

# INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

## Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?

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### Abstract

On 16 March 2016, the Prosecutor of the International Criminal Court (ICC) rejected on jurisdictional grounds a victims' request to investigate a case of environmental destruction by Chevron in Ecuador. A little over a year later, on 15 September 2016, the Prosecutor released a policy paper indicating that her office would consider hearing cases of environmental destruction. This article examines how the ICC can prosecute environmental destruction as a crime against humanity under Article 7 of the Rome Statute. It presents a survey of the potential jurisdictional and substantive issues of prosecuting environmental issues and uses the victims' request asking the Prosecutor to investigate environmental destruction by Chevron in the Ecuadorian Amazon as a backdrop. The article proceeds in three parts. Firstly, it discusses the request by the victims in Ecuador asking for the Prosecutor to investigate. Secondly, it sets out the basic jurisdictional framework of the ICC and analyzes why the Prosecutor rejected the victims' request. Thirdly, it examines Article 7 and concludes that while peacetime environmental destruction committed by a non-state actor that results in a humanitarian atrocity can qualify as a crime against humanity, the factual circumstances alleged in the Ecuadorian victims' request did not amount to a crime against humanity under the Rome Statute.

### Keywords

Chevron; crimes against humanity; Ecuador; environmental destruction; International Criminal Court

## I. INTRODUCTION

'Whatever step you took, walking around the jungle, you would actually get soiled with oil.' Pablo Fajardo, lawyer representing 30,000 Amazonians in a lawsuit challenging Chevron to clean up 1,700 square miles of rainforest in Ecuador.<sup>1</sup>

Pablo Fajardo is from an area of the Ecuadorian Amazon where black smoke from burning oil waste fills the air of the once pristine jungle.<sup>2</sup> This area is part of the

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<sup>1</sup> 'Pablo Fajardo Seeks Justice in the Amazon', *Environmental Law Alliance Worldwide*, Autumn 2009, available at [www.elaw.org/catastrophe-in-ecuador](http://www.elaw.org/catastrophe-in-ecuador).

<sup>2</sup> *Ibid.*

Amazonian rainforest in Ecuador where Texaco – which merged with Chevron in 2001<sup>3</sup> – extracted oil from the Lago Agrio oil field and dumped toxic waste from the 1960s until the 1990s.<sup>4</sup> When operations ceased in 1992, Texaco left behind hundreds of open pits full of black sludge that seeped into the water and soil causing ‘cancer deaths, miscarriages, birth defects, dead livestock, sick fish, and the near-extinction of several tribes’.<sup>5</sup> Since 1993, a rainforest community from Ecuador has sought redress and accountability against Chevron for the pollution caused by Texaco, but to no avail.<sup>6</sup> After their case was dismissed by a US Federal Court on grounds of *forum non conveniens* in 2002,<sup>7</sup> the Lago Agrio Victims pursued a civil case in Ecuador that resulted in a judgment of US\$ nine billion in damages against Chevron in 2011.<sup>8</sup> But the American oil company ‘vowed [to] never satisfy’ this judgment.<sup>9</sup>

Mr. Fajardo, in an effort to force Chevron’s hand, filed a letter of request on 23 October 2014 with the Prosecutor of the International Criminal Court (ICC or Court) asking her to investigate.<sup>10</sup> The Lago Agrio Victims’ Request contended that the actions taken by Chevron since 2002 to avoid legal responsibility for the toxic pollution in Ecuador amounted to a crime against humanity.<sup>11</sup> In asking the Prosecutor to investigate environmental destruction as a crime against humanity, Mr. Fajardo entered into new territory. The only explicit mention of environmental destruction in the Rome Statute, the founding treaty and primary legal source of the ICC, is in the provision governing war crimes, under which the Court can hold an individual criminally liable for an attack committed during an international armed conflict that causes ‘widespread, long-term and severe damage to the natural environment’.<sup>12</sup>

<sup>3</sup> ‘Texaco: A Century of Performance’, available at [www.texaco.com/about-timeline.aspx](http://www.texaco.com/about-timeline.aspx). When Chevron merged with Texaco, the company inherited the liability caused by Texaco’s pollution of the Ecuadorian Amazon.

<sup>4</sup> N. Cely, ‘Balancing Profit and Environmental Sustainability in Ecuador: Lessons Learned from the Chevron Case’, (2014) 24 *Duke Environmental Law & Policy Forum* 353, at 354.

<sup>5</sup> P. Radden Keefe, ‘Reversal of Fortune: A crusading lawyer helped Ecuadorians secure a huge environmental judgment against Chevron. But did he go too far?’, *The New Yorker*, 9 January 2012, available at [www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe](http://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe).

<sup>6</sup> See *ibid.* This article adopts the term Lago Agrio Victims to describe the rainforest community in Ecuador seeking redress.

<sup>7</sup> See *Aguinda v. Texaco Inc.*, 303 F.3d 470 (2d Cir. 2002); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998). See also P. Sharp, ‘Prospects for Environmental Liability in the International Criminal Court’, (1999) 18 *Virginia Environmental Law Journal* 217, 237–8. For a general overview of the litigation in the US, see C. Krauss, ‘Big Victory for Chevron over Claims in Ecuador’, *The New York Times*, 4 March 2014, available at [www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?\\_r=0](http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?_r=0). On 8 August 2016, the US Court of Appeals for the Second Circuit unanimously affirmed a lower court decision holding that the US\$9 billion judgment against Chevron was the product of fraud and racketeering activity, and unenforceable in the US. See *Chevron v. Donziger*, 14-0826(L) (2d Cir. 2016), available at [theamazonpost.com/wp-content/uploads/2016/08/CA2-Opinion.pdf](http://theamazonpost.com/wp-content/uploads/2016/08/CA2-Opinion.pdf).

<sup>8</sup> See *Aguinda v. Chevron Texaco*, Judgment of the Lago Agrio, Ecuadorian Provincial Court of Justice of Sucumbios, Case No. 002-2003 (14 February 2011), available at [chevrontoxico.com/assets/docs/2011-02-14-Aguinda-v-ChevronTexaco-judgement-English.pdf](http://chevrontoxico.com/assets/docs/2011-02-14-Aguinda-v-ChevronTexaco-judgement-English.pdf). See also S. Romero and C. Krauss, ‘Ecuador Judge Orders Chevron to Pay \$9 Billion’, *The New York Times*, 14 February 2011, available at [www.nytimes.com/2011/02/15/world/americas/15ecuador.html](http://www.nytimes.com/2011/02/15/world/americas/15ecuador.html).

<sup>9</sup> See Request to the Office of the Prosecutor of the ICC from the Legal Representatives of the Victims, ‘Communication: Situation in Ecuador’, 23 October 2014, available at [chevrontoxico.com/assets/docs/2014-icc-complaint.pdf](http://chevrontoxico.com/assets/docs/2014-icc-complaint.pdf) [hereinafter Lago Agrio Victims’ Request].

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> See 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, Art. 8(2)(b)(iv) [hereinafter Rome Statute].

However, Article 7 of the Rome Statute, which governs crimes against humanity, is broader and may also provide redress for environmental destruction.<sup>13</sup>

While the Court's Prosecutor ultimately rejected the Lago Agrio Victims' Request on grounds of jurisdiction,<sup>14</sup> the reasons for which are discussed below, she did not completely discount prosecuting environmental destruction as a crime against humanity. Instead, on 15 September 2016, the Prosecutor of the ICC indicated that she would consider doing just that.<sup>15</sup> In a paper on the Prosecution's policy on case selection and prioritization, the Prosecutor noted that her office 'will give particular consideration to 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'.<sup>16</sup> With this statement, the Prosecutor has signalled that she will consider prosecuting environmental destruction that is used as a tool to commit one of the crimes within the Court's remit, including crimes against humanity.

<sup>13</sup> Ibid., Art. 7(1)(k). The international community's commitment that crimes against humanity must not go unpunished is enshrined in Art. 7 of the Rome Statute:

'1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.'

<sup>14</sup> Letter from M.P. Dillon, Head of the Information and Evidence Unit of the OTP to R. Doak Bishop, Partner of King & Spalding LLP, Reference No. OTP2014/036752, 16 March 2015, available at [free-beacon.com/wp-content/uploads/2015/04/ICC-letter.pdf](http://free-beacon.com/wp-content/uploads/2015/04/ICC-letter.pdf) [hereinafter OTP Letter].

<sup>15</sup> Office of the Prosecutor of the ICC, Policy Paper on Case Selection and Prioritisation (2016), available at [www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](http://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf) [hereinafter OTP Policy Paper] (noting that the ICC Prosecutor expanded her prosecutorial strategy to include incidents of environmental destruction that cause humanitarian harm).

<sup>16</sup> Ibid., at 14.

This article asks whether the ICC can prosecute peacetime environmental destruction committed by a non-state actor, like the alleged situation in Ecuador, as a crime against humanity under Article 7. It does not propose to offer an in-depth analysis into each aspect of crimes against humanity or the Court's jurisdictional requirements like others have done.<sup>17</sup> Instead, this article's goal is more modest. It aims to provide a survey of the potential jurisdictional and substantive issues the Court will face in prosecuting peacetime environmental destruction as a crime against humanity and demonstrate that a principled argument can be made to bring such a case. This article does so against the backdrop of the Lago Agrio Victims' Request, discussed in Section 2. It sets out, in Section 3, the basic jurisdictional framework of the ICC and analyzes why the Prosecutor rejected the Lago Agrio Victims' Request. In Section 4, this article examines Article 7 and concludes that while peacetime environmental destruction committed by a non-state actor that results in a humanitarian atrocity can qualify as a crime against humanity, the factual circumstances alleged in the Lago Agrio Victims' Request do not amount to a crime against humanity under the Rome Statute.

## 2. THE LAGO AGRIO VICTIMS' REQUEST

The Lago Agrio Victims' Request submitted to the Prosecutor of the ICC, argued that the decisions made by Chevron's CEO John Watson and other high-ranking officers since July 2002 to avoid enforcement of the 2011 civil judgment 'maintained the contamination and aggravated the situation' in Ecuador, and this amounted to a criminal attack against a civilian population and thus was a crime against humanity within the jurisdiction of the ICC.<sup>18</sup> In setting out this argument, the request made a cursory attempt at establishing the Court's jurisdiction – discussed in Section 3 – over the alleged situation in Ecuador. In four sentences, it argued that the Court had temporal and territorial jurisdiction because Ecuador ratified the Rome Statute on 5 May 2002, and it pointed to the Prosecutor's *proprio motu* power to trigger jurisdiction by initiating an investigation.<sup>19</sup> The request gave even less consideration to the Court's personal jurisdiction over Chevron's CEO John Watson noting only his personal interest and involvement in avoiding civil liability.<sup>20</sup>

Satisfied that it had established jurisdictional grounds to investigate, the Lago Agrio Victims' Request then turned to establishing a crime against humanity. Article 7

<sup>17</sup> See generally D. Luban, 'A Theory of Crimes Against Humanity', (2004) 29 *Yale Journal of International Law* 85 (examining the theory behind crimes against humanity); C. Eboe-Osuji, 'Crimes Against Humanity: Directing Attacks Against A Civilian Population', (2008) 2(2) *African Journal of Legal Studies* 118 (arguing that courts should consider when determining cases of crimes against humanity not whether the civilian population was the primary target of an attack but merely whether it was intentionally targeted); C. Charles Russell, 'The Chapeau of Crimes Against Humanity: The Impact of the Rome Statute of the International Criminal Court', (2011–2012) 8(1) *Eyes on the ICC* 25 (arguing that the impact of the Rome Statute on crimes against humanity was limited and largely reflective of pre-Rome status regarding crimes against humanity); and M.M. de Guzman, 'The Road from Rome: The Developing Law of Crimes Against Humanity', (2000) 22 *Human Rights Quarterly* 335 (presenting a comprehensive overview of the elements of crimes against humanity).

<sup>18</sup> Lago Agrio Victims' Request, *supra* note 9, at 19.

<sup>19</sup> *Ibid.*, at 16 (citing the Rome Statute, *supra* note 12, Arts. 11, 12, 13).

<sup>20</sup> *Ibid.*, at 18.

requires that several contextual elements be proven – this is known as the *chapeau* and is discussed in more depth in Section 4 – but the request only addressed one of these elements. Namely, whether there was ‘an attack against a civilian population.’<sup>21</sup> To establish that Chevron’s actions amounted to an attack against a civilian population, the Lago Agrio Victims’ Request contended that the consistent interpretation under international criminal law of an ‘attack’ for the purposes of a crime against humanity is the definition espoused by the International Criminal Tribunal for Rwanda in *Prosecutor v. Akayesu*:

[An attack is an] unlawful act . . . like murder, extermination, enslavement, etc. An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.<sup>22</sup>

In citing this definition of attack, the request argued that the alleged situation in Ecuador is a crime against humanity because, by avoiding civil liability and maintaining the toxic pollution, Chevron’s actions and inactions amount to a non-violent attack.<sup>23</sup>

The Lago Agrio Victims’ Request did not address any other contextual elements of crimes against humanity besides attack and instead discussed the enumerated acts.<sup>24</sup> Beyond the *chapeau*, the Prosecutor is also required to prove one of the crimes listed under Article 7 – the enumerated acts are discussed alongside the *chapeau* below in Section 4. The request listed without analysis, murder, extermination, deportation or forcible transfer of a population, persecution, and other inhumane acts as the crimes under Article 7 that might apply to the situation of toxic pollution in the Ecuadorian Amazon.<sup>25</sup> The remainder of the Lago Agrio Victims’ Request was vague and conclusory, providing no further analysis of how the alleged acts and factual circumstances of the situation amounted to a crime against humanity. The Prosecutor ultimately dismissed the request on jurisdictional grounds.<sup>26</sup>

### 3. JURISDICTION OVER ENVIRONMENTAL DESTRUCTION

The ICC is the first permanent international criminal court. Created in 2002 after the establishment of the *ad hoc* tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY), the ICC stands for the international community’s realization that our world will continue to be ravaged by war, genocide, and other unthinkable acts that amount to crimes against humanity. But the ICC also stands for the international community’s commitment that ‘the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective

<sup>21</sup> Ibid., at 40–6.

<sup>22</sup> Ibid., at 19 (citing *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, T.Ch. I, 2 September 1998, para. 581 [hereinafter *Akayesu* Judgment]).

<sup>23</sup> See Lago Agrio Victims’ Request, *supra* note 9, at 19.

<sup>24</sup> Ibid., at 41–2.

<sup>25</sup> Ibid.

<sup>26</sup> See OTP Letter, *supra* note 14.

prosecution must be ensured'.<sup>27</sup> The Court's mandate to end impunity for the most serious crimes is broad and can encompass peacetime environmental destruction.<sup>28</sup> But the international community did not establish an untethered institution. Instead, the international community created a court guided by a limited jurisdiction.

### 3.1. Preconditions to the exercise of jurisdiction

The Court's ability to implement its mandate to end impunity turns on state consent.<sup>29</sup> A state consents to the jurisdiction of the Court by ratifying or acceding to the Rome Statute, giving the ICC jurisdiction over crimes committed on its territory by its nationals or non-nationals and by its nationals outside its territory.<sup>30</sup> Additionally, a state that is not a party to the Rome Statute may consent to the jurisdiction of the Court on an *ad hoc* basis giving it jurisdiction over crimes committed on its territory by nationals and non-nationals.<sup>31</sup> The only instance where the Court can infringe upon a state's sovereignty is when the UN Security Council refers a situation to the ICC effectively overriding the requirement of state consent.<sup>32</sup> In the alleged situation in Ecuador the preconditions for the Court's jurisdiction were met. Ecuador is a party to the Rome Statute and a non-national committed the alleged crimes on its territory.<sup>33</sup>

### 3.2. Temporal jurisdiction

When a state consents to the jurisdiction of the Court also determines how the ICC carries out its mandate to end impunity. The Court's jurisdiction is prospective, meaning that the ICC only has jurisdiction over crimes committed after the Rome Statute came into force on 1 July 2002.<sup>34</sup> For states that ratified the Rome Statute, the ICC has jurisdiction over crimes committed after this date.<sup>35</sup> For states that later accede to the Rome Statute, the Court has jurisdiction over crimes committed after the treaty enters into force for that particular state unless the state consents to jurisdiction for earlier crimes.<sup>36</sup>

Ecuador ratified the Rome Statute, so the ICC has jurisdiction over crimes committed in Ecuador after 1 July 2002.<sup>37</sup> The Lago Agrio Victims' Request argued that the alleged situation in Ecuador met the Court's temporal jurisdiction requirement

<sup>27</sup> Rome Statute, *supra* note 12, preamble.

<sup>28</sup> S. Freeland, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court* (2015), 44.

<sup>29</sup> The drafters of the Rome Statute intensely debated jurisdiction and the delegates ensured that state consent and not universal jurisdiction would guide the Court's jurisdiction. See S.A. Williams, 'Article 12. Preconditions to the exercise of Jurisdiction', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), 329. See also M. Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (2013), at 659.

<sup>30</sup> See Rome Statute, *supra* note 12, Art. 12.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, Art. 13.

<sup>33</sup> See States Parties to the Rome Statute, available at [asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#E](http://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#E) [hereinafter States Parties].

<sup>34</sup> See Rome Statute, *supra* note 12, Art. 11.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, at Art. 11. For states that accede to the Rome Statute, the treaty enters into force on the first day of the month after the sixtieth day following the deposit of its instrument of accession. See *ibid.*, Art. 126.

<sup>37</sup> See States Parties, *supra* note 33.

because the alleged criminal activity at issue was not Texaco's dumping of toxic waste from the 1960s to the 1990s, but rather Chevron's actions and deliberate inactions since 2002.<sup>38</sup> The Prosecutor rejected this argument finding that, based on the information currently available, some of the allegations in the Lago Agrio Victims' Request did not fall within the Court's temporal jurisdiction.<sup>39</sup>

### 3.3. Subject matter jurisdiction

The limited number of crimes within the Court's jurisdiction further restricts its mandate to end impunity. The ICC has jurisdiction with respect to genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>40</sup> The crime of aggression, last prosecuted at Nuremburg and criminalizing the illegal use of force by states, was set not to come into force at the ICC until 2017 at the earliest.<sup>41</sup> The three core crimes – genocide, crimes against humanity, and war crimes – codify international criminal law as it existed at the time of the formation of the ICC and are presently enforced by the Court.<sup>42</sup>

The Rome Statute does not criminalize environmental destruction as a stand-alone crime.<sup>43</sup> For the Court to gain jurisdiction over acts of environmental destruction the alleged acts must meet the elements of one of the core crimes: genocide, crimes against humanity, or war crimes. The core crimes, however, criminalize humanitarian atrocities. The Court, therefore, can only prosecute environmental destruction that results in a humanitarian atrocity.<sup>44</sup> In the alleged situation in Ecuador, the Lago Agrio Victims' Request argued, in a rather *ipse dixit* fashion, that by shirking their legal responsibilities and effectively maintaining a condition of toxic pollution, Chevron committed a humanitarian atrocity.<sup>45</sup> The Prosecutor determined, however, that some of the allegations in the Lago Agrio Victims' Request did not appear to fall within the Court's subject-matter jurisdiction.<sup>46</sup> Section 4 discusses how peacetime environmental destruction committed by a non-state actor can amount to a crime against humanity.

<sup>38</sup> See Lago Agrio Victims' Request, *supra* note 9, at 41. The Victims could have argued, as some commentators have, that Chevron's alleged acts were part of a continuing crime that began with Texaco's dumping of toxic waste. See A. Nissel, 'Continuing Crimes in the Rome Statute', (2004) 25 (3) *Michigan Journal of International Law* 653 (contending that the ICC can investigate and prosecute alleged crimes that occurred prior to the date the Rome Statute entered into force, if these alleged crimes are considered part of a continuing crime).

<sup>39</sup> See OTP Letter, *supra* note 14.

<sup>40</sup> See Rome Statute, *supra* note 12, Art. 5.

<sup>41</sup> See Bassiouni, *supra* note 29, at 661.

<sup>42</sup> *Ibid.* The ICC also has jurisdiction over offences against the administration of justice, such as witness tampering and contempt of court. See Rome Statute, *supra* note 12, Art. 70.

<sup>43</sup> See P. Sharp, 'Prospects for Environmental Liability in the International Criminal Court', (1999) 18(2) *Virginia Environmental Law Journal* 217, at 218 (noting that the Rome Statute is not an environmental document and the only explicit ground for environmental liability is under Art. 8 War crimes).

<sup>44</sup> See T. Smith, 'Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law', in W. Schabas, Y. McDermott and N. Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (2011), 3.

<sup>45</sup> See Lago Agrio Victims' Request, *supra* note 9, at 3–4.

<sup>46</sup> See OTP Letter, *supra* note 14.

### 3.4. Personal jurisdiction

If the ICC prosecutes environmental destruction as one of the core crimes, the subject of the prosecution would have to be an individual, not a state or corporate entity.<sup>47</sup> The Court's jurisdiction applies only to individuals over the age of 18 who are nationals of a state party or who have committed a crime on the territory of a state party or a non-state party that consents to the Court's jurisdiction.<sup>48</sup> This is a broad grant of personal jurisdiction with no individual exempt from prosecution because of his or her capacity.<sup>49</sup>

This broad grant of personal jurisdiction is meant to ensure that those most responsible for the gravest crimes do not go unpunished, but it only applies to corporate officers and not to corporations as legal persons.<sup>50</sup> This prevents the Court from directly prosecuting corporations for environmental destruction, but it does not prohibit the Court from prosecuting the officers of a corporation for their individual actions in bringing about the environmental destruction.<sup>51</sup> As pointed out by David Scheffer, the ICC can 'entertain individual criminal responsibility or superior responsibility for corporate officers when their actions are part of an overall situation' before the Court.<sup>52</sup> The ICC took this approach in the Kenya situation, charging Joshua Arap Sang for his individual actions at Kass FM Radio that allegedly incited violence in Kenya.<sup>53</sup> Moreover, accomplice liability may arise even when it is impossible to try the principal offender under the Rome Statute, so CEOs can be held liable even though the company cannot.<sup>54</sup> Thus, the Court could have had personal jurisdiction over Chevron's CEO John Watson as a non-national on the territory of a state party if the Court found that his direct involvement in evading the Ecuadorian civil judgment amounted to criminal liability.

<sup>47</sup> R. McLaughlin, 'Improving Compliance: Making Non-State International Actors Responsible for Environmental Crimes', (2000) 11 *Colorado Journal of International Environmental Law and Policy* 377, at 400–3.

<sup>48</sup> See Rome Statute, *supra* note 12, Arts. 1, 25(1), 26.

<sup>49</sup> *Ibid.*, at Art. 27. Notably, the Rome Statute prohibits the defence of personal immunity. See *ibid.*

<sup>50</sup> During the drafting of the Rome Statute, the delegates discussed including corporate liability but 'time was simply too short for the delegates to reach a consensus and ultimately the concept had to be abandoned', W. Schabas, *An Introduction to the International Criminal Court* (2011), 225.

<sup>51</sup> See Rome Statute, *supra* note 12, Arts. 25, 28.

<sup>52</sup> See D. Scheffer, 'Corporate Liability under the Rome Statute', (2016) 57 *Harvard International Law Journal* 35, at 36.

<sup>53</sup> *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, P.T.Ch. II, 23 January 2012, available at [www.icc-cpi.int/iccdocs/doc/doc1314535.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf). The ICC Trial Chamber vacated the charges against Sang on 5 April 2016. *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr, T.Ch. V(A), 5 April 2016, available at [www.icc-cpi.int/CourtRecords/CR2016\\_04384.PDF](http://www.icc-cpi.int/CourtRecords/CR2016_04384.PDF). The ICTR similarly held corporate officers accountable for their personal actions in the case of *Nahimana et al.*, where the accused were convicted for inciting genocide through radio and print media. See *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Appeals Judgement, Case No. ICTR-99-52-A, A.Ch., 28 November 2007, available at [www.un.org/en/preventgenocide/rwanda/pdf/NAHIMANA%20ET%20AL%20-%20APPEALS%20JUDGEMENT.pdf](http://www.un.org/en/preventgenocide/rwanda/pdf/NAHIMANA%20ET%20AL%20-%20APPEALS%20JUDGEMENT.pdf). National law increasingly recognizes finding a CEO and other high-ranking corporate officials criminally liable for corporate misconduct, including destruction of the environment. See generally N. Mullikan, 'Holding the "Responsible Corporate Officer" Responsible: Addressing the Need for Expansion of Criminal Liability For Corporate Environmental Violators', (2001) 3(2) *Golden Gate University Environmental Law Journal* 395.

<sup>54</sup> See generally C. Plomp, 'Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court', (2014) 30(79) *Utrecht Journal of International and European Law* 4.



### 3.5. Exercise of jurisdiction

The conditions that allow the Court to exercise jurisdiction further limit the ICC's ability to effectuate its mandate to end impunity for the gravest crimes. The Court will not necessarily exercise jurisdiction over a situation even if subject matter, temporal, and personal jurisdiction are met because its 'focus of prosecution is not pre-determined'.<sup>55</sup> The Rome Statute does not identify the geographic scope of potential prosecutions, so jurisdiction must be 'triggered' before the Prosecutor can investigate a particular country or factual situation.

The Rome Statute provides three separate jurisdictional 'triggers'. First, a state party can refer a situation.<sup>56</sup> Second, the UN Security Council, exercising its Article VII powers, can refer a situation.<sup>57</sup> Third, the Prosecutor can use her discretion, subject to judicial approval, under her *proprio motu* powers to initiate an investigation on the territory of a state party.<sup>58</sup> An extremely controversial trigger, the Prosecutor only used her *proprio motu* powers to trigger jurisdiction in two of the Court's 12 situations: Kenya and Côte d'Ivoire.<sup>59</sup> The Lago Agrio Victims' Request asked that the Prosecutor use her *proprio motu* powers to trigger jurisdiction and initiate an investigation into the alleged situation in Ecuador, which she refused to do.<sup>60</sup>

### 3.6. Complementarity and other admissibility issues

Even if the jurisdictional conditions are met concerning the 'situation' and jurisdiction is triggered, the judicial organ of the Court may determine that a 'case' within that situation is inadmissible. The ICC operates in parallel with national justice systems as a court of last resort.<sup>61</sup> A case is only admissible before the ICC when the national justice system of the case in question fails to prosecute the crimes within the jurisdiction of the Court.<sup>62</sup> Thus, the:

Court may have jurisdiction over a "situation", because it arises within the territory of a state party or involves its nationals as perpetrators, yet [a case] will be inadmissible because prosecutions are underway [domestically] or are not of sufficient gravity to justify intervention.<sup>63</sup>

Three components determine admissibility: (1) complementarity, (2) *ne bis in idem*, and (3) gravity.<sup>64</sup> Under the principle of complementarity, which applies to invest-

<sup>55</sup> Schabas, *supra* note 50, at 157.

<sup>56</sup> See Rome Statute, *supra* note 12, Art. 13. During the drafting of the Rome Statute, this referral mechanism was 'thought to have the least potential for making the Court operational', but state party referrals have proven effective with the self-referrals of the situations in the Democratic Republic of the Congo, Uganda, the Central Africa Republic, and Mali. See Schabas, *supra* note 50, at 159; Coalition for the International Criminal Court, ICC Situations and Cases, available at [www.coalitionfortheicc.org/node/1126](http://www.coalitionfortheicc.org/node/1126) [hereinafter ICC Situations and Cases].

<sup>57</sup> Rome Statute, *supra* note 12, Art. 13. This is how the ICC gained jurisdiction over Libya and Darfur, Sudan. See ICC Situations and Cases, *supra* note 56.

<sup>58</sup> Rome Statute, *supra* note 12, Art. 15.

<sup>59</sup> ICC Situations and Cases, *supra* note 56.

<sup>60</sup> Lago Agrio Victims' Request, *supra* note 9, at 40. See also OTP Letter, *supra* note 14.

<sup>61</sup> Schabas, *supra* note 50, at 187.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, at 188.

<sup>64</sup> The admissibility determination applies to all cases that come before the Court, even those referred by the UN Security Council. See *ibid.*, at 189.

igations and pending prosecutions, a case is inadmissible before the Court if the national jurisdiction is willing and able to prosecute the case.<sup>65</sup> In making this determination the judicial chamber will:

consider whether the purpose of the national proceedings was to shelter an offender, whether they have been unjustifiably delayed, and whether they were not concluded independently or impartially, “and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice”.<sup>66</sup>

What is more, when a state effectively does nothing, the case is admissible.<sup>67</sup> If the Prosecutor had brought a case against Chevron’s CEO, inadmissibility would not have been based on complementarity because even though Ecuador dismissed a criminal case against Chevron as a corporate entity in 2011, Ecuador has not brought criminal charges against Chevron’s CEO as an individual to date.<sup>68</sup> Thus, if the Court found that Ecuador was unwilling and unable to prosecute John Watson, the principle of complementarity would not have barred prosecution.

*Ne bis in idem* also would not have rendered a case against Chevron’s CEO inadmissible before the ICC. Under Article 20 of the Rome Statute, a case triggers double jeopardy if a domestic court already convicted or acquitted an individual, unless the trial was a sham.<sup>69</sup> A case against Chevron’s CEO would not have triggered *ne bis in idem* because Ecuador did not pursue a criminal case domestically.

Even if the Court finds that the principle of complementarity and double jeopardy do not bar prosecution, the case must still be of ‘sufficient gravity’ to be admissible.<sup>70</sup> This admissibility requirement seeks to limit the Court’s jurisdiction to the most serious crimes of concern to the international community.<sup>71</sup> Cases involving the core crimes are usually not deemed inadmissible on grounds of insufficient gravity because the very subject matter jurisdiction of the Court deems them grave, so the requirement of ‘sufficient gravity’ is somewhat redundant.<sup>72</sup> However, in borderline cases, the Court looks at the level of ‘social alarm’ the alleged conduct caused in the international community to determine if the case is of ‘sufficient gravity’.<sup>73</sup> A case prosecuting environmental destruction that causes a humanitarian atrocity may be inadmissible on grounds of insufficient gravity unless the Court found the requisite ‘social alarm’. Thus, even if the Court could have established jurisdiction

<sup>65</sup> See Rome Statute, *supra* note 12, Art. 17.

<sup>66</sup> Schabas, *supra* note 50, at 190.

<sup>67</sup> Schabas, *supra* note 50, at 193.

<sup>68</sup> Lago Agrio Victims’ Request, *supra* note 9, at 7. Under Ecuadorian law, a resolution on the facts in the civil case was needed before the criminal case proceeded. Once the facts in the civil case were resolved, the statute of limitations had run on reopening the criminal case against Chevron. See *ibid.*

<sup>69</sup> See Rome Statute, *supra* note 12, Art. 17. Sham trials are trials held to shield ‘the person concerned from criminal responsibility for crimes within the jurisdiction of the Court’, or trials that were ‘not conducted independently or impartially’ and in a manner ‘inconsistent with an intent to bring the person concerned to justice’. *Ibid.*, at Art. 20.

<sup>70</sup> *Ibid.*, Art. 17.

<sup>71</sup> See M.M. de Guzman, ‘Crimes Against Humanity’, in B.S. Brown (ed.), *Research Handbook on International Criminal Law* (2011), 21

<sup>72</sup> See Schabas, *supra* note 50, at 200.

<sup>73</sup> See S. SáCouto and K.A. Cleary, ‘The Gravity Threshold of the International Criminal Court’, (2008) 23 *American University International Law Review* 807, at 811.

over the alleged situation in Ecuador, the case against Chevron's CEO may have been inadmissible on the basis of insufficient gravity.

### 3.7. A tethered court

The delegates negotiating the Rome Statute ensured that the ICC did not have unbridled power to prosecute at will. The jurisdictional and admissibility hoops that the Court must jump through in order to prosecute make this clear. Thus, the hand of the Court can only reach as far as the Rome Statute and state consent permit. Can such a tethered court prosecute environmental destruction that results in a humanitarian atrocity? The Prosecutor rejected the alleged situation in Ecuador in part because she thought that the Court's temporal jurisdiction restricted her power to investigate the environmental destruction caused by Texaco and maintained by Chevron.<sup>74</sup> However, assuming that a factual situation meets the Court's jurisdictional and admissibility requirements, peacetime environmental destruction that results in a humanitarian atrocity may qualify as a crime against humanity. The remainder of this article examines this issue.

## 4. ENVIRONMENTAL DESTRUCTION AS A CRIME AGAINST HUMANITY AT THE ICC

The origin of 'crimes against humanity' is found in the aftermath of the First World War. In the midst of nearly 20 million deaths, the Ottoman Empire's massacre of an estimated 200,000 to 800,000 Armenian civilians shocked the Allied Powers.<sup>75</sup> France, Great Britain and Russia pledged to hold the Ottoman Government accountable for 'these new crimes of Turkey against humanity and civilization'.<sup>76</sup> But the various initiatives to carry out this pledge failed.<sup>77</sup> In the wake of the Second World War, the Allied Powers again felt compelled to address the heinous acts committed against civilians by Germany.<sup>78</sup> This time there was an international trial and the International Military Tribunal (IMT) at Nuremberg was the first court to prosecute crimes against humanity.<sup>79</sup> Since Nuremberg, crimes against humanity has developed into customary international law with numerous international tribunals including the crime in their charters.<sup>80</sup> This legal development has produced a

<sup>74</sup> See OTP Letter, *supra* note 14.

<sup>75</sup> See M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (2011).

<sup>76</sup> *Ibid.*

<sup>77</sup> See A. Cassese et al., *Cassese's International Criminal Law* (2013), at 85.

<sup>78</sup> *Ibid.*, at 86.

<sup>79</sup> *Ibid.* At Nuremberg, crimes against humanity were defined as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

See also 1945 Charter of the International Military Tribunal, 82 UNTS 279, 58 Stat. 1544, Art. 6(c) [hereinafter Nuremberg Charter].

<sup>80</sup> See generally Cassese et al., *supra* note 77, at 89–92. For example, Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/Res/955 (1994), Art. 3; Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/Res/827 (1993), Art. 5; Statute of the Special Court for Sierra Leone, UN

crime that prohibits acts ‘which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied . . . endangered the international community or shocked the conscience of mankind’.<sup>81</sup>

In the years since the Nuremberg IMT, international tribunals have prosecuted numerous acts that ‘shock the conscience of mankind’ as crimes against humanity.<sup>82</sup> However, while environmental destruction has been prosecuted as a war crime,<sup>83</sup> to date no international tribunal has ever prosecuted environmental destruction as a crime against humanity.<sup>84</sup> This section addresses the question of whether the Rome Statute permits the Prosecutor of the ICC, assuming all jurisdictional and admissibility conditions are met, to prosecute environmental destruction as a crime against humanity. This section specifically asks whether environmental destruction committed during peacetime by a non-state actor meets the definition of a crime against humanity under Article 7 of the Rome Statute. This section explains how the Lago Agrio Victims’ argument did not rise to the level of a crime against humanity, but demonstrates that the Prosecutor can make a strong case for holding non-state actors accountable for peacetime environmental destruction under Article 7.

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Doc. S/Res/1315 (2000), Art. 2. However, unlike genocide and war crimes, crimes against humanity has not been codified in an international convention but there have been calls to develop such a treaty. See generally M. Cherif Bassiouni, ‘“Crimes Against Humanity”: The Need for a Specialized Convention’, (1993–1994) 31 *Columbia Journal of Transnational Law* 457, and L.N. Sadat, ‘Forging a Convention for Crimes Against Humanity’, (2012) 44 *Studies in Transnational Legal Policy* 229. See also B. Van Schaack, ‘The Definition of Crimes Against Humanity: Resolving the Incoherence’, (1998–1999) 37 *Columbia Journal of Transnational Law* 787 (noting that crimes against humanity ‘did not become the subject of a comprehensive multilateral convention’ until the 1990s).

<sup>81</sup> R. Dixon, ‘Chapeau’, in Triffterer *supra* note 29, at 123.

<sup>82</sup> See, for example, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Judgement, Case No. IT-96-23 and IT-96-23/1-A, A.Ch., 12 June 2002, para. 32, available at [www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf](http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf) (upholding the Trial Chamber’s conviction for sexual enslavement and rape as crimes against humanity); *Prosecutor v. Alfred Musema*, Judgement, Case No. ICTR-96-13-A, A.Ch., 16 November 2001, para. 370, available at [unictr.unmict.org/sites/unictr.org/files/case-documents/ict96-13/appeals-chamber-judgements/en/011116.pdf](http://www.unmict.org/sites/unictr.org/files/case-documents/ict96-13/appeals-chamber-judgements/en/011116.pdf) (affirming the Trial Chamber’s conviction of extermination as a crime against humanity); and *Prosecutor v. Nuon Chea and Khieu Samphan*, Case 002/01 Judgment, Case No. 002/19-09-2007/ECCC/TC, T.Ch., 7 August 2014, at 622, available at [www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017:04/E313\\_Trial%20Chamber%20Judgement%20Case%20002\\_01\\_ENG.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017:04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf) (finding the defendants guilty of extermination, persecution and other inhumane acts, including forced transfer, enforced disappearances and attacks against human dignity, as crimes against humanity).

<sup>83</sup> The Nuremberg IMT prosecuted two Nazi generals for scorched earth practices during the Second World War as war crimes. See C.E. Bruch, ‘All’s Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict’, (2000–2001) 25 *Vermont Law Review* 695, at 716 [citing The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, (1950), Vol. 22, at 517 (holding General Alfred Jodl guilty for war crimes associated with scorched earth tactics in Northern Norway, Leningrad, and Moscow); Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, (1949) Vol. XI, at 1297, available at [www.loc.gov/rfd/Military\\_Law/pdf/NT\\_war-criminals\\_Vol-XI.pdf](http://www.loc.gov/rfd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf) (holding General Lothar Rendulic not guilty of war crimes associated with scorched earth tactics in Finland, Norway)]. Forms of environmental destruction were codified as war crimes under the Charter of the IMT at Nuremberg and defined as ‘violations of the laws and customs of war . . . shall include, but not be limited to . . . plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity’. Nuremberg Charter, *supra* note 79, at Art. 6(b).

<sup>84</sup> See T. Weinstein, ‘Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?’, (2005) 17 *Georgetown International Environmental Law Review* 697, at 698.

### Article 7 Crimes Against Humanity

The prosecution of environmental destruction committed during peacetime is possible under Article 7 because of one important development in the law of crimes against humanity instituted by the drafters of the Rome Statute. The Nuremberg Tribunal, and its sister tribunal in Tokyo, the International Military Tribunal for the Far East, only had jurisdiction over crimes against humanity committed before and during the Second World War, a limitation known as the ‘war nexus’.<sup>85</sup> Post-Nuremberg interpretations and codifications of crimes against humanity continued to include this limitation for the most part, but at the same time efforts were made to eliminate the war nexus, which led to a fragmented definition.<sup>86</sup> The drafters of the Rome Statute sought to clarify this confusion and, although Article 7 codified existing customary international law,<sup>87</sup> it removed the requirement of a nexus between crimes against humanity and armed conflict, thus opening up liability for criminal acts committed during times of war *or* peace.<sup>88</sup> Thus, the Prosecutor of the ICC can conceivably prosecute peacetime environmental destruction under Article 7 because there is no longer a requirement to prove the ‘war nexus’.

Even without the nexus requirement, however, Article 7 presents a demanding standard for criminal acts of peacetime environmental destruction. The drafters of the Rome Statute included both a *chapeau* and a list of crimes known as the ‘enumerated offenses’ under Article 7. The factual circumstances of a case must first meet the contextual elements of crimes against humanity laid out in the *chapeau*, which states that: ‘For the purpose of this Statute, “crime against humanity” means

<sup>85</sup> See Van Schaack, *supra* note 80, at 792 (noting that the Nuremberg Tribunal had jurisdiction only over crimes committed ‘before or during the war’ and ‘in execution of or in connection with any crime within the jurisdiction of the Tribunal’). The Charter of International Military Tribunal for the Far East, known simply as the Tokyo Tribunal, followed a similar construction for crimes against humanity as the Nuremberg Charter requiring that the acts be committed ‘before or during the war’. See 1946 The International Military Tribunal for the Far East Charter, T.I.A.S. 1589, Art. 5(c), available at [www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3\\_1946%20Tokyo%20Charter.pdf](http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf).

<sup>86</sup> See Van Schaack, *supra* note 80, at 793 [footnote 22, citing the ICTY Statute, *supra* note 80, Art. 5 (defining crimes against humanity as ‘the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.’); ICTR Statute, *supra* note 80, Art. 3, (defining crimes against humanity as ‘the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.’); Canadian Criminal Code, RSC, 1985, c. C-46, Section 7(3.76) (defining crimes against humanity as ‘murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at the time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations.’); Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935, UN Doc. S/1994/1405 (1994) (Rwanda Commission of Experts) (defining crimes against humanity as ‘gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim ...’)].

<sup>87</sup> See Cassese et al., *supra* note 77, at 105.

<sup>88</sup> See R. Dixon and K.A. Khan, *Archbold: International Criminal Court: Practice, Procedure & Evidence* (2013), 1100.

any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.’<sup>89</sup>

If the *chapeau* is met, the Prosecutor must then establish at least one of the acts enumerated in Article 7: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, sterilization, other forms of sexual violence, persecution, enforced disappearance of persons, apartheid, or other inhumane acts.<sup>90</sup> The following examines both the *chapeau* and the enumerated acts as they apply to peacetime environmental destruction by a non-state actor.

#### 4.1. Chapeau

When the Prosecutor brings a case of peacetime environmental destruction as a crime against humanity, the first challenge she faces is establishing the *chapeau*. The contextual elements laid out in the *chapeau* distinguish crimes of international concern from domestic crimes, ensuring that the alleged crime rises to the level of an international crime.<sup>91</sup> Thus, to prosecute environmental destruction as a crime against humanity at the ICC, the Prosecutor must first show that the factual circumstances of a case constitute (1) an attack against a civilian population; (2) that is widespread or systematic; and that (3) the accused had knowledge of the attack. The following discusses each element of the *chapeau* in turn.

##### 4.1.1. Attack against a civilian population

Under the *chapeau* of Article 7, the accused must have committed the alleged crime ‘as part of a[n] ... attack directed against any civilian population’.<sup>92</sup> Article 7(2)(a) defines an attack for purposes of crimes against humanity as ‘a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’.<sup>93</sup> This definition contains three elements: (1) a course of conduct involving the multiple commission of at least one of the enumerated offences; (2) that the course of conduct was directed against a civilian population; and (3) that the course of conduct was carried out pursuant to or in furtherance of a formal or informal policy. The purpose of this definition is to preclude the prosecution of random isolated acts as crimes against humanity.<sup>94</sup> Each prong of this definition is addressed below in light of the purpose of Article 7(2)(a).

4.1.1.1. *Course of conduct involving the multiple commission of acts.* The first prong of the definition of attack under Article 7(2)(a) is the requirement of ‘the multiple commission of acts’, which is ‘more than a single, isolated act’.<sup>95</sup> This does not mean that

<sup>89</sup> Rome Statute, *supra* note 12, Art. 7.

<sup>90</sup> *Ibid.*

<sup>91</sup> See Schabas, *supra* note 50, at 110. See also Dixon, *supra* note 81, at 122.

<sup>92</sup> Rome Statute, *supra* note 12, Art. 7.

<sup>93</sup> *Ibid.*, Art. 7(2)(a).

<sup>94</sup> See *Ruto and Sang* case, Decision on Defence Applications for Judgments of Acquittal, *supra* note 53, para. 345.

<sup>95</sup> See Dixon, *supra* note 81, at 158.

more than one of the acts listed in Article 7 must be present to establish an attack.<sup>96</sup> For instance, the Prosecutor does not have to prove that acts of both rape and murder were committed in order to establish an attack. Rather, ‘the multiple commission of acts’ simply requires more than one isolated act. This could entail multiple acts of rape, or acts of both rape and murder.<sup>97</sup> In the context of environmental destruction, if dumping toxic waste qualified as an enumerated act such as an ‘other inhumane act’, then each time a corporation dumped toxic waste it would commit a single act and the accumulation of these single acts would establish the requisite ‘multiple commission of acts’.<sup>98</sup> Moreover, a single act of environmental destruction that kills or harms multiple people would also satisfy ‘multiple commission of acts’ because each death or injury is a separate crime.<sup>99</sup>

An ‘attack’ can encompass any type of mistreatment of civilians listed under Article 7, not just an armed or violent attack. This is because the language ‘course of conduct’ that describes this action under Article 7 does not limit an ‘attack’ to a certain type of behaviour.<sup>100</sup> The Prosecutor need not prove that the attack involved military force or armed conflict (evidenced also by the omission of a requirement of a nexus between crimes against humanity and armed conflict).<sup>101</sup> Notably, the ‘course of conduct’ need not involve any violent force at all.<sup>102</sup> Thus, environmental destruction such as the pollution of drinking water or destruction of a food source caused as a side effect of an entity’s action could amount to an attack.

*4.1.1.2. Civilian population.* The second prong of attack under Article 7(2)(a) requires that the attack be perpetrated against a civilian population. The factual circumstances of peacetime environmental destruction committed by a non-state actor will easily meet this element. By default, the victims of such an attack will be civilians. The term ‘civilians’, as defined in Common Article 3 of the Geneva Conventions, assumes the existence of an armed conflict: ‘Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed “hors de combat” by sickness, wounds, detention, or any other cause . . .’.<sup>103</sup> Thus, the Prosecutor could easily prove that the attack was directed against civilians in most factual scenarios of environmental destruction committed outside of armed conflict, including the alleged situation in Ecuador, because all victims of peacetime crimes are by definition civilians.

*4.1.1.3. State or organizational policy.* To establish the existence of an attack in the case of environmental destruction that results in a humanitarian atrocity, the Prosecutor’s case would most likely hinge on the third prong of the definition of attack: that

<sup>96</sup> See Dixon and Khan, *supra* note 88, at 1100.

<sup>97</sup> See generally Dixon, *supra* note 81, at 158.

<sup>98</sup> See Rome Statute, *supra* note 12, Art. 7.

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

<sup>100</sup> See Dixon, *supra* note 81, at 124.

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

<sup>102</sup> *Ibid.* See also *Akayesu* case, Judgement, *supra* note 22.

<sup>103</sup> See 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135, Art. 3. The phrasing ‘any civilian population’ includes persons of *any* nationality and does not denote the entire population of a state or territory. See Dixon, *supra* note 81, at 127.

the perpetrator carried out the attack ‘pursuant to or in furtherance of a State or organizational policy’.<sup>104</sup> On its face, Article 7(2)(a) of the Rome Statute applies equally to state and non-state actors, such as corporate CEOs.<sup>105</sup> Key commentators including Professor Cherif Bassiouni support the view that ‘Article 7 brings a new development to “crimes against humanity” in that it recognizes its applicability to non-state actors’.<sup>106</sup> Professor Bassiouni argues for a limited application of Article 7 to non-state actors, however, contending that it does not apply to groups like the mafia because that is not the intent of the article.<sup>107</sup> However, he believes it does include terrorists groups like al-Qaeda because of their international character.<sup>108</sup>

The Pre-Trial Chambers of the ICC have also interpreted the phrase ‘pursuant to or in furtherance of a State or organizational policy’ as applying to non-state actors.<sup>109</sup> For Pre-Trial Chamber II, ‘[s]uch a policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised’.<sup>110</sup> Moreover, the Pre-Trial Chamber in its decision to authorize the investigation in the Kenya situation, by majority, adopted a flexible capacity approach to determining what type of entity can constitute an ‘organization’ under the Rome Statute.<sup>111</sup> This interpretation, which has generated a significant amount of legal scholarship that is beyond the scope of this article,<sup>112</sup> allows for the application of Article 7 to cases of environmental destruction because it opens up liability to non-state actors like corporate CEOs. Such an interpretation also furthers the purpose of the Rome Statute because, while a policy element is part of Article 7(2)(a), overemphasis on this requirement would severely limit the application of crimes against humanity undercutting the object of the ICC. Under this approach,

<sup>104</sup> Rome Statute, *supra* note 12, Art. 7(2)(a).

<sup>105</sup> *Ibid.*

<sup>106</sup> Bassiouni, *supra* note 29, at 664. In an earlier treatise, Professor Bassiouni argued the exact opposite, that Art. 7 of the Rome Statute did not apply to non-state actors. See M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (2005), 152.

<sup>107</sup> See Bassiouni, *supra* note 29, at 664. Professor Bassiouni argues that Art. 7 would apply to terrorist groups like al-Qaeda and the Islamic State because of the ability of these groups to inflict significant harm in more than one state. See *ibid.*

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

<sup>109</sup> See Schabas, *supra* note 50, at 113. See also T. Mariniello, ‘International Criminal Court: Selected Developments in 2012’, (2013) 2(2) *International Human Rights Law Review* 344, at 344–7.

<sup>110</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, P.T.Ch. II, 15 June 2009, para. 81 available at [www.icc-cpi.int/iccdocs/doc/doc699541.pdf](http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf). See also *Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui*, Decision on the Confirmation of the Charges, ICC-01/04-01/07-717, P.T.Ch. I, 30 September 2008, para. 398, available at [www.icc-cpi.int/iccdocs/doc/doc571253.pdf](http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf). But see, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, P.T.Ch. II, 31 March 2010, Dissenting Opinion of Judge Hans-Peter Kaul, para. 51, available at [www.icc-cpi.int/CourtRecords/CR2010\\_02409.PDF](http://www.icc-cpi.int/CourtRecords/CR2010_02409.PDF) (asserting that ‘even though the constitutive elements of statehood need not be established those “organizations” should partake of some characteristics of a State. Those characteristics eventually turn the private “organization” into an entity which may act like a State or has quasi-State abilities’).

<sup>111</sup> See generally *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute, *ibid.*, para. 90.

<sup>112</sup> See, for example, T. Rodenhauer, ‘Beyond State Crimes: Non-State Entities and Crimes Against Humanity’, (2014) 27(4) *Leiden Journal of International Law* 913 (arguing that non-state entities can commit crimes against humanity under the Rome Statute).



the Prosecutor would have had no difficulty in proving an organizational policy because there can be no doubt that Chevron and its leaders are an organization and that their dumping and maintaining of toxic waste over many years was neither random or isolated, it was clearly what they intended to do.

This analysis, however, does not stop at proving the mere existence of ‘a State or organizational policy’. The Court’s elements of crimes explicitly require that the Prosecutor show that the state or organization *actively promoted or encouraged* the attack, or deliberately failed to take action.<sup>113</sup> It follows that any practice ‘simply tolerated or condoned’ by a state or non-state actor like Chevron would not constitute an attack.<sup>114</sup> The Prosecutor must also prove a sufficient linkage between the unlawful acts of the accused and the attack.<sup>115</sup> The Rome Statute does not specify what would satisfy this nexus requirement or what would prove that the policy was actively promoted or encouraged. Thus, whether a policy is present will depend on the factual circumstances of each case. In Ecuador, Chevron’s acts went far beyond tolerating or condoning. Chevron deliberately failed to take responsibility for the toxic waste it created not only failing to properly clean up the waste but by actively and publicly refusing to take financial responsibility for it. The public statements of Chevron’s executives vowing to never satisfy the civil judgment would have established the nexus requirement and that the policy of maintaining toxic waste in Ecuador was encouraged if not actively promoted.<sup>116</sup>

#### 4.1.2. *Widespread or systematic*

If the Prosecutor establishes that the acts alleged in a case concerning environmental destruction amount to an attack, she then must establish that the attack was either widespread or systematic. The ‘widespread or systematic’ requirement is in accordance with customary international law and, at least in the ICC formulation of the crime, it distinguishes crimes against humanity from common domestic crimes such as mass murder.<sup>117</sup> The use of ‘or’ makes the requirement disjunctive.<sup>118</sup> Thus, if the Prosecutor can establish that the attack of environmental destruction was either widespread or systematic in nature, she will elevate the alleged crime to the level of an international crime and open up the possibility of prosecution under Article 7 of the Rome Statute.

Notably, the analysis of widespread or systematic is not focused solely on the accused’s acts, but on the cumulative acts that make up the attack. Under Article 7, each act that occurs within the alleged attack need not be widespread or

<sup>113</sup> ICC, Elements of the Crimes, Doc No ICC-PIDS-LT-03-002/11 (2011), at 5 [footnote 6], available at [www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/o/ElementsOfCrimesEng.pdf](http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/o/ElementsOfCrimesEng.pdf) [hereinafter Elements of Crimes].

<sup>114</sup> Cassese et al., *supra* note 77, at 107.

<sup>115</sup> Dixon and Khan, *supra* note 88, at 1102.

<sup>116</sup> See Lago Agrio Victims’ Request, *supra* note 9.

<sup>117</sup> See Dixon, *supra* note 81, at 122. But see C.C. Jalloh, ‘What Makes a Crime Against Humanity a Crime Against Humanity?’, (2013) 28 *American University International Law Review* 381 (noting that what establishes an act as a crime against humanity instead of a domestic crime is arguably the state or organizational policy element, the widespread or systematic element, or both elements together).

<sup>118</sup> *Ibid.*, at 126.

systematic.<sup>119</sup> Nor do an individual's acts have to be widespread or systematic.<sup>120</sup> 'The commission of a single act, such as one murder, in the context of a broader campaign ... can constitute a crime against humanity.'<sup>121</sup> Thus, if the Prosecutor had acted on the Lago Agrio Victims' Request, she would not have needed to prove that the individual acts of Chevron's CEO were widespread or systematic to establish the contextual element of widespread or systematic. The Prosecutor would only have had to prove that the alleged crimes of Chevron's CEO occurred within the context of a widespread or systematic attack.

*4.1.2.1. Widespread.* To establish whether the alleged crime was either widespread or systematic, one must start with the definitions of the terms. 'Widespread' refers to the large-scale nature of the attack, primarily reflected in the number of victims.<sup>122</sup> This includes 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.<sup>123</sup> Thus, the Prosecutor needs to focus on the number of victims to establish if an attack was widespread. There is no set number of victims that makes an attack widespread,<sup>124</sup> but if the nearly 30,000 plaintiffs involved in the class action lawsuit against Chevron were considered victims, then the Prosecutor would have had no problem establishing that the attack was widespread if she had pursued the alleged situation in Ecuador.<sup>125</sup>

With the focus on the number of victims, the geographic scope of an attack does not determine whether a particular attack is widespread.<sup>126</sup> What the Rome Statute requires is a widespread attack on a civilian population, not an attack that was widespread in a particular geographic area or an attack that covered a large geographic zone. However, the geographic scope of an attack concerning environmental destruction could bolster the argument that a particular attack was widespread. In the alleged situation in Ecuador, the polluted area covers 1,235,500 acres of rainforest.<sup>127</sup> The Prosecutor could have used this fact in conjunction with the number of victims to prove that the human cost of the alleged attack was widespread.

*4.1.2.2. Systematic.* On the other hand, the term 'systematic' is not focused on establishing the human costs of an attack. 'Systematic' denotes the organized nature of the acts that make up the attack.<sup>128</sup> It refers to 'a pattern or methodical plan', which is 'thoroughly organized and following a regular plan'.<sup>129</sup> To establish whether an attack was systematic, a court may look to, *inter alia*, evidence of public statements relating to the attack or the existence of a plan or policy, whether formal or informal,

<sup>119</sup> See Dixon and Khan, *supra* note 88, at 1107.

<sup>120</sup> *Ibid.*

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

<sup>122</sup> See *Prosecutor v. Dusko Tadić a/k/a "Dule"*, Opinion and Judgement, Case No. IT-94-I-T, T.Ch., 7 May 1997, para. 648, available at [www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf](http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf).

<sup>123</sup> *Ibid.*

<sup>124</sup> See Bassiouni, *supra* note 75, at 203.

<sup>125</sup> See 'Chevron's Chernobyl in the Amazon', *Amazon Watch*, available at [amazonwatch.org/work/chevron](http://amazonwatch.org/work/chevron)

<sup>126</sup> See Dixon and Khan, *supra* note 88, at 1107.

<sup>127</sup> See Lago Agrio Victims' Request, *supra* note 9, at 20.

<sup>128</sup> Dixon, *supra* note 81, at 126.

<sup>129</sup> *Ibid.*

targeting the civilian population.<sup>130</sup> One can easily imagine a systematic policy of dumping toxic waste that targets the environment of a particular population. In the alleged situation in Ecuador, the Prosecutor could have argued that Chevron's continued avoidance of civil liability for the toxic pollution established a pattern of behaviour, if not a policy, that amounted to a systematic attack.

#### 4.1.3. Knowledge

The *chapeau* of Article 7 also sets out the *mens rea* for crimes against humanity. It requires that the accused had knowledge of the overarching widespread or systematic attack on a civilian population when committing the alleged criminal act.<sup>131</sup> However, the elements of crimes do not require that the accused 'had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization'.<sup>132</sup> Nor is the motive of the accused relevant.<sup>133</sup> What is more, this analysis is objective and the finder of fact can infer knowledge from the circumstances.<sup>134</sup> Thus, the Prosecutor does not need to prove that the accused knew that his or her actions were inhumane, or that they rose to the level of a crime against humanity under Article 7. The Prosecutor only needs to prove that the accused knew of the broader widespread or systematic attack.<sup>135</sup>

The Prosecutor could establish objective knowledge in cases of environmental destruction that result in a humanitarian atrocity. In peacetime, the human costs of environmental damage are an unwanted 'side effect of cost-effective production methods', but this does not prohibit the Prosecutor from establishing that the accused knew that his or her acts were contributing to the environmental destruction that constitutes the overarching attack.<sup>136</sup> The accused does not need to 'want' an inhumane act, but only know of the broader attack. Thus, it is enough that the accused was aware of the environmental destruction. As such, the element of objective knowledge is a low bar that the Prosecutor can establish in situations where the accused knows about the environmental destruction that constitutes the attack. In the alleged case in Ecuador, the Prosecutor could have established the requisite knowledge by showing that Chevron's CEO knew that Chevron's avoidance of civil liability maintained the toxic pollution in Ecuador. It is not necessary to show that Chevron intended to harm the victims, it is enough that they were aware of the circumstances.

#### 4.2. The enumerated offences

Once the *chapeau* is established, the next step in proving a crime against humanity is satisfying one of the enumerated offences. The enumerated acts under Article 7 only encompass crimes with direct human costs. The prosecution of humanitarian

<sup>130</sup> Ibid.

<sup>131</sup> Rome Statute, *supra* note 12, Art. 7.

<sup>132</sup> Elements of Crimes, *supra* note 113, para. 2.

<sup>133</sup> Dixon and Khan, *supra* note 88, at 1112.

<sup>134</sup> *Tadić* case, *supra* note 122, para. 657.

<sup>135</sup> See Dixon and Khan, *supra* note 88, at 1112.

<sup>136</sup> See R. Rauxloh, 'The Role of International Criminal Law in Environmental Protection', in F. Botchway (ed.), *Natural Resource Investment and Africa's Development* (2011), 423 at 449.

atrocities is why the Allied Forces first prosecuted crimes against humanity at Nuremberg, and the drafters of the Rome Statute maintained this focus on human costs in Article 7.<sup>137</sup> Thus, crimes against humanity at the ICC can only address environmental destruction in an indirect manner – as a tool used to perpetrate a humanitarian atrocity – and criminal liability must be sought for harm caused to humans and not to the environment.<sup>138</sup> The following demonstrates that while peacetime environmental destruction by a non-state actor can amount to several of the enumerated acts, specifically extermination, forcible transfer of a population, persecution, and other inhumane acts,<sup>139</sup> the alleged acts of Chevron's CEO John Watson as laid out in the Lago Agrio Victims' Request did not.

#### 4.2.1. Extermination

A non-state actor can use environmental destruction as a tool to perpetrate a policy of extermination under Article 7. Extermination applies to 'intentional infliction of conditions of life . . . calculated to bring about the destruction of part of a population'.<sup>140</sup> Further, to qualify as extermination, the environmental destruction must constitute, 'or [take] place as part of, a mass killing of members of a civilian population'.<sup>141</sup> The intentional destruction of the environmental resources like water or soil that a population relies on for survival which results in mass deaths can meet this definition.<sup>142</sup> In Ecuador, a significant part of the rain forest was destroyed and rendered uninhabitable, resulting in the death of a large number of the indigenous people. However, the Prosecution would have had to show that Chevron's CEO John Watson intended to cause this humanitarian harm for his acts to amount to extermination.<sup>143</sup> From the facts in the Lago Agrio Victims' Request, Chevron's CEO intended to avoid civil liability and in turn knowingly maintained a situation of deadly contamination, but there are no facts showing he intended to cause human suffering.<sup>144</sup>

#### 4.2.2. Deportation or forcible transfer of a population

A non-state actor could also use environmental destruction as a tool to deport or forcibly transfer a population. Article 7 defines deportation or forcible transfer of population as 'forced displacement of persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds

<sup>137</sup> See *supra* notes 75–79 and supporting text.

<sup>138</sup> See Smith, *supra* note 44, at 3; M.A. Orellana, 'Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad', (2005) 17 *Georgetown International Environmental Law Review* 673, at 693.

<sup>139</sup> See Bruch, *supra* note 83, at 729. See also Lago Agrio Victims' Request, *supra* note 9, at 40–2.

<sup>140</sup> Rome Statute, *supra* note 12, Art. 7(2)(b).

<sup>141</sup> Elements of Crimes, *supra* note 113, Art. 7(1)(b)(2).

<sup>142</sup> While not perpetrated by a non-state actor, an example of such an act is the Iraq Government intentionally draining the water source of the Marsh Arabs, which ultimately led to the destruction of this group. See generally 'The Iraqi Government Assault on the Marsh Arabs: A Human Rights Watch Briefing Paper', *Human Rights Watch*, January 2003, available at [www.hrw.org/legacy/backgroundunder/mena/marsharabs1.htm](http://www.hrw.org/legacy/backgroundunder/mena/marsharabs1.htm).

<sup>143</sup> See Rome Statute, *supra* note 12, Arts. 7(2)(b), 7(2)(d), 7(2)(g).

<sup>144</sup> See Lago Agrio Victims' Request, *supra* note 9, at 18. If the facts evidenced that part of the population in the Ecuadorian Amazon moved out of the contaminated area, then the Prosecutor could potentially establish 'forcible transfer of population', but the Lago Agrio Victims' Request does not provide such facts.

permitted under international law'.<sup>145</sup> Thus, many actions that might be touted as economic development, like the targeting of indigenous groups because the land they inhabit has a profitable use, can amount to the forcible transfer of a population unless the accused can prove that international law permitted the action.<sup>146</sup> If the Prosecutor could have proved that Chevron's actions and inactions caused such environmental devastation to the rain forest region that a large part of the population were left with no other option but to leave their homes because the area had become uninhabitable, and that this was not permissible under international law, then deportation or forcible transfer may have been established.

#### 4.2.3. *Persecution*

A non-state actor could also use environmental destruction to persecute a group. Under Article 7, 'persecution' involves the 'intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively'.<sup>147</sup> The targeting of the group or collectively must be based on 'political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law'.<sup>148</sup> Thus, situations where indigenous groups are intentionally targeted on the basis of their identity in a manner contrary to international law because they are seen as an obstacle to development policies like mining or oil extraction may amount to persecution.<sup>149</sup> However, the act of persecution must be committed in connection with one of the other acts listed in Article 7 or another crime within the jurisdiction of the Court, which further constrains the application of persecution to acts of environmental destruction.<sup>150</sup> The Agrio Victims' Request would have failed to prove persecution because, like extermination, the facts as presented did not evidence intent to cause humanitarian harm.

#### 4.2.4. *Other inhumane acts*

If the environmental destruction in question is not addressed by the other enumerated crimes in Article 7, then 'other inhumane acts' serves as a potential option as a catchall provision that broadens the application of crimes against humanity beyond the enumerated crimes.<sup>151</sup> 'Other inhumane acts' encompasses 'acts of a similar character [to the enumerated crimes] intentionally causing great suffering, or serious injury to body or to mental or physical health'.<sup>152</sup> The requirements of

<sup>145</sup> Rome Statute, *supra* note 12, Art. 7(2)(d).

<sup>146</sup> See Smith, *supra* note 44, at 7 (noting the situation in South Sudan where the water supply and land of communities were targeted in an effort to force their exodus from the area to allow oil companies to exploit the area's natural resources). See also Rome Statute, *supra* note 12, Art. 7(2)(d).

<sup>147</sup> Rome Statute, *supra* note 12, Art. 7(2)(g).

<sup>148</sup> Elements of Crimes, *supra* note 113, Art. 7(1)(h)(3).

<sup>149</sup> See Smith, *supra* note 44, at 7. For example, the case of the Marsh Arabs would likely amount to persecution under Art. 7 because the identity of the Marsh Arabs was the reason why their environment was intentionally targeted. See generally Human Rights Watch Briefing Paper, *supra* note 142, at 1.

<sup>150</sup> See Elements of Crimes, *supra* note 113, Art. 7(1)(h)(4). See also de Guzman, *supra* note 71, at 16.

<sup>151</sup> See I. Haenen, 'Classifying Acts as Crimes Against Humanity in the Rome Statute of the International Criminal Court', (2013) 14(7) *German Law Journal* 796, at 810.

<sup>152</sup> Rome Statute, *supra* note 12, Art. 7(1)(k).

(1) intent; (2) acts similar to the enumerated crimes; and (3) serious injury contain the scope of this catchall phrase so it does not violate the principle of legality.<sup>153</sup> These limits, however, do not necessarily forestall prosecution of environmental destruction. It does not take much imagination to visualize a policy that intends to cause a population great suffering and to remove them from a certain geographical area in order to make way for a development scheme that exploits natural resources that would merit classification as an inhumane act.<sup>154</sup> But again, the case in Ecuador would have failed for lack of intent.

#### 4.2.5. *The other enumerated offences under Article 7*

While environmental destruction could be used indirectly to commit extermination, forcible transfer of a population, persecution, and other inhumane acts, it is unlikely to be used as a tool to perpetrate the other enumerated acts under Article 7. The enumerated acts of enslavement, imprisonment, slavery, torture, sexual crimes, enforced disappearances, and apartheid all describe crimes that cannot be perpetrated by destroying a population's environment.<sup>155</sup> Arguably, environmental destruction could be used to perpetrate the enumerated act of murder as the Lago Agrio Victims' Request suggested because a perpetrator could kill 'one or more persons' by destroying their environment.<sup>156</sup> However, destroying the environment to kill one or more persons denotes 'inflicting conditions of life calculated to bring about the destruction of part of a population', which is specifically addressed under the enumerated act of extermination.<sup>157</sup> Thus, it is unlikely given the principle of *nulum crimen sine lege*, which requires the definition of crimes to be strictly construed, that environmental destruction could amount to murder under Article 7 because extermination already addresses this scenario.<sup>158</sup>

### 4.3. An evolving crime

The failure of the alleged situation in Ecuador does not rule out the possible prosecution of environmental destruction as a crime against humanity at the ICC. On its face, Article 7 does not apply to environmental destruction. This is likely because the drafters of the Rome Statute codified existing customary international law when drafting Article 7 and at the time no tribunal had ever prosecuted environmental destruction as a crime against humanity.<sup>159</sup> However, the drafters did not intend

<sup>153</sup> See Schabas, *supra* note 50, at 119. But see Dr. M. Saif-Alden Wattad, 'The Rome Statute & Captain Planet: What Lies Between "Crimes Against Humanity" and the "Natural Environment?"', (2009) 19 *Fordham Environmental Law Review* 265, at 268–9 (arguing that interpreting 'other inhumane acts' to cover environmental destruction violates the principle of legality).

<sup>154</sup> See Smith, *supra* note 44, at 7.

<sup>155</sup> See Rome Statute, *supra* note 12, Art. 7(2); Elements of Crimes, *supra* note 113, Arts. 7(1)(c), 7(1)(e)–7(1)(g)-6, 7(1)(i), 7(1)(k).

<sup>156</sup> Elements of Crimes, *supra* note 113, Art. 7(1)(a).

<sup>157</sup> *Ibid.*, Art. 7(1)(b).

<sup>158</sup> See Rome Statute, *supra* note 12, Art. 22(2).

<sup>159</sup> See Cassese et al., *supra* note 77, at 105. However, the exclusion of environmental destruction in Art. 7 is arguably evidence of the drafters' intent to exclude environmental destruction when compared to the explicit inclusion of environmental destruction as a war crime under Art. 8(2)(b)(iv) of the Rome Statute. See L.N. Sadat, 'Crimes Against Humanity in the Modern Age', (2013) 107 *American Journal of International Law* 334, at

to limit Article 7 to the customary international law existing in 1998. The catchall provision of ‘other inhuman acts’ evidences the drafters’ intent that Article 7 evolve and expand beyond the drafters’ then understanding of the scope of crimes against humanity.<sup>160</sup> Thus, ‘[h]istory may offer an understanding of the origins of crimes against humanity, but cannot properly serve as a comprehensive guide to its current application’.<sup>161</sup> As such, peacetime environmental destruction by a non-state actor that results in a humanitarian atrocity can qualify as a crime against humanity regardless of the Prosecutor’s rejection of the Lago Agrio Victims’ Request because Article 7 of the Rome Statute was drafted to evolve beyond the enumerated acts.

## 5. CONCLUSION

Mr. Fajardo’s community deserves redress for the ‘cancer deaths, miscarriages, birth defects, dead livestock, sick fish, and the near-extinction of several tribes’ caused by Chevron’s toxic oil pits seeping into the water and soil.<sup>162</sup> Chevron should be held responsible for the environmental destruction they caused in the Ecuadorian Amazon, but the redress the Lago Agrio Victims seek was not available at the ICC. If the Court’s temporal jurisdiction covered Texaco’s initial pollution of the Ecuadorian Amazon from the 1960s until the 1990s, then the Lago Agrio Victims would have had a stronger case for crimes against humanity under Article 7 of the Rome Statute.

While the alleged situation in Ecuador did not qualify as a crime against humanity under Article 7, the Prosecutor of the ICC can make a principled legal argument that environmental destruction committed outside of armed conflict that results in a humanitarian atrocity is a crime against humanity. If the environmental destruction is committed as part of a widespread or systematic attack against a civilian population and the act in question resulted in extermination, forcible transfer of a population, persecution, or other inhumane acts under Article 7, then the Prosecutor can make a case under the Rome Statute. Not only can the Court prosecute environmental destruction as a crime against humanity, the Prosecution has signalled its intent to prioritize such cases. Now it is only a matter of time before the heads of companies that cause environmental destruction like that in Ecuadorian Amazon are held to account.

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352 (noting that the rejection of appeals during the drafting of the Rome Statute to include environmental crimes under Art. 7 proves the drafters’ intent to exclude such acts from ICC prosecution).

<sup>160</sup> See Rome Statute, *supra* note 12, Art. 7(1)(k).

<sup>161</sup> Sadat, *supra* note 159, at 370. See also Freeland, *supra* note 28, at 179–80.

<sup>162</sup> See Keefe, *supra* note 5.