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Climate Change, Global Governance and International Criminal Justice

Gerhard Kemp

Abstract

In this contribution it is argued that, as a response to climate change, international criminal law and the evolving system of international criminal justice can play a useful role in global governance. There are still many obstacles in the way of a truly international criminal justice response in the area of climate change. These obstacles include the lack of a substantive framework for the criminalisation of environmental crimes as international crimes, as well as the necessary enforcement jurisdiction at international and national levels. Complex issues such as the expansion of the jurisdiction of the International Criminal Court and corporate criminal liability under international criminal law inform the debate. These obstacles should, however, not be seen as insurmountable since the evolving system of international criminal law is dynamic in nature and firmly rooted in the normative frameworks that underpin modern international law. International climate change instruments and agreements can equally inform future efforts to provide for crimes against the environment under international law.

A. Introduction and Problem Statement

This article is concerned with the possibilities presented by international criminal justice as a response to climate change. It presents a balanced evaluation of international criminal justice mechanisms as possible helpful tools in the broader global response to climate change. The argument is presented that there are various modalities and mechanisms in the field of international criminal justice that may be useful. However, the pitfalls are also noted and contextualised. This article is not an exhaustive study of international criminal justice as a response to climate change. It proposes a meaningful framework for further debate and analyses.

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The essential assumption is that climate change is, at least in part, caused by human conduct. To the extent that such human conduct is *harmful* to the environment, thus causing or contributing to detrimental climate change, the question is whether an (international) criminal justice response or responses would be meaningful, appropriate and effective.

Philosophically, the question whether an international criminal justice response to climate change is meaningful, or indeed, warranted, can perhaps best be answered with reference to Hannah Arendt's distinction between *Verbrechen gegen Menschheit* (crimes against mankind) and *Verbrechen gegen Menschlichkeit* (crimes against humanity).[1] The former group of atrocities affect our very existence and survival. This includes crimes against peace, and should arguably also include crimes against the environment which, in terms of gravity and scale, constitute threats to the survival of mankind. While the crime against peace (in the form of the crime of aggression) was recognised as the "supreme international crime" at Nuremberg,[2] we have yet to see any comparable criminal justice response to the phenomenon of climate change caused by human conduct. The crimes against humanity group of crimes are informed by those violations that affect our sensibilities and characteristics as human beings: our sense of being private, free, autonomous beings with inherent human dignity.

There are, of course, criminal justice responses to conduct affecting the environment – both under national and international law. For instance, international humanitarian law prohibits widespread, long-term and severe damage to the natural environment. Violations of the relevant rules can lead to individual criminal liability. The article will return to the role of international humanitarian law later, but the point here is that the criminal justice response to harmful conduct against the environment is relatively well-established. The question is to what extent an (international) criminal justice response to human conduct that is so harmful that it causes climate change is sensible, and indeed feasible.

1 Reference to Hannah Arendt's use of the terms in Jaspers (2006:855).
2 Schabas (2004:31).

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B. International Criminal Justice as a Manifestation, or Exponent, of Global Governance

The central question in this contribution is whether international criminal justice can contribute meaningfully to efforts to stem global climate change. Margaret Karns and Karen Mingst's neat definition of global governance suggests that international (criminal) law is a "piece of global governance". They declare that "pieces of global governance are the cooperative problem-solving arrangements and activities that states and other actors have put into place to deal with various issues and problems".[3] The most important pieces of global governance identified by Karns and Mingst are:

- International law (including international humanitarian law and international criminal law)
- Norms or 'soft law' (for instance framework conventions on biodiversity and climate change)
- Formal and informal structures (such as intergovernmental organisations, non-governmental organisations, global conferences), and
- International regimes (for instance, on trade, nuclear nonproliferation, food aid and telecommunication).

If we accept that international law (including international criminal law) is an important part of global governance, the critical question is to establish the circumstances under which we (the international or global community) should resort to international criminal justice as a response to atrocities.

One view is that the (evolving) system of international criminal justice is primarily a system informed by the international community's *reaction* to atrocities like genocide, crimes against humanity and war crimes. The *ad hoc* nature of international criminal tribunals from Nuremberg to the Yugoslavia Tribunal (ICTY) and the Rwanda Tribunal (ICTR) underscores this view. Of course, the creation of the permanent International Criminal Court (with its forward-looking, preventive potential) represents an important turning point away from the primarily reactionary narrative of international criminal justice, discussed later. The point is that the criminal justice response is, by its nature, mostly reactionary and backward-looking: the emphasis is on punishment (retribution) for past conduct. This is not to say that criminal law theory is one-dimensionally preoccupied with past events: in-

3 Karns & Mingst (2004:4).

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deed, the utilitarian aspiration of (international) criminal law has an eye on the future as well – namely, prevention of further crime, rehabilitation of offenders, and even integration or healing of society affected by crime.[4]

A progressive view is that there are important elements and characteristics of international criminal law that espouse constitutionalist qualities. Constitutionalist in this context means that the international system is moving towards the supranational limitation of state power.[5] In this sense, the International Criminal Court can also be described as a constitutional development. It impacts on the way states conduct themselves and complements the exercise of state jurisdiction over the most serious crimes under international law.[6]

One should be careful not to view the emergence of international criminal law, generally, and the establishment of the International Criminal Court, in particular, in a too idealistic way. Of course, idealism has always been, and should remain, an important driving force for good – also with respect to international criminal justice. In practical terms, however, it is prudent to keep in mind that the body of international criminal law (still) consists of two conceptually somewhat different parts – namely, international law, with its "diplomatic conferences, convention-making by consensus and autopoetic interpretation of law",[7] and criminal law, which is "supposed to be the, by definition, positivistic discipline of law, based on the fundamental importance of legality, the principle of *nullum crimen sine lege, nulla poena sine lege"*.[8] These observations underscore the promises and the pitfalls of international criminal law as a potential tool or "piece" of global governance, aimed at addressing climate change. In the paragraphs below some of the important promises and pitfalls will be highlighted and analysed in the context of the global governance paradigm.

4 Tallgren (2002:562).
5 This reflects the development away from the traditionally anarchist international system where sovereign states invariably acted in their own interest. See further comments by Caron (2006:56).
6 Werner (2007:18–23); Kemp (2008).
7 Tallgren (2002:562).
8 (ibid.:564).

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C. The Main Features of the Emerging System of International Criminal Justice

A detailed discussion of the emerging system of international criminal justice falls beyond the scope of this article. A number of features of what can be called the emerging or evolving system of international criminal justice are however elucidated. In turn, the relevance of these features is indicated for the topic under discussion, namely international criminal justice as a piece of global governance that might assist with efforts to address global climate change.

I. Individual Criminal Liability

Individual criminal liability is the cornerstone of modern international criminal law. The evolving system of international criminal justice is premised on the notion that the various atrocities which form the subject matter material of international criminal law are committed by persons. In this sense, the Nuremberg and Tokyo precedents[9] established the separateness of international criminal law from other branches of international law. The principle was established that individuals are the subjects of international criminal law and can be held liable for crimes under international law. Decades later this principle was confirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Tadić*:

> The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).[10]

The Rome Statute of the (permanent) International Criminal Court (ICC) also confirms the principle of individual criminal responsibility as a key part of the Court's jurisdictional regime. Article 25 of the Statute provides as follows:

9 See the important observations by Wright (1947:38–72); Taylor (1955); Leonhardt (1949); Komarow (1980); Marston Danner (2005); Carr (1948).

10 International Criminal Tribunal for the Former Yugoslavia (ICTY) *Prosecutor v Dusko Tadić* (Appeals Chamber) Case No IT-94-1-A, 15 Jul 1999, para. 186.

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1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
      (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the court; or
      (ii) be made in the knowledge of the intention of the group to commit the crime;
   (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
   (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Some of the important implications of the Rome Statute's provisions on individual criminal responsibility will be discussed when dealing with the ICC as a potential forum to deal with those responsible for climate change.

II. The Principle of Legality

The notion that legal rules should be clear and certain is not unique to criminal law. But as an element of due process and as a general principle of

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criminal law, the principle of legality has a central and fundamentally important place in national criminal law as well as in international criminal law.[11] There are differences in approach between national and international criminal law, which are briefly discussed below. But first, it is necessary to delineate the normative foundations of the principle of legality in criminal law generally.

In the early 1880s the German legal scholar JP Anselm von Feuerbach coined the maxim *nullum crimen, nulla poena sine lege.* In terms of this principle, no crime (or punishment) can exist without a clear norm in law criminalising the conduct in question and providing for applicable punishment. The principle thus provides for a crime norm and a punishment norm.[12] In essence, the principle is understood to mean that criminal laws should be made by "a competent legislature that announced in advance and with clarity and certainty the definition of crimes and the details of their punishments".[13]

The principle of legality is firmly established in international criminal law – although with some modifications. It even has customary international law status, which is not surprising, given the widespread and general respect for the principle and international judicial confirmation of its paramount importance.[14] The Rome Statute of the ICC also provides for the principle of legality by splitting it into the two components referred to above, namely *nullum crimen sine lege*, in Article 22,[15] and *nulla poena sine lege*, in Article 23.[16] A further aspect, the non-retroactive application of criminal law, is provided for in Article 24[17] of the Rome Statute.

11 Lamb (2002:733).
12 Kemp (2010:13).
13 Burchell (2005:95).
14 Werle (2005:32).
15 Article 22: "1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterisation of any conduct as criminal under international law independent of this Statute.".
16 Article 23: "A person convicted by the Court may be punished only in accordance with this Statute.".
17 Article 24: "1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. 2. In the event of a change in the law

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Although the principle of legality, as applied in national criminal law and in international criminal law, clearly shares the same normative roots (fairness, clear warning that conduct is criminal, and so on), it is interesting to note that the principle is sometimes applied less strictly in international criminal jurisprudence. Indeed, the Nuremberg Tribunal set the scene with the retroactive criminalisation of and ultimate conviction of senior Nazis for the crime of aggression, as well as crimes against humanity (war crimes as a distinct category of crimes was already well-established). Many commentators objected to the Nuremberg Tribunal's *ex post facto* criminalisation of certain conduct.[18] By contrast, and not surprisingly, Telford Taylor[19] argued that international (criminal) law "is not capable of development by the normal processes of legislation, for there is no continuing international legislative authority". International criminal law "grows, as did the common law, through decisions reached from time to time in adapting settled principles to new situations".[20]

In a famous dissenting opinion delivered at the Tokyo Tribunal, judge Röling did not place the emphasis on the pre-existing criminal norm. This judge concluded that crimes against peace were to be punished "because of the dangerous character of the individuals who committed them". The focus was on the danger, rather than on the guilt.[21]

The notion that legality in criminal law can somehow be applied less strictly in international criminal law also found favour at the Special Court for Sierra Leone, which is hearing cases of crimes against humanity and war crimes committed in Sierra Leone since 1996.[22] In *Prosecutor v Sam Hinga Norman*,[23] the defence made certain objections in a motion relating to the substantive jurisdiction of the Special Court. In essence, the defence asserted that the Special Court had violated the principle of *nullum crimen sine*

applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply."

18 See the general criticism listed in Leonhardt (1949).

19 Telford Taylor was part of the American prosecution team at Nuremberg. He served on the team of Robert Jackson, who played an important role in the drafting of the Nuremberg Charter.

20 Taylor (1955:516).

21 See discussion in Cassese (2003:143–144).

22 Statute of the Special Court for Sierra Leone (2002), reproduced in van den Wyngaert (2005:307).

23 *Prosecutor v Sam Hinga Norman (Decision on preliminary motion based on lack of jurisdiction – child recruitment)* Case No SCSL-2004-14-AR72 (E) 31 May 2004.

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lege since the crimes mentioned in the indictment were not part of customary international law at the relevant times; neither were they criminalised under Sierra Leonean criminal law at those times. In reply to the defence, the prosecutor argued as follows:

> The principle of *nullum crimen sine lege* should not be rigidly applied to an act universally regarded as abhorrent. The question is whether it was foreseeable and accessible to a possible perpetrator that the conduct was punishable.[24]

The majority of the judges in this hearing favoured the approach submitted by the prosecutor, namely that the emphasis should be on the conduct, rather than on the specific description of the offence in substantive criminal law.

The examples from the Nuremberg and Tokyo Tribunals as well as the Special Court for Sierra Leone notwithstanding, the author of this article argues that the margin of difference between national and international understandings of the legality principle in criminal law is not fundamental. At any rate, the protection of the legality principle in the Rome Statute (as mentioned above) is quite clear and in line with most national systems that provide for a rather strict protection of the legality principle. The relevance of the more fluid application of *nullum crimen sine lege* is perhaps limited to crimes (and criminalisation) under customary international criminal law. There is no reason why conventional international criminal law should be treated differently from statutory criminal law at the national level.[25]

III. State Sovereignty and the Impact of International Criminal Justice

It was noted above that the evolving system of international criminal justice can be viewed as a constitutional limitation on the freedom of sovereign states to conduct their affairs as they wish. It is, of course, self-evident that international law generally has this constitutional effect. While the Charter of the United Nations is based "on the principle of the sovereign equality of all its Members",[26] other developments in international law, notably human rights, international criminal justice, and, indeed, environmental law, shape the content and scope of state sovereignty. In essence, it is safe to say that

24 *Prosecutor v Sam Hinga Norman* para. 2.
25 For more on this debate, see Swart (2005).
26 Article 2(4) UN Charter.

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states may no longer act as they please – in terms of their relations with other states or, to a growing extent, internally.

Bruce Broomhall eloquently describes the impact of international (criminal) law on the notion of state sovereignty:

> The idea that sovereignty does not arise in a vacuum, but is constituted by the recognition of the international community, which makes its recognition conditional on certain standards, has become increasingly accepted in the fields of international law and international relations. Such limits are held always to have been imposed by the community on the recognition of its members, but to be subject to development over time. From this perspective, crimes under international law can be understood as a formal limit to a State's legitimate exercise of its sovereignty, and so in principle justify a range of international responses (subject to the rest of international law, including that relating to the use of force).[27]

The author thus understands sovereignty to be a notion constantly changing and evolving in the light of the growing importance of international law, including the content and institutions of international criminal law. International criminal law should, however, not be seen as a negative limitation of state sovereignty. It also empowers states to act as agents of a normative framework premised on the rule of law, and is a drive to end impunity for the worst crimes affecting the whole of humankind. Next, the role of states vis-à-vis the International Criminal Court, the primary role-player in the modern international criminal justice system, needs to be considered.

IV. The International Criminal Court

The creation of the ICC in terms of the Rome Statute of 1998[28] was not an End of History[29] moment; it did not represent an end point even in terms of

27 Broomhall (2003:43).

28 Rome Statute of the International Criminal Court (1998), UN doc A/CONF 183/9, *International Legal Materials*, 1998, 999.

29 This refers to the much debated book by Fukuyama (1992). At the time, Fukuyama argued that, after the fall of the Berlin Wall and the collapse of the Soviet empire, the winner is clear: market economy and liberalism. It is plausible to see the progress of international criminal law, and the institutions of international criminal justice during the 1990s as part of the new world order made possible by the collapse of communism. It is true that the thaw in international relations after the end of the Cold War made possible the consensus in the Security Council which in turn adopted the statutes of the first international criminal tribunals since Nuremberg and Tokyo,

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the long historical quest for a system or structure to end impunity. It can be seen as an important development, even a starting point,[30] in the narrative that is international criminal law, or, the quest to end impunity for the worst crimes against humankind.[31]

For present purposes, a number of features of the ICC will be elucidated. The aim is briefly to identify and discuss those features of the ICC that are viewed as relevant to this article. The choices are informed by the central theme of this article, namely the contribution of international criminal justice as a piece of global governance that can help to address climate change.

1. The Crimes within the Substantive Jurisdiction of the ICC

a) The Core Crimes

The ICC has jurisdiction over the crimes of genocide, crimes against humanity, war crimes and the crime of aggression (although the latter crime is not yet within the effective jurisdiction of the court). The crimes listed were regarded by the drafters of the Rome Statute as the *most serious crimes of concern to the international community as a whole*.[32] This list of crimes can be viewed as at least containing the most serious crimes affecting humankind, but is not necessarily complete, as discussed later. The states that adopted the Rome Statute discussed various crimes to be included within the ICC's jurisdiction. The inclusion of the crime of genocide (based on the Genocide Convention of 1948) was not controversial. A bit more contentious were the definitions and scope of crimes against humanity and war crimes. After a considerable debate, the crime of aggression was also included, but on condition that a suitable definition be drafted and conditions for the ex-

namely the International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994). It is quite reasonable to see the adoption of the Rome Statute of the International Criminal Court in 1998 as a logical extension of the process that started in the early 1990s. However, the ICC, which purports to be a permanent international tribunal, cannot be seen as a culmination or end point. In many ways it is a starting point.

30 See observations by Kirsch (1999) who was elected the first President of the ICC.

31 For a discussion of the historical processes that culminated in the adoption of the Rome Statute of the ICC, as well as a broader historical perspective on the trends and currents in international criminal justice, see Bassiouni (2005:3–121).

32 Article 5(1) Rome Statute of the International Criminal Court.

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ercise of jurisdiction by the ICC of this crime be agreed upon. This indeed happened at the Kampala Review Conference of the International Criminal Court which was held in 2010. However, the definition of the crime of aggression and the related provisions on this crime can at the earliest enter into force in 2017.[33]

b) Other Crimes (like Drug Trafficking and Terrorism)

Apart from the so-called core crimes under international law mentioned above, the Rome Diplomatic Conference considered the inclusion of other crimes within the jurisdiction of the ICC. The most notable of these crimes were drug trafficking, terrorism, and violations of the Convention on the Safety of United Nations and Associated Personnel. A majority of states at the Rome Diplomatic Conference opposed inclusion of these treaty crimes.[34] The (rather unconvincing) rationale for the exclusion was that effective enforcement and cooperation regimes already existed for these crimes.

Jerry Fowler, legal counsel for the Lawyers Committee for Human Rights and participant at the Rome Conference, pointed out that the inclusion of drug trafficking and terrorism enjoyed "significant support", but not as much as aggression. While drug trafficking and terrorism certainly affect the international community as well, there was simply not enough agreement on the inclusion of these crimes. Of course, the contentious scope and content of, to a lesser extent, drug trafficking and, to a large extent, terrorism made them less obvious to include as the worst crimes affecting the whole of humankind.

33 For a comprehensive discussion of the work of the Special Working Group on the Crime of Aggression, see Kemp (2010:208–237). For a discussion of the definition of aggression and the conditions for the exercise of jurisdiction by the ICC over this crime, as adopted at the Kampala Review Conference, see Kress & von Holtzendorff (2010).

34 Lee (1999:81).

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c) What about Crimes against the Environment?

It was noted that the International Criminal Court was established as a result of many legal and geo-political factors that aligned in the 1990s. It was also pointed out that the creation of the ICC should not be seen as an end-point, but rather as an important starting-point, or new chapter, in international criminal justice.

While the outcome of the Rome Diplomatic Conference on the International Criminal Court was, on balance, satisfactory in terms of the crimes included in the jurisdiction of the ICC, activists and environmental lawyers can rightly point to the exclusion of crimes against the environment as an important omission, hopefully to be rectified at a future review conference.

The exclusion of crimes against the environment was by no means the result of bad preparatory work. In 1996, two years prior to the Rome Diplomatic Conference, a document on crimes against the environment was published in the context of the work by the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind – including the draft statute for an international criminal court.[35] The proposal on crimes against the environment was not adopted at Rome. However, the document on crimes against the environment can still serve as a very useful starting point for a debate on the inclusion of crimes against the environment (and even more broadly, crimes in the context of climate change) at a future Review Conference. Some of the important aspects of the document on crimes against the environment are discussed below.

2. ICC has Jurisdiction only over Natural Persons (Not Legal Entities)

Article 25(1) of the Rome Statute of the International Criminal Court provides as follows: "The Court shall have jurisdiction over natural persons pursuant to this Statute." There is no provision in the statute for corporate or state criminal liability.

There was considerable debate at the Rome Diplomatic Conference on whether to include corporate criminal liability. France proposed the recognition and inclusion of corporate criminal liability on the following grounds: first, the French concept of criminal liability for *personnes morales* is an

35 Tomuschat (1996).

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established criminal law notion; second, there is a moral imperative to punish all entities (natural or legal) who are responsible for the worst crimes affecting the whole of humankind; third, corporate criminal liability presented the ICC with a practical mechanism for ensuring compensation – especially since individual perpetrators on their own might not have the resources to fund adequate compensation for victims; fourth, the notion of corporate criminal liability can serve as a deterrent and can foster a culture of caution in the context of profit-motivated decision-making processes.[36]

The notion of corporate criminal liability is well established in many national legal systems. There are also notable exceptions – for instance, Germany. Although the German Criminal Code provides for criminal liability of certain administrators and officers of corporations, there is no general principle of liability for the legal entity, the corporation.[37]

Despite the relatively common acceptance of corporate criminal liability at national level, the debate at the Rome Diplomatic Conference resulted in a rejection of the French proposal on the inclusion of corporate criminal liability under the Rome Statute. The rejection of the proposal was not primarily motivated by a lack of understanding that corporations are important role-players and actors in terms of potential liability for gross human rights violations and atrocities. Indeed, many delegations at the Rome Conference noted the fact that many conflicts and instances of gross human rights violations were in no small measure aided and abetted by corporations. These include the involvement of media entities in the Rwandan genocide; the forced removal and transfer of people as a result of the activities of multinational oil companies; and, decades earlier, the involvement of corporations (including big banks) in the Holocaust.[38]

Because of the workings of the system of complementarity, which is discussed below, some delegations at the Rome Conference felt that the inclusion of corporate criminal liability would cause jurisdictional and practical problems. This means that where national legal systems do not recognise corporate criminal liability, this could hardly be seen as their being unwilling or unable to deal with the crime in question, as per the complementarity-regime.

Because of the difficulties mentioned above, France ultimately decided to withdraw the proposal.

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36 Stoitchkova (2010:14).
37 For a comparative perspective, see Kemp (2012:215–218).
38 Stoitchkova (2010:15). For more detail see Bachmann (2007).

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The exclusion of corporate criminal liability from the ICC jurisdictional regime is relevant for the discussion of international criminal justice responses to climate change. It is assumed, for purposes of this article, that corporations are not only active role-players in the global economy, but indeed also contributors to the human and commercial activities that cause climate change. The implications of this observation are further explored below.

3. The Principle of Complementarity

The jurisdictional regime of the International Criminal Court can perhaps best be described as justice in reserve: the ICC will only step in if states party to the Rome Statute are unwilling or unable to investigate and prosecute the crimes which fall under the jurisdiction of the ICC. This is known as the principle of complementarity. The principle is provided for in Article 17 of the Rome Statute:

1. having regard to paragraph 10 of the Preamble and article 1, the court shall determine that a case is inadmissible where:
   (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
   (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
   (c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
   (d) the case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exist, as applicable:
   (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court referred to in article 5 [currently genocide, crimes against humanity and war crimes];
   (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
   (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which,

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in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

It is obvious from the text of Article 17 that the issue of complementarity is very complex.[39] It involves the intricate relationship between the ICC and states. It underscores the ICC as an instrument of international criminal justice-in-reserve. Complementarity puts the emphasis on the *national* application of international criminal law. At the same time one can view the principle of complementarity as a form of fairness and quality control over national criminal justice systems. In this sense it reminds us of the constitutional role of international criminal justice mechanisms such as the Rome Statute of the ICC, as noted above. Thus, one can say that the principle of complementarity is also a manifestation of global governance.

D. The Potential Role of International Criminal Justice in Environmental and Climate Change Law

From the discussion above, it should be clear that the evolving system of international criminal justice (both in terms of substantive law and in terms of enforcement) can be regarded as an important piece of global governance. The International Criminal Court as the 'face' of international criminal justice is imperfect. Not only is it not meant to be the sole or even the most important enforcer of international criminal law, it also lacks certain mechanisms that would be necessary to address possible crimes against the environment and, more broadly, crimes in the context of climate change.

The exclusion of corporate criminal liability, complementarity, and the lack of substantive jurisdiction over crimes against the environment were noted. But it was also noted that the system of international criminal justice, including the ICC, is an evolving system. It is dynamic. The Rome Statute of the International Criminal Court also provides for amendment procedures. The mechanics and technical aspects of amendment aside, consideration will now be given to the possibility of criminalising crimes against the environment (including crimes of sufficient gravity to be regarded as crimes that

39 For a discussion see Zahar & Sluiter (2008:455f.).

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contribute to climate change). A brief discussion will then follow on the ICC as a possible forum for the prosecution of crimes against the environment.

I. Attempts to Criminalise Crimes against the Environment under International Law

The possible criminalisation of crimes against the environment will now be addressed in terms of two distinct but related subject matters: environmental crimes (or crimes against the environment), and crimes that contribute to climate change.

It is beyond the scope of this exploratory article to analyse fully the elements of crimes against the environment as crimes under international law. The aim here is to outline the most important aspects and basic elements to the extent that they are relevant for the purposes of a discussion about the general theme of international criminal justice and climate change.

1. Crimes against the Environment

It was noted above that the International Law Commission prepared a Document on Crimes against the Environment in the context of the preparatory work that included a draft statute for an international criminal court. While the ICC eventually materialised (in terms of the Rome Statute of the International Criminal Court), crimes against the environment were not part of the package.

The short history of the Document on Crimes against the Environment (henceforth DCAE) underscores the fact that the normative underpinnings of international criminal law always (or at least since Nuremberg) seemed to have favoured the *protection of the human person directly*. Indeed, Tomuschat pointed out that at Nuremberg, no charges were brought on account of the immense damages to the natural environment during the Second World War. Even the ban on "poison or poisoned weapons" in terms of the so-called Law of The Hague on the Rules and Methods of Warfare sought to prevent the immediate impact on military personnel, not on the natural

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environment – even though these weapons could have lasting damaging effects on the environment.[40]

The lack of substantive and enforcement jurisdiction with respect to crimes against the environment at Nuremberg resulted in the fact that the International Law Commission, which was tasked to codify the principles of Nuremberg after the completion of the Nuremberg Trials, also did not address the issue of crimes against the environment. The Nuremberg Principles are therefore silent on the matter, and the subsequent first Draft Code of Offences against the Peace and Security of Mankind (1954) also did not include any new crimes that were not mentioned in the Nuremberg Principles.

Decades later, in 1986, however, environmental awareness and the work of a special rapporteur resulted in the submission that the list of crimes against humanity should include a category of crimes against the environment. This form of crime against humanity would be: "any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment".[41]

During the debates at the International Law Commission's thirty-eighth session, the majority of speakers supported the notion of crimes against the environment (as crimes against humanity). Some offered caution on the basis that crimes against the environment do not fit within the structure and normative foundations of crimes against humanity. Others warned that more clarity is needed (also important from a legality point of view). In terms of the general principles of criminal liability, it was noted that intent (*dolus*) will be required for liability for crimes against the environment. Following the debate, and following the further work of the Special Rapporteur, a revised article on crimes affecting the environment made it into the seventh report (that preceded the adoption of the 1991 Draft Code of Crimes against the Peace and Security of Mankind). The definition of crimes affecting the environment in the seventh report (1989) thus provides that the following constitute crimes against humanity: "Any serious and intentional harm to a vital human asset, such as the human environment".[42]

40 Tomuschat (1996:para. 3.).

41 *Yearbook of the International Law Commission*, 1986, Vol II (Part One), 85–86, cited in Tomuschat (1996:para. 5).

42 *Yearbook of the International Law Commission*, 1989, Vol II (Part One), 86, cited in Tomuschat (1996:para. 7).

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In the 1991 Draft Code of Crimes against the Peace and Security of Mankind, crimes against the environment were eventually not listed as crimes against humanity, but rather as a new crime, namely, causing wilful and severe damage to the environment: "An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced to...".[43] It should be mentioned that this crime could be committed in times of peace or during an armed conflict. It was not supposed to be linked to an armed conflict. However, by 1996 the independent crime of causing wilful and severe damage to the environment was not listed in the Draft Code. Article 20 of the Draft Code of Crimes against the Peace and Security of Mankind (1996)[44] provided for a war crime in the form of the use of methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudicing the health or survival of the population. The notion of crimes against the environment thus moved from a form of crime against humanity (the reports preceding the 1991 Draft Code), to an independent crime of causing wilful and severe damage to the environment (1991 Draft Code), and back to a more limited notion of crime against the environment as a war crime during an armed conflict (1996 Draft Code).

As noted above, none of the modalities for the criminalisation of crimes against the environment (as an independent group of crimes under international law) were eventually adopted at the Rome Diplomatic Conference on the International Criminal Court in 1998. The Rome Statute of the ICC provides, in line with the approach adopted for purposes of the 1996 Draft Code, for the war crime (in the context of an international armed conflict) of intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or "widespread, long-term and severe damage to the natural environment

43 Article 26 Draft Code of Crimes against the Peace and Security of Mankind (1991) *Report of the International Law Commission*, 43d Session, UNGAOR, 46th Session, Supplement No. 10,A/46/10 (1991), reproduced in van den Wyngaert (2005:323–329).

44 Draft Code of Crimes against the Peace and Security of Mankind (1996), *Yearbook of the International Law Commission*, 1996, Vol II(2), available at http://www.un.org/law/ilc/texts/dcodefra.htm, last accessed 14 October 2012.

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which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[45]

It is thus clear that the Rome Statute of the ICC is much more restricted in terms of the substantive notion of crimes against the environment. It is a form of war crime in the context of an international armed conflict. It is a far cry from the more progressive view of crimes against the environment as either a stand-alone international crime or as a crime against humanity – committed during times of peace or during an armed conflict.

Next, the possibility is briefly considered of reviving the debate about crimes against the environment for inclusion in the Rome Statute (that is, during a future revision conference), or to provide for crimes against the environment in a separate convention (comparable to the Genocide Convention[46] or the four Geneva Conventions[47]).

2. *A More Comprehensive Criminalisation of Crimes against the Environment (Incorporating the Dangers of Climate Change)*

Any discussion of the possible criminalisation of crimes against the environment, incorporating the element of climate change, must take due notice of the normative context and developments of the past twenty years. A prominent development was the adoption of the United Nations Framework Convention on Climate Change (1992).[48] The primary aim of the Framework Convention is the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame

45 Article 8(2)(b)(iv) Rome Statute of the International Criminal Court, 1998.

46 Convention on the Prevention and Suppression of the Crime of Genocide (1948) *UN Treaty Series*, Volume 78, 227.

47 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) *UN Treaty Series*, Volume 75, 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (1949) *UN Treaty Series*, Volume 75, 85; Convention Relative to the Treatment of Prisoners of War (1949), *UN Treaty Series*, Volume 75, 135; Convention Relative to the Protection of Civilian Persons in Time of War (1949), *UN Treaty Series*, Volume 75, 287.

48 United Nations Framework Convention on Climate Change (UNFCCC), 1992, 31 *ILM* 849. For commentary on the subject of climate change and the normative impact of the Framework Convention, see Dryzek et al. (2011); Vinuales (2011).

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sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[49]

The very broad normative and policy objectives reflected in the Framework Convention can at best be the *starting point* for a discussion on the elements of a future international crime against the environment. With reference to the crime of causing harm to the environment, as provided for in the 1991 Draft Code of Crimes against the Peace and Security of Mankind, the Government of the United States, for instance, reacted as follows:

> This article, dealing with damage to the environment, is perhaps the vaguest of all the articles. The article fails to define its broad terms. There is no definition of 'widespread, long-term and severe damage to the natural environment'. Similarly, the term 'wilfully' is not defined, thereby creating considerable confusion concerning the precise volitional state needed for the imposition of criminal liability. The term 'wilfully' could simply mean that the defendant performed an act voluntarily, i.e. without coercion, that had the unintended effect of causing harm to the environment. 'Wilfully' could also be construed to impose criminal liability only when the defendant acted for bad purpose, knowingly, and intending to cause serious harm to the environment. As presently drafted, the meaning of 'wilfully' is subject to a variety of interpretations. This confusion is magnified by the draft Code's failure throughout to specify the necessary mental and volitional states needed for the imposition of criminal liability.

The reaction quoted above is indicative of an approach that emphasises the strict application of general principles of criminal law. Aspects like the legality principle (which was discussed earlier as one of the key features of the international criminal justice system) demarcate and limit the criminal law content of broader normative (policy-oriented) propositions. A number of considerations in the context of the criminalisation of crimes against the environment should be considered:

a) The Protected Interest: The Environment

It is clear from the debates, reports and various draft texts and other international instruments informing the various Draft Codes of Crimes against Peace and Security of Mankind that 'environment' connotes 'human environment' as well as 'natural environment'. The 15th International Congress

49 Article 2 of the UNFCCC.

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of Penal Law, which was held in Rio de Janeiro in 1994, adopted the following description of environment in its resolution on crimes against the environment:

> Environment means all components of the earth, both abiotic and biotic, and includes air and all layers of the atmosphere, water, land, including soil and mineral resources, flora and fauna, and all ecological inter-relations among these components.[50]

Thus, *natural* environment is the emphasis. Other aspects of the environment in which we live (including our cultural spaces) are best protected under a separate framework, as indeed is the case with war crimes, which criminalises wanton destruction of cultural property.

b) Gravity and Scale: Requirements of Seriousness

Crimes under international law, especially the so-called atrocity crimes (genocide and crimes against humanity) and the crime of aggression, usually become relevant for the international criminal justice system because of their gravity and scale. Thus, for instance, the Rome Statute of the International Criminal Court proclaims that it has jurisdiction over persons for the most serious crimes of international concern (Article 1), and further, that the ICC shall determine that a case is inadmissible where it is not of sufficient gravity to justify further action by the court (Article 17).

To the extent that one can say that climate change (caused by the increase of greenhouse gas concentration in the atmosphere)[51] affects the environment in such a way as to cause, for instance, wholesale destruction of ecosystems, it must be viewed as serious and of sufficient gravity for purposes of international criminal justice action.

The requirement of seriousness for purposes of international criminal justice is in line with international instruments that criminalise crimes under international law. Article 55 of Additional Protocol I to the Geneva Con-

50 Reproduced in *Yearbook of the International Law Commission*, 1986, Vol II (Part One), 85–86, cited in Tomuschat (1996:para. 25).

51 Article 2 UNFCCC.

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ventions (1949),[52] for instance, refers to the protection of the natural environment against widespread, long-term and severe damage.

c) Harm to the Environment: An International Dimension

The types of crimes relevant for international criminal justice are those that affect the whole of humankind. This is a normative perspective. It is not a factual question of territorial impact. 'International' in this context does not mean 'more than one jurisdiction' or 'more than one state'. The inherent nature of crimes like genocide and crimes against humanity is that they affect and shock the whole of humanity, hence the term *international crime*.

It has been suggested that an international element is present in a crime when the "commons of humankind have been affected".[53] The environment, climate and complex ecosystems are, to the author's mind, commons of humankind and any severe, serious or long-term damage to the environment (including as a result of climate change) is, at least as a matter of principle, worthy of international action, including via the system of international criminal justice.

d) An Autonomous Crime against the Environment (Not Linked to Armed Conflict or Crimes against Humanity)

It was noted that, at present, the environment is a protected aspect for purposes of war crimes law. Crimes against the environment were not adopted as crimes against humanity or as autonomous crimes under the Rome Statute of the International Criminal Court, or any other international criminal tribunal. There is, at present, no comprehensive treaty that provides for crimes against the environment.

The aim here is not to provide the content of a comprehensive instrument on crimes against the environment. This is a subject for future research. It must be noted that there are certain pointers in this regard. Some of them are briefly mentioned here.

52 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977) (Protocol I), UN Doc A/32/144, 15 August 1977, reproduced in van den Wyngaert (2005:455–494).

53 Tomuschat (1996:para. 32).

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First, attempts to codify and provide for a comprehensive framework on the criminalisation of crimes against the environment (or ecocide) are not new. In the 1970s a draft International Convention on the Crime of Ecocide was prepared by the international law scholar Richard Falk. This draft convention was proposed and discussed in the context of an evaluation of the effectiveness of the Genocide Convention of 1948.[54] The spirit of the draft text is today kept alive by the Ecocide Project at the Human Rights Consortium, School of Advanced Study, University of London.[55] The project's concept of ecocide rests on two key notions:

> *Ascertainable ecocide* is a crime of consequence, primarily arising out of corporate damaging and destructive activity which is primarily governed by ineffectual and nominal civil legislation. In the case of *non-ascertainable ecocide* (other causes – e.g., tsunamis, rising sea levels – climate change-driven) there is currently no coherent international mechanism in place to help territories that are rendered unable to self-govern and are in need of emergency assistance. Instead, we deal with each disaster on a 'case by case' basis after the event.

The concept of ecocide, together with the work that was done by the International Law Commission in the context of the Draft Codes of Crimes against Peace and Security of Mankind, provides a solid basis for further research and proposals on a comprehensive international criminal justice response to crimes against the environment, including the consequences of climate change. To criminalise an autonomous crime against the environment is an important (indeed, vital) step, but one must also take into consideration the necessary enforcement regime. A few points in this regard are given below.

II. A Framework for Enforcement

1. National Level: States as Agents of the International Community

Serious crimes against the environment affect the whole of humankind. A global (or, in legal terms, *international*) response is required. It is not enough to leave enforcement to individual states. It is an open question whether states are always willing or able to prosecute violations of environmental

54 Falk (1973).

55 See http://www.sas.ac.uk/hrc/projects/ecocide-project, last accessed 14 October 2012.

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laws. South Africa is a case in point. A 2012 report[56] noted that, while the National Environmental Management Act[57] provides for a number of criminal offences, individuals and companies often apply to the relevant ministry for *ex post facto* authorisation of relevant parts of the law that were violated. The Act does indeed provide for such *ex post facto* authorisation, but an almost institutionalised practice of this nature seems to be an abuse and violation of the letter and spirit of the Act. It reflects poorly on the political and institutional will to combat violations of environmental laws. It furthermore underscores the point that states alone cannot be trusted with matters affecting the environment – especially if the impact goes beyond the local environment. An international or transnational approach is needed. The eventual criminalisation of crimes against the environment at international level might help to force states to take seriously their custodial duties as protectors of the environment on behalf of all humanity.

2. Regional Level

In terms of geography and political pragmatism, it might make sense to advance an agenda of criminalisation of crimes against the environment at regional level. This might, at least in the short or medium term, be more realistic than to push for a true international regime on criminal liability for crimes against the environment.

The Council of Europe Convention for the Protection of Environment through Criminal Law[58] does not create a direct or vertical supranational or international enforcement regime. It rather focuses on the creation of certain obligations (contracting states must, for instance, introduce certain specific criminal provisions into their domestic criminal laws) and (horizontal) international cooperation in criminal matters.

In the context of the European Union (EU), a number of so-called eurocrimes have developed. A number of EU instruments provide for the criminalisation of certain protected interests. These include crimes against fair competition, crimes against the integrity of the financial sector, crimes against human dignity, crimes against the democratic society and crimes

56 See http://www.legalbrief.co.za/, last accessed 11 October 2012.
57 Act 107 of 1998.
58 CETS No. 172, available at http://conventions.coe.int/Treaty/en/Html/172.htm, last accessed 15 October 2012.

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against the environment. In terms of EU Directives,[59] member states must criminalise various forms of conduct related to the environment.

The Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (African Union) provides for the creation of an African Court with international criminal law jurisdiction over certain crimes of regional and international concern. These include the classic 'core' crimes under international law (genocide, war crimes, crimes against humanity), as well as other crimes of concern such as drug trafficking, human trafficking, and corruption. The Draft Protocol also provides that the Court shall have jurisdiction over the crime of trafficking in hazardous wastes. This is the closest that the Draft Protocol gets to the criminalisation of crimes against the environment.

At first glance, the regional examples (Council of Europe, EU, and African Union) mentioned above seem to be steps in the right direction – namely, a regional approach to crimes that clearly affect more than just national or parochial interests.

It is beyond the scope of this article to analyse fully these proposed regional instruments. Regarding developments in the African Union, the following can be noted. The creation of a criminal chamber in the African Court of Justice and Human Rights, with jurisdiction over persons responsible for serious international crimes or crimes that affect the African region as a whole, should in principle be a commendable development to end impunity for these crimes. The problem is that many observers see the creation of this 'African Criminal Court' as a political stunt aimed to undermine or disrupt the jurisdictional regime of the International Criminal Court.[60] More than 30 African states are also states party to the Rome Statute of the International Criminal Court. It is thus not clear how the proposed African Criminal Court will fit into the complementarity regime of the ICC. Since the ICC does not have jurisdiction over crimes such as drug trafficking, corruption and the (limited) crime against the environment of trafficking in hazardous waste, the African Criminal Court may yet prove to be a useful supplementary criminal regime to the ICC. A possible consequence might be that a (relatively) successful regional criminal regime can serve as impetus for an expanded substantive jurisdiction of the ICC over crimes such as human traf-

59 For instance Directive 2008/99. For a discussion see Klip (2012:218).
60 Manirakiza (2010).

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ficking and environmental crimes. Of course, it could also lead to nothing. Only time will tell.

3. International Level

The International Criminal Court is the best available vehicle for the direct application of international criminal law at international level. It is, of course, complementary to national criminal justice systems. The emphasis is thus on the national application and enforcement of international criminal law. The ICC has limitations as well. It does not have jurisdiction over legal persons (corporations). Its substantive jurisdiction is, at present, limited to crimes against humanity, war crimes, and genocide. The Rome Statute of the ICC provides for amendment procedures and the first Review Conference on the Rome Statute (held at Kampala in 2010) proved that it is indeed possible to expand the substantive jurisdiction of the ICC. However, the inclusion of the crime of aggression, long recognised as one of the core crimes under international law and indeed described as the "supreme international crime" at Nuremberg, was perhaps less difficult in the end precisely because of the historical basis for the criminalisation of aggression. Crimes against the environment, let alone crimes in the context of climate change, are yet to be regarded as universally recognised criminal notions. It is not only at the substantive level that environmental crimes or crimes in the context of climate change might prove to be problematic in terms of the ICC regime. As pointed out above, the ICC has jurisdiction only over natural persons. Any expansion of the substantive jurisdiction of the ICC to include crimes against the environment or crimes in the context of climate change, must also be accompanied by an expanded jurisdiction of the ICC to include corporate criminal liability.

E. Concluding Remarks

If one accepts, as one should, that climate change affects the whole of humankind, then one also needs to accept that a global strategy to address this phenomenon is needed. The paradigm of global governance is an appropriate context for a debate about the best strategies and responses to climate change and global environmental calamities.

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International criminal law, and the evolving system of international criminal justice, has the potential to be a key "piece" of global governance. Climate change and environmental changes can only be addressed in terms of a global response. States on their own, with territorial or parochial approaches to law enforcement (including criminalisation of crimes against the environment) cannot effectively address the challenges of climate change. Regional approaches seem to underscore the national implementation of environmental laws but do not present a real transnational enforcement regime. This author therefore argues that the international criminal justice system, with the International Criminal Court as a key role-player, has the potential to be an important legal response to a changing environment. Much work needs to be done in terms of the substantive and enforcement jurisdiction of the ICC. But if that can be achieved, the transformational impact will be that many states will be able to act as agents of a truly global response to climate change via the complementarity enforcement regime provided for in the Rome Statute of the International Criminal Court.

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