ACCOUNTABILITY FOR ENVIRONMENTAL CRIMES IN CONFLICT ZONES: WHY EXPANDING THE INTERNATIONAL CRIMINAL COURT'S JURISDICTION IS NOT THE BEST SOLUTION

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This Article seeks to understand options and challenges to achieve better and more comprehensive accountability for environmental crimes in conflict zones. It takes the starting point in asking if recently made suggestions for expanding accountability for environmental crimes at International Criminal Court (ICC) level are likely to be adopted and effectively enforced – and if not, what are the alternative avenues for advancement of accountability for environmental crimes in conflict zones. The main argument set out in the Article is that the ICC is likely to achieve operational success when it operates in line with the interests of key players in the so-called 'rules-based international order' (RBO). The Article argues that whenever the ICC seeks to transcend the boundaries set by that system and/or directly challenges key individual members of it, the Court inevitably runs into major challenges, resulting that it is corrected and hence faces significant challenges producing accountability outcomes. This, the Article suggests, creates profound obstacles for the ICC to meaningfully advance accountability for environmental crimes in conflict zones exactly because the most serious of these crimes frequently implicate actors with a link to the RBO. Though also regularly facing significant challenges when challenging powerful interests, national jurisdictions are for reasons set out in the Article arguably better placed to produce meaningful accountability outcomes for these types of crimes.

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I. INTRODUCTION

This Article seeks to understand options and challenges to achieve greater accountability for environmental crimes especially in conflict zones.[1] It takes a starting point in asking

1. Taking into account that the nature of environmental crimes and accountability options often take different shapes depending on whether these crimes occur in conflict zones, this Article is focused primarily on environmental crimes in conflict zones, though some of the remarks made below especially about enforcement of the ecocide proposal are of broader relevance. The term "conflict zones" is used in this Article in line with common understandings in the literature—and also reflecting the International Law Commission Draft Principles' approach to not limit to situations that

if recently made suggestions for expanding accountability for environmental crimes at the International Criminal Court (ICC or Court) are likely to be adopted and effectively enforced—and if not, what are the alternative avenues for advancement of accountability for environmental crimes in conflict zones. While the Article is focused primarily on criminal accountability, it also briefly examines other types of accountability where particularly relevant. Seeking to understand how the future could look inevitably entails a level of speculation. The Article attempts to make qualified predictions based on past experience as well as the structural and systemic issues surrounding specific accountability regimes.

The main argument set out in the Article is that the ICC is likely to achieve operational success, understood here in terms of actual accountability outcomes,[2] mainly when it operates *in line with* the interests of key players in the so-called "rules-based international order" (RBO).[3] Based on a review of key cases,[4] the Article argues that whenever the ICC seeks to transcend the boundaries set by that system and/or directly challenges key individual States subscribing to that order, the Court inevitably runs into major challenges, resulting in the Court being corrected, and hence facing significant challenges producing

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amount to an armed conflict in international humanitarian law terms—to broadly refer to countries or regions experiencing or just emerging from violent conflict, or where large-scale human rights violations are occurring in politically unstable areas which make the outbreak of violent conflict likely. *See Report of the International Law Commission to the General Assembly*, U.N. Doc. A/77/10 (2022), at 100 (stating in the Draft Principles on Protection of the Environment in Relation to Armed Conflicts that the principles apply to the protection of the environment before, during or after an armed conflict, including in situations of occupation) [hereinafter *International Law Commission Draft Principles*].

2. While this Article is focused on accountability *outcomes*, it acknowledges that even in situations where such outcomes are ultimately not produced, accountability processes can still be valuable from a range of perspectives, including contribution to public debate and awareness. *See* Florian Jeßberger & Leonie Steinl, *Strategic Litigation in International Criminal Justice: Facilitating a View from Within*, 20 J. Int'l Crim. Just. 379, 384 (2022) (explaining that strategic litigation organizations have explicit goals of raising public awareness and shaping public opinion).

3. For further discussion of this concept, see *infra* Sec. II.

4. To facilitate the analysis, the Article is based mainly on a review of ICC practice where the outcomes are already sufficiently clear. *See* the comments made in *infra* Sec. III.C.

accountability outcomes. This, the Article suggests, creates profound obstacles for the ICC to meaningfully advance accountability for environmental crimes in conflict zones exactly because the most serious of these crimes often implicate actors with a link to the RBO. Though also regularly facing significant obstacles when challenging powerful interests, national jurisdictions are for reasons set out in the Article arguably better placed to produce comprehensive accountability outcomes for these types of crimes.[5]

Previous critiques of the ICC's capacity to produce meaningful accountability outcomes for environmental crimes have not sufficiently engaged the structural and systemic issues pointed to in this Article, focusing instead, for example, on lack of Court resources,[6] or challenges applying international criminal law's (ICL) requirements concerning intent to environmental harm—which is often "a side effect of actions undertaken for economic, social, or political reasons."[7] Accordingly, this Article offers a novel perspective by focusing the analysis on the broader structures and systemic issues affecting the ability of accountability regimes to deliver accountability outcomes for environmental crimes in conflict zones. As will be demonstrated, applying insights from critical international criminal law scholarship to contemporary debates about accountability for environmental crimes is important both from a scholarly and practice/advocacy perspective.

The Article is based on the premise that environmental crimes in conflict zones often involve particularly powerful interests—the nature of which are elaborated on below—and that these crimes in some important ways set themselves apart

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5. The Article distinguishes between *comprehensive* and *peripherical* accountability outcomes, where the first term is understood to broadly imply accountability outcomes that include powerful actors, including individuals and potentially other legal entities associated with particularly influential States in the international system, whereas the latter term is understood to imply accountability outcomes that are fundamentally more limited in terms of scope and the actors subject to accountability. *See* the comments made in *infra* Sec. III.C.

6. *See, e.g.*, Darryl Robinson, *Ecocide — Puzzles and Possibilities*, 20 J. INT'L CRIM. JUST. 313, 320 (2022).

7. Adam Branch & Liana Minkova, *Ecocide, the Anthropocene, and the International Criminal Court*, 37 ETHICS INT'L. AFF. 51, 54 (2023).

from core atrocity crimes,[8] which make the pursuit of accountability particularly challenging. For the purposes of this Article, it suffices to note that there is no consensus-definition of environmental crimes, but in the context of conflict zones these crimes are broadly understood to involve unlawful acts under international or national law causing serious harm to the natural environment, with a link to the conflict.[9] Such crimes cover a broad spectrum of conduct, ranging from the unlawful targeting of the environment under international humanitarian law (IHL) or pillaging of natural resources amounting to war crimes, to conduct constituting crimes under other legal frameworks such as illegal trafficking in these and other natural resources, poaching and illegal trade of wildlife and plants, water contamination, and several other types of crimes.[10] The connection between environmental crimes and other forms of crime, human rights abuses and armed conflict is well documented.[11] It is generally acknowledged that widespread impunity surrounds environmental crimes in conflict zones—hence the need to strengthen legal accountability for these crimes.[12] This accountability gap concerns a broad range of powerful actors,[13] such as militaries and other State agencies, non-State armed groups, organized criminal groups, and, importantly,

8. The Article uses the term "core atrocity crimes" to refer to physical integrity violations—such as torture, sexual violence, or unlawful killings—which are covered by one of the existing international crimes provisions under the ICC Statute. *See* William Schabas, *Atrocity Crimes (Genocide, Crimes Against Humanity and War Crimes)*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW 199, 203 (William Schabas ed., 2016).

9. *See, e.g.*, United Nations Env't Programme, THE STATE OF KNOWLEDGE OF CRIMES THAT HAVE SERIOUS IMPACTS ON THE ENVIRONMENT XIV (2018), https://www.unep.org/resources/publication/state-knowledge-crimes-have-serious-impacts-environment (citing a definition of environmental crime put forth by the UNEP and INTERPOL).

10. *See, e.g.*, International Union for Conservation of Nature, CONFLICT AND CONSERVATION 19–22 (2021), https://portals.iucn.org/library/node/49472.

11. *See, e.g.*, Linert Lirëza & Gentian Koçi. *Environmental Crimes: Their Nature, Scope, and Problems in Identification*, INTERDISCIPLINARY J. OF RESEARCH AND DEV., 10(1), (2023), 237.

12. *Id.*

13. The Article uses the terms "powerful actors," "powerful players," or simply "the powerful" to broadly refer to particularly influential players in the international system, and, depending on the context, specific individuals and entities, for example large business enterprises, within these countries operating with the support of and/or with the ability to exercise significant influence on their governments and more broadly national and global affairs. The

various forms of business enterprises which perpetrate or benefit from environmental crimes in conflict zones.[14] The fact that powerful actors, including actors operating out of countries not directly taking part in the conflict, often draw economic advantage from environmental crimes in conflict zones, for example from exploitation of or trade in natural resources,[15] in some ways set environmental crimes apart from the core atrocity crimes currently criminalized in ICL. Even if actors external to a conflict sometimes benefit economically from the commission of core atrocity crimes, for example in the context of arms sales, there is therefore both an additional layer of *economic interest* and an additional layer of *extraterritoriality* surrounding environmental crimes.

A range of recent initiatives seek to address the accountability gap for environmental crimes in conflict zones, and, more broadly, to advance protection of the environment in times of conflict. Developed in 2020 as a reference tool for States, parties to armed conflicts, and other actors interpreting and applying IHL, the International Committee of the Red Cross (ICRC) published its guidelines on protection of natural environment in armed conflict.[16] In 2022, the International Law Commission adopted the draft principles on protection of the environment in relation to armed conflicts, endorsed by the U.N. General Assembly.[17] The International Law Commission Draft Principles, which take a holistic approach to cover situations

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concept of "powerful," which is self-evidently both contextual and relative, is explored further in *infra* Secs. II and III.

14. *See, e.g.*, Daniëlla Dam-de Jong & Saskia Wolters, *Through the Looking Glass: Corporate Actors and Environmental Harm beyond the International Law Commission*, 10 GOETTINGEN. J. INT'L L.111 (2020) (exploring potential extraterritorial obligations for the home States of multinational corporations with respect to the prevention and remediation of environmental harm in conflict zones); United Nations Env't Programme, *supra* note 9; Branch & Minkova, *supra* note 7, at 70 (illustrating the difficulty of holding transnational companies accountable for environmental harms under the Rome Statute because of the regime's geographic constraints).

15. *See, e.g.*, Jong and Wolters, *supra* note 14, at 116–21 (highlighting the fact that exploitation of natural resources sometimes funds armed conflict in the same region).

16. INT'L COMM. OF THE RED CROSS, GUIDELINES ON PROTECTION OF NATURAL ENVIRONMENT IN ARMED CONFLICT, Sept. 25, 2020, https://www.icrc.org/en/publication/4382-guidelines-protection-natural-environment-armed-conflict.

17. *International Law Commission Draft Principles*, *supra* note 1. For academic commentaries, see, for example, B. Sjostedt & A. Dienelt, *Enhancing the*

of armed conflict as well as pre- and post-conflict situations, entail a level of innovation, even if not attempting to rewrite IHL, especially perhaps with regard to accountability for business enterprises (Principles 10 and 11).[18] Taken together, these developments suggest—and contribute to—normative elevation of criminalization of environmental crimes in conflict zones, as elaborated further below in this Article. Another significant development concerns the proposal to make ecocide a crime under the ICC Statute.[19] Convened by the Stop Ecocide organization, an Independent Expert Panel (IEP), which involved acknowledged international environmental law (IEL) and ICL experts, tabled the ecocide proposal in June 2021. This proposal defines ecocide as "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."[20] A main objective of that campaign is to have the proposed ecocide crime—which,

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Protection of the Environment in Relation to Armed Conflicts—The Draft Principles of the International Law Commission and Beyond, 10 GOETTINGEN. J. INT'L L. 13 (2020).

18. Concerning the significance of the holistic approach, see, for example, Karen Hulme & Elizabeth B. Hessami, *New Legal Protections for the Environment in Relation to Armed Conflict*, INTERNATIONAL UNION FOR CONSERVATION OF NATURE (July 16, 2022), https://www.iucn.org/story/202207/new-legal-protections-environment-relation-armed-conflict. Concerning the legal status of the mentioned principles, see Marie Jacobsson & Marja Lehto, *Protection of the Environment in Relation to Armed Conflicts—An Overview of the International Law Commission's Ongoing Work*, 10 GOETTINGEN J. INT'L. L. 27 (2020).

19. *See e.g.*, Madison P. Bingle, *Codifying Ecocide as an International Atrocity Crime: How Amending Ecocide into the Rome Statute Could Provide Vietnamese Agent Orange Victims Access to Justice*, 45 U. HAW. L. REV. 123 (2022) (examining prospects for the amending of the Rome Statute to codify ecocide as an international atrocity); *see also* Anastacia Greene, *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative*, 30 FORDHAM ENV'T. L. REV. 1 (2019) (discussing the prospects of success for the campaign to include ecocide in the Rome Statute).

20. For a definition of the core terms, see *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text*, STOP ECOCIDE FOUND. (June 2021), https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf. Although the current debate about ecocide is focused on the IEP proposal, suggestions have previously been made to make ecocide a crime under international law. A notable example involves Richard Falk's work in the early 1970s for the adoption on an "International Convention on the Crime of Ecocide." Richard Falk, *Environmental Warfare and Ecocide—Facts, Appraisal, and Proposal*, 4 BULL. PEACE PROPOSALS 80, 91(1973).

importantly, covers environmental harm both in armed conflict and peacetime—adopted as a crime in the ICC Statute. Due to the ecocide proposal's centrality to current debates about addressing accountability gaps for environmental crimes and the broader issues this raises concerning the ability of accountability regimes to adequately address these forms of crimes, this Article takes a particular interest in exploring the feasibility and merits of adopting and enforcing the ecocide crime at the ICC level. Since the Article is focused on environmental crimes occurring in conflict zones, it mainly examines the ecocide proposal from that perspective, though some of the reflections below are of broader relevance to the proposal including environmental crimes committed in peacetime.

The Article proceeds as follows: first, it sets out a framework for understanding the ICC's placement in the international system; this is succeeded by an analysis of the ICC's ability to give effect to suggested expanded jurisdiction over environmental crimes; after which the Article offers some reflections on alternative accountability avenues for addressing these crimes; finally, the Article concludes by making suggestions for the future advocacy, litigation and research agenda.

II. The ICC—Caught Between the Demands of the Rules-Based International Order and Universalism

In order to understand the ICC's capacity to deliver accountability outcomes for environmental crimes in conflict zones, it is necessary to briefly set out a general framework of the ICC as an institution. As Douglas Guilfoyle observes, one dominant line of thinking is based on the universalist approach where the ICC is seen to have capacity to advance accountability norms in ways that transcend State power—and thus the ability to "discipline politics," even when confronting particularly powerful States.[21] The other common approach takes a legalistic or positivist

21. Douglas Guilfoyle, *Lacking Conviction: Is the International Criminal Court Broken?*, 20 Melbourne J. Int'l L. 401, 412 (2019). The premise of this view is that even if international justice institutions by way of their creation are anchored in power and politics, their legitimacy depends on how well they manage to transcend the realm of politics. *See generally* Frédéric Mégret, *The Politics of International Criminal Justice*, 13 Eur. J. Int'l. L. 1261 (2002) (reviewing an array of books that analyze international criminal prosecution through the lens of political science).

view which holds that the ICC has its origins in State consent and therefore "exercises delegated jurisdiction," resulting in it being unable to exceed State power.[22] A third view is that the ICC is best understood as an intergovernmental organization accountable mainly to its Member States, but according to this view to understand its operations and challenges one needs to move beyond a positivist approach and focus on structure, context and management of the organization.[23]

This Article takes the analytical starting point in the latter view but adds that, to understand the options and challenges facing the ICC system in terms of producing accountability outcomes, including for environmental crimes, one needs to acknowledge that the Court operates within—and is seen by itself and relevant States to form a part of—the RBO.[24] The RBO, in simple terms, claims to promote "peaceful, predictable, and cooperative behavior among States that is consistent with liberal

22. *See* Guilfoyle, *supra* note 21. For a more general discussion of what has been referred to as the "the simple state consent view" in international law, see Allen Buchanan, *The Legitimacy of International Law*, in The Philosophy of International Law 79, 90–94 (Samantha Besson & John Tasioulas eds., 2010.)

23. *See* Guilfoyle, *supra* note 21, at 13.

24. For an account of what the RBO implies (and how that concept differs from an international order guided by international law), see John Dugard, *The Choice Before Us: International Law or a "Rules-Based International Order?"*, 36 Leiden J. Int'l L. 223 (2023) (highlighting the ambiguity over the legal contours of "the rules-based international order" and how countries like the United States violate international law while championing the concept). *See also* Stefan Talmon, *Rules-based Order v. International Law?*, German Practice in International Law (Jan. 20, 2019), https://gpil.jura.uni-bonn.de/2019/01/rules-based-order-v-international-law/ (explaining that the RBO includes legally nonbinding political statements on states that do not consent to be bound); and Malcolm Jorgensen, *The Jurisprudence of the Rules-Based Order: The Power of Rules Consistent with but not Binding under International Law*, 22 Melb. J. Int'l L. 1 (2022) (observing that the RBO generally refers to the order of legal and non-legal rules of global governance but has increasingly developed a secondary meaning as a comparative conception of international law informed by particularistic Western and liberal notions of global order). Previous attempts to explain the ICC's placement within the global order have tended to point generally to the influence of specific Western powers or the United Nations Security Council. But for the reasons set out in this Article it is more accurate to position the ICC within the RBO. For an example of the former approach, see William Schabas, *The Banality of International Justice*, 11 J. Int'l Crim. Just. 545 (2013) (arguing that diminishing interest in the ICC stems from the institution's deference to the Security Council).

values and principles,"[25] and to be based on values of "democratic governance, the protection of individual rights, economic openness and the rule of law."[26] Although environmentalism is sometimes mentioned as a value embraced by the RBO,[27] statements by States that claim adherence to the system indicate this is a less central concern of the RBO agenda.[28] Seemingly coined as an alternative to an international order based on international law, the RBO is said to define relevant rules in a deliberately ambiguous way and to permit "sui generis cases in which the national interest precludes accountability," thus embracing notions of exceptionalism.[29] States subscribing to the RBO generally include key NATO powers, but other countries such as Japan and India also claim adherence (though in the case of the latter, attributing to the RBO a somewhat different meaning), whereas China and Russia "reject the terminology of the RBO as they link it to a unipolar system led by the United States."[30]

Representatives of the ICC have regularly sought to confirm the Court's "belonging" in the RBO, stressing the Court's significance in upholding the proclaimed values and norms of the RBO, including its contribution to the "achievement of

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25. Jeffrey Cimmino and Matthew Kroenig, *Strategic Context: The Rules-Based International System*, Atlantic Council (Dec. 16, 2020), https://www.atlanticcouncil.org/content-series/atlantic-council-strategy-paper-series/strategic-context-the-rules-based-international-system/. *See also* UK Government (FCO), Rules Based International System Conference (Jan. 25, 2018), https://www.gov.uk/government/news/rules-based-international-system-conference (noting that the system promotes "peace and prosperity through security and economic integration; encouraging predictable behaviour by [S]tates; and supporting peaceful settlement of disputes [and] also encourages states, and a wide range of non-state actors, to create the conditions for open markets, the rule of law, democratic participation and accountability"). Concerning other States' understanding of the term, including critique by for example Russia and China, see, e.g. Lieberherr, *infra* note 30; Dugard, *supra* note 24; Talmon, *supra* note 24.

26. Ash Jain et al, *Strategy of "Constrainment": Countering Russia's Challenge to the Democratic Order* (Atl. Council, Research Paper, March 2017), https://www.atlanticcouncil.org/wp-content/uploads/2017/03/AC_Russia_Strategy-Constrainment-ELECT-0313.pdf [https://perma.cc/GV89-VYU2].

27. *See* Dugard, *supra* note 24, at 232.

28. *See* text accompanying *supra* notes 24–25.

29. *See* Dugard, *supra* note 24, at 227.

30. Boa Lieberherr, *The "Rules-Based Order": Conflicting Understandings*, (Center for Security Studies Analyses in Security Policy No. 317, 2023), https://www.research-collection.ethz.ch/bitstream/handle/20.500.11850/594159/2/CSSAnalyse317-EN.pdf.

peace, security and sustainable development."[31] In turn, States subscribing to the RBO regularly point out that the ICC forms an integral part of that system, citing the Court's perceived potential to end impunity for core atrocity crimes.[32] While the RBO is endorsed or subscribed to by many ICC States Parties in Europe and elsewhere, it was "invented" and is led by a non-State Party, namely the United States, which regularly challenges the Court's basic conditions of existence and yet plays a central role defining the parameters of its operations.[33] Ironically, confirmation that the ICC forms an integral part of the RBO tends to be most clearly expressed when the Court is perceived to be under threat by the actions of States subscribing to the RBO.[34]

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31. Press Release, Chile Eboe-Osuji, ICC President, Fatou Bensouda, ICC Prosecutor, ICC President and Prosecutor Attend the UN General Assembly (Oct. 1, 2019), https://www.icc-cpi.int/news/icc-president-and-prosecutor-attend-un-general-assembly-court-plays-critical-role-rules-based. *See also* Judge Piotr Hofmański, *Address to the United Nations General Assembly presenting the Court's Annual Report to the United Nations* (Oct. 31, 2022), https://www.icc-cpi.int/sites/default/files/2022-10/221031-ICC-President-UNGA-speech.pdf; Press Release: ICC Prosecutor, *Fatou Bensouda, meets with the EU Foreign Affairs Ministers: 'The ICC is Central to a More Just and Rules-Based International System'* (Feb. 22, 2021), https://www.icc-cpi.int/news/icc-prosecutor-fatou-bensouda-meets-eu-foreign-affairs-ministers-icc-central-more-just-and.

32. *See, e.g.*, U.K. Foreign & Commonwealth Office, Supporting Human Rights, Democracy and the Rules Based International System: Objectives 2018 to 2019, https://www.gov.uk/government/publications/official-development-assistance-oda-fco-departmental-programme-spend-objectives-2018-to-2019/supporting-human-rights-democracy-and-the-rules-based-international-system-objectives-2018-to-2019.

33. *See* Dugard, *supra* note 24, at 226–28 (explaining the U.S. self-interested preference for a rules-based international order over one based on international law); Jerome Roos, Why the West should stop talking about the "rules-based order", NEW STATESMAN (June 12, 2024, https://www.newstatesman.com/international-politics/geopolitics/2024/06/why-the-west-should-stop-talking-about-the-rules-based-order; *see also infra* Sec. III.B and III.C. concerning the U.S. approach to the ICC; Permanent Mission of France to the United States, *Statement in Support of the International Criminal Court (ICC) following the release of the US Executive Order of 11 June 2020* (June 23, 2020), https://onu.delegfrance.org/We-remain-committed-to-an-international-rules-based-order; European Union Diplomatic Service, *Statement by the High Representative following the US Decision on Possible Sanctions related to the International Criminal Court* (June 16, 2020), https://www.eeas.europa.eu/eeas/international-criminal-justice-statement-high-representative-following-us-decision-possible_en.

34. *See Statement in Support of the International Criminal Court (ICC) Following the Release of the U.S. Executive Order of 11 June 2020* (June 23, 2020), https://

In accepting that the RBO is central to understanding the conditions of the ICC's operations, one needs to acknowledge that stakeholders subscribing to the universalist approach also exercise real influence on the ICC system. This creates a legitimacy paradox for the Court in the sense that its existence and operational success are based, on one hand, on complying with the conditions set by RBO and its central members. But, on the other hand, to advance its legitimacy the Court needs to counter criticism from other stakeholders—in particular, countries in the Global South and supporters of the universalist approach, such as global human rights organizations and groups of academics—by demonstrating a willingness to challenge global powers, including key States subscribing to the RBO.[35] Doing so provides useful counter arguments to a narrative that prevailed for years and threatened to undermine the Court's legitimacy altogether; namely, that the Court only targets less powerful actors in the Global South.[36] As this author has previously suggested, scrutinizing crimes allegedly committed by powerful States in the West thus advances the ICC's legitimacy in the eyes of key stakeholders since it helps portray the ICC as: *relevant* (because such activity focuses on types of crimes that universalists deem particularly important to prosecute); *unbiased* (because all actors are seen to be equally subject to the law); and *powerful* (because of the implied willingness to confront particularly powerful actors in the international system and speak law to power).[37] This

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onu.delegfrance.org/We-remain-committed-to-an-international-rules-based-order issued by many States Parties to the Rome Statute such as France, Germany and South Africa, that did so to affirm their continued commitment "to an international rules-based order", of which the ICC is seen to be "an integral part", after the U.S. sanctioned the ICC for the Court's investigation into U.S. activities in Afghanistan.

35. *See* Thomas Obel Hansen, *The International Criminal Court and the Legitimacy of Exercise*, in LAW AND LEGITIMACY (Per Andersen et al. eds., 2015), 73.

36. For an overview of that critique and responses to it, see Charles Chernor Jalloh, *Africa and the International Criminal Court: Collision Course Or Cooperation*, 34 N.C. CENT. L. REV. 203 (2012) (explaining how the ICC arrest warrant for Sudanese President Omar Hassan Al Bashir was seen by other African leaders as controversial and thus a source of distrust of the ICC).

37. *See* Thomas Obel Hansen, *The Role of Great Powers within the Court* (Feb. 27–28, 2020) (Conference Paper for "International Criminal Court in Crisis?"), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3546847.

implies that, even if operating within the parameters set by the RBO, the ICC has its own institutional interests, which in some ways transcend the interests of States subscribing to, and driving, the RBO.[38]

As discussed in the analysis below, the ICC's ability to advance accountability for environmental crimes in conflict zones has become central in that regard, not only because these crimes are experienced to be particularly important to address by many stakeholders, but also because it could advance perceptions that the ICC is able to speak law to power since these crimes often implicate particularly powerful interests with a link to the RBO. As further seen in the analysis below, the conditions arising out of the ICC operating within the RBO are central to the challenges it faces in this regard. Importantly, experience to date suggests that when there is a clash between universalist demands and the conditions of the RBO, or resistance by key players in it, the latter tends to ultimately prevail—and that is a central point to understand assessing the ICC's ability to advance accountability for environmental crimes.

III. Prosecuting Environmental Crimes in the ICC System: What Promises for the Future?

A. *The Expressed Desire to Expand Accountability for Environmental Crimes at ICC level – Initial Reflections on the Conditions*

Recent years have seen intense debate in ICL and IEL circles on how the ICC's capacity to investigate and prosecute environmental crimes in different forms could be strengthened. Examining the ICC's potential to address environmental crimes, some scholars point to options that could be further explored within the existing legal framework, and on that basis typically reject calls for expanding the Court's jurisdictional

38. *See* Mark Kersten, The ICC as an Actor—Negotiating Interests, Selecting Targets, and Affecting Peace, *in* Justice In Conflict: The Effects of The International Criminal Court's Interventions on Ending Wars and Building Peace (Oxford Univ. Press, 2016) (arguing that the ICC is guided by a negotiation between its own institutional interests and those of the political actors upon which the Court depends).

basis.[39] The Prosecutor's reference to environmental harm in the 2016 policy paper on case selection and prioritization is sometimes read as evidence that the Office of the Prosecutor *wants* to make environmental crimes in conflict zones a core focus area.[40] One could therefore say these commentaries try to assist the Office by finding the most feasible ways to make that happen within the current legal framework.[41] Others, who

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39. *See, e.g.*, Kai Ambos, *Protecting the Environment Through Criminal Law?*, EJIL: TALK! (June 29, 2021), www.ejiltalk.org/protecting-the-environment-through-international-criminal-law (questioning the practicality and doctrinal legitimacy of adding ecocide to the Rome Statute).

40. OFF. OF THE PROSECUTOR, INT'L CRIM. CT., *Policy Paper on Case Selection and Prioritisation* ¶ 41 (Sept. 15, 2016) (stating that the impact of the Rome Statute crimes may be assessed with regards to their environmental damage and that the Office will give "particular consideration" to prosecuting crimes that result in "the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land"). Although sometimes overlooked in contemporary debates, this approach follows a previous policy paper. OFF. OF THE PROSECUTOR, INT'L CRIM. CT., *Policy Paper on Preliminary Examinations* 16 (Nov. 2013). For a discussion of the 2016 Policy Paper, including understandings of its prospects for advancing prosecution of actors responsible for environmental crimes, see Nadia Bernaz, *An Analysis of the ICC Office of the Prosecutor's Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights*, 15 J. INT'L CRIM. JUST. 527 (2017) (highlighting the possibility of holding complicit private actors accountable under the policy paper). In this context, it is also worth noting that the Office of the Prosecutor launched a consultation process in 2024 concerning the development of a new policy paper to advance accountability for environmental crimes under existing provisions in the ICC Statute. *See* OFF. OF THE PROSECUTOR, INT'L CRIM. CT., 'Office of the Prosecutor Launches Public Consultation on New Policy Initiative to Advance Accountability' (June 13, 2023), https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability-0.

41. Besides Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90, scholars have pointed to a range of other war crimes provisions which could be relied on to prosecute environmental crimes, such as arts. 8(2)(e)(v), 8(2)(e)(xii), 8(2)(e)(xiii), and 8(2)(e)(xiv). Matthew Gillett, *Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict*, in ENVIRONMENTAL PROTECTION AND TRANSITIONS FROM CONFLICT TO PEACE: CLARIFYING NORMS, PRINCIPLES, AND PRACTICES 220, 230 (Carsten Stahn et al. eds., Oxford Univ. Press 2017). Specifically, regarding pillage as a basis for prosecuting certain environmental crimes, see James G. Stewart, CORPORATE WAR CRIMES: PROSECUTING THE PILLAGE OF NATURAL RESOURCES (Open Soc'y Just. Initiative, 2011) (exploring how modern international criminal courts and many national courts prosecute the crime of theft during war). Some scholars have also debated how environmental crimes could in certain circumstances be prosecuted as a crime against humanity. *See* Jessica Durney, *Crafting a Standard:*

are less optimistic about the ability of the ICC system as it is currently constructed to handle environmental crimes, often point to the narrow construction of relevant provisions, in particular the so-called first ecocentric war crimes provision in Article 8(2)(b)(iv), which in their view severely limits the Prosecutor's ability to charge environmental crimes.[42] These statutory limitations help this group of scholars explain the absence of environmental crime charges in ICC practice to date.[43] ICL and IEL scholars concerned about the current state of affairs often express a desire to expand the ICC's jurisdictional basis for prosecuting environmental crimes—most recently by supporting the ICC's adoption of the IEP ecocide proposal.[44] In

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Environmental Crimes as Crimes Against Humanity Under the International Criminal Court, 24 HASTINGS ENV'T. L.J. 413 (2018) (arguing that extermination and forcible transfer of population, which are prohibited acts under crimes against humanity, could extend to cover environmental harms). Further, some scholars debate how crimes involving environmental destruction could in some circumstances be prosecuted as genocide. *See* Martin Crook & Damien Short, *Marx, Lemkin and the Genocide–Ecocide Nexus*, 18 INT'L. J. HUM. RTS. 298 (2014) (arguing that capital-driven land use, such as those by extractive industries, could constitute the cultural genocide of Indigenous populations).

42. Article 8(2)(b)(iv) defines war crimes as "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated." The Article is seen by some scholars to create significant limitations on the ability of the ICC to prosecute environmental crimes. *See, e.g.*, Jessica C. Lawrence & Kevin Jon Heller, *The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute*, 20 GEO. INT'L ENV'T. L. REV. 61 (2007) (arguing that significant revision of this provision is needed for the Rome Statute to properly prosecute environmental harms).

43. While the Office of the Prosecutor at the time of writing this Article has not specifically charged any individual with environmental crimes, in some cases, including in *Lubanga* and *Bosco Ntaganda*, the charges brought have stressed that the exploitation of natural resources fuelled the conflicts in the context of which alleged crimes were committed. Further, in the *Al-Bashir* case, the Prosecutor brought charges of genocide and referred to the destruction or depletion of natural and man-made resources. *See* Gillett, *supra* note 41.

44. For an account of the various considerations at play in the IEP process, see Christina Voigt, *"Ecocide" As An International Crime: Personal Reflections on Options and Choices*, EJIL: TALK! (July 3, 2021), https://www.ejiltalk.org/ecocide-as-an-international-crime-personal-reflections-on-options-and-choices/ (providing the parameters the panel used in formulating the ecocide proposal). For an example of scholarly support for criminalizing ecocide prior to the IEP proposal in 2021, see Polly Higgins, Damien Short & Nigel

a way, as Rachel Killean observes, suggested approaches to enhance accountability for environmental crimes at the ICC level thus broadly fall into two camps: one holding that there is a need for a new legal category for environmental crimes, and the other holding that it is possible to promote accountability for environmental crimes within the existing legal framework, and to "green" the ICC without statutory changes.[45]

However, there is also an alternative possibility, namely that the ICC system, due to its structure and broader conditions of operations, may not necessarily be very well geared at all to substantially advance accountability for environmental crimes, especially with regard to the type of actors that this Article focuses on. This last view, which is elaborated upon in this Article, is receiving remarkably limited attention in contemporary commentaries on the topic.[46] Arguably this is because many scholars, especially those with a background in ICL, appear to take for granted the superiority of the ICC system in the context of norm building—and, with it, the desirability of *expanding* criminalization at ICC level.[47] Perhaps because of that inclination, there follows a tendency for proponents of expanding jurisdiction for particular crimes or actors to temporarily ignore insights from critical ICL scholarship about the pitfalls of the ICC in terms of its conditions of operations and ability to actually enforce relevant norms.[48] This norm-adoption/enforcement paradox may

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South, *Protecting the Planet: A Proposal for a Law of Ecocide,* 59 CRIME, LAW SOC. CHANGE 251 (2013) (tracing the institutional history of ecocide to the crime of genocide).

45. Rachel Killean, *From Ecocide to Eco-Sensitivity: "Greening" Reparations at the International Criminal Court*, 25 INT'L. J. HUM. RTS. 323, 324–25 (2021).

46. However, some scholars question whether enforcement of ecocide may not be more successful through a new treaty, or simply through national implementation of ecocide model laws, rather than in the first place through the ICC system, in this regard citing among other factors the ICC's struggles to prosecute crimes currently within its jurisdiction. *See, e.g.*, Robinson, *supra* note 6, at 320–21.

47. *Id.* at 321 (making a similar point about the inclination of many ICL scholars to suggest that expanding criminalization at ICC level should be the primary point of entry for advancing environmental crimes accountability).

48. By way of example, proponents of altering the ICC's legal basis to enable the Court to prosecute legal persons sometimes assume that if only the ICC Statute is amended to permit such prosecutions, they will then occur, leaving aside the broader conditions of the ICC system. *See, e.g.,* Mordechai Kremnitzer, *A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*, 8 J. INT'L CRIM. JUST. 909, 917 (2010).

result in what is a desirable outcome for the protection of the environment in conflict zones, and, more broadly, to the further building of environmental rule of law—namely, by advancing legal accountability for actors who violate these norms —being pursued at least partially under the wrong expectations.[49]

In other words, leaving aside for now the various other critiques that have been raised against the ICC system, actual performance to date and broader operational conditions demonstrate profound obstacles to its ability to enforce accountability norms with regard to issues that clash with the perceived interests of key actors in the RBO. This is a crucial point to keep in mind in the specific context of ICC prosecution of environmental crimes because these crimes frequently implicate powerful entities with a stake in the perceived economic and strategic interests of States that are particularly influential in the RBO.

B. *Where will Likely Opposition Come From, Why, and with What Possible Consequences?*

Proponents of introducing an ecocide crime are quick to point to the various actors that appear to currently support the proposal's adoption at ICC level—and going by the public statements, that involves a broad and quickly growing range of influential actors.[50] Less attention, in turn, has been dedicated to questions of where likely opposition to expanding ICC jurisdiction over environmental crimes will come from, why, and with what possible consequences.

Despite the support and centrality that the ecocide proposal has recently achieved in the ICL agenda, some key stakeholders in the RBO will expectably prove disinclined to ultimately

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49. The term "enforcement paradox" has been used in other studies to broadly connote the idea of a significant gap between the mandates of ICL institutions and their enforcement powers. *See* Nadia Banteka, *Mind the Gap: A Systematic Approach to the International Criminal Court's Arrest Warrants Enforcement Problem*, 49 Cornell Int'l L.J. 521, 528–30 (2016).

50. For a recent overview of support expressed for the ecocide proposal by key actors, see Kate Mackintosh & Lisa Oldring, *Watch This Space: Momentum Toward an International Crime of Ecocide*, Just Security (Dec. 5, 2022), https://www.justsecurity.org/84367/watch-this-space-momentum-toward-an-international-crime-of-ecocide/. *See* also Stop Ecocide, 'Leading States', https://www.stopecocide.earth/leading-states.

support an amendment which, if adopted in its current form, would not only substantially expand the Court's jurisdiction over environmental crimes, but also the type of actors that could potentially be subject to ICC jurisdiction. Such opposition may refer to a variety of reasons, but much of it would presumedly be grounded in the simple fact that some key stakeholders ultimately prefer an ICC system that continues to focus on the types of crimes and actors that it has *effectively* prosecuted to date (not to be confused with the type of crimes and actors for which the Court has *attempted* to pursue accountability). Though claims concerning States' preferences are rarely articulated in such clear terms,[51] a key point in this often advocacy-oriented or highly legal-technical debate about accountability for environmental crimes is that some influential players in the RBO do prefer an ICC system that continues to focus on core atrocity crimes committed in civil wars in the Global South, or by States seen to be operating outside of or challenging the prevailing RBO, such as Russia.[52]

The United Kingdom, a key supporter and funder of the ICC and a State normally exercising significant influence on treaty developments in ICL, is a case in point. Even if the British government's opposition to the ecocide proposal appears at present to have not been stated in clear terms outwardly, government officials have made clear that they are not planning

51. Statements by U.K. officials following the ICC's Iraq examination came close to explicitly making these points, noting that the ICC must be careful not to "act as a human rights monitoring organisation for the whole world. It must focus on its core and essential task". Andrew Murdoch, Legal Dir to the Int'l Crim. Ct. Assembly of State Parties, Statement at its 17th Session in the Hague (Dec. 5, 2018), https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session. The US, leaving aside that it is not a State Party, takes a similar approach, including under the Biden Administration. *See* Press Release, Antony Blinken, U.S. Sec'y of State, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court, (Apr. 2, 2021), https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/ (expressing U.S. satisfaction with ICC States Parties considering "reforms to help the Court prioritize its resources and to achieve its core mission of serving as a court of last resort in punishing and deterring atrocity crimes").

52. *See* Murdoch, *supra* note 51. As has been detailed by others, support, including financial, logistical and moral, among key States in the RBO for the Court's intervention in Ukraine is unprecedented. *See, e.g.*, Sergey Vasiliev, *Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice*, 20 J. Int'l Crim. Just. 893 (2022).

to support it any time soon.[53] Should the United Kingdom and other like-minded States keep up that understanding, it needs to be recalled that the ICC Statute amendment process is a complex one which creates a high bar for success—and necessarily involves compromises to balance different interests and demands.[54] The United States, which despite not being a State Party exercises substantial influence on the ICC system and relevant ICL treaty developments,[55] has so far remained quiet about the possible expansion of ICC environmental crime jurisdiction,

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53. During a debate in the House of Lords on July 21, 2021, about ecocide, British government representatives expressed a reluctant, if not outright dismissive view, observing that "the ICC is far from functioning effectively in relation to the jurisdiction it already has. Our priority is to improve its ability to prosecute existing crimes against humanity before we create new ones", further noting "the significant amendment that would be required to establish a crime of ecocide is not only likely to distract from reform of the international court […] it would also be extremely difficult to secure the agreement of all state parties and could occupy international negotiators for many years". While agreeing that more needs to be done internationally to address environmental crimes, UK government representatives expressed their view that this is not best done "through" the ICC. *See* Baroness Boycott & Lord Jones of Cheltenham, Statements made during UK Parliamentary Debate on Ecocide (July 21, 2021), https://hansard.parliament.uk/Lords/2021-07-21/debates/3AD1BE27-B0A5-4C68-9A39-0E6566E63FCF/Ecocide. The Labour Party, which since July 2024 has formed government, appears to take a more forthcoming view, meaning that a change in the position of the United Kingdom's government might occur in the future. *See UK Labour Party To Support Criminalising Ecocide*, Practical Source (Nov. 10, 2021), https://practicesource.com/uk-labour-party-to-support-criminalising-ecocide/.

54. For an example of the complexity of ICC Statute amendment processes, see generally Andreas Zimmermann, *Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties*, 10 J. Int'l Crim. Just. 209 (2012). Even when ICL instruments are expanded to include provisions for the prosecution of environmental crimes, experience shows that this is no guarantee that the relevant States, even if they worked collaboratively to conclude an amendment text, will ratify the amendment and/or domesticate relevant provisions. The most obvious example of this involves the 2014 Malabo Protocol which grants the African Court of Justice and Human Rights jurisdiction over "illegal exploitation of natural resources". However, the Protocol has not yet entered into force, and it is doubtful if it ever will since as at the time of writing not a single AU Member State has ratified it. For an analysis of the relevant provisions in the Malabo Protocol, see generally Daniëlla Dam de Jong & James Stewart, *Illicit Exploitation of Natural Resources*, in The African Court Of Justice and Human and Peoples' Rights 590 (Charles Jalloh et al., 2019).

55. *See generally* David Bosco, Rough Justice: The International Criminal Court In A World Of Power Politics (Oxford Univ. Press 2014).

including the ecocide proposal. Regardless of the reasons for that silence, it is worth keeping in mind the United States' generally fluctuating approach to the ICC which tends to turn from accommodating to not accommodating depending on whether perceived American interests are seen as being advanced or threatened by ICC activity.[56] The ICC's adoption of the ecocide proposal would, in theory, significantly expand the Court's opportunities to exercise jurisdiction over American citizens, including U.S. military personnel engaged in conflict zones and business representatives. Despite fluctuation in U.S. attitudes to the ICC, one thing that various U.S. administrations have always been clear about is that they will not accept the ICC exercising jurisdiction over American citizens.[57] As we will see below, when the ICC has attempted just that, it has not fared well.

To summarize: it is expected that key players in the RBO will ultimately oppose—or attempt to substantially water down—an amendment process involving suggestions for significantly expanding ICC jurisdiction over environmental crimes, mainly because they will see that as opening new doors for the ICC to scrutinize the actions of their citizens and entities.

C. *The ICC's Dysfunctionality when Challenging "Power": Implications for the Court's Ability to Produce Accountability Outcomes for Environmental Crimes*

The ecocide proposal is seen by many of its supporters as important not only because it would permit the ICC to increasingly focus on a specific category of crimes seen to be particularly worthwhile of attention, but also because it is seen to permit

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56. *Id.* (describing the United States' changing positions towards, and relationship with, the ICC over time). *See* also Sara Ochs, *The United States, the International Criminal Court, and the Situation in Afghanistan*, 95 NOTRE DAME L. REV. REFLECTION 89 (2019) (discussing the recent deterioration is the U.S.–ICC relationship in the context of the ICC Afghanistan investigation involving allegations against U.S. actors); Elizabeth Beavers, *Where Do They Go for Justice? The United States-International Criminal Court Dispute and Crimes Against Humanity in Afghanistan*, 52 CAL. W. INT'L. L. J. 85 (2021) (discussing the recent U.S.–ICC conflict over alleged war crimes in Afghanistan in the context of historical tensions).

57. Kyra Wigard & Guissou Jahangiri, *The International Criminal Court and Afghanistan: A Tale of Misunderstandings and Misinformation*, 20 J. INT'L CRIM. JUST. 203, 220 (2022).

focus on a specific category of offenders that are deemed particularly important for the ICC to target, namely powerful elites in the RBO. Darryl Robinson summarizes the perception well:

> Whereas one of the main criticisms of [ICL] today is that it often focuses disproportionately on persons in developing countries, proponents of ecocide observe that ecocidal acts are often committed by wealthy elites in the global North, whereas the harms are most commonly borne by persons in the South. Thus, it has been suggested that ecocide may help maintain a spotlight on crimes of the powerful and help to "decolonize" international law.[58]

The premises of these observations are broadly accurate in terms of the current functioning of the ICC system, the structure of environmental crimes and existing accountability gaps for "the powerful." However, expectations that the ICC system's dysfunctionality when challenging power will be somehow miraculously cured by adding a new crime are, for the reasons set out in this Article, at best optimistic. Logically, a jurisdictional expansion which *permits* increased focus on crimes that often involve the powerful does not, in by itself, *facilitate* that the powerful are held to account. Whereas the potential adoption of the ecocide proposal in the ICC regime could indeed create increased space for focusing on crimes by the powerful, it is important to note that, technically, there already is quite significant space for exactly that within the ICC's legal framework.[59] As will be demonstrated below, the main challenge is that this space has not been, and perhaps simply cannot be, utilized in ways that produce actual accountability outcomes for the powerful at ICC level. In part, this is because the Court ultimately tends, as Adam Branch and Liana Minkova phrase it, to "align with existing structures of global political and economic power instead of challenging those structures."[60] It does so because it is perceived, including by itself, as an integral part of the RBO and because it is corrected whenever it has sought to challenge that condition. Accordingly, if the expectation is that adding

58. Robinson, *supra* note 6, at 318 (internal citations omitted).

59. As demonstrated by the examples given below where the ICC has *pursued* accountability for crimes by major Western powers relating for example to detainee abuse and unlawful killings in military operations abroad.

60. Branch & Minkova, *supra* note 7, at 67.

the "fifth international crime" of ecocide to the Rome Statute will enable to ICC to prosecute the type of offenders most commonly associated in public opinion with the most serious environmental crimes—such as business executives and other high-ranking officers in multinational business enterprises, or the political leaders who benefit from these and other types of environmental crimes[61]—hopes are almost certainly bound to be broken. What, then, could the Court achieve and in what circumstances?

Although only a very limited number of convictions have been achieved after more than twenty years of operation, one could say that the ICC has demonstrated some level of efficiency as an enforcer of ICL norms in cases involving members of non-State armed groups committing core atrocity crimes in conflict zones in the Global South.[62] By now, it is well acknowledged in ICL scholarship that a key factor permitting accountability outcomes in such situations is that the territorial government is supportive of the ICC's concrete efforts towards accountability for specific crimes and actors,[63] *and* that major players in the RBO embrace (or at least do not oppose) these efforts.[64] In contrast, when the territorial government resists specific ICC activity, the Court has continuously run into significant challenges which outdo its ability to produce accountability outcomes.

The ICC Kenya investigation, where ICC cases covering atrocity crimes in the context of the 2007-08 election violence

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61. *See id.*, at 70.

62. All of the ICC's successful prosecutions of core atrocity crimes to date (five such convictions as of early 2024) involve members of non-state armed groups in the Global South (specifically Africa). Whenever the ICC has brought charges against incumbent State or military leaders or senior politicians, this has not produced accountability outcomes to date, either because the accused person is acquitted, the case is terminated or collapses before conclusion, the accused person cannot be brought into ICC custody, or the accused person dies before standing trial. For an overview, see Int'l Crim. Ct., *The Court Today*, ICC-PIOS-TCT-01-139/24_Eng (May 20, 2024), https://www.icc-cpi.int/sites/default/files/2024-05/TheCourtToday-Eng_1.pdf.

63. For a detailed analysis of this condition, see Phil Clark, *Who Pulls the Strings?*, in Distant Justice: The Impact of the International Criminal Court on African Politics 51–99 (Cambridge Univ. Press 2018) (arguing that African governments have used the ICC in highly destructive ways, and have protected themselves from prosecution for serious crimes while continuing to commit violations against their own citizens).

64. *See generally supra* notes 54-56 and the accompanying text.

collapsed once the accused persons accessed State power,[65] is a case in point. The various operational and managerial reasons for that collapse—including the operation of ICC witness protection mechanisms, challenges giving effect to ICC-State corporation mechanisms, and the Prosecutor's approach to the investigation—all broadly connect to a more profound challenge; namely the Court's inability to adequately address the challenges following from the accused persons' association with the Kenyan State.[66] As the Report of the External Independent Experts observes, "it may be that the Kenya cases simply reflected the inability of the [ICC] to adequately respond to the challenges presented in cases against powerful, high level accused."[67] A broader factor arguably contributing to the inability of the ICC system to take forward the cases was that support for the ICC's activities among key players in the RBO, including the United States, United Kingdom, and other Western powers, who had up until then insisted on the importance of accountability, started waning after ICC suspects gained control of government in a country seen as a key regional player for the fulfilment of their interests, especially in security and economic terms.[68]

More generally, the ICC repeatedly faces serious obstacles attempting to enforce IHL and ICL norms when, often encouraged and prompted by stakeholders advocating for the

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65. While the main core atrocity crimes cases all collapsed, several cases concerning offences against the administration of justice were brought, but the accused persons in those cases have either not appeared before the Court or have died. *See* Janet Anderson, *Gicheru Dead, the Mysteries Of ICC's Kenya Case fall in a Black Hole*, JUSTICEINFO.NET (Nov. 15, 2022), https://www.justiceinfo.net/en/108820-gicheru-dead-mysteries-icc-kenya-case-black-hole.html.

66. *See generally* Int'l Crim. Ct., *Full Statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation* (Nov. 26, 2019) [hereinafter Full Statement of the Prosecutor], https://www.icc-cpi.int/sites/default/files/itemsDocuments/261119-otp-statement-kenya-eng.pdf (discussing the lack of sufficient cooperation, witness tampering and interference, and poor leadership and decision-making in the Prosecutor's office as reasons for failure to bring successful cases against powerful accused persons).

67. *Id.* at Annex 1, ¶ E5.

68. *See* Stephen Brown & Rosalind Raddatz, *Dire Consequences or Empty Threats? Western Pressure for Peace, Justice and Democracy in Kenya*, 8 J. EAST. AFR. STUD. 43, 45–54 (2014) (discussing the pattern among Western powers of not pressuring Kenyan leaders, after they were elected to office, to follow ICC procedures because of Kenya's strategic location and the economic interests of the relevant powers).

universalist approach,[69] it engages in activities that are not supported by powerful players in the RBO. This is particularly so when such activity directly challenges the interests of these actors.[70] The result is that the Court, regardless of any potential expansion of its jurisdictional basis, is unlikely to produce comprehensive accountability outcomes for environmental crimes in conflict zones, again because these crimes often implicate powerful interests and involve global processes with links to the RBO. What is much more likely to happen is that the ICC would, eventually, facilitate some level of *peripherical accountability* for environmental crimes in conflict zones. This is most probable in the form of successful prosecution of low or mid-level non-State armed groups members with direct responsibility for crimes negatively affecting the environment in combat situations. However, this is unlikely to satisfy the aspirations of environmentalists and others who demand for the Court to increasingly focus on environmental crimes and may contribute to a further legitimacy crisis for the Court.[71] To counter that, the Court might even at some point attempt to pursue accountability for environmental crimes committed by other types of offenders, such as representatives of global business enterprises, but to the extent these actors are linked with the RBO, the conditions explained in this Article would likely render these efforts fruitless in terms of producing actual accountability outcomes.

Actual performance of the ICC to date supports the above arguments, though recent developments in the Palestine investigation relating to the ICC Prosecutor's request for arrest warrants for Israeli leaders raise important questions as to whether the Court may be increasingly willing and able to more adequately push ahead with action that challenges the interests of Western powers.[72] So far, however, whenever the ICC has

69. *See* Jeßberger & Steinl, *supra* note 2, at 394.

70. This point is sometimes accepted by ICC Prosecutors. *See* Full Statement of the Prosecutor, *supra* note 66, Annex 2; *see also* Branch & Minkova, *supra* note 7.

71. *See* also Branch & Minkova, *supra* note 7, at 58.

72. The ICC Palestine investigation—which includes allegations of crimes by Israeli armed forces as well as settlement practices and is strongly opposed by both Israel, the United States and other Western powers—has proven among the most controversial and contested in the Court's history. In May 2024, the ICC Prosecutor filed requests for arrest warrants against three top Hamas leaders as well as Israeli Prime Minister Benjamin Netanyahu and

attempted to pursue accountability for crimes by citizens and agents of States that can broadly be described as particularly powerful in the RBO, these efforts have been thwarted in terms of producing actual accountability outcomes. The various reasons for this lack of success broadly connect to the fact that the relevant State whose citizens and entities are placed under ICC scrutiny is opposed to that and hence, in various ways, *resist* and attempt to *correct* the ICC. Unfortunately, the Court thus far has proven unable to overcome such resistance. This most likely will continue to be so exactly because the ICC system operates on the conditions set by the RBO, dominated by specific State powers, and subject to the conditions set out in this Article. Accordingly, whenever ICC Prosecutors have taken action that is seen to challenge or transgress these conditions, key players in the RBO resist—and they resist enough that the ICC ultimately pulls back. Whereas it is difficult to "prove" an argument that the ICC's efforts to promote accountability in situations where the Court challenges major players in that system are unsuccessful *due* to the Court's inability to counter resistance by the relevant States, it is easier to point to *correlation*. These factors are worth keeping mind when debating the ICC's potential to successfully prosecute environmental crimes in conflict zones.

The most notorious example of this transpired with respect to alleged U.S. crimes in Afghanistan. The ICC's Afghanistan investigation was opened in March 2020 following an Appeals Chamber decision,[73] which disagreed with the premises of the Pre-Trial Chamber's initial decision to reject the Prosecutor's request for the opening of an investigation on the grounds that an investigation would not serve the "interests of justice"

Defence Minister Yoav Gallant, a move sharply criticized for a range of reasons by certain Western powers, including the U.S. *See* Int'l Crim. Ct., *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine* (May 20, 2024); Thomas Obel Hansen, *State Objections to the ICC Prosecutor's Request for Arrest Warrants in the Palestine Investigation*, EJIL: TALK! (MAY 27, 2024), https://www.ejiltalk.org/state-objections-to-the-icc-prosecutors-request-for-arrest-warrants-in-the-palestine-investigation/. This Article does not address the Palestine investigation—including the Prosecutor's requests for arrest warrants in May 2024—in detail because the outcome and broader implications are too uncertain at the time of writing this Article.

73. *See* Int'l Crim. Ct., Situation in the Islamic, Republic of Afghanistan, Appeals Chamber Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, ICC Doc. ICC-02/17-1385 (Mar. 5, 2020).

essentially because the United States was expected to oppose the investigation.[74] The ICC investigation initially covered allegations of ill-treatment of detainees by U.S. military personnel and CIA operators, crimes which by and large have not been subject to prosecution in the U.S. criminal justice system.[75] Spearheaded by then-National Security Advisor John Bolton, the Trump Administration responded to the ICC's decision to subject American citizens to an investigation by committing itself to "use any means necessary to protect [American] citizens and those of our allies from unjust prosecution by this illegitimate court."[76] U.S. officials explained that the measures taken were "part of a continued effort to convince the ICC to change course with its potential investigation and potential prosecution of Americans for their activities and our allies' activities in Afghanistan."[77] That is exactly what happened,

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74. *See* Int'l Crim. Ct., *Situation in the Islamic Republic of Afghanistan, Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, ICC Doc. ICC-02/17-62 (Sept. 17, 2019). For a critique of the decision, see Christian De Vos, *No ICC Investigation in Afghanistan: A Bad Decision with Big Implications*, INTERNATIONAL JUSTICE MONITOR (Apr. 15, 2019), https://www.ijmonitor.org/2019/04/no-icc-investigation-in-afghanistan-a-bad-decision-with-big-implications/ (reporting that the Pre-Trial Chamber's decision not to authorize the Afghanistan investigation explicitly cited "changes within the relevant political landscape […] in key States", which the Chamber said it believes "make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities").

75. For an analysis of U.S. domestic justice responses, see generally Beavers, *supra* note 56, at 94–100.

76. Measures mentioned included banning ICC judges and prosecutors from entering the US; sanctioning their funds in the U.S. financial system; and potentially prosecuting them in the U.S. criminal system. *See Full text of John Bolton's speech to the Federalist Society*, AL JAZEERA (Sept. 10, 2018), https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html. Then U.S. Secretary of State Mike Pompeo later announced, "a policy of US visa restrictions on those individuals directly responsible for any ICC investigation of US personnel". *See* U.S. Dep't. of State, *Remarks to the Press, Remarks by Michael R. Pompeo* (March 15, 2019), https://2017-2021.state.gov/remarks-to-the-press-6/. *See also* Claus Kreß, *Editorial: An Unusual and Extraordinary Assault on International Justice*, 18 J. INT'L CRIM. JUST. 791, 791 (2020) (discussing President Trump's decision to classify the International Criminal Court as an "unusual and extraordinary" threat to the national security of the United States).

77. Dan de Luce & Abigail Williams, *Trump admin to ban entry of International Criminal Court investigators*, NBC NEWS (Mar. 15, 2019),

when Karim Khan, having just taken up the role of ICC Prosecutor, announced in September 2021 that his Office would "deprioritize" the aspects of the investigation involving alleged crimes by U.S. armed forces and the CIA.[78] The Prosecutor cited general resource restraints and mentioned the gravity and scale of crimes committed by other actors in Afghanistan but did not reference any statutory-endorsed reasons for the *de facto* termination of the investigatory aspects covering alleged crimes by agents of the United States.[79] There is therefore broad agreement in ICL scholarship that this decision is best explained as the ICC Prosecutor simply giving in to the extensive pressure exercised by a major player in the RBO.[80] A large number of ICC State Parties had stood up in defense of the Court against U.S. reprisals,[81] and bodies representing the views of many of the same States had previously expressed concern about the conduct which gave rise to the investigation in the first place.[82] A key observation of relevance to environmental crimes

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https://www.nbcnews.com/politics/white-house/trump-admin-ban-entry-international-criminal-court-investigators-n983766.

78. Int'l Crim. Ct., *Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan* (Sept. 27, 2021), https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application.

79. *Id.*

80. *See, e.g.*, Beavers, *supra* note 56, at 90 ("[T]his announcement meant that ICC succumbed to U.S. pressure.").

81. *See* Permanent Mission of France to the United States, *Statement in Support of the International Criminal Court (ICC) following the release of the US Executive Order of 11 June 2020* (June 23, 2020), https://onu.delegfrance.org/We-remain-committed-to-an-international-rules-based-order; *see also* European Union Diplomatic Service, *Statement by the High Representative following the US Decision on Possible Sanctions related to the International Criminal Court* (June 16, 2020), https://www.eeas.europa.eu/eeas/international-criminal-justice-statement-high-representative-following-us-decision-possible_en (noting that "at a time when the rules-based international order is facing increased pressure, the strengthening of the international criminal justice system is more important than ever"). *See further* M P Broache & Kyle Reed, *Who Stands Up for the ICC? Explaining Variation in State Party Responses to US Sanctions*, 19 Foreign Policy Analysis, no. 1 Jan. 2023 (noting that over two-thirds of ICC State Parties issued or joined public statements supporting the Court after the United States sanctioned two ICC officials).

82. *See, e.g.*, Eur. Parl Ass., Resolution 1340: *Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay* (June 26, 2003), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17130&lang=en (expressing strong disapproval over the continued detention

prosecution is therefore that the limits to the ICC's reach are defined not only in terms of the level of consensus among players in the RBO as to what conduct deserves scrutiny, but also that certain paths, namely those that directly challenge the interests of key players in that system, simply may not be viable for the ICC. This appears to be the case even where other States subscribing to that order may perceive the action of the resisting State to run counter to the norms of the self-same global system and attempt to stand up in support for the ICC.[83] If this were to be true, this would prove a major challenge for delivering comprehensive accountability outcomes in cases involving environmental crimes, again because there will often be a link between the most systematic of such crimes and citizens or entities in key States subscribing to the RBO.

In a separate development, a long-lasting preliminary examination of alleged war crimes, including likely systemic detainee abuse,[84] by British soldiers during the Iraq War was ultimately closed by the ICC Prosecutor in 2020 with reference to the complementarity principle, although the British legal system has produced only minimal accountability outcomes for the relevant crimes.[85] Whether or not the strong opposition expressed by British officials towards the ICC's intervention

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and treatment of persons held in U.S. military custody in Afghanistan or in Guantanamo Bay).

83. *See Statement in Support of the International Criminal Court (ICC), supra* note 81 (expressing continued commitment "to an international rules-based order", of which the ICC "is an integral part" in the face of U.S. sanctions against the ICC).

84. In 2017 the ICC Prosecutor concluded that there was a reasonable basis to believe that crimes within the Court's jurisdiction relating to detainee abuse and unlawful killings had been committed by British forces and hence proceed with its examination. *See* Int'l Crime. Ct. Office of the Prosecutor, *Report on Preliminary Examination Activities* 2017, at 43 (Dec. 4, 2017). In a 2018 report, a working group under the British Ministry of Defence said that it "considered that there was sufficient evidence to conclude that assaults in detention had occurred, and *may* have been systemic". *See* U.K. Ministry of Defence, Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas, ¶ 7.1.7. (Aug. 30, 2018).

85. The Prosecutor published a detailed report setting out the reasons for the decision to not open an investigation, observing that while war crimes seemed to have been committed on a substantial scale and only minimal accountability for those responsible had been facilitated by Britain's justice system, the Office could not reach a conclusion that British authorities had been unwilling to carry out investigations "genuinely". *See* Int'l Crim. Ct. Office of the Prosecutor, *Situation in Iraq/UK: Final Report*, ¶¶ 312, 350 (Dec. 9, 2020).

directly impacted this decision-making process,[86] observers rightly point out that there is a mismatch between the decision not to proceed with an investigation and the Prosecutor's "strong findings on the commission of international crimes by U.K. troops and on the failure of the U.K.'s domestic justice system."[87] An obvious conclusion is, therefore, that the United Kingdom succeeded in utilizing the ICC's complementarity regime, not with a view towards its stated objectives of advancing accountability, but rather to facilitate that accountability for crimes in Iraq would be essentially avoided, and ICC Prosecutors saw themselves unable to manage that situation in any other way than to step back.[88] Thus, a key observation of relevance to environmental crimes prosecution at ICC level is that States with a central standing in the RBO and with robust legal systems and general capacity to address the relevant crimes in domestic courts may be able to successfully counter accountability efforts at ICC level by utilizing the complementarity framework, regardless of whether they actually intend to prosecute the relevant crimes in domestic courts.[89] Taking into account the developments discussed below regarding expanded legislation for environmental crimes prosecution in many jurisdictions, these factors could likely prove a serious obstacle to ICC prosecution of actors responsible for environmental crimes in conflict zones who are "linked" to States forming part of the RBO.

A general point that follows from the above of relevance to the prosecution of environmental crimes at the ICC level is that

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86. For a more detailed analysis of British officials' attitudes and reactions towards the ICC – and ICC Prosecutors' responses – in this case, see Thomas Obel Hansen, *Accountability for British War Crimes in Iraq? Examining the Nexus between International and National Justice Responses*, in Quality Control In Preliminary Examination: Reviewing Impact, Policies And Practices 399, 430–32 (Morten Bergsmo & Carsten Stahn eds. 2018).

87. Andreas Schüller, *The ICC, British War Crimes in Iraq and a Very British Tradition*. OpinioJuris (Dec. 11, 2020), https://opiniojuris.org/2020/12/11/the-icc-british-war-crimes-in-iraq-and-a-very-british-tradition/.

88. An argument further substantiated in Thomas Obel Hansen, *Transitional Justice and the British Military in Iraq*, in Transitional Justice In Aparadigmatic Contexts: Accountability, Recognition And Disruption 126, 136 (Tine Destrooper et al. eds., 2023).

89. *See generally Thomas* Obel Hansen, *Opportunities and Challenges Seeking Accountability for War Crimes in Palestine*, 9 Notre Dame J. Int'l Comp. L. 1 (2019) (detailing how the principle of complementarity enshrined in the Rome Statute may hinder accountability for crimes committed in Palestine).

while the Court may well at some point be inclined to *pursue accountability* for powerful actors in, or with a close connection to, the RBO responsible for such crimes, to date it has proven unable to produce *actual accountability outcomes* in cases involving such actors. One question that needs to be asked, then, is how much, if anything, is gained by the ICC showing efforts towards accountability for crimes, including environmental crimes, by these types actors. For example, one could question whether the efforts debated above may have added value by encouraging domestic authorities to take more seriously accountability. However, existing research raises doubts that this happens in situations involving powerful players.[90] It could also be asked if ICC intervention may promote democratic debate and possibly contribute to initiatives that could help prevent recurrence of similar crimes in the future. This does, in some ways, seem a valid point, but equally important, forceful anti-accountability narratives and counter-measures that are detrimental from a rule of law perspective sometimes have been developed as a response to ICC intervention.[91] A separate suggestion is occasionally made about the expressive value of the ICC pursuing accountability for crimes by the powerful.[92] While this value could be promoted as long as accountability efforts are ongoing, the expressive value is logically limited, and perhaps even undermined, to the extent the relevant efforts are terminated on the basis of what to the public appears as the ICC giving in to pressure from the State targeted.

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90. Regarding the U.K., see, for example, Hansen, *supra* note 86. Regarding the U.S., see, for example, Beavers, *supra* note 56, (arguing that there are no easy or likely pathways toward the US taking seriously the issue of international legal accountability).

91. For an analysis of how this has occurred in the UK, see Hansen, *supra* note 86, 429–47.

92. This argument is sometimes made taking the starting point in the ICC's selection decisions and the gravity requirement under the ICC Statute, with some commentators arguing that crimes such as torture, including by powerful States in the RBO, which are committed systematically and cause particular "social alarm", are particularly worthwhile for the ICC to pursue due to the expressive value. *See, e.g.*, Kevin Heller, *Situational Gravity Under the Rome Statute*, in Future Directions In International Criminal Justice 227 (Carsten Stahn & Larissa van den Herik eds., 2009). For an overview of expressive arguments in ICL, see generally Barrie Sander, *The Expressive Turn of International Criminal Justice: A Field in Search of Meaning*, 32 Leiden J. Int'l L. 851 (2019).

Some may want to question the above conclusions with reference to recent developments in the Ukraine investigation, especially the arrest warrant issued for Russia's President in March 2023.[93] These developments are seen by some as indicating the emergence of a more confident Court with an increased willingness to challenge power.[94] Although indicting the Head of State of a nuclear power and permanent member of the U.N. Security Council is self-evidently a major development in ICL, these developments demonstrate exactly the points made throughout this Article: namely, that the ICC can proceed with confidence when operating *in line* with the interests of key players in the RBO.[95] As noted above, the ICC Prosecutor decision to request warrants of arrest for Israeli leaders in the context of the Palestine investigation could possibly indicate a change of direction in terms of the Court's ability and willingness to challenge actors associated with the RBO, but, at the time of writing this Article, it is still too uncertain how that process will unfold (and to what extent it actually challenges the policy preferences of key players in the RBO) to meaningfully comment on its implications.

Besides what has been examined above on what has actually occurred, from the perspective of the Court's potential to achieve accountability for environmental crimes, it is relevant to also note what has *not* occurred at the ICC level to date. That includes not (formally) investigating various forms of environmental harm outlined in Article 15 communications, for example, alleged pillaging and destruction of natural resources in

93. Press Release, International Crim. Court, Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

94. *See, e.g.*, Mark Kersten, *Straight to the Top: The International Criminal Court issues an Arrest Warrant for Russia's Vladimir Putin*, Justice in Conflict (Mar. 17, 2023), https://justiceinconflict.org/2023/03/17/straight-to-the-top-the-international-criminal-court-issues-an-arrest-warrant-for-russias-vladimir-putin/ ("[T]he warrant against Putin today indicates an institution that is in a period of high confident, perhaps more confident than it ever has been.").

95. *See similarly* Vasiliev, *supra* note 52, at 900 (noting that the ICC's actions are in "perfect alignment with the consolidated position of powerful Western/Global North military and economic alliances (NATO and E.U.) against a common foe they are determined to defeat on all fronts, including the legal one").

the situation in Palestine,[96] or alleged environmental destruction by Chevron in Ecuador.[97] It also includes not bringing charges against representatives of business enterprises or other actors benefitting economically from crimes, despite previously expressed commitment by the ICC Prosecutor to do exactly that[98] and despite receiving Article 15 communications to that effect.[99]

D. *The Ecocide Proposal is Valuable, But Not Because the ICC is Likely to Effectively Enforce It!*

Do the challenges pointed to above then mean that the ecocide proposal is entirely misconceived and should simply be put to rest? Not necessarily. The mere tabling of the proposal is

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96. *Palestinian Human Rights Organisations Submit File to ICC Prosecutor: Investigate and Prosecute Pillage, Appropriation and Destruction of Palestinian Natural Resources*, Al-Haq (Oct. 26, 2018), https://www.alhaq.org/advocacy/6144.html.

97. *See, e.g.*, Caitlin Lambert, *Environmental Destruction in Ecuador: Crimes Against Humanity under the Rome Statute?*, 30 Leiden J. Int'l L. 707, 711–18 (2017) (outlining the request by Ecuadorian victims to the Court and the grounds on which it was rejected).

98. The Office of the Prosecutor stated early on in its existence that it is paying close attention to such crimes, including illegal exploitation of natural resources, but it has not to date actively pursued charges in that regard. *See, e.g.*, Press Release, Int'l Crim. Ct., *Communications Received by The Office of the Prosecutor of the ICC* (July 16, 2003), https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/9B5B8D79-C9C2-4515-906E-125113CE6064/277680/16_july__english1.pdf. Some scholars observe "a widespread reluctance" among ICC staff to "accept the notion of the ICC investigating and prosecuting certain individual businesspersons." *See* Nicola Palmer & Tomas Hamilton, *Legal Humility and Perceptions of Power in International Criminal Justice*, 23 Int'l Crim. L. Rev. 416, 435 (2022).

99. *See, e.g.*, *Made in Europe, Bombed in Yemen: How the ICC Could Tackle the Responsibility of Arms Exporters and Government Officials*, European Center for Constitutional and Human Rights (Feb. 2020), https://www.ecchr.eu/en/case/made-in-europe-bombed-in-yemen/ (providing background and explanation for the organization's case for the ICC to investigate European responsibility for war crimes in Yemen). More generally concerning the potential of international criminal tribunals to promote accountability for business actors, *see, e.g.,* Andrew Clapham, *Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups*, 6 J. INT'L CRIM. JUST. 899 (2008); Donna Minha, *The Possibility of Prosecuting Corporations for Climate Crimes Before the International Criminal Court: All Roads Lead to the Rome Statute?*, 41 Mich. J. Int. L. 491 (2020).

productive in advancing legal accountability for environmental crimes, including in conflict zones. It brings about increased attention to the need to promote accountability for crimes with serious, negative implications for the environment.[100] As discussed further below, the tabling of the proposal has seemingly induced some States to strengthen accountability frameworks for environmental crimes at the domestic level—and may likely induce more going forward. Perhaps most importantly from a long-term perspective, the proposal contributes to the further conceptual integration of environmental protection and legal accountability regimes. In that regard, it is vital to keep in mind, as Darryl Robinson notes, that "ecocide is a construct that is still being constructed."[101] It is at this point therefore best viewed as an ongoing process which ultimately could produce a variety of outcomes, depending on how the process is approached and concluded—including on the important question of enforcement. Accordingly, the ecocide proposal, even with the challenges pointed to in this Article and elsewhere, presents an opportunity for enhancing accountability for environmental crimes, including in conflict zones, especially when considered together with other recent advancements in international law outlined in this Article, such as the ICRC guidelines and the International Law Commission Draft Principles. Rather than assessing the proposal's quality and potential success in terms of the likelihood that it will be adopted in its current form and effectively enforced at ICC level, its main importance should therefore be understood in terms of its ability to foster normative and legal integration and elevation of norms concerning environmental crimes accountability through process, narrative and suasion.

In that regard, it is important to keep in mind that the ecocide proposal essentially seeks to bridge elements of IEL with ICL. This is no straightforward task, partly because, as Darryl Robinson explains, IEL does not entail the same type of concrete and absolute prohibitions known from existing ICL rules; often has a broader acceptance of "balancing" (where protection of the environment is only one side of the coin evaluating

100. *See also* Robinson, supra note 6, at 317-18 ("[P]erhaps an even greater value of the crime is its social 'expressive function': reframing massive environmental wrongdoing not as a mere regulatory infraction, but rather as one of the gravest crimes warranting international concern.").

101. *Id.* at 320 (emphasis omitted).

the legitimacy of particular action) than known from core atrocity crimes; and relies heavily on national law to identify "wrongful" forms of environmental impact.[102] Of course, it being no *straightforward* task does not necessarily imply that it is not a *worthwhile* effort. But it being a worthwhile effort requires, at a minimum, that there is some prospect of meaningful enforcement. The further bridging of IEL and accountability law does not automatically imply that one specific enforcer, the ICC, among several candidates should be seen as most capable candidate. Indeed, as this Article suggests, the ecocide proposal presents a valuable contribution to this process primarily because of the normative elevation of the prohibition environmental crimes that it brings with it and because of its potential to enhance enforcement *outside* the ICC system.

IV. If Not the ICC, What Then?

A. *Basic Advantages for Environmental Crimes Accountability of Focusing on National Jurisdictions*

One particularly important alternative to environmental crimes enforcement at the ICC level involves national courts' extraterritorial application of accountability law, including but not limited to universal jurisdiction principles.[103] Such efforts have in the past faced many of the same obstacles pointed to in the analysis of the ICC above, including pushback from influential actors in the RBO (especially the United States), but also

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102. *Id.* at 315–16 (noting IEL's "circumspect" principles, balancing tests, and heavy reliance on national systems of enforcement).

103. Extraterritorial application of accountability law is used here to refer broadly to the various jurisdictional principles which permit accountability for crimes committed extraterritorially. Among them are the active personality principle (i.e., a State exercising criminal jurisdiction over its own nationals or legal entities domiciled in its jurisdiction for crimes committed outside its territory), the passive personality principle (i.e., a State exercising criminal jurisdiction over crimes injurious to its own nationals), and so-called "pure" universal jurisdiction principles (where neither victims or alleged offenders are nationals of the State exercising criminal jurisdiction, but there may, depending on the version of universal jurisdiction applied, be requirements concerning the presence of the suspect). For an overview, see generally, International Center for Transitional Justice, Research Report: Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes (2020).

at times actors operating outside that system (such as China), whenever other States (typically States subscribing to the RBO) have attempted to pursue accountability for crimes by agents of powerful States.[104] Extraterritorial application of accountability law is therefore not immune to the types of pressure from influential players in the international system discussed in this Article. Indeed, whereas universal jurisdiction cases in European courtrooms covering, for example, core atrocity crimes in Rwanda and Syria regularly produce accountability outcomes,[105] cases targeting officials associated with influential States in the RBO have tended not to, precisely because of pushback by the States concerned.[106] That being said, in the context of achieving greater accountability for environmental crimes in conflict zones, national courts' extraterritorial application of accountability law has some basic advantages over the ICC system.

For one, legal frameworks permitting the prosecution of some types of environmental crimes, including those committed in conflict zones abroad, are already in place in many countries.[107] This cuts against the argument often made by

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104. For an account of extensive pressure from the U.S., Israel and China leading Spain in 2009 and again in 2014 to pass legislation significantly reducing the possibilities to exercise universal jurisdiction, see Montserrat Abad Castelos, *The End of Universal Jurisdiction in Spain?*, 18 SPAN. Y. B. INT'L L. 223, 223–25 (2013–14). Concerning U.S. reactions to attempts in Belgium and Germany to exercise universal jurisdiction over Bush administration officials for torture and related crimes committed in the "War on Terror," see Sean Murphy, *U.S. Reaction to Belgian Universal Jurisdiction Law*, 4 AM. J. INT'L L. 984, 984–87 (2003); Katherine Gallagher, *Universal Jurisdiction in Practice*, 7 J. INT'L CRIM. JUST. 1087, 1100–09 (2009).

105. *See, e.g.*, TRIAL INTERNATIONAL, UNIVERSAL JURISDICTION ANNUAL REVIEW (2022), https://trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf (documenting dozens of such cases from the calendar year 2021 alone).

106. *See supra* note 103. For an account of earlier universal jurisdiction practice in European courts and an assessment of the factors at play often resulting that accountability outcomes were not achieved in high-profile cases, see generally Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT. L. 927 (2009).

107. *See* Darryl Robinson, *The Ecocide Wave is Already Here: National Momentum and the Value of a Model Law*, JUST SECURITY (Feb. 23, 2023), https://www.justsecurity.org/85244/the-ecocide-wave-is-already-here-national-momentum-and-the-value-of-a-model-law/ (citing examples across Europe demonstrating that "criminalizing ecocide has recently garnered surprising public and political momentum").

proponents of expanding criminalization at ICC level who in the face of facts concerning the Court's enforcement record often emphasize that criminalization in the ICC Statute has a drop-down effect resulting in States providing for similar criminalization in domestic legislation.[108] Further diminishing the need for an ICC Statute drop-down effect, the adoption of a new E.U. Environmental Crimes Directive will require E.U. Member States to criminalize much of the same conduct entailed in the IEP ecocide proposal.[109] The basic point here is that many States simply appear to not need additional encouragement to expand criminalization of (certain) environmental crimes. As one commentator puts it, "the ecocide wave is already here,"[110] with a significant number of States currently putting in place legislation involving expanded criminalization of environmental crimes, including in some cases under principles of secondary liability such as aiding and abetting.[111]

States increasingly frame environmental laws that permit prosecution of certain environmental crimes as ecocide legislation, but as some commentators point out the level of resemblance with the IEP proposal clearly varies and may in some cases be overstated.[112] However, as others have argued, allowing

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108. *See, e.g.*, ANNEGRET HARTIG, MAKING AGGRESSION A CRIME UNDER DOMESTIC LAW 17–24 (2023) (assessing the "hard" and "soft" obligations of ICC member states to incorporate the crime of aggression into their domestic law).

109. Directive 2024/1203, of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, 2024 O.J. (L), https://eur-lex.europa.eu/eli/dir/2024/1203/; *see also* Kate Mackintosh, *European Parliament Votes Unanimously for Ecocide*, OPINIOJURIS (Apr. 10, 2023), http://opiniojuris.org/2023/04/10/european-parliament-votes-unanimously-for-ecocide/ (noting that the Directive "prohibits environmental damage in terms almost identical to the Independent Expert Panel (IEP) proposal for the definition of the crime").

110. Robinson, *supra* note 107.

111. *See, e.g.*, UNODC, RESPONDING TO ILLEGAL MINING AND TRAFFICKING IN METALS AND MINERALS: A GUIDE TO GOOD LEGISLATIVE PRACTICES, 52-64 (2023) https://www.unodc.org/documents/organized-crime/tools_and_publications/Final_version_Illegal_Mining_and_Trafficking_in_Metals_and_Minerals_200123.pdf (noting case studies of natural resource-related criminal laws in Peru, Colombia, Ghana, Laos, Guyana, and South Africa).

112. *See* Kevin Heller, *Belgium Set to Criminalise Ecocide (Kinda Sorta)*, OPINIOJURIS (Nov. 8, 2022), http://opiniojuris.org/2022/11/08/belgium-set-to-criminalise-ecocide-kinda-sorta/ (observing that in the context of

for some "national variation and experimentation" concerning a new crime may be productive.[113] In all events, these developments raise the question whether expanding criminalization of environmental crimes, including the specific crime of ecocide, may not be achieved more effectively through a "bottom up" approach where, rather than primarily focusing on ICC adoption of the crime, the focus is on further supporting criminalization and enforcement options at the national level.[114] Of course, doing one thing does not exclude the other, but in terms of priorities it is worth keeping in mind the observations made in this Article about the ICC's (lack of) potential to meaningfully enforce accountability for these crimes.

B. *Recent Developments in Extraterritorial Application of Accountability Law and Environmental Crimes Prosecution at the National Level*

The developments in environmental law discussed above must be considered in light of many national jurisdictions having put in place—or, like the United States, are considering introducing[115]—legislation permitting some form of

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Belgian ecocide legislation the claim that it is 'clearly aligned' with the IEP proposal "is a significant overstatement.").

113. Robinson, *supra* note 107.

114. *See* Robinson, *supra* note 6, at 320–21 (comparing the disadvantages of "focusing on the ICC" with domestic law incorporation or "simple declaration"); Robinson, *supra* note 107 (highlighting the advantages of the "bottom up" approach). As a sort of "reversed positive complementarity argument," some commentators suggest that creating precedence at the national level for prosecution of environmental crimes through application of universal jurisdiction principles could encourage courts at the international level to ultimately take a more proactive approach. *See, e.g.*, Ryan Gilman, *Expanding Environmental Justice after War: The Need for Universal Jurisdiction Over Environmental War Crimes*, 22 Colo. J. Int'l Envtl. L. & Pol'y 447, 467–70 (2011) ("Once a body of law is created, the ICC can use the new precedent to effectively prosecute war criminals that destroy the environment in the context of an international conflict.").

115. Bills have been recently introduced in the U.S. which, if enacted, would significantly expand the ability of U.S. courts to prosecute international crimes committed by foreign nationals under universal jurisdiction principles. *See From Nuremberg To Ukraine: Accountability For War Crimes And Crimes Against Humanity, Hearing Before the S. Judiciary Comm.*, 117th Cong. (2022) (submission of Beth Van Shaack, Ambassador-at-Large, State Dept. Office of Global Justice) (expressing gratitude for recent bills "to help ensure

extraterritorial application of accountability law. This involves various forms of extraterritorial application of criminal law, often under universal jurisdiction principles (which, contrary to popular belief, has expanded in recent years),[116] but also extraterritorial application of tort law and due diligence legislation, which in the case of business enterprises often provide for comparable accountability outcomes in terms of the relevant sanctions.[117] Even where States have sought to restrict the application of universal jurisdiction principles, such as through requirements concerning double criminality or residency requirements, judiciaries in some key jurisdictions have proven willing to challenge or soften these requirements through "liberal interpretation" of the law.[118] It is worth recalling in this regard that there is increased backing in international guidelines and soft law for States to apply universal jurisdiction principles to environmental crimes.[119]

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that the United States can more robustly address serious atrocities" and recommending future areas of focus).

116. *See* Máximo Langer and Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT'L L. 779, 784–808 (2019) (describing and discussing empirical findings the quiet expansion of universal jurisdiction exercise between 1961 and 2017); Workshop: Universal Jurisdiction and International Crimes: Constraints and Best Practices, Eur. Parl. Doc. EP/EXPO/B/COMMITTEE/FWC/2013-08/Lot8/21 (2018) (noting that 163 of the 193 UN Member States can exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law). Although the number of States actively doing so is at present significantly smaller, the potential is still substantial, as is the number of charges brought for conflict-related crimes. *See* TRIAL INTERNATIONAL, UNIVERSAL JURISDICTION ANNUAL REVIEW (2022) https://trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf (documenting dozens of cases utilizing universal jurisdiction to combat conflict-related sexual violence).

117. *See* Jong and Wolters, *supra* note 14, at 140–47 (outlining state practice on due diligence obligations and liability for corporations).

118. For an account of recent decisions by the French Supreme Court in this regard, see Roger Lu Phillips, *2nd Time's the Charm: France's Cour de Cassation Broadens Universal Jurisdiction Law*, JUST SECURITY (May 24, 2023), https://www.justsecurity.org/86689/2nd-times-the-charm-frances-cour-de-cassation-broadens-universal-jurisdiction-law/.

119. For instance, the Madrid–Buenos Aires Principles of Universal Jurisdiction explicitly supports that environmental crimes be made subject to universal jurisdiction prosecutions. *See* INTERNATIONAL CONGRESS ON UNIVERSAL JURISDICTION, MADRID-BUENOS AIRES PRINCIPLES ON UNIVERSAL JURISDICTION, https://fibgar.org/upload/proyectos/35/en/principles-of-universal-jurisdiction.pdf ("Principle 3 . . . Universal Jurisdiction shall also apply to economic and

Importantly, national jurisdictions can—and do, in fact, sometimes—apply these legal frameworks to a range of actors who have not been subject to ICC jurisdiction. Criminal prosecution of business actors for crimes abroad is a particularly important issue in this regard given what was noted above concerning the additional layers of economic interest and extraterritoriality surrounding environmental crimes. As demonstrated by recent cases in for example Switzerland[120] and Sweden,[121] domestic authorities (often prompted by NGOs) have, in some situations, pursued criminal cases against business representatives with alleged responsibility for crimes with environmental dimensions committed in conflict zones abroad. In some jurisdictions, such cases can be initiated by victims from conflict zones bringing criminal complaints covering environmental

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environmental crimes the extent and scale of which seriously affect group or collective human rights or cause the irreversible destruction of ecosystems."). Noting the need to ensure that the most "serious environmental crimes are punished with appropriate severity", the European Council recommends that States "consider introducing the crime of ecocide in their national criminal legislation, if not yet done" and "consider recognising universal jurisdiction for ecocide and the most serious environmental crimes". EUR. COMM. LEGAL AFFS & HUM. RTS., *Addressing Issues of Criminal and Civil Liability in the Context of Climate Change*, Doc. No. 15362, ¶¶ 8.4-8.6 (2021) https://pace.coe.int/en/files/29226/html.

120. In June 2019, after Trial International filed a criminal complaint against a Swiss businessman, Swiss authorities decided to take forward an investigation covering alleged involvement in pillaging as a war crime committed in the context of the civil war in Senegal's southern Casamance region, in the form of illegal trade with rosewood timber. TRIAL INTERNATIONAL, *Westwood: Dealing In Conflict Timber Across The Gambia And Senegal* (Mar. 23, 2020), https://trialinternational.org/latest-post/westwood-dealing-in-conflict-timber-across-the-gambia-and-senegal/; TRIAL INTERNATIONAL, *War Crime of Pillage: No More Impunity for Economic Actors* (Aug. 11, 2022), https://trialinternational.org/latest-post/war-crime-of-pillage-no-more-impunity-for-economic-actors/.

121. Following allegations that Lundin Petroleum, a Swedish oil company, paid the Sudanese army and non-state armed groups to forcibly displace the local population from oil-rich areas in southern Sudan during the civil war and other related war crimes including pillage, in November 2021 Swedish authorities indicted the chairman of the cooperation and the head of the exploration unit, a Swiss national, for complicity in war crimes, some of which cover environmental harm (but victims have faced a set back because the Swedish court has decided that victims' damage claims will not be considered in the context of the criminal trial). *See* TRIAL INTERNATIONAL, *Lundin Petroleum* (Apr. 4, 2022), https://trialinternational.org/latest-post/lundin-petroleum/; *Major setback for victims in the Lundin Oil trial, Civil Rights Defenders*, (Nov. 30, 2023), https://crd.org/2023/11/30/major-setback-for-victims-in-the-lundin-oil-trial/.

crimes to authorities in the jurisdiction where the alleged offender is a resident.[122] Further, whereas only a few States traditionally allowed for criminal liability for corporations as legal persons, this trend has now been reversed, with many States now permitting criminal prosecution of corporations as legal entities under certain circumstances, often including crimes committed abroad.[123] These legal frameworks have led to criminal cases being brought in some jurisdictions against multinational corporations involving crimes in conflict zones.[124] Although existing practice concerning prosecution of corporate actors appears to have rarely focused directly on environmental harm, and not all of them have been successfully prosecuted,[125] there

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122. For instance, Belgian authorities opened an investigation and issued a European arrest warrant for a Belgian businessman following a complaint in January 2011 by citizens of Sierra Leone who had been forced to work in mines during the civil war, alleging enslavement as a crime against humanity as well as looting of "blood diamonds" as the war crime of pillaging. The businessman died in custody before standing trial. TRIAL INTERNATIONAL, *Michel Desaedeleer* (May 9, 2016), https://trialinternational.org/latest-post/michel-desaedeleer/.

123. *See* Eric Engle, *Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?*, 20 J. CIV. RTS. & ECON. DEV. 287, 288–308 (2006)) ("*In principle*, corporations today are subject to criminal law in the common law, in civilian legal systems, and by extension in international law"); Sufyan Droubi, *Transnational Corporations and International Human Rights Law*, 6 NOTRE DAME J. INT'L COMP. L. 119, 119 (2016) (outlining a previous situation where "only a very limited number of states ha[d] legislation that makes the attribution of criminal responsibility to legal entities possible.").

124. In France, for instance, in May 2022 the Paris Court of Appeal confirmed the criminal charges against LaFarge, the world's largest cement group, for aiding and abetting crimes against humanity by way of purchasing oil and paying jihadist groups millions of Euros to keep its cement factory in northern Syria running through wartime. In October 2022, the same company pleaded guilty to criminal charges brought by the U.S. Justice Department under anti-terror legislation covering the same conduct. Sandra Cossart et al, *Multinational Lafarge Facing Unprecedented Charges for International Crimes: Insights Into the French Court Decisions*, OPINIOJURIS (Nov. 15, 2022), http://opiniojuris.org/2022/11/15/multinational-lafarge-facing-unprecedented-charges-for-international-crimes-insights-into-the-french-court-decisions/.

125. In Switzerland, following a petition by Trial International, authorities opened a formal investigation into a large gold refinery based in the country, for allegedly having perpetrated the war crime of pillage in connection with gold ore obtained from militias in the DRC during the civil war, but ultimately did not bring charges. James Stewart, *The Argor Heraeus Decision on Corporate Pillage of Gold*, (Oct. 19, 2015), http://jamesgstewart.com/the-argor-heraeus-decision-on-corporate-pillage-of-gold/.

is potential for relying on extraterritorial jurisdiction principles to bring criminal cases against corporate entities for environmental crimes committed in conflict zones.

Domestic courts' extraterritorial application of tort law presents another potentially rewarding accountability avenue for corporate actors' responsibility for environmental crimes in conflict zones. Recent practice from Canada and some European jurisdictions has established that corporations operating out of the relevant country may be sued in tort for human rights violations abroad.[126] Whereas the current interpretation of the U.S. Alien Torts Claim Act (ATCA) creates significant barriers for pursuing environmental crimes,[127] a bill was recently introduced which, if enacted, could potentially remedy some of these challenges and open the door to ATCA extraterritorial environmental crimes litigation.[128] These developments in

126. *See* William Dodge, *Supreme Court of Canada Recognizes Corporate Liability for Human Rights Violations*, JUST SECURITY (Mar. 26, 2020), https://www.justsecurity.org/69349/supreme-court-of-canada-recognizes-corporate-liability-for-human-rights-violations/(discussing the noteworthy *Nevsun Resources Ltd. v. Araya* case out of Canada and other cases from the Netherlands and the U.K.).

127. So far, no claim involving environmental damage brought under ATCA has been successful, reflecting the U.S. courts' cautious approach to claims involving the environment and their dismissal of the notion that claims involving environmental damage can be assessed under human rights law. Further, U.S. courts currently interpret ATCA as if there is a presumption against extraterritorial application. *See* Christopher Ewell et al., *Has the Alien Tort Statute made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205, 1237–43 (2022) (noting the contribution of *Kiobel*'s "presumption against extraterritoriality" to the decline of ATS suits); *cf.* Kathleen Jawger, *Environmental Claims under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 519, 526 (2010) (concluding that the 2010 landscape of environmental cases under the ATS was unclear).

128. In May 2022, the Alien Tort Statute Clarification Act (ATSCA) was introduced, which if enacted would affirm that the ATCA applies extraterritorially and thus counter the Supreme Court's rulings in *Kiobel v. Royal Dutch Petroleum Co.* and more recent cases which have established the presumption against extraterritoriality. 569 U.S. 108 (2013). The Congressional findings passed alongside the ATSCA suggest that it would enable suits involving corporate liability, including for committing, aiding or abetting human rights violations and war crimes abroad, both directly and through "supply chains." *See* S. 4155, 117th Cong. §2, ¶¶ 4–5 (2022) ("When corporations commit or aid and abet human rights violations directly and through their supply chains, they should be held accountable. … Impunity for corporations who violate human rights unfairly disadvantages businesses that respect and uphold human rights."). *See also* William Dodge and Oona Hathaway, *Answering the Supreme*

tort law potentially could be boosted by the relevant normative developments mentioned above, including support in the International Law Commission Draft Principles for enhancing accountability for business actors, as well as the increased attention facilitated by the ecocide campaign to the need for expanding criminalization of environmental crimes.

Taken together, national legal foundations for advancing accountability for environmental crimes with extraterritorial dimensions have thus drastically improved in recent years—and seem bound to further improve in the years ahead.

V. Concluding Observations: The Future of Accountability for Environmental Crimes and Implications for Advocacy, Litigation and Research

There are various reasons for the relative success and potential of national legal systems to promote accountability for powerful actors for extraterritorial action, including the fact that robust national legal systems have substantially more resources and enforcement tools at their disposal compared to the ICC. For the purposes of the analysis in this Article, a key point is that national authorities, generally speaking, have less ability to resist and are more prone to accept legal accountability established by own courts for crimes committed by own citizens and entities (or entities with a sufficient link to their jurisdiction), compared to accepting that these actors are held accountable externally through the actions of international tribunals.[129] It is true, of course, that governments often resist, sometimes successfully, when national legal systems seek to apply accountability principles to powerful persons or entities, especially own

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Court's Call for Guidance on the Alien Tort Statute, Just Security (June 3, 2022), https://www.justsecurity.org/81730/answering-the-supreme-courts-call-for-guidance-on-the-alien-tort-statute/ (arguing that the ATSCA "clarify[ies] Congress's intent that the ATS does, indeed, apply extraterritorially".

129. On State resistance to international courts and interplays with the domestic sphere, see generally Mikael Madsen et al., *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 Int'l J. L. Context 197 (2018); Edouard Fromageau et al., *Domestic Contestations Against International Courts and Tribunals: Introduction to the Special Issue*, 12 J. Int'l Disp. Settlement 173 (2021); Raffaela Kunz, *Judging International Judgments Anew? The Human Rights Courts Before Domestic Courts*, 30 Eur. J. Int'l L. 1129 (2020).

government officials and militaries, or those of their allies. The point here is therefore not that States do not object and resist—and sometimes successfully so; rather, the point simply is that States have *less* ability to resist the actions of national legal system. To illustrate these points: Italian prosecutors, in the face of resistance by both the U.S. and Italian governments, secured the conviction in Italian courts of some twenty-six U.S. citizens, in absentia, among them a former CIA station chief, as well as Italian intelligence officials, for the 2003 abduction in Milan of Abu Omar, and his subsequent rendition.[130] This demonstrates that even when governments, including powerful ones associated with the RBO, object and resist when their interests are perceived to be challenged, unlike what is the case at ICC level, it has *sometimes* proven possible for independent prosecutors and judges in strong legal systems to produce accountability outcomes even in the face of resistance by influential players in the RBO.[131]

Assuming that similar resilience could be demonstrated by national prosecutors and judges pursuing powerful actors responsible for environmental crimes in conflict zones and taking into account the developments in legal frameworks concerning extraterritoriality and environmental protection discussed above, the future of accountability for environmental crimes in conflict zones certainly looks more promising at the domestic level, especially when compared with the ICC. The Court will most likely continue to "avoid provoking major political opposition from the powerful, which [steers] it away from Western actors," including in any potential environmental crimes prosecution.[132] In contrast, some national legal systems have already proven an ability to advance accountability for the

130. Public Statement: Italy/USA: *Italian Appeals Court Convicts Three Former CIA Officials in Abu Omar Kidnapping Case*, Amnesty International (Feb. 6, 2013), https://www.amnesty.org/fr/wp-content/uploads/2021/06/eur300022013en.pdf; Pietro Insolera & Irene Wieczorek, *The Italian Court of Cassation Delivers its Ruling in the Abu Omar Case: What to Expect from the Decision?*, 4 New J. Eur. Crim. L. 180, 180–81 (2013).

131. The Italian government had attempted to invoke the doctrine of State secrets, but ultimately unsuccessfully. For a detailed account of the case, including decisions by Italian courts and the European Court of Human Rights, *see* Arianna Vedaschi, *State Secret Privilege Versus Human Rights: Lessons from the European Court of Human Rights Ruling on the Abu Omar Case*, 13 Eur. Const. L. Rev. 166 (2017).

132. Branch & Minkova, *supra* note 7, at 70.

powerful, including large business enterprises, or representatives thereof, as well as officials of key Western powers, responsible for serious crimes under international law. In sum, given the current momentum of environmental harm criminalization domestically and developments in conceptions of and application of principles of extraterritoriality as well as accountability for business enterprises, national legal systems appear as the most feasible avenue for promoting meaningful accountability for environmental crimes in conflict zones.

If the hypotheses and arguments set out in this Article are accurate, it has at least three important implications for how relevant stakeholders can best approach the process of advancing accountability for environmental crimes in conflict situations going forward.

First, from an advocacy perspective, strengthening accountability and enforcement of accountability for environmental crimes in conflict zones should not first and foremost be seen as a question of expanding the ICC's jurisdictional reach. Rather, actors seeking to promote accountability for environmental crimes in conflict zones may benefit from focusing in the first place on further exploring and seeking to strengthen accountability options at the domestic level. This does not imply that advocacy for normative elevation of relevant accountability standards covering these crimes, including in ICL instruments, should necessarily be discontinued. It does imply, however, that it would be beneficial to focus more on alternative legal frameworks.

Second, identifying the challenges of the ICC system is important, especially when operating in complex political space often involving resistance by powerful players, but it is equally important to investigate the broader operational conditions of accountability platforms at the domestic level, including the challenges and opportunities this creates for successful prosecution and litigation. While this Article offers some initial reflections on these matters, additional research is needed to better understand the conditions that make efforts in national legal systems to promote accountability for environmental crimes in conflict zones possible in some cases, and when not, what can be learned from that.

Third, if the feasibility of accountability avenues for environmental crimes in conflict zones are so profoundly affected by power and context as this Article suggests, more attention

needs to be paid to exploring how legal accountability can be portrayed as desirable to relevant stakeholders. In other words, if accountability dysfunctions to a large extent originate in opposition by powerful stakeholders, a main task is to understand how suasion best occurs. This self-evidently is no easy task in the case of environmental crimes, as there are inherent conflicts of interests at play, but this is not unique to environmental crimes, and lessons can be learned from other regimes where accountability standards have achieved relative uncontested status over time.