Africa and West Africa, have led to a sharp increase of 83% of asylum seekers and refugees as well as economic migrants entering Europe in 2015.¹⁴⁷ This increase in migration and refugee flows has prompted EU states to adopt two responses. One has been to strengthen EU internal and external borders to prevent refugees and migrants from entering Europe. The second approach has been restricting the activities of traffickers. During an emergency meeting of the European Council on 23 April 2015, the main priorities identified were ‘strengthening our presence at sea’, ‘fighting traffickers in accordance with international law’, ‘preventing illegal migration flows’ and ‘reinforcing internal solidarity and responsibility’.¹⁴⁸ However, given the insufferable conditions in the States the migrants and refugees were fleeing, the restricted immigration laws and policies and attempts to curb the traffickers activities did not succeed in decreasing the migration flows. Rather, they created a fertile ground for unauthorised migration to flourish, where traffickers and smugglers were forced to resort to using alternative, even more dangerous back routes, leaving migrants more vulnerable to exploitation.¹⁴⁹

¹⁴⁷ Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries Report prepared for the United Nations High Commission for Refugees (December 2015), <https://www.unhcr.org/56bb369c9.pdf>, at 3, 54.

¹⁴⁸ *Id.*, at 3.

¹⁴⁹ BBC, ‘African migration ‘a trickle’ thanks to trafficking ban across the Sahara’ (11 January 2019), <https://www.bbc.com/news/world-africa-46802548>

77. As such, the effects of such policies inevitably go beyond unauthorized migration. On many occasions, an initial contractual agreement to be smuggled over the border may quickly transform into an (unconsented) act of trafficking.¹⁵⁰ The restrictions of immigration laws have therefore inevitably led to an increase in the sophistication and violence of the organizations that promote such illicit movement of people across borders, and eventually, human trafficking.¹⁵¹ Many thousands of migrants who entered Libya were sold on by their traffickers to kidnappers who obtained thousands of dollars from their families back home.¹⁵² The European Commission has reported an increase of child trafficking as a significant number of the migrant and refugee children are unaccompanied, travelling to and in the European Union (EU) without a responsible adult, making them a high-risk group for human trafficking.¹⁵³

78. Strict immigration laws help traffickers to assert control over victims once they arrive in the destination country. People with illegal immigration status are more vulnerable to traffickers' threats, and prone to being exploited as a result, as efforts to seek legal recourse can lead to protracted immigration detention, criminal prosecution, or administrative proceedings, and consequently, expulsion or extradition. The potential double victimization of human trafficking victims through being treated as undocumented persons or perpetrators if found by the authorities, has left many victims of human trafficking, as well as undocumented migrant workers, reluctant to report crimes or violence, inhumane conditions, or fair labour standards violations they are subjected to.

79. Aggressive immigration crackdowns generate fear of deportations in victims of human trafficking, putting abusers in a position of power as the only perceived safeguard. Many trafficking victims turn to legal and social service providers, who act as liaisons between victims and law enforcement working to bring cases against traffickers. However, fear of possible immigration repercussions for victims may lead service providers to discourage their clients from

¹⁵⁰ Jennifer M. Chacon Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement, 158 U. Pa. L. Rev. 1609 (2010), at 1612.

¹⁵¹ *Id.* at 1611.

¹⁵² BBC, 'African migration 'a trickle' thanks to trafficking ban across the Sahara' (11 January 2019), <https://www.bbc.com/news/world-africa-46802548>.

¹⁵³ Implementation of the Action Plan on UAMs (2010-2014), Communication from the Commission to the Council and the European Parliament: The protection of children in migration; 12 April 2017, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017SC0129&rid=9>

contacting law enforcement and testifying against traffickers, adding significant new hurdles to the ability to increase successful trafficking prosecutions.¹⁵⁴

80. Harsh immigration laws and aggressive crackdowns on undocumented migrants create a vicious cycle: stricter immigration laws disincentive migrants fearing deportation from seeking law enforcement, which in turn enables and strengthens the traffickers' control over migrants. Becoming *de facto* the first and only point of contact for the migrants not only increases the profits of the traffickers, but also enables them to reach an even greater number of victims.

2. *Premiers Responsables: States*

81. As of February 2020, all but seven ICC State Parties have ratified or signed the UN Trafficking Protocol, which requires States to adopt national legislation in line with the Protocol so they can then prosecute human trafficking domestically.¹⁵⁵ According to the 2018 Global Study on Trafficking in Persons from the UNODC, which covered 100 ICC State Parties, most States have enacted human trafficking-related domestic legislation.¹⁵⁶ Nevertheless, the actual investigation and prosecution of human trafficking worldwide, including among ICC State Parties, has been minimal.¹⁵⁷

82. As reported by the UNODC in 2016, the average number of convictions per country was 254,¹⁵⁸ and “the number of convictions has only recently started to grow” with “increasing trends (...) recorded in Asia, the Americas, and Africa and the Middle East.”¹⁵⁹ While Central America and the Caribbean, North America, and Central and South-Eastern Europe had high victim detection rates, they failed to reflect these proportionally in their conviction rates.¹⁶⁰ On the contrary, Western and Southern Europe, as well as Eastern Europe and Central Asia, had higher rates of both victim detection and convictions.¹⁶¹ South Asia, South America, East Asia and the

¹⁵⁴A *Crackdown on Immigration Puts Trafficking Victims in More Danger*, Human Rights First, 25 May 2017.

¹⁵⁵ The seven state parties are Andorra, Bangladesh, Comoros, Cook Islands, Marshall Islands, Samoa, and Vanuatu. For the legislation adoption requirement, see UN Trafficking Protocol, *supra* note 139, art. 5.

¹⁵⁶ U.N. Office on Drugs and Crime, Global Report on Trafficking in Persons (2018). The Report found that out of the 142 countries reviewed, only 13 countries did not yet have legislation criminalizing most forms of human trafficking as defined by the UN Trafficking Protocol. *Id.*

¹⁵⁷ See *id.* at 50-51.

¹⁵⁸ See *id.*

¹⁵⁹ *Id.* at 8.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

Pacific, Sub-Saharan Africa, North Africa and the Middle East all had relatively low victim detection and low convictions.¹⁶²

83. The U.S. State Department's 2019 Trafficking in Persons report places countries into one of four tiers, based on the governments' efforts to meet the Trafficking Victim Protection Act (TVPA)'s minimum standards for eliminating human trafficking.¹⁶³ All but 12 ICC State Parties were evaluated in the report.¹⁶⁴ Out of 111 State Parties that were evaluated, only 27 (less than 25%) were in compliance. This brings into question the effectiveness of the current system of trafficking victim protection, as the likelihood of prosecution at the domestic level is relatively low.

84. Currently, trafficking in human beings is prosecuted at the domestic level. Traditional mutual legal assistance agreements are used when cooperation with other States is required.¹⁶⁵ This approach has, however, many disadvantages, such as lack of enforcement of the relevant anti-trafficking provisions at the domestic level and insufficient inter-state cooperation, causing the *de facto* impunity of traffickers.

85. According to the principle of complementarity, one of the core principles of the Rome Statute, States have the primary duty to exercise criminal jurisdiction over international crimes.¹⁶⁶ The ICC can only consider a case admissible within its jurisdiction when no domestic criminal proceedings relating to the same case are ongoing domestically, or when the State is "unwilling or unable" to genuinely investigate and prosecute the crime.¹⁶⁷

3. *Jurisprudence of other International Tribunals and Regional Human Rights Courts*

86. Up to date, the ICC has not charged or prosecuted the crime of human trafficking. Therefore, while limited, the jurisprudence of international courts and tribunals on prosecuting

¹⁶² See *id.*

¹⁶³ See U.S. Dep't of State, Office to Monitor and Combat Trafficking in Persons, *supra* note 131, at 36-37. The standards broadly entail prohibiting human trafficking and punishing perpetrators, as well as promoting safety and resources for victims. *Id.* at 35.

¹⁶⁴ The states parties that were not included were Andorra, Cook Islands, Dominica, Grenada, Kiribati, Liechtenstein, Nauru, State of Palestine, Saint Kitts and Nevis, Samoa, San Marino, and Vanuatu. *Id.* at 48; *The States Parties to the Rome Statute*, The International Criminal Court, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited 24 May 2020).

¹⁶⁵ For more information on the status of mutual legal assistance agreements amongst states on human trafficking, see generally, United Nations Office on Drugs and Crimes, Toolkit to Combat Trafficking in Persons (2006).

¹⁶⁶ Rome Statute, *supra* n. 3, paragraph 10 of the Preamble and articles 1 and 17.

¹⁶⁷ The Rome statute of the international criminal court: a commentary 667 (Antonio Cassese, et al., eds, 2002).

perpetrators for the crime of human trafficking may be of assistance to better understand the crime of human trafficking in the context of international criminal and human rights law.

87. A landmark judgment was issued by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Prosecutor v. Kunarac et al.* by holding individuals accountable for acts that satisfied the legal definition of human trafficking under the UN Trafficking Protocol.¹⁶⁸ Even without actually charging the defendants with the crime of human trafficking, this case opened the possibility for prosecuting such crime under certain underlying acts of crimes against humanity or laws or customs of war.

88. In *Kunarac*, defendants Kunarac and Kovač were charged with enslavement as a crime against humanity for imprisoning victims for months and exercising *de facto* powers of ownership over them; forcing them to perform sexual services and domestic tasks; and moving them from one location to another so that the Serb soldiers could sexually assault them.¹⁶⁹ These acts met the UN Trafficking Protocol definition of human trafficking by satisfying the element of act (transporting and transferring victims), the element of means (coercion) and the element of purpose (sexual exploitation). For these acts, Kovač was also convicted of the crime of outrages upon personal dignity, a violation of the laws or customs of war, for acts including selling victims to other men in exchange for money.¹⁷⁰

89. The ICTY did not explicitly state that Kunarac and Kovač engaged in human trafficking. However, by using the elements entailed in the crime, i.e. “buy[ing], sell[ing], trad[ing], or inherit[ing] a person or his or her labours or services” as “relevant factors” to determine the existence of the act of enslavement, the ICTY laid ground for trafficking in human beings forming a part of the enslavement definition and thereby giving rise to its criminalization under a crime against humanity.¹⁷¹

90. Regional courts’ jurisprudence on human trafficking cases is also scarce, though it does offer somewhat richer jurisprudence than international criminal tribunals. The ECtHR, the

¹⁶⁸ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001.

¹⁶⁹ *Id.*, para. 12-13.

¹⁷⁰ *See Prosecutor v. Kunarac*, *supra* note 170, at para. 247.

¹⁷¹ *Id.*, at paras 193-194.

IACHR), and the Economic Community of West African States (ECOWAS) Community Court of Justice have all ruled or commented on cases involving human trafficking.

91. The ECtHR has ruled on several cases involving human trafficking, with the most notable precedent of *Rantsev v. Cyprus and Russia*¹⁷² which expounds the relationship between “enslavement” and human trafficking. The Court ruled that article 4 of the European Convention on Human Rights, prohibiting slavery and forced labor, applied to human trafficking,¹⁷³ while ruling on the liability of both States for failing to combat the crime.¹⁷⁴

92. In 2016, the IACtHR made its first judgment on a human trafficking in *Hacienda Brasil Verde Workers v. Brazil*.¹⁷⁵ The Court held Brazil liable for failing to adequately address the case of 85 victims, some of them children, who suffered from slavery-like working conditions and human trafficking, in a privately-owned cattle ranch located in northern Brazil.¹⁷⁶ The Court extended narrowly construed Article 6.1 of the American Convention of Human Rights which prohibits “slave trade and traffic in women” to apply to “all kinds of victims of human trafficking, as defined by the UN Trafficking Protocol.”¹⁷⁷

93. The ECOWAS Community Court of Justice has delivered one judgment on a case involving human trafficking and forced labour: *Hadijatou Mani Koraou v. Republic of Niger*.¹⁷⁸ The Court found that Niger violated the prohibition of slavery provision in Article 5 of the African Charter on Human and Peoples’ Rights by failing to convict the victim’s former master and thereby failing to protect her from the crime of slavery under international law.¹⁷⁹ While the Court did not specifically mention human trafficking in its judgment, the case qualified as human trafficking

¹⁷² *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (Eur. Ct. H.R. 2010) (involving a victim who was trafficked from Russia to Cyprus and was working as a prostitute in Cyprus) [hereinafter “Rantsev”]; *L.E. v. Greece*, App. No. 71545/12 (Eur. Ct. H.R. 2016).

¹⁷³ See *Rantsev*, *supra* note 172, at 2-6, 66-69.

¹⁷⁴ European Court of Human Rights, Press Unit, Factsheet – trafficking in human beings 1-2 (July 2019). See also *Rantsev*, *supra* note 109, at 71-76.

¹⁷⁵ See Tatiana Gos, *Hacienda Brasil Verde Workers v. Brazil: Slavery and Human Trafficking in the Inter-American Court of Human Rights*, OxHRH Blog, April 24, 2017. See also *Workers of the Hacienda Brasil Verde v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 318 (20 October 2016).

¹⁷⁶ See Gos, *supra* note 175.

¹⁷⁷ See *id.*

¹⁷⁸ See *Hadijatou Mani Koraou v. Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, Judgment, (Econ. Community of W. Afr. St., 27 October 2008) [unofficial translation from the U.N. Office on Drugs and Crime] (concerning a girl who had been sold to a local chief at the age of twelve and was subjected to rape, violence and forced labor without remuneration for nine years).

¹⁷⁹ See *id.* at paras 72-89.

under the UN Trafficking Protocol definition, as the victim was transferred by means of coercion for the purpose of exploitation.¹⁸⁰

94. The jurisprudence of regional courts' case law may thus be useful for defining the extent of the concept of human trafficking. Even though the Rome Statute is silent on the applicability and relationships with regional jurisdictions,¹⁸¹ ICC judges nevertheless often refer to regional courts' jurisprudence in their decisions.¹⁸² However, the relevance of such jurisprudence may be limited given the courts' lack of jurisdiction over natural persons. Their rulings and principles, strictly limited to the assessment of fulfilment of States' obligations, may thus not be directly relevant for the purpose of determining individual criminal responsibility by the ICC.

95. The jurisprudence of international criminal tribunals ruling over individual criminal responsibility, may, on the contrary, play a more relevant role. The Rome Statute allows the ICC to rely on principles and rules of international law, including the established principles of the international law of armed conflict. Under this provision, the ICC may refer to the jurisprudence of *ad hoc* international criminal tribunals.¹⁸³ However, even though *Kunarac* demonstrates the potential of international courts to create criminal accountability for human trafficking, it is ultimately a limited precedent. Relying on this precedent would allow for the prosecution of human trafficking as merely a means of materialising the act of enslavement, or as falling under different crimes (such as attacks on personal dignity) which do not fully encapsulate all aspects of the crime of human trafficking.

¹⁸⁰ See UN Trafficking Protocol, *supra* note 139.

¹⁸¹ See Rome Statute, *supra* note 3, art. 21.

¹⁸² See, e.g., Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido, Public Redacted Version of Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red, para. 25 (19 October 2016); Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido, ICC-01/05-01/13-969, Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aime Kilolo Musamba, Jean-Jacques Mangenda, Fidele Babala Wandu, and Narcisse Arido and order for reclassification, para. 45 (29 May 2015); Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06-586-tEN, Decision on the Application for the interim release of Thomas Lubanga Dyilo, para. 7 (18 October 2006).

¹⁸³ Prosecutor v. Sylvestre Mudacumura, ICC-01/04-01/12-1-Red, Decision on the Prosecutor's Application under Article 58, ¶ 63, n.128 (13 July 2012).

96. The ICC has also previously relied on the jurisprudence of other international courts, including the ICJ.¹⁸⁴ However, if such jurisprudence is not indicative of a principle or rule of international law, it may only be relied on as a sort of “persuasive authority”.¹⁸⁵

4. Prosecuting Human Trafficking under Existing Provisions of the Rome Statute

97. The *travaux préparatoires* do not offer much insight into why human trafficking was not explicitly included in the Rome Statute.¹⁸⁶ However, some scholars offer a view that crimes against humanity could be read as encompassing human trafficking,¹⁸⁷ under one of its underlying acts: enslavement¹⁸⁸ or as other inhumane acts.¹⁸⁹

a. Satisfying the crimes against humanity chapeau elements

98. At the outset, in order for the act of human trafficking to fall under the Court’s jurisdiction as a crime against humanity, it must meet the requirements included in the chapeau of its definition, *i.e.*, be part of a “systematic or widespread attack against the civilian population” done “pursuant to or in furtherance of a state or organizational policy.”¹⁹⁰

¹⁸⁴ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, para. 238 (30 September 2008).

¹⁸⁵ Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 289 (23 January 2012).

¹⁸⁶ The *travaux préparatoires* of the Rome Statute rarely mention trafficking in human beings. The limited references are primarily elaborating on human trafficking as part of the wording of article 7(2) of the Rome Statute and its definition of the term “enslavement”. The *travaux préparatoires* do not contain any other discussions or proposals, objections, or statements from particular countries, non-governmental organizations, the International Law Commission, or even from the Ad Hoc Committee on the establishment of the ICC itself. The only two exceptions are a press release citing a representative of Belgium supporting the inclusion of human trafficking as one of the crimes against humanities under the Court’s jurisdiction and a submission by the NGO Equality Now. See Bureau Proposal, 10 July 1998, UN Doc. 53 A/CONF.183/C.1/L.59, 10 July 1998; Bureau Proposal, UN Doc. A/CONF.183/C.1/L.76/Add.2, 16 July 1998; Equality Now, Recommendations for the Draft Statute for an International Criminal Court: Position Paper, April 1995.

¹⁸⁷ Joshua Nathan Aston, Trafficking of Women and Children: Article 7 of the Rome Statute 135 (2016); John Cooper Green, *A Proposal Leading to an International Court to Combat Trafficking in Human Beings*, Third Annual Interdisciplinary Conference on Human Trafficking 25 (2011)

¹⁸⁸ International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), art. 7(1)(c) [hereinafter “ICC Elements of Crimes”]. See also Anne T. Gallagher, *The International Law of Human Trafficking* 214 (2010).

¹⁸⁹ Tom Obokata, ‘Trafficking Humans as a Crime against Humanity: Some Implications for the International Legal System’, *International and Comparative Law Quarterly*, Vol. 54 (2005), 451.

¹⁹⁰ *Id.*, Art. 7(2)(a).

99. The term “widespread” refers to the scale of the attack or to the number of victims.¹⁹¹ It covers situations involving a multiplicity of victims, as a result of the *cumulative effect of a series* of inhumane acts or the *singular effect of one* inhumane act of extraordinary magnitude.¹⁹² The term “systematic” refers to the “organised nature of the acts of violence and the improbability of their random occurrence”.¹⁹³ An attack's systematic nature can “often be expressed through patterns of crimes, in the sense of non- accidental repetition of similar criminal conduct on a regular basis”.¹⁹⁴

100. An attack under Art. 7 of the Rome Statute does not have to be a military attack¹⁹⁵ but can entail “a campaign or operation carried out against the civilian population,” “consist[ing] of a course of conduct involving multiple commission of acts referred to in article 7(1).”¹⁹⁶ “Civilian population” refers to persons who are civilians, as opposed to members of armed forces and other legitimate combatants.¹⁹⁷ The attack needs to be directed against the civilian population and not merely against randomly selected individuals.¹⁹⁸

101. The “state or organizational policy” requirement can be satisfied by circumstantial evidence showing that the “attack follow[ed] a regular pattern” and was not an “isolated act of violence”. The policy does not need to be formalised¹⁹⁹ and it can be deducted from the “systematic” element.²⁰⁰

¹⁹¹ Christopher K. Hall and Kai Ambos in Kai Ambos & Otto Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court* (third ed.) 2015, at 168.

¹⁹² *Id.*, at 169.

¹⁹³ Pre-Trial Chamber I, Decision on the confirmation of charges, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 30 September 2008, ICC-01/04-01/07-717, para. 394.

¹⁹⁴ *Id.*, para. 397.

¹⁹⁵ Elements of Crimes, *supra* no. 188, Introduction to Article 7 of the Statute, para. 3.

¹⁹⁶ Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para 75.

¹⁹⁷ *Id.* para 78.

¹⁹⁸ *Id.* para 77.

¹⁹⁹ *Id.* para 81.

²⁰⁰ Christopher K. Hall and Kai Ambos in Kai Ambos & Otto Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court* (third ed.) 2015, at 246.

102. While the term of “State” is self-explanatory, the ICC Pre Trial Chamber added that the policy did not have to be conceived ‘at the highest level of the State machinery’, therefore, also a policy adopted by regional or local organs of the State could satisfy this requirement.²⁰¹

103. The term “organizational” refers to non-State entities. ICC Pre-Trial Chamber stated that the organization may be ‘groups of persons who govern a specific territory or [...] any organization with the capability to commit a widespread or systematic attack against a civilian population.’²⁰² Despite dissenting opinions,²⁰³ it clarified that it is not limited to State- like entities.²⁰⁴ Determining further guidelines whether an entity could be qualified as an organization under the Rome Statute, ICC Pre-Trial Chamber listed the following criteria:

(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.²⁰⁵

b. Specific acts under crimes against humanity

b.1 Enslavement

²⁰¹ Situation in the Republic of Kenya, ICC PT. Ch. II, ICC PT. Ch. II, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 89, citing *Prosecutor v Blaškić*, ICTY T. Ch., Judgment, 3 March 2000, para. 205]

²⁰² *Prosecutor v Bemba*, ICC PT. Ch. II, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 81; *Prosecutor v Katanga and Ngudjolo*, ICC PT. Ch. I, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, para. 396.

²⁰³ *Prosecutor v Ruto et. al.*, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, 15 March 2011, and *Prosecutor v Muthaura et. al.*, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, 15 March 2011.

²⁰⁴ *Situation in the Republic of Kenya*, ICC PT. Ch. II, ICC PT. Ch. II, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras 90-92; *Prosecutor v Muthaura et al.*, ICC PT. Ch. II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 112; *Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 33.

²⁰⁵ ICC, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 93.

104. The Rome Statute and the ICC Elements of Crimes include explicit connection between the act of enslavement and human trafficking.²⁰⁶ The Rome Statute defines the act of enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”²⁰⁷ The essential element under this article is the existence of a right of ownership over the trafficked persons acquired “by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”²⁰⁸ The ICC Elements of Crimes further add that it is also understood that this includes trafficking in persons.²⁰⁹

b.2 Other inhumane acts

105. Another potential provision under which to prosecute human trafficking under the Rome Statute is its “residual provision” of “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”²¹⁰ This provision aims to cover “serious violations of international customary law and basic rights pertaining to human beings, drawn from the norms of international human rights law, akin to the acts referred to in Article 7(1) of the Statute.”²¹¹ Unlike similar provisions included in the Statutes of the ICTY and International Criminal Tribunal for Rwanda, conceived “as a ‘catch all provision’ ... leaving a broad margin for the jurisprudence to determine its limits,”²¹² the “other inhumane acts” provision in the Rome Statute is strictly limited to acts which are “of a character similar” to any other underlying act of crimes against humanity²¹³ and so “must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity.”²¹⁴ Nevertheless, there is no doubt that the crime of human trafficking would satisfy this criteria required by the Rome

²⁰⁶ Nevertheless, the reference to human trafficking provides neither a definition of the crime nor a reference to any international instrument encompassing such definition. In practice, for the purpose of subsidiary interpretation, the reference to the UN Trafficking Protocol would likely be justified by Article 21 of the Rome Statute which states that “the Court shall apply [...] where appropriate, applicable treaties and the principles and rules of international law.”

²⁰⁷ Rome Statute, *supra* note 3, art. 7(2)(c).

²⁰⁸ ICC Elements of Crimes, *supra* note 188, art. 7(1)(c).

²⁰⁹ *Id.*, at n.11.

²¹⁰ See Rome Statute, *supra* note 3, art. 7(1)(k).

²¹¹ Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-717, Decision on Confirmation of Charges, ¶ 448 (30 September 2008).

²¹² *Id.* at ¶ 450.

²¹³ See ICC Elements of Crimes, *supra* note 188, art.7(1)(k)(2).

²¹⁴ Prosecutor v Frances Kirimi Mathura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 269 (23 January 2012).

Statute. While the forms of human trafficking vary, from imposing physical violence or threat of thereof, to purely psychological manipulation and abuse of person's vulnerable position to obtain a misinformed consent, it can be safely concluded that trafficking in human persons results in great physical and mental suffering of victims.²¹⁵

106. Human trafficking is of a similar character to other underlying acts of crimes against humanity in Article 7. As with enslavement and sexual slavery, human trafficking is an affront to human dignity and goes against basic international human rights norms, such as freedom from torture and from cruel, inhumane or degrading treatment and the freedom of movement.²¹⁶ The serious social, psychological, and physical harm human trafficking victims suffer is of comparable gravity to that of the crimes listed in Article 7.²¹⁷

c. Practical implications

107. Prosecuting human trafficking under the already existing crime of enslavement or other inhumane acts as crimes against humanity would not require an amendment to the Rome Statute, and so might be the most feasible way to prosecute it at the ICC.²¹⁸ However, it is unlikely that this would constitute an effective way to curtail trafficking given the nature of the perpetrators of the crime. Even when most trafficking is committed by criminal networks,²¹⁹ these, while organised, may not meet the requirements of “organizational policy” developed by the ICC jurisprudence. The well-established interpretation of this required element of the chapeau of crimes against humanity definition suggests that only high-level organised criminal networks *de facto* governing a part of State territory, may satisfy the element of “organizational policy”.

108. As such, the trafficking groups, which constitute the majority of perpetrators, would not be prosecutable under the existing Rome Statute provisions: within such narrow interpretation of the term “organization”, the ICC would be unable to respond to many situations where organized

²¹⁵ See generally Mzaeda Hossain et al., *The Relationship of Trauma to Mental Disorders Among Trafficked and Sexually Exploited Girls and Women*, 100 Am. J. Pub. Health 2442 (2010); Tai-lin Hampton, *Sex Trafficking: impact on victim's mental & physical health*, Medium, 16 November 2017).

²¹⁶ International Covenant on Civil and Political Rights, arts. 7, 12, 23 March 1976.

²¹⁷ See generally Mzaeda Hossain et al., *supra* no. 215 and Tai-lin Hampton, *supra* no. 215.

²¹⁸ See generally Tom Obokata, *Trafficking of Human Beings as a CAH: Some Implications for the International Legal System*, 54 The Int'l & Comp. L. Q., 445 (2005); Janne Haraldsen, *Human Trafficking as a CAH: An analysis of the legal potential to prosecute human trafficking in the International Criminal Court with reference to the trafficking of Rohingya Muslims in Southeast Asia* (2014), (unpublished LL.M. thesis, University of Oslo); Fausto Pocar, *Human Trafficking: A CAH*, in *Measuring Human Trafficking* 5 (Ernesto U. Savona & Sonia Stefanizzi, eds., 2007).

²¹⁹ See U.N. Office on Drugs and Crime, *Global Report on Trafficking in Persons* (2016).

groups - although not reaching the “organizational policy” threshold - are nevertheless capable of committing systematic or widespread attacks against a civilian population.

109. In addition, despite the overlap of crime of enslavement and other inhumane acts with human trafficking and the corresponding jurisprudence of the ICTY and regional courts, which have used the crime of enslavement against human traffickers, these crimes are insufficient to cover all elements defined in the UN Trafficking Protocol.

110. In particular, the definition of enslavement under the Rome Statute would only cover the prosecution of acts resulting in the enslavement of the victim (which forms only one of the purposes of exploitation under the UN Trafficking Protocol) without the ability to capture other forms of exploitation such as organ harvesting²²⁰ or any acts of trafficking not necessarily satisfying the elements of the act of enslavement, such as the right of ownership or deprivation of liberty. Further, as stemming from the UN Trafficking Protocol definition, trafficking can only be regarded as slavery if the traffickers themselves continue to exploit the victims. If the continuous exercise of ownership on the part of the traffickers is terminated (the victims are exploited by other than traffickers) once they reach their destination, trafficking can no longer be considered as slavery.²²¹

111. Further, while it could be argued that the ‘catch all’ provision of other inhumane acts could potentially compensate for these shortcomings, it would be an imperfect solution to addressing this grave widespread crime to simply call it ‘other inhumane act’ and not accord it the qualification as required. If one were to apply this logic, we would not need to have any specific underlying acts of crimes against humanity whatsoever.

112. Finally, the absence, under the existing Rome Statute provisions, of certain elements that form an integral part of human trafficking would also limit the prosecution options in terms of applicable modes of liabilities. In particular, the acts of recruitment, transportation, transfer, harbouring or receipt would likely only be prosecutable under alternative modes of indirect perpetration liability (ordering, soliciting, or inducing,²²² or aiding, abetting or otherwise assisting

²²⁰ While the Elements of Crimes on the enslavement provision (Article 7(1)(c)) covers “purchasing, selling, lending or bartering such a person or persons,” this does not necessarily mean that the sale of a person’s organs is covered under this definition. ICC Elements of Crimes, *supra* note 188, art. 7(1)(1)(c).

²²¹ Tom Obokata, ‘Trafficking Humans as a Crime against Humanity: Some Implications for the International Legal System’, *International and Comparative Law Quarterly*, Vol. 54 (2005), 449.

²²² *Rome Statute*, art. 25(b).

in the commission of the crime)²²³ or contribution liability (“in any other way contribut[ing] to the commission or attempted commission of such a crime by a group of persons acting with a common purpose”)²²⁴ rather than under direct (co-) perpetration²²⁵ of the human trafficking simply because the crimes of enslavement or other inhumane acts do not include these acts within their elements. This could, therefore, lead to shorter sentences in case of adjudication of criminal liability, potentially limiting the deterrence effect of the ICC for these crucial parts of the crime of trafficking in persons.

5. ICC Recent Practices and Developments

113. While only limited cases of human trafficking could currently fall within the ICC’s jurisdiction, the OTP has expressed an intention to address human trafficking by prosecuting elements of the crime of enslavement, imprisonment, rape and sexual slavery.²²⁶ First mentioned in a 2016 policy paper on case selection and prioritization, the Prosecutor reiterated this strategy the following year during her briefing to the UN Security Council on the situation in Libya.²²⁷

114. Expressing her concern about the smuggling of migrants and human trafficking to and from Libya, Prosecutor Bensouda announced that the OTP was “carefully examining the feasibility of opening an investigation into migrant-related crimes in Libya should the Court’s jurisdictional requirements be met.”²²⁸ In May 2019, she indicated that the “evidence collected by [her] Office (...) implicates individuals, militias and State actors in the migrant smuggling and trafficking business in many parts of Libya,” and that the OTP was continuing to assess whether they would be able to bring forward this type of case under its mandate.²²⁹

115. While no case has so far been publicly put forward, the crime of human trafficking (particularly in the context of Libya) appears to remain under a radar of the OTP. In her remarks at the 17th session of the Assembly of States Parties in December 2018, Prosecutor Bensouda

²²³ *Id.*, art. 25(c).

²²⁴ *Id.*, art. 25(d).

²²⁵ *Id.*, art. 25(a).

²²⁶ See OTP Policy Paper on case selection, *supra* note 113, ¶ 41; Julia Crawford, *Could the ICC Address Human Trafficking as an International Crime?*, JusticeInfo.net, 17 June 2019.

²²⁷ Office of the Prosecutor, Statement of ICC Prosecutor to the UNSC on the Situation in Libya, International Criminal Court, 9 May 2017.

²²⁸ *Id.*

²²⁹ ICC Office of the Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 8 May 2019.

expressed the intention to develop an additional policy paper that specifically addresses modern slavery within the legal framework of the ICC.²³⁰ At the same time, in line with the principle of complementarity, the OTP also addresses human trafficking by supporting domestic prosecutions. In 2019, Prosecutor Bensouda announced to the UN Security Council that her Office “is cooperating with a number of States and organizations to support national investigations and prosecutions that relate to human smuggling and trafficking through Libya” to ensure accountability “for crimes that may not fall within the ICC’s jurisdiction.”²³¹ Without mentioning further specifics, Prosecutor Bensouda revealed that “this strategy is already proving effective and issuing concrete results.”²³²

116. However, it is important to state that even though trafficking has arguably always been a part of the definition of enslavement under the Rome Statute and could fall under other inhumane acts, the Court has not yet prosecuted a trafficking case. Accounting for case- prioritisation factors,²³³ it is unlikely that the Court will prosecute a trafficking case under the current Rome Statute in the future without more substantial change occurring.

6. Amendment to the Rome Statute

117. While there are international and regional human rights treaties addressing human trafficking,²³⁴ none of them create a mechanism to incur individual criminal responsibility. Adding human trafficking as a separate crime under the Rome Statute would allow for a precise language that will best target the acts international law seeks to address. This will, in turn, allow the OTP to more efficiently investigate and prosecute those responsible for the commission of such crime. The inclusion of human trafficking under the Rome Statute as defined in the UN Trafficking Protocol could be pursued in two ways: either through adding an underlying act of human trafficking under the existing provision of crimes against humanity, or as a new Art. 5 core crime.

²³⁰ Fatou Bensouda, Opening Remarks at 17th Session of the Assembly of State Parties, 5 December 2018/ *See also* Crawford, *supra* note 226.

²³¹ *Id.*

²³² *Id.*

²³³ OTP Policy Paper on case selection, *supra* note 113.

²³⁴ For treaties from the past 50 years, *see, e.g.*, Protocol against the Smuggling of Migrants by Land, Sea and Air, 15 November 2000, 2241 U.N.T.S. 507; Inter-American Convention on International Traffic in Minors, 18 March 1994); UN Trafficking Protocol, *supra* note 139; Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197.

118. The first option would already expand the material jurisdiction of the ICC to the elements that the crime of enslavement would not cover. As to the feasibility of its adoption by States, the amendment to expand underlying acts of Article 7 of the Rome Statute to human trafficking may be more realistic than to include a new core crime. Nevertheless, the disadvantage of this option is obvious: prosecuting crimes under the crimes against humanity would require the satisfaction of the crime's strict chapeau elements, limiting the ICC jurisdiction to human trafficking committed in either widespread or systematic manner pursuant to or in furtherance of State or organizational policy. This would, as a result, disregard the majority of the human trafficking cases committed by criminal organised groups which do not reach the high organisational policy criterion required by the ICC Chambers.

119. For this reason, a stand-alone crime under the Rome Statute, using the definition of the UN Trafficking Protocol, would offer the widest—and for the moment the only— international legal avenue to investigate and prosecute human trafficking, irrespective of whether it satisfies all the chapeau elements of crimes against humanity.

120. As such, creating a new core crime would allow the OTP to pursue specific, tailored cases which would target all stages of the crime, without needing to face jurisdictional hurdles or to cherry-pick facts to fit the existing crimes of enslavement or other inhumane acts. This guidance will not only aid the Prosecutor in developing the case but will also allow focused and effective investigations that target key individuals in trafficking operations, rather than individuals whose actions best match other related crimes.

121. Even though States have the primary obligation to prevent, investigate and prosecute human trafficking at the domestic level,²³⁵ the lack of generalized accountability as well as the scale, gravity and brutality of the crime of human trafficking warrants its inclusion in the Rome Statute.²³⁶

²³⁵ Article 5(1) of the UN Trafficking Protocol states “Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.” See Art. 4, which stipulates the application of the Protocol “to the prevention, investigation and prosecution of the offences established in accordance with article 5 of [the] Protocol, where those offences are transnational.” UN Trafficking Protocol, *supra* note 139, art. 5(1).

²³⁶ The crime of trafficking in persons affects virtually every country in every region of the world. Between 2010 and 2012, victims with 152 different citizenships were identified in 124 countries across the globe. Moreover, trafficking flows - imaginary lines that connect the same origin country and destination country of at least five detected victims – criss-cross the world. U.N. Office on Drugs and Crime, Global Report on Trafficking in Persons (2014).

122. As such, in line with the principle of complementarity, the Court could step in when a State with the primary jurisdiction is unwilling or unable to genuinely carry out an investigation or prosecution.²³⁷ The creation of the new core crime of human trafficking would create individual responsibility independent of domestic legal systems and could serve not only as an additional prosecution channel, but also as a much-needed deterrent in light of the current climate of impunity.

123. The definition of trafficking in persons enshrined in the UN Trafficking Protocol could serve as the basis for an amendment to the Rome Statute, with its specificities added to the Elements of Crimes.²³⁸ This definition has not only achieved almost universal acceptance,²³⁹ but has also been transposed into the domestic legislation of many State Party and even the second most important international treaty on human trafficking—the Council of Europe Convention on Action against Trafficking in Human Beings.²⁴⁰

124. Gang leaders and heads of criminal organisations could be prosecuted in the same manner as commanders and armed forces leaders may have been. Given the publicity and exposure of proceedings at the ICC, such prosecutions could deter traffickers and end the prevailing impunity. The creation of a new core crime of human trafficking within the Rome Statute would create the essential connection between international and transnational operations and ultimately elevate the crime to “a level of seriousness which it does merit.”²⁴¹

125. It is, however, also important to mention several barriers that may hinder this proposal. It may be difficult to find support for the Rome Statute amendment since no State has been particularly advocating for the inclusion of human trafficking in the international criminal law framework.²⁴² The negotiations over drafting of the Convention on the Prevention and Punishment of Crimes Against Humanity (Convention) do not offer positive outlook either: the crime of human

²³⁷ See Rome Statute, *supra* note 3, art. 17(1).

²³⁸ Article 3 of the UN Trafficking Protocol defines trafficking as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]” UN Trafficking Protocol, *supra* note 139.

²³⁹ The UN Trafficking Protocol has been adopted by 176 States.

²⁴⁰ Council of Europe Convention on Action Against Trafficking in Human Beings, *supra* note 234, art. 4(a).

²⁴¹ *Id.* at 712.

²⁴² See *supra* note 186 on *travaux préparatoires*.

trafficking has not been included among the list of the underlying acts of crimes against humanity, despite its inclusion in the first versions of the draft Convention.²⁴³ Replicating the Rome Statute, the draft Convention merely includes the crime under the definition of the crime of enslavement.²⁴⁴

126. Many countries and regions experience corruption, links between government and organised criminal groups, and insufficient rule of law, enable the crime of human trafficking to expand without adequate accountability. The ICC jurisdiction over the crime could significantly assist the States which are unable to address the crime on their own, benefitting their economy, rule of law and enforcement of human rights standards. This unique potential of the ICC, as opposed to any international human rights treaty, including the Convention, could serve as a strong and persuasive argument that would weigh in for the inclusion of human trafficking in the Rome Statute as a new core crime under Article 5.

127. In addition, one should also take into account possible organisational and budgetary issues. The ICC's Investigation Division currently has a yearly budget of approximately 20 million euros.²⁴⁵ This has led to the understaffing of investigators, which has a number of auxiliary effects. Most concerning, the Investigation Division lacks the ability to react to unforeseen events without significantly reducing resources dedicated to other activities.²⁴⁶ It is uncertain whether the current budgetary constraints of the Court would allow it to develop and apply the new and innovative methods required to investigate and prosecute the crime of human trafficking.

7. Conclusions

128. While there are certainly budgetary, logistical, and political challenges to amending the Rome Statute to include human trafficking as a new core crime or as an underlying act of crimes against humanity, the endeavour is worth pursuing, given the gravity of human trafficking itself and the persistent lack of effective domestic prosecutions. The fact that human trafficking was not extensively discussed during the negotiation of the Rome Statute does not necessarily entail that

²⁴³ Sean D. Murphy, *Current Development, Crimes against Humanity and other Topics: The Sixty- Ninth Session of International Law Commission*, 111 *The Am. Soc'y of Int'l L.*, 970, 988 (2017).

²⁴⁴ Draft articles on prevention and punishment of crimes against humanity (2019), Article 2(2)(c).

²⁴⁵ Assembly of States Parties, Proposed Programme Budget for 2020 of the International Criminal Court, ICC-ASP/18/10, ¶¶ 281-282 (25 July 2019).

²⁴⁶ *Id.*

there could not be renewed political incentive in the future in response to the changing criminal practices worldwide.

129. The decrease of human trafficking is nowhere in sight. On the contrary, the increasing flow of migrants and refugees alongside stringent immigration controls fuel its widespread occurrence.

130. Whether and how the ICC should get involved with prosecuting trafficking in persons is a question that requires continued reflection and engagement on behalf of States impacted by human trafficking. Given the gravity of the crime and the absence of other criminal jurisdictions capable of stepping in in the face of voluntary or involuntary inaction of States and regional bodies, the discussion to accord a more inclusive role to the ICC is not only highly anticipated, but also very much needed.

IV. EXPANSION OF THE ICC'S PERSONAL JURISDICTION

A. Corporate Accountability

131. Corporate actors have been involved in many human rights violations around the world. However, an accountability gap exists because states are often unwilling and/or unable to regulate them, and most sources of international human rights law only provide jurisdiction over natural persons.²⁴⁷ Expanding the jurisdiction of the ICC to legal persons for human rights abuses could, however, create accountability for corporations themselves.

132. The text of the Rome Statute does not prohibit criminal liability of corporate actors. The language in Article 25(3), (c) or (d), of the Rome Statute could be used as the basis to prosecute a group of individuals within a corporation or an industry for complicity. This could include, among other actions, profiting from arms sales to armed groups, propping up oppressive governmental regimes, and participation in environmental degradation and displacement of peoples for the sake of resource extraction.²⁴⁸

133. In practice, corporate actors have not faced ICC prosecution commensurate with the number of human rights abuses documented.²⁴⁹ Yet, the OTP's "Policy Paper on Case Selection and Prioritisation" (2016) confirms that the ICC can prosecute members of an organisation accused of crimes at all levels of the organisational hierarchy, even when their individual crimes are not as serious as the crime as a whole.²⁵⁰ However, an amendment to the Rome Statute allowing for jurisdiction over corporations as legal persons would better deter corporations from engaging in Rome Statute crimes and ensure accountability.

²⁴⁷ Danielle Olson, *Corporate Complicity in Human Rights Violations under International Criminal Law*, 1 DePaul Int'l Hum. Rts. L. J. 1, 5 (2015); Angela Walker, *The Hidden Flaw in Kiobel: Under the Alien Tort Statute the mens rea standard for corporate aiding and abetting is knowledge*, 10 Nw. U. J. Int'l Hum. Rts. 119, 123 (2011) ("companies currently do not have direct human rights obligations under international law"); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) Judgment, 2007 I.C.J. Report 43, 457 (26 February) (Separate opinion by Judge ad hoc Kreca) ("Such a legal rule is not known to the Genocide Convention or to positive international law"); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120-121 (2d Cir. 2010) ("no corporation has ever been subject to *any* form of liability [whether civil or criminal] under the customary international law of human rights"; "customary international law has steadfastly rejected the notion of corporate liability for international crimes").

²⁴⁸ See Juan P. Calderón-Meza, et. al., *An International Jurisdiction for Corporate Atrocity Crimes*, 57 Harv. Int'l L. J. 1 (2016).

²⁴⁹ David Scheffer, *Is the Presumption of Corporate Impunity Dead*, 50 Case W. Res. J. Int'l L. 213, 220 (2018).

²⁵⁰ OTP Policy Paper on case selection, *supra* note 113.

1. Proposed Solutions to Lack of Accountability for Corporations

134. Corporate criminal liability is not universal across domestic legal systems and is uncommon in international law.²⁵¹ However, “[i]n the majority of those jurisdictions that already recognize the potential criminal responsibility of companies, companies can be held responsible for ... crimes under international law”.²⁵²

a. International proposals for corporate accountability

135. Treaties such as the Convention Against Transnational Organized Crime and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions seek to establish criminal liability for corporations for specific offense and have been ratified by an overwhelming majority of states.²⁵³

136. Despite such instruments, there are no international criminal tribunals that have “jurisdiction to try a company as a legal entity for crimes under international law.”²⁵⁴ However, as discussed below, the international community has demonstrated its desire for such jurisdiction, by

²⁵¹ Martin Petrin, *Reconceptualizing the Theory of the Firm-from Nature to Function*, 118 Penn St. L. Rev. 1 (2013); Walker, *supra* note 247, at 12; Michael Koebele, Corporate Responsibility Under the Alien Tort Statute: enforcement of the international law through US torts law 196 (2009) (“[D]espite trends to the contrary, the view that international law primarily regulates States and in limited instances such as international criminal law, individuals, but not [transnational corporations], is still the prevailing one among international law scholars.”); International Commission of Jurists, Corporate Complicity and Legal Accountability Volume 1: Facing the Facts and Charting a Legal Path 4 (2008) (“criminal law will often (though not always) only apply to individuals (natural persons)”) [hereinafter “ICJ Report Vol. 1”].

²⁵² International Commission of Jurists, Corporate Complicity and Legal Accountability Volume 2: Criminal Law and International Crimes 57 (2008). *See also* Olson, *supra* note 247, at 5. *But see* Wolfgang Kaleck & Miriam Saage-Maaß, Corporate Accountability for Human Rights Violations Amounting to International Crimes,” 8 J. of Int’l Crim. Just. 699, 701 (2010) (“even though criminal liability of corporations has been introduced in several national jurisdictions, there are no known criminal law cases regarding international crimes against corporations as such”); ICJ Report Vol. 1, *supra* note 251, at 6 (“as national legal systems incorporate international criminal law into their domestic legislation, they often include legal entities”). Note that in the United States, certain circuits have ruled that corporations can be sued civilly under international law for human rights violations, causing European human rights organizations to pursue similar avenues. *See* Kaleck, *supra* note 259, at 699-724; Walker, *supra* note 247, at 123; *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

²⁵³ The Convention Against Transnational Organized Crime mandates that “each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation” in crimes within the scope of the treaty, but does not go on to discuss how to attribute *mens rea* to legal persons. Convention Against Transnational Organized Crime, art. 10(1), 15 November 2000, S. Treaty Doc. 108-16. Similarly, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions mandates that “each Party shall... establish the liability of legal persons,” though it also specifies that legal systems that do not recognize criminal liability for legal persons can instead apply non-criminal measures. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, 17 December 1997, S. Treaty Doc. No. 105-43.

²⁵⁴ Olson, *supra* note 247, at 5; ICJ Report Vol. 1, *supra* note 251, at 6 (“no international forum yet has jurisdiction to prosecute a company as a legal entity”); Protocol on Amendments to the Protocol on the Statute of the African Court of Justice, art. 46C, 27 June 2014 [hereinafter “Malabo Protocol”].

proposing treaties that would specifically address the liability of corporations for human rights violations.

137. For example, once ratified by 15 of the African Union's 55 member states, the 2014 Malabo Protocol (providing criminal jurisdiction to the African Court of Justice and Human Rights (ACtJHR)) will be "the first to grant an international or regional criminal court jurisdiction over corporations."²⁵⁵ Under this protocol, legal persons could be liable for genocide, crimes against humanity, war crimes, aggression and other crimes such as mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous waste, and illicit exploitation of natural resources.²⁵⁶

138. Similarly, during the twenty-fourth session of the UN Human Rights Council in September 2013, Ecuador presented a proposal for the creation of an international, legally binding instrument on business and human rights, which countries in the African Union and the Arab League, as well as Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, and Peru seconded.²⁵⁷ In June 2014, the Human Rights Council created the Open-ended Intergovernmental Working Group on Transnational Corporations and tasked it to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."²⁵⁸ In 2018, Ecuador presented a "zero draft legally binding instrument to regulate, in international human rights law, the activities of transnational

²⁵⁵ The Malabo Protocol has 15 signatories, with the most recent in April 2019, but has yet to be ratified by any country. Taygeti Michalakea, *Article 46C of the Malabo Protocol: A Contextually Tailored Approach to Corporate Criminal Liability and Its Contours*, 7 Int'l Hum. Rts. L. Rev. 225 (2018); African Union, List of Countries Which Have Signed, Ratified/Acceded To The Protocol On Amendments To The Protocol On The Statute Of The African Court Of Justice And Human Rights, (20 May 2019)

²⁵⁶ See Malabo Protocol, *supra* note 254, art. 28A(1).

²⁵⁷ Business & Human Rights Resource Centre, Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council, September 2013.

²⁵⁸ Human Rights Council Res. 26/9, U.N. Doc A/HRC/RES/26/9, at 2 (14 July 2014).

corporations and other business enterprises”.²⁵⁹ This draft has since been revised and was last circulated in August of 2021.²⁶⁰

139. An exception within existing international criminal law, the STL held in *The Case Against Al Jadeed [Co.] S.A.L./New T.V. S.A.L. (N.T.V.) & Karma Mohamed Tahsin Al Khayat* (2014) that in the context of contempt proceedings, the word “person” in its statute included both natural and legal persons, and that there was an emerging international consensus on the role of corporations under international law.²⁶¹ It based these conclusions on various international instruments holding that transnational corporations have duties to respect human rights and State practice providing for liability of corporations at a domestic level. The STL noted that “in a majority of the legal systems in the world corporations are not immune from accountability merely because they are a legal—and not a natural—person”.²⁶²

140. The personal jurisdiction of the ICC is, under Article 25(1) of the Rome Statute, ultimately focused on natural persons. However, the possibility for seeking accountability of corporations was recognised, discussed and ultimately deferred during the Rome Statute negotiations. In the course of constituting the ICC, a draft article was proposed that would have placed a necessary condition for corporations to be tried only if the natural persons who controlled the legal person were convicted and if the Prosecutor included in the charges against that natural person that they were in control of the legal person and acted under ‘consent’ of the latter. This did not appear in the final version of the Rome Statute; however, discussions recognized that “liability of a corporation could be important in the context of restitution”.²⁶³

²⁵⁹ Human Rights Council, Fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights,” Office of the High Commissioner for Human Rights, <https://www.ohchr.org/en/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx> (last visited 23 May 2020). The Zero Draft stipulated, “State Parties shall ensure through their domestic law that natural and legal persons may be held criminally, civil or administratively liable for violations of human rights undertaken in the context of business activities of transnational character. Such liability shall be subject to effective, proportionate, and dissuasive criminal and non-criminal sanctions, including monetary sanctions. Liability of legal persons shall be without prejudice to the liability of natural persons.” See also, Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Entities: Zero Draft (16 July 2018).

²⁶⁰ Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises: Revised Draft (17 August 2021).

²⁶¹ In re New TV S.A.L. & Al Khayat, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶¶ 60, 67 (2 October 2014).

²⁶² *Id.* at ¶ 58.

²⁶³ Transnational Corporations and Human Rights 289 (Olivier De Schutter, ed., 2006).

2. Proposed Amendments to the Rome Statute

a. Personal jurisdiction amendment

141. The most direct way that States Parties could close the accountability gap for corporations would be to amend Article 25(1) of the Rome Statute and expand personal jurisdiction to include legal persons. While many scholars have proposed amendments to encapsulate this change, none have been adopted thus far.²⁶⁴

142. This report proposes that an amendment of the Rome Statute follow that proposed by Ambassador David Scheffer with respect to Articles 1 and 25 and suggests complementary amendments to Article 30.

143. The proposed rewording of Article 1 is as follows:

[The ICC] shall be a permanent institution and shall have the power to exercise its jurisdiction over *natural and juridical* persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. *Any use of 'person' or 'persons' or the 'accused' in this Statute shall mean a natural or juridical person unless the text connotes an exclusive usage.* (New language emphasized)

144. The proposed amendment of Article 25 is as follows:

The Court shall have jurisdiction over natural *and juridical* persons pursuant to this Statute. (New language emphasized)

b. Complementarity amendment

145. Kathryn Haigh proposed addressing complementarity concerns by adding specific language to the definition of a juridical person that would restrict jurisdiction to corporations incorporated in States that recognize criminal corporate liability for atrocity crimes relevant to the ICC in their national criminal jurisdictions.²⁶⁵ Amendments to Articles 17 and 19 would codify

²⁶⁴ See e.g. Kathryn Haigh, *Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns*, 14 Austl. J. of Hum. Rts. 199, 212 (2008) (proposing changes to Article 25(1) that would return to the language deleted prior to ratification, including both natural and juridical persons); Martin-Joe Ezeudu, *Revisiting corporate violations of human rights in Nigeria's Niger Delta region: Canvassing the potential role of the International Criminal Court*, 11 Afr. Hum. Rts. L. 23, 53 (2011) (suggesting that the language offered by the French delegation during the drafting stage be used to circumscribe jurisdiction over corporations to situations where a natural person connected to the same crime and corporation is also charged and convicted); Rome Statute, *supra* note 3; David Scheffer, *Corporate Liability under the Rome Statute*, 57 Harv. Int'l L. J. (2016) (explicating an amendment process that follows the basic structure Ezeudu proposes, but with opt-in consent from each State).

²⁶⁵ Haigh, *supra* note 271, at 203, 212.

this exception as part of the standards that must be met for a case to be admissible under ICC rules.²⁶⁶

c. Amendment on *mens rea* of corporations

146. Jurisdictions that recognise corporate criminal liability adopt varying approaches to determine the mental element of corporate crimes. There are broadly four legal models used to establish the *mens rea* of a corporation; (1) *respondeat superior*, (2) identification, (3) collective knowledge, and (4) corporate culture. Of these, the first three involve some form of derivative liability, whereby the *mens rea* of the corporation is derived from the mental state of one or more of its employees. The fourth, corporate culture, is concerned with the general policies and practices existing within the corporation.

147. The doctrine of *respondeat superior*, also known as the Principal-Agent rule, finds its basis in the civil law of torts. According to this rule, an employer is liable for the acts of employees when such acts are committed within the scope of employment. Under the French *Code Pénal*, organisations are criminally liable for offenses committed “*pour leur compte, par leurs organes ou représentants*” (on their behalf, by their organs or representatives).²⁶⁷ United States federal law holds corporations liable for acts committed by an employee or agent of the corporation if such acts were within the scope of employment and motivated by intent to benefit the corporation.²⁶⁸ Similarly, the South African Criminal Procedure Act imposes criminal liability upon a corporation for an offense committed by its directors or servants in exercise of their powers, in performance of their duties or in furtherance of the interests of the corporation.²⁶⁹

148. The identification model imputes to a corporation the mental state of its senior, managerial employees.²⁷⁰ UK courts have consistently held that the “guilty mind” of a corporate director or manager is the mind of the company itself.²⁷¹ In Canada, companies are liable for offences committed by senior officers if the act was within their “field of operation,” the act was not totally in fraud of the corporation, and the company benefited from the act.²⁷² The United States Model

²⁶⁶ *Id.*

²⁶⁷ Code Pénale, (Penal Code), arts. 121-2 (Fr.)

²⁶⁸ *United States v. Singh*, 518 F. 3d 236, 249-50 (4th Cir. 2008).

²⁶⁹ Criminal Procedure Act of 1977 § 332(1) (S. Afr.)

²⁷⁰ Petrin, *supra* note 258, at 22.

²⁷¹ *Tesco Supermarkets, Ltd. v Natrass*, [1972] AC 153 (Austl).

²⁷² *Canadian Dredge and Dock Co v. The Queen (Canadian Dredge)*, [1985] 1 SCR 662 (Ont.).

Penal Code provides that a corporation may be convicted for an offense if it was authorised, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment.²⁷³ A similar standard can also be found in the Australian Criminal Code.²⁷⁴ In international law, the OECD's "Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" explains that either: "the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons" or it is "only triggered by acts of persons with the highest level managerial authority".²⁷⁵

149. Under collective knowledge, even if no single employee possesses complete *mens rea*, the *mens rea* of the corporation can be construed from the aggregate of several employees' knowledge.²⁷⁶ This doctrine has been applied in the United States at the federal level.²⁷⁷ The Malabo Protocol similarly notes that a corporation's knowledge "may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation" and that the knowledge can be "divided between corporate personnel."²⁷⁸

150. Australia bases corporate liability on the existence of a "corporate culture" that encouraged, tolerated, or led to the offence.²⁷⁹ The Australian Criminal Code defines "corporate culture" as an "an attitude, policy, rule, course of conduct or practice" within the company.²⁸⁰ Though the United Kingdom relies on the identification doctrine to establish corporate criminal liability generally, the Corporate Manslaughter and Corporate Homicide Act permits the jury in a corporate manslaughter case to consider "attitudes, policies, systems or accepted practices" within the corporation that contributed to the commission of the offence.²⁸¹ The Malabo Protocol establishes *mens rea* of a

²⁷³ Model Penal Code § 2.07 (1)(c) (Am. Law. Inst.) (U.S.).

²⁷⁴ Criminal Code Act 1995, s 12.3 (Austl.)

²⁷⁵ Organisation for Economic Co-operation and Development, Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 November 1997).

²⁷⁶ *United States v. Bank of New England*, 821 F. 2d 844 (1st Cir. 1987), *cert. denied* 484 US 943 (1987).

²⁷⁷ *United States v. TIME – DC*, 381 F. Supp. 730 (1974).

²⁷⁸ Malabo Protocol, *supra* note 254, art. 46C.

²⁷⁹ Criminal Code Act 1995, *supra* note 274, § 12.3 (6) (Austl.)

²⁸⁰ *Id.*

²⁸¹ Corporate Manslaughter and Corporate Homicide Act 2007, c. 19, § 8 (3)(a) (Eng.).

corporation through “proof that it was the policy of the corporation to do the act which constituted the offence”,²⁸² and the policy can be “attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.”²⁸³

151. The language utilized in the Malabo Protocol, South African law, and the Australian Criminal Code could be aggregated to create an Amendment to Article 30 that would cover the four models of *mens rea* for corporations. This would read as follows:

4. For the purposes of this article, the mens rea of a juridical person may be established by proof that:

- (a) Conduct was performed, with or without a particular organisational intent or policy, by or on instructions or with permission, express or implied, given by a director or servant of that juridical person in the exercise of his or her powers or in the performance of his or her duties as such director or servant or in furthering or endeavouring to further the interests of that juridical person;*
- (b) The juridical person’s board of directors or a high managerial agent intentionally, knowingly, or recklessly engaged in; carried out; or permitted or authorised (explicitly, tacitly, or impliedly) the commission of an offence;*
- (c) Actual or constructive knowledge of the relevant information was possessed within the juridical person, even if the relevant information was divided between corporate personnel; or*
- (d) It was the policy of the juridical person to do the act which constituted the offence.*²⁸⁴

d. Amendment on penalties

152. There are penalties that the ICC could introduce in order to effectively punish corporate perpetrators and incentivise positive structural changes that go beyond the imprisonment, fines, and forfeiture listed in Article 77. For instance, French law includes multiple non-monetary sanctions in the available penalties for corporations that have been convicted of crimes:

[D]issolution of the corporation, ‘judicial surveillance,’ public display and distribution of the sentence, general or special confiscation of assets, exclusion from public procurement, and (permanent or temporary) closure of one or more of the firm’s establishments that were used to commit the crimes.²⁸⁵

²⁸² Malabo Protocol, *supra* note 254, art. 46C.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Caroline Kaeb, *A New Penalty Structure for Corporate Involvement in Atrocity Crimes: about Prosecutors and Monitors*, 57 Harv. Int’l L. J. 20, 21-23 (2016).

Adding non-monetary penalties could induce compliance with human rights norms as a preventative, not solely retributive, measure.²⁸⁶

153. The ICC could also follow the example of compliance mechanisms such as the Foreign Corrupt Practices Act and institute monitorships, a criminal penalty that would impose upon indicted corporations an official monitor to oversee compliance with human rights guidelines.²⁸⁷ Monitorships have the potential to have deeper structural impacts than fines, and preclude corporations from treating fines for criminal activity as a cost of doing business.²⁸⁸ The States Parties would need to develop a mandate for a monitor of atrocity crimes, as opposed to corruption, and should also decide on the metrics by which the corporation could be deemed to have met its obligations to uphold human rights and business norms and standards.²⁸⁹ Compliance monitors would also need to be staffed, or at least identified, to ensure that penalties would be more than idle threats to corporate perpetrators.²⁹⁰

e. Reparations amendments

154. There are additional, and probably less controversial, ways to institutionalize corporate accountability into the structure of the ICC. It is worth recalling that the draft of 1 April 1998 indicated that there was a middle ground as to the divergence regarding criminal liability of corporations:²⁹¹

Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.²⁹²

²⁸⁶ *Id.*

²⁸⁷ Caroline Kaeb, *The Shifting Sands of Corporate Liability Under International Criminal Law*, 49 Geo. Wash. Int'l L. Rev. 351, 396 (2016).

²⁸⁸ See Angel Gabriel Cabrera Silva, "Legal Innovations for corporate Accountability under International Law: A Critique," 57 HARV. INT'L J. 26, 27 (2016).

²⁸⁹ See Kaeb, *The Shifting Sands of Corporate Liability*, *supra* note 287, at 401. The Guiding Principles on Business and Human Rights could be a starting point for creating the standards that monitors would be charged with implementing. See also *supra* foot notes 264-67, (explaining the development of the Guiding Principles and the ongoing work of the Working Group).

²⁹⁰ See Kaeb, *A New Penalty*, *supra* note 285, at 23.

²⁹¹ A/AC.249/1998/CRP.9, fn. 3. See also UNDCPICC, *Report of the Preparatory Committee on the Establishment of an International Criminal Court. Addendum*, 14 April 1998, A/CONF-183/2/Add-1, para. 49.

²⁹² *Ibid.*

155. It is the time to explore this possibility. It could be based on the *partie civile* system, currently provided in jurisdictions such as France,²⁹³ wherein victims could implead corporations at the sentencing and reparations stages of proceeding against industrialists who have been convicted.²⁹⁴ This may, nonetheless, require some amendments to articles 75, 76 and 77 of the Rome Statute.

156. In order to facilitate a *partie civile* approach, the States Parties could amend Article 75(2) to include civil claims, which could look something like the following:

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

2a. If the convicted person is a member of a group of persons as provided for in Article 25(3)(c)-(d) or an organization as provided for in Article 7(3)(a), the victims of the crime may attach civil claims for damages against that organization or group of persons.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79. (New language emphasized)²⁹⁵

157. Article 76 could be amended to include the procedures necessary to sentence corporations, either through a separate hearing for that purpose (which might require an additional Article), or by explicitly stating that any penalties would be the sole responsibility of the corporation.²⁹⁶ Finally, Article 77(2) could be modified to include the corporation's vicarious liability for civil damages, in addition to fines levied on individuals, as follows:

In addition to imprisonment, the Court may order:

- (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
- (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

²⁹³ Caroline Kaeb, "A New Penalty Structure for Corporate Involvement in Atrocity Crimes: about Prosecutors and Monitors," 57 HARV. INT'L J. 20, 21 (2016).

²⁹⁴ Ibid, at 21-22.

²⁹⁵ Rome Statute, *supra* note 3, art. 75. The reference to "organizations" in Article 7 has been the subject of some scrutiny by international lawyers, as it suggests that Crimes Against Humanity can be committed by non-state actors, which may facilitate jurisdiction over some business practices in international criminal law. See Volker Nerlich, "Core Crimes and Transnational Business Corporations," 8 Journal of International Criminal Justice 895, 904 (2010).

²⁹⁶ See Rome Statute, *supra* note 3, art. 76.

*(c) In a case where the victims have attached a civil claim for damages against an organization, damages are to be paid by the organization to the victims, directly or through the trust fund as provided for in Article 79. (New language emphasized)*²⁹⁷

158. In order to seek redress for victims under such a scheme, it may be possible to use Article 75, which allows for the freezing of assets of convicted individuals and for mandated reparations to victims through the Trust Fund established in Article 79.²⁹⁸ Although the ICC could not directly seize the corporation's assets, victims might be entitled to reparations from profits made directly from crimes perpetrated against them.²⁹⁹

3. *Implementing Corporate Accountability in the ICC*

159. There are two commonly cited reasons for the exclusion of corporate accountability from the Rome Statute. The first reason, related to complementarity, is that at the time of the Rome Conference in 1998, some states had not yet passed laws on the liability of legal persons, making those states unable to prosecute them domestically before the ICC could do so.³⁰⁰ The second reason is that delegations did not have time to adequately address how to enforce judgments and procedures.³⁰¹ The criminal nature of the Court would require a procedural understanding of how to ascertain the *mens rea* of legal persons, while rendering a judgment against such persons would require amendments to determine penalty schemes.

160. Because the Rome Statute drafting committee explicitly rejected language that would have extended jurisdiction over legal persons directly, prosecutors may be conservative in evaluating cases against corporate executives, especially as the bar for accumulating evidence against one person within a corporation is already higher than it would be if one were trying the acts of the corporation as a whole. However, given relatively recent social responsibility efforts initiated by corporations,³⁰² as well as an increase in international and domestic corporate accountability

²⁹⁷ See *id.*, art. 77.

²⁹⁸ See *id.*, arts. 75, 79.

²⁹⁹ See Luis Moreno Ocampo, *International Jurisdiction for Corporate Atrocities: An Interview with Luis Moreno Ocampo*, 57 Harv. Int'l L. J. (2016).

³⁰⁰ David Scheffer and Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 Berkeley J. Int'l L. 334, 379 (2011), at 379.

³⁰¹ *Id.* at 380.

³⁰² Rebecca M. Henderson, *More and More CEOs Are Taking Their Social Responsibility Seriously*, Harv. Bus. Rev., 12 February 2018.

attempts,³⁰³ an amendment granting the ICC personal jurisdiction over corporations would be both timely and transformative.

a. Practical measures for implementation

161. Today, the international community may be prepared to address a corporate accountability proposal. As indicated above, numerous jurisdictions now provide for criminal liability of corporations under domestic law, providing a foundation for agreement as well as mitigating complementarity concerns.³⁰⁴ Likewise, the trend in international law is towards increased recognition of criminal liability for corporations.

162. A corporate accountability amendment would need to take into account, beyond the process of charging a corporation, the following: the distinctions between natural and juridical persons throughout the process of adjudication; the requirements for physical presence of corporations; the laws of evidence that would apply to corporations and, State Parties' role in cooperating with the OTP.³⁰⁵

b. If no amendment, victims, TFV, and even the convicted person could try novel avenues to seek contribution for reparations from liable corporate actors

163. Lastly, if none of the alternative amendments seem to have any reception among the States Parties to the Rome Statute, the victims TFV and the convicted person could explore novel

³⁰³ For a general overview of corporate accountability efforts and the legal landscape, see Jernej Letnar Čerňič, *Corporate Accountability for Human Rights: From a Top-Down to a Bottom-Up Approach*, in *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Jena Martin & Karen E. Bravo, eds., 2016).

³⁰⁴ See e.g. *Verbandsverantwortlichkeitsgesetz 2005* (Law on the Responsibility of Associations of 2005) (Austria); *Code Pénal/Strafwetboek*, art. 5 (Belg.); *Law 20.393, 2009* (Chile); *Criminal Code*, art. 30 (China); *Act No. 151/03 on the Responsibility of Legal Persons for Criminal Offences* (Croat.); *Criminal Code of Cyprus*, § 4 (Cyprus); *Criminal Procedure Law*, § 46 (1) (b), 72, 95 (Cyprus); *Corporate Criminal Liability, Act No. 418/2011 Coll.*, §§ 2-3 (Czech); *Code Pénal*, arts. 121-2 (Fr.); *Guatemalan Criminal Code*, art. 38 (Guat.); *Büntető Törvénykönyv*, § 70(1)(8), (3) (Hung.); *2001 Criminal Measures Applicable to Legal Persons (Act CIV of 2001)* on (Hung.); *General Criminal Code*, art. 19 a-c (Ice.); *Law No. 23 of 1997 (Law Concerning Environmental Management)*, arts. I (24) and 41-48 (Indon.); *Law 31 of 1999 (Eradication of the Criminal Act of Corruption)*, art. I (3) (Indon.); *Act Preventing Escape of Capital to Foreign Countries of 1932* (Japan); *Securities and Exchange Act of 2002*, art. 207 (Japan); *Corporation Tax Act of 2013*, art. 163 (1) (Japan); *Unfair Competition Prevention Act 2005*, art. 22(I) (Japan); *Lebanese Criminal Code*, art. 210 (Leb.); *Criminal Code*, art. 20 (Lith.); *Criminal Code*, art. 127 (Morocco); *Weboek van Strafrecht (Criminal Code)*, art. 51 (Neth.); *Civil Penal Code*, Chapter 3 a, art. 48 a-b (Nor.); *Criminal Code*, art. 11(2) (Port.); *Act on Preventing Bribery of Foreign Public Officials in International Business Transactions of 1998*, art. 4 (S. Kor.); *Criminal Code*, art. 45 (1) (Rom.); *Penal Code (Sen.)*, art. 163 *bis*; *Código Penal*, art. 31 (Spain); *Schweizerisches Strafgesetzbuch, Code Pénal Suisse, Codice Penal Svizzero*, art. 102 (Switz.); *Criminal Code*, art. 209 (2) (Syria); *Penal Code*, art. 65 (UAE).

³⁰⁵ Scheffer, *Is the Presumption of Corporate Impunity Dead*, *supra* note 249 at 217, 222.

possibilities to seek contribution from corporate actors who have acted as co-perpetrators and/or accessories.

b.1 Impleading corporate actors to appear in reparations at the ICC

164. Although it has never been tried, rule 94(1) of the Rules does not prevent a victim to name accessory corporate actors in their request for reparations, so that the Court, under rule 94(2) of the Rules, ‘ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons’. Corporate actors could be called as impleaders named in the request. Likewise, in proceedings started under the Court’s motion, the Court could call corporate actors as impleaders, considering that rule 95(1) of the Rules provides that the Court ‘shall ask the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination’.

165. Certainly, neither rule limits the interpretation of the terms ‘person or persons named in the request’ and ‘person or persons against whom the Court is considering making a determination’ to natural persons, let alone to the convicted person. Either the victims in their request or the Court on its own motion could thus call companies or, at the very least, industrialist to appear as impleaders in the reparations’ proceedings. This would of course require that their liability as contributors to the harm caused by the crimes can be proved. The victims could do so to secure that the payment of the award against the person convicted be paid by either the convicted person or the corporate actors so impleaded.

b.2 Seeking contribution of corporate actors at local courts

166. Another possibility that has not yet been tried at the ICC either is to seek contribution from corporate actors that are jointly liable for the harm caused by the crimes of which the convicted person is liable. As Judge Simma found in the ICJ case *Oil Platforms* case, the principle of joint liability for multiple tortfeasors is a general principle of law.³⁰⁶ Several jurisdictions furthermore

³⁰⁶ In the ICJ case *Oil Platforms* case, Judge Bruno Simma concluded that the principle of joint and several responsibility “can properly be regarded as a ‘general principle of law’” (ICJ, *Oil Platforms* (Iran v. U.S.), 6 November 2003, Separate Opinion of Judge Simma, 2003 I.C.J. p. 161, at p. 358). To address the issue whether Iran had violated its treaty obligations by laying mines during the Iran-Iraq War, whereas the U.S. could not prove whether Iran or Iraq had laid the mines, Judge Simma found the principle of joint liability in different domestic laws addressing the problem of multiple tortfeasors: “I have engaged in some research in comparative law to see whether anything resembling a ‘general principle of law’ [...] can be developed from solutions arrived at in domestic law to come to terms with the

provide that a party who is held jointly liable to pay the entirety of the award can seek contributory damages from other liable parties. On the basis of domestic legislation from 24 jurisdictions, Professor Alford notes, “[i]t is the very general rule that if a tortfeasor’s behaviour is held to be a cause of the victim’s harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause”.³⁰⁷ According to Professor Noyes *et al*, principles preventing unjust enrichment across jurisdictions explain that “the availability of contribution does make a system of joint and several liability more palatable”.³⁰⁸

167. Although the forum to seek contributory damages from tortfeasors would be the domestic courts that have jurisdiction over the other liable parties, either the convicted person or eventually the TFV could seek contribution from corporate actors, corporations and/or industrialists, that contributed to the harm caused by the crimes. In the case of the convicted person, he or she could seek contribution from other liable individuals or corporations. As for the TFV, in cases where the convicted person’s lack of funds, the reparations order is made against the convicted person but the TFV disburses money to pay the award.³⁰⁹ Having done so, the TFV could subrogate and seek contribution from the liable corporate actors that also participated in the harm caused by the crimes.

problem of multiple tortfeasors. I submit that we find ourselves here in what I would call a textbook situation calling for such an exercise in legal analogy....[R]esearch into various common law jurisdictions as well as French, Swiss and German tort law indicates that the question has been taken up and solved by these legal systems with a consistency that is striking” (ICJ, *Oil Platforms (Iran v. U.S.)*, 6 November 2003, Separate Opinion of Judge Simma, 2003 I.C.J. p. 161, at p. 354).

³⁰⁷ R. Alford, ‘Apportioning Responsibility Among Joint Tortfeasors for International Law Violations’, 38 *Pepperdine Law Review* (2011), p. 233, at p. 241 (referring to applicable law in Austria, Belgium, Canada, China, the Czech Republic, Denmark, England, Finland, France, Germany, Ireland, Israel, Italy, Netherlands, New Zealand, Poland, Portugal, Scotland, South Africa, Spain, Sweden, Switzerland, and the United States); *see also* Weir, ‘Complex Liabilities’, 11 *International Encyclopedia of Comparative Law* (2013), A. Tunc ed., pt. 2, ch. 12, §§ 1, 79-104.

³⁰⁸ J. E. Noyes & B. D. Smith, ‘State Responsibility and the Principle of Joint and Several Liability’, 13 *Yale Journal of International Law* 2 (1988), p. 225, at p. 255-56. It is also pointed out that ‘the conditions to its availability vary significantly. For example, in different legal systems, contribution may derive from wide-ranging sources, including subrogation, independent right, or statutory terms. In some systems, contribution may not be available unless a claim has formally been reduced to judgment, or unless all the joint tortfeasors have been named in the complaint or the judgment. In addition, the amount or availability of contribution varies among legal systems when one tortfeasor has settled with the plaintiff’. J. E. Noyes & B. D. Smith, ‘State Responsibility and the Principle of Joint and Several Liability’, 13 *Yale Journal of International Law* 2 (1988), p. 225, at p. 256 (referring to Weir, ‘Complex Liabilities’, 11 *International Encyclopedia of Comparative Law* (2013), A. Tunc ed., pt. 2, ch. 12, §§ 109-140).

³⁰⁹ ICC, Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, para. 115.

168. In fact, judging from the TFFV's submissions, it does not seem to oppose to the idea to subrogate for the money it pays to the victims. In support of Victims V01's appeal in *Lubanga*, the TFFV submitted in *Lubanga* that it 'reiterates its legal opinion that a reparations order has to be directed against the convicted person regardless of his or her financial situation' and that it 'plays only an intermediary role to implement the order against the convicted person'.³¹⁰ Importantly, the TFFV noted that an order against the convicted person the convicted person '*remains liable even if reparations were advanced by the Trust Fund*' and did not discard that the possibility that, 'even at a later stage, the convicted person fulfils this part of the Court's order', serving reconciliation purposes.³¹¹ The Appeals Chamber observed:

In cases where the convicted person is unable to immediately comply with an order for reparations for reasons of indigence, the Appeals Chamber agrees with the parties and participants' submissions that were made before the Trial Chamber, namely that the TFFV may advance its "other resources" pursuant to regulation 56 of the Regulations of the TFFV, but such intervention does not exonerate the convicted person from liability. The convicted person remains liable and must reimburse the TFFV.³¹²

169. Importantly, in the Reparations Order issued in the case of *Al Mahdi*, Trial Chamber VIII did not reject the idea that a third party who pays for part of the harm awarded in a reparations order seeks contribution against the liable party. Although UNESCO had restored the protected buildings attacked by Mr Al Mahdi, it held Mr Al Mahdi liable for that harm regardless of the rights that UNESCO may assert against him

³¹⁰ TFFV, Observations of the Trust Fund for Victims on the Appeals Against Trial Chamber I's "Decision Establishing the Principles and Procedures to be Applied to Reparations", ICC-01/04-01/06-3009, 8 April 2013, para. 107 ('The Trust Fund reiterates its legal opinion that a reparations order has to be directed against the convicted person regardless of his or her financial situation. That the Trust Fund plays only an intermediary role to implement the order against the convicted person is very clearly stated in the French version of Article 75 (2), second sentence: "Le cas échéant la Cour peut décider que l'indemnité accordée à titre de réparation est versée par l'intermédiaire du Fonds visé à l'article 79"). See also *id.*, para. 108 ('If the Trust Fund plays the role of an intermediary, an order for reparations is the prerequisite for the implementation through the Trust Fund and this order must be made against somebody, which necessarily means in the current setting of the Statute, an order against the convicted person').

³¹¹ See *id.*, para 110 ("The Trust Fund observes that the high significance of a Court decision should not be underestimated for both the convicted person and the victim. Civil liability for reparations is of high symbolic value for victims, because this clearly sends the message that the convicted person is obliged to remedy the harm caused. A reparations order by the Court would also mobilise State Parties to give effect to the order. Beside a conviction and a punishment, it is also of high importance to have the burden of a reparations order rest on the shoulders of the convicted person, reminding him or her that the reparations order was issued against him or her, and that he or she remains liable even if reparations were advanced by the Trust Fund. It could also be a measure which aims at future reconciliation if, even at a later stage, the convicted person fulfils this part of the Court's order").

³¹² ICC, Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, para. 115.

65. The Defence submits that, when considering reparations for repairing the Protected Buildings, the Chamber should take into account the fact that they have been restored. The Chamber is unconvinced and considers the fact that the Protected Buildings have been restored by UNESCO and others to have no impact on whether Mr Al Mahdi is liable for the damage caused. Remedial efforts by a third party in the time elapsed between the destruction and the issuance of the reparations order do not alter the amount of damage originally done. To place undue weight on this fact would be to understate the amount of harm actually caused and the corresponding reparations required to remedy it. The fact that UNESCO has no intention of collecting any reparations is likewise immaterial. *The Chamber will not speculate on the extent to which bona fide third parties may assert their rights against the convicted person once the reparations order is issued.* The Chamber's only role at this point is to decide on the convicted person's liability, taking into account the scope and extent of any damage, loss or injury caused. In the present case, the Chamber finds that Mr Al Mahdi is liable for the destruction of the Protected Buildings.³¹³

170. Like UNESCO, the TFV could also assert its rights against the liable parties once it pays for the harm awarded in reparations orders against convicted persons. In situations where companies are involved in crimes for which the convicted person was held liable for reparations but was declared indigent or has not paid the award, the TFV could pay and thus subrogate to seek payment from co-perpetrators or accessories. This could be feasible through civil litigation in fora with personal jurisdiction over the companies or their assets. The fact that this subrogation action exists or is actually filed might furthermore serve as collateral for the TFV to seek funding and it might give some security to people who want to invest in the TFV.³¹⁴

³¹³ ICC, Trial Chamber VIII, *The Prosecutor v. Thomas Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 August 2017, ICC-01/12-01/15-236, para. 65 (emphasis added).

³¹⁴ That said, to this end, the TFV would need collaboration from outside partners (such as clinics and/or other members of the civil society) and/or proper staff and funding to be able to retain attorneys to conduct these actions in different domestic jurisdictions.

V. ACKNOWLEDGEMENTS

171. This report was completed thanks the following individuals who, as volunteers or members of Advocates for Human Rights or the Independent Clinical Program of Harvard Law School, contributed to the research and drafting of this report:

Molly Ma JD '18

Etiene Martins LLM '19

Katerina Simonova LLM '19

Emma Broches JD '20

Isha Jain LLM '20

Celeste Kmiotek, JD '20

Samantha Lint JD '20

Nicolas Luongo JD '20

Fracia Njoroge LLM '20

Matthew P. Farrell, JD '21

Justin Fishman JD '21

Alexander Guerin JD '21

Johanna Lee JD '21

Jung Min (Jasmine) Shin, JD '21

Rebecca Tweedie JD '21

Sondra Anton JD '22

Hannah Allen LLM '22

Anoush Baghdassarian JD '22

Chetna Beriwalla JD '22

Rebekah Carey JD '22

Yang Ding JD '22

Stephanie Gullo JD '22

Mustafaen Kamal LLM '22

Olivia Klinkum LLM '22

Anum Mesiya LLM '22

Ji Soo Park JD '22

Alexia Tizzano, Carr Center Fellow

Their work was supervised by Juan Pablo Calderon Meza and Romina Morello, as supervising attorneys for Harvard Law School's Advocates for Human Rights.³¹⁵ The student work was further reviewed by Anthony Abato (environmental crimes), Shirleen Chin (environmental crimes), Philippa Greer (hybrid chambers), Ana Peña (drug trafficking) and Frederika Schweighoferova (trafficking in human beings).

³¹⁵ The views expressed herein are those of the author alone and do not reflect the views of the International Criminal Court.