



Expanding the Jurisdiction of the International Criminal Court

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Abstract: *Environmental destruction and exploitation of natural resources are some of the main causes of humanitarian conflicts, which are often international in scale. One instance was the crime of genocide conducted by Al-Bashir, which was triggered by exploitation of natural resources (resource war), causing pollution of vital water sources, and ending with conflict in Darfur, Sudan. This case is evidence that environmental destruction can be a driving factor for crimes against humanity. In response to this, the International Criminal Court (ICC) issued a Policy Paper, which sets out considerations to prosecute cases of environmental destruction and illegal exploitation of natural resources, which is referred to by some as ecocide. With growing demand of the international community, not only natural persons, but corporations are urged to be prosecuted before the ICC for ecocide. This research is normative legal research. It is intended to outline the current rise of demand for the ICC to prosecute cases of ecocide, whilst challenging the existing jurisdiction of the ICC based on the Rome Statute. This paper will discuss whether the ICC have jurisdiction to adjudicate ecocide, expanding the Court's jurisdiction to prosecute corporations, and crimes conducted in and/or by citizens of States that are not members of the Rome Statute, such as Indonesia. This paper concludes with constructive recommendations for businesses to start re-evaluating their business plans to put environment and human rights awareness into priority concern.*

Keywords: *environmental destruction; international criminal court; security council.*

I. Introduction

On September 15, 2016, the Office of the Prosecutor (the "OTP") of the International Criminal Court (the "ICC"), issued the Policy Paper on Case Selection and Prioritisation (the "Policy Paper") wherein sets out the OTP's commitment to cooperate and provide assistance to Rome Statute Member States with respect to conducts which constitute as

serious crime under national law, such as the illegal exploitation of natural resource, land grabbing or the destruction of the environment. Under the policy, the ICC stated that it would consider prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land. In addition, in

adjudicating these cases, the Court will assess the impact of the alleged crime, considering the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.¹

The Policy Paper was triggered by several cases of environmental damage that ended in crimes against humanity on an international scale. One of them was the crime of genocide by the former president of Sudan, Al-Bashir, which was triggered by the struggle for natural resources (resource war), pollution of vital water sources, and conflict in Darfur, Sudan. The international community also condemned the actions of former Iraqi president Saddam Hussein as a crime of environmental-based genocide after his group carried out the diversion of the Tigris and Euphrates rivers. Other environmental crimes include the devastating fires in the Persian Gulf during the 1991 Gulf War, as well as the leaks of oil refineries and chemical plants in the 1999 Kosovo conflict. It caused massive contamination and pollution of the Danube river.² These cases prove that environmental destruction can become a driving factor for crimes against humanity, and not a few have escalated into international conflicts.

The ICC's statement to consider expansion of its jurisdiction is certainly a positive development in Environmental Law, Human

Rights Law, and International Law in general. There are at least four important points that can be noted. First, there is currently no international court with special jurisdiction in handling Environmental Law cases. Second, access of non-state actors – either as plaintiffs or defendants – to international courts in dealing with environmental problems, is still very limited. Third, it is worth noting that environmental protection is closely related to the survival and fulfilment of basic human rights. Thus, it constitutes the enforcement of basic international humanitarian principles. Lastly, the inclusion of environmental crimes in the scope of international human rights crimes becomes a warning to multinational corporations and their executives, who are often the masterminds behind massive environmental damage. With this Policy Paper in place, corporations shall reconsider their conducts to no longer underestimate the impact of environmental pollution they produce.³

Although the Policy Paper sheds a positive light to environment and human rights enforcement, it is nevertheless uneasy to be implemented. This is because the ICC's jurisdiction is limited to prosecuting certain crimes and only against citizens of Rome Statute member states.⁴ Jurisdiction of the ICC is also against individuals and have yet to recognize corporate entities as subjects before it. However, Article 13 letter (b) of the

¹ Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation* (The Hague: International Criminal Court, 2016), https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf, [41].

² Tara Smith, "Why the International Criminal Court is Right to Focus on the Environment," *The Conversation*, published September 23, 2016, <https://theconversation.com/why-the-international-criminal-court-is-right-to-focus-on-the-environment-65920>.

³ John Vidal and Owen Bowcott, "ICC Widens Remit to Include Environmental Destruction Cases," *The Guardian*, published September 15, 2016, <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases>.

⁴ Rome Statute of the International Criminal Court, (adopted July 17, 1998, entered into force July 1, 2002) 2178 UNTS 3. Hereafter, Rome Statute.

Rome Statute provides another way to access the jurisdiction of the ICC, namely through a decision of the Security Council (SC) acting under Chapter VII of the United Nations (UN) Charter. This then gave rise to the relationship between the ICC as an independent judiciary and the UNSC as an international political body.

This study discusses the jurisdiction of the ICC in adjudicating cases of environmental destruction, with three legal issues. First, whether the ICC has jurisdiction to adjudicate cases of environmental destruction. In this case, the role of the UN Security Council in accessing the jurisdiction of the ICC will be discussed. The second one, whether this jurisdiction can be extended to prosecute corporations and their executives. Thirdly, whether this expansion of jurisdiction would yield in positive effect on countering environmental destruction by corporations in states that are not members of the Rome Statute, such as Indonesia.

II. Legal Materials and Methods

This research is a normative legal research. It is intended to outline the current rise of demand for the ICC to prosecute cases of ecocide, whilst challenging the existing jurisdiction of the ICC based on the Rome Statute. This research is expected to give a valuable contribution to the development of International Humanitarian Law, Human Rights Law, and Environmental Law, and to become an ontological basis for laws and policies made in dealing with ecocide, both at national and international level. The approaches used in this research are the statute approach, conceptual approach, and case approach in analysing current provisions

with regard to ICC's jurisdiction, and growing number of cases on ecocide which triggers for the Court to extend its jurisdiction. The primary legal materials which are used are all applicable international policy papers, statutes and conventions, while the secondary legal materials are in the form of literature and related materials.

III. Result and Discussion

Jurisdiction of the ICC

The ICC is the first permanent and independent tribunal with authority to investigate and prosecute anyone who commits the gravest violations of international humanitarian law. The ICC was established under the Rome Statute on July 1, 2002. Until nowadays, the Rome Statute has been ratified by 128 countries. Departing from the historical experience of world wars that caused millions of deaths and misery for most of humanity in the world at that time, in 1948, the UN General Assembly recognized the need for mechanisms to prosecute mass killings and war crimes. At the initiative of UN member states, the Rome Statute was formulated. From that Statute, the ICC was formed with the hope of providing a deterrent effect for perpetrators of crimes against humanity and ending the culture of granting forgiveness (impunity) to international criminals.⁵

A court has the authority to adjudicate based on its jurisdiction or competence. Jurisdiction is a legal parameter related to the commission of a crime and is used as a guide for the operation or operation of a court. According to Cherrif Bassiouni, the

⁵ Koalisi Masyarakat Sipil untuk Mahkamah Pidana Internasional, *'Mengenal ICC'* Koalisi Masyarakat Sipil Untuk Mahkamah Pidana

Internasional (Jakarta: Sentralisme Production, 2009).

jurisdiction of the ICC relates to the following fundamental principles:⁶

1. Jurisdiction relating to the subject matter (Subject matter jurisdiction) (*ratione materiae*)

In Article 5 of the Rome Statute, the jurisdiction of the ICC is limited in trying the most serious crimes against humanity. These crimes are genocide (crimes of genocide), crimes against humanity (crimes against humanity), war crimes (war crimes) and aggression (crimes of aggression).

2. Territorial jurisdiction (territorial jurisdiction/*ratione loci*)

Article 12 paragraph (2) letter (a) of the Rome Statute confirms that the Court has jurisdiction over crimes committed within the territory of a member state, regardless of the nationality of the perpetrator.

3. Personal/individual jurisdiction (personal jurisdiction) (*ratione personae*)

Article 25 of the Rome Statute, which sets out provisions on individual criminal responsibility, clearly limits ICC's jurisdiction only over natural persons who commit a crime within the jurisdiction of the Court. Article 12 paragraph (2) letter (b) of the Rome Statute stipulates that the ICC has jurisdiction over citizens of member states of the Statute who are prosecuted due to committing international crime (*the State of which the person accused of the crime is national*). The ICC may also have jurisdiction over individuals who are from non-member countries but who have

accepted ICC jurisdiction through *ad hoc* declarations.⁷

In light of the above provision, it can be concluded that ICC's jurisdiction does not extend to: (i) corporate entities/legal persons, and (ii) crimes outside of that stipulated under Article 5 of the Rome Statute, and (iii) persons committing crime in a State that is not a member of the Rome Statute, or States that have yet to recognize the Court's jurisdiction.

In relation to the issue of the Court's jurisdiction over legal persons, it is worth noting that the *travaux préparatoires* of the Rome Statute show that the original wording of Article 25 of the Rome Statute would have allowed prosecution of corporations as well as individuals. Article 17(5)–(6) of the Working Group on General Principles of Criminal Law's Draft of April 1, 1998 included personal jurisdiction over legal persons, other than states “when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.”⁸ It added that “criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.”⁹ Article 23(5)–(6) of the draft of July 3, 1998 placed the necessary condition for corporations to be tried only if the natural person who controls the legal person is convicted and the Prosecutor included in the charges against that natural person that he/she was in control of the legal person and acted under “consent” of the

⁶ M Cherif Bassiouni, *Crime Against Humanity in International Criminal Law* (Leiden: Martinus Nijhoff Publication, 1992).

⁷ Rome Statute, art 12(3).

⁸ International Criminal Court, *Text of the Draft Statute for the International Criminal Court* (1998) UN Doc. A/AC.249/1998/CRP.9, [2].

⁹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum* (Rome, April 14, 1998) UN Doc. A/CONF-183/2/Add-1, [49].

latter.¹⁰ This would have allowed the prosecution of both individual persons as well as corporations. However, paragraphs (5) and (6) were not included in the final wording of Article 25. Drafters of the Statute, such as Ambassador Scheffer, notes that some delegations indicated that their jurisdictions lacked legislation on criminal liability of legal persons, thereby having a barrier to prosecute them domestically.¹¹

In its final version, the Rome Statute excludes legal persons from its jurisdiction. The inclusion of legal persons would, seemingly, be constrained primarily by the principle of complementarity. The ICC is considered as the “last resort” jurisdiction; it can prosecute only if states were unwilling or unable to do so. Regardless, many of them do not recognize legal persons in their internal orders, which would challenge the effective implementation of the principle of complementarity.¹² The decision to exclude legal persons was, however, far from unanimous. Professor Andrew Clapham in his writing denotes that, though the negotiations failed to include legal persons in the Rome Statute, the discussions during negotiations reinforced the idea that there was a need for further development of corporate criminal liability.¹³

Jurisdiction of the ICC based on UN Security Council Decision

In addition to the jurisdiction of the ICC as discussed above, Article 13 letter (b) of the Rome Statute provides a mechanism to access the Court’s jurisdiction, namely in situations or cases that are referred to the Public Prosecutor of the Court by the UN Security Council acting under Chapter VII of the Charter of the United Nations. The Rome Statute gives the UN Security Council the role of accessing the jurisdiction of the ICC to refer a situation or conflict to the ICC where a crime under the jurisdiction of the Court has occurred. In referring cases to the ICC, the Security Council issues resolutions within its competence in determining the existence of (1) threats to the peace, (2) violations of the peace, or (3) acts of aggression.¹⁴ The resolution must explicitly state that at least one of the three issues above has occurred, and the Security Council explicitly decides to submit the case to be processed under the authority of the ICC.

To date, the Board has only referred two cases to the ICC under Article 13(b). The first case is the situation in Darfur, Sudan, through UNSC Resolution No. 1593 (2005). The second case is the situation in Libya, through UNSC Resolution No. 1970 (2011). These resolutions impose an obligation on the parties to the conflict to cooperate fully with

¹⁰ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Group on General Principles of Criminal Law* (Rome, July 3, 1998) UN Doc. A/CONF.183/C.1/WGPP/L.5/Rev.2.

¹¹ David Scheffer and Caroline Kaeb, “The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory,” *Berkeley Journal of International Law* 29, no. 1 (2011): 380.

¹² United Nations Diplomatic Conference of an

International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court* (Rome, February 4, 1998) UN Doc. A/CONF.183/2.

¹³ Andrew Clapham, “The Questions of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court,” in *Liability of Multinational Corporations Under International Law*, ed. Menno T. Kamminga and Saman Zia-Zarifi (Leiden: Brill, 2000), 171.

¹⁴ Charter of the United Nations, (signed June 26, 1945, entered into force October 24, 1945) 1 U.N.T.S. XVI. Hereafter UN Charter, art 39.

the ICC's legal process. Of the two cases, the situation in Darfur became the first case related to environmental damage submitted by the UN Security Council to the ICC. Allegations of genocide, war crimes and crimes against humanity in Darfur prompted the United Nations to take firm action by bringing the case to the ICC in March 2005. The ICC began investigating the alleged crimes in June 2005.¹⁵ The Darfur case is the first case handled by the ICC at the request of the United Nations and the first case by the ICC to conduct trials against a State that is not a member of the Rome Statute. In addition, the conflict that occurred in Darfur was also the first ICC conflict to handle a genocide crime case. In Resolution 1593, the Security Council decided:

“Acting under Chapter VII of the Charter of the United Nations (1) Decides to refer the situation in Darfur since July 1, 2002, to the Prosecutor of the International Criminal Court;(2) Decides that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not a party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;”

In this case, the Sudanese government is accused of mobilizing the Arab military to attack African civilians in Darfur since the

rebels took up arms in 2003. Sudan's President, Omar Al-Bashir, is accused of being responsible for genocide, crimes against humanity and war crimes that occurred in Darfur. The United Nations estimates that around 300,000 people have died, and two million people have fled their homes due to the conflict that has occurred in Darfur since 2003. Based on these allegations, the ICC issued a warrant for the arrest of the President of Sudan on March 4, 2009, and at the same time, for the first time, the ICC has made arrests for the President of Sudan as the head of state.¹⁶

The scarcity of resources, which is not matched by the dense population formed from various ethnic and tribal groups, most of whom use resources as a livelihood, has triggered the conflict in Darfur. Resource struggles occur between tribes, which leads to massive environmental damage, as pictured in the SC Resolution No. 2429 (2018). In the resolution, the UNSC stated:

“Recognizing the adverse effects of climate change, ecological changes and natural disasters, among other factors, on the situation in Darfur, including through drought, desertification, land degradation and food insecurity.”¹⁷

This resolution is one of the UNSC resolutions which directly states the sentiment of environmental damage as the cause of a humanitarian conflict. Similar language was also used in Resolution 2349 (2017) on the situation on the Chad River¹⁸ and Resolution 2408 (2018) on the situation in Somalia. However, these two cases have

¹⁵ “Situation in Darfur, Sudan (ICC-02/05),” International Criminal Court, accessed September 21, 2021, <https://www.icc-cpi.int/darfur>.

¹⁶ “ICC Issues a Warrant of Arrest for Omar Al Bashir President of Sudan (ICC-CPI-20090304-PR394),” International Criminal Court, published March 4, 2009, [https://www.icc-](https://www.icc-cpi.int/pages/item.aspx?name=icc+issues+a+warrant+of+arrest+for+omar+al+bashir+_+president+of+sudan)

[cpi.int/pages/item.aspx?name=icc+issues+a+warrant+of+arrest+for+omar+al+bashir+_+president+of+sudan](https://www.icc-cpi.int/pages/item.aspx?name=icc+issues+a+warrant+of+arrest+for+omar+al+bashir+_+president+of+sudan).

¹⁷ UNSC Res 2429 (July 13, 2018) UN Doc. S/RES/2429.

¹⁸ UNSC Res 2349 (March 31, 2017) UN Doc. S/RES/2349.

not yet been submitted to the ICC handling.¹⁹ The ICC investigation into the Darfur case opened in June 2005 and has resulted in several developments with the arrests of suspects ranging from Sudanese Government officials, Militia/Janjaweed leaders, and Resistance Front leaders, and has implicated charges that include the crimes of genocide, war crimes and crimes against humanity. Through reports every 6 months submitted to the UN Security Council in accordance with the mandate of Resolution 1593, to date, there are 5 cases handled by the ICC, including:²⁰

1. Harun and Kushayb Case, up to Pre-Trial Chamber stage.
2. Al Bashir Case, up to the Appeal Chambers stage (May 6 2019).
3. Abu Garda Case, case closed. On February 8 2010, the Pre-Trial Chamber decided not to confirm the allegations against Abu Garda and subsequently rejected the Prosecutor's application to appeal the decision.
4. Banda Case, up to the Trial Chamber stage. On March 7 2011, the Pre-Trial Chamber unanimously decided to confirm the ICC Prosecutor's war crimes charges against Abdallah Banda.
5. Hussein Case, up to the Pre-Trial Chamber stage. An arrest warrant for Abdel Raheem Muhammad Hussein was issued on March 1, 2012.

Development of the Darfur Case before the ICC can be deemed rather slow. Owing to this fact, law enforcement and protection for victims cannot be enforced easily. In

addition, the ICC is still more focused on prosecuting international crimes that have been recognized in the Rome Statute and have not focused on adjudicating environmental crimes and their impacts. Despite the priority for cases that have implications for environmental damage, environmental cases are still associated with major crimes that have become the jurisdiction of the ICC.²¹ Referral of the SC to the ICC in the case of Darfur shows two things. First, in its authority, according to Chapter VII of the United Nations Charter and Article 13 paragraph (b) of the Rome Statute, the Security Council does not regard the nationality of criminals. Sudan is not a member state of the Rome Statute, but when the SC decides to refer the case to the ICC, regardless of the jurisdictional limitations of Article 13 letter a of the Rome Statute, the individual must comply with the Security Council's decision, and must comply with the ICC's legal process. Second, although the SC Resolution can access the jurisdiction of the ICC, as an independent judicial institution the ICC has the discretion to determine admissibility whether cases under its jurisdiction can then be tried. It is not possible for the SC to intervene the ICC.

Expanding ICC's Jurisdiction: Urgency and Challenges

Due to the growing number of international crimes which, from one way or another, culminates and/or aggravated due to environment or natural resources illegal exploitation, the international community continues to urge the ICC to expand its jurisdiction to include prosecution of

¹⁹ UNSC Res 2408 (March 27, 2018) UN Doc. S/RES/2408.

²⁰ Office of the Prosecutor, *Twenty-Ninth Report Of The Prosecutor Of The United Nations Security Council Pursuant To UNSCR 159* (The Hague: International Criminal Court, 2005).

²¹ Jessica Durney, "Crafting a Standard: Environmental Crimes as Crimes Against Humanity Under the International Criminal Court," *Hastings Environmental Law Journal* 24, no. 2 (2018).

ecocide. The term ‘ecocide’ was first used by Arthur Galston, an American biologist, at the Conference on War and National Responsibility in Washington DC in 1970. In 1972, Olof Palme, Swedish Prime Minister, referred to ‘ecocide’ in his opening speech at the UN Conference on the Human Environment in Stockholm.’ In 1985, UN Special rapporteur Benjamin Whitaker advocated the inclusion of ‘ecocide’ into the definition of ‘genocide’, describing it as ‘adverse alterations, often irreparable, to the environment, whether deliberately or with criminal negligence.’²²

Scholars, advocates, and legal practitioners have voiced concerns to recognize ecocide as an international crime. The most comprehensive move thus far is made by the Stop Ecocide Foundation, an NGO founded by a group of international lawyers that strives to add ecocide as a new international crime by recommending an amendment to the Rome Statute. It convened an Independent Expert Panel for the Legal Definition of Ecocide, which then submitted a legal definition of ecocide on June 22, 2021.

The Stop Ecocide Foundation defined 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.”

The definition above contains several aspects/elements, which are promulgated as such:

a. *“Wanton” means with reckless disregard for damage which would*

be clearly excessive in relation to the social and economic benefits anticipated;

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

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

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

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

The proposed definition creates two thresholds for prohibited conduct: First, there must exist a substantial likelihood that the conduct (which includes an act or omission) will cause severe and either widespread or long-term damage to the environment. Second, the acts must be proven to be unlawful or wanton. With these two thresholds, the prosecution would need to prove a substantial likelihood of causing severe and either widespread or long-term damage through acts or omissions that are either unlawful or wanton. The Panel believes that if ecocide would be added to the Rome Statute as a fifth international crime, it could become an arrestable offense. This way offenders who are responsible for actions or decisions leading to grave environmental harm would become liable to criminal prosecution.

²² Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text* (2021).

Despite the above proposal having yet to gain traction from the ICC, the Policy Paper alone, which considers the expansion of ICC's jurisdiction to cover environmental destruction and land grabbing, provides hope and opportunity to submit ecocide cases before the Court. One notable case of ecocide is the massive-scale deforestation and violations of agricultural concession rights that were illegally issued in Cambodia.²³

On October 7, 2014, a group of Cambodian rural communities sent a communication to the ICC Prosecutor's Office in The Hague (the "Communication"). In the Communication, rural residents stated that there had been massive and systematic land grabbing by Cambodia's ruling elite for more than a decade and claimed it was a crime against humanity.²⁴ Affected communities argue that senior members of the Cambodian government, state security forces, as well as business elites closely linked to the government deliberately commit crimes against civilians in rural areas to obtain illegal land concessions. The crimes committed included murder, forced displacement of villagers, illegal imprisonment, torture, and other inhumane acts.²⁵

The Communication stated that in the last 14 years, an estimated 770,000 people, 6% of the Cambodian population, have been affected by land grabbing in Cambodia, with more than 145,000 people being forcibly displaced from the capital, Phnom Penh. At least 4,000,000 hectares of land have been

confiscated, which represents 22% of Cambodia's land area. Mass forcible population transfers have been accompanied by the destruction of homes and crops, leaving entire communities destitute. Those who resist have been murdered, illegally imprisoned, and / or persecuted. Indigenous minority ethnic groups have suffered disproportionately – it is estimated that about half have already lost land.

After taking power in 1975, the Khmer Rouge communist party rulers also destroyed and forcibly took property and fields belonging to marginal farmers. The Khmer Rouge also killed at least 1.8 million people during his four-year reign. More than 400 families from the countryside in the Sre Ambel district in Cambodia's southwest say they were evicted from their farms to make way for a sugar plantation industry. Those who defy the orders of the ruling elite and do not move from their homes are then suppressed and treated cruelly. Civil society leaders, religious leaders, journalists, lawyers, environmental activists, labour unions, civil society demonstrators, and opposition politicians have been killed, threatened, or imprisoned on false charges. In 2012, there were arbitrary arrests of 232 workers and activists related to land grabbing issues, and to date, the perpetrators of the crimes enjoy full impunity.²⁶

Based on the OTP's Report on Preliminary Examination Activities 2020, the OTP confirms that they are finalizing its response on the communication with respect to

²³ Luigi Prospero and Jacopo Terrosi, "Embracing the 'Human Factor'," *Journal of International Criminal Justice* 15, no. 5, (2017).

²⁴ Chris Arsenault, "Landless Cambodian Farmers Look to International Criminal Court for Justice," Reuters, published November 22, 2016, <https://www.reuters.com/article/us-icc-cambodia-landrights-idUSKBN13H1J9>.

²⁵ "Joint Letter to UNHRC on Human Rights Situation in Cambodia," Human Rights Watch, published August 20, 2015, <https://www.hrw.org/news/2015/08/20/joint-letter-unhrc-human-rights-situation-cambodia>.

²⁶ Global Diligence LLP, *ICC Cambodian Case Study* (Global Diligence).

Cambodia's land grabbing case.²⁷ In addition, on March 16, 2021, 3 NGOs namely the Global Witness, FIDH, and Climate Counsel, supported by UN Experts and other organizations and distinguished individuals, have sent an Open Letter to the ICC's OTP in support of the Cambodian Land Grabbing Case (the "Open Letter"). Owing that the Court has yet to acknowledge ecocide as an international crime, the approach taken by the drafters of the Open Letter is to equate "*crimes associated with land grabbing amount to crimes against humanity.*" Should the expansion of jurisdiction come into force, this case can be the ICC's first case on environmental damage and land grabbing, thus becoming a precedent for countries that have similar problems. To date, the ICC has not issued their response with respect to the initial communication and the recent Open Letter.²⁸

If the Court decides to open a full examination into the situation in Cambodia, either on grounds of crimes against humanity or extending its jurisdiction to prosecute ecocide, then it would affect several stakeholders, namely corporations and businesspeople being the masterminds involved.²⁹ This forces corporations to change the way they manage their business

and supply chains and ensure that each production chain is not implicated in human harm and environmental degradation.³⁰ Governments and politicians, being those under authority to legislate and oversight environment and human rights norms, will also re-evaluate existing policies and permits given to un-eco-friendly investors so that they will not become targets owed for individual criminal responsibility before the ICC.

The above concern is especially relevant to the Indonesian government and corporations/investors, owing that Indonesia also has a long history of environment exploitation and human rights violation instigated by businesses and/or multinational corporations. One prominent case is the forest fires in 2019, which razed a total of 1.649.258 hectares of land across Indonesia.³¹ The forest fires have pumped at least 708 million tons of greenhouse gases into the atmosphere — almost double the emissions from the fires that swept through the Brazilian Amazon. The fires caused an estimated \$16 billion in economic losses, equivalent to about 1.8% of Indonesia's Gross Domestic Product, and the smoke they generated sickened half a million people.³² The Indonesian Minister of Environment and

²⁷ Office of the Prosecutor, *Report on Preliminary Examination Activities 2020* (The Hague: International Criminal Court, 2020), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>, [35].

²⁸ "Cambodian Villagers' International Criminal Court Complaint (Re Land Grabbing)," Business and Human Rights Resource Centre, published October 7, 2014, <https://www.business-humanrights.org/en/latest-news/cambodian-villagers-intl-criminal-court-complaint-re-land-grabbing/>.

²⁹ Global Diligence, "Land Grabbers May End Up In The Hague: Global Diligence Welcomes The ICC Prosecutor's New Case Selection Policy," Centre de Ressources sur les Entreprises et les Droits de l'Homme, published September 15, 2016,

<https://www.business-humanrights.org/fr/dernières-actualités/land-grabbers-may-end-up-in-the-hague-global-diligence-welcomes-the-icc-prosecutors-new-case-selection-policy/>.

³⁰ Evelyne Schmid, *Taking Economic, Social And Cultural Rights Seriously In International Criminal Law* (Cambridge: Cambridge University Press, 2015).

³¹ "Rekapitulasi Luas Kebakaran Hutan dan Lahan (Ha) Per Provinsi Di Indonesia Tahun 2016-2021," Indonesian Ministry of Environment and Forestry, accessed September 25, 2021, http://sipongi.menlhk.go.id/hotspot/luas_kebakaran.

³² "Indonesia's Fire and Haze Crisis," World Bank, published November 25, 2015,

Forestry stated that a total of 56 companies were involved in the land-clearing activities that led to the fires. In which 23 of them, mostly pulp wood and palm oil plantations, have received punishments ranging from administrative sanctions to revocation of licenses.³³ NGOs concerned on environment degradation also claimed a total of 45 mining conflicts which resulted in more than 700,000 hectares of land being damaged. Based on the data from the Forum for the Environment (WALHI), a 230-meter sand mining vessel operates to carry tens of thousands cubic feet of sand each day for reclamation projects in South Sulawesi, which affected the people in Kodingareng Island to suffer losses of up to IDR 80 billion due to loss of work, environment degradation and illness because of sea sand mining.³⁴

IV. Conclusion and Suggestion

Based on the discussion above, 3 main points can be concluded. First, the ICC OTP's Policy Paper can be seen as an initial progress for international judicial institutions to adjudicate cases of environmental damage, exploitation of resources, and illegal land grabbing. Although there is a growing demand for ICC to accommodate ecocide as an international crime within the ambit of the Court's jurisdiction, to date no further progress have been announced. The cases handled by the ICC are still focused on the 4 main crimes against humanity according to the Rome Statute.

Secondly, jurisdiction of the ICC based on the decision of the UN Security Council in accordance with Chapter VII of the UN Charter and Article 13(b) of the Rome Statute, does not consider the nationality of the criminal and/or the location where the crime took place. As such, even though the state is not a member of the Rome Statute, it must still submit to the decision of the UNSC in accordance with state obligations under the United Nations Charter. However, the authority of the UNSC is only limited to referring cases to the ICC, while the ICC still holds the authority to determine its own admissibility - whether the situation or case referred to by the UNSC can be investigated by the Court. In this light, Indonesian citizens, even though they are not a member of the Rome Statute, can be brought to the ICC through UNSC decision.

Third, although the ICC has stated that it will prioritize cases of environmental damage that could have implications for bringing legal persons (i.e., corporations) to be prosecuted for environmental crimes, to date there is no such precedent, and the ICC seems reluctant to make new precedent by prosecuting corporations in the Cambodian Case.

In an era where environment-related human rights violations have reached shocking levels, where millions of poor people around the world have been violently affected by environment exploitation and being dispossessed of their land and homes, the ICC shall consider their crucial role in protecting mankind from mass human harm

<https://www.worldbank.org/en/news/feature/2015/12/01/indonesias-fire-and-haze-crisis>.

³³ "Indonesia punishes 23 companies for causing forest fires," *The Jakarta Post*, published December 23, 2015, <https://www.thejakartapost.com/news/2015/12/23/indonesia-punishes-23-companies-causing-forest-fires.html>.

³⁴ Raja Eben Lumbanrau, "Di mana ada tambang di situ ada penderitaan dan kerusakan lingkungan, nelangsa warga dan alam di lingkaran tambang," *BBC News Indonesia*, published June 7, 2021, <https://www.bbc.com/indonesia/indonesia-5734684>.

and environmental degradation. Multinational corporations must take this chance to revisit their business plans, recalculate profit and risk when intending to invest or purchase commodities sourced from areas affected by large-scale land disputes and environmental exploitation. Investors must consider involving local communities in business decision making and begin to promote human rights due diligence to their supply chains.

REFERENCES

- Arsenault, Chris. "Landless Cambodian Farmers Look to International Criminal Court for Justice." Reuters. Published November 22, 2016. <https://www.reuters.com/article/us-icc-cambodia-landrights-idUSKBN13H1J9>.
- Bassiouni, M Cherif. *Crime Against Humanity in International Criminal Law*. Leiden: Martinus Nijhoff Publication, 1992.
- "Cambodian Villagers' International Criminal Court Complaint (Re Land Grabbing)." Business and Human Rights Resource Centre. Published October 7, 2014. <https://www.business-humanrights.org/en/latest-news/cambodian-villagers-intl-criminal-court-complaint-re-land-grabbing/>.
- Charter of the United Nations, (signed June 26, 1945, entered into force October 24, 1945) 1 U.N.T.S. XVI.
- Clapham, Andrew. "The Questions of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court." In *Liability of Multinational Corporations Under International Law*, ed. Menno T. Kamminga and Saman Zia-Zarifi. Leiden: Brill, 2000.
- Durney, Jessica. "Crafting a Standard: Environmental Crimes as Crimes Against Humanity Under the International Criminal Court." *Hastings Environmental Law Journal* 24, no. 2 (2018).
- Global Diligence LLP. *ICC Cambodian Case Study* (Global Diligence).
- Global Diligence. "Land Grabbers May End Up In The Hague: Global Diligence Welcomes The ICC Prosecutor's New Case Selection Policy." Centre de Ressources sur les Entreprises et les Droits de l'Homme. Published September 15, 2016. <https://www.business-humanrights.org/fr/dernières-actualités/land-grabbers-may-end-up-in-the-hague-global-diligence-welcomes-the-icc-prosecutors-new-case-selection-policy/>.
- "ICC Issues a Warrant of Arrest for Omar Al Bashir President of Sudan (ICC-CPI-20090304-PR394)." International Criminal Court. Published March 4, 2009. https://www.icc-cpi.int/pages/item.aspx?name=icc+issues+a+warrant+of+arrest+for+omar+al+bashir+_+president+of+sudan.
- International Criminal Court. *Text of the Draft Statute for the International Criminal Court* (1998) UN Doc. A/AC.249/1998/CRP.9.
- "Indonesia's Fire and Haze Crisis." World Bank. Published November 25, 2015. <https://www.worldbank.org/en/news/feature/2015/12/01/indonesias-fire-and-haze-crisis>.
- "Indonesia punishes 23 companies for causing forest fires." The Jakarta Post. Published December 23, 2015.

- <https://www.thejakartapost.com/news/2015/12/23/indonesia-punishes-23-companies-causing-forest-fires.html>.
- “Joint Letter to UNHRC on Human Rights Situation in Cambodia.” Human Rights Watch. Published August 20, 2015. <https://www.hrw.org/news/2015/08/20/joint-letter-unhrc-human-rights-situation-cambodia>.
- Koalisi Masyarakat Sipil untuk Mahkamah Pidana Internasional. *‘Mengenal ICC’ Koalisi Masyarakat Sipil Untuk Mahkamah Pidana Internasional*. Jakarta: Sentralisme Production, 2009.
- Lumbanrau, Raja Eben. “Di mana ada tambang di situ ada penderitaan dan kerusakan lingkungan, nelangsa warga dan alam di lingkaran tambang.” BBC News Indonesia. Published June 7, 2021. <https://www.bbc.com/indonesia/indonesia-5734684>.
- Office of the Prosecutor. *Policy Paper on Case Selection and Prioritisation*. The Hague: International Criminal Court, 2016. https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.
- Office of the Prosecutor. *Report on Preliminary Examination Activities 2020*. The Hague: International Criminal Court, 2020. <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>.
- Office of the Prosecutor. *Twenty-Ninth Report Of The Prosecutor Of The United Nations Security Council Pursuant To UNSCR 159*. The Hague: International Criminal Court, 2005.
- Prosperi, Luigi and Jacopo Terrosi. “Embracing the ‘Human Factor’.” *Journal of International Criminal Justice* 15, no. 5, (2017).
- “Rekapitulasi Luas Kebakaran Hutan dan Lahan (Ha) Per Provinsi Di Indonesia Tahun 2016-2021.” Indonesian Ministry of Environment and Forestry. Accessed September 25, 2021. http://sipongi.menlhk.go.id/hotspot/luas_kebakaran.
- Rome Statute of the International Criminal Court, (adopted July 17, 1998, entered into force July 1, 2002) 2178 UNTS 3.
- Scheffer, David and Caroline Kaeb. “The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory.” *Berkeley Journal of International Law* 29, no. 1 (2011).
- Schmid, Evelyne. *Taking Economic, Social And Cultural Rights Seriously In International Criminal Law*. Cambridge: Cambridge University Press, 2015.
- “Situation in Darfur, Sudan (ICC-02/05).” International Criminal Court. Accessed September 21, 2021. <https://www.icc-cpi.int/darfur>.
- Smith, Tara. “Why the International Criminal Court is Right to Focus on the Environment.” *The Conversation*. Published September 23, 2016. <https://theconversation.com/why-the-international-criminal-court-is-right-to-focus-on-the-environment-65920>.
- Stop Ecocide Foundation. *Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text* (2021).
- United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum*. Rome,

April 14, 1998. UN Doc. A/CONF-183/2/Add-1.

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*. Rome, February 4, 1998. UN Doc. A/CONF.183/2.

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. *Working Group on General Principles of Criminal Law*. Rome, July 3, 1998.

UN Doc. A/CONF.183/C.1/WGGP/L.5/Rev.2.

UNSC Res 2408 (March 27, 2018) UN Doc. S/RES/2408.

UNSC Res 2429 (July 13, 2018) UN Doc. S/RES/2429.

Vidal, John and Owen Bowcott. "ICC Widens Remit to Include Environmental Destruction Cases." *The Guardian*. Published September 15, 2016. <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases>.