ANADOLU ÜNİVERSİTESİ | HUKUK FAKÜLTESİ DERGİSİ
ANADOLU UNIVERSITY | LAW JOURNAL
AndHD

Penalizing Environmental Harm: Merits, Limits and Alternatives(*)

Çevresel Zararı Cezalandırma: Avantajlar, Sınırlamalar ve Alternatifler

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Keywords

Ecocide,
Ecocrime,
Environmental Crimes,
Environmental Harm,
International Criminal Court,
Punishment,
Response.

Abstract

This article aims to take a substantive and tangible step towards bridging the aspects of International Environmental Law (IEL) and International Criminal Law (ICL) in responding to environmental harm. On this purpose, following a concise introduction to the aims of punishment and the justifications for penalties, the article firstly discusses the current approaches within the international system for penalizing and responding to environmental harm. It then critically analyzes the International Criminal Court (ICC) system, specifically its mechanisms for penalizing and responding to environmental harm, considering both its strengths and weaknesses. The analysis reveals that the ICC is not fully equipped with penalties or responses adequate for compensating environmental damage, primarily because its focus tends to be on the offender, rather than the victim. Afterwards, drawing upon alternative perspectives, the article offers several recommendations for relevant policy development and best practices. Finally, based on its findings, it underscores the importance of employing proactive, reactive and restorative tools within an ecocentric framework to develop a more robust structure equipped with more appropriate and effective penalties for adequately addressing environmental crime and the harm it engenders.

Anahtar Kelimeler

Ekokırım,
Ekosuç,
Çevre Suçları,
Çevresel Zarar,
Uluslararası Ceza Mahkemesi,
Karşılık.

Öz

Bu makale, çevreye verilen zarara karşılık verme hususunda Uluslararası Çevre Hukuku (UÇH) ve Uluslararası Ceza Hukuku (UCH) yönlerini birleştirmek için esaslı ve somut bir adım atmayı amaçlamaktadır. Bu amaçla, cezanın amaçları ve cezaların gerekçeleri hakkında kısa bir giriş yaptıktan sonra, makale öncelikle uluslararası sistemin çevresel zararı cezalandırma ve bu zarara karşılık verme konusundaki mevcut yollarını tartışmaktadır. Daha sonra, Uluslararası Ceza Mahkemesi (UCM) sistemini, özellikle çevresel zararı cezalandırma ve yanıtlama sistemini, hem yararları hem de sınırlarıyla sorgulamaktadır. Böylece, UCM'nin çevresel hasarı telafi etmek için gerekli cezalar/karşılıklarla donatılmadığını; odak noktasının suçludan ziyade mağdurda olması gerektiğini ortaya koymaktadır. Ardından, alternatif görüşlere atıfta bulunarak, ilgili politikaların ve iyi uygulamaların geliştirilmesi için bazı önerilerde bulunmaktadır. Son olarak, bulgularına dayanarak, çevre suçları ve bunların yol açtığı zararların yeterince ele alınmasına daha uygun ve etkili olabilecek cezalarla donatılmış bir yapının oluşturulması amacıyla ekosentrik bir yaklaşımla proaktif, reaktif ve onarıcı araçlara başvurmanın önemini vurgulamaktadır.

(*) Research Article.
This article has been subjected to peer review.
Submission Date: 01.05.2025, Acceptance Date: 25.06.2025.
This article has benefited from membership of the European Cooperation in Science and Technology (COST) Action, CA18228-Justice360 (Global Atrocity Justice Constellations).

I. INTRODUCTION

Based on the Policy Paper on Case Selection and Prioritisation published by the Office of the Prosecutor of the International Criminal Court (ICC) in September 2016[1], it was determined that the analysis of the seriousness of a crime should encompass its economic, social, and environmental impacts. This implied the potential for the ICC to hear and adjudicate cases of environmental destruction or environmental crimes. Following this Policy Paper, new discussions have emerged concerning various aspects of considering environmental impacts of crimes within the ICC, such as the necessity and feasibility of a proposed new crime and possible jurisdictional pathways within the Court. Indeed, this has initiated an intense debate on whether environmental crimes can be considered within the context of the three categories of mass atrocity crimes (ACs) under the Rome Statute, i.e., war crimes, genocide, and crimes against humanity[2]; or whether a new crime against the environment should be proposed. Further debate concerns whether the ICC can exercise jurisdiction over such cases, instead of remaining exclusively focused on the prosecution of the core crimes already subject to its jurisdiction, and whether the ICC can extend its jurisdiction to legal persons, such as multinational corporations, in addition to natural persons[3], thus including criminal liability of corporations.

Studies on the possibilities of recognizing 'ecocide' as a core international crime under the Rome Statute, which is defined as a crime based not only on human-centered harm but specifically environmental destruction and applicable in peacetime and non-armed conflicts, had already commenced in the 1970s, and have gained significant momentum through these notable developments within the ICC framework. While a substantial body of literature exists on environmental crimes, particularly with the recent surge of discussion surrounding 'ecocide' as a proposed new crime under the ICC, there is a relative lack of focus on the specific relationship between environmental crimes and atrocity crimes, with the issue of punishment at the core of the research. All these ongoing debates regarding the necessity and feasibility of a proposed new crime, i.e., the recognition of environmental damage as a crime under the Rome Statute, have also raised the question of effective legal responses to environmental damage and their practical application under both International Environmental Law (IEL) and International Criminal Law (ICL).

Beyond the *sui generis* features of IEL[4] and considering the unique characteristics of environmental problems as well and the urgency of the threats they pose, it becomes essential to seek novel legal responses capable of fostering behavioral change. As is well-established, legal responses to environmental damage under IEL primarily aim to promote compliance with multilateral environmental agreements (MEAs) through compliance mechanisms (CMs), rather than sanctioning violations, largely due to its self-contained regime structure. Environmental crimes are mentioned at the United Nations (UN) level primarily as components of transnational organized crimes, such as trafficking in waste, wildlife, flora and fauna (as seen in the United Nations Convention against Transnational Organized Crime, the Convention on International Trade in Endangered Species, and the Basel Convention). However, particularly in severe cases of environmental damage, criminal deterrence, condemnation, and punishment may be necessary as complementary tools to the preventive/ facilitative mechanisms of IEL.

At this juncture, a new discussion should also be initiated on the optimal approach to environmental damage: specifically, the penalties and legal responses that should be adopted against environmental dam-

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1 INTERNATIONAL CRIMINAL COURT (ICC): *Policy Paper on Case Selection and Prioritisation*, Office of the Prosecutor, 15 September 2016.

2 ICC: *Rome Statute of the International Criminal Court*, 17 July 1998, Articles 6-8.

3 Art.25, *Rome Statute*.

4 IEL is unique because it addresses not only state interests but also global concerns, and so requires cooperation among different multiple actors. It allows special treatment for developing and least developed states through the principle of differentiated responsibilities. Most importantly, unlike traditional dispute resolution methods, it heavily prioritizes a preventive approach and focuses on managing environmental problems. For details see SAVAŞAN, Zerrin: *Paris Climate Agreement: A Deal for Better Compliance? Lessons Learned from the Compliance Mechanisms of the Kyoto and Montreal Protocols*, Springer Nature, Cham, 2019, (Paris Climate Agreement), p.58-59.

age under the Rome Statute and the question of their effective implementation through the ICC jurisdiction. Therefore, the aim of this article is to examine potential modalities for penalizing and responding to environmental damage, focusing on their values, limitations, and alternative proposals. In this respect, following a brief introduction to the aims of punishment and the justifications for penalties, the article firstly explores current approaches in international law (IL) to penalizing and responding to environmental harm. It then discusses the extent to which and by what means environmental harm can be penalized and addressed under the current ICC system, with both its inherent limits and those specifically related to penalization. This analysis, by exposing and unpacking these limits and opportunities, attempts to assess the potential effectiveness of the ICC in this area. Moreover, it investigates alternative proposals developed by Draft Conventions on Ecocrimes and Ecocide. Finally, drawing upon these alternative proposals and its analysis of the merits and limits of the ICC, it provides several recommendations for policy development and best practices for penalizing and responding to environmental harm.

I. PURPOSES OF PUNISHMENT

The most prominent traditional theories of punishment-retribution, deterrence, and the expressivist approach- familiar from domestic legal systems, can also be employed to explain the justifications for and purposes of punishment for crimes under IL. Within the framework of retribution, punishment should be commensurate with the actual crime committed by the offender and its severity, adhering to the principles of fairness and proportionality. Crime deterrence aims to discourage future wrongdoing by instilling fear of the consequences in offenders (specific deterrence); consequently, punishment also serves as an example to the wider society to abstain from criminal acts (general deterrence). In contrast to punishing solely as recompense for the crime or to prevent future criminal conduct, the characterization of punishment from an expressive (communicative) approach is grounded in the moral reinforcement of the importance of the rule of law, normative challenges, and the secondary consequences of punishment[5].

However, due to inherent differences between the nature and the type of crimes committed in domestic and international contexts, as well as variations in perpetrators, victims, punishing authority, and procedures, the adaptability of these theories to ICL becomes questionable. A careful analysis of these differences, alongside the similarities and interconnected issues, is necessary. Existing literature addresses these points. To illustrate, *Elies van Sliedregt* discusses both the divergences and convergences between domestic and international criminal justice, focusing on what she terms the domestic analogy 'proper' and the domestic analogy 'of transplants'[6]. *Frank Neubacher*, in his work, addresses three interconnected issues: the purpose of punishment; the explanation of international crimes; and sentencing[7]. Some scholars also contend that theories from domestic law can be readily transferred to ICL, obviating the need for special theories addressing international crimes and punishment. Indeed, *Ambos* argues that, with certain limitations and acknowledging its non-schematic application, the domestic context can serve as a basis for ICL[8]. Similarly, *Bung* expresses scepticism regarding the distinctiveness of ICL, suggesting that, apart from the principles of sovereignty and non-intervention, there is no other aspect of punishment and crimes under ICL that necessitates fundamentally different consideration[9]. *Holtermann* echoes this view, arguing that the primary distinction lies in the absence of a superior power equipped with enforce-

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5 https://plato.stanford.edu/entries/legal-punishment/ (ET: 12.07.2025).

6 SLIEDREGT, Elies van: "Punishment and the Domestic Analogy, Why It Can and Cannot Work", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp. 81-102.

7 NEUBACHER, Frank: "Criminology of International Crimes", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp. 25-44.

8 AMBOS, Kai: "Not Much, but Better than Nothing - Purposes of Punishment in International Criminal Law", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp. 103-112.

9 BUNG, Jochen: "Is International Criminal Law Special?", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp. 129-134.

ment tools at the international level[10]. Current scholarship on these issues has yielded a multitude of distinct views and perspectives on the justification and purpose of punishment under ICL. For instance, *Kremnitzer*, while not dismissing deterrence, emphasizes retribution as a rationale for punishing international crimes, arguing for its moral justification and legitimacy based on its reference to the human dignity of both the victim and the offender, and the application of the principle of proportionality[11]. Conversely, *Drumbl* expresses skepticism about the efficacy of retribution, noting the potential for victims to also be perpetrators, thus creating their own victims, and questioning the appropriate punishment in such cases, as it is not something readily deliverable in a courtroom setting. *Holtermann* posits that international punishment has a deterrent effect, albeit without conclusive evidence, existing at levels of probability; however, the necessity of rational actors to achieve this deterrent effect limits its practical impact[12]. While *Rothe and Schoultz*[13] assume human nature, and thus humans, to be rational, it can be argued that such an assumption may overlook the structural and contextual factors influencing individual decision-making (e.g., organisational or cultural pressures). Thus, similar to *Pareto*'s observation, it might be considered that individuals rationalize their behavior after recognizing their irrational actions. Focusing on the communicative function and significance of international punishment, *Demko* develops the basic features of an expressive theory of punishment for international crimes, also explaining how retributive and preventive theories can be integrated into this framework[14]. *Günther* and *Drumbl* also express support for the expressivist theory, although *Drumbl* questions whether the courts are the appropriate venues for its practical application[15]. In his work, *Punishment, Communication and Community, Duff* introduces his theory of punishment as a process of communication, viewing it is as an exercise in moral training for both the defendant and the victim community, thus advocating for non-unilateral approach[16].

An analysis of international criminal tribunals, on the other hand, reveals that various justifications for the punishment of crimes are invoked within their respective jurisdictions, including retribution, deterrence, and rehabilitation[17], with retribution and deterrence being the most prominent. However, in practice, expressivism has emerged as an ultimate aim, striving to be the primary purpose of punishment[18]. Nevertheless, victim-centered restorative modalities[19] and sanctions other than incar-

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10 HOLTERMANN, Jakob v.H.: "Can I be Brought before the ICC?", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp. 137-160.

11 KREMNITZER, Mordechai: "An Argument for Retributivism in International Criminal Law", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp. 161-175.

12 DRUMBL, Mark A.: "We're Exhausting Ourselves, Let's Get Busy Instead", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, (We're Exhausting Ourselves), pp. 129-134.

13 ROTHE, Dawn L. / SCHOULTZ, Isabel: "International Criminal Justice, Law, Courts, and Punishment as Deterrent Mechanisms", (Ed.) LINT, Willem de / MARMO, Marinella / CHAZAL, Nerida: *Criminal Justice in International Society*, Routledge, New York, 2014, pp. 151-165.

14 DEMKO, Daniela: "An Expressive Theory of International Punishment for International Crimes", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp. 176-195.

15 GUNTHER, Klaus: "Positive General Prevention and the Idea of Civic Courage in International Criminal Law", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp.213-227.

16 DUFF, Anthony: *Punishment, Communication and Community*, Oxford University Press, Oxford, 2001.

17 KELLER, Andrew N.: "Punishment for Violations of İnternational Criminal Law: An Analysis of Sentencing at the ICTY and ICTR", *Indiana International & Comparative Law Review,* 2001, Volume 12, Number 1, pp. 53-74.

18 VASILIEV, Sergey: "Punishment Rationales in International Criminal Jurisprudence", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp. 45-80.

19 DRUMBL, Mark A.: *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007, (Atrocity, Punishment), p.62.

ceration are not yet effectively on the agenda[20]. Consequently, it is sometimes argued that expressive theory of punishment for international crimes "best capture[s] both the nature of international sentencing and its unique institutional capacity"[21]. This has led to a tendency towards the adoption of expressivist dimensions of punishment within the international criminal justice (ICJ) system, although these remain relatively weak[22]. Considerations such as reconciliation and reparations, rehabilitation, post-trial justice, and reintegration, which play crucial roles in domestic contexts[23], fail to be managed influentially under the ICJ, and are thus largely left to domestic laws[24]. Furthermore, permanently removing offenders from the community can impede restoration and reconciliation; but, for perpetrators of mass murder/atrocities, allowing their return and reintegration into the community after a period of exclusion may be exceedingly difficult[25]. Notably, as *Drumbl* also emphasizes, while reconciliation is supported as an objective in both theory and practice, assessing and measuring its generation through criminal trials is exceedingly challenging in practice. Adding to this ongoing debate, some perspectives emphasize the plurality of approaches that can be taken to international punishment, thus addressing the 'why punish' question[26], or the limited influence of theories of punishment on outcomes[27], or even questioning whether international punishment can be an effective response to mass atrocities[28].

In conclusion, through detailed investigation and debate, it becomes evident that while a range of theories exists under domestic criminal law, the issue of punishment under ICL, despite the existence of crucial relevant academic works on "the substantive crimes, the formation of institutions and their independence, and the impact of prosecuting these crimes on collective reconciliation and political transition"[29], remains very much in its nascent stage and requires further discussion and development. Indeed, not just academic works but also leading treatises on ICL, and international criminal tribunals -such as the International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY), and ICC- are not particularly rich when it comes to punishment and sentencing[30], resulting in limited academic and empirical knowledge on the subject. It is so natural that the existing body of prior research on environmental crimes and their punishment is also limited.

II. PENALIZING AND RESPONDING TO ENVIRONMENTAL HARM: CURRENT INTERNATIONAL LAW

IEL and ICL employ considerably different approaches to legal issues. Indeed, while ICL traditionally relies on dispute settlement and enforcement mechanisms to punish legal violations; IEL generally favors non-compliance mechanisms grounded in principles of flexibility, prevention, and facili-

20 SLIEDREGT, p.81-102.

21 SLOANE, Robert D.: "The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law", *Stanford Journal of International L*aw, 2007, Volume 43, pp.39-94. For a detailed discussion also on the expressive justice in ICL and its limits see SANDER, Barrie: "The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law", *International Criminal Law Review*, 2019, Volume 19, Number 6, pp. 1014-1045.

22 DRUMBL, *Atrocity, Punishment,* p.61.

23 HASSAN, Farooq: "The Theoretical Basis of Punishment in International Criminal Law", *Case Western Reserve Journal of International Law,* 1983, Volume 15, Issue 1, pp. 39-60.

24 See Erdemovic case, in which rehabilitation was taken into account when sentencing the defendant, see International Criminal Tribunal of Yugoslavia (ICYT): Prosecutor v. Erdemovic, Sentencing Judgment, ICTY, IT-96-22-T29 November 1996, para. 58.

25 SLIEDREGT, p.81-102.

26 TALLGREN, Immi: "The Question in International Criminal Punishment-Framing the Landscapes of Asking", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp. 113-128.

27 *Werle* and *Epik* disagree with this in their contribution. WERLE, Gerhard / EPIK, Aziz: "Theories of Punishment in Sentencing Decisions of the International Criminal Court", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp.323-352.

28 AMBOS, p.103-112.

29 DRUMBL, *We're Exhausting Ourselves*, p.129-134.

30 DRUMBL, *Atrocity, Punishment,* p.46-67.

tation. Nevertheless, exploring avenues of interaction between these two distinct systems may yield improved solutions, including penalizing environmental harm. This is because punishment, as a potentially just response to environmental harm, can play an important role in the development of a comprehensive and more systematic analytical framework for addressing legal violations that result in environmental harm.

A. International Environmental Law: Responses or Consequences

When environmental damage arises from a breach of an international obligation, seeking a remedy can be pursued through various international legal remedies: the law of treaties (LoT), responsibility, dispute resolution procedures (DSPs) and compliance mechanisms (CMs)[31].

Among these, the LoT principle dictates the unanimous suspension of a treaty's entry into force in the event of a fundamental breach by a party. In addition, it allows the party specifically affected by the violation to suspend, in whole or in part, its treaty relations with the defaulting state[32]. Nonetheless, it is often challenging to identify a specific party directly affected by a violation of environmental agreements. Moreover, regardless of the intentionality of the non-compliance, suspending the treaty is often counterproductive to bringing the non-compliant party back into compliance; because removing them from the system undermines the system's purpose and hinders control over the issues regulated within the treaty[33].

Similar to the LoT, international responsibility may not be ideally suited for environmental issues, for several reasons, the most important being that its consequences, like restitution and compensation, may be largely ineffective for irreversible or irreparable environmental harm[34]. Remarkably, there are very few examples of states bringing counter-claims against other states under rules of responsibility concerning environmental protection, environmental damage, etc. The most well-known case is the Trail Smelter case (1941)[35]. More recent cases, such as Argentina v. Uruguay (2010)[36] and Costa Rica v. Nicaragua/Nicaragua v. Costa Rica (2015)[37], focus on preventing transboundary environmental damage, and specifically address the impact of environmental impact assessments in this context. Different courts may play varying roles in resolving disputes arising from environmental issues at different scales (global, e.g. ICJ; regional, e.g. ECJ) and scope (in international trade, e.g. World Trade Organization (WTO) DSP; on law of the sea, e.g. International Tribunal for the Law of the Sea (ITLOS); arbitration of related disputes that may arise on matters related to natural resources and/or the environment, for example the Permanent Court of Arbitration; environmental crimes, e.g., the ICC etc.)[38].

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31 Their effective implementation related to the environmental issues in practice has many shortcomings. For details see SAVAŞAN, *Paris Climate Agreement,* p.60-68. For further information on CMs, CHAYES, Abram / CHAYES, Antonia Handler / MITCHELL, Ronald B.: "Managing Compliance: A Comparative Perspective", (Ed.) WEISS, Edith Brown / JACOBSON, Harold: *Engaging Countries: Strengthening Compliance with International Environmental Accords*, MIT Press, Cambridge, 1998, pp. 39-62; CHAYES, Abram / CHAYES, Antonia Handler / MITCHELL, Ronald B.: "Active Compliance Management in Environmental Treaties", (Ed.) LANG, Winfried: *Sustainable Development and International Law,* Nijhoff, London, 1995, pp. 75-89; CHAYES, Abram / CHAYES, Antonia Handler: *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, Cambridge, 1995; SAVAŞAN, Zerrin: "A Brief Assessment on the Paris Climate Agreement and Compliance Issue"*, Uluslararası İlişkiler Dergisi*, 2017, Volume 14, Number 54, (A Brief Assessment), pp.107-125; SAVAŞAN, *Paris Climate Agreement*.

32 UN 1969, Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, Article 60, para. 2.

33 For detailed information, see SAVAŞAN, *A Brief Assessment*; SAVAŞAN, *Paris Climate Agreement*.

34 Arts. 34-37, INTERNATIONAL LAW COMMISSION (ILC): Draft Articles on Responsibility of States for Internationally Wrongful Acts; See also KOSKENNIEMI, Martti: "Breach of Treaty or Non-Compliance? Reflection on the Enforcement of the Montreal Protocol", *Yearbook of International Environmental Law,* 1992, Volume 3, Issue 1, pp.123-162.

35 UN 2006. Arbitral Tribunal, Trail Smelter Case (United States, Canada), UN Reports of International Arbitral Awards, 16 April 1938 and 11 March 1941, Vol. III, pp. 1905-1982.

36 INTERNATIONAL COURT OF JUSTICE (ICJ): Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgement of 20 April 2010.

37 ICJ 2015. Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgement

38 For details on their relation to the environmental disputes, see SAVAŞAN, *Paris Climate Agreement*, p.60-68.

However, DSPs, consisting of not only judicial but also diplomatic instruments, are also not entirely adequate for addressing environmental problems for several reasons[39], including the non-binding and non-compulsory character of diplomatic ways, the multilateral nature of environmental problems contrasting with the bilateral structure of court systems; the challenge of bringing states before an international court due to political considerations; the slow and expensive nature of court proceedings lacking a preventive function; and the absence of effective enforcement and monitoring mechanisms[40].

IEL primarily operates through environmental regimes established on the basis of principles of inter-state negotiation and cooperation under MEAs[41]. Failure to comply with an MEA can affect not only the interests of a single state but also the interests of the entire international community. In addition, establishing a direct link between a state's non-compliance with environmental regulations and the state suffering damage from this action it is often very difficult, if not impossible[42]. Therefore, unlike traditional dispute resolution methods, IEL generally focuses more on resolving and managing potential conflicts before violations or damage occur, given the oftenirreversible nature of environmental destruction. While environmental harm could theoretically be addressed as any other internationally wrongful act are dealt with under international tribunals' jurisdiction, prevention takes precedence over sanctioning in IEL[43]. For instance, the UN Charter refers to 'measures' rather than 'sanctions' or 'penalties'. Similarly, MEAs typically use terms like 'measures'[44] or 'consequences' instead of explicit sanctions[45]. Thus, under their CMs, the fundamental aim is to support rather than punish. In other words, instead of imposing penalties on parties not acting in accordance with the agreements' provisions; the aim is to support them in rectifying the conditions that led to non-compliance and to prevent recurrence. Therefore, in these mechanisms, the mere failure to act in accordance is sufficient for the mechanism to be activated; a breach of the agreement and direct damage are not prerequisites[46]. Functioning through preventive and facilitative tools[47], these mechanisms employ both positive and

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39 UNITED NATIONS (UN): Rio Declaration on Environment and Development, 3-14 June 1992, Principle 26; UN: Charter of the United Nations, 1945, Art. 33(1).

40 BROWNLIE, Ian: *Principles of Public International Law*, Oxford University Press, Oxford, 2003; CHARNEY, Jonathan: "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea", *The American Journal of International Law*, 1996, Volume 90, Number 1, pp. 69-75; DOWNES, David / PENHOET, Braden: *Effective Dispute Resolution, A Review of Options, For Dispute Resolution Mechanisms and Procedures*, CIEL, Washington, 1999; FAURE, Michael G. / LEFEVERE, Jürgen: "Compliance with International Environmental Agreements", (Ed.) VIG, Norman J. / AXELROD, Regina S.: *The Global Environment: Institutions, Law and Policy*, CQ Press, New York, 1999; KOLARI, Tuula: *Promoting Compliance with International Environmental Agreements-An Interdisciplinary Approach with Special Focus on Sanctions*, Pro Gradu Thesis, Faculty of Social Sciences Department of Law University of Joensuu, Finland, 2002; WANG, Xueman / WISER, Glenn: "The Implementation and Compliance Regimes under the Climate Change Convention and Its Kyoto Protocol", *Review of European Community and International Environmental Law*, 2002, Volume 11, Issue 2, pp. 181-198; WERKSMAN, Jacob: "Designing a Compliance System for the UNFCCC", (Ed.) WERKSMAN, Jacob / CAMERON, James / RODERICK, Peter: *Improving Compliance with International Environmental Law*, Earthscan, London, 1996, pp. 85-112.

41 BODANSKY, Daniel / BRUNNÉE, Jutta / HEY, Ellen: "International Environmental Law, Mapping the Field", (Ed.) BODANSKY, Daniel / BRUNNÉE, Jutta / HEY, Ellen: *The Oxford Handbook of International Environmental Law*, Oxford University Press, Oxford, 2007, p.1-28.

42 HANDL, Günther: "Compliance Control Mechanisms and International Environmental Obligations", *Tulane Journal of International and Comparative Law*, 1997, Volume 5, Number 1, pp. 29-51; WANG/WISER, p.181-198.

43 ENDERLIN, Tim: "Alpine Convention, A Different Compliance Mechanism, What is a Compliance Mechanism?", *Environmental Policy and Law*, 2003, Volume 33(3-4), pp. 155-162; HUNTER, David / SALZMAN, James / ZAELKE, Durwood: *International Environmental Law and Policy*, Foundation Press, New York, 2002; JACOBSON, Harold K. / WEISS, Edith Brown: "Assessing the Record and Designing Strategies to Engage Countries", (Ed.) JACOBSON, Harold K. / WEISS, Edith Brown: *Engaging Countries: Strengthening Compliance with International Environmental Accords*, MIT Press, Cambridge, 1998, pp. 511-554.

44 The Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, Article 8.

45 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, Article 18.

46 For detailed analyses on CMs CHAYES / CHAYES; CHAYES/ CHAYES/ MITCHELL, "Managing Compliance"; CHAYES, CHAYES/ MITCHELL, "Active Compliance"; SAVAŞAN, *Paris Climate Agreement.*

47 INTERNATIONAL NETWORK FOR ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT (INECE): *Principles of Environmental Compliance and Enforcement Handbook*, Washington DC, 2009; KLABBERS, Jan: "Compliance Procedures", (Ed.) BODANSKY, Daniel / BRUNNÉE, Jutta / HEY, Ellen: *The Oxford Handbook of International Environmental Law,* Oxford University Press, New York, 2012, pp. 995-1009; TANZI, A. / PITEA, C.: "Non-Compliance Mechanisms: Lessons Learned and the Way Forward", (Ed.) TREVES, Tullio / PITEA, Cesare / TANZI, Atila / RAGNI, Chiara / PINESCHI, Laura: *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, Asser Press, The Hague, 2009, pp. 569-580.

negative measures to promote compliance. While supportive positive measures, such as advice from compliance agencies and technical/ financial assistance, are applied for non-compliance stemming from resource constraints; punitive measures, such as shaming, requests for additional information and/or suspension of the rights of the non-compliant party, suspension of operations, can be invoked for deliberate and continued non-compliance, although infrequently. In practice, negative or punitive measures are typically observed as a 'last resort' against non-compliant parties[48].

B. Penalizing Environmental Crime Under International Criminal Law

Recent academic literature features a substantial body of work on 'the substantive crimes, the establishment and independence of related institutions, and the social and political impacts of prosecuting these crimes etc.'[49]. However, the issue of punishment under the ICC remains largely underdeveloped and requires further discussion and elaboration[50]. Indeed, leading treatises on ICL and international criminal tribunals, including the ICTR, ICTY as well as the ICC, lack detailed provisions on punishment[51]. Consequently, there is limited academic and empirical knowledge on punishment within ICL. Given that environmental crimes are not currently central to this field; it is unsurprising that the issues surrounding the penalization of environmental harm have also received scant academic attention until recently.

Environmental crime, as is known, can occur at various levels (national/domestic-regional-international)[52]. These different levels of analysis yield diverse definitions of the concept, aligned with the varying applicable principles, institutions, procedures, and implementation methods. Each system can possess distinct mechanisms and identify specific environmental offenses punishable as criminal acts. Broadly, environmental crime is understood to encompass any act violating environmental laws, or so-called 'environmental protection statute'[53], and thus causing harm to the environment. In its widest scope, it can extend to include all illegal activities somehow related to the environment, such as illegal extractive activities (regardless of whether they affect protected areas or species) or legal activities that nonetheless result in environmental harm. For example, *Clifford* argues that environmental crime can be defined as any act committed with the intent to harm the ecological system for personal gain; or violating the law in a way that endangers human life, health or the environment itself, while serving the interests of companies or individuals[54].

The question of what constitutes international environmental crime (IEC) is also complicated, as there is no commonly accepted definition. The Independent Expert Panel conceptualizes ecocide as a situation where illegal or intolerable acts are committed despite knowledge of a significant likelihood that these acts will cause serious and "widespread or long-term" environmental damage[55]. It is argued that this definition of ecocide can establish criteria for identifying international environmental

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48 MALJEAN-DUBOIS, Sandrine / RICHARD, Vanessa: "Mechanisms for Monitoring and Implementation of International Environmental Protection Agreements", *Institut du Développement Durable et des Relations Internationales,* 2004, pp. 1-53.

49 DRUMBL, *Atrocity, Punishment*, p.2.

50 GENEUSS, Julia / JEßBERGER, Florian: "Introduction: The Need for a Robust and Consistent Theory of International Punishment", (Ed.) JEßBERGER, Florian / GENEUSS, Julia: *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp. 1-11.

51 DRUMBL, *Atrocity, Punishment*, p.46-67.

52 As an example to the regional dimension, see EU: Directive 2008/99/EC on the Protection of the Environment Through Criminal Law, 2008.

53 For a different definition of environmental crimes as "any act that violates an environmental protection statute", see SITU, Yingyi / EMMONS, David: *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment*, Sage Publications, London, 2000, p.3.

54 CLIFFORD, Mary: *Environmental Crime: Enforcement, Policy Social and Responsibility*, Aspen Publishers, Gaithersburg, 1998.

55 STOP ECOCIDE FOUNDATION (SEF): *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text, Commentary and Core Text*, 2021, (https://www.stopecocide.earth/legal-definition ET: 12.03.2025).

crimes[56]. This is because, adopting an ecocentric approach, it focuses not only on human needs and consequences directly affecting human survival and well-being; but also on the well-being of the overall natural environment. In some classifications, it is identified as the most severe form of environmentally harmful behavior within a hierarchical structure that categorizes and ranks environmental harms from minor to major ones according to their scale, intensity and irreversibility[57]. In line with this debate, green criminologists have further broadened the definitional scope of environmental harm to include harms resulting from activities not yet criminalized[58].

Despite this variety of definitions, two particularly prominent types of environmental crime exist at the international level: transnationally organized environmental crimes (TOECs) and crimes provided for under the Rome Statute (arts.6-8), often referred to as ACs (or core crimes)[59]. These can properly qualify as IECs if they result in environmental harm. In this context, there is no need for codified domestic law to punish and prosecute certain acts harmful to the environment; the ICC and the positive law upon which it is based serve as the ultimate source of their criminalization and prosecution. However, under a broader approach, both atrocity crimes and transnational crimes requiring domestic prosecution can be considered part of IECs[60], potentially providing a 'collective term' for all environmental criminal acts committed internationally[61].

At the UN level[62], IEC as a concept is primarily used for TOECs, which are generally defined across five broad areas of offenses regulated under international environmental treaties, involving illegal trade in wildlife, hazardous waste, logging, timber, fishing; unreported/regulated fishing; trafficking of ozone depleting substances[63].

These treaties also outline clear measures and penal prohibitions that should be applied by the parties[64]. Important bodies in this context include the Commission on Crime Prevention and Criminal Justice (under the Economic and Social Council (ECOSOC)), as the main policy-making body of the UN on crime prevention and criminal justice, and the Division of Environmental Law and Conventions (under United Nations Environmental Programme (UNEP)), as a specific body responsible for dealing with transnational environmental crimes[65]. Nonetheless, no specific overarching environmental regime on environmental crime exists. Moreover, current MEAs lack explicit or direct references to environmental crime or judicial cooperation in criminal matters, containing only indirect references

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56 KROTT, David: *The Ecocide-International Environmental Crime Nexus: When Can an International Environmental Crime be Called 'Ecocide'?*, 2021, (https://internationallaw.blog/2021/06/25/the-ecocide-international-environmental-crime-nexus-when-can-an-international-environmental-crime-be-called-ecocide, ET: 25.04.2025).

57 KROTT.

58 BENTON, Ted: "Rights and Justice on a Shared Planet: More Rights or New Relations?", (Ed.) SOUTH, Nigel: *Green Criminology*, Routledge, London, 2006, pp. 1-28; GIBBS, Carole / GORE, Meredith L. / MCGARREL, Edmund F. / RIVERS, Louie: "Introducing Conservation Criminology: Towards Interdisciplinary Scholarship on Environmental Crimes and Risks", *The British Journal of Criminology*, 2010, Volume 50, Issue 1, pp. 124-144; MEGRET, Frederik: *The Challenge of an International Environmental Criminal Law*, 2010, (https://ssrn.com/abstract=1583610, ET: 22.04.2025).

59 ICC: Rome Statute of the International Criminal Court, 17 July 1998, Articles 6-8.

60 MISTURA, Alessandra: "Is There Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework", *Columbia Journal of Environmental Law*, 2018, Volume 43, Issue 1, pp. 181-226; BRACK, Duncan: "Combating International Environmental Crime", *Global Environmental Change*, 2002, Volume 12, Number 2, pp. 143-147.

61 ZAGARIS, Bruce: "International Environmental Crimes", (Ed.) ZAGARIS, Bruce: *International White-Collar Crime*, Cambridge University Press, Cambridge, 2015, pp. 252-282.

62 For a different perspective questioning how the ecocrime debate affects the mandate of the principle of the responsibility to protect (R2P), also see: SAVAŞAN, Zerrin: "Rethinking of Ecocrime with the R2P Debate", (Ed.) SANCIN, Vasilka / KOVIČ DINE, Maša: *The Limits of Responsibility to Protect,* University of Ljubliana, Ljubliana, 2023, (Rethinking of Ecocrime), pp. 172-192.

63 UN Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1975; UN Montreal Protocol on Substances that Deplete the Ozone Layer, 1987; UN Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1992; UN International Convention for the Prevention of Pollution from Ships (MARPOL), 1973.

64 Art.4, MARPOL; Art.8, CITES; Art.4/4A, Basel Convention.

65 UNITED NATIONS GENERAL ASSEMBLY(UNGA): Resolution 1992/1; UNGA: Resolution 1992/22.

within their implementation-compliance provisions. The United Nations Convention against Transnational Organized Crime (UNCTOC) is also relevant, as it includes provisions on substantive criminalization, judicial investigation, and judicial cooperation in criminal matters. However, it does not specifically identify environmental crime as a pertinent global issue within the Convention's scope. Overall, this discussion reflects the somewhat blurred lines between IEL and ICL, as TOECs are regulated under IEL treaties and thus have clear links with IEL.

On the other hand, ACs -i.e. genocide, crimes against humanity and war crimes, as well as the crime of aggression (the 2005 World Summit Outcome Document extended it to incorporate ethnic cleansing through paras.138-139)-[66] are provided for under the Rome Statute of the ICC[67]. Thus, they are involved in the environmental crime debate through a specific Court and penalty mechanism, the ICC system[68], which will be discussed in greater detail in the following section[69].

III. THE ICC SYSTEM: MERITS AND LIMITS

The ICC is a criminal court possessing a distinct Statute, Rules of Procedure, and a penalty system applicable to violations of law resulting in environmental harm, particularly when such harm constitutes or is an integral part of a core crime. Indeed, considering the wide range and significant scale of environmental damage caused by individuals, corporations, and governments alike, it can be argued that the possible costs of inattention and underestimation of this harm can be substantial and far-reaching for humanity in the final analysis[70]. Furthermore, the magnitude of environmental harm, ecological destruction, and the financial/social costs they generate underscore the fact that environmental harm, ecological destruction, and the financial/social costs they generate underscore the fact that "environmental harm cannot [should not] be tolerated any longer"[71]. Additionally, recognizing that environmental protection should be a common concern of humanity, the ICC can also play a crucial role in promoting the argument that norms of environmental protection are *jus cogens* and that the interest in their implementation is *erga omnes*[72]. Thus, it offers the potential for "greater inclusiveness" than other international criminal tribunals, even at the investigatory stage[73]. Criminal law as applied by the ICC can lead to convictions and punishments that signify particular behavior as unlawful, potentially creating long-term deterrent and rehabilitative effects for both individuals offenders and society as a whole. Therefore, while the appropriateness of criminal penalties for environmental harm remains debatable, the threat of criminal prosecution, alongside the more flexible tools of IEL, can be a valuable means of addressing environmental destruction to ensure and improve compliance by deterring violations of environmental matters. Indeed, particularly for the most extreme and deliberate violations of environmental law, criminal condemnation and punishment may be necessary and yield effective outcomes[74]. Nonetheless, it is also crucial to focus more closely on the ICC system itself and understand its limitations, which can be broadly categorized in two dimensions: ICC system-specific limits and those related to penalizing.

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66 UN: World Summit Outcome Document, 2005 (paragraphs 138 and 139).

67 Articles 6-8, Rome Statute.

68 COCHRAN, Joshua C. / LYNCH, Michael J. / TOMAN, Elisa L. / SHIELDS, Ryan T.: Court Sentencing Patterns for Environmental Crimes", *Journal of Quantitative Criminology*, 2018, Volume 34, Number 1, pp. 37-66.

69 UN: *Framework of Analysis for Atrocity Crimes - A Tool for Prevention*, 2014.

70 COCHRAN / LYNCH / TOMAN / SHIELDS, p.40.

71 RAUXLOH, Regina: "The Role of International Criminal Law in Environmental Protection", (Ed.) BOTCHWAY, Francis N.: *Natural Resource Investment and Africa's Development*, Edward Elgar, Cheltenham, 2011, pp. 423-461.

72 See BASSIOUNI, Mahmoud Cherif: "International Crimes: *Jus Cogens and Obligatio Erga Omnes*", *Law and Contemporary Problems*, 1996, Volume 59, Number 4, pp. 63-74; GOULD, Harry D.: *The Legacy of Punishment in International Law*, Palgrave Macmillan, New York, 2010, pp. 45-108; ORAL, Nilüfer: "Environmental Protection as a Peremptory Norm of General International Law, Is It Time?", (Ed.) TLADI, Dire: *Peremptory Norms of General International Law (Jus Cogens)*, Bril-Nijhoff, Leiden, 2021, pp. 575-599.

73 DRUMBL, *Atrocity, Punishment*, p.13.

74 GREENE, Anastacia: "The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?", *Fordham Environmental Law Review*, 2019, Volume 30, Number 3, pp. 1-48; MEGRET, Frederic: "The Problem of an International Criminal Law of the Environment", *Columbia Journal of Environmental Law*, 2011, Volume 36, pp. 195-257.

A. ICC System-specific Limits

Under the current ICC system, the Court can primarily exercise jurisdiction over core crimes committed on or after 1 July 2002. Moreover, several other preconditions must be met for the Court to exercise its jurisdiction, including an age requirement (the Court has no jurisdiction over individuals under the age of 18 at the time of the act); the state being a party to the Statute[75]; the absence of a reservation by state parties to the Statute; and the acceptance of jurisdiction by a non-party state to the Statute[76]. Consequently, ratification of the Rome Statute is crucial for the ICC's application[77], as it has jurisdiction is principally based on crimes committed by a national of a state party, on the territory of a state party, or in a state that has accepted the Court's jurisdiction. The ongoing challenges of securing countries' ratification can also cause the ICC's ability to support work on the development of environmental crimes to be questioned by both its parties and other states[78]. They can highlight the considerable hurdles in achieving widespread acceptance and effective implementation of the ICC's mandate, which are critical considerations when contemplating its role in addressing complex issues like environmental crimes. The ICC's case-law indicates that, while the Court has initiated more cases outside of Africa recently, including Afghanistan, Georgia, and the Palestinian territories, it still prosecutes a greater number of perpetrators from the African continent[79]. This creates a perception that the Global North has been excluded from the scope of criminal responsibility[80]. Moreover, its jurisdiction is limited to crimes committed after the entry into force of the Rome Statute on 1 July 2002[81]. Accordingly, given the limitations of its current system, the ICC's legitimacy, fairness, and credibility are already generally contested[82]. Additionally, as the environment is not conceptualized as a collective victim, a specific crime against the environment has not been included in the Rome Statute as an autonomous international crime[83]. The ICC is exclusively concerned with the prosecution of the core crimes subject to its jurisdiction[84]; i.e., genocide, war crimes, crimes against humanity, and crimes of aggression[85], if they cause severe consequences for human beings[86]. Thus, in practice, there is very limited scope for successfully prosecuting environmentally destructive acts through these existing

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75 The jurisdiction of the ICC may also be exercised upon referral by the United Nations Security Council (UNSC), which eliminates the requirement for a state to be a party to a relevant situation. See Art.13b, Rome Statute.

76 Articles 12, 26, 44, 124, Rules of Procedure and Evidence.

77 Arts.11-13, Rome Statute.

78 In fact, a number of significant countries, including Indonesia, China, Pakistan, India, and the USA have not even signed the Rome Statute. Furthermore, some signatory states, such as Israel, Egypt, and Iran, have yet to ratify it, further limiting its reach. Notably, only two of the UNSC's permanent members, the UK and France, are members of the ICC. Moreover, the ICC's authority has been further challenged by the withdrawal of several parties, including Burundi, Gambia, and South Africa in October 2016, followed by Russia in November 2016 (see Art.27, Rome Statute).

79 BA, Oumar: *A Truly International Criminal Court, Why the New Prosecutor Should Look Beyond Africa*, 2021 (https://www.foreignaffairs.com/articles/africa/2021-06-18/truly-international-criminal-court, ET: 07.05.2025).

80 KILLEAN, Rachel: *The Benefits, Challenges, and Limitations of Criminalizing Ecocide*, 2022, https://theglobalobservatory.org/2022/03/the-benefits-challenges-and-limitations-of-criminalizing-ecocide/, ET: 07.05.2025).

81 Arts. 11, 22, 24, Rome Statute.

82 FINDLAY, Mark / HENHAM, Ralph J.: *Beyond Punishment: Achieving International Criminal Justice*, Palgrave Macmillan, Basingstoke, 2010, p.17.

83 In the Draft Code Involving Crimes Against the Peace and Security of Mankind, in Article 26, there is a reference to potential environmental crime and its sentence on the basis of the conviction. ILC: Draft Code Involving Crimes Against the Peace and Security of Mankind, Yearbook of the International Law Commission, 1996, vol. II (Part Two).

84 Arts.6-8, Rome Statute.

85 For similar provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), see Art. 35(3) prohibiting any ways of warfare that can cause 'widespread, long-term and severe damage to the natural environment'; Art. 55(1) adding a ban on damage to the natural environment that is detrimental to the health or survival of human beings. UN: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 1977.

86 SMITH, Tara: "Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law", (Ed.) SCHABAS, William / MCDERMOTT, Yvonne / HAYES, Niamh: *The Ashgate Research Companion to International Criminal Law, Critical Perspectives,* Routledge, London, 2013, pp.45-62.

crimes[87]. If ecocide were to become one of the core crimes, then extreme harm directly caused to the environment could also be prosecuted; however, until that time, it can only be considered within one of the existing core crimes of the Rome Statute, most likely, crime against humanity[88]. Amending the Statute to adopt a new offense based on Article 121[89] can also be a protracted process, for example, it took twenty years (1998 to 2018) to define and approve the crime of aggression. Furthermore, in line with the principle of individual criminal responsibility[90], only natural persons can be subject to the ICC's jurisdiction. A proposal to grant the ICC jurisdiction over legal entities was rejected on the grounds that it would conflict with the ICC's complementarity to domestic jurisdiction[91]. This poses a challenge as multinational corporations (MNCs) are often the legal persons most frequently implicated in environmental crimes, and may remain outside the ICC's mandate (individuals working for MNCs are within the mandate in line with Article 25(3), as exemplified by Case No. 9, the Zyklon B case)[92].

B. Limits Related to Penalizing

Through its existing penalties, the ICC can penalize or respond to environmental harm using imprisonment and fines (art.77), reparations (art. 75) and the Victims' Trust Fund (VTF) (art.79)[93]. Specifically, the ICC can sentence an offender to imprisonment for up to thirty years, in addition to a fine, with the possibility of life imprisonment in certain circumstances[94]. Enforcement is subject to the ICC's review; however, it lacks its own police force or enforcement body to ensure the fulfilment of its requests for the presence of investigated persons, victims, and witnesses, as well as for making arrests, freezing suspects' assets, and enforcing sentences, unlike domestic criminal justice systems[95]. Therefore, it must rely on the cooperation of concerned states to obtain any evidence, suspects, or witnesses for ongoing investigations[96]; consequently, states parties share responsibility for the execution of sentences in accordance with the Rules of Procedure and Evidence[97]. The ICC may also decide to grant restitution, compensation, and rehabilitation to victims[98]. The VTF can play an important role here, as the Court can order the transfer of money and property obtained through fines and confiscations to this fund, which has already been established through compensation decisions against convicts and voluntary donations from organizations and governments for the benefit of crime victims[99]. This allows victims to recover lost funds from perpetrators. However, the Fund's impact on perpetrators and its contribution to society's sense of justice are not easily understood and assessed[100].

In short, through its limited penalty range (imprisonment and fines), the Statute lacks preventive measures, like ordering an interim injunction to prevent damage before it occurs, or provisional

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87 BUSTAMI, Ammar / HECKEN, Marie-Christine: "Perspectives for a New International Crime Against the Environment: International Criminal Responsibility for Environmental Degradation under the Rome Statute", *Goettingen Journal of International Law*, 2021, Volume 11, Number 1, pp. 145-189.

88 SAVAŞAN, *Rethinking of Ecocrime*, pp.172-192.

89 GREENE, p.1-48.

90 Art.25, Rome Statute.

91 ORTS, Eric W.: "Human Rights, the Environment, and Corporate Accountability", (Ed.) ANTON, Donald K. / SHELTON, Dinah L.: *Environmental Protection and Human Rights*, Cambridge University Press, Cambridge, 2012, pp.863-976.

92 British Military Court (BMC): Case No. 9, the Zyklon B, Case Trial of Bruno Tesch and Two Others Gr. Brit. Military 93, 1946; MEZA, Juan Pablo Calderon: *ICC Personal Jurisdiction on Corporations for Criminal Liability and/or Civil Liability for Reparations*, (https://harvardilj.org/, ET: 20.04.2025)

93 Art. 75, 77, 79, Rome Statute. See also SLIEDREGT, Elies van: One Rule for Them - Selectivity in International Criminal Law, *Leiden Journal of International Law,* 2021, Volume 34, Issue 2, pp.283-290.

94 Art. 77(1(b), Rome Statute.

95 Arts. 54-58, Rome Statute.

96 Arts.103-111, Rome Statute. See also ROTHE/SCHOULTZ, p.151-165.

97 Rules 198-225, Rules of Procedure.

98 Art.75, Rome Statute.

99 Art. 79, Rome Statute.

100 DRUMBL *Atrocity, Punishment,* p.53.

measures like those under the ICJ Statute[101]. Restorative and reintegrative methods are also not frequently employed[102], thereby excluding local values and individuals most traumatized by the criminality[103]. Notably, these penalties and measures are directed only at individuals rather than the ecosystem affected by the harm. Moreover, the two fundamental documents forming the basis of the ICC's positive law, the Rome Statute and the Rules of Procedure and Evidence, do not provide detailed explanations of the punitive purposes referred to in the Statute's preamble. These texts do not clarify, first of all, how retributive, deterrent or expressive goals can be operationalized in the application of punishment. Moreover, they offer no specific guidance on how punishment and retribution can be applied to crimes that cause environmental harm in particular. The ICC Rules of Procedure and Evidence merely outline the elements to be considered in determining an appropriate punishment, including the nature of the harm, the degree of the intent, and the extent of the damage[104]. It can be argued, on the other hand, that this level of generality is normal and perhaps unavoidable for the statute of an international criminal court. In addition, it puts forward aggravating factors such as persecution, abuse of office, personal characteristics of the convict and criminal record, duration and repetition of the crime, and financial gain from the crime; and mitigating factors including cooperation and compensation to victims, the victim's vulnerability, and the convict's cognitive capacity[105]. The use of and weight attributed to any of these factors is expressly discretionary. In other words, since there is no clear guidance on which criteria to use in assessing the severity of environmental crimes and determining the appropriate penalty in different types of cases, judges must make decisions using their judicial discretion[106]. However, judges and prosecutors working for the ICC may lack the specialized knowledge required to properly investigate and decide on environmental issues. Given that environmental crimes do not currently fall within the Court's jurisdiction, it is reasonable for their expertise to lie primarily in criminal law or humanitarian law[107]. Nevertheless, considering the possibility of environmental crimes becoming part of this system in the long term, and even if they do not, the emerging connections between core crimes and environmental destruction necessitate preventing crucial oversights due to inadequate environmental understanding. Therefore, it can be argued that possessing the necessary expertise to impose penalties likely to deter potential perpetrators of environmental crimes in the future should be among the qualifications sought for those working at the ICC.

IV. ALTERNATIVE PROPOSALS & RECOMMENDATIONS

A. Alternative Proposals: Draft Conventions

Drawing upon Draft International Conventions on both ecocrimes and ecocide, developed by a multidisciplinary team of legal experts specializing in criminal law, human rights law, and environmental law[108], there appears to be a discernible trend towards transcending the limitations of the current system. These drafts aim to bridge related disciplines and enhance the existing framework through

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101 UN: Statute of the International Court of Justice (ICJ Statute), 1945, Art. 41(1-2).

102 For detailed information on the reintegrative shaming theory emphasizing the importance of shame in criminal punishment focusing on the offenders behavior rather than the characteristics of the offender or the actual crime committed, developed by Australian criminologist John Braithwaite, see ROSE, Matthew: *Criminal Law: Theories of Punishment*, 2019, (https://ourpolitics.net/criminal-law-theories-of-punishment, ET: 13.04.2025).

103 DRUMBL, *Atrocity, Punishment*, p.14.

104 Art.78, para.1, Rome Statute.

105 Rule 145(1(c); 2(a, b). See also KELLER, p.53-74.

106 DRUMBL, *Atrocity, Punishment,* p.52.

107 DRUMBL, Mark A.: "International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?", *International Law Students Association Journal of International & Comparative Law,* 2000, Volume 6, Issue 2, pp. 304-341.

108 NEYRET, Laurent: *The Texts of the Draft Conventions (Part I), From Ecocrimes to Ecocide, Protecting the Environment Through Criminal Law*, 2016, pp. 1-42.

diverse and novel proposals[109]. These draft conventions also incorporate provisions on penalties that can be imposed using different justice approaches-preventive, punitive, and restorative-depending on the specific circumstances of the perpetrators, who may be natural or legal persons[110].

Under the Draft Ecocrimes Convention (DEC 1), for sentencing natural persons and determining the appropriate penalty level, states should consider criteria such as[111]: whether there was financial gain from the crime; the perpetrator's level of responsibility; the promptness and duration of compensation reparation efforts; and whether the crime was organized. The Draft Ecocide Convention (DEC 2), in addition to these provisions, proposes that states can make ecocide punishable by imprisonment, monetary fines, and confiscation of proceeds, property and assets, with the severity of the penalty determined by the gravity of the crime[112]. The aforementioned drafts also include a non-exhaustive list of penalties that may be imposed on legal entities, such as prohibition, publication of conviction, fines, and the appointment of a judicial officer. They further establish benchmarks for determining penalties for legal entities, including the economic benefit derived from the violation and whether the environmental crimes were repeated or organized[113]. Notably, under the Draft Ecocrimes Convention, legal persons that duly comply with their internal organizational measures and voluntarily and promptly inform the authorities about the crime or compensate the resulting damage may avoid prosecution, punishment, or sentencing[114]. Additionally, mirroring Article 12 of the UNCTOC, both draft conventions contain a provision allowing for the confiscation of proceeds, property, equipment, or other means used or intended for use in the commission of these crimes[115]. Both drafts also emphasize taking measures for the restoration of environmental damage and for providing compensation to victims[116]. In line with this restorative justice approach, the establishment of guidelines on relevant measures for environmental restoration; compensation for environmental damage; compliance schedules; and symbolic reparation measures (like apologies to affected communities; local development measures; and the establishment of an international self-sustaining fund, potentially supported by developed countries or corporations, for compensating environmental harm and financing future environmental projects) is also proposed[117]. Both draft conventions include a specific section on preventive measures, particularly emphasizing international cooperation through information exchange and training for relevant personnel working with perpetrators and victims[118]. More specifically, to combat ecocide, a group called the Research and Enquiry Group on Environmental Matters will be created under the DEC2 framework to investigate and monitor cases of environmental crimes[119]. Countries party to the Convention will be obligated to actively cooperate with the proposed new independent body, the International Office for Prosecuting the Environment[120]. Both draft Conventions also outline other forms of cooperation that could enhance the system, such as reciprocal legal assistance in criminal investigations, prosecution phases, and judicial proceedings based on the principle of reciprocity[121], as well as the possibility of extradition, regardless of its inclusion in national laws and subject to the relevant requirements of

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[109] FOUCHARD, Isabelle / NEYRET, Laurent: "A Consolidated Report Containing 35 Proposals for a More Effective Punishment of Crimes Against the Environment (Part II), From Ecocrimes to Ecocide", *Protecting the Environment Through Criminal Law*, 2016, pp. 43-155.

[110] Art. 7, Draft Ecocrimes Convention (DEC1); Art. 6, Draft Ecocide Convention (DEC2); Arts. 8-11, DEC1; Arts. 7-9, DEC2.

[111] Article 7 (2), DEC1.

[112] Art. 6(2), DEC2.

[113] Art.8, 9(3), DEC1; Art. 7, 8(3), DEC2.

[114] Art.10, DEC1.

[115] Art. 10-11, 23, DEC1; Art. 9, DEC2.

[116] Art. 7, 8 (1, 3), DEC1; Art. 6, 7(1, 3), DEC2.

[117] FOUCHARD/NEYRET, p.125-128.

[118] Art.7(4),18, DEC1; Art.8(4), art.19-20, DEC2.

[119] Art. 20, DEC2.

[120] Art. 16(2), 17, DEC2.

[121] Art. 17, DEC1; Art. 15, DEC2.

those laws[122]. Article 18 of DEC2 also represents an initial step towards the establishment of a special environmental criminal court, complementing national judicial mechanisms for the crime of ecocide[123]. While a detailed discussion on the necessity and feasibility of establishing such a court for environmental crimes falls outside the scope of this article, its mention is significant as it opens a new avenue for the environmental crimes debate. Consequently, while these proposals offer only a preliminary overview of a highly complex situation, they suggest potential pathways for overcoming environmental destruction, at least attempting to do so, through effective responses and a punishment system that can complement IEL tools. However, further exploration is necessary to determine which responses and sanctions will be the most acceptable, applicable, and effective for international environmental crimes.

B. Recommendations

The existing penalizing tools available at the ICC appear inadequate for truly addressing the wrongdoing caused by environmental crime or for satisfying the interests of the environment as a victim. Two fundamental reasons for this are:

- The practical effect of the penalties available under the ICC Statute is questionable with regard to environmental crime, as they largely exclude or disregard the prevention, recovery, or remediation of environmental harm.
- There is currently no international crime against the environment as a separate offense in the Statute, and the existing core crimes can only address environmental harm insofar as it is linked to harm inflicted upon human beings[124].

It is more logical, especially from a practical standpoint, to develop an alternative perspective for responding to and punishing environmental crimes. This alternative should, first and foremost, involve tools for penalizing and responding to environmental crimes that encompass aspects of prevention (deterrent potential), reaction (punitive potential), and rehabilitation (repairing/remediation potential)[125].

As thoroughly discussed above, these elements are not inherently in conflict with the most prominent traditional punishment theories -retribution[126], deterrence[127] and the expressivist approach[128] or pluralist perspectives-[129] originally developed in domestic contexts; but also used to justify and explain the purposes of punishment for crimes under international law (IL)[130]. However, there are some pitfalls and weaknesses in the practical application of these theories to international crimes in general. Indeed,

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122 Art. 16, DEC1; Art. 14, DEC2.

123 FOUCHARD/NEYRET, p.137.

124 ENGELHART, Marc / ROKSANDIĆ, Suncana: "Beyond Classic Core Crimes: International Criminal Law for the Protection of Mankind-Economic and Environmental Crimes as International Crimes", (Ed.) CAPALDO, Giuliana Z.: *The Global Community Yearbook of International Law and Jurisprudence*, Oxford University Press, Oxford, 2022, pp. 261-288; SLIEDREGT, pp.283-290.

125 GENEUSS / JEßBERGER, pp.1-11.

126 KREMNITZER, pp.161-175.

127 HOLTERMANN, pp. 137-160.

128 DEMKO, pp. 176-195.

129 In his obligation-based preventive model, i.e., *"cosmopolitan pluralism",* which is is mobilized through a variety of bottom-up methods by designing a coordinated mix of sanctions scaled for each atrocity; while there is tension in the sense of mediating between the universal and the particular, *Drumbl* suggests two synergistic reforms (vertical-horizontal) drawn from cosmopolitan theory relying on the existence of a single moral community for all human beings. DRUMBL, *Atrocity, Punishment,* p.181-205. For views stating that a plurality of perspectives could be taken with respect to international punishment, and so to answer the 'why punish' question. TALLGREN, p.113-128; or to address the lack of influence of theories of punishment on the outcome. AMBOS, p.103-112; or to question if international punishment can be an effective answer to mass atrocities. DRUMBL, *We're Exhausting Ourselves*, p.129-134.

130 Besides differences between the nature/type of crimes committed in domestic and international contexts (the perpetrators, the victims, the punishing authority, the procedures etc.), there is also need for a careful analysis of similarities and interconnected issues between them, see at: BUNG, p.129-134; NEUBACHER, p. 25-44; SLIEDREGT, p.81-102; HOLTERMANN, pp.137-160.

an analysis of the sentencing practices of international criminal tribunals reveals a primary focus on retribution and deterrence rather than rehabilitation[131]. Moreover, while expressivism has emerged as a recognized purpose or consequence of punishment[132] and has been recognized as ideally suited to address international sentencing[133]; victim-centered restorative modalities and sanctions alternative to incarceration are not yet effectively integrated and remain comparatively underdeveloped[134]. Assessing and measuring the reconciliatory impact of international criminal trials has also proven exceedingly difficult in practice[135]. Consequently, despite judicial consideration of reconciliation and reparations, rehabilitation, post-trial justice, and reintegration, which play crucial roles in domestic contexts[136]; these appear to have been managed ineffectively under the ICC, and are largely left to domestic laws.

Accordingly, the current ICC system, which includes retributive and restorative justice processes and outcomes already faces challenges in punishing and responding to damages. Addressing environmental damage necessitates a system capable of implementing not only punitive but also preventive measures (e.g. ordering interim injunctions) and rehabilitative or remedial measures (e.g. ordering the rehabilitation of polluted sites, offender training, community-based measures such as contributions to the VTF, participation in or working for environmental projects, etc.)[137]. In terms of reactive/retributive penalties, alternative proposals beyond mere fines and imprisonment can be considered. These could include forcing the closure of companies causing pollution; prohibiting the use of harmful materials or the removal of waste; covering the costs of environmental harm including rehabilitation; compelling offenders to financially support environmental organizations for a specified period or to volunteer with such organizations, or acknowledging the negative consequences of their actions through public service announcements (carefully avoiding measures that permanently isolate offenders from the community, as this can hinder reconciliation and their eventual reintegration)[138]. Activities such as self-reporting, self-policing, self-auditing, voluntary disclosure, and remedial action for environmental violations, already employed in some domestic laws, could also be considered as mitigating factors[139]. Furthermore, those tools should be grounded in an ecosystem approach that penalizes destruction impacting not only human beings but also the environment/ecosystem itself. Both the establishment and the practical application of these tools should take into account the *sui generis* features of environmental issues reflected in IEL, requiring the application of principles of flexibility, prevention, and facilitation. Under these conditions, proactive, reactive, and restorative tools adopted within an ecocentric framework can play a significant role in developing a comprehensive and systematic mechanism for addressing violations of the law that result in environmental harm. Nevertheless, it is crucial to specifically note that penalties imposed by relevant mechanisms like the ICC must be appropriate and proportionate to the environmental crime[140]. Measuring and determining the relevance and proportionality of penalties to the crime is often very difficult and can be even more complex and complicated for environmental crimes. However, some insights can be gleaned from recent proposals and other approaches to combating environmental crime. For all of this to materialize, the following measures may be beneficial to consider: overcoming gaps in positive law (both substantive and proce-

131 KELLER, pp.53-74.

132 VASILIEV, pp.45-80.

133 SLOANE, pp.39-94. For a detailed discussion also on the expressive justice in ICL and its limits see SANDER, p.1014-1045.

134 DRUMBL, *Atrocity, Punishment*; HASSAN, pp.39-60; SLIEDREGT, pp.81-102; VASILIEV, pp.45-80.

135 DRUMBL, *We're Exhausting Ourselves*, pp.129-134.

136 HASSAN, pp.39-60

137 For a relevant decision, with all apologies and admissions of responsibility made by Kaing Guek Eav during the trial, including the appeal phase, see EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC): Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007-ECCC/SC, 3 February 2012.

138 SLIEDREGT, pp.81-102.

139 RAUXLOH, pp.423-461.

140 BANKS, Debbie / DAVIES, Charlotte / GOSLING, Justin / NEWMAN, Julian / RICE, Mary / WADLEY, Jago / WALRAVENS, Fionnuala: Environmental Crime, A Threat to Our Future, Environmental Investigation Agency, Emmerson Press, London, 2008.

dural), harmonizing responses and penalties for environmental crimes; ensuring effective, proportionate (considering the violation's seriousness, the perpetrator's error/defect, and the environmental harm), and deterrent (for both perpetrators and potential ones) penalties; incorporating problem-solving features in detection and investigation phases; avoiding vague legal definitions and gaps in enforcement/prosecution phases; providing more detailed requirements/ precise guidelines on the assessment/ type/ level of punishment to minimize the need for high-level discretion; and ensuring no impunity for offenders and those complicit (through inciting, aiding, and abetting) in the commission of environmental crimes. The ways proposed here may necessitate certain changes, such as amending the Rome Statute to incorporate these options (either directly or through an Annex, Protocol etc.), adopting a new treaty, establishing a completely different court with the power to enforce these measures, or reforming the ICC in line with these changes. For any of this to become reality, it is first and foremost fundamental that penalizing and responding to environmental harm during relevant phases (prevention, investigation, detection, prosecution, punishment, enforcement, monitoring, etc.) should be prioritized both legally and politically by states.

V. CONCLUSION

While numerous studies have significantly contributed to the literature on environmental crimes, a holistic view reveals a relative scarcity of precise information on how the ICC can effectively address the issue of penalizing and responding to environmental harm. Indeed, it remains premature to have substantial data on how environmental cases will be handled and resolved by the ICC, their impact on environmental crimes, and their success in meeting expectations. However, considering the evaluation of the crime of aggression and the current debates surrounding ecocide, it is plausible to argue that the ICC's official jurisdiction has the potential for long-term expansion to include ecocide. Nevertheless, given the *sui generis* features of environmental issues and international environmental law previously discussed, punishing or sanctioning methods alone are unlikely to be the most appropriate response for more effective environmental protection. Consequently, environmental harm cannot be adequately addressed solely through the ICC's criminal penalties. However, the ICC can serve as a powerful complement to the evolving law on environmental protection, recognizing it as a common concern of humanity that necessitates both environmental law and criminal law responses.

As previously mentioned, the legal responses to environmental harm available under IEL do not primarily aim to sanction violations. Instead, they focus on promoting compliance with MEAs through CMs, inherent to IEL's self-contained regime structure. While the concept of environmental crime is referenced within the context of TOCs, like trafficking in waste, wildlife, flora and fauna, severe cases of environmental harm may necessitate criminal deterrence, condemnation, and punishment as supplementary tools to IEL's preventive and facilitative mechanisms. The ILC acknowledged the need for severe penalties against serious environmental harm in its 28th session's report[141], equating significant acts of environmental degradation with crimes such as slavery, genocide, and apartheid[142]. Indeed, in the face of a global challenge like environmental protection, where time is of the essence, relevant environmental crimes must be met with severe penalties, especially when committed intentionally or through gross negligence. In this regard, streamlining necessary proactive, reactive, and restorative tools within an ecocentric approach that utilizes IEL's principles of flexibility, prevention, and facilitation can be proposed as a reasonable and feasible solution for responding to environmental harm under the ICC.

[141] INTERNATIONAL LAW COMMISSION (ILC): "Report of the International Law Commission on its Twenty-Eighth Session", *Yearbook of the International Law Commission*, 1976, Volume 2, Part 2, pp. 95-96.

[142] BERAT, Lynn: "Defending the Right to Healthy Environment: Toward Crime of Genocide in International Law", *Boston University International Law Journal*, 1993, Volume 11, Number 2, pp. 327-348.

Considering that criminal prosecution by the ICC, in addition to the more flexible tools of IEL, can provide valuable means to address environmental destruction, particularly serious environmental harm, this article aimed to take an important and concrete step towards bridging the IEL and ICL aspects of responding to environmental damage, recognizing that neither offers a singular solution to all instances of environmental harm. It initially scrutinized various areas of current international law that respond to environmental harm, specifically focusing on IEL and ICL aspects. It then specifically examined the ICC system, considering both its merits and limitations. This study concludes that the ICC is not fully equipped with penalties or responses adequate for compensating environmental damage. Within its current system, fines (which can only be applied in addition to imprisonment) have the potential to become the most common form of punishment for crimes causing serious environmental damage. While imprisonment can be applied when environmental crimes are committed by natural persons, it is often argued that when the environment is damaged, priority should be given to preventing or repairing the damage itself, thus emphasizing the victim rather than solely the offender. The article then outlined recent proposals reflecting alternative approaches to penalizing and responding to environmental harm, as developed in the Draft Conventions on Ecocrimes and Ecocide. Finally, based on its findings, it concluded with several recommendations, advocating for proactive, reactive, and restorative tools within an ecocentric approach to develop a more effective structure equipped with more appropriate penalties for adequately addressing environmental crime and the harm it causes.

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