

ECOCIDE: THE ENVIRONMENT AS VICTIM AT THE INTERNATIONAL CRIMINAL COURT

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ICD Brief 30
February 2023

ABSTRACT

One of the most innovative provisions of the Rome Statute of the International Criminal Court (ICC) concerns victims' rights to participate in the proceedings and to have the harm suffered repaired. The definition of ecocide proposed by the Independent Expert Panel (IEP) convened by the Stop Ecocide Foundation aims to protect the environment as an end in itself. As such, the definition seems to acknowledge the victimization of nonhumans. Bringing to the fore the different meanings associated with the term victim in the ICC, including the different interpretations of the criteria provided for by the definition of the term victim under Rule 85(a) of the ICC Rules of Procedure and Evidence (RPE), this ICD Brief argues that the existing legal framework allows for the recognition of nonhumans as victims of ecocide.

I. INTRODUCTION

In 2016, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) published a Policy Paper on Case Selection and Prioritization, indicating its intent to consider crimes committed through, or resulting in, 'the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land'.¹ The reference to the environment in the Policy Paper revitalized the debates about the international criminalization of environmental destruction.²

A few years later, in 2020, the Stop Ecocide Foundation convened an Independent Expert Panel for the Legal Definition of Ecocide (IEP). The IEP defined ecocide as 'the unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and

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¹ Office of the Prosecutor of the International Criminal Court, '[Policy Paper on Case Selection and Prioritization](#)' (15 September 2016) para. 41.

² Ricardo Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?' (2020) 31 Criminal Law Forum 179.

either widespread or long-term damage to the environment being caused by those acts'.³ The terms wanton, severe, widespread, long-term, and environment were also defined. The IEP definition was presented as a starting point for the consideration of an amendment to the Statute of the ICC (Rome Statute).⁴ Despite debates concerning the adequacy of the IEP definition,⁵ this ICD Brief will rely on it, as a working definition, to illustrate some of the challenges related to the recognition of the environment as a victim before the ICC.

As explained by White, three different levels of victimization in light of environmental harm can be identified: environmental justice (where the victims are humans); ecological justice (where the victims are specific environments), and species justice (where the victims are animals and plants).⁶ The extent to which we focus on human victims of environmental harm, specific environments, or animals and plants reflects, to a certain degree, our ability to recognize that "matter matters" or, put differently, (...) that entanglements of the human and the nonhuman, of organic and inorganic matter, are deeply enmeshed in the interdependent web of life'.⁷ Even though the recognition of humans as environmental victims still raises various issues,⁸ this ICD Brief will focus on the potential recognition of nonhumans as

³ Independent Expert Panel for the Legal Definition of Ecocide, [Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text](#) (Stop Ecocide, June 2021).

⁴ Previous efforts to criminalize offences against the environment and to define ecocide have been undertaken. See Richard Falk, 'Environmental Warfare and Ecocide – Facts, Appraisal and Proposal' (1973) 4(1) *Bulletin of Peace Proposals* 80; Mark Allan Gray, 'The International Crime of Ecocide' (1996) 26(2) *California Western International Law Journal* 215; Polly Higgins, 'Seed-Idea: Seeding Intrinsic Values: How a Law of Ecocide will Shift our Consciousness' (2012) 1(5) *Cadmus* 9; Polly Higgins, Damien Short, and Nigel South, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59(3) 251; Anja Gaujer et al, '[Ecocide is the missing 5th Crime Against Peace](#)' (Human Rights Consortium, University of London, July 2012). The proposal to include a new crime to the jurisdiction of the ICC has been related to the declaratory impact and potential deterrent effect of any resulting conviction. As explained by Gillett, using 'genocide and crimes against humanity to substitute for the direct prosecution of environmental harm would not signal the international community's condemnation of environmental harm itself.' Matthew Gillett, 'Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict' in Carsten Stahn et al, *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles and Practices* (OUP, 2017) 227.

⁵ Heller, for instance, points out that 'the Panel was mindful that socially beneficial acts, such as housing developments and transport links, can cause severe and either widespread or long-term damage to the environment' [and insisted] that 'not all acts likely to cause severe and widespread or long-term damage to the environment are illegitimate, or even undesirable.' In other words, it's fine to cause 'severe and widespread or long-term damage to the environment' as long as humans benefit enough from the destruction. Kevin Jon Heller, '[Skeptical Thoughts on the Proposed Crime of "Ecocide" \(That Isn't\)](#)' (Opinio Juris, 23 June 2021).

⁶ Rob White, 'Green Victimology and non-human victims' (2018) 24(2) *International Review of Victimology* 244.

⁷ Karsten A Schilz, 'Decolonizing political ecology: ontology, technology and "critical" enchantment' (2017) 24 *Journal of Political Ecology* 130.

⁸ See Matthew Hall, *Victims of Environmental Harm: Rights, Recognition and Redress under National and International Law* (Routledge, 2013).

environmental victims by the ICC.⁹ Whilst the separation between nonhumans and humans can be considered artificial within an ecocentric approach,¹⁰ the distinction is adopted in this ICD Brief to highlight the challenges related to the articulation of the intrinsic value of nonhumans and the due consideration of the complexity of ecological relationships within international criminal law.¹¹ In this perspective, the term environment is hereby used to refer to biotic (plants, animals, bacteria, fungi) and abiotic components (air, water, soil) and their interactions.

Within the ICC, the recognition of the status of victims opens up 'opportunities for the concerns of nature to be asserted by a legal representative and for reparations to be sought on behalf of ecosystems'.¹² In this ICD Brief, the recognition of the environment as a victim is, by itself, considered an important step in understanding what kind of knowledge about the environment international criminal justice produces.¹³ As such, it is decoupled from the analysis of victims' right to participate in the proceedings before the ICC as well as victims' right to reparations.

Whilst the potential amendment of the Rome Statute to establish the ICC's jurisdiction over ecocide should ideally be followed by amendments aimed at the recognition of the environment as a victim, this aspect was not clearly addressed by the IEP. As such, this ICD Brief explores the potential recognition of the environment as a victim within the ICC's current legal framework. This approach acknowledges that the Rome Statute already contains, even if only in a limited way, provisions for which the recognition of the environment as a victim might be relevant.¹⁴ The prosecution of 'intentionally launching an attack in the knowledge that such attack will cause [...] widespread, long-term and severe damage to the natural environment', for instance, opens the space to the discussion of which living and non-living

⁹ Broad references to the environment as a victim can already be found in the literature. See Bronwyn Leebaw, 'Scorched Earth: Environmental War Crimes and International Justice' (2014) *Perspectives on Politics*, and Peter Doran et al, '[Criminalising 'Ecocide' at the International Criminal Court](#)' (Environment Justice Network Ireland, April 2021).

¹⁰ As summarized by Brisman and South, ecocentrism is 'based on the idea that humans and their activities are inextricably interconnected with the rest of the natural world'. Avi Brisman and Nigel South, '[Green Criminology and Environmental Crimes and Harms](#)' (2018) 13(1) *Sociology Compass*.

¹¹ See Anna Grear, 'The closures of legal subjectivity: why examining law's person is critical to an understanding of injustice in an age of climate crisis' in Anna Grear and Louis J Kotze, *Research Handbook on Human Rights and the Environment* (Elgar, 2015) 80.

¹² Doran et al (fn 9).

¹³ Anette B Houge, 'Narrative expressivism: A criminological approach to the expressive function of international criminal justice' (2019) 19(3) *Criminology & Criminal Justice: An International Journal* 277.

¹⁴ See Alessandra Mistura, 'Is there space for environmental crimes?' (2018) 43(1) *Columbia Journal of Environmental Law*, 221. In relation to provisions relevant to the potential recognition of animals as victims, see Marina Lostal, 'De-objectifying animals: could they qualify as victims before the International Criminal Court?' (2021) 19(3) *Journal of International Criminal Justice* 583.

components of the damaged natural environment could be recognized as a victim.¹⁵ Bringing to the fore specific challenges related to the recognition of the environment as a victim within the ICC's existing legal framework, this Brief contributes to the identification of aspects that should be the focus of future amendments. As such, it adds to the literature related to the recognition of victims by the ICC, pointing out the potential scope of the criteria established by Rule 85(a) of the ICC Rules of Procedure and Evidence (RPE), as well as to the literature related to environmental victimization.

For this purpose, Section II of this ICD Brief addresses the different meanings attributed to the term victim within the legal framework of the ICC. Section III furthers this analysis by looking at different interpretations of the criteria that inform the definition of the term victim provided for in RPE Rule 85(a).¹⁶ Drawing attention to the overall ambiguity that characterizes the meaning of the term victim within the ICC, this Brief highlights the fact that victimhood is not a neutral process. It involves weighing up the costs of victimhood.¹⁷ In a context in which the efforts related to the criminalization of ecocide can be considered as part of a paradigmatic change that re-orientes the law away from anthropocentrism,¹⁸ this process involves the resignification of the criteria established by RPE Rule 85(a); a challenging, but certainly not inconceivable, process, if one considers that the environment is 'a fundamental driver of disciplinary evolution, shaping legal concepts in seminal ways.'¹⁹

II. VICTIMS IN THE INTERNATIONAL CRIMINAL COURT

¹⁵ See Article 8(2)(b)(iv) of the Rome Statute. The prosecution of environmental harm based on this provision has been considered extremely hard due to the cumulative criteria - widespread, long-term and severe damage - and the introduction of a balancing test in the evaluation of the environmental harm caused during the international conflict. Gillett (fn 4) 229.

¹⁶ Hereinafter, RPE Rule 85(a).

¹⁷ According to White, at the basis of this process lies the understanding that 'the intrinsic and worth and value of non-human environmental entities is vital from the point of view of an ecocentric approach, but this does not mean that instrumental uses of these by humans are, thereby, rendered unimportant'. White (fn 6) 249.

¹⁸ Article 31 Vienna Convention on the Law of Treaties.

¹⁹ Usha Natarajan Kishan Khoday, 'Locating nature: making and unmaking international law (2014) 27 Leiden Journal of International Law 576.

The Rome Statute has been considered a progressive instrument regarding victims' rights in international criminal law.²⁰ The Statute, however, does not define the term victim. The analysis of its negotiation process indicates that the involvement of victims in the proceedings was considered by different working groups throughout the negotiations.²¹ As a result, the term victim refers 'to different persons at different times, as specific victims interact in distinct ways with different parts of the [c]ourt at different phases of the proceedings'.²²

In the Rome Statute, the term victim is used, for instance, to describe those who have sent communications or information of crimes to the prosecutor²³ as well as those allowed to submit 'representations' or 'observations' before the commencement of the trial.²⁴ In these contexts, the status of a victim does not depend on a previous ruling of the ICC.²⁵ It is based on the interpretation of the Rome Statute by those submitting communications, representations, or observations. An example of the constraints imposed by the Rome Statute to the recognition of the environment as a victim can be seen in the communication submitted by the Human Rights Advocacy Collective and the Dom Paulo Evaristo Arns Commission for Human Rights. The communication pointed out alleged offenses perpetrated by Jair Messias Bolsonaro, then Brazilian President, against the environment – land, forests, wildlife, and rivers. Despite that, due to the non-criminalization of offenses against the environment during peaceful times by the Rome Statute, the communication framed the acts that destroyed the environment as elements of crimes of extermination perpetrated against human beings. In this regard, the communication reads:

Although the facts presented here highlight a key element in the offenses perpetrated by President Jair Messias Bolsonaro against the environment, whose consequences

²⁰ See Elisabeth Baumgartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court' (2008) 90 *International Review of the Red Cross*; Carsten Stahn et al, 'Participation of Victims in Pre-Trial Proceedings of the ICC' (2006) 4 *Journal of International Criminal Justice*, Charles P Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29 *Michigan Law Review*.

²¹ UN Doc Preparatory Committee on the Establishment of an International Criminal Court, Working Group on the Composition and Administration of the Court, Draft Statute for the International Criminal Court, Part 4, Articles 36 and 37. UN Doc A/AC.249/1998/WG.4/DP 19, Preparatory Committee on the Establishment of an International Criminal Court, Working Group on Procedural Matters, 'Proposal by France and the United Kingdom of Great Britain and Northern Ireland'. On the negotiation process of the Rome Statute, in relation to victims, see Baumgartner (fn 20) 409-440.

²² ICC-ASP/8/45, Report of the Court on the Strategy in Relation to Victims, p. 2.

²³ See Article 15(3) of the Rome Statute.

²⁴ See Article 19(3) of the Rome Statute.

²⁵ Stahn et al (fn 20) 225.

will be felt worldwide, this Informative Note is not intended to extend the types of crimes listed in the Rome Statute. Here, practices destroying the environment are elements of crimes of extermination perpetrated against human beings, as addressed in Article 7. This is because the means of existence of the indigenous peoples are grounded on their relationships to the land, the forest, wildlife and water. Consequently, trespassing on their lands, polluting rivers, illegal burn-offs in order to log timber and take possession of lands – which helps spread the flames through the forest – all contribute to putting these indigenous peoples at risk of falling victim to crimes against humanity.²⁶

When related to Article 68(3) of the Rome Statute, which provides for the participation of victims in various stages of the proceedings before the ICC, a decision of the judges on whether or not a person is a victim from a legal point of view is required.²⁷ In this context, the status of a victim is assigned in light of the definitions of the term victim in RPE Rule 85. Based on the United Nations Victim Declaration, RPE Rule 85(a) defines victims as ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court’.²⁸ In addition to the victimization of natural persons, RPE Rule 85(b) provides for the victimization of legal persons, stating that ‘victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes’.²⁹ These provisions highlight that not only

²⁶ Human Rights Advocacy Collective (CADHu) and the ARNS Commission São Paulo (2019) [‘Informative Note to the Prosecutor: International Criminal Court pursuant to Article 15 of the Rome Statute requesting a preliminary examination into incitement to genocide and widespread and systematic attacks against indigenous peoples by President Jair Messias Bolsonaro in Brazil’](#), para. 11.

²⁷ Article 68(3) of the Rome Statute establishes that: ‘Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.’

²⁸ The broad reference to harm in RPE Rule 85(a) concealed the disagreements during the negotiation process about the relevance of the types of harm considered in the United Nations Victims Declaration to the ICC. An agreement could not be reached over the types of harm included in the UN Victims Declaration, i.e., physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights. There were also reservations with respect to indirect harm and the inclusion of collective harm. See B Timm, ‘The Legal Position of Victims in the Rules of Procedure and Evidence’ in H. Fischer, C. Kress and S. R. Lüder, *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin Verlag Arno Spitz, 2001) 290.

²⁹ Even though it was broadly acknowledged that legal entities are often the target of certain war crimes, the adoption of RPE Rule 85(b) was controversial. ‘Delegations opposed to the inclusion of legal persons feared

victimhood, but also personhood, are legal constructs, which are historically and politically contingent.

It is, therefore, interesting to note that even though the negotiation process of the Rome Statute led to the criminalization of intentionally causing widespread, long-term and severe damage to the natural environment during an international armed conflict, it did not address the victimization of nonhumans. A similar silence can be noted in the negotiations of the ICC RPE. It seems, therefore, that the ICC's legal framework took into account only one level of environmental victimization, acknowledging mainly humans as potential victims.³⁰

More recently, due to the challenges related to victims' participation, new understandings of the term victim seem to be developing at the ICC. Trial Chamber V, for instance, differentiated among the victims 'who wished to appear directly before the Chamber', registered victim participants, and 'victims who choose not to register or who are, for practical or security reasons barred from doing so'.³¹ In the first category, an application form needs to be completed and assessed by the Chamber.³² The Chamber is responsible for granting the status of a victim. In the second category, victim participants submit their names, contact information, and information regarding the harm suffered to the Registry. Without any individualized review by the parties or a decision from the Chamber, this information is entered into a database. The database is shared with the common legal representative, who would then verify which victims are eligible to participate in the case.³³ In the third category, the identification of non-registered victims also falls under the responsibility of the legal representative.³⁴ The Chamber decided that the views and concerns of registered and non-registered victims should be expressed, in a general way, through common legal representation.³⁵

When creating these categories, the Chamber acknowledged the negative impact that the administrative process, in particular the challenges related to the completion of a detailed application form, can have on the recognition of the victims.³⁶ If administrative difficulties in

a diversion of the Court's resources, better used for individual victims, and potential misuse of the participation scheme by multinational companies. Baumgartner (fn 20) 417.

³⁰ See White's discussion of the different environmental harm levels referred to above, at p. 2.

³¹ Trial Chamber V, *Prosecutor v Uhuru Muigai Kenyatta*, Decision on Victims' Representation and Participation, 03 October 2012, ICC-01/09-02/11, paras. 24, 51. To Kendall and Nouwen, victims in categories two and three become part of an amorphous category of victims. See Sara Kendall and Sarah Nouwen, 'Representational practices at the international criminal court: the gap between juridified and abstract victimhood' (2013) 76(3) *Law and Contemporary Problems* 249.

³² *Ibid.*, para. 24.

³³ *Ibid.*, para. 48.

³⁴ *Ibid.*, para. 51.

³⁵ *Ibid.*, para. 38.

³⁶ *Ibid.*, paras. 23, 30, 50.

complying with specific formal requirements are perceived as one of the main impediments to the recognition of not only humans, but also nonhumans, as victims, this jurisprudential development opens the space for the recognition of the environment as a victim. In particular, it seems to enable the recognition of the environment as a non-registered victim by a common legal representative.

The extent to which the term victim can refer to the environment in the ICC might, therefore, vary. At different times, different actors are responsible for conveying and acknowledging the nature of nonhumans' victimization. In this context, the discussion of who should convey and acknowledge the nature of nonhumans' victimization within the international criminal procedure has a direct impact on the knowledge that can be produced about the environment at the ICC. As illustrated by White,

a 'river' may be defined in spiritual and cultural terms by an Indigenous community; be viewed primarily in terms of water flow according to the narrow Eurocentric conceptions (...); be seen as being constituted by its channel banks and channel bed according to the science of geomorphology; and be conceptualised as inclusive of riparian zones, which relate to the observed influence of the river on the biota within and adjacent to the river, from an ecological perspective.³⁷

As the views of these various actors about the status of the environment as a victim are informed by the ICC legal framework, the definition of the term victim in RPE Rule 85(a) and RPE Rule 85(b) of the ICC RPE become relevant. This ICD Brief will focus on RPE Rule 85(a) due to the potential application of the notion of indirect harm to the characterization of harm as severe, long-term or widespread harm in the IEP definition of ecocide.³⁸ The focus on RPE Rule 85(a) also takes into account that 'in contrast to institutions and corporations, that are both a human construct and a fictionalized human person, the biotic and abiotic components of the environment exist independently of human construction and imagination'.³⁹ RPE Rules

³⁷ Rob White, 'The Four Ways of Eco-global Criminology' (2017) (6)1:8 *International Journal for Crime Justice and Social Democracy* 13. See also Alyse Bertenthal, 'Standing up for Trees: Rethinking Representation in a Multispecies Context' (2019) 32(3) *Law and Literature* 357.

³⁸ RPE Rule 85(b) refers exclusively to direct harm. See Trial Chamber I, *Prosecutor v Thomas Lubanga Dyilo*, Decision on Victims' Participation, 18 January 2008, ICC-01/04-01/06, para. 91.

³⁹ Alessandro Pelizzon et al, 'Can you hear the rivers sing? Legal personhood, ontology and the nitty gritty of governance' (2018) 45(4) *Ecology Law Quarterly* 831. In addition to that, the reference to institutions and organizations with specific objectives in RPE Rule 85(b) questions the extent to which the intrinsic value of the environment can be encompassed by RPE Rule 85(b).

85(b), nonetheless, contributes to the discussion of the recognition of the environment as a victim to the extent that it demonstrates that personhood is a legal construct.

III. THE DEFINITION OF VICTIM INCLUDED IN RULE 85(A) AND THE ENVIRONMENT

To be granted the status of a victim of ecocide by the ICC under RPE Rule 85(a), three criteria need to be met: to be considered a natural person, to have suffered harm, and the establishment of the nexus between the harm suffered and the crime within the jurisdiction of the ICC (in this case, ecocide). These criteria are assessed against the information provided in applications for participation in the proceedings. The application process is provided for in RPE Rule 89.

RPE Rule 89(1) establishes that ‘to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber’. The defense and the prosecutor are allowed to comment on the application form. RPE Rule 89(2) grants the Chamber the power to reject the application, on its own initiative, or based on the comments of the parties, if it considers that the person is not a victim or that the criteria set forth in Article 68(3) of the Rome Statute are not fulfilled. RPE Rule 89(3) provides that an application ‘may be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled’. Potential amendments to the RPE should, therefore, consider the representation of nonhumans at the application stage to avoid it becoming an impediment to the recognition of the environment as a victim.⁴⁰ Similarly, new application forms, capable of capturing the harm suffered by the environment, will need to be developed.⁴¹ Nonetheless, as seen in the previous Section, within the existing legal framework, the recognition of the environment as a victim might be enabled by the legal representative, following the above-mentioned jurisprudence of Trial Chamber V.

⁴⁰ For decisions related to the representation of the environment and the challenges they might put forward, see Pelizzon (fn 39) and Mihnea Tănăsescu, ‘Rights of Nature, Legal Personality and Indigenous Philosophies’ (2020) 9(3) *Transnational Environmental Law*.

⁴¹ Regarding the challenges related to the design of an application form, see War Crimes Research Office, [Obtaining victim status for purposes of participating in proceedings at the International Criminal Court](#) (American University Washington College of Law, December 2013) 21, 26.

As the recognition of victims and their rights to participate in the proceedings have been related to each other in Article 68(3) of the Rome Statute, Article 68(3) imposes further constraints on the recognition of the environment as a victim. When considering the applications for participation, in addition to the criteria of RPE Rule 85(a), ICC Chambers have also 'examined whether participation would be prejudicial to the rights of the accused or a fair and impartial trial, whether the victim's personal interests are affected, and at what stage participation would be most appropriate' when granting the status of a victim.⁴² As the scope of participation of potential environmental victims is not the focus of this ICD Brief, the next section will focus on whether each criterion established in RPE Rule 85(a) allows for the recognition of the environment as a victim.

III.1. Natural person

There has not been much reflection on the notion of legal personhood in the jurisprudence of the ICC.⁴³ Natural persons have been interpreted to refer mainly to human beings.⁴⁴ Nonetheless, it has also been defined in opposition to juridical persons.⁴⁵ This approach, in a context of paradigmatic change, arguably opens the space for the application of the concept of 'natural person' to the environment.

The thematization of environmental legal personhood has started to take place through the recognition of the rights of nature. References are commonly made to the 2008 Constitution of Ecuador,⁴⁶ the adoption of the Framework Law of Mother Earth and Integral

⁴² Yvonne Mc Dermott, 'Some are more equal than others: victim participation at the ICC' (2008-2009) 5(1) *Eyes on the ICC* 28.

⁴³ The phrase legal person can refer to a bundle of legal positions as well as to an entity that meets certain criteria. See Visa A J Kurki, *A theory of legal personhood* (Oxford, 2019) 128. In this Brief, the term is used to refer to legal positions. When referring to the entities, the phrases 'natural person' and 'juridical person' are used. As such, legal personality is used as the umbrella concept that encompasses both natural and juridical persons.

⁴⁴ Héctor Olásolo and Alejandro Kiss, 'The role of victims in criminal proceedings before the International Criminal Court' (2010) 81 *Revue Internationale de Droit Penal*. See also Lostal (fn 14) 357.

⁴⁵ Pre-Trial Chamber I, *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 80.

⁴⁶ Ecuador, Constitution of the Republic of Ecuador (2008). Gordon points out that in the Ecuadorian constitution 'Nature here, instead of being named as a legal person directly, instead is given these rights by analogy to "persons and people."' Gwendolyn J Gordon (2018), 'Environmental Personhood' 43(1) *Columbia Journal of Environmental Law* 52.

Development to Live Well by Bolivia in 2012,⁴⁷ the recognition of the legal personhood of the Whanganui River by New Zealand in 2017,⁴⁸ and of the Te Urewera, a New Zealand body of land formerly classified as a national park, in 2014,⁴⁹ and the recognition of the legal personality of the Magpie River by Canada in 2021.⁵⁰ Various decisions at the domestic level have also acknowledged the rights of natural systems.⁵¹ At the international level, the Inter-American Court of Human Rights' advisory opinion on the environment and human rights stated that the right to a healthy environment

protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.⁵²

More recently, in the *Indigenous Communities Members of the Lhaka Honhat Association v. Argentina* case, the Inter-American Court of Human Rights confirmed its recognition of nature's independent rights.⁵³ It reasserted the understanding that the right to a healthy environment protects components of the environment 'as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals'.⁵⁴ In fact, the protection

⁴⁷ Bolivia, Plurinational Legislative Assembly, "Framework Law of Mother Earth and Integral Development for Living Well" (2012).

⁴⁸ New Zealand, Te Awa Tupua (Whanganui River Claims Settlement) Act (2017).

⁴⁹ New Zealand, Te Urewera Act (2014).

⁵⁰ Canada, Reconnaissance de la personnalité juridique et des droits de la rivière Magpie – Mutehekau Shipu, Resolution 025-21 (2021). See, in general, David R Boyd, 'Constitutions, human rights and the environment: national approaches' in Anna Grear and Louis J Kotze, *Research Handbook on Human Rights and the Environment* (Elgar, 2015) 182; Dinah Shelton, '[Nature as a Legal Person](#)' (2015) 22 *VertigO* – a revue électronique en sciences de l'environnement, Jan Darpö, '[Can nature get it right? A study on the rights of nature in the European context](#)' (March 2021).

⁵¹ See, for example, Constitutional Court of Colombia, Judgment T-622-16, 10 November 2016, paras. 9.27 - 9.31; Constitutional Court of Ecuador, Judgment No. 218-15-SEP-CC, 9 July 2015, 9 - 10, and High Court of Uttarakhand at Naintal of India, Decision of 30 March 2017. Petition (PIL) No. 140 of 2015, 61 - 66

⁵² Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, para. 62.

⁵³ Inter-American Court of Human Rights, *Indigenous Communities Members of the Lhaka Honhat Association v Argentina*, Judgment (Merits, reparations and costs), Series C No 420, 17 November 2020.

⁵⁴ *Ibid*, para. 203.

of the environment was related to its importance to other living organisms, rather than to its usefulness to or effects on human beings.⁵⁵

In these references, the recognition of the rights of nature has been articulated in broad terms or related to the concept of juridical personhood. As such, they do not provide a straightforward pathway to the recognition of the environment as a natural person. Despite that, these developments should not be underestimated. As pointed out by De Vido, 'they challenged laws that have been created to protect the environment for the benefit of human beings without considering two key aspects: first, that human beings are themselves part of nature, and second, that the existence of nature per se, independently from human beings, matters'.⁵⁶ Within this broader context, arguments have been put forward to enable the understanding of the environment in relation to other international instruments. Fischer-Lescano has, for instance, argued that the concept of the individual is 'sufficiently open to interpretation to endow non-human entities with rights and with possibilities for their enforcement'.⁵⁷ This understanding is particularly relevant to the discussion of environmental personhood within international human rights instruments, such as the International Covenant on Civil and Political Rights.

The attribution of environmental personhood within the boundaries established by the binomen natural person and juridical person has not been without its challenges. The judgments in the *Ganges and Yamuna case*⁵⁸ and in the *Glaciers case*⁵⁹ by the High Court of Uttarakhand (the Court) illustrate some of them. Both decisions created rights to the environment through the recognition of its juridical personhood. Nonetheless, by comparing the environment to a living person, the Court, in both cases, seems to conflate the concept of a juridical person with that of a natural person.⁶⁰ In the *Ganges and Yamuna case*, the Court ruled that the two rivers are 'living entities having the status of a legal person with all

⁵⁵ Ibid.

⁵⁶ Sara De Vido, 'A Quest for an Eco-centric Approach to International Law: the COVID-19 Pandemic as Game Changer' (2021) 3 *Jus Cogens* 107.

⁵⁷ Andreas Fischer-Lescano, 'Nature as Legal Person: Proxy Constellations in Law' (2020) 32(2) *Law and Literature* 252.

⁵⁸ *Mohd Salim v State of Uttarakhand & others*, WPPIL 126/2014 (High Court of Uttarakhand) 2017 [19] (hereinafter, the *Ganges and Yamuna case*).

⁵⁹ *Lalit Miglani v State of Uttarakhand & others*, WPPIL 140/2015 (High Court of Uttarakhand) 2017 64 (hereinafter, the *Glaciers case*).

⁶⁰ Erin L. O'Donnell, 'At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India' (2018) 30 *Journal of Environmental Law* 138.

corresponding rights, duties and liabilities of a living person'.⁶¹ In the *Glaciers* case, the Court found that

the Glaciers, including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls [are] legal entity/legal person/juristic person/juridical person/moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a *living person*, in order to protect and conserve them. They are also accorded rights akin to fundamental rights/legal rights.⁶² [emphasis added]

Furthermore, in the *Glaciers* case, the Court explicitly stated that the rights of these legal entities 'shall be equivalent to the rights of *human beings* and the injury/harm caused to these bodies shall be treated as harm/injury caused to the *human beings*'.⁶³ [emphasis added] The attribution of juridical personality together with the analogy between these living entities and a living person, a human being, seems to suggest a certain discomfort with, on the one hand, the expansion of the concept of natural persons to include the environment and, on the other hand, the application of the concept of juridical personhood in light of the environment's intrinsic value.⁶⁴

To address these challenges within the international criminal context, amendments aimed at the inclusion of crimes against the environment to the Rome Statute should, ideally, be followed by amendments to the RPE. Nonetheless, the application of the notion of natural personhood to the environment might not be inconceivable. As suggested by Gear, such application would require a (new) juridical imaginary that understands that 'matter matters', that the human legal subject is not the autonomous, abstract human of traditional international human rights universalism, but a living, flesh and blood being.⁶⁵ Within this new imaginary, the term natural could be considered more broadly to refer to beings,⁶⁶ to the biotic and abiotic

⁶¹ Ganges and Yamuna case (fn 58) 19.

⁶² *Glaciers* case (fn 58) 64.

⁶³ *Ibid*, 65.

⁶⁴ As explained by Pietrzykowski, the recognition of organizational entities 'as separate holders of rights and duties is derivative and based on essentially pragmatic grounds. Namely, such recognition is supposed to serve as a tool to better realize some of the needs and interests of human beings. The goal of the recognition of any organizational entity as a legal person is the satisfaction of the interests of human persons.' Tomasz Pietrzykowski, 'Towards modest naturalization of personhood in law' (2017) 32 59-71. See also the overall criticism to the application of juridical personhood pointed out above, in page 8.

⁶⁵ Gear (fn 11) 88.

⁶⁶ Lostal (fn 14) 590.

components of an ecosystem, such as plants, animals, soil, water, minerals, and gases. In other words, the word natural within the phrase 'natural person' in RPE Rule 85(a) could assume a broader meaning,⁶⁷ ensuring that the interpretation of the provisions related to the rights of victims could be applied to the environment.

Even if a requirement of a paradigmatic shift, the reconstruction of the meaning attributed to the phrase 'natural person' is certainly challenging. It could, however, be facilitated by the adoption of amendments to the Rome Statute that clearly reflects an ecocentric perspective regarding crimes against the environment. Such amendments would provide not only a clear indication of such a paradigmatic change but also a new legal context against which the ordinary meaning of the phrase 'natural person' would need to be assessed. In this regard, it is interesting to note that the IEP did suggest amendments to the Preamble of the Rome Statute, one of the constitutive elements of a treaty context, in accordance with Article 31(2) of the Vienna Convention on the Law of Treaties (VCLT). The reconsideration of the automatic association between the concept of natural persons and humans could, therefore, be derived from a new, less anthropocentric context.

Without an ecocentric perspective embedded in the Rome Statute, the potential reconstruction of the notion of a natural person would need to be motivated by the impact that overall developments in international and domestic law might have on the arguments put forward by the various actors responsible for the articulation of victimhood in the ICC. As seen, the first steps related to the definition of a victim might, therefore, be undertaken by non-specialized actors, those sending a communication to the OTP. They might also be the ones submitting applications for victims' participation on behalf of the environment. The legal representative of the victims can also put forward the characterization of the environment as a victim and, therefore, address the extent to which the environment can be considered a natural person. The decisions of the judges within this context will need to take into account the convincing force of the legal arguments put forward by all these different actors within a broader context of paradigmatic change. In other words, whilst the concept of a natural person might be informed by previous decisions of the ICC, one should not disregard the impact of the overall (legal) background.

Due attention to the materiality that characterizes human and nonhuman biotic elements as well as abiotic elements might provide the basis for the expansion of the concept

⁶⁷ This has been one of the points put forward by the Rights of Nature movement. See Joshua C Gellers, 'Earth system law and the legal status of non-humans in the Anthropocene' (2020) 7 Earth System Governance 1.

of natural person within a less anthropocentric legal framework. In such a context, the recognition of the environment as a victim will need to take into account its concrete components. Their complex interactions will, therefore, need to be explored under the idea of harm.

III.2. The notion of harm

There is no definition of the term harm in the Statute of the ICC or in its RPE. According to the Appeals Chamber in the *Lubanga Dyilo* case, '[t]he word "harm" in its ordinary meaning denotes hurt, injury and damage [and] it carries the same meaning in legal texts, including in the RPE'.⁶⁸ Various ICC Chambers have interpreted the notion of harm broadly to include physical or mental injury, emotional suffering, and economic damage.⁶⁹ The determination of a single instance of harm suffered has been considered sufficient for the fulfilment of this criterion.⁷⁰

Regarding environmental damage, De La Fayette notes that in the majority of international environmental law instruments 'the concept of damage does not refer to damage to the environment, but damage through the environment to persons, property, and economic interests'.⁷¹ The influence of such an approach can also be felt in the IEP definition of ecocide. Relying on the 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, the IEP definition of severe damage involves 'grave impacts on human life or natural, cultural or economic resources'.⁷² As a result, to ensure that the definition of ecocide embraces not only damage *through* the environment, but also damage

⁶⁸ Appeals Chamber, *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation, 18 January 2008, ICC-01/04-01/06-1432, para. 31.

⁶⁹ See, Pre-Trial Chamber III, *Prosecutor v Jean-Pierre Bemba Gombo*, Fourth Decision on Victim's Participation, 12 December 2008, ICC-01/05-01/08-320; Pre-Trial Chamber II, *Prosecutor v William Samoei Ruto, Henry Kiprono Kogsey and Joshua Arap Sang*, 5 August 2011, ICC-01/09-01/11-249, para. 50; Appeals Chamber, *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para. 32; Trial Chamber I, *Prosecutor v Laurent Gbagbo*, 6 March 2015, ICC-02/11-01/11, para. 33. The Booklet [Victims before the ICC: A guide for the participation of victims in the proceedings of the Court](#), produced by the ICC, refers to these types of harm.

⁷⁰ See, for instance, Pre-Trial Chamber I, *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, VPRS 6, para. 82; Pre-Trial Chamber II, *Prosecutor v Bosco Ntaganda*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014, ICC-01/04-02/06, para. 33.

⁷¹ Louise De La Fayette, 'The concept of environmental damage in international liability regimes' in M Bowman and A Boyle (eds) *Environmental Damage in International and Comparative Law* (OUP: 2002) 181.

⁷² See IEP comments regarding severe damage, IEP (fn 3).

to the environment, the IEP added the phrase 'very serious adverse changes, disruption or harm to any element of the environment' to its definition of severe damage.

When the focus is on damage to the environment, French explains that 'there is often agreement as to a term's core meaning to justify broad consensus, there is rarely agreement as regards a term's exact content'.⁷³ The current interpretation of harm to humans by the ICC seems to reflect such an approach, allowing for the gradual articulation of various dimensions of harm. Regarding the environment, this approach enables the development of our understanding of harm not only in light of scientific knowledge, but also of indigenous traditional knowledge.⁷⁴ As environmental harm does not necessarily follow a linear conception of cause and effect, indigenous peoples' 'interpretation of reality as a world made up of constantly forming multidimensional cycles in which all elements are part of an entangled and complex web of interactions'⁷⁵ can further our ability to assess environmental harm.

It is, nonetheless, important to note that the types of harm already acknowledged by the ICC can contribute to the discussion of environmental harm. Wildman, for instance, suggests that biotic components do not pose further challenges to the notion of physical harm. Physical harm to abiotic components can be articulated in light of the notion of environmental integrity.⁷⁶ The determination of mental injury and emotional suffering, in his view, requires a careful analysis of the social embedding, psychological complexity, and emotional capacities of biotic components in the cognitive realm.⁷⁷

Even though the differentiation between the concepts of direct and indirect victims relies on a mechanical understanding of causation, which might not be the most appropriate approach to the analysis of the interactions among abiotic and biotic environmental factors, they can also contribute to the thematization of environmental harm before the ICC. Direct victims were defined by the Appeals Chamber in the *Lubanga Dyilo* case as 'those whose

⁷³ Duncan A French, 'Review: Environmental Damage in International and Comparative Law: Problems of Definition and Valuation' (2003) 15(2) *Journal of Environmental Law* 266.

⁷⁴ See Kamila Pope et al, 'The what, who and how of socio-ecological justice: tailoring a new justice model for earth system law' (2021) 10 *Earth System Governance* 2. The reference to traditional knowledge is also relevant if the hierarchy within Anthropos is introduced in the debates related to human victims of environmental harm.

⁷⁵ Fulvio Mazzocchi, 'Western science and traditional knowledge: despite their variations, different forms of knowledge can learn from each other' (2006) 7(5) *EMBO Reports*.

⁷⁶ According to Wildman, 'the best case for injury in nonbiological systems of nature turns on showing that there is a kind of physical integrity to some nonbiological systems that can be disturbed in a way that is loosely similar to the way injury disrupts the integrity of a biological organism'. Wesley J Wildman, 'The use and meaning of the world suffering in relation to nature' in Robert J Russell et al (eds), *Suffering and Cosmology: Scientific Perspectives on Suffering in Nature* (Centre for Theology and Natural Sciences, 2007) 58.

⁷⁷ *Ibid.*, 66. For the challenges that such analysis might put forward, see Lostal (fn 14) 595.

harm is the result of the commission of a crime within the jurisdiction of the Court⁷⁸. In the same decision, the Appeals Chamber defined indirect victims as ‘those who suffer harm as a result of the harm suffered by direct victims’.⁷⁹ Within this differentiation, one could say that large-scale illegal fires cause direct harm to plants and animals (biotic component) as well as to the soil (abiotic element).⁸⁰ It is also possible, in principle, to conceive the moral or physical harm of a biological organism (including a human being) because of the disruption of the physical integrity of a non-biological system, such as in cases related to illegal mining.⁸¹ Similarly, abiotic components can be considered indirect victims, as in cases related to illegal logging. Whilst trees are directly harmed by illegal logging, deforestation can indirectly harm the soil as it leads, among others, to soil erosion.⁸²

As explained by Sknnider, ‘environmental crimes do not always produce an immediate consequence, the harm may be diffused or go undetected for a lengthy period of time’⁸³. In this context, a denser understanding of environmental harm, which is capable of taking into account the interactions among biotic and abiotic components within an ecosystem, avoids the undue characterization of environmental crimes as victimless crimes. Within the ICC, the notions of physical and moral harm as well as direct and indirect victims can contribute to this process.

III.3. The nexus between the harm suffered and the crimes under the jurisdiction of the Court

The assessment of this criterion in the ICC jurisprudence involves, firstly, the discussion of how the phrase ‘crimes under the jurisdiction of the Court’ should be interpreted. Trial Chamber I, in the *Lubanga* case, did not impose any limitations to the phrase: a crime under the

⁷⁸ Appeals Chamber, *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para. 31.

⁷⁹ *Ibid.*

⁸⁰ See, for instance, Giacomo Certini, ‘Effects of fire on properties of forest soils: a review’ (2005) 143(1) *Oecologia* 1.

⁸¹ See, for instance, Dan Collins, [Illegal gold mining exposing Peru’s indigenous tribes to mercury poisoning](#) (The Guardian, 9 September 2013).

⁸² See, for instance, J C Anyanwu et al, ‘The Impact of Deforestation on Soil Conditions in Anambra State of Nigeria’ (2015) 4(3) *Agriculture, Forestry and Fisheries. Special Issue: Environment and Applied Science Management in a Changing Global Climate* 64.

⁸³ Eileen Sknnider, *Victims of Environmental Crime – Mapping the Issues* (The International Centre for Criminal Law Reform and Criminal Justice Policy: March 2011) 2.

jurisdiction of the Court would be relevant to the determination of victim's status regardless of when and where it had allegedly been committed.⁸⁴ Victim's status, in this perspective, did not imply victims' right to participate in the proceedings. A second analysis of the applications was necessary to assess the criteria established in Article 68(3) of the Rome Statute. Pre-Trial Chamber I interpreted the phrase differently. To Pre-Trial Chamber I, the phrase crime under the jurisdiction of the Court needed to be interpreted in accordance with the different stages of ICC proceedings.⁸⁵ This approach differentiated between situation victims and case victims. The phrase crimes under the jurisdiction of the Court during the situation stage of the proceedings meant 'a crime within the subject-matter jurisdiction of the Court allegedly committed within the temporal, territorial and personal parameters that define the relevant situation'.⁸⁶ During the case stage of the proceedings, the phrase meant 'a crime within the subject-matter jurisdiction of the Court allegedly committed in the context of the specific incidents included in the relevant arrest warrant or summons to appear (and subsequently charging document)'.⁸⁷ The Appeals Chamber, in the *Lubanga case*, has rejected the approach followed by Trial Chamber I, stating that:

whilst the ordinary meaning of Rule 85 does not per se limit the notion of victims to the victims of the crimes charged, the effect of Article 68(3) of the Statute is that participation of victims in trial proceedings, pursuant to the procedure set out in Rule 89(1) of the Rules, is limited to those victims who are linked to the charges.⁸⁸

This approach clearly illustrates the impact that Article 68(3) of the Rome Statute can have on the interpretation of RPE Rule 85(a). As explained by Kendall and Nouwen, this process

⁸⁴ Trial Chamber I, *Prosecutor v Thomas Lubanga Dyilo*, Decision on Victims' Participation, 18 January 2018, ICC-01/04-01/06-1119, para. 93.

⁸⁵ Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 65.

⁸⁶ See Pre-Trial Chamber I, *Situation in Darfur, Sudan*, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, 14 December 2007, ICC-02/05-111-Corr, para. 49.

⁸⁷ See Pre-Trial Chamber I, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, 31 March 2008, ICC-01/-4-01/07-357, Pre-Trial Chamber II, *Prosecutor v Bosco Ntaganda*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014, ICC-01/04-02/06, para. 18.

⁸⁸ Appeals Chamber, *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para. 58. See also Trial Chamber V, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, 03 October 2012, ICC-01/09-01/11, para. 47.

results ‘in a narrowing, like a pyramid, of the victims that are considered legally relevant’.⁸⁹ Differences between situation victims and case victims of ecocide might lead to the creation of hierarchies not only between human and nonhuman victims, but also among nonhuman victims within the proceedings.

The second aspect examined under this criterion is causation. When causation is being assessed to grant victims status to participate in the proceedings it has been broadly interpreted. In *Gbagbo*, for instance, Trial Chamber I determined that it was sufficient to demonstrate ‘that the alleged crimes could have objectively contributed to the harm suffered’ and that the ‘crimes charged do not have to be the only cause of the harm suffered by the applicant.’⁹⁰ Similarly, in *Bemba*, the Single Judge of Pre-Trial Chamber III followed a broad approach, noting that, in that case, ‘the circumstances surrounding the crime(s) [...] must be appropriate to bring about the harm alleged and [were] not entirely outside the range of expectation or probability, as viewed ex post by an objective observer’.⁹¹ A more restrictive approach to causation has been adopted when victim status has been related to the right to have the harm suffered repaired. Within this context, Trial Chamber II, in the *Katanga* case, dismissed the claims related to transgenerational harm, because it understood that it could have been caused by events unrelated to the attack on Bogoro.⁹²

The approach followed to understand the link between harm and ecocide can have a significant impact on the recognition of the environment as a victim. As an unlawful or wanton act can damage a global ecosystem, its impact on human and nonhuman life might take place without a linear causal relationship. If, in addition to that, the limits to our understanding of the dynamism, instability, and unpredictability of the interactions between the different elements of the environment are taken into account, Trial Chamber II’s understanding of causation might end up reproducing the perception of ‘environmental crimes as victimless crimes’.⁹³

IV. Conclusion

⁸⁹ Kendall and Nouwen (fn 31) 241.

⁹⁰ Trial Chamber I, Prosecutor v Laurent Gbagbo, Decision on victim participation, Prosecutor v Gbagbo, ICC-02/11-01/11, 06 March 2015, para. 36.

⁹¹ Pre-Trial Chamber III, Prosecutor v Jean-Pierre Bemba Gombo, Fourth Decision on Victims’ Participation with Confidential Annex, ICC-01/05-01/08, 12 December 2008, paras. 76-77.

⁹² Trial Chamber II, Prosecutor v Germain Katanga, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, ICC-01/04-01/07-3804-Red-tENG, 19 July 2018, para. 134.

⁹³ Eileen Sknider, Victims of Environmental Crime – Mapping the Issues (The International Centre for Criminal Law Reform and Criminal Justice Policy: March 2011) 2.

The IEP proposal to criminalize ecocide can be situated among the efforts to shift from an exclusively anthropocentric protection approach of the environment to a perspective that is at least partly ecocentric. Within the legal framework of the ICC, the recognition of the victimization of the environment can be expected to contribute to this process, rejecting not only the view that crimes against the environment are victimless crimes, but also the incorrect understanding that such crimes harm only humans.⁹⁴ Nonetheless, the ICC legal framework has not been developed with an ecocentric approach in mind. In this context, any potential amendments to the Rome Statute to incorporate a definition of ecocide would also benefit from the introduction of specific provisions related to environmental victimization.⁹⁵

This ICD Brief argues, however, that the current legal framework allows for the recognition of environmental victims within a context of paradigmatic shift. Regarding nonhuman environmental victims, such recognition can take place indirectly, once communications, representations or observations submitted on behalf of the environment as a victim are considered by the prosecutor or the relevant ICC Chamber. It can also take place within the procedures related to victims' participation in the proceedings within Article 68(3) of the Rome Statute or through common legal representation. In all these cases, it has been argued that the recognition of nonhumans as victims can be supported by the definition of victim put forward in RPE Rule 85(a).

It is, nonetheless, important to note that the recognition of the environment as a natural person requires rethinking the intuitive and exclusive association between humans and natural persons. This might be one of the most challenging aspects of the application of RPE 85(a) to the environment. Despite that, it has been argued that, if this discussion is considered as part of a broader paradigmatic shift towards a less anthropocentric understanding of the law, the materiality that characterizes both humans and nonhumans might enable the construction of a new understanding of a natural person. Similarly, whilst the types of harm already identified by the ICC provide an initial framework for the assessment of the harm suffered by nonhumans, the discussion of environmental harm through the lens of indigenous traditional knowledge or in light of a better understanding of the interactions among biotic and abiotic

⁹⁴ On the overall relevance of law to the shape human behaviour in the Anthropocene, see Pope et al (fn 74).

⁹⁵ The IEP proposal did not suggest any amendments to the provisions related to victims. It, nonetheless, acknowledged that consequential amendments may also be required for other provisions of the Rome Statute and the RPE.

facts might indicate the need for the articulation of other types of harm.⁹⁶ The existing ambiguity in the interpretation of the causal nexus between the harm suffered and the crimes under the jurisdiction of the ICC opens a space for the consideration of the complex, non-linear relations that characterize the environment. Nonetheless, this same ambiguity enables the adoption of a restrictive approach. Therefore, even though RPE Rule 85(a) can support the recognition of the environment as a victim, it can also lead to the denial of such recognition.

As there is no system of binding precedent in the ICC, the extent to which RPE Rule 85(a) will indeed enable the recognition of environmental victims rests on the convincing force of the arguments put forward by the parties and participants in the legal process and on the ability of each Chamber to consider such arguments in a context of paradigmatic change. This is particularly important if one considers that the non-recognition of the status of victims to nonhumans might be interpreted as the denial that a specific act constitutes ecocide if it does not harm humans, contradicting the paradigmatic shift that underlies the efforts to criminalize ecocide. In this context, it is important to note that the interpretation of the criteria established by RPE Rule 85(a) has the potential to influence our understanding of ecocide and, more broadly, of the environment.

In developing its reasoning, each Chamber will need to be critical of the overall potential of international criminal law as a means of promoting the full consideration of the intrinsic value of the environment. In this regard, it is important to note that the discussion of whether the environment can be considered a victim within the ICC has followed a mechanistic approach in this ICD Brief. Not only were the criteria of the definition of victim analyzed individually, but also the ambiguity in the jurisprudence of the ICC was gradually discussed. The complexity of the victimization process was reduced to compartmentalized discussions, which followed a linear approach. This same mechanistic approach has been considered unable to fully address the current planetary socio-ecological crisis.⁹⁷ In fact, it has been considered an essential element of the crisis, as it supports the view that nature is the object of humanity's control, domain, and property.⁹⁸ In this context, the potential recognition of the environment as a victim also needs to take into account the limits that such an analytical approach presents to our understanding of the interaction between humans and the environment, including the challenges related to the representation of the environment.

⁹⁶ See Mazzocchi (fn 75)

⁹⁷ Ibid. Pope et al (fn 74).

⁹⁸ Pope et al (fn 74).

