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Towards International Criminalization of Transboundry Environmental Crimes

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**TOWARDS INTERNATIONAL
CRIMINALIZATION OF TRANSBOUNDRY
ENVIRONMENTAL CRIMES**

By: HAMDAN QUDAH

**A Thesis Submitted in
Fulfillment of the
Requirements for the Degree of**

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Introduction

"Enforcement of environmental laws is essential to attaining the international objective of sustainable development to be effective; however, this enforcement must be routine, reasonably resourced and predictable-an arduous challenge". - Nicholas A. Robinson

On April 20, 2010, through willful conduct or by gross negligence, British Petroleum (BP) released several hundred thousands of gallons of crude oil into the Gulf of Mexico. The only remedy afforded to the victims was a scheme of civil liability under the "Polluter Pays" principle.¹ This principle asserts that private parties who generate the pollution should bear the costs of clean up. BP's failure to seal an exploratory well caused an explosion, sinking the Deepwater Horizon oil rig. This unleashed a gusher of oil that lasted for months and coated beaches with thick oil all along the Gulf Coast. The initial corporate response from BP was to downplay the severity of the spill. This created significant misinformation that delayed effective remedial measures from the American Government and BP.²

Immediately after the spill, public opinion and private parties began suggesting that the nature of accident, and the special circumstances surrounding the gross dereliction of duty should trigger criminal liability, in addition to civil penalties. Under public pressure and aggressive Non-Governmental Organization (NGO) campaigns, the United States Attorney General, Eric Holder, charged BP officers aboard the drilling rig with manslaughter in connection with each of the 11 men who perished. The charges alleged that the officials were negligent in supervising tests to seal the well.³ Prosecutors also brought charges against BP's former Vice President for Exploration in the Gulf of Mexico, David Rainey. Mr. Rainey was prosecuted for obstruction of Congress and making false statements in relation to the rate at which oil was spilling from the well. BP agreed to a settlement of an estimated \$4 billion over a five year period. This includes \$1.256 billion in criminal fines; it became one of the largest fines levied by the United States against a corporation. The corporation also plead guilty to 11 felony counts related to the deaths of BP employees, a felony related to obstruction of Congress and two misdemeanors.⁴

In the Deepwater Horizon spill, the crime was committed by an international corporation, with business entities across the globe. The location of the incident was within the territories of the United States. Of particular interest within the penalties brought forth against BP, are the sanctions the corporation faced in U.S. courts. Public pressure and awareness were significant

factors in the swift and heavy-handed response suffered by BP. A failure to respond by the U.S. government would have placed the governing apparatuses in a position to lose confidence in its ability to handle environmental crisis.

In similar situations involving international corporations, when a crime happens outside of the company's domiciliary nation state, the country in which the crime took place could be reluctant to take legal action beyond civil penalties for economic or political reasons. In other instances, a nation could find that it lacks sufficient jurisdiction to dispense damages. Domestic governments may also be reluctant to defend the victims of other foreign nationals when their rights collide with the economic interests of the home state.

In *Kiobel v. Royal Dutch Petroleum (Shell)*, victims of crimes against humanity in Nigeria alleged that Shell was complicit in the violent suppression of a nonviolent movement. The Supreme Court of the United States granted certiorari and asked whether lawsuits concerning human rights could be brought under an Article III court, (a federal court within the United States) when the abuses occurred outside the U.S. The Obama administration submitted a brief arguing that courts should not allow the human rights claims to be heard in a federal venue. The Department of Justice did not urge a blanket rule against all cases arising in foreign countries, but it did argue that in a case like *Kiobel*, where the defendant is a foreign corporation doing business in the U.S., and where the abuses were committed by government forces within their own territory, the courts should deny the victims application by withholding jurisdiction.

In circumstances that closely parallel these facts, we see that national courts are unable or unwilling to take criminal legal action for political or economic reasons. In the case at hand, Shell had close relationship with the Nigerian military regime during the early 1990s. The corporation provided monetary and logistical support to the Nigerian police.⁵ Frequently, crimes against the environment result in financial remediation and little if any criminal liability. Inflicting criminal liability upon international polluters such as BP or Shell would pose a set of questions regarding legal doctrines and may leave many questions unanswered. Among the inquiries to be addressed are those regarding applicable law, enforcement of that law, proper jurisdiction and other economic or international comity concerns.

Vast arrays of issues arise when dealing with international corporations, or when the effect of the action in question has a transnational geographical spread. BP for example, is an international corporation. The company explores for oil in 30 countries. It markets Shell products

in more than 80 nations and operates 22,400 gas stations around the world.⁶ A corporation with this type of global reach and business brings forth challenges when attempting to address criminal liability from conduct that was seen during the Deepwater Horizon incident. This dissertation will attempt to address this issue.

The devastation of the BP oil spill continues to have an intense environmental impact and will likely cause severe economic damage to several generations. The damage will include local fisheries, and more importantly, the oceans upon which they survive.⁷ It is important to note that financial remediation alone will not result in an effective deterrence of willful or negligent environmental destruction.

The system of the Polluter Pays Principle demands that the harm done to the environment be internalized by those that have caused the harm.⁸ This incentivizes corporations to factor in the environment as an expense related to the cost of production. Therefore, if harming the environment is profitable, since civil liability will be outweighed by profit, than harming the environment is an expense worthwhile in the line of business. Only tough and aggressive international criminalization of environmental crimes will be able to achieve the outcome future generations of our world desire; a healthy and vibrant planet with vast eco-diversity.

As the argument is made for an international system to bring individuals to justice through criminal statutes, it is critical to recognize the corporate system that serves as a backdrop to the current political and economic climate of liability. The twenty and twenty first century has seen the creation and dawn of the global corporation. From the British East India Company, to Exxon and Apple, global companies enjoy a special place within the framework of the modern legal system.

In 1886, the U.S. Supreme Court asserted that corporations under the Fourteenth Amendment of the Constitution are legal persons.⁹ Since this ruling, corporations within the U.S. have been afforded legal protections that include the rights of selling and buying property, transferring assets, and the ability to initiate and defend against law suits. In the early uses of corporations, a large public service sentiment was tied closely to the establishment and missions of American companies.¹⁰ States within the Union saw their municipalities, universities, guilds, transportation systems and other public entities seek incorporation status.¹¹ By the 1800s, there were only 335 business corporations, which only amounted to a minuscule force in the American economic landscape.¹²

After the Supreme Court Case of *Dartmouth College v. Woodward*,¹³ the public-service aspect of corporations was in steep decline.¹⁴ From this period until the present, corporations have become a major driver of the global economy and the immoral pollution of the natural earth. In a recent case that solidified the bedrock upon which corporate law has been forming over the centuries, *Citizen United* expressly granted corporations the right of speech in a split decision.¹⁵ Under the U.S. Constitution, this would grant corporations a fundamental right that cannot be infringed by the government unless it falls under the standard of strict scrutiny (government has a necessary and compelling interest in infringing the right). This decision has empowered corporations to continue transforming the American legal system by swaying politicians and the public opinion into ways that align with their specific business interests. One of the many assets that these companies have includes their ability to spend great sums of money in specific areas of use. For instance, millions of dollars can be used for a public image blitz. This recent decision opens up the flood gate of corporate money in U.S. political campaigns. The end result is a weaker, less capable political system that can reign in the power of corporations and their interests.

Recent congressional opposition to climate change legislation can be explained by the corrupting influence of financial contributions in the form of campaign donations. These donations do not discriminate by party and find root in politicians across the spectrum. Since 1990, total financial contributions have exceeded \$239 million in direct campaign donations.¹⁶ These donations are back by significant resources being channeled into Washington D.C. in the form of lobbying funds to directly contact and convince legislators to act against the interest of the environment. In turn, U.S. leaders legislate against environmental protections including drilling, zoning, and regulations.

The argument for an international organization to reign in corporations is given additional merit by the *Citizen's United* Case. As will be discussed under current models such as the E.U., international organizations have the ability and willpower to check institutions, such as global corporations, when domestic government are unable or unwilling to do so. Regardless of the system that is used to bring criminal prosecution, the nexus between corporate personhood and corporate responsibility is a key analysis that is discussed in this dissertation. Criminal liability of corporate actors must in essence pierce the corporate veil to attach to directors and those individuals who make decisions on behalf of their companies. Throughout the twentieth and

twenty first centuries, countless actions have gone unpunished because of the blanket protection that is often afforded to those acting under the corporate umbrella. With the proposed solution of an international mechanism enforcing stern criminal laws against corporate polluters, the environment as a whole will benefit from responsible conduct that will be the natural result of such policies.

This dissertation puts forward the argument that violations of the International Covenant on Economic, Social and Cultural Rights should be penalized under a criminal body of international law. The theories brought forth under this proposal stems from the field of green criminology, which explores the criminal application of law in the context of environmental protection. The concept of crimes against future generations can be the crux of new law that can be used to criminalize conduct against the interest of future populations. In an effort to maintain sustainable development which centers on environmental protection, economic protection and social development, the principle of crimes against a generation can be built on the principle of basic normative ethics that teach us to care for ourselves and others.

The underlining proposal is to establish a new sovereign international court that has the ability to supersede domestic decisions and implement international principles for the execution and enforcement of environmental protection. This dissertation argues that it is acknowledged that domestic and international regulatory instruments are semi-effective. Currently, there exists a plethora of legal instruments on environmental protection. Although bodies of law exist, as well as courts to hear violations, the current ability to stop the very worst acts of environmental destruction is nonexistent. Gross acts by corporations continue as they are largely unsanctioned. To further elaborate on the gaps and solutions proposed, this dissertation shall delve into the existing international and national legal responses to gross environmental damage and the feasibility of a new area of criminal justice.

Chapter 1

NATURE OF ENVIRONMENTAL CRIMES AND THE FAILURE OF THE CIVIL LIABILITY SCHEME TO PROTECT THE ENVIRONMENT

I. Internalization of Pollution

A brief discussion of the internalization of pollution costs is helpful for conceptualizing the problem with enforcing environmental protection worldwide. It also illustrates how the current civil liability scheme does not discourage environmental pollution. Within the legal infrastructures of all existing countries, governments have the authority to regulate private citizens on the use of personal property; this is so, especially when such use is likely to cause negative externalities. Regulation of pollution is justified because pollution imposes costs on others. If the effects of pollution were solely suffered by a property owner, there would be less justification for the imposition of environmental restrictions.¹⁷

The traditional way for polluters to internalize costs under a pollution control regime, is for the regulators to charge the company for its emissions. Within the context of this method, this treatise argues that civil penalties are not effective in persuading the leaders of international corporations to comply with environmental regulations. It is evident that criminal sanctions need to be enforced by a regulatory scheme to incentivize corporate leaders to cease illegal activities that result in damage to the environment. By carefully installing criminal sanctions, governments could induce companies to reduce carbon emissions. Such penalties can increase the marginal cost of production to then exceed the benefit of continued environmental destruction. In this circumstance, the corporation and its officers would be liable for significantly more damages, both civil and criminal. This would create a system designed to put pressure on the culprits of environmental crimes by holding them fully accountable.¹⁸

A common way to understanding the problem of external and internal costs is by looking through the prism of a single property owner's interests. This is illustrated by the following: an owner of a ballpark does not put a fence around his field, so balls sometimes break the windows of the neighboring houses. The owner gains by omitting the fence; he saves a substantial sum of money. Through this omission, the neighbors suffer a harm because the windshields on their cars keep breaking. The neutral spectator can observe these circumstances and conclude that if

the amount of money saved by not placing the fence is less than the amount of monetary damage to the neighbors, a waste has occurred. This interplay of interests should be contemplated in the aggregate; we decide whether there is waste by comparing the gains and losses of all the parties involved. The challenge is to have the ballpark owner understand this, and curve selfish gains for the benefit of the community.¹⁹

The argument follows that approaching the solution to the ballpark simulation is to calculate all the interests at stake. Then we should ask, if there was a single owner, what would that person do given the circumstances? The problem has its genesis because the owner of the ballpark has separate interests from his neighbors. Therefore, he doesn't take their losses as seriously as he takes his own.²⁰ This is analogous to the challenges faced by criminalizing international environmental polluters. The environmental objective is that when corporations pollute on a global scale, there will be criminal sanctions enforced on them by an international governing body able to exercise jurisdiction such as the International Criminal Court.²¹ Specifically, corporate executives and employees will receive criminal sanctions, while corporate profits suffer from both civil and criminal penalties.

When Corporations like BP and Chevron-Texaco engage in legal contest against government agencies and private NGOs, they employ white-shoe law firms and substantial financial resources to win high profile cases. The corporate philosophy is to safeguard the interest of the shareholders, as a fatal liabilities verdict could force a company into bankruptcy, or simply into a new corporate entity. The costs associated with challenging government agencies and environmental activist organizations are internalized as the "cost of business." Therefore even if a corporation were found liable under civil penalties, those costs are accounted for and no real net loss to the corporation has come to fruition.

Acts against the environment deny basic livelihood of inhabitants, virtually altering health, shelter, water, education, nutrition and physical safety in a region.²² The avenues of recourse afforded to these communities are few and the costs high. Court systems in certain regions can be easily corrupted by the vast financial resources of large corporations, effectively denying any available of justice for community groups. The costs of litigation can itself run into the millions of dollars, disallowing poorer groups to engage in legal battles over years – all while the corporate war chest flows with profits from the illegal acts that set the chain of events into motion.

Between 1971 and 1972, Texaco began unprecedented oil exploration as it extracted 1.5 billion barrels from Ecuador.²³ Subsequently, the company has been responsible for the world's worst oil spill, even surpassing the Exxon Valdez disaster. Texaco spilled approximately 18.5 billion gallons of water that was contaminated by oil. The financial benefit to the corporation was estimated to be \$2 per barrel. To acquire this economic benefit, a criminal decision was made to illegally dispose of toxic waste in manner that brought great harm to the citizens of Ecuador. Tragically, the cost to the environment and the local communities is immeasurable.²⁴

These dumping pits resulted in significant contamination of the groundwater and ecosystem. Reports have estimated that thirty thousand people in this region do not have an alternative water source. Therefore, the local population must use this water to drink, bathe, and cook. Furthermore, a significant portion of the local citizenry is now afflicted with cancer. Women in the region have experienced frequent miscarriages during pregnancy, and children are now suffering from skin related diseases that arose from bathing in contaminated waters.²⁵

The real tragedy was the legal outfall that came as a result of the illegal dumping. The lack of a transnational body that could prosecute and hear the case resulted in a true miscarriage of justice. While the initial arbitration award was for \$40 billion, after years of costly tactics and illegal bribes, the matter was settled for a mere \$40 million. Texaco was able to place significant legal pressure on its challengers by draining the financial capital of the community bringing suit. This was done by filing motions to change venue, bribing judges, challenging every legal question in court, and extending proceedings.²⁶

Corporations benefit greatly from their lack of legal status on the international level.²⁷ This in turn is amplified by the lack of uniformity in the application of international law and norms to corporate activities. "While a number of voluntary codes of conduct or sets of norms applicable to corporations have been developed to fill this gap, such voluntary initiatives, lacking effective measures to monitor and sanction non-compliance, have proved to be ineffective and insufficient."²⁸ The violation of international law subverts the rule of law and the administration of justice for the common person. The Texaco-Chevron case study exemplifies the ability of corporations to use their status as floating international bodies to pick and choose their forums, and then using any means necessary to undermine the opposition, including corruption. Governments are also complicit as they accept bribes and welcome corporate profits into their treasuries, effectively placing corporate and personal interest over the citizens of their states.

II. Polluter Pays Principle and Criminal Liability

Professor Hans Chr. Bugge, a Professor of Environmental Law at the University of Oslo, has noted that there are four main policies of the Polluter Pays Principle. First, it economically promotes efficiency. Second, it promotes justice. Third, there is a promotion of the harmonization of international environmental policies. Finally, it specifically defines the proper way to allocate pollution costs within a certain State.²⁹

Proponents argue that the Polluter Pays Principle is the optimal mechanism for two prongs of enforcement, prevention and remediation. In fact, this principle plays a particularized role in incentivizing the potential pollution by only holding the polluter civilly responsible for environmental contamination. The avoidance of potential future pollution is not a priority under this theory. This is because the undertaking of the preventive mechanisms is likely to exceed remedial retributions.³⁰ Furthermore, corporations understand that there is a possibility that they may not be prosecuted at all for their infractions.

The failure of this system has caused a significant drain on developing countries. Through legislative and judicial acts, many nations oblige themselves to pay victims of environmental harm when the actors fail to compensate.³¹ In other words, states, local governments, and the polluters themselves are joint and severally liable for damages from environmental crimes.³² This has in turn virtually gutted the purpose of the Polluter Pays Principle by turning it into the Government Pays Principle. This new method of operation shifts the responsibility from the actor, to the State, and in turn to the general population (through taxes and damages).³³ This is seen in nations like India where the government is mandated to make direct disbursements to victims while it is permitted to seek damages from the actor. This would be an efficient method of paying and collecting, except the Indian government is unable to chase after those who break the law while it suffers from administrative deficiencies.³⁴ Rather than deter corporate polluters, this has had the opposite effect in developing nations.

When deterrence has failed to be achieved, one can conclude that such policies will not result in the furtherance of environmental protection. In the instance of environmental protection, full deterrence cannot be effectively achieved without criminal liability. The deterrence of a crime is the essential goal of criminal law. Legislators have sought to optimize

the control of crime by devising a penalty-setting system that assigns criminal punishments in accordance with the unlawful conduct of the perpetrator. The magnitude of the penalty should be sufficient to deter a thinking individual from committing the specific crime.³⁵ Commentators writing for the American Criminal Law Review support the notion that criminal punishment is the proper mechanism to effectively deter crimes against the environment. Those commentators argue that criminal penalties are favorable when prosecution deters future infractions and brings justice through remedial measures.³⁶ The reasoning behind this follows closely to general notions of crime, punishment and deterrence. For those who have the means to commit illegal acts, there must be a reaction or response to discourage actors, and criminal prosecution is an optimal solution.

III. Corporate Environmental Crimes and Corporate Control

BP and Halliburton are allegedly responsible for committing environmental crimes by polluting the Gulf of Mexico. These two companies are legal persons pursuant to controlling U.S. law.³⁷ A perversion of justice towards Corporations can be linked to the vast amounts of financial resources at their disposal. This money is used increasingly to influence media coverage and convince politicians of corporate friendly legislation. Regarding the Gulf of Mexico, BP launched a comprehensive marketing and propaganda campaign to paint the Deepwater Horizon incident as a natural disaster, rather than a criminally sparked tragedy. Due to this effective use of finance, the media shifted the conversation from criminal negligence, to the discussion of alternative clean energy and compensation for victims. BP effectively changed the national dialogue to suit its corporate interests.

There is however significant outrage at the incident. Within the media, pundits called for immediate cleanup efforts in the Gulf of Mexico. Coupled with these demands, calls rang out for civil penalties to be brought against BP. In comparison to other disasters, these calls for penalties are generally rare, but many argued that BP's actions inflamed an already dire environmental situation in the Gulf of Mexico. Experts and observers further called for the freezing of assets held by BP in the U.S. A portion of the discourse even revolved around the banishment of BP's corporate presence within the territorial United States. Proponents for criminal prosecution were few and sporadic. Nearly all media coverage on the Deepwater Horizon oil rig was either silent or against criminal prosecution.³⁸

The media played a crucial role in changing the national dialogue from the criminal acts of the corporate polluter to the need for alternative green energy and appropriate victim compensation. There was a strategic downgrade in the importance placed on the impact of the pollution on the environment. News networks continued to misdirect the blame onto innocent parties while manufacturing controversial stories that diverted attention from BP's criminal liability. Corporations with vast financial capabilities can easily divert the public focus by utilizing media actors. BP and other companies are armed with the knowledge that the severity of corporate punishment is linked to public opinion and anger.

The media is able to shape and frame the public's perception and anticipated acceptance of corporate criminal behavior. Historically, providers of news information have influenced the public acceptance of illegal actions by corporate and individual environmental polluters. Those who wish to influence the general population seek to do so through legacy media networks and networks of mass self-communication (through broadband and other internet technologies).³⁹ As the general population now has access to "communicative bridges" such as YouTube and Facebook, corporations have the same ability to use these forums of information dissemination.⁴⁰ However, the corporate pocketbook allows a far greater reach than the average users. News propaganda significantly contributes to a constant clouding of the unfortunate facts that accompany environmental crimes.

Corporations invest substantial sums of money and time into preempting negative information that could impact their interests. It is within their ability to commit assets for internet surveillance in order to protect themselves from embarrassing revelations.⁴¹ Furthermore, this edge in technology puts them steps ahead of damage control and public relation efforts. This furthers the notion that international environmental criminal prosecution is necessary as domestic governments can be challenged in attempting to prosecute and bring corporate violators to justice, given their ability to effectively change public opinion.⁴²

A prime example illustrating corporate influence can be found in commentator and radio talk-show host Rush Limbaugh, who has an estimated three million daily listeners. His assertion in the wake of the Deepwater Horizon incident suggested that environmentalists probably bombed the oil rig to stir up substantial support for the 'cap and trade' bill. He went on further to state that the oil gushing out under the surface is as natural as ocean water. These comments are part of a larger pattern of corporate support that reaches commercial airways through media

actors like Rush Limbaugh. Unless the global community finds a systematic way to bring corporations like BP to justice, media outlets will continue to support and relieve perpetrators of environmental crimes.⁴³

Within the George W. Bush Administration experts have documented the effects of lobbyists “with regard to the politicization of climate change.” The number of lobbyists in Washington D.C. representing the oil and gas industry number at least 786. This is more lobbyists than there are members of the U.S. Congress (535).⁴⁴ These lobbyists, combined with the systematic use of media as discussed *supra*, define a narrative that undermines the scientific and true realities of climate change and the environmental impact of human conduct. “Politicians tend to gain significant amounts of information through these sources. This includes the lobbyists and news media outlets. The constant flow of information from one area of though slowly changes the agenda of politicians themselves to believe the well-funded anti environmentalist philosophy.”⁴⁵

When observing the contemporary American landscape, it is apparent that the Republic Party has swayed further toward a group of corporate donors that have built the anti-environment narrative. The current Republic party, protecting its corporate donors, effectively blocks any attempt to mitigate the quickly changing environment. Unfortunately, the Republican Party also leads efforts to repeal already existing legislation that protects the environment.⁴⁶ In 2010, after Republican victories in the mid-term elections, vote tallies showed that the house attempted to repeal or undercut environmental laws more than two hundred times.⁴⁷ This record of Republican voting is illustrated in 2011 by their attempts to repeal an authority that was firmly established in *Massachusetts v Environmental Protection Agency (EPA)* that allowed the EPA to regulate greenhouse gas emissions. This vote was also coupled with another which had the sole purpose of stating that climate change was not real.⁴⁸

In recent years, the discourse within the Republican base has been shaped by a growing faction called the Tea Party. This right wing populist movement has been accredited with pushing extremist views into the political mainstream. This right wing faction has been supported by activist billionaires such as the Koch Brothers who are industrialists that are invested in hydrocarbons. These billionaires and media outlets that are funded by the right wing, have given the tea party enough grassroots energy to surpass the power of long established political institutions, effectively changing the American conversation on numerous issues.⁴⁹

Therefore, the conclusion is that one out of the two major American political parties has been virtually high jacked by private interests who profit greatly from the subversion of interests in line with the environmental cause. Mann and Ornstein have concluded recently through academic study that the GOP is an American outlier that has facilitated extreme political thought that counters progress in Washington.⁵⁰

BP serves as a shining example of corporate influence in Washington D.C. Over time, the corporation has aggressively lobbied the federal government on regulation and policy, specifically around the Deepwater Horizon Oil Spill. This coupled with a heavy marketing campaign touching on BPs efforts in the cleanup have swayed decision makers in Washington. To see other corporations work similarly with this *modus operandi* in the U.S. or elsewhere, we need go no further than Texaco-Chevron in Equador as discussed *supra*.

Corporations are able to influence policy making decisions that aim to regulate them in a rapidly globalizing economy. Illustrative of this is the Minerals Management Service's decision to expressly grant BP's lease at the Deepwater Horizon a "categorical exclusion" from the National Environmental Policy Act in 2009. Such exclusion came through hard fought negotiations and persuasion through lobbyists in Washington employed by BP. Again, corporations who have large sums of money to spend can not only shift the national conversation from crimes the they have committed, but they can also influence regulation to allow greater ability to create profits and harm the environment. A decision to categorically exclude BP from the National Environmental Policy Act of 2009 is an example of a failure to effectively regulate international corporations by a national government.

A recent U.S. Supreme Court Decision allows corporations the absolute right to uninhibited contributions to political candidates. This has served only to embolden corporate mingling in political affairs. In this ruling, the Court invalidated laws and regulations that separated significant corporate influence from public elections by allowing an unlimited amount of private money to enter political action committees.⁵¹ This decision has opened up the flood gates. An influx of special interest money in American politics has begun to rapidly undercut the integrity of its elected institutions. The Republic, founded upon representation of the American people, now favors representation of private interests with substantial sums of money.

In light recent public attention to the environment and global warming, corporations around the world have begun to alter their image to reflect environmental responsibility. It is a

fact that corporations do not exist for the welfare of people, or the planet. Rather, the corporate goal is to make as much profit as possible for the interested shareholders. It then comes as no surprise that environmental damage is not a significant consideration when corporations are planning their business model. The same can be said for calculating potential costs and profits when weighting environmental safety. The free capitalist market inherently views the environment as a collateral cost to production in light of the financial burden caused by following the rules, and therefore, corporations will only act to alter their image rather than significantly change their practice of conservation.⁵²

The consequences are apparent as a result of the influence of corporations in the media and political institutions. The corruptive nature of these powers has politicians serving as willing accomplices in an agenda that serves private corporate interests. The urge to drill, regardless of the social and economic consequences, represents a mindset at odds with sustainable development.⁵³ In 2008, the John McCain/Sarah Palin ticket used the slogan “Drill Baby Drill.” The apparent goal of the slogan was to support the idea of attaining self-sufficiency in energy production, while decreasing the dependence on foreign oil. This is a prime example of how a policy fits perfectly within the interest of certain oil companies that spend billions to influence Washington. This relationship between corporate money and political action is a fact that should not be ignored and left unquestioned. As long as Corporations have significant support in political circles, they will continue to evade liability and undermine the interests of citizens.⁵⁴

Political corruption is another form of pervasive corporate conduct that continues to undermine the ability of domestic governments to combat illegal action. In 2001, a former employee of BAE systems informed British authorities that an arms dealer was bribing Saudi officials to win lucrative arms contracts.⁵⁵ When the Saudi Government threatened the United Kingdom with the loss of a \$10 billion arms contract, and severing of intelligence cooperation, the U.K. dropped the investigation.⁵⁶ It was soon picked up by the United States and what was uncovered was the largest corporate corruption scheme in history.⁵⁷ BAE was forced to pay a \$400 million fine to the U.S. What the BAE incident represents is the ability of corporations to bribe politicians throughout the world. With the environment, we see corporate actors bribing local officials to dump toxic wastes and obtain illegal permits.

Economic globalization has given tremendous power to corporations. This has limited the right of self-determination for local communities. This is done when corporations impose

restraints on the government's ability to intervene or properly utilize its authority to regulate a sector of commerce. With the emergence of a global economy, the difficulty in implementing environmental law stems from jurisdictional and choice of laws issues. Many countries and numerous organizations, both domestic and international, have been debating this problem for years. With the continued growth of economies all over the world, environmental protection has been pushed to the forefront of international affairs.⁵⁸ The lack of sufficient solutions for this emerging problem has caused a gradual and increasing deterioration of the environment. Furthermore, it has created a dire set of circumstances for human rights as forests, farms and oceans deteriorate. In particular, the unregulated and under regulated extraction of natural resources, exploitation of hydrocarbons and open pit mining have caused severe detrimental effect on biodiversity, contamination to the land, water and air.

National governments have been constrained from taking actions by the political power marshaled by influential corporations. As a result, corporations have tried to suppress the rights of native communities in many regions that have tried to challenge the harmful actions of these companies; companies who are only driven to maximize profits while causing significant harm to the environment. The tactics used by corporations in the suppression of public opinion and outrage include media deception, corruption of the judicial/political process, and the push to criminalize public dissent.

Globalization has been driven by free trade agreements. These agreements also play an integral part in providing corporations free reign to secure their interests above the welfare of people and the environment. For example, such covenants also allow companies the ability to utilize legal safe havens, free of certain liabilities that are not enjoyed by local businesses. Unfortunately, the result in the aggregate is the silencing of opposing voices, which ultimately leads to adverse effects on human rights matters in health, food, and security. It also interferes with any substantial long-term development of countries participating in the global economy.⁵⁹

The insistence for a system that promotes the public domain and democratic control over resources would be wholly inconsistent with the principles of free market capitalism. At a minimum, what is needed is effective governmental oversight and proper regulation that can protect the environment from corporate polluters. An effective regime of governance can be achieved by establishing enforceable laws that protect the environment and legal mechanisms that aim to repair the damage done by the ills of capitalist production. Another avenue of

achieving this goal is to have states ally with each other by agreeing to international environmental treaties. This would require meaningful participation in assuring the prosecution and oversight required for environmental protection. These are the straightforward solutions to secure environmental preservation. To do this, we must shift the corporate analysis from a cost cutting-profit driven mentality, to process that involves weighing harm to the environment.

Environmental preservation that is not instantly driven by profits can still achieve a long term goal of profit maximization while maintaining a healthy environment. For example, a rule restricting property uses may limit the economic potential of a parcel of property, but by supplying the entire community with improved environmental quality, the rule allows an owner to enjoy the benefit of a clean environment. In the long run, real property may be more valuable if they exist in a clean community, rather than one that has been degraded.⁶⁰

The reasons for committing corporate environmental crimes are varied. And thus, ways to fight these crimes differentiate. A crime may occur because there is a presence of ignorance regarding environmental obligations, negligence or deliberate and intentional illegal acts. In the case of Deepwater Horizon, and many other environmental crimes, a decision was made by company employees in full knowledge that the act(s) were illegal and would result in environmental harm. It is ineffective however to attempt to deter international crimes with pure national laws because enforcement of domestic law can only achieve a limited remedy against powerful perpetrators.⁶¹

The transnational element is significant for some particular attacks on the environment. It seems that a substantial amount of environmental harm caused in the modern economy is not done so by nation states. Since the international link is generally omitted in most environmental calamities, the primary jurisdiction of the country where the offense has occurred is exercised over penalties. It is these local laws that are enforced against polluters. The issue with this current mode of regulating environmental harms is that the state with jurisdiction, implementing domestic sovereignty, “greatly limits the ability of [other] states to arrest and prosecute those responsible.”⁶²

IV. The International Community and Environmental Crimes

In 1987, Professor Nicholas A. Robinson stated it was “time to do something because we had already launched irreparable change to the environment. . . . But the urgent pace of international development is slow.”⁶³ Over the past four decades however, general awareness for environmental issues has been on the rise. With the emergence of green energy, and a willingness of countries to further cooperate with their international partners to stave environmental crime and catastrophe, concrete progress has been measurable and significant. However, the destruction and degradation of the environment is exceeding the international response in speed and ferocity.

Specifically in the current period of the Anthropocene Epoch’s Great Acceleration, increasing disruptions to human society are inevitable. The warming of the ice caps in Greenland, and new reports of Antarctic melting will flood coastal cities and cause a crisis of mass migration.⁶⁴ One need look no further than Hurricane Katrina and the emergency alarmed by nation states such the Maldives that are being threatened with absolute submergence within the next few generations. Al I though the task of changeing the current momentum is astronomical, crimes of unregulated and unchecked pollution adds to the oncoming crisis of climate change.⁶⁵

When looking at existing agreements, a lack of speed in solving issues of environmental degradation is apparent. For instance, in the Kyoto negotiations, the premise of the accord was based on the assumption that nations can address climate slowly. When stepping back and looking at the totality of accomplishments between the various international covenants, one is hard pressed to find significant headway in reversing global environmental damage between the Stockholm Convention and the Copenhagen Accord.

In light of the current landscape of international progress, the importance of criminal sanctions and injunctive measures to deter crime are extremely important. Crimes equal in their broad effects and deliberate destruction of environmental habitats during war are covered by the Jurisdiction of the International Criminal Court. Specifically, the field of law covers forced migrations of civilians due to environmental damage.⁶⁶ For many years the international community has sought to find a legal formula that is suitable for redress regarding international crimes against the environment. This need is urgent in light of the obvious incompetence of national forums to effectively provide such capabilities. Environmental activists have begun to call the destruction of ecosystems crimes against peace and the welfare of nations. Such a

classification would place these crimes at the same level of genocide and crimes against humanity. If the UN adopts "ecocide" as a fifth "crime against humanity," then certain cases of egregious misconduct could be adjudicated at the International Criminal Court (ICC). This legal recognition would create sufficient precedent to supply support for existing environmental mechanisms charged with protecting community interests.

There is an illuminating possibility that international crimes against the environment may one day fit into the jurisdiction of the ICC. This may become a reality because domestic laws are seen as insufficient in handling the most egregious transnational crimes. Domestically, these types of offenses generally beget civil penalties from relevant government agencies. Unfortunately, these laws are generally insufficient to penalize perpetrators. The current classification of environmental destruction is not a crime against humanity under the contemporary international legal structure. This is because these types of crimes do not systemically attack a specific civilian population, although the results can be very similar.

The severity of the impact on biodiversity and the degradation of environmental health when considering these acts give sufficient ground to consider the criminality of the conduct on an international scale. Uncontrolled pollution has the ability to destroy entire eco-systems and therefore reduce bio-diversity within a region. Just as important, the health of locals where the pollution takes place can be severely harmed as is seen in South America with American oil companies. To categorize such conduct as world-wide crimes would be appropriate for an international community embracing globalization.⁶⁷

Opponents of international environmental laws have worked tirelessly to stymie any substantial measures to advance legislation in an effort to protect communities. Many arguments have been put forward through lobbyist, governments and scholars to defeat any attempt to create a unified system of criminalization of the most serious crimes. For instance, an argument was made that it is very difficult to establish the causation element of why the act occurred, let alone whether it was deliberate or not. Opponents further state that there is great difficulty in linking harm to specific corporations given the diversity of actors who commit crimes and a lack of investigatory resources. This is why the degree or extent of culpability is not weighed in most environmental crimes on an international scale. Most of these crimes are designated as strict liability offenses; accordingly civil fines are the only proper remedy for these violations.⁶⁸

The pertinent question is whether BP can be prosecuted in a criminal forum. Under current controlling U.S. laws, it can be a felony to pollute the waterways, but a court cannot sentence a corporation to prison. When implementing a criminal system internationally, fear of incarceration is necessary to insure corporate obedience. Criminal liability is ultimately enforced by such penalties. However, under current law, a company can only be court ordered to pay civil fines, and there is no possibility of criminally convicting the executives of the condemned corporation.⁶⁹

Ultimately, BP may be civilly responsible for its environmental crimes and may pay fines in the billions of dollars. The world however, will not see the controlling executives serve prison time, despite the known fact that the occurrence in the Gulf of Mexico was a criminal act. Opponents of executive criminal liability assert that a balancing test between government interest and the burden of prosecuting such crimes are unfavorable for a criminal liability regime. The argument rests on the premise that the proof necessary to show an executive had a direct involvement and was criminally negligent is a significant prosecutorial burden, and that being an executive of a corporation should not expose that person to criminal liability.⁷⁰ The fact is that the cost of prosecution is worthwhile when considering the protected interest and the effect of deterrence on the offending officers and others who are similarly situated.

There is evidence that much environmental harm is executed in a deliberate fashion, with full knowledge of the crime. There is also a weighing of beneficial interests upon which crimes are committed. Frequently, the purpose behind corporations committing intentional crimes rests on the corporation's interest in seeking an inexpensive way of performing their business, even if substantial fines would be levied in the future. The polluting corporation is generally fully conscious that its actions are illegal and the decision to take such conduct was made. This is because it was the most economically effective way of protecting the best interests of the company, even with the element of illegality attached to such action.⁷¹

V. Criminal Deterrence of Environmental Crimes

Criminal prosecution will have the effect of shifting the status quo of current corporate business. On the national and international levels, corporate officers will assess not only the profit risk and loss statements when considering committing a crime against the environment, but their own freedom and risk of incarceration and financial penalties. Although the reality of such

a system is apparent, developing mechanisms to implement them are challenging given the vast resources of special interests.

For example, in 1987, the United States Sentencing Commission created general sentencing guidelines.⁷² The purpose behind this act was to deter criminals, by enforcing environmental statutes that were already in the books, through stricter penalties. However, the corporate involvement in the actual process of recommending, developing, and executing the guidelines were borderline corrupt. These guidelines were flexible and broad enough to fit corporate interests, while still giving the public the perception that stricter laws and regulations are in place. This in essence is comparable to state legislators asking felons for advice on drafting state criminal law.

The schematic change this dissertation is arguing for is that international polluters would be liable under international criminal prosecution, and not just civil fines. Criminal liability would have an effect on the actions of transnational corporation. The reason such measures need to be taken are evident in characteristic of companies to put corporate welfare above the global environment, and in doing so causing widespread damage to the environment.⁷³ The creation of the ICC contributed substantially to decreasing the crime of genocide. Political leaders noticed that the international community was actively voicing their strict stance on the crime of genocide. In 2002, the ICC was established under political pressure and the need to prosecute war criminals.

The establishment of the ICC was a revolutionary and ground breaking step forward for international cooperation in the pursuit of justice against criminal actors. “It serves both as a practical and symbolic articulation of the scheme (referring to the Kantian model of the international community) and a powerful push to its full realization.”⁷⁴ Although the court has shortcomings and successes, scholars have designated the two faces of the court to be a “watchdog court” and a world “security court.”⁷⁵ It is important to note that this institution is not just a court system, but an entire criminal justice system with a prosecutor, defense unit and judges (unfortunately it still lacks its own enforcement agency or prison).⁷⁶ It does however work with the hallmarks of any criminal court, implementing warrants, indictments and judgments that are to be followed by nation states.⁷⁷ It is this court system that could accept a new mandate of including environmental crimes within its jurisdiction to serve the community of nations.

What makes the ICC an attractive option as a mechanism of prosecution is its role as a United Nations “security court.” Fletcher and Ohlin make the argument that the U.N. Security Council refers matters to the ICC under Chapter VII of the U.N. Charter. The intention is that the Court use its power as a U.N. institution to restore international peace and security when there is a conflict between parties.⁷⁸ In essence, the Court serves as an impartial body seeking only to find solutions to complicated issues on the global stage. To allow the ICC to increase its jurisdiction over environmental matters however, there must be a concord to expand its purview and many fundamental structural changes.

The ICC is structured to adjudicate cases for four crimes against the peace: crimes of aggression, crimes against humanity, genocide, and war crimes.⁷⁹ The benefits of adding ecocide to the list of jurisdictionally proper crimes pursuant to the Rome Statute would provide more authority for the international community to prosecute individual corporate executives in serious violations of environmental protection schemes. This would cause many parties to revisit current practices. For instance, extractive mining may all together cease or be limited. Chemicals that leak into bodies of water that cause harm to the established ecosystem would become illegal and their use obsolete. All of these events would greatly further the cause of environmentalism.

It is clear that ecocide has the same result in certain situations as genocide and war crimes. It is misleading to downgrade the seriousness of ecocide. This crime itself “is the heedless or deliberate destruction of the natural environment through various human activities that endanger human life. It is the extreme environmental degradation of the vital areas needed for the survival of indigenous communities.”⁸⁰ The peaceful enjoyment of land by populations that inhabit them are severely affected at the loss of bio-diversity. Eventually, environmental crimes that rise to the rank of ecocide cause wide spread displacement of communities. They are often categorized under the term “environmental refugees.” These individuals are forced to migrate when they are left little to no choice to remain in their homes.

The commission of ecocide is indeed the very antithesis of life, resulting in the depletion of natural resources and poverty. This in turn causes war and facilitates crimes against humanity and peace. As such, it could be regarded as a crime against the peace, and the self-interested perpetrators should be subject to international prosecution. Nations will have to engage in competition over resources such as water, oil and minerals with historic consistency. Recently, Sir David King of the United Kingdom predicted a “resource wars” that would engulf the

coming century. The United Nations has publicly accepted the premise of his argument and has called for caution and action to avert such a crisis.⁸¹

VI. International Jurisdiction of Environmental Crimes

This dissertation argues for the creations of an international legal system combined of both national courts and one international court specializing in environmental crimes. Alternatively it proposes that the International Criminal Court's purview should encompass universal jurisdiction over conduct, not already within the ICC's Rome Statute, that affects future generations.⁸² Crimes against future generations by those parties who place profits over their moral duty to others are an international problem, and it heeds the call for global action that will canonize an international legal binding framework.⁸³

The crime of Ecocide contains the necessary elements that qualify it to be under the sharpest scrutiny with the international community, similar to other crimes against peace.⁸⁴ This call to protect the interests of environmental integrity must be answered immediately. A failure to do so will inevitably leave the human race vulnerable and unprepared to take on some of the most challenging issues of the 21st century.

It is clear that future generations are disadvantaged because of harmful actions that neglect the interests of this class. This disregard for the future finds its roots in the consistent defense of the status quo of the current socio-economic and political structure. What makes this group so vulnerable is their inability to bargain for proper treatment. The unfortunate result will mean future generations are inevitably destined to inherit a poor quality of life in consequence of current environmental destruction. This degraded inheritance poses severe consequences for the sustainability of life. Human health and security are automatically threatened when natural resources are depleted. Crimes against the environment coupled with the changing climate will inevitably result in catastrophe with famine, exodus, and loss of life.⁸⁵

This dissertation makes the argument for an international legislative scheme that outlines defined offenses. These laws would be universal protocols that would serve the international community by creating a proper mechanism to deter and punish potential perpetrators from committing crimes against the environment.⁸⁶ Attached to these laws would be a schedule of fines and incarceration recommendations for the illegal shipments of waste, discharge of dangerous substances, and the unlawful possession of protected wild life. These categories would

be structured with the purpose of eliminating conduct causing significant deterioration to the environment in an effort to protect habitats and the general health of the planet. Such legislation would curb environmental disasters like the recent Deepwater Horizon oil spill and the chemical catastrophe in the Ivory Coast, where 500 metric tons of toxic waste were released from a Dutch cargo vessel.⁸⁷

VII. International Law and International Environmental Crimes

The September 11th attacks (9/11) in the United States gave rise to extreme patriotic feelings within the country and brought together a coalition of international actors ready to commit to an immediate response. In the U.S, Political will increased for war, and the nation came together to make decisions, even though contemporary scholars still judge the wisdom of those choices. 9/11 serves as an example of how the world can unite to create agreements (in this case, conventions against terrorism) when an incident occurs that shocks the conscience.

The U.N. Convention against Illicit Drugs is another example of how such cooperation was boosted by an existing problem; it represents the will and ambition of politicians to make a global effort against criminal organizations that feed from the financial benefits of producing and running narcotics. This agreement made strides in the free flow of information between nations to regulate and combat the flow of drugs across borders. It created the most advanced and effective international criminal law yet seen.⁸⁸ Unfortunately, international enthusiasm is not the same when it comes to combating international environmental crimes. When discussing recent environmental catastrophes, it is important to capitalize on current and ongoing disasters that affect the global commons, in order to establish a sound system of law to protect the environment and achieve sustainable development.

The recent disaster in the Gulf of Mexico, the hazardous waste incident in the Ivory Coast, and other notorious environmental disasters show how environmental crimes can have a devastating effect on people and the environment. These tragedies continue to reinforce the need for more stringent measures to ensure a sustainable future.

There have been a wide range of laws that have been adopted by several nations and international bodies. These legislations have been created to adjudicate war crime and prosecute human rights violators. Although these bodies of law and their enforcement mechanisms have

strengthened over time, environmental law that is safeguarded by criminal sanctions for violators, continues to be evaded because of jurisdictional issues and lack of political will. The boundaries and circumstances of environmental crimes do not have an international legal definition.

In the international forum, categorizing legal and illegal activities can become a difficult legal analysis. There is debate that genocide is an illegal action. The elements of genocide, including the extermination of a specific human population, does not closely mirror any conduct that could be justifiable. Unlike genocide, determining whether an environmental crime has occurred in the international forum is challenging. In order to guide the discourse, this dissertation argues that an international agency, such as the ICC, is the correct body to adjudicate these issues. Going further than the ICC, a proposal is set forth establishing a new legal system that would establish a new court on the international level. A prolonged delay in creating the required infrastructure to protect our environment will continue to allow transnational corporations to go unpunished for their crimes.⁸⁹

The model to be implemented will provide provisions for criminal liability and direct agency oversight. Jurisdiction will be exercised by the international body when the most serious of environmental crimes occur; in the alternative, when states are unable or unwilling to prosecute under a domestic court of competency. The notion of sovereign rights will surely provide challenges to this model of prosecution, but using existing examples of international cooperation will allow a feasible blueprint to be articulated. This approach will encourage states to make substantial changes to their existing body of law in this area. Such changes of law are necessary if individual states wish to adjudicate domestic matters of environmental concerns.

The proposed model that will facilitate international jurisdiction over crimes against the environment will have several fundamental challenges. These challenges stem from the nature of international law which is constantly changing through new agreements and can sometimes be difficult to enforce. Furthermore, environmental harm can many times be a boon to local economies. Therefore, local politicians and citizens seek to continue supporting the degradation of their lands in order to reap immediate benefits. This causes an issue with sovereignty and the ability to allow individual states to determine their own course of action.

There are three fundamental reasons that undercut absolute authority.⁹⁰ First, every sovereign nation is not legally required to apply a sentence ordered by the courts of any other

country against a natural or a legal person. Second, there is no international agency that has executive global international police duty, similar to the missions created under Chapter 7 on the United Nations Charter.⁹¹ Finally, there is a lack of an international or regional body that may properly exercise jurisdiction over a sovereign nation. The only applicable exception to this is the European Court of Justice at Luxembourg. This court can properly assert its power to enforce compliance with standing European Community environmental laws. However, jurisdiction fails outside the euro-zone. Since 1993, the International Court of Justice (ICJ) has formed an *ad hoc* Environmental Chamber consisting of seven judges handling petitions lodged by individual States. The jurisdiction of the ICJ is extremely limited due in major part to the court's inability to bind states who reserve the authority to follow or refuse compliance with court orders. Further limitations can be traced to the ICJ's lack of jurisdiction for claims that arise from individuals and corporations.⁹²

An international body that has the characteristics to adjudicate international environmental crimes is both possible and necessary. Legal experts and commentators have produced various proposals that are forging a direction forward. For example, the United Nations has made a recommendation termed the "Swiss Initiative." This called for the formation International Court on Human Rights with the inherit ability to adjudicate matters arising from multinationals. Additional proposals have been introduced that recommend that the ICC have competent jurisdiction over legal persons such as corporations. Both of these examples serve as prime examples of how challenges to create a universal body for environmental regulation can be overcome.

VIII. Ecocide as an International Crime

The term ecocide is a legal doctrine upon which parties can be criminally convicted for activities that harm the ecosystem, land, and humans in a given location. The common definition is "the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished."⁹³ In recent years, international lawyers and activists have reviewed their calls for the creation of a body of law that incorporates ecocide into current legal systems and international agreements.⁹⁴ Efforts have centered around making ecocide "the fifth International Crime against Peace."⁹⁵

The crucial establishment of ecocide as an international form of criminal conduct would bring it under the purview of the ICC and other international courts that adjudicate corporate culpability. This is especially the case when national governments are unwilling or unable to take proper judicial actions to enforce and redress environmental crimes. A recommended way to produce this outcome is to have ecocide be labeled under provisions of international legal norms, such as a fifth crime against the peace.

When observing criminal activity that transcends national borders, a significant component to the development of a legislative scheme is recognizing the failure of both bilateral and unilateral enforcement measures. No government possesses sufficient resources to police every crime that occurs in the transnational forum. Even rarer are countries willing to unilaterally pursue a criminal when doing so would involve a blatant affront to another nation's sovereignty. International norms develop in order to eliminate the potential havens from which criminals can flee. That is the very substance of an international criminal norm.⁹⁶

Genocide, a crime that is subject to the jurisdiction of the ICC is a result of criminal intent, planning and execution. Ecocide however, is the result of greed and aggravated negligence. This is coupled with an indifference to human life, allows this crime be criminalized in the same legal processes that international humanitarian law applies to armed conflict. Genocide is a horrific policy of extermination that is intentionally planned by political and military leaders to destroy large groups of people. The unnecessary exploitation of resources and ecological degradation will eventually force families from their homes by literally destroying their surrounding environment. This unfortunate result is the probable and expected consequence to environmental destruction; the end result frighteningly parallels planned extermination.⁹⁷

The ICC seems to be the appropriate forum through which criminal prosecution and adjudication can be effectuated. The court is empowered with identifying individual actors who possess criminal *mens rea*. Corporations repeatedly act with the intent of only earning large profits and thoroughly disregarding provisions that were created to prevent human and environmental disaster. Such disasters lead to mass exodus, with people being forced to abandon their homes and become refugees. The same result can be found under the reign of Saddam Hussein when he utilized chemical weapons. Evidence has shown that wars over resources occur directly as a result of contamination and the rights to limited natural resources.

Many domestic legal systems continue to shirk their duty by protecting criminal polluters. This is another reason why the ICC would make a proper forum through which environmental crimes can be prosecuted. Most nations already have controlling law to criminalize polluters, but these crimes must be linked to a mass killing of a group of people. When seeking efficiency and effectiveness, what is required is both national and international courts that prosecute environmental crimes.⁹⁸

IX. Domestic Legal Failures and Need for International Jurisdiction

Despite the current establishment of national or regional forums, these mechanisms are extremely limited because many governments do not have the will and resources to properly monitor environmental impacts. What is needed is a firm coalition for international monitoring and the enforcement of criminal provisions. Such laws can be wholly distinct from the ICC or properly under its competent jurisdiction. This system would be designed to address domestic governmental failure in reporting and effectively responding to environmental harms.⁹⁹

At its backbone, an international mechanism for monitoring criminal provisions would mirror some of the existing adjudicative tribunals in several nations. In the United States, the federal appellate courts serve as “circuit courts” encompass smaller “district courts.” At the apex is the “supreme court” which serves as the court of last resort. Within the appellate system, certain courts have specific subject-matter jurisdiction that include drugs, domestic violence, tax, bankruptcy, and others. These areas can be seen as specialized topics assigned to a specific body within an already established judicial body. Other countries such as Sweden have established a “water court” focusing on water rights issues. Denmark also has created a “nature protection board” focused on the conservation of the environment.

Environmental courts and tribunals have been arising more frequently in the 1970s after the emergence of the environmental movement. Currently, in only 35 nations, there exists some form of environmental court or tribunal.¹⁰⁰ In each of these courts, certain strengths and weakness can be attributed to local legal culture and socio-economic circumstances. However, certain benefits arise from all of these systems, such as consistency in the application of law, expertise of judicial professionals in the environmental field, and the reduced costs of environmental damage. Furthermore, the general benefits to the non-environmental legal system

can be seen by the relief in backlog as specialized environmental courts handle environment based cases efficiently.

Specifically within the United States there is lacking any national environmental court. National tribunals do exist however with in the executive branch to perform functions within the EPA. However, state courts for the environment do exist. The Vermont Environmental Court was the first U.S. court to specialize in the environment. “It hears appeals from state land use permit decisions (Act 250), from state environmental permits and other decisions of the Agency of Natural Resources, and from municipal land use zoning and planning decisions. The Court also hears municipal land use enforcement cases, and enforcement actions brought by the Agency of Natural Resources and Natural Resources Board. Almost all cases are heard *de novo*, with an evidentiary trial, and are scheduled for a courtroom in the county in which the case arises.”¹⁰¹ Its enforcement functions center on civil penalties allowed by statute. The court itself has the authority to set civil penalties by recapturing economic benefits or instituting fines under statute.¹⁰² This in turn makes it economically challenging for parties to break environmental law. This “sanctioning” is the main form of deterrence.

The goal that the international community should strive for would be one that includes an international policing mechanism for state and corporate compliance, which is controlled by international environmental law – a step above the domestic systems just discussed. Setting aside the prospects that the ICC may be granted jurisdiction, attention must be brought to the urgent need for national courts and the international community to effectively adjudicate environmental crimes. This would undoubtedly protect and insure that domestic legal actions are enforced against polluters.

What should now be undertaken is a comprehensive international codification of environmental laws that guarantee individual states are responsible in helping prevent and properly punish environmental criminals. In light of the fact that domestic courts have a binding mechanism that punishes violators is an option for the international legal community to strongly consider. As stated by Professor Nicholas Robinson in his address in Johannesburg South Africa, nations cannot obtain sustainable development without regional cooperation of judicial institutions who systematically apply fundamental environmental principles¹⁰³ This *uniform* application of the law, under the assistance of criminal sanctions provides the international

community the ability to effectively and systematically tackle aggressors against the environment.

After years of continued failure in dealing with environmental crimes through domestic systems a time for change has come. Considering the gravity of the crimes and their effects on human life, the tremendous power of the offending transnational corporation to corrupt officials and silence dissenting communities has crossed an event horizon. The academic community must now provide a solution. It has become apparent that voluntary codes of conduct, self-regulation and national courts have failed to tackle human rights and environmental abuses of transnational corporations. Ultimately, calls for the current system of broken enforcement to be replaced by a binding international code are well founded. This would limit the powers and influence of transnational corporations, and standardize their responsibilities and obligations, which they have successfully resisted over time.¹⁰⁴

This fundamental change starts by identifying international environmental crimes which cause systematic violations of human rights. We must develop effective regulations and control irresponsible corporations by aiming to cure the imbalance created by the *new current realities*. This can be accomplished by establishing a system where corporations are accountable, do not hold more power than nation states, and can no longer define for themselves responsibilities and regulations. There must be a reversion of theory upon which profits are prioritized over the wellbeing of people and nature. This can be achieved by forcing international companies to submit to an international code, which would define the limits of corporations' legal responsibilities for the consequences of their activities. This binding legal framework must have the ability to prosecute, adjudicate and enforce decisions. The content of these laws should be the result of a synthesis of the *ad hoc* codes of the ILO, the OECD and the proposals discussed at the UN in the 1970s.¹⁰⁵

There is a challenge in pinning down the responsible party when the actor is a corporation. Identifying a certain company as the polluter requires filtering through a network of corporations. The same issues arise when attempting to pierce the corporate veil, as it can be difficult understanding and finding the truly responsible parties, especially when corporations are layered in parent and sibling companies.¹⁰⁶

Substantive evidence has produced ample facts that illustrate international corporations are a source of environmental crimes on the global stage. Illuminated by this, economic and

environmental crimes carried out by these companies should be properly identified as “crimes against humanity.”¹⁰⁷ A new legal framework argued for in this dissertation will propose the formation of an international environmental tribunal that can properly adjudicate claims against transnational companies. This body would be responsible for defending the basic rights of people affected by criminal environmental activities.¹⁰⁸

Chapter 2

DEVELOPMENT OF THE INTERNATIONAL ENVIRONMENTAL CRIMINAL LAW

“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.” –
1972 Stockholm Declaration of the U.N. Conference on the Human Environment

The Stockholm Declaration sought to set principles in the field of environmental law. Following closely in its footsteps, the 1992 Rio Declaration on Environment and Development reiterated in its Principle 1, “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”¹⁰⁹ These declarations of principles were eventually codified in the 1998 Aarhus Convention. This agreement affords new rights that allow for public engagement in the process of environmental protection decision-making. The convention directs signatory states to create procedural rules and legislation to enact laws to achieve the goals of the agreement. These goals – the right to information, right to public participation, and right to the access of justice for environmental protection, create the “three pillars” of environmental justice behind the agreement.

This agreement has helped usher the rise of “third generation” rights that are sometimes in contradiction to long settled common law surrounding economic development, property rights, and employment arrangements.¹¹⁰ There is a struggle with governments on how to balance these conflicts between environmental protection and development; however as scholars continue to focus on the commons, more just legislation can be promulgated through the international community.¹¹¹

I. The Transboundary Nature of Environmental Damage

“The urgent need for refining and observing environmental rules becomes increasingly evident as the trends in environmental degradation deteriorate worldwide.”¹¹² As massive super storms pummel unsuspecting regions, and droughts and fires ravage communities, it has been

more evident now than ever the consequences of human consumption on our world. For example in 1998, Hurricane Mitch caused massive devastation in Central America. Death and destruction were left in its wake as the damage was multiplied the excessive foresting that failed to capture water and hold soil steady.¹¹³ Also worthy of note is the excessive melting of the ice caps in Greenland, which is exacerbated by black ice that results from forest fires and carbon emissions. The reality is clear that our planet is vulnerable to change and human conduct.

When considering the consequences of environmental harm and its international effects, we must observe the dire need to install criminal sanctions. A failure to do so will result in irreparable damage to our communities. These crimes will continue to impact the life support system that nature has developed over millions of years. The imperative to create these mechanisms has never been stronger.

Currently, criminal conduct that is not within the jurisdiction of a national court and is not covered by competent international jurisdiction is allowed to simply go unpunished. Without a court to adjudicate matters, a prosecutorial body is unable to punish perpetrators. This failed system provides criminals an avenue to enrich themselves at the expense of the others and to the detriment of the global community. In addition to the current state of affairs, directives and aspirations of many international treaties have failed to bring results because of their lack of a powerful and centralized enforcement mechanism.¹¹⁴

Several treaties addressing environmental concerns have been promulgated. For example, during the 1992 UN Conference on Environment and Development, also known as the Earth Summit, the Convention on Biological Diversity (CBD) was born. One hundred and ninety two nations, including the European Union, are now parties of this convention.

In April 2002, the signatories of the CBD committed to drastically reducing the loss of biodiversity by 2010 in an effort to alleviate poverty and improve general global conditions.¹¹⁵ Predictably, this benchmark was never attained. This is illustrative of world leaders failing to deliver on promises made in 2002 and during other covenants to combat the decline of global biodiversity. The international community has instead been the steward of a planet that has seen biodiversity decline at alarming rates. A recent study brings these findings to light and illustrates the lack of will shown by international leaders based upon their 2002 CBD commitments. This study asserted that the "analysis shows that governments have failed to deliver on the commitments they made in 2002: biodiversity is still being lost as fast as ever, and we have made

little headway in reducing the pressures on species, habitats and ecosystems.” This statement was made by lead author Dr Stuart Butchart of the United Nations Environment Programme World Conservation Monitoring Centre and BirdLife International.¹¹⁶ Sadly, despite numerous successful conservation measures and agreements supporting biodiversity, targets emphasized by them still have not been achieved.

The same failures are seen with the Kyoto Protocol. This agreement forged in Japan, introduced flexibility mechanisms which were defined as alternative methods for achieving reduction of emissions as a component of an effort to address the changing climate.¹¹⁷ The categories set out by the protocol include: Clean Development Mechanisms, Joint Implementation, and Emissions Trading. Each of these classes are aimed to “(1) stimulate sustainable development through technology transfer and investment, (2) help countries with Kyoto commitments to meet their targets by reducing emissions or removing carbon from the atmosphere in other countries in a cost-effective way, and (3) encourage the private sector and developing countries to contribute to emission reduction efforts.”¹¹⁸ The acceptance of these mechanisms remains highly controversial. Criticisms were drawn at the inclusion of these priorities by U.S. (even though the U.S. eventually withdrew).¹¹⁹ Additionally, elements of the protocol have received further criticism as emissions reductions have not been effectively achieved.¹²⁰ It is important to note however the effectiveness of one international body in accepting and agreeing to the measures of the Kyoto Protocol. The European Union was able to effectively set key agenda items in part because of their ability to subordinate themselves to the greater international community.¹²¹

In 1995, the United Nations was awakened by disastrous environmental degradation, and the calls by global citizens and special interest groups for tougher national and international measures to protect the environment. These protests included calls for criminalization of certain activities. The Economic and Social Council of the United Nations reached resolution 1994/15, wherein it called upon the community of nations to “consider acknowledging the most serious forms of environmental crimes in an international convention.”¹²² The resolution also urged member states to focus on the need for law enforcement resources to address environmental crimes. The premise behind the proposals was the viability of an international criminal court being able to adjudicate matters of environmental concern under criminal doctrines.¹²³

The Council urged signatory states to adopt a list of recommendations in their domestic laws.¹²⁴ The purpose of these recommendations was to provide the basic ground work for criminal sanctions when endangering the environment. Provisions that signatory states were asked to provide included certain core criminal offenses.¹²⁵ They involved a variety of mens rea levels, intent, reckless or negligence, that are required to find a party guilty of causing imminent risk, damage, or injury. The Council stressed that these offenses should be categorized separately in accordance with the harm of the conduct (damages). As a consequence, the injury caused by the offense would be reflected in a proportional sanction against the offending party.¹²⁶

The position was also taken that states should impose criminal fines on corporations.¹²⁷ This alone would require a fundamental change in the domestic laws of signatory states, including the criminal philosophy of liability; enforcement mechanisms would also require significant remodeling. Overall, this enforcement strategy would be facilitated by the provisions of technical assistance, through relevant international agencies such as the Commission on Crime Prevention and Criminal Justice (CCPCJ) and the U.N.¹²⁸

The resolution also encouraged cooperation among the internal agencies of member states. Forums for discourse and enforcement were identified through relevant international agencies. They include the CCPCJ, the network of institutes of the United Nations Crime Prevention and Criminal Justice Program, and other similar regional institutes. The Council has emphasized the threats posed by environmental crimes, which inflict irreparable damage. They pointed out that cross border cooperation has to be regarded as a top priority to mitigate long-term harmful effects.¹²⁹

This resolution was neither the first nor the last of the many international attempts to move forward transnational cooperation in fighting environmental crimes. However, similar to the fate of many other attempts, the resolution remained a dead letter without any meaningful implementation of its recommendations. Although many of the ideas proposed were ambitious in scale, none had any noticeable impact. The failure to these propositions to take hold points to the harsh reality that international criminal law and international environmental law are restricted at best when considered together, despite their depth of law.¹³⁰ This could be attributed to one or more reasons; chief among them, the corporate might factor, and its influence on national and international law.

As the climate begins to change, and the environment as a whole is thrown into the forefront of a global conversation, calls for international laws penalizing certain attacks on the environment and derivatively future generations have mounted. There is an urging of harsh punishment for perpetrators of trans-boundary crimes against the environment and for stricter criminal enforcement.¹³¹ However, there are critics that think that environmental crimes are not suitable for criminalization. The voices that disfavor criminal liability are seen in the text and spirit of many international treaties and conventions, including the Convention against Transnational Crime which completely omits any reference to environmental crimes.

At one time, the United Nations gave credence and attention to the application of criminal law in the context of environmental protection. These efforts were predominately focused on organized crime. A recommendation was made that “National and supranational authorities should be provided with a wide array of measures, remedies and sanctions, within their constitutional and legal frameworks and consistent with the fundamental principles of criminal law, in order to ensure compliance with environmental protection laws.”¹³² These U.N. efforts never amounted to significant progress, and the Convention against Transnational Organized Crime eventually omitted any reference to the environment.

The omission of the environment occurred, despite the undisputable fact that environmental crimes are often transnational in nature. They involve organized crime activities such as trafficking in natural resources, the illegal trade in wildlife, unregulated fishing and the illegal exploitation and trafficking in minerals and precious stones. The Convention touched upon the illegal sale and manufacturing of firearms and human trafficking as relevant global issues.¹³³ These initiatives all failed to touch upon what are arguably the gravest threats.

Although examples of such failures are evident in the formation of a body of law, the international community has paid specific attention to providing protection for the environment during war time. Such focus suggests that the global community is more interested in regulating war than in protecting the environment.

II. Protection of the Natural Environment During Warfare

This topic will be reviewed briefly as the purpose is to give a general background for this dissertation. This subject has been the discussion of many treatises and research papers. The law in this area is much clearer, and volumes of treaties have been specific in criminalizing

activities during armed struggles; specifically activities with the purpose to destroy the environment as the mean to achieve military advantages.¹³⁴ The long-term effects of environmental damage caused as part of belligerent military operations may have serious after effects on the ecosystem. The area of law to address this long term damage is lagging, but there are still some instruments available to pressure violators.

The international community turned attention toward such endeavor following many atrocities committed during war, specifically during World War II. This included acting affirmatively to prevent war related activities that create major consequences on the natural environment.¹³⁵

War is conducted based upon internationally recognized principles. This includes self-defense and the protection of sovereignty. This right however, to engage in war, is not absolute. "The Law of War prescribes restrictions on three aspects of armed conflict: the definition of war, relations between neutral and belligerent states, and the conduct of war."¹³⁶ Touched upon the law of war includes recognized boundaries in the treatment of prisoners, nationals, property, vessels, weapons, and occupied territories.

International rules on the conduct of war are intended to avoid unnecessary suffering or injury to combatants, civilian populations and property. But under the Law of War, the definition of "unnecessary" is decidedly limited. Generally, by declaring a military necessity, states can exempt themselves from the restrictions of the Law of War and sidestep barriers towards illegal conduct.¹³⁷

Limitations are present however. A States' ability to claim exceptions on the basis of military necessity is one. First, local covenants established by nation-states or regional governmental bodies set out rules that regulate the use of certain weapons.¹³⁸ Secondly, the use of weapons of mass destruction are governed by well establish international customary law. This is evident by opinions from the ICJ. In 1996, the ICJ ruled on nuclear weapons concluding that:

"States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets... it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use."¹³⁹

The 1907 Hague Conventions did much in establishing a system of law that addresses armed conflict. Unfortunately, the environment was not a priority in 1907, and therefore the articles agreed upon do not offer explicit protection. Within Article 55 of Hague Convention II, when occupying enemy territory, nations may not destroy or permanently alter the land, nor use natural resources irresponsibly. The environment itself can be interpreted as property of the state and therefore, invoking the Hague is within legal abilities. The convention further provides for compensation for the destruction of seized enemy property. It is unclear however what exactly the term property covers (e.g. air, water, land).

In the wake of the Vietnam War, a global concern emerged in light of U.S. military operations that cause severe environmental damage.¹⁴⁰ About 3 million Americans served in the armed forces in the Vietnam War during the 1960s and early 1970s. During that time, the U.S. armed forces used large amounts of chemical agents known as *defoliants*. Once dispersed, these chemicals caused the leaves to fall off plants and trees. One of these defoliants was called Agent Orange. Throughout the war, many troops and civilians were exposed in mass numbers to this specific variant.¹⁴¹ Many years later, questions remain about the lasting health effects of those exposed. More Vietnam Veterans were being diagnosed with different forms of skin cancers, which were later determined to be caused Agent Orange, specifically dioxins contained within.¹⁴² After multiple generations and relative stability in the region, the true after effects of U.S. operations have become apparent.¹⁴³

In response to what had transpired in Vietnam, the international community responded with the 1977 Additional Protocol I to the Geneva Conventions.¹⁴⁴ Article 35 asserts that Parties to warfare are “prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment.”¹⁴⁵ Within Article 55, this prohibition is further elaborated.

Article 55, which is titled “Protection of the natural environment,” states under the first provision, “Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes the prohibition of the use of warfare means which is intended or expected to cause such damage to the natural environment and thereby prejudice the health or survival of the population.” Under second provision, the Article states, “attacks against the natural environment by way of reprisals are prohibited.”¹⁴⁶ Reprisal during wars is one of the disputed areas of the law of war.¹⁴⁷ Even the Supreme Court and its

learned Justices have struggled over the true extent and breadth of anti-reprisal treaties, sometimes being in stark contrast to the views and opinions of the U.S. Congress.¹⁴⁸

The 1977 protocol purported to virtually ban all forms of reprisal during armed conflicts. The language of Article 55 under the second provision of Protocol 1 is clear as to the prohibition of “attacks against the natural environment by way of reprisal.” The purpose of this prohibition is stated as “to avoid prejudice to the health of the civilian population.”¹⁴⁹ Despite being unambiguous, scholars are continuing to debate the boundaries of this prohibition. Their questions revolve around the definitions of reprisal and the natural environment. These inquiries stretch to understand how far the protocol reaches in the protection of biological environments, and the specific beneficiaries of the protection (e.g. humans and wildlife). Questions have also been raised to ascertain the specific types of resources to be protected, such as forests and water.¹⁵⁰

The actual implementation of Protocol I may be hard to gauge, but the purpose is defined. The covenant aims to make significant advances in the protection of the environment from the effects of conventional warfare. It prohibits wartime damage to the environment even when it is a military necessity under the traditional rules of *jus in belli*. A central challenge with the Article is that the criterion of widespread, long-term, and severe damage are not well defined. For example, “long term” can be considered to occur over the expanse of numerous decades or after 10 years. The conjunctive use of these terms contemplates a higher threshold of damage before its prohibitions are implicated.¹⁵¹

Some scholars argue however, that the language of the article is too vague to impose criminal liability under international humanitarian law.¹⁵² They assert that while it imposes the affirmative duty to be cautious, the article falls short of being a control on warfare that damages the environment. An example of this is the use of the expression “long-term.” The simple ambiguity of “long term” turns a clear mandate into a murky and toothless prohibition. The only use for the protocol would be in the most outrageous violations that generate international outcry, or when an offending party is too powerful to be punished. Ambiguity, whether in the language of the legislation or concerned scholarly writings, opens the doors for selective application of the law.¹⁵³

Damage caused by warfare on the environment has been further protected by the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental

Modification Techniques (ENMOD). The ENMOD is the first international agreement that governs the impact of armed conflict on the environment. It is a foundation for further agreements as it touches upon the manipulation of the environment for war. This was adopted by the U.N Security Council in December 1976 and opened for signature in May 1977. This was largely done to address the use of defoliants in Vietnam. In 1980 the ENMOD was ratified by the United States.¹⁵⁴ The convention aimed to prevent deliberate and catastrophic environmental changes from being triggered by hostile conduct. The agreement is referred to as a non-use agreement, where it prohibits certain weapons from use. Other agreements take a different approach by halting the creation and production of weapons. This is the first environment-specific law of armed conflict in history.¹⁵⁵ This covenant coupled with Article 55 and 35 are now seen as a clear expression of international law in area.

Within the ENMOD, signatories agreed to not “engage in military or other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury.” Ratification was fiercely opposed by environmentalist because of the disappointing language of the ENMOD that only attached the protection of the environment to warfare.¹⁵⁶ Furthermore, a fear out of the language’s lack of control and regulation was amplified as legal scholars argued the ENMOD could legitimize weapons targeting the environment.¹⁵⁷ Furthermore, Additional Protocol I allows for the prohibition of environmental damage even if human suffering is not shown. Time will be indicative as to whether this treaty will be respected by the most powerful nations within its intended boundaries. A key observation centers on the language within the ENMOD and the ambiguity surrounding its provisions.

In his dissertation “The Responsibility of Head States for Environmental Crimes Under International Law” submitted at Pace Law School, Mishari Alefan argued that the Iraqi government’s decision to set a fire to the oil fields in Kuwait, while simultaneously dumping millions of tons of crude oil into territorial waters, is an example of environmental crime. Unfortunately, since no Iraqi government officials were prosecuted for the offense, the impact of the provisions are still vague.¹⁵⁸ Although the ENMOD has been around for more than three decades, it has never been used, even though there have been cases upon which it could have been invoked.

Examining some of these cases, the Mexican army in 1998 targeted a well-known insurgent, the Mediterranean fruit fly, for "phytosanitary" reasons; Zapatistas alleged that the army was trying to wipe out the rebels' food crops.¹⁵⁹ The loss in crops affected fruits and vegetables that are required and relied on by the citizens of local areas in Mexico. The spraying endangered the livelihood and welfare of these people.¹⁶⁰

Colombia serves a model example of domestic law destroying the local environment. The War on Drugs has given license for the use of herbicides in areas where environmental impact is severe. From the air, approximately 25,000 hectares were treated with a chemical agent containing glyphosate.¹⁶¹ The use of these agents were designed to stem the production of plants that led to the manufacturing of narcotics.¹⁶²

Also in the 1990s, the United States' instituted the High Frequency Active Auroral Research Program (HAARP) to study the behaviors of the ionosphere with the goal of enhancing communications and surveillance systems. This initiative created a giant antennae beam that blasted powerful frequencies into the ionosphere. Representatives of the Russian Federation alleged that these can induce region wide headaches and psychological distress. There were also allegations that such blasts could rupture oil and natural gas pipelines. In times where cases like these have been brought to the international forefront, the ENMOD has remained silent.

Although their authority has not been exercised, the group's power in theory is considerable. In a detailed study, legal experts Susana Pimiento Chamorro and Edward Hammond point to the "remarkably simple and direct" language with which ENMOD commands its fact-finding committee to take complaints straight to the U.N.'s most powerful agency, the Security Council.¹⁶³ Which has lately shown signs of leaving its war footing and warming up to climate as a security-related concern.

III. International Criminal Liability for Crimes Against Nature

A. International Conventions

Various international treaties contain mandates for criminal sanctions against violations of certain environmental norms. However, all unanimously fall short of expressly asserting international jurisdiction over these crimes, exacting punishments, or designating an international

body of enforcement. Furthermore, they failed to create an international system independent of domestic mechanisms to deal with these crimes.¹⁶⁴

The introduction of environmental protections as a priority in international law arose rather late. Recently, global catastrophes and activists have brought the relevant discourse to the forefront. In the first half of the century, the international community adopted agreements that protect the birds, polar bears, whales, fish, and fur seals. Other covenants such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora served as broader nets protecting a wide array of species. In the 1970s, nations saw the terms of the International Convention for Prevention for Pollution from ships, and the 1979 Geneva Convention on Long-Range Transboundary Air Pollution come into effect.

These international conventions have dealt with the issue of environmental crimes through general directives. Signatory states are required to follow certain mandates to criminalize certain activities. States have varied in their individual implementation of these treaties for many reasons. Chief among these reasons are costs of implementation, the resilience of perpetrators, especially powerful and politically connected corporations, protecting their economic interests and corruption. Also many attempts to create the desired level of protection at the international level through criminal sanctions are frustrated at the outset during the establishment of agreements. For example, a treaty that attempted to regulate environmental crimes in the international forum was made at the Rome conference. Although the ICC Statute that would have brought criminal liability into consideration was considered, it was ultimately rejected. These occurrences are too commonplace.

Crimes against the environment such as illegal fishing, trade of endangered species, CFC smuggling, illegal logging, and the unsanctioned dumping of wastes have been the subject of many international treaties.¹⁶⁵ The number of international treaties regarding the environment has ballooned as countries are alerted to the ever growing presence of dangerous actors in the destruction of the environment. Pressure is also being exerted by indigenous people and NGOs. NGO's are becoming more persuasive in shaping international environmental criminal law. They are enhancing the knowledge base for international governance of the matter. NGOs accomplish this task by compiling and disseminating relevant information to policy-makers and the broader public. A particularly well-known example in the area of implementation review is TRAFFIC International (the wildlife trade monitoring network), which has regularly provided

information to the signatories of Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).¹⁶⁶

The legitimacy of NGOs stem from their mission and purpose. They are generally established to represent the public interest and therefore, they are able to garner public trust. This in turn allows them to influence public opinion more effectively than other organizations. Studies have shown that NGOs and their measured strength have correlated to the passage and adoption of key international legislation. The Kyoto Protocol is an example of the effects of NGOs and their ability to persuade the adoption of legislation within nation states.¹⁶⁷ When 26 transitional economics were studied in Europe and Eurasia between 1998 and 2009, it was found that nations which had higher NGO strength oversaw a quicker adoption of the protocol.¹⁶⁸ Furthermore, the study revealed that NGOs gain influence and support over time as “citizens [obtained] opportunities to observe new sources of political agency.”¹⁶⁹

As the international community is trying ineffectively to face the challenges imposed by adverse environmental activities, environmental crimes are rapidly growing due to strong demand, low risk, and other factors. In an effort to combat this, nations are attempting to put into place international agreements to halt the rapid growth of environmental offenders. Efforts however have been stymied by poor bureaucratic management, corruption, and lack of resources.

The International Convention for the Prevention of Pollution from Ships (Marpol Treaty),¹⁷⁰ the Convention on the Prevention of Marine Pollution,¹⁷¹ and CITES have implemented criminal provisions.¹⁷² The Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal is another covenant that includes such mechanisms.¹⁷³ Most of these conventions inhibit certain activities and their focus on criminalization of differentiating conduct varies. The effect of these treaties remain limited when it comes to criminal sanctions at the national and international level. Many countries fail to either to pass domestic legislation or undertake ratification procedures; so they may comply with their international obligations. In many nations, the process of transforming international prescriptions into national law is very slow.¹⁷⁴

Treaties have failed to protect the environment, because they lack obligatory provisions and enforcement mechanisms. For example, the provisions of ENMOD have no effective enforcement or remedial provisions for a breach of duty, such as reparation or monetary compensation. Instead, any state party which has reason to believe that another signatory state is

acting in violation of the convention's obligations, may lodge a complaint with the U.N. Security Council. This U.N. body would then investigate the claim and make a report. Article V(2) requires the U.N. Secretary-General to convene a Consultative Committee of Experts at the request of any signatory. However, ENMOD does not provide for any civil or criminal liability. It remains to be seen whether the Consultative Committee has more than soft authority.¹⁷⁵ In light of these circumstances, substantive adjudication of matters affecting member states have yet to be litigated. Many states continue to fail in their responsibilities and commitments under the various treaties. This is mostly due to lack of political will and the involvement of corporations in politics and environmental policymaking.

According to U.N. sources, there are currently over 500 international agreements or treaties related to the protection of the environment. The majority of these accords have been concluded in recent years.¹⁷⁶ Finalizing an agreement however, is only a step towards a far reaching goal. The most difficult challenge is to breathe life into the substantive objectives of these treaties. This can only be done by implementing and enforcing them. Countries that embrace a treaty by becoming a signatory are not bound by its commitments until an internal legislative body ratifies the treaty.¹⁷⁷ This turns into a sophisticated dance between politics and lobbyists with corporate and economic interests. The backing of corporations and other influential constituencies may not be easily be secured. For instance, corporations in the business of oil and offal fuels will marshal their political power to resist ratification of international treaties that would otherwise mitigate climate change. These industries are politically powerful and have the ability to defeat attempts at ratification. Elements of legislation that would otherwise strengthen the global community find their demise in bodies of representatives who are bombarded by corporate money.¹⁷⁸

Another mechanism used by the international community is widening the jurisdiction of conventions to regulate and expand categories of activities in illegal trafficking of a number of restricted substances such as wildlife.¹⁷⁹ The criminalization of certain environmental crimes are encompassed in the terms of various treaties. International conventions generally require signatory states to implement domestic regulatory schemes that punish prohibited acts that are originally addressed in the convention. The preciseness and clarity of these convictions, their degrees, and specific elements are varied. Some require that parties take "appropriate measures to ensure the application of the [agreement in question] and the punishment of infractions against

[those] provisions.”¹⁸⁰ Other treaties have required parties to "enact and enforce such legislation as may be necessary to make effective the... provisions [of the agreement] with appropriate penalties for violation thereof.”¹⁸¹

Other less effective conventions have included clauses providing violations "shall be an offense punishable under the law of the territory in which the ship is registered," or "shall be made a punishable offense by each State Party under its national law.”¹⁸² The least effective examples requiring criminal sanctions through implication provide that the parties "shall enact and enforce such legislation and other measures as may be necessary for the purpose of giving effect to [the] agreement.”

Various agreements structure their conventions so that "the penalties specified under the law of a party shall be adequate in severity to discourage violations of the present Convention.” For example, the United Nations Convention on the Law of the Sea (UNCLOS) states, “penalties provided for by the laws and regulations of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur.” Also the Bamako Convention addressing the ban of the Import into Africa and the Control of Transboundary Movements and Management of Hazardous Waste within Africa states, “each state shall introduce appropriate national legislation for imposing criminal penalties on all persons who have planned, carried out, or assisted in such illegal imports. Such penalties shall be sufficiently high to punish and deter such conduct.”¹⁸³

These conventions contain frequently what is known as "policing provisions." These provisions allow signatory states to enforce the rules. For example, this rings true of the 1911 Convention for the Preservation of Fur Seals in the North Pacific. This covenant provided in Article 7 states that “it is agreed on the part of the United States, Japan and Russia that each respectively will maintain a guard or patrol in the waters frequented by the seal herd in the protection of which it is especially interested, so far as may be necessary for the enforcement of the foregoing provisions.”¹⁸⁴

Generally, the vast majority of international environmental conventions explicitly recognize the penal nature of an environmental crime by setting an affirmative duty to prohibit, prevent and ultimately, prosecute. These conventions are usually a source of obligation within the international community, not a source of law.¹⁸⁵ Generally, conventions lack the ability to combat the offenses themselves. This stems from the domestic interests of signatory states that

lead to a failure of enforcement consensus.

B. The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

Under the under the terms of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), trade in certain products derived from wildlife is prohibited.¹⁸⁶ Some 900 plant and animal species are included in this ban. These organisms are generally in danger of extinction and an additional 29,000 additional species that are threatened by commerce also receive protections.¹⁸⁷

It is fair to say that CITES has disrupted the trade operations for many threatened species. Unfortunately, the trafficking in these and other animals continues and the organization itself still falls short in many instances in protecting wildlife. Generally, the majority of illegally traded wildlife exists in developing countries such as Brazil, which supplies “10 percent of the global black market” of trafficked species.¹⁸⁸ What makes this form of conduct an international crime that deserves an effective international response is the trans-boundary nature of these acts. The demand to create these markets arises from collectors seeking wildlife or the products of wildlife for ornamentation, clothing, medicine, food and other uses.

The multibillion-dollar Asian medicine industry poses the greatest risk to endangered species in the continent of Asia. One of main challenges facing the community of nations, in which all countries need to play a prominent role, is the protection of wildlife and natural resources. This includes the need to protect endangered species, reduce water and air pollution, and conserve natural resources including forests. The decision to protect or not to protect is a question of policy; nations are constantly confronted with conflicts between technological developments and the advantages it entails. These advances are generally nonconforming to the desire of living in a clean environment.

The African Elephant is an observable example of the implementation and effectiveness of CITES. The elephants began their rapid decline during the 1980s and 90s as they were hunted for their ivory tusks.¹⁸⁹ Since 1985, elephants have sparked heated debates at every CITES Conference. In the 1980s, the elephant was added to Appendix II creating export requirement permits, but this was still inadequate to protect the animals. In 1989, the Elephant was listed under Appendix I granting it additional protections.¹⁹⁰ This in turn prohibited any international

commercial trade of the animal or its parts. However, in 1997, Botswana, Zimbabwe and Namibia took the approach of shifting the elephants from Appendix I to a sub class of Appendix A. This once again opened up the allowance of limited trade.¹⁹¹

It has been argued that there has been two fundamental failings of CITES in the protection of the African Elephants. The first was in 1997 when the international body capitulated to Botswana, Namibia and Zimbabwe by allowing them to auction off 50 tons of government ivory stockpiles. They were sold to Japanese traders in 1999.¹⁹² Again in 2002, CITES voted to allow Botswana, Namibia and South Africa to auction another 60 tons of ivory.¹⁹³ This is a fundamental failure of the international body to protect against natural resources and the illegal poaching of elephants. Indirectly, these accessions increase the demand of ivory as more and more markets are temporarily flushed with the rare goods.¹⁹⁴ Although CITES has done a service to the world by banning trade of certain Appendix I species, the political nature of the organization still has not been extinguished. In order to counteract such failings, other international organizations or bodies of law would bring progress to certain categories of illegal activities, such as the poaching of elephants in Africa. In order for this to happen, public opinion must be aware of the international shortcomings.

It is thoroughly documented that the global community became aware of the dangers of environmental crimes in the early 20th century. Even with such a head start, little has been done internationally to face the challenges imposed by the continuity of such crimes, despite their undeniable consequences. Research about this field of law has paid very little attention to dealing with environmental crimes. Acid rain, pollution, and global warming are all only a few of the symptoms associated with the problem. Other issues such as genetic changes, allergies, and defective births are side effects that are rarely discussed. Another moral question stems from the use of animals in genetic testing. Critics argue that such use falls under cruelty and inhumane treatment of nature's creatures.¹⁹⁵ The awareness of these environmental issues within nation-states is a relevant topic of conversation when discussing the current state of the legal structure and possible solutions to combat loopholes. Within the current public sphere, "what is failing to occur, as evidenced by the worsening of many environmental problems, is a process whereby members of society internalize specific knowledge and alter their behavior quickly enough to mitigate environmental harm."¹⁹⁶

Environmental degradation is not a new concern. However, it was only in the latter years

of the twentieth century – as pollution accelerated – that global awareness of the problems mature. Understanding the natural environment and its problems must also be international in scope. In the development of this awareness, the global consciousness has come to realize that our world constitutes a single ecosystem composed of the interaction of all living organisms and their natural environment. There is still a long way to go however when it comes to internalizing the rapid information that is readily available to the world population. With the rise of the internet and accessible media, the world and its leaders need to be educated on the issues so they can act on them. Furthermore, the stewardship of this system of life is so vast an undertaking that the care of the earth cannot be the task of one country alone; this problem is part of the process of globalization.¹⁹⁷ A cohesive effort of the international body would properly regulate man made risks; risks that are associated with new technologies that pose unforeseen consequences that could take thousands of years to reverse.¹⁹⁸

C. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes

Similar to other international conventions, the Basel Convention requires states that are signatories to create mechanisms of enforcement within the domestic legislative schemes. The language of the covenant requires states to set appropriate bench marks and agencies to oversee them, and the enforcement of penal provisions against violators of the convention. It states that parties to the convention “shall consider illegal traffic in hazardous wastes and other wastes to be criminal.”¹⁹⁹ It also asserts, "Each party shall introduce appropriate national domestic legislation to prevent and punish illegal traffic." This method is observed across many agreements.

The Basel Convention does not strictly forbid the movement of hazardous waste. It merely regulates such movement. In light of this approach, the Basel Convention faces problems that several other international agreements have encountered. Furthermore, the materials that the convention covers is limited to prescribed wastes that contain “hazardous characteristics.” If a material is not enumerated, the movement of that waste is not regulated, allowing frequent polluters to exploit the loophole.

Implementation of provisions contained within the Convention raises several questions. The agreement does not independently promulgate regulations of how the rules are to be enforced. There is also a lack of guidance on how the waste disposal is to be monitored. The Convention falls short by merely tracing restrictions that other programs have established.

Unfortunately, many existing programs have fundamental errors embodied within them. These failures in turn are now included in the commitments of this Convention. This only increases the number of problems and confusion surrounding the regulation.

D. United Nations Convention on the Law of the Sea (UNCLOS)

Regulation was needed during the twentieth century to counter the “freedom of the seas” theory. This doctrine stated that domestic law only extended to a small area of the water outside a nation’s coast, and the rest of the ocean was not within the jurisdiction of any individual nation. This new regulation aimed to expand national jurisdiction over the seas. The theory found its genesis in a growing awareness of depleting fish stocks and increasing levels of water pollution.

UNCLOS expressly requires that penalties be specified under the law. The course of repercussions should be sufficient to discourage violations of the agreement. It states, "Penalties provided for by the laws and regulations of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur." UNCLOS primary provisions address territorial jurisdiction. The convention put in place regulations that designated a 12 mile long zone outside a nation’s shores. This regulation allows a country to enforce their laws within that limit. They are also granted 24 miles to enforce other certain laws to prevent enumerated violations. UNCLOS has been utilized to hold criminals responsible for water pollution in violation of national law or treaties.

The scourge of piracy and the international community’s attempts to reign in the “enemies of all mankind” gives us a good understanding of the prosecutorial shortcomings of UNCLOS. The international Maritime Organization (IMO) has reported that off the coast of East Africa during 2007, 60 attacks took place. In 2008, 134-153 incidents took place and in 2009, 222.²⁰⁰ In addition to robbery on the high seas, murder and rape have been reported as an attached consequence to these atrocious acts. Furthermore, estimates reach \$15 billion of lost profits (not including ransoms) between the Indian and Pacific Oceans in just 2006.²⁰¹

The U.S. Constitution explicitly grants the U.S. Congress jurisdiction to penalize pirates on the high seas. This long-standing tradition exists in many other nations that also allow for their governmental apparatus to extend jurisdiction over piracy. In a modern day context however, a nation-state must observe the legal ramifications carefully before prosecuting pirates. Traditionally, pirates have received the legal definition as “enemies of all mankind.”²⁰² Under

this legal definition, they do not fall under the protection of any state, and therefore any state may exert jurisdiction over them. In the modern context however, UNCLOS abrogates statelessness created by legal terminology.

The Geneva Convention of the High Seas (Geneva LOS) is another covenant that speaks to the international law of the seas. The provisions of Geneva LOS and UNCLOS are very similar. UNCLOS supersedes Geneva LOS, and although the U.S. is not a party to UNCLOS, it is to Geneva LOS. Article 105 of UNCLOS gives nation-states the right to capture pirates and determine their criminal penalty.²⁰³ However there is a limit to the exercise of this jurisdiction. The Commission's commentary to Article 19 of Geneva LOS, which closely mirrors UNCLOS's article 105, states in part that "[t]his right cannot be exercised at a place under the jurisdiction of another state."²⁰⁴ States have used this to avoid the prosecution of pirates so other nations may deal with the enforcement responsibilities.

The International Tribunal for the Law of the Sea (ITLOS) is a juridical body that issues advisory opinions on the meanings of the provisions contained in UNCLOS.²⁰⁵ ITLOS falls short however of being able to judicially try the suspects of piracy itself. In the case of environmental criminal law, ITLOS is constricted similarly in that it cannot arbitrate matters but only issue advisory statements on the UNCLOS. Under the current legal infrastructure of UNCLOS, Geneva LOS and ITLOS, states follow the practice of sending captured pirates to other jurisdictions in part due to the lack of a uniform body charged with enforcing international criminal law against piracy.²⁰⁶

Although UNCLOS sets a firm foundation to enforce international criminal provisions against pirates, it falls short from being able to enforce it through a judiciary system. This example illustrates the difficulties in handling criminal matters in other sectors of public interest, mainly environmental criminal law. Academics have argued that there are solutions that can be implemented to give enforcement powers to provisions under these bodies of law. One such suggestion is the strengthening of ITLOS to allow it to adjudicate matters and dispense punishment appropriate to the crimes committed.

IV. Regional Agreements Establishing Criminal Liability

Regional agreements have proven to be more dynamic in their efforts to mandate states to resort to criminal sanctions. The most important agreements are concluded among and between member states of the European Union.

A. The Council of EU Convention on the Protection of the Environment through Criminal Law

The Council of Europe has adopted “a convention on the protection of the environment through criminal law.”²⁰⁷ The European Union “has also adopted a similarly worded directive on the basis of substantial domestic convergence.”²⁰⁸ Animal²⁰⁹ and ocean protection treaties include penal provisions.²¹⁰

B. The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movements and Management of Hazardous Waste

This regional agreement was entered into to protect environmental interests in Africa. It asserts, "Each state shall introduce appropriate national legislation for imposing criminal penalties on all persons who have planned, carried out, or assisted in such illegal imports. Such penalties shall be sufficiently high to punish and deter such conduct."²¹¹

The Bamako Convention drew on regulations that the Basel Convention implemented. Its provisions regulate hazardous waste materials, and they also ban the exporting of waste in international waters. Furthermore, it regulates the process for international movement of this waste with a notification mechanism. Finally, it applies an affirmative duty on the country to “re-import” any waste they have exported previously.

C. The Convention for the Preservation of Fur Seals in the North Pacific

Similar to other agreements, this convention contains some enforcement provisions that permit parties to take action immediately to enforce the rules of the agreement. Article I provides that violators against the Convention’s ban on pelagic sealing “may be seized” by domestic authority where the infraction exists. It also states under Article VII that each party "will maintain a guard or patrol in the waters frequented by the seal herd in the protection of which it is especially interested, so far as may be necessary for the enforcement of the [Convention].”

The Interim Convention on Conservation of North Pacific Fur Seals

The convention allows "duly authorized official of any of the Parties" to board and search "any vessel... subject to the jurisdiction of any of the Parties". They are allowed to conduct this search so long as the official "has reasonable cause to believe... is offending against the prohibition of pelagic sealing...." The Convention goes on to provide that if after searching the vessel the official "continues to have reasonable cause to believe that the vessel or any person on board thereof is offending against the prohibition, he may seize or arrest such vessel or person."

D. The Agreement Between Canada and the United States on Great Lakes Water Quality of 1978.

This agreement was founded to help maintain and replenish the biological integrity of the Great Lakes. The purpose of drafting these regulations were to protect wildlife, air and water quality, and the people who live in close proximity to the bodies of water. An addition to that agreement affirms, "As soon as any person in charge [of a vessel] has knowledge of any discharge of harmful quantities of oil or hazardous polluting substances, immediate notice of such discharge shall be given to the appropriate agency in the jurisdiction where the discharge occurs; failure to give this notice shall be made subject to appropriate penalties." This form of regulations produces a more comprehensive form of rules than a more narrow case by case analysis.

The focus of this agreement is to eliminate toxic chemicals from entering the waters of the Great Lakes. The signatories have focused primarily on five factors, (1) presence and ambient concentration in the Great Lakes environment, (2) degree of toxicity, (3) persistence in the environment, (4) bioavailability, and (5) potential to bioconcentrate and bioaccumulate. The purpose of these factors concerns the serious environmental damage that can occur from banned substances.

V. Environmental Damage as a Violation of Customary International Law

Severe environmental damage breaches the responsibilities and trust placed on individuals and corporate actors on the highest level. Such damage to the environment sets in motion a chain of incidents that cause loss of life and great suffering. Not only can affirmative

acts make a party culpable, but so can the failure to act, for instance in the scenario of climate change. The new thinking places a duty upon states to prevent degradation or in theory, find themselves in breach of the public trust.²¹²

International customary law provides a general principle that states should provide access to Environmental Justice. Traditionally, customary law emerges through decisions and norms established by the conduct of nations. They are not the result of formal written agreements.²¹³ These laws are time-honored customs that have been recognized by nation states through the history of practice and recognition of norms. In today's contemporary legal systems, it is the norm for states to provide a judicial means to adjudicate environmental issues. This in turn is the current practice because states themselves acknowledge their duty to facilitate such justice.²¹⁴

As discussed *supra*, the Aarhus Convention on Access to Information is an example of such customary international law that has been codified. After the signing of this convention, international customary law was in line with the principle of free and open access to information, touching upon access to justice in the environmental context. "States that deny access to justice for environmental claims violate this customary duty, and are thus in violation of international law."²¹⁵ An example of this would be the intentional destruction of files, evidence or hampering of litigation between parties. Such conduct would effectively make equal justice unattainable for citizens within a state.

States themselves can fail to provide the necessary resources and security to public interest. In this situation, international mechanisms can be built to support the application of international customary law. All though the State may have failed for myriad of reasons to uphold its duties, the cooperation of a State when international parties engage to assist is crucial in its commitments to international law. An example of this type of international assistance is when "UNEP, together with the Environmental Law Programme of the IUCN, provided consulting services to assist nations in establishing and refining their environmental legislation."²¹⁶

Once international law has been established through domestic codification, enforcement is the next approach in making sure environmental damage can be reduced in line with international customary law. Generally, International enforcement of environmental laws can be observed through two different prisms; that of domestic enforcement and enforcement with international assistance.²¹⁷ Relevant to our analysis lies the latter, which requires domestic

schemes to abide by international law. Within this scheme, domestic legislative bodies would create enforcement mechanisms through their own agencies, or permit international agencies to hold quasi-jurisdictions within sovereign borders.

Chapter 3

NATIONAL IMPLEMENTATION OF PENAL PROVISIONS OF INTERNATIONAL ENVIRONMENTAL CONVENTIONS

I. Implementing Environmental Laws

In order to be effective, environmental laws require enforcement. Implementing these laws requires a judiciary and a prosecutorial body to carry out enforcement. A lack of either of these independent and non-prejudicial parts can lead to a lack of enforcement or a miscarriage of justice. A coherent regulatory system is the most efficient method for insuring compliance and enforcement of environmental laws. For many years, the environment was not subject to regulation by lawmakers on a domestic or international scale.²¹⁸ The first real thrust of environmental law saw the creation of specialized administrations and a body of law for them to administer. This first set of legislation pertained to threatened species conservation, wilderness conversation and pollution control. The laws were the progeny of the 1972 Stockholm Conference on the Human Environment.²¹⁹

Certain countries began passing environmental legislation after the 1972 Stockholm conference. They were slow to discover that without specifically authorizing prosecutors and judges to enforce this legislation, polluters would not comply with these laws.²²⁰ In the late 1980's, both judges and prosecutors received more attention from NGO's and policy makers. Unfortunately, in most countries, judges are still unfamiliar with environmental issues. These failures of knowledge by the adjudicators of justice result in the lack of implementation of environmental law on the national level.²²¹

Challenges facing the judiciary in the enforcement of environmental laws vary among nations. Some environmental issues are very technical and complex. This results in a knowledge deficiency as lawmakers and adjudicators do not have the scientific knowledge, ability, or expertise that is needed to make proper decisions relative to the case. One way to reduce the cloudy issues of enforcing environmental law has been to exchange data concerning information about successful implementation of environmental laws between sectors of the government

responsible for enforcement. This model has been successfully used by NGO's such as the WWF TRAFFIC, the Environmental Investigation Agency (EIA) and Global Witness. All three organizations set up Secretariats to oversee this process. Additionally, societal unawareness of environmental issues is generally reflected in the judiciary presiding over these cases, and may lead to an indecisive approach to environmental problems. Other challenges are attributed to constitutional limitations, prioritizing states' interests in implementation, and conflicts with codes.²²²

For most countries, proper enforcement and implementation of environmental laws require reforming the whole regulatory system.²²³ Commentators have stated that developing countries would benefit from subtle support structures by the developed world community. This would assist them in facilitating a transitional justice project intent upon reforming their legal body to align itself with international norms. Most importantly, it will establish the process of cultivating the 'glue' that will ultimately hold together the uniform system of justice.²²⁴ This would involve enacting green laws, empowering citizens and NGO's by giving them standing to bring cases in courts, and most importantly, a capable judiciary that is well aware of both the relevance of the case, and the laws to address the problems at hand.

The Global Community must recognize the importance of creating international bodies that carry out the implementation of environmental legislation under transnational jurisdiction. This need springs from the failure of national laws to afford the necessary minimal environmental protection through effective implementation of international treaties.²²⁵

As signatory states, each party can have a specific role that is designated to them in implementing environmental treaties. These specific obligations can be examined by reviewing the penal code and the process of its enforcement. States may implement environmental treaties by enacting civil law statutes, criminal statutes or both. Usually, they create or authorize existing administrative agencies to carry out day to day implementation of environmental treaty obligations.

II. Stages of Treaties Implementation into National Law

Three stages encompass the implementation of penal provisions included in various treaties. These steps are taken to enact provisions on a domestic level. They are:

A. Signature and Ratification of the Treaty by the State

Under International Law, the signing of a treaty does not make it legally binding upon a state; the ratification of the treaty creates a binding legal effect. An example of this is when the United States became a signatory to the Rome Statute, and remained so from December 2000 to May 2002. The Rome Statute established the ICC. During this time, the treaty was not ratified by the U.S. Senate.²²⁶ In May 2002, the President of the United States ordered the “unsigning” of the Rome Statute. However, during this period between May 2002 and the formal release of obligation, the U.S. was bound to not “defeat the object and purpose” of the Rome Statute. While under the purview of the Rome Statute, an obligation existed for the U.S. to cooperate with its purpose, including surrendering persons to the ICC within U.S. territory. Because of these obligations, the Bush Administration sought the removal of American commitment from the international covenant.

Although the U.S. attempted to unsign the treaty, it may still however be considered bound to its commitments under international customary law. For example, “[o]f the 189 U.N. member states, 159 have ratified Additional Protocol I. While some of the Protocol’s articles have not yet reached the level of customary international law, others may have, such as ‘Article 51, prohibiting attacks against civilians, including target area bombardment’”²²⁷ Law can still become binding upon a party if it has reach the level of international customary law. Once accepted by nation states, and affirmed as to its validity, countries moving in the opposite direction of such directives can be ostracized for their actions.

The controlling application of treaties upon domestic law and state action are captured in Article 18 of the Vienna Convention on the Law of Treaties. This provision declares that the mere signature of a treaty only prevents a state from taking actions contrary to the direction of the treaty. Explained simply, a state should not frustrate the purpose of the covenant. It reads:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.²²⁸

B. Ratification Process

Ratification is a process by which a nation formally confirms its commitment domestically to an international agreement. If a treaty requires a separate process through domestic mechanisms to become binding depends on the terms of the treaty, as well as the domestic legal requirements of the signatory state. Generally, the ratification process is accomplished through a confirmation vote in a legislative body of the signing country. Theoretically, this results in a representative decision by the citizens of the state.

The process of ratification has become more relevant as countries of the world are democratizing. International commitments have a larger impact on the average citizens' daily lives, stemming from economic to quality of life concerns. Citizens exercise their right to summon their legislatures to influence the policies and direction of government. Unfortunately, this healthy civil influence is hindered by the influence of other parties participating in national law making.²²⁹ Corporations, now considered legal persons, tend to lobby fiercely against the ratification of treaties that may have adverse consequences on their economic interests.

When a signing nation completes the process of ratification, that country then becomes a State party to the treaty. This obligates them to carry out the provisions and mandates of the agreement.²³⁰ Throughout this process, states attempt to fulfill their obligations in good faith according to the principle of *pacta sunt servanda*, the cornerstone of international law. The notion of *pacta sunt servanda*, incorporated in article 26 of the Vienna Convention and typically translated from the Latin as “agreements must be kept,” underlines the importance of voluntary agreements. Consenting to a promise is powerful tool of evidence showing that the rule or agreement is “binding” upon the agreeing parties.²³¹ It therefore should come as no surprise that one of the most basic principles of international law is the principle of *pacta sunt servanda*—that is, that nations are bound to keep the promises they make.

C. Implementation of Treaties in Domestic Penal Legislation

Based upon the source of international law, the effect of implementation has varied consequences on states. For example, a given country is not required to offer legislation

accepting international customary law. This is because as members of the international community, all nations are implicitly obliged to heed customary law. On the other hand, when the international law in question is a specific treaty, it often requires that states who are parties to the agreement act in unison to implement statutes. This in turn may impact existing law that has been settled, or it may upset the cultural/legal norms within the country.²³² This has important implications for the development of the economic resources such as trade, agriculture and manufacturing.

There are mainly two feasible methods in which persons or groups can be prosecuted under for engaging in activities that are harmful to the environment. They are, (1) directly through the application of international law, or (2) through domestic legal channels. International agreements usually require domestic channels to criminalize certain conduct.²³³ As previously discussed, such obligations are only carried out in a meaningful and practical way. If the State party implements the treaty within its own legal system, the internal laws of the State must meet the obligations under the covenant. By doing this, signatory nations achieve compliance with their commitments. The mere passing of laws on the domestic level is not in itself assurance that the treaty will be followed. There must be full scale implementation of benchmarks that measure compliance and enforcement. The relationship between international conventions and domestic regulatory schemes often hinge on a country's commitment to a monist or dualist legal system.

In the monist system, no additional implementation procedures are required to bring the nation within its commitments to the international agreement.²³⁴ When a conflict arises between two contradictory laws, the treaty will trump domestic rule, as long as the legal norm of the country places international agreements above domestic law. Non-self executing treaty stipulations can only be carried out judicially (or have a supremacy clause effect which binds judges) once there is legislation authorizing the treaty's implementation. After the implementing legislation is passed, treaty stipulations should be executed, as a matter of enforcing national foreign relations policy decisions. This should be in accordance with the legislation and the implemented treaty. It is important that authority of the treaty not be solely derived from an act of congress. Foreign policy makes generally state that treaties have a supremacy effect against all domestic law. For instance, if congress or a local government were to enact legislation to counter or constrict treaty obligations, such law would be null and void. Unless the authority of the treaty is purposefully undermined in the provisions of the agreement, the treaty obligations ought to be

regarded as enforceable law (with full Supremacy Clause effect). This would provide the government with legal authority to enforce national foreign policy decisions made by the federal government against conflicting state actions. This ensures the supremacy of treaties over domestic laws.²³⁵

Authority for treaties under the U.S. Constitution stems from Article VI. The reason for this stems from the ability of the federal government to make commitments in a quasi-confederate system of government, where states have sovereign authority under a federal body. In a situation where a state disobeys the intent of the federal government, the constitution provides the ability of foreigners to use federal courts to make their grievances known.²³⁶

To ensure the separation of powers however, the U.S. Constitution requires that the Senate provide “Advice and Consent” to the President making a treaty.²³⁷ Therefore, international agreements by U.S. government will not take effect unless the Senate provides its approval. This check and balance scheme limits the power of the executive to commit the U.S. to international agreements.²³⁸

Pursuant to this approach, many treaties in the United States are known as “self-executing.” A treaty is considered self-executing when, by its terms, it creates rights without the need for implementing legislation. Some legal cases, if not most, view the term self-executing to be synonymous with private rights of action. To a certain degree, however, the logic becomes circular; in order for a private right of action to arise the treaty must be self-executing. However, the treaty is self-executing if it provides for a private right of action.²³⁹

There have been instances when the legislature is required to pass law for treaty implementation. For example, the specific criminal component outlining bad acts and motives must be enumerated by the legislature, not the principles of the treaty.²⁴⁰ In this instance, the U.S. Congress would legislate laws that would penalize certain criminal conduct while outlining the appropriate punishments.

In a dualist system, international law is separate from national legislation. Proponents of dualism argue that between internal and international provisions, there cannot exist any forms of conflicts since these provisions do not cover the same subject matter. This is premised on the fact that internal provisions are applied exclusively between the state's borders and cannot intervene in the international legal system. Though a state that adopts a dualist system is bound by ratification when observing obligations under an international treaty, the treaty itself will only be

integrated in the domestic legislative scheme upon an act of the legislature. This would require specific parliamentary action. The United Kingdom is an example of a country with a dualist system. In such parliamentary systems, treaties only become part of domestic law if an enabling act of the parliament has been passed.²⁴¹

The dualist approach roots its principles in the separation of powers.²⁴² Within the executive rests the ability to initiate and sign treaties. Thus parliamentary implementation serves as an important check for the executive power. In other words, if the parliamentary check was lacking, the executive would have the ability to change domestic laws without recourse by signing international treaties.²⁴³ This in turn would subvert the legislative process.

Incorporation of treaties into national law can take place through a number of channels. The first method is by amending the law in order to reflect a newly ratified treaty. Another process is by adding the treaty to the existing domestic law as additional statutory provisions that would require that the treaty be re-written. Third, the treaty could be added to domestic law in its entirety, unmodified. In the previous case, when a conflict between a treaty and domestic law arises, the judge will enforce the domestic law, not the treaty. This method would require the judge to harmonize the two parallel laws to an acceptable extent.

Within the judiciary of each nation state, conflicts arise between domestic and international laws. What happens when a conflict is identified is usually determined by “conflict rules.” This regulates the jurisdiction and manner upon which conflicts should be adjudicated.

Many treaties have provisions that observe domestic law in its principles and goals. For example, Article 27 of the Vienna Convention on the Law of Treaties, asserts “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” This recognizes the nature of the domestic element in the implantation of treaties, and empowers national governments to subjugate domestic conflict. Article 46 makes an exception to Article 27 when a country agrees to be bound to a treaty, in violation of domestic law. The provision recognizes the importance of such domestic laws as being of greater interest to the nation state. In contrast, states have their own constitutional, statutory and common law rules that determine the effect given to international law.²⁴⁴

One of the main issues that have a major influence on the effectiveness on the enforcement of a treaty, is the emphasis placed on such agreements in the international hierarchy of law. Transnational treaties do not exceed the authority of the constitution of any country. In

the United States for example, the Constitution's specific incorporation of treaties into the law does and should not grant the treaty a preemptive status. Treaties are but a part of domestic laws, requiring state courts to examine their terms and purpose.²⁴⁵ In some countries, such treaties are equal to legislation and in others they serve as common law. In other nations, the authority of international law occupies a status below constitutional provisions and legislation.

The authority of an international treaty when pitted against domestic law is crucial to its application. The degree to which a treaty is directly applied in a domestic forum, and to what degree it is treated as state law without a further act of transformation, has been subject to debate for more than a century. The direct application of a treaty requires it to have enforcement mechanisms within domestic boundaries. However, even if international agreements are considered valid in domestic law, they may not be immediately applicable.²⁴⁶ Factors that play into the applicability of these agreements touch upon context and principles that are identified upon its founding.

D. Implications of Military Alliances

An alliance between nations to protect their mutual interests with the forces of their military goes beyond security interests in its implications. Organizations like the North Atlantic Treaty Organization (NATO), the Collective Security Treaty Organization, and the South American Defense Council each assure mutual protection while shifting domestic policy to accommodate their international obligations. These alliances, similar to non-military agreements, also leave room for domestic interpretation and enforcement of international law. In the context of environmental criminal law, it is important to understand the mechanisms of militarily alliances and their usefulness in being able to implement international agendas. The counter is also true, in that domestic policy can shift and change military covenants on the international scale. The creation, selection of parties, and effectiveness of military alliances and treaties are relevant to the exploratory mission of finding a firm foundation to promulgate environmental criminal law.

The differences between nations on their domestic legal structures are overlooked in the discussion of alliances and treaties. Entering into military alliances is a crucial component of any countries foreign policy. Therefore, who a nation selects as their close military partners warrants an inquiry in the context of international relationship creation. Generally, nations whose

domestic legal structures closely resemble each other are more likely to select each other as parties to a military alliance.²⁴⁷ There have been numerous scholars that have argued interstate cooperation is bolstered by a common cultural background. When these alliances are formed, parties integrate by adopting certain beliefs and skills from their counterparts.²⁴⁸

The content of the alliances themselves are also adjusted to match the domestic schemes of signatory states. “When drafting an alliance agreement, states can incorporate into their treaties numerous details concerning the functioning and execution of an alliance....”²⁴⁹ Civil law contracts, common law contracts, and Islamic law contracts are some domestic principles and legal doctrines that can make a treaty or alliance ambiguous and ineffective, or precise and efficient. For instance, common law states and Islamic states place a greater amount of contingencies on military alliances, while civil law countries place fewer.²⁵⁰

Research has found a major difference between military and non-military alliances. “Opportunistic abrogation is less likely for alliances including democratic states and alliances that are linked to nonmilitary cooperation.”²⁵¹ There is also information showing alliances that are between democratic states are less likely to end with a violation of terms.²⁵² All of this data is important to understand and digest when it comes to promulgating environmental protection schemes on the international arena.

Understanding what factors help bond nations together, and the reasons why certain international covenants succeed while others fail, will help strengthen an academic recommendation for a new protective scheme. Environmental criminal law is a new field in penal enforcement that still has not been adopted on the international scale. The values that certain nations place on military alliances or non-military alliances may be a stepping stone in asserting the environmental agenda in a venue that maybe non-traditional. For instance, a military alliance could be lobbied to consider environmental protection as a national security interest worthy of armed protection. As alliances vow to attack or defend any nation that is attacked within an alliance, it is possible to categorize certain acts against the environment as attacks on the national security interest. Furthermore, the likelihood of states to keep their military alliances over nonmilitary alliances, and the frequency of regional alliances over vast global military cooperation gives us the scholarly deduction that an environmental criminal protection system may be implemented on a local and stable scale.

III. Harmonization in Domestic Penal Legislation

One purpose of international treaties is to create a universal understanding of a prohibited act. This realization must be disseminated to the extent that it can be effectively used to implement penal codes in the various signatory countries. Such an understanding could lead to the criminalization of a prohibited act at domestic level in ways that create consistency and predictability among the various countries.²⁵³ An obstacle facing such harmonization is the reality that most treaties, in dealing with issues of prohibition, limit their mandates without going further to demand a specific penalizing method to be adopted by member states, whether criminal or administrative. States would also have wide discretion over the substance and form of the penalties adopted to meet the requirements of the treaty. Standardization of prohibited acts and punishable behavior would eventually lead to harmonization of national laws when it comes to adequacy of implementation.

Developing prohibited acts that are universal, and coupling them with penalizing procedures will most likely impact procedural and substantive issues of environmental law. Examples are evidence of the commission of the crime, or proof of causality between the act and the harm. The definition or nature of the specific environmental crime affects the burden of proof that must be met to successfully prosecute the crime in question.²⁵⁴ A violation of an administrative regulation would most likely require different standards compared to violation of a criminal code. In addition, the very nature of environmental crimes necessitates a different treatment of evidentiary issues because of the nature of the harm.²⁵⁵ Damage to the environment can often be caused by long term accumulation of certain actions, rather than the immediate result of single conduct. This is frequently the case in other non-environmental crimes. The ability to meet the burden of proof also depends on the level of protection offered to the environmental medium. For instance, prosecuting the endangerment of an environmental entity generally requires a lesser burden than a case involving specific damage to the medium.

It is important to turn to recent history on environmental criminality, in concept and practice. Societies are still unsure about what parameters define environmental crimes. This is closely related to the historical reality that the environment has not been considered significant in value. Therefore, building law on the subject cannot be found in traditional environmental legal principles and precedent.²⁵⁶ Unlike other crimes that benefit only the criminal, crimes against the

environment may have societal benefits, such as employment opportunities and economic prosperity. For example, in the light of existing scientific evidence on global warming, continued encouragement of such activities represents intentional harm that is immoral and destructive to collective public interest. This is concurrent to the particular industries and companies that also benefit from such crimes.²⁵⁷

Historically, the scope and severity of environmental crimes have been measured by the amount of pollution they cause. This scale is coupled with enforcement being centered on controlling the amount of pollution through administrative regulations. Here, the purpose of criminal law is to ensure the proper enforcement of the regulatory scheme. Prosecutorial focus must remain on important issues including the lack of permits. The lack of this element limits the function of criminal law, as many acts of pollution are not prescribed in the permit scheme. These types of conduct would go unpunished despite their seriousness. The threat that this pollution poses to the environment is far more serious than mere administrative disobedience. This dependency on administrative law to enforce environmental treaties has created serious limitations on the effectiveness of domestic law and international treaties. This is strongly correlated to the power vested in administrators who make controlling regulations, not legislators. A few models have been presented that focus on the environmental interest rather than adherence to the administrative scheme.

The first model is the Model of Abstract Endangerment. This essentially focuses on criminalizing disobedience of administrative requirements,²⁵⁸ such as a failure to obtain appropriate permits. It does not punish for damages committed against environment. Rather, it is a penal code designed to punish entities that do not adhere to the dictate of government regulations. This model reflects the notion that adherence to government regulations are more effective in preventing environmental damage. The Abstract Endangerment Model couples existing regulations that touch upon licensing, paperwork and monitoring of pollution producing conduct with enforcement mechanisms designed to touch upon criminal law. The language contained within the criminal provisions generally identify the illegal conduct and the specific punishment to go along with infractions. There are also incentive provisions that reward parties that adhere to the rules of compliance with mechanisms that protect them from further liability and enforcement actions.²⁵⁹ The focus here is on vindicating administrative values.

The second model, Concrete Endangerment, criminalizes actions that violate administrative law and pose a danger to the environment. This model raises the bar closer to protecting ecological values rather than regulatory schemes. It requires proof that the activity is dangerous to the protected medium, such as water, air, or soil. An example of a violation of this second model involves the Belgian Surface Water Protection Act of 1971. The courts have a legal presumption that any discharge of waste water is considered pollution. This follows the requirement that dischargers gain legal status through permits. Conversely, when no permit is available for the specific form of discharge, the presumption does not apply. In this case, the prosecutor would have to provide evidence that the discharge “*could* have changed the water quality of the receiving surface water.” This would be a violation of this second model.²⁶⁰

The third model of sanctions for serious environmental pollution punishes harm to the environment even if the act is not otherwise unlawful. This model severs the link between administrative regulations and criminal law. It aims to punish serious environmental harm regardless of whether there was an underlying administrative violation. Under this model, crimes must be extraordinarily serious in order to justify a presumption that the harm was beyond the contemplation of the regulations; that such risk was never permitted to be taken. Some legislative structures provide margins that anticipate room for error.²⁶¹ Not understanding minor infractions or unintentional ones would be contradictory to its purpose.

Environmental treaties usually require that states enact penal laws to enforce its provisions with respect to “prohibited activities.”²⁶² However, most treaties do not provide a definition of the prohibited acts. Signatory states may use administrative regulations to impose penalties for actions such as violations of certain limits of discharge, or improper permits or bookkeeping.²⁶³ Here criminality becomes complementary to the administrative scheme. The concept of environmental harm is usually not presented; it is the protected interest of the administrative measure itself and not the ecological value.

This poses a challenge to the very basic idea that criminal law should be implemented to protect against harm. However, it could be argued that the enactment of the legislative law aimed at protecting an environmental medium could be imposed regardless of the occurrence of the harm.²⁶⁴ Here, all that is needed to prove a crime is the occurrence of the violation, regardless of the *mens rea* or the degree of damage to the ecological medium.

There is sharp criticism against the concept of abstract endangerment and its strict liability premise. It originates from the delegation of power from the legislative to the executive authority of government. This raises a constitutional issue in countries that do not criminalize a violation of penal code that is ambiguous.²⁶⁵ (Nullumcrimen, nullapoena sine legepraevia et scripta). Furthermore, the model has been called ineffective for its inability to prosecute against those who have not violated an administrative rule, even though substantial harm has occurred. For example, for the various mediums of soil, water and air, the agency in charge of monitoring enforcement would set levels of “acceptable” contact between the environment and the pollutant itself. This baseline would consider the various conflicting interests involved in the drafting of the legislation as well as the underlying principles of its goals.²⁶⁶

The Council of Europe Convention adopted the Abstract Endangerment Approach by requiring member states to implement directions through criminal or administrative measures.²⁶⁷ Article 4 of that Convention refers to *inter alia*; the unlawful operation of a plant. It allows its signatories to rely on administrative law to accomplish the ends of the convention.²⁶⁸

The concrete endangerment approach has a direct impact on the way a crime can be proven. This is due to the relationship between harm and criminal liability. Policy-makers in the 1980’s became concerned about the dependency of criminal environmental law on administrative law, and sought to separate the two by sanctioning violators directly. This affected the way environmental crimes were proven. Rather than discussing an abstract analysis to the risk posed to the environmental medium and human health, criminal consequences under this approach rely on the nature of the damage to the environmental medium and the scientific diagnosis of such damage. Two elements of the crime that must be proven include an allegation of the occurrence of an illegal emission or discharge, or the violation of statutory or administrative duties (including the condition of a license). Even under this approach, which is stricter than the abstract endangerment model, administrative law provides a defense from criminal liability for the polluter. Perpetrators can avoid sanctions by proving compliance with regulations. Thus, the administrative scheme has a determinative influence on criminal liability since the emissions or pollution can be charged as a criminal offense if they were committed illegally.

The Serious Pollution Model attempts to provide protection against extremely harmful acts of pollution. Here, administrative authorities are not engaged in the process. The power is shifted from polluters to prosecutors because criminal liability can still exist even if

administrative conditions are met. The administrative link is broken because parties who follow this theory understand that administrative code cannot always encompass harmful conduct of perpetrators. The assumption administrative body did not permit the damage or risk at bar. The end results require that the harms cause by the release of pollutants be “extreme in nature.”²⁶⁹

Casual links still remain however, as a very difficult field to predict with reliability. The Korean and Japanese legislators have taken this into consideration and introduced presumptions within their legal systems that address causation. This legal doctrine asserts that a presumption exists when material that would normally cause damage if released would arise upon the release of the material. The Koreans have gone a step further by placing penal provisions to couple the presumptions.²⁷⁰

In harmonizing domestic legislation, two forces can be largely helpful in accomplishing this goal. First, an international body that leads in changing law and practice. Second, a domestic organization that lobbies and provides information to government bodies directly responsible for implementing vital environmental law. UNEP was established in 1972 to be the leading international organization in the realm of environmental protection. However its weakness has been cited in its lack of centralized authority. Furthermore, rather than function as a long term institution, it has been spending time and resources in short time fixes, lacking presence in policy. All though this international organization has been a force in the realm of environmental protection, it has fallen short of creating true impact with domestic policy and legislation.

IUCN on the other hand was established in 1965 and it operates within most nations in the world. It has in recent times been focusing on providing judicial institutions resources and material to assist in the adjudication process of environmental matters. It has also made strides in creating cooperation amongst international bodies by planning summits and meetings. This and a range of information that it has provided to judicial institutions has created a lasting impact in the development of law on the domestic scale.²⁷¹

IV. Legal Persons – Criminal Liability for Pollution

The debate over the criminal accountability of corporations committing environmental crimes has become increasingly more pertinent in light of serious atrocities committed on their behalf. These tragedies have acutely affected the environment and areas of public and private

interest. Companies such as Exxon, Pfizer, Bayer, BP, and Halliburton have recently breached several environmental, health and safety laws.²⁷² The direct financial and human consequences of such actions are steep, and the damage that these crimes cause to the environment are extensive.

State signatories to environmental treaties must commit to enforce penal sanctions against parties who break the law on behalf of themselves or corporate entities. The ability to penalize these entities, either civilly or criminally varies among nations. However, there is no established protocol in international law for the penalization of a corporation's activities conducted by personnel or agents, even in the absence of a direct act by the company. In nearly all countries, the illegal actions of a corporate employee must be within the scope of their employment. The philosophy of the Responsible Corporate Officer doctrine holds individuals responsible for civil penalties and criminal sanction when avoidable violations occur. Furthermore, under most circumstances, evidence must exist that their actions were authorized by or with the consent of a senior official, and within the scope of his or her authority. In this section, the criminality of corporate entities will be discussed firstly in the context of the liability of individual employees and then the corporation itself.

1. Corporate activities are typically the result of myriad coordinated decisions, leading to the potential for a wide range of delegated responsibilities. As a result, it can be difficult to find and prosecute the person or persons liable for a crime in the case of "organizational wrongdoing," which can lead to an "organized irresponsibility" of individual employees. Thus the indirect liability of a director or other actor can be easily avoided; such actors can only be punished when they themselves have committed a crime. Therefore, the extension of individual liability is being explored in both statutory and case law, especially in the area of entrepreneurial activity.

There are general approaches to criminal liability regarding international environmental law:

(a) Criminal liability for corporate officers may still exist even if they themselves did not commit the act, as long as the act occurred within the scope of their control and knowledge.

(b) A more broad scope of liability occurs if the corporate officer is indirectly responsible for the act in question; he may be liable for the failure to adequately supervise subordinates.

(c) In broader cases, even if the officer is not a direct participant in an employee's unlawful behavior, he may still be liable. The officer would have to exercise special care to avoid liability by preventing illegal activity.

International law generally seeks to create a presumption of intent or to change the burden of proof per (b) and (c). In many countries, adherence to the traditional principle that criminal liability requires personal fault ((a)) is being sacrificed in an effort to secure greater environmental protection.

2. Once it has been determined that a corporate action constitutes a crime, it is possible to punish both the individual and the enterprise itself. Numerous mechanisms are in place to accomplish this goal. In the U.S., such sanctions include placing the corporation in the custody of the U.S. Marshalls, requiring reforms of operations, financial penalties, and imposing substantial sanctions. In cases involving financial penalties, the estimates of illegal gains is generally not accepted, but there are nations that have regulations that calculate accordingly. For example, in the matter of surcharges in the Japanese Antimonopoly Act, the law can reduce illegal gains by imposing payment to the government with a clear numerical formula. There is growing consensus towards bringing criminal liability against corporations.

However, in countries such as Korea or Japan, the difficulty rests more in determining personal fault. For example, both countries provide that a corporate entity is held responsible for a crime committed by one of its employees.²⁷³ In order to do this, one must prove that an individual acted illegally and violated the regulation. Generally, this individual is difficult to locate, particularly when the enterprise is a large company. Once the individual has been located and charged, a prosecutor needs proof that the corporation did not uphold its requirement to prevent the employee from committing a crime. In response to this problem, the Korean Judiciary has adopted a theory of fault presumption, which allows for additional findings against perpetrators. This example reflects the difficulty involved in punishing a large corporation. Such approaches have been met with criticism because of the doctrine of guilt.

Observing corporate liability in the context of international law is rooted in legal doctrine. In 1987, the Restatement of Foreign Relations Law recognized corporate liability under

international law.²⁷⁴ Since the formal acknowledgement of corporate responsibility, there has been an increased push in holding non state actors criminally liable in the international arena.²⁷⁵ In a recent analysis, scholars have argued that corporations fall under specific laws already established within the community of nations such as the Universal Declaration of Human Rights and the Genocide Convention. Furthermore, “Corporations are already widely regulated by international law, whether through economic frameworks and trade agreements or through penal provisions governing fraud and money laundering. Indeed, the next step to bring them specifically under the rubric of international criminal legal norms is not a far stretch.”²⁷⁶

Opponents of liability have made their stand on international covenants such as the Genocide Convention. The convention states, “Persons committing genocide or any other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”²⁷⁷ The defenders of corporate interests argue that the list is fully inclusive of those that are subject to the jurisdiction of the convention, and the list does not include legal persons but only real persons. However, there have been no judicial or textual distinctions between a legal and non-legal person in reference to this specific international law during its creation.²⁷⁸ Unfortunately, there is still debate as to the meaning and application of “persons.” This continues to be an obstacle to the prosecution of corporations. The doctrine of vicarious liability serves as another legal mechanism to bring corporations to justice. In recent years, more and more nation states have been found liable for individual actors performing duties on behalf of their country. This was solidified in 2007 when the International Court of Justice rendered a decision making nation states liable for committing genocide.²⁷⁹ As states are held liable for acts done by individuals, the argument scholars propose would effectuate the same principle towards corporations. “Modern companies cannot feign innocence by claiming that they were unaware that they enable genocide.”²⁸⁰ These measures would ensure that corporations create internal systems of self-policing that would control their own directors and members from engaging in acts that would be against the corporate interests. However, until we incentivize corporations to not engage in these activities through penalties, fines, and penal sanctions, they will continue to look at their profits as a driving factor of their agenda.

V. Transnationalization in Domestic Penal Legislation

Transnational subject matter jurisdiction is less than established, even with well settled principles. Conflicts arise when more than one law is applicable to the same issue. Even with the assumption that principles of nationalism and territory have attained customary law status, there are neither general treaties nor customary legal rules for resolving such conflicts. Significant obstacles to providing solutions gain genesis in the uncertainty revolving around conflicting authoritative principles and extraterritorial principles under international law.²⁸¹ To overcome such obstacles, novel interpretations can be created to observe extraterritorial rules through more a more workable prism.

A state signatory has jurisdiction within its territorial boundaries, including relevant coastal waters and seabed areas (the so called “territorial theory” of jurisdiction).²⁸² To apply national law to transboundary cases, the range of territorial theory should be expanded by determining the geographic location of a crime. Within the ubiquity principle, the place of commission is where the act took place. That extends the principle of ubiquity in connection with the principle of territoriality.

Broader jurisdiction theories are adopted by certain countries. The “passive personality theory” extends jurisdictional prosecutorial powers to where the victim of the offense is a domiciliary.²⁸³ The “protective theory” extends judicial dominion over all violations, including those occurring outside domestic boundaries. Such acts could easily be argued as they have been done, that they infringe on national security and sovereignty. The “universal jurisdiction theory” allows states to exercise *in personam* jurisdiction over individual when they are within the territorial boundaries of the nation state and their violations can be categorized as particularly harmful or heinous to mankind.²⁸⁴ This concept is generally applicable when an international covenant has outlawed or banned the specific conduct that was committed by the violator, and the country is a member state to that agreement.²⁸⁵

There can also be limits that arise when the perpetrator is connected in some manner to another country, but the offender does not adhere to foreign administrative requirements. For example, the Federal Republic of Germany does penalize actors operating within a foreign country who lack proper permits.²⁸⁶ Under the ubiquity principle, the location of the offense the location of the harm occurred and the act causing such harm differ. However, this is only applicable when concrete endangerment is an element of the offense. Abstract dangers that could

or could not exist would be outside the bounds of this principle. In these circumstances, according to prevailing opinion, the harm itself is not a legal element to the offense.

Illegal conduct must be top priority in the country where it exists. Both the United States and the United Kingdom insisted on criminal jurisdiction favorable to territoriality. They did not acknowledge the idea that a state may apprehend and prosecute actors outside their own territorial boundaries. This is in sharp contrast to countries who have adopted the passive personality principle, protective theory, and the universal jurisdiction doctrine to protect their environment and prosecute criminals. In recent decades, the United States has moved away from this possession.

Now the U.S. generally relies on what other countries recognize as extravagant jurisdiction claims. The criminal provisions in U.S. environmental statutes have been interpreted very broadly. These interpretations of legal principles allow the U.S. to reach beyond its borders to have an international long arm. The extraterritorial interpretation of American environmental laws would expose actors with no personal connections with the U.S., except through their business, to criminal liability within the U.S. This is the case regardless of whether the irresponsible officer's corporation was a domiciliary of the U.S. or another country. Whether the Americanization of international law enforcement is also applicable within the international community should be examined more closely.

Numerous nations have adopted laws to protect interests outside their territorial boundaries. The most common are laws focused on the protection of the oceans. These laws generally ban vessels of the legislating state (or vessels operating within its territorial boundaries) from polluting. Many of these regulations were passed in conjunction with the implementation of the 1954 London Convention for the Prevention of Pollution of the Sea by Oil and the Convention for the Prevention of Pollution from Ships.²⁸⁷

The passage of the Oil Pollution Act of 1990 was a legislative response by the United States Congress to the environmental damage caused by the 1989 Exxon Valdez oil spill.²⁸⁸ This act gave the President power to prosecute actors on a criminal level. The Act's liability provisions are ill-defined, as is the issue of applicability to foreign nationals. If it were, new interpretations would be required of existing international maritime law. The enforcement of the Oil Pollution Act's criminal provisions within or beyond the territorial sea of the U.S. for spills that fail to rise to egregious or willful, would mean that the US would be exercising greater

power than that allocated to coastal states under the U.N. Conventions on the Law of the Sea (UNCLOS).²⁸⁹

Many provisions of UNCLOS have been accepted as customary international law. In light of this, the agreement has been used to guide the marine jurisdiction debate in academic circles. The importance of the UNCLOS and its provisions urge U.S. courts to give precedence to the Oil Pollution Act over UNCLOS. The MARPOL Convention and its corresponding U.S. legislation are based on the necessity of pollution reduction from routine ship movements and operations.

The inability of the Law of the Sea to effectively handle developments in modern life is well recognized. However, unilateral actions outside the law's boundaries are viewed as inevitable, which may lead to international conflict. In some academic circles, international law is viewed as growing slowly because of its requirement of mutual consent prior to any communal action. The use of criminal sanctions to protect the environment recognizes a growing consensus that has emerged to govern the international community since the 1982 U.N. Convention on the Law of the Sea. That Convention laid a framework that defers to the flag state for compliance certification and enforcement action.

UNCLOS and MARPOL approach this problem by adopting the perspective that the "freedom of the seas" should be absolute. The community of nations should seek to comply with the provisions of UNCLOS. Its provisions reflect the needs of today's worlds and will help shape it for future generations. The international community should be accepting of rules that support the mutual enforcement of rules against environmental crime.

Chapter 4

REGIONAL COOPERATION IN CRIMINALIZING ENVIRONMENTALLY HARMFUL ACTIVITIES

I. History of Regionalism

The concept of regionalism has sparked a remarkable interest in the public consciousness with its policy considerations. This surge of focus comes in the aftermath of the Cold War, the consolidation of Europe, and the creation of several supranational agreements including NAFTA.²⁹⁰ Because environmental issues arise from ecosystems and geographical features rather than political boundaries, domestic and local actions are insufficient, requiring international cooperation.²⁹¹ The cohesive facilitation of environmental issues can create a common pool of rules, goals, and procedures with the end product of international cooperation.²⁹²

The consequences for failing to adequately address environmental crimes are potentially disastrous. There exist well-funded criminal organizations that continually profit from exploiting the environment. Within the same breadth, corporations continue to play out profit scenarios upon which they accept financial gains over damages to the environment. The Environmental Investigation Agency has urged “the international community to wake-up to the menace of environmental crime and show the necessary political will to tackle the criminal gangs plundering our planet for a quick profit.”²⁹³ Enforcement agencies traditionally have chosen to place their efforts against classic international crimes such as the trafficking of drugs, weapons, people and terrorism.²⁹⁴ The focus on these international matters have stymied efforts to regulate environmental crimes such as the illegal trading of environmental commodities.²⁹⁵

The realities of environmental infractions require an appropriately measured response that will regulate the field of law in a manner that would protect the lives of wild animals and human health. Similar to traditional crimes, gauging the tolerable level of unregulated environmental conduct is often difficult. Regardless of this analysis, sufficient regulatory response is required from all parties that aim to police environmental crimes. Attempts to obtain this goal have severely fell short in depth and breadth.²⁹⁶

Cooperation on a regional geographic basis has been a builder of alliances since the dawn of the history of nations. States, cities, and communities working together have achieved goals that have progressed civilized society. With respect to environmental protection however, progress has been slow and in many ways nonexistent. A few reasons for this are the delicate nature of interests that conflict with neighbors. For example, it may be in the interest of one nation to log its natural forests for economic gain, while the flood run off caused by this policy may only affect the neighboring nation. Furthermore, even when states have common interests, common obstacles remain in achieving their success. The lack of monetary resources, the risk of economic harm, political instability, and lack of political will for long term commitment are all problem issues that nations face.

Strong domestic legislation coupled with international law provides systematic engagement on established principles that foster regional cooperation. This can then overcome domestic legal differences as long as international commitment is priority within the region. Given this premise, it is much easier to create cooperation in the field of environmental legal issues in comparison to other fields of law. The main for reasons for this are: 1) the study of ecology and the environment is a shared common body of knowledge with a medium that is inhabited by all, 2) technological systems that are used by all mankind cause many of the contemporary public health issues such as acid rain and urban smog, 3) the advanced nature of governments cause commonalities in bureaucracies and their enforcement practices, and 4) globalization that has caused the integration of economies, the speed of news, and the low travel time between far distances has made it easier for different countries to find common ground in the need for environmental protection.²⁹⁷

II. Domestic Legislation

Often, legislation passed on the domestic level that aims to combat environmental crimes has been inadequate in substance and enforcement. This is primarily caused by state's self-centered concerns about their economy and security. This focus ignores the environment while focuses on short term growth.²⁹⁸ Pursuing the goal of regulating environmental crimes is out of the possible scope of the individual state.²⁹⁹ Due to the glaring weakness of nation-state regulations, interstate cooperation is the necessary mechanism to solve the steep crisis of environmental crimes. Transnational cooperation has proven to be the correct mechanism to

combat similar international challenges in the past.³⁰⁰ It has been effective in eliminating cholera that had ravaged large populations.³⁰¹ Community based cooperation also oversaw the elimination slavery and the increase of the human standard of living.

A specialized agency that directs its efforts in exploring and developing a sound knowledge base of organized environmental crimes is a rare reality.³⁰² The few that are in existence are grossly under financed which leads to poor training, and a wholly underdeveloped understanding of proper strategies to produce intelligence led enforcement. Unfortunately, this setback leads to a poor allocation of resources and a poorly planned approach to organized environmental crime.

Corruption at the state and corporate level has proven to be the most prominent challenge in circumventing environmental crimes.³⁰³ The root of the problem rests in corruption, anchored in bribes and other monetary considerations; this must be addressed by all parties.³⁰⁴ Efforts are need to push for administrative reform. Corruption prevention is the most effective and historically successful way to combat the problem. However, many developed and developing nations still face profound problems that adversely affect international and transnational progress. Easily accessible technologies that can be adopted with nominal resources are still not enacted to provide online auditing capabilities to average citizens.³⁰⁵

Commentators have noted that there seems to be an unreasonable institutional complacency in respects to environmental crime.³⁰⁶ There is a certain lack of awareness concerning the size of the environmental problem and the efforts needed to curb it which is unacceptable. Proper attention must be paid to the clear fact that environmental crimes and their resulting harm are time sensitive. This is exemplified by many organizations such as the Mississippi Department of Environmental Quality who aim to develop solutions quickly and efficiently to solve the problems at hand in the Gulf of Mexico.³⁰⁷

In attempting to understand the specific domestic legislative schemes that are encountered in the West, the United States and the European Union are a prime example for comparison. The differences between the two bodies show the strengths and weaknesses of each system that can be used to lobby for effective adoption of environmental criminal regimes. Even if such adoption cannot be attained by the E.U. or the U.S. alone, their place in their regional position in the world allows us to see alternative methods for understanding external pressures for domestic adoption of laws.

It is imperative to understand the effects of various legal systems. The differences allow us to measure the success of certain legal structures and the deficiencies of others. This can translate to not only the substantive nature of the laws themselves, but the enforcement mechanism used to put them into practice. The United States has arguably the most advanced system of environmental protection laws in the modern world. The only comparable system of law is the steadily progressing European Union. This regional government has put into place various pieces of legislation that ripples through its member states.

In the 1970s, the United States was in an era of drastic social change. One of the many popular movements centered on environmental protection occurred during this period. The adoption of such laws happened quickly and took place in effective fashion. “[J]ust within a few years, Congress passed the National Environmental Policy Act, the Clean Air amendments, the Federal Water Pollution Control Act Amendments, the Federal Environmental Pesticide Control Act, the Marine Mammal Protection Act, the Noise Control Act, the Coastal Zone Management Act, and the Endangered Species Act of 1973.”³⁰⁸ These laws were all passed on the federal level, allowing national resources to be used to protect all of these environmental interests. This is in contrast to individual states attempting to combat environmental challenges on their own, with limited financial means.

Although the American system puts large emphasis on the federal government to enforce and supervise industries, it does not place the entire burden on Washington. Rather, federal law serves only as a minimum requirement, where states can create stricter rules and regulations. For environmental rules, states are free to create their own emissions rules and standards that are tougher than the federal bar. This of course is limited by the U.S. Constitution. The Supreme Court has interpreted the document to not allow States to place an unnecessarily high burden on interstate commerce or the interest of other states. This is generally referred to as the “commerce clause.” Another instance of states being countermanded by the Supreme Court is when federal law occupies the field and preempts the area of law that the state is legislating in. The Supreme Court refers to the “supremacy clause” that allows federal law to supersede that of states.

The model in the European Union has vast differences. Unlike the federal system in the United States, the E.U. binds its nation states together through treaties and other international agreements. Therefore, each country is only granted power that has been expressly outlined by international covenants. “Despite this principle, the power of the European bureaucracy... has

steadily increased and led to a steady shift of environmental regulatory competences to the European level.³⁰⁹ This is because a large amount of domestic policies that are passed by individual legislatures are effectively becoming European Law.

In the E.U., enforcement is also a crucial component to understanding domestic relationships. Member states themselves are charged with the enforcement of European Commission environmental law.³¹⁰ This has in turn pushed nation states to adopt in large part rules and regulations that are used by the E.U. collective. “For example, sixty-six percent of environmental law in the Netherlands is based on European directives and regulations.”³¹¹ In addition to this, the European Court of Justice has “held that under certain circumstances, citizens who have suffered damage as a result of a lack of implementation by a Member State can be entitled to compensation....”³¹²

Another principle adopted in Europe allows an individual citizen to invoke supranational law to challenge policies of their own state. This is another mechanism that allows individuals to hold their own domestic systems accountable by using international law that binds signatory countries. A prime example is an ECJ decision that imposed financial penalties on Greece for not complying with an earlier judgment from 1992.³¹³ This shows a clear support from the entire European Community to hold those responsible for infractions against the environment and its unified principles.

The main difference between both the U.S. system and the E.U. system rests in the E.U.’s inability to hold citizens or enterprises liable. E.U. law is focused mainly on the nation states that have signed on to its treaties. The member states themselves are responsible for prosecuting citizens and enterprises that have offended principles of law. In understanding both of these systems, one can observe positives of federal system that has great effectiveness in handling matters on a domestic level. It can also not be overlooked that a supranational body like the E.U. can hold many nations accountable at once through its own checks and balances; a power unavailable to the U.S.

To maintain the balance, the world must come to the general consensus that environmental crimes demand a sustained response from the community of nations. These efforts must be undertaken before attempts to cure the problem is moot due to temporal inactivity. The success of this initiative requires proper regional cooperation between all interested parties. There have been a few global mechanisms, both governmental and non-governmental that have

achieved solid results. These approaches have pushed forward this task in an attempt to connect groups and help to create regional cooperation.³¹⁴

Regionally located organizations seem to be better equipped than global institutions, both in efficiency and execution when dealing with the challenge of implementing effective environmental policies.³¹⁵ This is generally the case because regional treaties are able to encompass a larger number of parties than a single global treaty, assuming that the cost of cooperation is the same within both types of regimes. This results in regional cooperation being more effective in policing and regulating environmental crimes.³¹⁶ Generally, local organizations have more accessible means to gather information, and it is simply easier to create cooperation among regional parties with similar cultures and ecological systems.³¹⁷

III. Variability in the Application of Domestic Law

Individual countries with commitments to regional agreements have varying circumstances that often this lead to exceptions and exemptions being applied to that party. Such exceptions often remain the steadfast rule. For example, Eastern European countries, with their lower environmental living conditions and nearly non-existent regulations, have ties with the European Commission (EC). The environmental objectives are defined in Article 4 of the Water Framework Directive.³¹⁸ The purpose of this article is to provide continued access to sustainable water while emphasizing a high level of environmental protection.

Article 4.1 defined the Water Framework Directive's general objective to be prevalent in all surface and groundwater bodies, namely, a positive status mark by 2015, and the introduction of principles that help to prevent any further crippling of that status. Within the short term however, there are a number of exemptions to the general objectives that allow for less stringent requirements. For example, the article allows the extending of the deadline beyond 2015 for the implementation of new projects, provided a set of conditions are fulfilled.³¹⁹ The result is that the interpretation of regional instruments will generally remain inconsistent, possibly for a long period of time due to the nature of the exemptions and the likelihood that there will be a breach by the subject state.

Poorer countries joining regional organizations are expected to develop their industry fully respecting and adhering to environmental laws. Economic exemptions and incentives that

allow these particular nations to take calculated precautions against pollution and gradually attain pollution controls are on par with industrialized nations.³²⁰

Exemptions that are practiced domestically vary in scope. An example of this incentive based exemption system was passed into law to form a successful U.S. based mechanism. The system was designed to control acid. Title IV in 1990-The Clean Air Act was passed to allow tradable emission allowances for sulfur dioxide. The system allowed for the electric power industry in the eastern part of the county to be allowed a fixed number of allowances, and the rules allowed the banking, buying and selling of these allowances.³²¹ The theory revolves around the idea that countries are allowed certain privileges to help better strike the balance between economic prosperity and complying with environmental laws. These incentives are designed avoid social and political instability that result in the shifting values countries place on pollution control. Such changes in perspective can be due to their individual environments and political climate.

Another example stems from the Baltic Sea region. Surround this geographic location are 14 countries at the drainage basin of the Baltic Sea; Sweden, Finland, Estonia, Latvia, Lithuania, Poland, Germany, Denmark, Belarus, Norway, Slovakia, and Czech. Since these nations vary in development, the amount each nation contributes to pollution in the region can be divided into two categories. In developed nations such as Denmark, Finland, Sweden and Germany, pollution stems from paper manufacturing and the fertilization of agriculture.³²²

Proponents of “regional cooperation” as a tool to protect the environment, which utilizes criminal penalties, adopts and concedes that the differences between nations legislative structures are roadblocks that hinder the success of environmental protection agreements.³²³ It is at this junction that international law helps clear the murky waters. Standard conflict-of-law doctrines are not sufficient to handle the existing challenges.³²⁴ However, participation must be voluntary and by national will rather than international criticism and penalties. Nations who are pushed to agreement by unsolicited pressure are less likely to keep their commitments.³²⁵

IV. Environmental Standards in Individual Nations

The burden of determining environmental standards that should be controlling for each developing country is often a difficult task. Applying general principles of international environmental law to the various issues in these nations are not realistic.³²⁶ The principle of

“Sustainable Development,” which formulates the idea that safeguarding the environment and economic development are intertwined practices, has increased international environmental cooperation.³²⁷ However, the principle of national sovereignty remains a significant obstacle to full international cooperation. Many countries are stern in their demands and in their practice of exploiting their native natural resources pursuant to their own political and economic policies.³²⁸

Nations often use the sovereignty argument as a shield to protect against rising social costs and keep the contradicting benefits that go along with pollution control.³²⁹ These countries feel that their privilege as sovereign nations allows them to use all available means to attain economic success on par with those enjoyed by the developed countries. This notion comes in light of the plausible argument that these now-developed countries did not have to succumb to any rigid environmental restraints, and they have achieved economic prosperity because of the lack of restraints.

Before 1970 for example, environmental laws in the U.S were virtually non-existent. A few states did attempt to establish limited controls. There were common law property and tort principles that were invoked on behalf of environmental concerns in certain lawsuits. These restraints were extremely limited, and there was no legislation in place that regulated pollution of the air, water, or land. The U.S. had no national clean air legislation, no federal clean water act, and no hazardous waste or toxic substance laws. Prior to 1970, the Environmental Protection Agency was nonexistent. Mechanisms that did exist were only granted limited powers under statutory definitions, most of which only allowed for some basic assistance to local and state governments.³³⁰ Nevertheless, the sovereignty shield has been pierced now that nations realize that international interests are most important in sustainable development.³³¹

Other less discussed nations from Southeast Asia also illuminate the diversity of domestic laws, and the deep history that accompanies legislation. In Indonesia for example, the “natural resource management after the Suharto regime’s demise in 1998 is heavily influenced by the ongoing process of decentralization of power to the regions.”³³² This has led to a failure of government in attempting to balance the interests of local provinces with those of the central government in reference to national resources. Indonesia’s forest management effort has been struck by a massive dysfunction as local leaders no longer comply with demands from the centralized government.³³³ “Overall, the institutional governance of natural resources and the

environment in Indonesia continues to be fractured, with problems of corruption and lack of coordination becoming even more pronounced than during the Suharto era.”³³⁴

Thailand offers a more optimistic perspective, where efforts have been bolstered by the new Ministry of Natural Resources and Environment (MNRE). The agency faces its toughest competition not from outside special interests, but other government agencies, such as the Ministry of Agriculture and Co-operatives.³³⁵ Although the new agency has seen setbacks after its genesis, there is confidence that the governmental body will be able to regulate environmental exploitation within Thailand’s borders. Malaysia has also taken the same approach by establishing its own MNRE. Experts have noted however that “there are worrying signs that the [Malaysian] MNRE is perpetuating the traditional emphasis on exploitation and wealth creation, as evidence by the new Minister’s recent assertion that land and forests are national assets which must not be left dormant.”³³⁶

Vietnam is another Southeast Asian country that has implemented an MNRE to regulate natural resources. It too “faces challenges in reconciling the policies of its central and provincial governments.”³³⁷

The common problem between these countries and other Southeast Asian nations revolves around their inability to manage the interests between the central and provincial governments. This is “exemplified by Indonesia and Vietnam [as] many of the laws enacted are typically initiated by sectoral ministries interested only in the specific range of activities that fall within their mandate.”³³⁸ This is in stark contrast to the United States that has a functioning republican government with both a state and federal governments. The E.U. boasts strong supranational policies with nation states enforcing international policy on the domestic scale without great conflict. With every unique nation, there comes a delicate balance of government that interplays with environmental policy and enforcement. Southeast Asia serves as a small test site for the rest of the world. It provides a survey of how international law and domestic lobbying for environmental legislation will be received by a diverse pool of countries.

V. Regional Regimes

Regional regimes have developed to connect and reinforce the common interests of different areas of the world. These systems are designed to help nations in their efforts to

implement sound environmental laws.³³⁹ Local institutions include, among others, the Council of Europe, the Asian Regional Partners Forum on Combating Environmental Crime (ARPEC), and the environmental security regime established for the Baltic Sea region.

ARPEC consists of numerous nations that have made environmental protection a main domestic priority.³⁴⁰ The illegal trade of commodities led to the creation of this forum. For example, the increase in the trade of wild flora and fauna, hazardous waste, ozone depleting chemicals, and other items initiated international concern and action. The continued patronage and existence of these black markets contradicts the efforts of environmental conservationists as well as the various agreements nation states have signed in an effort to protect wildlife.³⁴¹

It is an implied reality that a more specialized regional legislation would be more effective in providing specific solutions as problems arise. Other international bodies of law and agencies do not possess regional character, therefore may not be able to effectively meet many challenges.³⁴² An example of a regional problem that required a more centralized effort can be illustrated through a case in the People's Republic of China and its neighboring countries. China has a serious problem with environmental crime as it is the target for dumping a large amount of hazardous waste. Over 85,000 tons of illegal waste shipments have been seized since 2000, and the source of most of the ozone depletion substances (ODS) on the global market.³⁴³

Transnational exportation of waste in and out of China continues to plague the country. This continues after years of difficulties with illegal international shipments of waste for disposal within their borders and the attached human and environmental harms resulting from these crimes. The NGO report, "Exporting Harm: The High-Tech Trashing of Asia," is an early example of a citizen group's outcry resulting from such issues. The fingers point to the general perception that China has a weak enforcement of their existing dumping laws.³⁴⁴ Citizen groups continue to campaign against environmental harms resulting from electronic waste dumping and disassembly.³⁴⁵ The Sky Hole Patching Project was launched in 2006 to help solve this problem. The purpose behind Project Sky Hole Patching is to push forward the agenda of stamping out illegal trade in ODS and other dangerous materials as set forth in the Montreal Protocol and the Basal Convention in the Asia Pacific region.³⁴⁶

A. Asian Regional Partners Forum on Combating Environmental Crime (APREC)

ARPEC was created in 2005 with the efforts of regional cooperation to help fight environmental crimes in Asia. The principal goal was to create an operative mechanism that allowed the free flow of information coupled with technical cooperation and coordination activities among NGO's and international associations.³⁴⁷

Through mutual cooperation, opportunities have arisen for these groups to enrich themselves through educational workshops and through an established forum to share vital information that they possess. Several regional organizations have formed as well. They include Project Sky Hole Patching (aims to fight against illegal trade of ozone depleting substances) and the Partnership against Transnational Crime through Regional Organized Law Enforcement. Members of ARPEC include most notably, The Environmental Investigation Agency, The International Union for Conservation of Nature, The World Bank, The Wildlife Conservation Society, and The Ministry of Industry of Thailand.³⁴⁸ These forums are informal and membership is open to other organizations.³⁴⁹

In July of 2011, several national government, NGO's and international associations, gathered to debate and share information regarding the illegal trade of flora and fauna. These debates occurred at the 11th ARPEC meeting. This event was organized by the Regional Centre organ of the UN Office of Drugs and Crime under the direction of UNEP.³⁵⁰

The participating groups at the ARPEC meeting discussed the importance of sharing knowledge relevant to their goals. Conversation also revolved around how media management can aid in the fight against organized environmental crime in target Asian countries. Emphasis was placed on developing a forum of knowledge sharing among environmental law enforcers from a global perspective. This theme is seen as an important key to defeating crimes against the environment.³⁵¹

Other tactics employed against environmental crimes were debated at length during this meeting. They included the pressing need to push forward strict environmental legislation that was not only simpler in its application but more effective. Combining this with the free flow of intelligence sharing between enforcement agencies seems to be the main muscle that will be flexed when trying to successfully prosecute environmental crimes. The hope is this will lead to the development of better targeted penalties for environmental offenses.³⁵²

There have been a series of expositions on the importance of sharing knowledge and intelligence by key actors.³⁵³ These have been pushed by several groups urging that the pertinent

priority be the sharing of criminal intelligence. The Wildlife Conservation Society and other similar actors accentuated their positive experiences by broadcasting their coverage of environmental criminal acts in hopes of raising public awareness of the severity of such crimes and their harm against humans, animals, and the environment. This meeting laid groundwork for the introduction of a collaborative effort between the International Consortium on Combating Wildlife Crime (ICWC), the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), INTERPOL, UNODC, the World Bank and the World Customs Organization (WCO).³⁵⁴

Project Sky-Hole Patching was the original project that operated in the fight against environmental crime in Asia.³⁵⁵ The initiative was a watershed effort by the Regional Intelligence Liaison Office-Asia and Pacific (RILO/AP) that aimed to target and regulate the smuggling of hazardous wastes and ozone depleting substances.³⁵⁶ Project Sky-Hole Patching aimed to forge the intelligence gathering capacity and knowledge matrixes to intercept shipments of illegal ODS and toxic waste, using the sources from customs authorities in 20 of the Asian-Pacific countries. The first phase of the project focused on ODS, and the second broadened its reach to include hazardous waste. Since 2007, the project has been transformed into a standard operation, employing numerous customs agents.³⁵⁷ Since then, over 100 tons of illegal ODS and 1,000 tons of illicit waste was seized.³⁵⁸ This project clearly raises the awareness of ODS, toxic waste dumping, and smuggling among custom groups throughout the region. This has led to positive cooperation even beyond the original target region, with RILO AP now allying themselves with the European Union Network.³⁵⁹

B. The European Union and the Brief History of Criminal Environmental Cooperation in Europe

The European Union (EU) has been frequently cited as an example of strong regional organization that has enjoyed success in combating environmental crimes.³⁶⁰ The E.U. was originally established as a mechanism to facilitate economic prosperity and political stability throughout Europe. This pathway to economic unification was laid out before the Summit in Paris in 1972 which waded into the area of environmental protection as a component of economic prosperity.³⁶¹ The newly adopted Article 6 stands at the forefront of the Treaty. The clause beckoned for the protection of environmental interests to be placed into the application

and meaning of other policies. This article also stated that integration is one avenue of promoting sustainable development.

This new article is seen to be complimentary with the Declaration on Environmental Impact Assessment, annexed to the Final Act of the Intergovernmental Conference which drafted the Treaty of Amsterdam.³⁶² Environmental assessment compilations are prepared when the Commission of this Declaration suggests initiatives that may have profound environmental implications.³⁶³

On November 4, 1998 the Council of Europe passed the *Convention on the Protection of the Environment through Criminal Law*.³⁶⁴ This Convention focused on advancing the substance behind criminal law as a tool for transnational advancement in the area of international environmental crimes.³⁶⁵ The preamble states the point of the Council of Europe is to create unity between members. Its provisions include mandates for parties to “adopt legislation on the national level.”³⁶⁶ The offenses that it lists include intentional offenses, negligent offenses, and criminal or administrative offenses. The offenses listed are “...obligatory and the parties are instructed to adopt the appropriate measures necessary in order to establish the criminal [offenses] in their domestic law.”³⁶⁷ In addition to outline the offenses, the Convention requires parties to establish jurisdiction to prosecute crimes within its territorial borders.

The Council of Europe, formed in the aftermath of World War II, in the prevalent criminal law arena. This Council is known for its 21 Conventions and 70 some recommendations.³⁶⁸ Due to post Cold War geographic changes in the Eastern part of Europe, it has 47 members.³⁶⁹ The Council has shown its dedication to environmental matters, with most of its focus on environmental crime.³⁷⁰ Several resolutions for this purpose have been passed based on the conclusion of the 7th Conference of European Ministers of Justice in Basel, 1972. In 1977 the Council of Europe adopted its *Resolution 28 on the Contribution of Criminal Law to the Protection of the Environment*. Further, the 17th Conference of European Ministers of Justice in Istanbul passed the *Resolution No.1 on the Protection of the Environment through Criminal law*. These resolutions articulate appropriate regulations that the nation’s governments should undertake.

The Single European Act (1986), which is another example of regional enforcement, provides clear authority for the European Community (EC) on environmental and natural resource concerns.³⁷¹ The goals of the European Community are to provide direction and suggest

regulations aimed at controlling pollution and safeguarding the environment. This is coupled with future plans for higher protection. The European Court of Justice has appointed itself as the principal chair that will seek to ensure that regulations adopted by the nations comply with the outlined provisions. Pursuant to E.C. law, the burden of enforcement has been transferred from inter-state and placed under the jurisdiction of the European Commission and the European Court of Justice. The 1992 Maastricht Treaty was the genesis of providing financial penalties upon signatory states that shirked from their responsibility in complying with community law.³⁷² Despite the importance allocated to the doctrines incorporated in the Maastricht Treaty, it is unclear if the European Community will hold a tight grip on control in the environmental field. It seems that the European Union's views of environmental law and its method of enforcement are one of its more popular activities in Europe.³⁷³

Chapter 7 of this thesis discusses in detail the European Union's environmental protection mechanisms and its suitability as a model for a global union with respect to environmental protection, specifically through criminal law.

C. North American Agreement on Environmental Cooperation (NAAEC)

Mexico agreed to strengthen its domestic environmental laws in order to encourage the United States to politically support the North American Free Trade Agreement (NAFTA).³⁷⁴ During NAFTA negotiations, many groups warned of the pending consequences from increased transnational pollution which had already begun to develop. The increase in pollution began to occur when corporations began moving their plants to Mexico; the quasi-merger of bi-national economies lead to symmetry within the countries' environmental laws and a net decrease in the United States' strict environmental regulations. Furthermore, under-regulated Mexican imports that posed health risks from the mishandling of harmful pesticides found a boon in this agreement.

These important issues were silenced with the formation of the North American Agreement on Environmental Cooperation (NAAEC), which is a supplemental environmental agreement attached to NAFTA.³⁷⁵ Because the NAAEC does not provide any substantial remedies to harmed individuals, it offers very little to parties of NAFTA in terms of incentivizing their actions toward effective environmental regulation.

Subsequent to Mexico's adoption of NAFTA, the rate of environmental inspections dropped drastically. This has led to reasonable speculation as to what the true motives were behind this substantial thrust towards environmental protection.³⁷⁶ As late as 1999, Mexico's GDP was growing around 10-14% annually. Curiously, only 0.6% of the GDP was being invested into the pressing needs of environmental protection.³⁷⁷ Mexico has not made any substantial achievements in incentivizing industries to comply with environmental rules.³⁷⁸ It seems that the majority of the maquila industry is missing the proper structures to battle the grave environmental harm caused by the voluminous trade along the border.³⁷⁹ Between 1985 and 1999 commentators calculated that Mexico suffered substantial increases in environmental harm. This includes the growth of rural soil erosion by nearly 90%, municipal solid waste by 108%, water pollution by 29%, air pollution by 97%, and other environmental harms.³⁸⁰

The aim of NAFTA's Environmental Side centers on the domestic enforcement of environmental law, including its establishment and maintenance. The agreements encourage a forum of public participation in the legislative and policing processes. They also provide for nation to nation conflict settlement for repetitive failures of effective enforcement of national environmental regulations, and the establishment of a structure for cooperation between the NAFTA parties. The Agreement provides persons or groups within any NAFTA territory can file a submission with a tri-national secretariat. This filing will adjudicate allegations that a bound party has failed to enforce its environmental regulations. The submission must comply with certain established criteria (e.g., provide sufficient information regarding the allegation and it aims for proper enforcement) that the Secretariat will determine.

Part Five of the Agreements lays out the mechanism for obtaining a chance to formally dispute and settle when evidence of repetitive failure of a party to enforce their environmental laws is present.³⁸¹ If the incumbent dispute settlement panel does come to the conclusion that a persistent pattern of failure as outlined by the Agreement exists, they will execute a thorough plan to cure the problem.³⁸² The sanctions against a party that fails to implement the proposed action plan can include monetary assessment.³⁸³ If a party fails to pay the proposed monetary assessments, as between the United States and Mexico, trade sanctions can subsequently be imposed. The complaining party is required to first seek termination benefits in the same matrix where the repetitive failure has been seen. As per the Agreement with Canada, the Commission

for Environmental Cooperation, which was established under the Agreement, generally applies to a court order to enforce the assessment.

Through regional coordination, countries continue to slowly but surely use their joint resources and common available neutral facilitators to enhance cooperation. This is done to support international decision-making and to ensure environmental threats are effectively addressed.³⁸⁴ Such endeavors can be achieved through supporting political and programmatic cooperation with a broad and diverse spectrum of major groups and stakeholders. Such collaboration not only provides data and information that is critical to crafting effective policy solutions, but it produces and communicates this information, helping to connect scientific networks to national governments.

Chapter 5

INTERNATIONAL NATURE OF ENVIRONMENTAL CRIMES

This chapter aims to examine the International Nature of Environmental Crimes, with a focus on both the limitations and arguments for the criminalization of such breaches. Issues shall be examined that center on the penal doctrines of certain environmental harms, while exploring the *mens rea* requirement when defining corporate and individual liability. This chapter will conclude with the idea of Internalization. It is a concept that seeks to incorporate international law and international environmental protection into one mechanism with a functioning enforcement scheme.

I. Transboundary Character

International environmental criminal law takes root in certain conceptual categories that define its inherit basis as an area of legal philosophy infused with transboundary characteristics. The legal apparatus that covers this form of illegal conduct focuses in on the international and penal aspects of punishment.³⁸⁵ Defining environmental crime requires acknowledging that certain specific acts or omissions have occurred. This is relevant to discussing the environmental aspect in a transnational forum. Putting into the focus the global nature of environmental crimes is the subject of this dissertation, and the definition reads as followed:

Transnational environmental crimes, as defined in legal terms, refers to: (1) unauthorized acts or omissions that are against the law and therefore subject to criminal sanctions; (2) crimes related to pollution (air, water and land) and crimes against wildlife; and (3) crimes that involve a form of cross border transference and an international or global dimension. The third prong of the definition helps to lay the basic framework of the transnational character that embodies the environmental crimes in this dissertation.

Shaping and defining the international element of environmental crimes has been the work of many international protocols and conventions that deal with such matters. The discourse has been brought to the forefront of international psyche as illegal trade in ozone depleting substances, trade in chemicals, dumping in toxic wastes on land and sea, and the transportation

of these materials increases.³⁸⁶ There are numerous international initiatives that have expressly recognized the transnational character of certain environmental crimes by attempting to define certain offenses.³⁸⁷

Examining the geographic locations of various environmental crimes reinforces the sound notion that this form of conduct breaches multiple international boundaries. This analysis might include a closer look into the production of toxic materials, illegal trade at sea and land, trafficking in high threat regions, and terminal end points where these substances are illegally abandoned. Mapping such harmful practices can serve us by providing useful insights into how environmental harm is transferred around the globe, and by identifying who the responsible parties of these violations are.

Viewed from a global perspective, transnational environmental crimes can be four intertwined processes, each affecting the nature of world ecology.³⁸⁸ These categories are resource depletion, disposal problems, corporate colonization of nature, and species decline. The four layers of analysis illuminate some of the issues that threaten specific types of transnational environmental crimes.

The existence of these environmental infractions are partly determined through the complex processes of transference.³⁸⁹ Harm can move from one area to another. The difficulty in ascertaining the origin and dumping grounds of toxic hazards stems from externalizers that can make pollutants disappear from sight and record. The call for an international body to criminalize international environmental harm will provide the incentive for transparency in avoiding such loopholes. The illegal dumping of toxic wastes in developing countries constitute some of the worst aspects of the “not in my backyard” syndrome. The result is a massive movement of environmentally harmful wastes to the most vulnerable places and most exploited peoples of the world.³⁹⁰ This is an example of rampant violations in a small area that could be stymied by international law.

Environmental degradation at the transnational level is not only concerned with the harm being done at the national level, but it focuses more importantly on the issue of pollution. This is illustrated by the transfer of flora and fauna across various borders and into new ecological habitats. Tracking the movement of these types of harms are important in the development of remedies that can be applied through criminal sanctions. The Southern Ocean is prime example to illustrate the harm that can be avoided by a system of tracking and categorizing. This location

has become the slaughterhouse for whale meat to satisfy the Japanese black market. When the Japanese can no longer whale in their own national waters, then transnational space is where the whaling will now occur.

The global forum continues to provide cutting edge information on the emergence of new environmental crimes. For instance, the decline of fisheries off the coast of Somalia due to overfishing, has robbed the local inhabitants of their livelihood. A consequence of this reckless disregard for sustainable fishing is illustrated by the common fisherman entering a new line of work – most notably piracy. Environmental harm, legal or otherwise, can have spin off consequences that is felt across the borders of several states.

II. Limitations and Obstacles to the Emergence of International Environmental Crimes

This section of the chapter will examine the limitations of a fully functioning mechanism of international criminal law, applicable to the environment from an analytical perspective. Such international legislation and agreements are lacking in large part due to the separate doctrines of penal responsibility and environmental law.³⁹¹ States are continuously argued to consider the importance of punishing the most serious environmental crimes by international coalitions.³⁹² Unfortunately, reactions to these calls have remained relatively dormant. Recommendations have been made to provide for a supranational authority to be equipped with a wide array of remedies and criminal sanctions. This would support efforts in ensuring compliance with environmental protection laws by allowing academic recommendations for penal codes to be applied to environmental actions.³⁹³

Though these proposals aim to address severe international environmental crimes, they are quite limited in scope and purpose. For example, a Protocol I Prohibition centers more on regulating war rather than protecting the environment.³⁹⁴ In reference to environmental protection, UN efforts have not amounted to significant progress, and the Convention against Transnational Organized Crime eventually omitted any reference to the environment. None of these conventions attempt to deal with the growing global environmental threat.³⁹⁵

State sovereignty continues to be a limit on the international criminalization of harm to the environment. Sovereignty arguments have been used to undermine efforts for protecting the environment on a transnational level. The interplay between states interest in the development of their own lands, and the use of their natural resources, has cause many nations to fall back on this legal stance to protect self-interest.³⁹⁶ Sovereign states and their domestic laws have traditionally provided the legal mechanisms for regulating environmental issues. This has marginalized efforts of non-state actors hoping to regulate international environmental criminal law.

Sovereignty and adherence to this principle severely interferes with the ability of nation states to prosecute violators of environmental integrity. The continued resilience of the international legal order serves as a paramount obstacle to those who would lobby for stronger environmental protection.³⁹⁷

In the case of sovereign crimes, where the matter of “impunity” has taken center stage, hesitation in enforcing current criminal offenses has to do with traditional assertions of sovereignty. In many cases, the state that is attempting to enforce criminal law may be influenced by actors committing the offense. Interstate crimes are caught in between the intersection of competing state interests, which can stagnate efforts to penalize conduct. Nations may overall be keener on repressing transnational offenses, but the various locations in which the crimes are committed may make jurisdictional reach difficult.

There is an ongoing tendency for decision makers to ‘fit’ environmental crimes within existing penal definitions enumerated by the ICC’s jurisdiction. This is done often in order to bring strength to enforcement mechanisms so polluters may be criminally sanctioned. Such an approach severely restricts the application of criminal laws to perpetrators. The problem with observing harms against the environment under the existing framework is the fluid nature of the infractions and criminals who commit them. Environmental law can be more effective if it is buttressed to genocide, crimes against humanity, aggression, and war crimes. Only a very small proportion of environmental harms, even among those that sow devastation among human beings, overlap substantially with “core” international crimes. Moreover, these crimes typically require proof of complex elements that do relate with environmental degradation. Linking these two separate fields of protective law may reduce prosecutions. Waiting for environmental degradation to be genocidal, defeats the purpose of using criminal law as a first line of deterrence.

In addition to the difficulties linked with the limitations of international law based on ideas of sovereignty, a would-be international environmental criminal law must also face the challenges of a complex subject, the environment. Harm against the environment creates a problem of its own that is not primarily interstate or political in the narrow sense. Prosecuting environmental offenses that stir international harm may create novel problems of potential interference within the domestic affairs of nations. It also becomes very difficult to determine where responsibilities lie for prosecuting criminals. Failing to implement strong international laws to protect the environment is best analyzed as a specific manifestation of a broader lacking system to protect the global commons. This has been described and analyzed in this dissertation as the tragedy of the commons.³⁹⁸

Contrary to their best long term interests, states are sometimes blind to the decisions they have routinely made. These decisions include overlooking certain parties to prosecute. These failures may be incentivized by not wanting to be the dissident who seeks to repress certain parties.

The threat of criminal sanctions may deter countries and companies from participating in certain economically worthwhile activities that now fall under the criminal prohibition. This is due to the immediate prosecutorial costs, and more generally, because serious criminal legislation is likely to have substantial political and economic expenses. This takes place in a situation where nations will most likely not consider themselves bound by the international criminal legislation, and in turn, they reap the benefits of not subjecting themselves to the rules that apply to others. This is a classic free rider problem.

Theoretically, international criminal law could impede its own progress by creating a market that shirks responsibilities. If there is to be a penal code and a significant enforcement mechanism, it would most likely require a large global administration, possibly much broader and more powerful than the ICC. Some international environmental lawyers have even advocated that rooting sanctions in a criminal code will do more harm than good by alienating and polarizing member states.³⁹⁹

There are several characteristics of criminal law that can be viewed as imposing limits on the development of a strong international mechanism that serves to protect the environment. A basic blueprint of criminal law is to sanction acts that are wholly undesirable to society, but the environmental harms that are to be penalized cost society by generating alternative benefits.⁴⁰⁰

There are acts that cause the environment to suffer which are illegal versions of otherwise legal acts.⁴⁰¹ Unlike traditional criminal acts such as theft or murder, which are rooted in common law and defined within jurisprudence, environmental law has troubling drawing a distinction between legal and illegal conduct. This difficulty may make environmental criminal law seem like a balancing act that weighs the costs and benefits of each activity. When it comes to environmental crime, profit-making is made possible through the overlapping relationship between licit and illicit markets and the close connection between legal and illegal practices. The link between vested private interests (corporations profit maximizing), state interests and environmental harm is of great concern. This troubling aspect of defining and then punishing environmental criminal law might be an impediment to forming a governing transnational mechanism that addresses international crimes against the environment.

Another aspect of criminal law that is challenged in relating to international crimes against the environment is the preciseness of the harm itself. Environmental harm in its entirety is very damaging and is considered a crime in the totality of the circumstances. The troubling aspect is each step towards defining a level of serious environmental damage is usually unrecognizable and at worst negligible.⁴⁰² Traditional criminal law relies on clearly defined and immediate damage (murder, theft, property damage), and environmental crimes are unlike that in nature.

The scope of environmental crimes may over include those who are not the true perpetrators in any particular case. If an international body of law were to govern crimes against the environment, casual and proximate relationships to the environmental crime would surely be an issue. The further in time one stretches the horizon of harm, the more a particular result may turn out to be the acts of a great many individuals. If this governing body extends the range of liability and responsibility to everyone who has had some casual role in producing a certain environmental harm, the end result may be a concept of criminal liability that is so over inclusive, it would defeat the point of criminal law.

Many principles of environmental law are vague and unpredictable. They are intentionally designed to allow countries to define the demands and boundaries of criminal justice. Transnational environmental provisions typically rely on both soft law and customary international law instruments.⁴⁰³ This may raise concerns about the respect for the legality principle.⁴⁰⁴ Furthermore, both domestic and international versions of environmental law will

rely on certain agencies to enforce sanctions in a way that can raise serious concerns about the predictability of regulations.⁴⁰⁵

III. Arguments for International Environmental Criminal Law

When it comes to deliberate and egregious environmental damage, most criminal law theorists have agreed that additional steps need to be taken. Domestically, it has been noted that civil penalties lack the enforcement capabilities to deter fundamentally egregious environmental crimes.⁴⁰⁶ The strength of criminal law and its sanctions serve as an enforcer of certain international norms that would not otherwise be abided. Criminal prosecutions for polluters have been understood to work well, having a “very substantial effect” in regards to deterrence and compliance.⁴⁰⁷

The tragedy of the commons may make it difficult to set up a system of international criminal law (because such a system may only be effective if a very large number of states join it). In turn however, criminal law may be the answer out of the tragedy.⁴⁰⁸ Many attacks on the environment are decided in a cold calculated way, on the basis of perceived benefits. For example, corporations make conscious decisions to pollute in an effort to save on production costs. Criminalizing their conduct and prosecuting these companies may be the optimal way to deal with environmental crimes in this particular context.⁴⁰⁹

International criminal law sanctions will not only be enforceable against traditional polluters (state and corporate actors) but also targeted individuals. The modern reasoning behind this policy is because environmental crimes are often committed by individuals and not abstract entities. International criminal law is ideal for deterring illegal conduct done by non-state actors,⁴¹⁰ especially if states come to see themselves as the protectors of a certain transnational interest against the power of corporations.

Efforts towards greater criminal sanctions could lean on an increasingly strong connection between the international public order and the global environment. The protection of the environment on the global scale has been tied strongly to a plethora of other values inherent in the international system. This ultimately raises the legitimacy of its efforts. Governmental bodies like the United Nations Security Council enumerate expressly that the environment is connected to the protection of human life and some basic human values.⁴¹¹ It is also noted by such organizations that aggressive acts against the environment effect peace and security.⁴¹²

Further, there is a clear correlation between a damaged environment and poverty.⁴¹³ Attention seems to be gathering at the fact that there is a connection between the basic conditions of human life and the health of the environment. This will hopefully put in place regime that makes it a goal to connect the two in the future. This would produce a work public order that advocates for those rights.

Hungary serves as a tragic illustration of the consequences of environmental crimes. In early October 2010, “a thick red torrent of sludge [began to gush] from a reservoir at the metals plant 100 kilometers south of Budapest....”⁴¹⁴ During the tragedy, nine people lost their lives from the surge, and hundreds more were physically harmed by the toxic sludge as it penetrated the local communities. “The toxic sludge reached the Danube River several days later, from where it could flow into six other European countries before reaching the Black Sea: Croatia, Serbia, Romania, Bulgaria, Ukraine and Moldova.”⁴¹⁵ In one environmental tragedy, numerous lives, indigenous species, and countries were affected.

Another indirect result of environmental crimes is green-house gas emissions. The unrestrained emissions of carbon dioxide into the atmosphere have been linked to global climate change. Studies have shown that higher temperatures impact power generation, water reserves for local and national populations, national security, and food production. “For example, in a single year in 2003, melting reduced the mass of Alpine glaciers in Europe by one-tenth, and tens of thousands of people died due to the severe health wave (European Environment Agency, 2010).”⁴¹⁶ Furthermore, the change in climate will intensify and accelerate natural disasters that we have seen in recent years. These hurricanes, cyclones, mudslides, floods, and severe droughts will create a massive humanitarian issue that will require global parties to find solutions in the immediate. Whether solutions can be found once the climate reaches a tipping point is still to be seen.

Increasingly, the environment has been presented as an asset whose ruin constitutes a violation of criminal provisions. The Articles on State Responsibility included a notion of international environmental crimes that aimed to safeguard the human environment. It expressly prohibited against mass pollution of the seas and atmosphere.⁴¹⁷ Supporters of this type of regime have argued that there are concrete obligations that flow from the international community into the general public. This should be done with the inalienable intent to protect the environment.⁴¹⁸

Currently, the existing legal infrastructure is not designed to bring environmental violations under criminal law. However, in light of recent events including the changing climate, more scholars have proposed and are vouching for such developments. As discussed *supra*, Polly Higgins has defined Ecocide and has made the term an effective criminal definition to bring violators to justice. “However, the likelihood that the United Nations, dominated by the carbon dependent and carbon profiting nations of the global North, would establish ecocide as an international crime is slim.”⁴¹⁹

Moral consistency is also a factor that plays into the support of the criminalization. International criminal law already sanctions acts that cause widespread and severe damage to the environment during wartime. It seems difficult that the same policy should not apply during peace.⁴²⁰ Environmental crimes are more akin to crimes against humanity, which would fit nicely into the international criminal category enumerated by many international law theorists. This category elaborates on illegal acts that are known widely across the community of nations as crimes against humanity.⁴²¹ The argument flows naturally that grave crimes against the environment, because of their perverse nature, are in fact a crime against humanity. Therefore, parties should be punished as such and by the regimes that are in place to punish the existing articulated humanitarian crimes.

As the introduction of an international criminal law and its application to the environment develops, there will be discussions to address the details of what actions should be illegal, and the specific circumstances of enumerated degrees. There is a base for setting up a matrix because there is already a scheme of legal and illegal uses of the environment (as seen in treaties such as Protocol I and in domestic law statutes). A reasonable concern is the articulation and prosecution of long term impacts of environmental damage, but these can be addressed by models that already exist.

Finally, the character of international environmental law need only be a concern in respect to the principles of legality and the definition of categories for prosecution. It is noted that much of the existing international criminal law relies on broad standards contained in treaties. These articulate what an international offense is, and the standards that have been successfully illustrated and implemented. At worse, the vagueness of international environmental crimes is a result of its infancy.

IV. Criminalization

A. *Nature of the harm*

International environmental law touches upon various issues. They include clean air, water, regulation, and the management of toxic substances and waste. Environmental treaties are layered upon common law and international norms that have led to modern day approaches to environmental protection. Over the last 30 years, this area of law has further developed.⁴²² Most treaties and international conventions have established broad regulatory goals. These agreements then leave detailed regulation to the individual states and agencies.⁴²³ The agreed upon treaties, convention provisions, and its accompanying regulations, coupled with land use regulations and tort law, attempt to reduce environmental damage in the aggregate.

International environmental law focuses primarily on damage to nature and its human rights implications. This particular method shows the various harms that might bring claims against the criminal actor. The law should investigate the consequences of environmental harm by analyzing duration, severity and geographic scope.

i. Geographic Scope

The geographic reach of environmental damage varies greatly. The greater the area of the geographic scope of damage, the more likely it has negative impact on humans who are in the vicinity of the harm. For example, in *Beanal v. Freeport-McMoran*, “Freeport-McMoran’s mining operations in the Irian Jaya region of Indonesia destroyed 15.4 square miles of rainforest, poisoned a lake, and noticeably impacted people living within three hundred kilometers of the mine.”⁴²⁴ There is a great probability that a swath of destruction, similar to that seen in Indonesia, will have important human repercussions.

Geographic scope also engulfs the location of the damage and defines the total nature of that harm. The significant concern surrounding the Three Mile Island incident was its geographic proximity to New York City.⁴²⁵ Chernobyl’s location near the Ukrainian capital of Kiev played a significant role in that tragedy’s human costs.⁴²⁶ When international environmental harm occurs close to highly populated areas, the probability that humans are harmed, either directly or

collaterally, increases significantly. This is especially true when the local population lives directly of the land.⁴²⁷

ii. Severity

The severity of harm is central to the question of whether the harm itself qualifies as an international violation of environmental law. Contemporary waste treatment plants that operate within normal pollution standards generally produce less waste than oil spills and open pits. A nuclear incident of course overshadows all any of these forms of pollution. As the risk of activities increase, so should the precautions. Unfortunately, when extra steps for safety are not taken, the likelihood of harm increases to the environment and human populations. Simply stated, low-level environmental pollution pales in comparison to larger scale violations.

The pattern of the damage should also instruct international organizations that are assessing the severity of the damage. Currently, there are numerous ongoing violations that are harming the environment. When oil spills, openly stored toxic waste, and dangerous gas flares occur together, as they did in the *Social Rights Action Center for Economic and Social Rights v. Nigeria*,⁴²⁸ a stronger claim for abuse under general environmental obligations is appropriate.

iii. Duration

The extent of time that environmental damage is ongoing, directly affects the severity of the harm. Duration touches not only to the time span of the illegal conduct, but also to the amount of time that the negative impact can be seen on the affected people who have been harmed by the environmental damage. “Some problems, such as the destruction of forest and farmlands through persistent acid rain, have minimal immediate impacts but massive long-term ones. Other problems may constitute both a short-term nuisance and have long-term health impacts.”⁴²⁹ “Flaring gas and improper toxic waste storage, similar to Shell's oil production process in Nigeria, create air and water pollution that not only impacts people at the time of exposure, but it also poses health risks over time.”⁴³⁰

Bhopal, India provides an example of how a gas leak over time seeped in to the water supply and contaminated ground water.⁴³¹ Ultimately, a great many more people were injured by

the contaminated water than the original gas leak.⁴³² The damage is generally greater when the environmental harm continues to linger and magnify.

B. *Mens Rea*

As a group, major environmental treaties criminalize virtually every known violation of regulations, including operating without a permit when one is required, violating any substantive regulatory requirement, and violating recording and reporting measures. This “knowing” requirement creates a broad criminal net, which piggybacks on a full range of environmental regulations. This places a heavy burden on the “knowing” requirement in assessing transnational environmental crimes.

To “know” one's conduct has been interpreted and debated by the courts. It does little to differentiate between the civil and criminal spheres of the environmental statutes. This interpretation has been explicated and debated elsewhere at length.⁴³³ Though it is frequently suggested that we eliminate mens rea from environmental criminal statutes, a more careful examination of the “knowing violation” doctrine indicates that it is helpful in providing the basis for what little separation there is between civil and criminal environmental violations.

A similar view *mens rea* requirement comes from the public welfare doctrine; criminal liability's usual requirement of proof of evil intent is relaxed in the context of regulatory offenses designed to protect public health and safety. The rationale behind the public welfare doctrine is twofold. First, the public does not have the means to protect itself from the harm the regulations it seeks to avoid. Second, the offender is dealing with a dangerous substance and should know that his activities are heavily regulated. In other words, the defendant must be aware of the criminalized actions and know all of the relevant facts that make his activity criminal. However, the defendant need not know the law criminalizes his behavior. As a result, “innocent” defendants, to the extent that they are ignorant of the illegality of their actions, may be reached by the criminal statutes.

The application of the “knowing” distinction to the material facts that constitute the violation of an international treaty or convention is both slippery and controversial. It is clear that the defendant need not know that she is violating a regulation or permit, but the question remains how much she should know concerning the facts that make her actions a violation. Instructive to this inquiry may be holdings by the courts in the United States.

In *Weitzenhoff*, the Ninth Circuit required proof that the sewage treatment plant managers were aware that they were discharging pollutants. They did not know that they were discharging six percent more pollutants than the permit allowed.⁴³⁴ According to the applicable regulations, the legal permit level is a law where knowledge of the element involved in the offense is not required. In *United States v. Hopkins*, the Second Circuit reached the same result. It held that the defendant need not be aware of the regulatory “proscription,” just the acts that were “proscribed.”⁴³⁵ Rather than holding that knowledge of the proscription was not an element of the offense, the Second Circuit held that it could be presumed, given the obviousness of stringent government regulation in this area and the fact that the defendant was issued a permit.⁴³⁶

In two situations however, the “knowing” requirement as it pertains to material facts still has real enforcement powers. First, it creates a mistake of fact defense for those who innocently and truly believe that they are engaged in conduct other than prohibited illegal activity. Second, it creates a more technical defense based on either mistake of fact or lack of awareness of the ancillary elements of the complex criminal provisions. Both situations provide minimal separation between the criminal and civil regimes under the environmental criminal treaties. The mistake of fact principle is firmly accepted within criminal law. It is the counterpart to the excluded mistake of law excuse. Though the distinction between these two is fine and can become confusing,⁴³⁷ it is the kind of determination the courts can be relied on to particularize and make concrete through the exercise of the tools of international criminal law adjudication.

The Rome Statute defines its mental requirements under Article 30 to be intent or knowledge. Under Article 28 (2)(a), the concept of command responsibility includes recklessness. The requirement of reckless takes away the burden of prosecutors that must normally show the violating party had actual knowledge or should have had knowledge of their illegal acts. Rather, they must only show that their conduct was reckless, and this recklessness was the proximate and actual cause of the violation. The most serious crimes in both war and peace should have the requirement of recklessness as the state of mind standard to put a lower burden on prosecutors, and increase the reasonability taken by individual corporate officers.

IV. Corporate Liability and Responsible Corporate Officer Liability

A. *Corporate Liability*

Corporations are generally accepted as part of the definition of “persons” used in international environmental law treaties. As persons, they should be prosecuted for violations of international environmental laws. Corporate liability for environmental crimes is “based on the imputation of agents' [or employees'] conduct to a corporation, usually through the application of the doctrine of respondeat superior.”⁴³⁸ Liability can also exist for corporations, their subsidiaries or predecessors even though criminal liability has not been found. Rather than attempting to attach criminal liability to the corporation itself, the common trend has bucked this notion and began to attach penalties to the corporate officers.

Using American judicial interpretation as instructive, under certain circumstances the acts of a corporation's predecessors can create liability for the corporation. “A corporation is not responsible for the liabilities of its predecessor unless one of four exceptions applies: (1) the successor expressly or impliedly agrees to assume the liabilities of the predecessor; (2) the transaction may be considered a de facto merger; (3) the successor may be considered a “mere continuation” of the predecessor; or (4) the transaction is an effort to fraudulently evade liability.”⁴³⁹ It seems to show that corporations can be wholly, severally, or jointly liable for its and their employees criminal infractions that result in a violation of international environmental treaties.

As discussed *supra*, current existing self-regulation schemes are unable to effectively combat violators of international law. The urgency for remedying such conduct is widely apparent. The Stockholm Declaration signified the need to international cooperation in order to create and put in place novel solutions. In light of this analysis, and in line with contemporary activist movements, scholars have argued that international criminal law should be used as *ultimo ratio* to sanction violators, and end the international corporation's ability to evade prosecution.⁴⁴⁰

When observing existing criminal law, it is plain to state that the law itself is designed to identify, associate, and punish blameworthy human behavior. Corporations however have been able to evade this identification and punishment process because of their quasi-personhood status. There are some international agreements however, such as the Basel Convention on Hazardous Waters that create criminal liability for corporate entities. The international community should not by itself be charged with holding corporations responsible. In a day and

age of the internet and mass communication, the social importance of corporations is booming. Private citizens and the corporations themselves should understand the *social* impact of violating environmental integrity.

Criminal law has the potential to imprison and remove the freedom of certain violators. This is a major benefit over strict civil penalties that are confined to monetary fines. A criminal conviction of a multinational corporation would be a significant step shifting the status quo of corporate business. This shifts the ability of corporations from doing a simple cost benefit analysis when harming the environment, to an analysis of fear of imprisonment for failing to follow the law. This will make it more likely that corporations follow the law rather than circumvent it or blatantly violate the rules.

B. Piercing the Corporate Veil

The legal doctrine of Piercing the Corporate Veil (PCV) allows for victims of corporate wrong doing to attach directors and shareholders to civil proceedings for damages, effectively merging the individuals who own and operate the corporation with the company itself. Throughout the world, this doctrine has developed differently, and this dissertation gives a brief overview of how PCV is observed in legal systems in Europe, the United States and China. In the context of environmental crimes, PCV sets the stage of understanding how individuals can be liable for actions of the corporation (or themselves). There are two instances when this is applicable, 1. When the corporation commits an offense and a director/parent or subsidiary company is held liable for the breach, or 2. When the director/parent or subsidiary company commits an offense and the corporation serves as a shield for the actor's wrongdoing. In both instances, PCV in civil matters lends perspective on how to implement penal mechanisms for corporate actors.

Under U.S. law, the PCV doctrine varies as one shifts through contract and tort actions. "Generally, the corporate veil will not be pierced unless: 1) the corporate shareholder dominates the corporate subsidiary, and 2) the corporate shareholder has engaged in fraudulent or illegal conduct or other 'improper conduct' which has generated an injustice."⁴⁴¹ Under the American system, courts generally do not allow for piercing unless there is an exceptional circumstance where the "separate corporate entity is used to evade an obligation or statute, to perpetrate a fraud, or to commit a crime."⁴⁴² The State of Delaware, a leading state in the creation of

competent corporate law in the U.S., only allows PCV when it is in the “interest of justice, upon the showing of fraud, contravention of law or contract, public wrong, or where equitable considerations among members of the corporate require it.”⁴⁴³

The German system has a specific statutory regime to regulate corporations and parent companies. These corporations, unlike their American but like their British counterparts, must annually disclose financial information. They must also satisfy a minimum capital requirement.⁴⁴⁴ Furthermore, the standard of care that each director must apply is stringent. “The standard is absolute, and even slight negligence may result in liability. This strict standard contrasts with the lower negligence standards and the business judgment rule found under both U.S. and U.K. law.”⁴⁴⁵ The German system provides a better model to set up a legal system that allows for individuals to be held liable under corporate law for their own wrongdoing.

PCV in the U.K. is very similar to the U.S. because both nations’ laws are “premised upon the principle that the corporation is a separate entity, subject only to exceptions in unusual cases.”⁴⁴⁶ The legal philosophy places a corporation as a stand-alone subject that must have some extra level of control that is exerted upon it to create liability. English law has also been defined by judges under its common law that outlines certain situations where the veil maybe pierced. This includes occasions of fraud, criminal activity, the avoidance of debts, and a specific matter when “a suit [is initiated] for damages arising from an individual shareholder’s use of corporate funds to obtain control of a public corporation.”⁴⁴⁷

China officially introduced the doctrine of PCV in 2005 when it enacted a company law overhaul. Unlike its western counterparts, China has explicitly codified its veil piercing laws. The central provision states, “Where the shareholder of a company abuses the independent status of the company as a legal person or the limited liability of shareholders, evades debts and thus seriously damages the interests of the creditors of the company, he shall bear joint liability for the debts of the company.”⁴⁴⁸ Under the jurisdiction of Chinese courts, three main elements must be satisfied before the PCV doctrine can prevail. They are, 1. Misconduct, 2. Intent, and 3. Consequence.⁴⁴⁹ An instance where Chinese Law differs from other nations is that it only allows creditors to pierce.⁴⁵⁰

Countries across the world each use their own method of common law and statutes to allow government entities or individual parties to pierce the corporate veil. The method of doing so is relevant for measuring the liability of those who have broken environmental criminal law.

When a director or group of shareholder commit illegal acts that further corporate interest, while degrading natural public resources, enforcement mechanisms should have a clear cut picture of who they can prosecute. It is possible to merge western legal doctrine that allows for PCV when the actor has committed fraud or an illegal act, with the codified structure of the Chinese. This could bring greater clarification to an international body charged with bringing corporate criminals to justice, especially for environmental crimes.

C. Corporate Officer Liability

The Doctrine of Responsible Corporate Officer (RCO) lends itself very well to the notion of corporations who violate international environmental crimes, and the theory that the corporate officer in charge shall be held criminally responsible for those environmental harms. Under the environmental statutes, most criminal sanctions apply to any “person” who violates a regulation. The RCO doctrine generally changes the scheme of liability from that of the corporation to the individual officer. The doctrine does not require the government to pierce the corporate veil or show that the officer personally perpetrated or otherwise participated in the wrongful act. If the government proves that the defendant was a corporate officer who failed to use his or her authority to assure that the corporation complied with laws and regulations, the government may hold the defendant individually responsible under the RCO doctrine as an alternative theory of liability.

Imposing personal liability on corporate officers is an important means of achieving deterrence. This allows a greater the number of avenues for finding personal liability. It is significant that courts and other administrative agencies are beginning to distinguish the RCO doctrine from other theories of liability. By making this distinction courts and agencies added a new tool to the enforcement arsenal by providing another vehicle for holding corporate officers responsible for environmental violations. That is, the RCO doctrine can be applied where other theories of personal corporate liability may fail.

The application of the RCO doctrine will encourage environmentally compliant behavior, facilitate the intent of the primary international environmental treaties, and eliminate inconsistent enforcement of those treaties. Furthermore, the majority of the international legal communities’ resources that are dedicated to environmental enforcement are spent in the civil arena (for injunctive relief and penalties). Unfortunately, this financial backing does not support the

prosecution of the most egregious, and far less common, “knowing” criminal offenses. The philosophy of the RCO doctrine is to hold individuals responsible for civil penalties and necessary criminal sanction when avoidable violations occur.

VI. Internalization

The current status of the internalization of environmental criminal law can be found in many treaties. They provide transnational guidelines for crimes to be drawn and the burden to be placed on individual states to enforce these provisions. The thought is that by and large, enforcement of these provisions are not suited for the international community to proctor.⁴⁵¹

Academic observers of both international environmental protection and international law warn against entrusting individual states with too much responsibility when it comes to enforcing provisions and sanctions. Internalization of these provisions is presented as paramount to the administrative necessity. This is due to the lack of incentives states have to launch their own criminal statutes and protect the environment; this includes a lack of willingness to enforce provisions.⁴⁵² Left to their own sovereignty, states will either fail to criminalize or do so in a way that cherry picks the harms that do not sufficiently provide justice to those who have sought relief.

Further, even if states do criminalize independently, the fact that there are varying environmental regimes still creates incentives for environmental “dumping.” The international nature of many environmental crimes increases the risks of competing jurisdictions. This arises when one state exercises jurisdiction frustrating the protection of the public order of another. It can also lead to a waste in prosecutorial resources.

The creation of common international environmental offenses would at least have the merit of reinforcing the cooperation of judicial bodies. The lack of supranational offenses designed to protect the environment create conditions for the assertion of “creeping” domestic jurisdiction, where states take advantage of the void that festers a lack of regulation. For example, “the U.S.’s Oil Pollution Act criminalizes pollution in the High Seas in a way that is not normally contemplated by UNCLOS” (which the US has not signed).⁴⁵³ The delicate balance exists between the freedom of the seas the protection of the marine environment.

Legitimacy of international law has certainly flowed from a perception that it was dealing with problems that were inherently “international.” Typically, the argument is that when “there is

something involved that is too serious or important for the international community, the matter to be entirely delegated to states and domestic law – even if domestic systems might conceivably be up to the task.”⁴⁵⁴ It is important to acknowledge that there are symbolic factors at work.

First, there are notable historical antecedents to global crimes, and international environmental crimes are slowly being considered part of this penal category. Inflicting grave harm on the environment might be the modern-day equivalent of piracy; either because it actually occurs on the High Seas or⁴⁵⁵ it occurs concretely on the territory of a particular state.

Second, some parts of international criminal law seem to already have evidence of a new “global” approach. This pathway is still being matured and has not received much attention. UNCAC for example, does not go as far as to describe the various crimes it creates as “international crimes.” It does however mandate states to criminalize a vast field of infractions that contradict the principles of global communal life (corruption, bribery, money laundering, etc). These provisions would undoubtedly support the global interest by undermining forms of exploitation, oppression and violence which would undermine the minimally functioning domestic international order.

Lastly, the broad evolution of international environmental law has clearly been moved in the direction of tackling threats to the global environment, rather than domestic harms. The argument might be that a number of phenomena analyzed domestically do not by themselves suffice to constitute a crime, and that it is only by seeing them in their aggregate dimension that one can take in their full significance. It is argued since environmental problems are inherently of a global nature, so should be their regulation. In turn, it would seem to make sense that international environmental criminal law should ultimately follow the preferred route of its subject matter, rather than international criminal law’s own logic.

CHAPTER 6

ESTABLISHMENT OF AN INTERNATIONAL ENVIRONMENTAL COURTE

I. Necessity of an International Environmental Court

The Rome Statute sets out grave crimes for the International Criminal Court as “crimes that threaten the peace, security and well-being of the world” and “atrocities that deeply shock the conscience of humanity.”⁴⁵⁶ Over the past six decades, the international community has established fundamental treaties that have shaped international customary law in the areas of war crimes, crimes against humanity, genocide, water rights, and enforcement. However, it must be noted that with few exceptions, international crime “violations of civil and political rights and do not cover the serious violations of international economic, social, and cultural rights and international environmental law that are of direct relevance to sustainable development.”⁴⁵⁷ The current context of environmental crime is limited to war based crimes that prohibit certain acts and degrees of violence. For example, genocide, the usage of chemical and biological weapons, and the treatment of civilians and prisoners during conflict have all been addressed through international agreement.

In light of recent political and historical incidents, the international focus on crimes of war and mechanism of peace are understandable. However, the exclusion of other violations of international law has had severe consequences for the victims of such acts. This problem is captured for illustration when we observe that current law punishes long-term damage to the environment through acts of warfare; however when the environmental damage itself is caused with no relation to acts of war, no criminal statute is invoked to challenge the perpetrator. As discussed below, international violations of ICESCR such as the right to not be medically experimented on during war time, or be starved, are acts that can also be achieved outside the context of war. In this situation, violations against health and food supplies would not violate international law. This proves to show that violations of existing criminal law schemes remain deficient and parties may still violate with impunity on an entire range of conduct that attacks the pillars of sustainable development.

These gaps in the international enforcement of cultural, social, and economic rights are difficult to close with the powerful interests such as corporations who are invested in combating such implementation. “As noted by the U.N. Special Rapporteur for Business and Human Rights, a patchwork of weak, non-existent, or inadequately enforced laws in both developed and developing states has resulted in gaps in the governance of transnational corporations operating in developing countries.”⁴⁵⁸ These loopholes have allowed corporations to proliferate their profits as they target and expand the lack of regulation.

The lack of ability to penalize violators of these gaps has pushed governments to install legislation that holds parties *civilly* liable for infractions. However, even this mechanism falls short. As illustrated by the Chevron-Texaco case, civil enforcement can be greatly perverted to meet the needs of the corporation. The costs placed on the judicial authorities charged with hearing the cases, the costs placed on private parties bringing suit against violators, and the easily corruptible authorities in certain nations all make this form of enforcement weak in form and execution. Most importantly, civil liability does not capture the gravity or the moral blameworthiness associated with crimes against the environment.

This Chapter argues that a court of universal jurisdiction over environmental crimes is necessary. After numerous disasters created by corporate and individual actors, it has become apparent that national law enforcement has been ineffective in deterring the degradation of the environment.⁴⁵⁹ An International Environmental Court (IEC) must be established in order to combat the widespread harm caused to the environment that is not only unpunished but supported.⁴⁶⁰ The call for an IEC presiding over environmental crimes finds its base in the fundamental connection between the preservation of life and environmental damage, between human rights and the human environment.

The argument logically follows that environmental rights and protection are a part of fundamental privileges enumerated by several international bodies that aim to prevent and sanction abuses of core human rights.⁴⁶¹ There has been an increased awareness generated by major environmental disasters, along with a growing international economy and global communication. This has caused an increase in the belief that states and private parties should have an obligation not to harm the environment in a way that is so severe that it causes grave risks to the life and well-being of humans.

Even in light of these facts, it is only within the last quarter century that the International Community has begun to realize that an IEC is the correct forum to address the need for universal environmental protection.⁴⁶² With this realization, an analysis is warranted to evaluate and argue the appropriateness of the establishment of an IEC to serve as a forum for sanctioning grave environmental damage.

II. Environmental Destruction Is a Fundamental Human Right

Awareness generated by major environmental disasters has caused an increase in the belief that states and private parties should have an obligation not to harm the environment in a way that is so severe that it causes grave risks to the life and well-being of humans. It is still true that the exact moment at which environmental harm crosses the threshold of a human rights violation remains uncertain.⁴⁶³ Furthermore, it remains very difficult to identify boundaries between illegal conduct which qualifies as a violation of a fundamental human rights and its relation to an environmental breach of duty.

Customary international law has been defined as a legal body of accepted norms that branch from general practices of states that owe each other a uniform legal obligation. This obligation cultivates the formation of customary law over an extended period of time. The state practice of following these norms has, now developed into *jus cogens*. The International Court of Justice (ICJ) has held, “Multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.”⁴⁶⁴ Unanimous conformity with a universal norm is not required for it to be defined as an obligatory custom. The ICJ has stated it is “sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule.”⁴⁶⁵ The natural environment is essential to life,⁴⁶⁶ and this right to life is the most fundamental principle within *jus cogens*, without which no other right can be exercised.⁴⁶⁷ It is well established that customary international law requires the basic minimum standard that grave environmental harm, threatening the life and nature, is not acceptable.

Recently, there have been numerous conventions, and agreements established international tribunals that have reinforced the conclusion that grave environmental harms constitutes a basic violation of customary international law. The repetitive practice of states,

through the mechanisms of international and state law, illustrates a clear *modus operandi* in being bound to customary legal obligations. States have adopted over 1000 bilateral agreements designed to protect the environment.⁴⁶⁸ Over 50 nations have memorialized, in their national constitutions, an affirmative obligation to protect the environment.⁴⁶⁹ Furthermore, over 100 states that attended the World Conference on Human Rights, declared that the illegal dumping of toxic waste threatens the right to life, a fundamental human right.⁴⁷⁰ The practice of the International community has been to apply local law to civil and/or criminal liability on perpetrators for the most severe environmental crimes.⁴⁷¹

The duty not to cause grave environmental harm has been witnessed in adjudications by many international tribunals. These bodies have recognized that environmental dangers that pose a severe risk to the health humans is forbidden, and they have penalized the act of causing such danger under customary international law.

The first of all cases to observe this concept of international environmental law is *The Trail Smelter* case, which expressly recognized that international liability may stem from supranational actions that cause grave environmental harm.⁴⁷² In another case, the U.N. Human Rights Committee handed down a ruling that dumping of nuclear waste on a large scale is grounds for a *prima facie* showing that a violation of the right to life has occurred in *Article 6(1)* of the *International Covenant of Civil and Political Rights*.⁴⁷³ That Committee further noted that the scope of any state's autonomy to achieve economic prosperity was limited by the direct obligation to maintain human rights protections under international law.⁴⁷⁴

Beginning in the late 1970s, the International Law Commission decided that a state's "serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment" violates principles that "have become particularly essential rules of general international law."⁴⁷⁵ The breadth of scholarly opinion, together with judicial authority in this field, supports the proposition that the duty to prevent the most serious forms of environmental harm, in particular harm that is transboundary in nature, has attained the status of custom. It has become a part of the group of fundamental human rights that are to be protected by customary international law.⁴⁷⁶

III. The History, Failure, and Need for an International Environmental Court

A. *The History of Proposed International Environmental Courts*

The first expression of an International Environmental Court was first suggested in the late 1980s. This came to the forefront of discussion in Rome by the International Court of the Environment Foundation.⁴⁷⁷ There was a suggestion that urged for a new administrative authority within the appropriate UN organ. This suggestion was proposed during the Hague Declaration on the Environment. It called for an administration with the sole purpose of confronting global warming concerns. Furthermore, the enforcement mechanism argued for would be armed with the right to make decisions concerning the cases it held jurisdiction over.⁴⁷⁸

In the late 1980s, the *Congress on a More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations* urged for a tribunal to establish an inherent right to a clean and flourishing environment. It further requested that a stable world administration be enacted to inspect and sanction crimes against this inherent right.⁴⁷⁹ Further conventions on an IEC were held in the early 1990s. There was a particular meeting in Florence where procedural rules of an IEC were debated.⁴⁸⁰ In the late 1990s, there were advocates of an IEC but their calls were squarely rejected by the heads of UNEP.⁴⁸¹ The articulated reason for rejecting the IEC revolved around a concern over the authority that the court would have in regulating penalties against states that did not comply with environmental statutes, as well as private corporations that disregarded these environmental laws.⁴⁸²

Possibly the most detailed proposal for an International Environmental Court came at the National Academy in Lincei in the late 1980s.⁴⁸³ The IEC proposed during this meeting would be controlled by an administration that centered its principles on human and environmental rights, in which an inherent right for each individual was attached to a safe and healthy environment.⁴⁸⁴ This meeting led to a draft completed in 1992. It explained that states are to be legally liable to the entire international community for harm to the environment that is caused within their own borders. They must further take every possible measure to circumvent this damage.⁴⁸⁵ Rights under this provision include in relevant part:

- (a) the fundamental right to the environment; (b) the right of access to environmental information, along with the duty to provide such information; (c) the right to participate in procedures involving the environment; and (d) the right of the private sector . . . to take

legal action in order to prevent activities that are harmful to the environment and to seek compensation for any environmental damage.⁴⁸⁶

B. Failures of Previously Proposed IEC's and the Glaring Need For A Functional IEC

There does not exist any functioning judicial tribunal with explicit mandatory jurisdiction, right to monitor and observe, or legally-bind parties to enforce or sanction globally corporations and nation-states. There exist only a few treaties that allow for the monitoring of parties who do not comply with international law.⁴⁸⁷ The International Court of Justice (ICJ) technically has power to exercise jurisdiction over international environmental cases, but has not exercised this power in nearly 40 years. Furthermore, this unused jurisdictional power is expressly limited to conflicts between state parties. This implicitly secludes private citizens, corporations and NGO's from procuring legal standing in these types of cases.⁴⁸⁸

In the *Gabcikovo-Nagymaros* case,⁴⁸⁹ which concerned environmental harm, the ICJ shirked from its jurisdictional power and did not rule on the environmental dispute. Instead, it deferred to a previous agreement to control the outcome of the case. The European Court of Justice (ECJ), the European Court of Human Rights, and the Council of Europe have been forward thinking in regards to enacting international environmental laws that are capable of facilitating proper resolution of disputes in regional forums. The ECJ will generally grant standing to NGO's and private citizens in matters that concern the application of the European Union's regulations pertaining to the environment.⁴⁹⁰ The European Court of Human Rights has utilized international human rights to increase the view of environmental protection, but it has failed to extend the thrust of its jurisprudence in subsequent cases.⁴⁹¹

At the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment,⁴⁹² The Council of Europe submitted for signature a Convention on the Protection of the Environment Through Criminal Law. This agreement asked member states to enact domestic statutes to establish crimes specified as environmentally harmful, without regard to the accompanying *mens rea* requirement for illegal conduct.⁴⁹³ Nevertheless, the depth of these efforts remain regional. The regulations have limited reach; their purpose remains incomplete and insufficient from the perspective of proponents who are promoting comprehensive international protection of the environment.

In the international forum of criminal law, the Statute of the International Criminal Court (ICC), which has expressly defined its jurisdiction over the gravest international concerns, does not expressly confront the issue of its jurisdictional power to prosecute environmental crimes. In Article 22 of the Statute of the ICC, the provision ensures that jurisdiction over environmental crimes by the ICC would need amendment of the Statute.⁴⁹⁴ This absence of power from the ICC's jurisdiction is a cause for concern in light of the language in Article 19(d) of the International Law Commission's Draft Articles on State Responsibility. It states that "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment" shall constitute an international crime.⁴⁹⁵

Evident from the lack of compliance with these international conventions that national courts have instituted in adjudicating crimes against the environment, there is strong advocacy for an international court to exercise universal jurisdiction over such cases. The need is ripe for a world-wide coordination of these existing international courts and tribunals. This could be accomplished by International Environmental Court.⁴⁹⁶

International treaties addressing the enforcement of penal provisions against international environmental crimes and their progeny are insufficient to handle the depth of environmental crises.⁴⁹⁷ The inherent problem that seems to be incurable is that the treaty process that is insufficient and unable to be an effective channel for curing the rapidly increasing environmental harms. This is a consequence of the current system as treaties take an unduly amount of time to be effective and reach their enumerated goals. The 1992 United Nations Convention on the Rio Declaration of Environment and Development is instructive for the inherent problems of treaty implementation. In the aggregate, this treaty moves the international environmental criminal law systems in the right direction, but a learned analysis of the treaty uncovers that there are extremely vague doctrines. Additionally, the regulations imposed in the treaty are not accepted by all states. The United States has taken direct reservation to many of the principles that provided the true enforcement powers of a treaty in combating grave environmental harms.⁴⁹⁸ This is an example of the typical ineffectiveness of international environmental criminal treaties, and it only supports further the need for an IEC.

C. Expansion of Existing Courts

Another method of achieving the same goals as International Environmental Criminal Courts is expanding currently existing regional courts to administer the same jurisprudence. A prime example of this would be the African Court of Justice and Human Rights which is currently seeking to expand its jurisdiction and judicial power. Similar to the European Court of Human Rights and the Inter-American Court of Human rights, the African counterpart's purpose is to "hold accountable states whose action or inaction violates their residents' human rights in contravention of states' treaty obligations."⁴⁹⁹ There are additional courts that are forming to achieve the same purpose "such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda."⁵⁰⁰

The earliest regional courts used a method which can be implemented in early levels of expansion. The doctrine of concurrent jurisdiction allows "at any stage of the procedure, the International Tribunal [to] formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."⁵⁰¹ This in turn grants jurisdictional power to the international body over matters of criminal concern. In relation to existing international courts, this serves a method for them to establish their integrity as a judicial body. This is in contrast to the ICC's complementary jurisdiction scheme where the court exerts its purview when a domestic court is unwilling or unable to commit to investigation, prosecution and sentencing.⁵⁰²

Placing appropriate importance on regional courts is crucial in understanding the larger picture of international jurisprudence. As this dissertation approaches the ICC as a model, a large international tribunal is not the only method to achieve successes in prosecuting environmental crime. There are regional bodies that are capable and willing to investigate and prosecute environmental criminals. As they grow, they can seek to implement the concurrent method of jurisdiction. This will allow greater cooperation from the regional tribunal, without them impeding on sovereignty of nation states.

IV. The International Criminal Court as a Model for an International Environmental Court

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the final statute for what became the world's first International Criminal Court.⁵⁰³ The Rome Statute created a court with "jurisdiction over the

most serious crimes of concern to the international community”⁵⁰⁴ This Statute gave the International Criminal Court jurisdiction over crimes against humanity, war crimes, the crime of genocide, and the crime of aggression.⁵⁰⁵

The primary principle of this Court is to address human rights abuses without expressly extending its jurisdiction over grave environmental crimes that deeply deprive humans of safe and healthy environments. The only express mention of environmental sanctions in the Rome Statute states, that it is a war crime to “intentionally launch an attack in the knowledge that such attack will cause... long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”⁵⁰⁶

Advocates of an IEC assert that there are many challenges that have stymied existing transnational courts. These obstacles can be solved by creating or granting power to an international judicial body. The ICC has taken many steps to define and prosecute the core crimes enumerated in its governing statute and under its jurisdiction. Similarly, the advocates of an IEC recognize the same care needs to be taken for a network of independent nations in the international environmental community. This will allow individual states greater ability to submit jurisdiction and police power to an IEC.

Section A below will argue that the ICC already has the power to exercise jurisdiction over grave environmental crimes. This stems from the understanding that serious crimes against the environment automatically endanger the right to life.

Section B will examine the enhanced progress the ICC has made while being the primer Court that prosecutes international environmental crimes by extending its jurisdiction over grave environmental crimes.

A. The ICC’s Jurisdiction over Crimes Against Humanity Inherently Includes Grave Crimes Against the Environment

Though not expressly articulated as within the jurisdiction of the International Criminal Court, the inclusion of environmental crimes is not only legally proper, but it is necessary to the spirit of the definition of the core crimes as defined in the Rome Statute. For the International Criminal Court to have the power to properly address the violation of the “most serious crimes of international concern,”⁵⁰⁷ it must have the power to prosecute crimes that gravely harm the environment. This can be allowed under firm legal arguments illustrating that the perverse nature

of environmental harms are inherent to the core crimes enumerated by the Statute. To put this simply, grave environmental harm is inherently inseparable from the Rome Statute's core crimes.

Each core crime enumerated in the Rome Statute and their connection with environmental harm will be discussed in turn below.

i. Crimes Against Humanity

Serious environmental crimes match many of the criteria for crimes against humanity. The Rome Statute is the first action by a supranational administration to articulate precisely what is known as crimes against humanity. The topic of crimes against humanity was debated during this conference. The question arose to whether the Statute would define acts committed as part of a “widespread or systematic” attack against a civilian population, or more simply just acts that are “widespread and systematic” attacks.⁵⁰⁸ Many states were concerned that if the threshold were too low, “common crimes such as mass murder would fall within the jurisdiction of the Court.”⁵⁰⁹ The final language defined crimes against humanity as:

[A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity . . . ; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

There are two further definitions enumerated within the language of the Rome Statute that are instructive and strengthen the argument of this Chapter. The Statute states that “[d]eportation or forcible transfer of population” means in its actual application, “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”⁵¹⁰ The term

“extermination” is defined to encompass “the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.”⁵¹¹

The ongoing environmental issues that include international corporations conducting oil drilling in the greater Amazon River Basin, as well as the subsequent oil spills, serves to illuminate how grave environmental crimes are encompassed within the Statute’s definition of crimes against humanity. These crimes touch upon the spilling of chemical, nuclear, biological, and other dangerous waste materials. In the early 1990s, the government of Ecuador had recorded nearly 30 serious oil spills. They discharged roughly 17 million gallons,⁵¹² and millions of those gallons were harmful toxic waste which entered the surrounding lands and waters.⁵¹³ The legal suits that were brought to seek compensation were dismissed on substantive grounds in the aftermath of these spills.⁵¹⁴

The U.S. District Court concluded that it must dismiss the case because it did not have general jurisdiction to preside over matters.⁵¹⁵ Contrary to that reasoning, the International Criminal Court has jurisdiction over the “most serious crimes of concern to the international community as a whole.”⁵¹⁶ The ICC would be acting negligently if it were to completely disregard these grave environmental crimes. The facts of this involve supranational corporations knowingly and continuously discharging several millions of gallons of oil and toxins. These materials flowed into the lands of innocent people, resulting in displacement, injury, and death; it is clear that this action resulted in a “widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁵¹⁷

ii. *Genocide*

The horrible crime of genocide was clearly defined in the Rome Statute. In fact, the crime is defined exactly as it was in the Genocide Convention.⁵¹⁸ The Rome Statute defines genocide as:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious mental or bodily harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction

- in whole or in part; (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁵¹⁹

It is easy to envision a supranational company knowingly acting to allow toxins into a water supply which may injure, displace, or possibly kill the native inhabitants of a particular land. It has been recorded and visibly observed, that economic development, particularly in third world countries, causes fatal environmental degradation.⁵²⁰ An example of such an occurrence took place in the 1970s, when the Ache and other native people in Paraguay were the victims of acts of genocide by their own government. The government, in its efforts to grow the economy, allowed unrestricted oil exploration by supranational companies on native lands.⁵²¹ Today, those indigenous inhabitants are considered to be a wholly extinct group of people.⁵²²

As seen in Paraguay, where there is a clear “intent to destroy,” the means by which the genocide is formulated should not be dispositive. It has been argued that any perpetrator who knowingly destroys a native people by destroying their land and their right to life is guilty of genocide. Attached with this crime is the grave environmental harms contemplated by this Chapter. This clearly shows that the Rome Statute guarantees some level of environmental protection from acts.

iii. War Crimes

Article 8 of the Rome Statute states that “[t]he Court shall have jurisdiction in respect to war crimes.” This has a caveat as an additional clause that stated the court shall have jurisdiction “in particular when [an act is] committed as part of a plan or policy as a part of a large-scale commission of such crimes.”⁵²³ This additional clause was intended to increase the low threshold for jurisdiction, but that intention has been dead letter.

The eight war crimes of section 2(a) were derived from the grave breaches of the four Geneva Conventions of 1949. The twenty-six war crimes of section 2(b) were derived from the Hague law. The three crimes in section 2(c), applicable in armed conflict not of an international character, were derived from Common Article 3 of the four Geneva Conventions. Finally, the twelve war crimes of section 2(e) were derived from the Second Additional Protocol of 1977 to the Geneva Conventions.⁵²⁴

This statute has a fully articulated penal provision that addresses grave environmental damage. It is the only explicit addressing of the environment and its need for protection in the

Rome Statute. Article 8(2)(b)(iv) defines as a war crime “[i]ntentionally launching an attack in the knowledge that such attack will cause . . . long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”⁵²⁵ The completed text requires full knowledge that damage will be excessive in relation to the advantages gained by the commission of the act. This is a classic balancing test that urges us to consider the environment and its need to be protected.

Article 8(2)(b)(iv) may be vague in its terms, but there are specific acts that do meet the burden articulated under the Statute. These crimes produce grave environmental harm and are clearly. An example is the Iraqi bombing of the oil fields in Kuwait and the subsequent discharge of millions of barrels of harmful oil into the Persian Gulf, during the Gulf War.⁵²⁶ It is clear that the exact perimeter of what is “excessive in relation to the concrete and direct overall military advantage anticipated” may be tough to gauge. What is clear is that horrible acts of illegal environmental conduct, such as those in the Gulf War, would be a war crime and punishable under the Rome Statute.

V. Domestic Law Enforcement is Ineffective to Adjudicate Environmental Crimes

It must be noted that domestic laws, where they exist, are not effective in policing environmental crimes. The reasons for this are numerous and out of scope for this section. What will be analyzed are the consequences of harmful conduct when countries exploit their native lands in hope of economic prosperity.

Many countries, especially developing states, are the unfortunate dumping grounds for first world nations, as well as powerful corporations. This happens often and systematically because these countries do not have sufficient means to enforce their environmental laws. In many cases, environmental laws themselves do not exist for a prosecutorial body to act on.⁵²⁷ These groups clearly take advantage of the naivety of the indigenous residents and their money hungry political officials. Criminal groups have also taken advantage of infant political systems by paying bribes in order to have access to dumping of toxic wastes.⁵²⁸

Developing nations rely on strong companies to invest in their land and economy.⁵²⁹ These corporations, armed with limitless financial assets play a controlling role in the political

and economic development of the countries they invest into.⁵³⁰ This puts tremendous pressure on these developing nations. In a global economy, it seems that no country can have powerful environmental laws that would hurt the bottom line of international corporations. If a legislative body does this, they risk putting themselves at an economic disadvantage. Deregulation of law enforcement has also resulted in many problems for these exploited countries. Numerous states have implanted what is known as “free trade zones” in which companies have placed themselves in superior positions, evading civil and criminal liability.⁵³¹ Wherever these “free-trade zones” are established, there is enormous and long lasting environmental harm.⁵³² However, international law has yet to clearly state whether a corporation operating abroad can or should be forced to follow the environmental laws of its home country. Until this question is clearly answered, transnational corporations will be allowed to continue their exploitation of these countries.

This recurring problem of economic growth and the resulting environmental damage clearly illuminates the need for an International Environmental Court. The need is even more glaring in light of the inter-connectedness of countries and economies in the 21st Century.

CHAPTER 7

THE EUROPEAN UNION

I. History of the European Union

In 1951, Belgium, Italy, Germany, France, the Netherlands and Luxembourg were faced with the after effects of World War Two. They banded together to promote economic progress and created the European Coal and Steel Community. This turned out to be the foundation of the European Union.⁵³³ By delegating their collective steel and coal production to a single entity, they chose to start a forum for greater European integration. The idea of European integration was further pushed by the terms of the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC). This was done with the initial goals of establishing a common market, common competition and economic policies.⁵³⁴

In 1957, the Treaty of Rome articulated the goals of the free movement of goods, people, services and capital, but it would take years for those goals to become reality. To facilitate the accomplishment of these benchmarks, the customs union was achieved in 1968. Still, more was needed to be done to move from a customs union into an integrated market without internal borders.

The Single European Act was the legal foundation for the start of the single market.⁵³⁵ The states that were privy to this act fully dismantled all their national borders, and they began a single market in which goods, capital, and services can move freely. Today, citizens of member states are free to move and live anywhere in the E.U. The last bastion of traditional borders was removed by the signing of the Schengen-Agreement, which established the free movement of people entirely. The Treaty on European Union⁵³⁶ enhanced the mechanism of the integration of the European community, and it brought member states closer to a modern economic and political structure. This treaty and its kin have laid the roots for the introduction of the single currency system. The combined efforts of multiple nations have setup a new, largely intergovernmental political structure, in the form of a single institutional.

II. The Union's Contemporary Legal Environment

The European Union is a group of independent countries that envision a collective that respects human rights. These principles have formed the bedrock of their treaties policies and political goals. The European Union is empowered with sovereign authority, its own sovereign rights and an independent legal power. This legal framework results in the citizens residing within the borders of the E.U. to be subject to the jurisdiction and laws of the international body. The longer the European integration occurs, the greater the amount of domestic rights that will be surrendered to the central order.

The legal foundation of the Union is not established in a constitution, but it is compromised by the totality of rules and basic values found in its treaties. These doctrines form the political and legal system that establishes organization's procedural mechanisms for rulemaking and the basic rights of the member states.

The main functioning body of the European Union is the European Council.⁵³⁷ This entity within the E.U. is composed of the leaders of the member states. Although the Council does not have any legislative power, the Treaty of Lisbon defines their charge to set forth "the general political directions and priorities" of the Union.⁵³⁸ Their main purpose is to provide guidelines for the envisioned European integration. With the Council at the helm of E.U. planning, substantive legislative items receive significant influence from its decisions and recommendations.

Since the Council consists of numerous national leaders, domestic political parties fall into the analysis E.U. decision making.⁵³⁹ Within each governing entity of the E.U., there are a wide variety of politicians, many from the leading political parties of their home countries. This creates a complicated political stage for moving forward a legislative agenda.⁵⁴⁰ For example, if a political a minister who belongs to the German Christlich Demokrastische Union (CDU) votes in support of a conservative regulatory scheme, would their fellow CDU party members vote similarly? In certain cases, voting takes place along national party lines, and in other instances, members of the governing apparatus vote in accordance with their opinion on continental government.⁵⁴¹

The European Council however has bucked the notion of domestic party influence through recent studies. The natural assumption would be that agreements would be hard sought

with such varying degrees of political backgrounds of the European leaders. The Council however has created a “culture of consensus.”⁵⁴² Decisions made by the body are only contested one-third of the time. This is due in part to the negotiation tactics used by the Institution. When topics are discussed and deliberated, the Council goes to extra lengths to include all of the member states and their political representatives. This in turn has created a Council capable of making decisions with a vast array of political players.⁵⁴³

The E.U. is also composed of a legislative body called the Parliament. This institution is composed of the General Secretariats, Staff of the European Parliament’s Political Groups, and the Members of European Parliament (MEP).⁵⁴⁴ MEPs are selected by the citizens of the E.U. through a democratic election process.⁵⁴⁵ Member states are allowed a formulized number of representatives in accordance with their current population. The parliament has been charged with the responsibility of formulating legislation to govern under the Council’s long-term direction. This governing body has the mechanism for producing rules that will govern its member states.⁵⁴⁶

The commission performs the executive functions of the European Union.⁵⁴⁷ This institution safeguards the ratified treaty, and it also promulgates legislation across Europe. The commission is akin to the administrative organs seen domestically in the U.S. Enforcement powers rest within the authority of the commission, and individual parties who break rules can be brought to justice within the European system. Employees who serve within the executive body must receive the consent and approval of the European Parliament.

The law is interpreted by the Union’s judicial branch, also known as the Court of Justice.⁵⁴⁸ This branch is the sole authority that is empowered to interpret and answer questions of law for the European Union. This court, as the sole judicial body, delivers legally binding orders. Its case load is first prioritized by the Court of First Instance and it is regulated for optimal efficiency.

Throughout the 1970’s the European Court of Justice engaged in judicial activism that helped establish the Treaty of Rome as a supranational constitution granting rights to citizens within the E.U.⁵⁴⁹ This in turn has allowed the Treaty of Rome to stand as one of the premier international bodies of law that support and propel environmental protection. The E.C.J.’s ability to co-opt domestic judges and lawyers, serves as another driving force in European integration. Domestic legal systems that have developed in a construction that is against their own interests

are now routed through an international judicial entity that supports the interests of the entire European body.⁵⁵⁰ The E.C.J. has continued to rule against the interests of the most powerful and influential bodies within the E.U. This institution serves as a beacon of supranational authority and functioning integration.⁵⁵¹

A recent example of the E.C.J. paving the way for European integration beyond its economy is the matter of the European Commission v. Italy (C-297/08). The Court found that Italy was in breach of Article 4 and 5 of Directive 2006/12/EC when it incorrectly disposed of wastes.⁵⁵² This not only shows the power of the E.C.J. to hold member states accountable, but it also shows the power of a judicial institution in creating integration on an international scale beyond the economy (e.g. the environment and human health).

The Union's acts are structured to provide boundaries for individual autonomy of the states. These formulas are careful to safeguard states' rights as independent and functioning actors, with pathways to retain their own sole laws and regulations. Individual state autonomy allows members to execute their own administrative tasks. Generally, the European Union will only be allowed to exercise its jurisdiction when the autonomy of the individual state is not threatened. This is an area where environmental criminal law legislation fits perfectly. In the enactment of such laws, member states would be relinquishing independence for the betterment of the entire environment, by allowing a supranational organization to police illegal conduct. This would be the appropriate course of action since individual states find great challenges in handling these particular crimes autonomously.

Decisions made within the E.U. create controlling regulations for member states. These laws establish the principles that guide European nations when administering rules. Upon the ratification of legislation within the E.U., member states are given the authority to enforce the related provisions. This form of implementation is appropriate for the problem of international environmental crimes. The E.U. can articulate the criteria for a crime and the minimum penalties. Furthermore, the act of sanctioning can be left to the member states. This type of mechanism can allow member states to abandon jurisdiction to the E.U. and the Court of Justice to adjudicate any particular claim that may be difficult for a state to prosecute.

Upon its formation, the European Commission was the sole enactor of Union law. The Parliament was merely granted an advisory function. Through the passage of time, new procedures were adopted because of the need for more efficient promulgation of laws. These

new procedures allow the Parliament to amend laws by providing review and policy assessments. The Parliament has the discretion to reject these policies by motions, and they can assert comments for amendment. These procedures are similar to the Notice and Comment approach provided by the Administrative Procedure Act (APA) that is utilized by Federal administrations who engage in the promulgation of rulemaking. Similar to the APA, the E.U.'s procedures address rules in a far reaching spectrum of issues, including economic and environmental concerns.

Law is created in the European Union pursuant to the procedures outlined above. The correct application of these laws are controlled and adjudicated by the European Court of Justice. This court is the proper adjudicatory organ for complaints of international environmental crimes. It has the authority given by community, in a supranational forum. This type of forum will bind the states to a certain order of regulation, and this is necessary in response to the factual realities of environmental crimes.

What is attractive about this model for implementing environmental criminal provisions is the breadth that these laws provide. The legislation, with authority from its organic treaties, imposes affirmative duties on the individual member states and their citizens. The aim is for the community to act as a union, for the betterment of the group as a whole.⁵⁵³

The European Court of Justice enforces principles laid down by the community, and they are applied to the member states uniformly.⁵⁵⁴ This direct application is the type of enforcement that is needed to deter and sanction environmental criminals. The proper mechanism for this type of enforcement is a strong and united supranational forum that articulates clear regulations and while simultaneously enforcing any breaches of its law.

It is especially promising that in the case of a conflict of law, the court requires that the Union's law to be controlling over the domestic laws of the member states.⁵⁵⁵ Union members have willingly relinquished some of their rights in order to allow Union law, as principal, to be properly applied throughout the EU. This has been advanced by institutions such as the E.C.J. which has used legal doctrine to push forward integration of the various European States.⁵⁵⁶ It is important for the application of legal duties of the member states be uniform in defining, prosecuting, and adjudicating international environmental crimes. Allowing the E.U. to have supremacy when there is a conflict of law, allows for the circumvention of any country that may

have been bribed or forced to accept pollution against their interests. The Union has the capacity to override this coercion and properly execute the laws it is legally bound to impose.

III: Criminal Law Provisions for Environmental Crimes: History and Structure

The European Community promulgated decisions that are written to protect the environment through the use of criminal sanctions. These decisions are structured to safeguard the environment through the use of several avenues, including the use of criminal sanctions. Member states also provide feedback which is appropriate to reach the goals established by the collective.⁵⁵⁷

The increasing number of international mechanisms prescribing penalties for environmental infractions comes during an era where law makers are internationally embracing their role as the protectors of the environment. This is a stark change from past politicians following the traditional cost-benefit analysis. Growing social and public pressure has pushed this view as obvious environmental damage continues to mount. To adhere to the public pulse, the European Union has put the enforcement power back into environmental protection by formulating environmental laws that prescribe criminal sanctions.

Currently, there exists minimal international environmental enforcement provisions. There is however existing sanctions enumerated by the environmental laws of the European Union (compared to the damaging effects of the criminal acts).⁵⁵⁸ An introduction of penal provisions and standards from the European Union will be helpful in taking a more holistic approach to environmental protection.

Legal principles suggest that the E.U. adopts baseline laws. This puts into place a foundation that shall provide stability and uniformity for which member states must conform with and abide. These provisions are important for instructing member states on what acts of environmental pollution will rise to the level of criminal conduct. Such laws must be enacted to promulgate the appropriate level of criminal sanctions that encompass the vision policy makers had when they drafted such provisions.⁵⁵⁹

The implementation of these regulations find their justification from the numerous environmental crimes that are international in nature; crimes that continue to impact nature across national borders. The uniformity of criminal sanctions is needed so that perpetrators cannot take advantage of weak national laws, and the differences between domestic legal

provisions. It seems the E.U. must face its problems head on regarding international environmental damage. Its directive asserts that provisions are important where the crimes have damaging results or are acted out in a forum of criminal mechanisms that play an important role in environmental crime. In response to organized environmental crime, the Directive requires strict criminal provisions by clearly articulating the disapproval of the malice *mens rea* requirement.

IV. Legal Structure of Criminal Provisions of International Environmental Crimes

A sound and firm legal structure is needed to combat international environmental crimes. An instructive piece of international legislation which forms a basis for the proper mechanism for criminal provisions is found in the 2007 Directive Proposal.⁵⁶⁰

This Proposal aims to formulate a set of grave environmental crimes to be labeled as criminal conduct throughout the E.U. The provisions are applicable to water, soil, and living beings (animals, plants), and it also encompasses the conservation of certain species.⁵⁶¹ The Directive enumerates the list of acts that constitute criminal offenses. This list is instructive for an international organization who aims to criminally sanction environmental crimes. It includes offenses that incorporate the discharge of emissions or materials into a natural medium; the unlawful discharge of emissions or materials into a natural medium that will likely cause death or injury; the unlawful handling of waste that will likely cause death or injury; the unlawful operation of an electrical plant; the unlawful handling of nuclear materials; the unlawful handling of animals; and the unlawful act of degrading a protected habitat.⁵⁶²

A. *Analysis of the Crimes*

This Directive states that a particular act is criminal in nature if it causes an enumerated result. Furthermore, a “significant” risk that may cause damage to the environment is to be punished, as is an omission to act if there is an affirmative duty to act.

An unlawful commission of an act is required to violate this directive. This is an act that impinges on controlling legislation, administrative provisions, or opinions proscribed by proper authorities that seek to protect the environment.⁵⁶³ The lone exception is the particular offenses

enumerated in Article 3(a). This provision touches on an end result that is nothing less than devastation (death, disease, etc.), rather than the illegality of the act.

The *mens rea* requirement for these offenses are satisfied when the act is performed with intent or with gross negligence. Aiding and abetting the offense is equally criminal and will be sanctioned.⁵⁶⁴

B. Corporate Criminal Liability

Nations that are members of this Directive must make certain that corporations can and will be held criminally liable for offenses committed on their behalf by employees and agents.⁵⁶⁵ The Directive provides the choice to enforce criminal sanctions against corporations. This was a policy compromise that attempted to downplay the concerns of certain states that do not provide for criminal liability for corporations. Some nations have articulated that the criminal sanctioning of corporations goes against their legal statutes.⁵⁶⁶ What is needed to truly combat the harmful emissions of corporations is the establishment of a Directive that binds all states to criminally sanction corporations. Corporations continue to use the dishonorable trade of bribery and monetary pressure. These international sanctions can help strike a balance between international governance and domestic failures. Binding sanctions that are uniformly applied seems to be the best way to fight back against strong corporations and deter them from future pollution.

C. Criminal Sanctions and Fines

The enumerated criminal offenses are to be deterred by basic criminal doctrines. The punishment should be effective and proportionate for both citizens and corporations.⁵⁶⁷ For certain crimes performed under certain parameters, such as causing severe and long lasting damage, the level of criminal punishment for the actors, regardless of if the actor is a citizen or a corporation, should be within a specified range of punishment. This range of punishment is necessary in order to deter criminals from exploiting the differences in national criminal laws. This scheme is an effective method in deterring environmental crimes from occurring. Uniformity across all nations, bound together, will ensure the successful application of sanctions.

This particular Directive contrasts primary criminal sanctions and collateral criminal sanctions. Primary punishments include imprisonment and certain fines against citizens or

corporations. Prison time and its proposition approximate a certain balance that correlates to the conclusion of the Justice and Home Affairs Council.⁵⁶⁸

This scale encompasses the criminal structure that defines incarceration times, based on the illegal conduct. The exact terms depend on the *mens rea* of the actor, combined with the totality of the circumstances.⁵⁶⁹ This structure also provides for crimes that are conducted by organized bodies by making punishment much steeper.⁵⁷⁰ It must be noted that these criminal sanctions and their application must not be left to the individual nation to implement. This problem arises frequently when attempting to establish an adjudicatory process. The international community must be willing and able to enforce these provisions, which require unison among countries. Providing a forum for the several nations to effectuate a uniform application of environmental criminal laws would be optimal. It must not however be left to the individual nation.

D. Secondary Sanctions and Measures

The directive provides articles enumerating lists for restitution that will hopefully stymie future environmental acts of degradation from occurring. Also, ancillary punishment is listed for environmental criminals. This gives powers to states to disbar businesses from activities that require official approval. This sanction is enforced when the criminal's activity presents a probable chance of repeat breaches of law, and this may be accompanied by a requirement to repair the damage done to the environment. Also, sanctions exist that may bar a criminal from public benefits and effectively disqualifying them from certain business practices. This forces them to adopt safety provisions to manage and repair damage already done to the environment.

V. Implementing the Directive

Past civil sanctions have not been effective in curing the issue of environmental crimes, which is why criminal sanctions are necessary. Promulgating such criminal sanctions is seen to be the appropriate method for deterring future environmental crimes. Civil sanctions have continued to fall short in being effective. One of the main reasons for this revolves around the monetary penalty principle itself. When a company is asked to pay a civil fine, the corporation will automatically engage in a cost benefit analysis. This balancing of the scales allows the

company to see if it is financially profitable to pollute the environment (if the costs of civil penalties are still cheaper than changing their *modus operandi*).

Adopting criminal sanctions will alter this analysis. Polluters will now be forced to factor in criminal sanctions when choosing their actions. Furthermore, unified criminal laws will be symmetrical across all member states. It will deter polluters from planning illegal actions in countries that do not criminalize such conduct. This is crucial in the implementation of criminal sanctions.

VI. Current Analysis of the European Union's Impact on Environmental Protection

At the center of various E.U. treaties, including the 1992 Treaty on European Union, is a strong push for the protection of the natural environment. This prioritization is focused on the long term sustainability of the human habitat. The 1992 Treaty was especially important because it provided for an express enumeration of environmental goals. It asserted that the E.U. should “aim at a high level of protection” for the environment.⁵⁷¹ The 2007 Treaty of Lisbon continued this push by forming the structure of legal goals encompassing environmental protection.

The European Union has shown a deep enthusiasm for a continental scheme for environmental protection. This however is challenged by the goals of individual states and economic integration. The first major balancing test that the E.U. faces in creating such laws revolves around the need to protect the environment versus the protection of free trade principles. The E.C.J. has created a proportionality test to protect regulations that come into conflict with free movement priorities.⁵⁷² There is also the larger balancing test that includes the interests of domestic governments with their own environmental protection schemes versus the creation of a universal European law designed to protect the same interests on a larger scale. Although the E.U. has faced these conflicting interests, they have continued to push forward regulations that have created an international impact.⁵⁷³

Through regulation, subsequent European Law has formulated environmental protective measures. These laws have given signed treaties a more defined role as they used to create controlling law in prosecuting future crimes. A calling card for Union legislation surrounds its regulatory provisions that are legal doctrines, created at an international level. These pieces of international agreements have been integrated and implemented on the domestic governmental level.

In particular, these laws have been designed to merge domestic and European Union regulations to create a proper structure for environmental protection. It also allows for the individualized enforcement of relevant legislation by national governments.⁵⁷⁴ Currently, there are more than 175 different forms of regulations that expressly speak to the protection of the environment. These provisions control different forms of pollution including water, air, waste, and nuclear discharge. Furthermore, being held responsible for environmental damage has led the Union to promulgate laws that will control other important arenas of environmental protection.⁵⁷⁵

The E.U.'s environmental laws have been influential in shaping legislation passed on the domestic level for its member states. A glowing example is that of the United Kingdom. This nation has seen an 80% increase in their environmental regulations since they joined the E.U.⁵⁷⁶ Additionally, other countries within Europe have been required to adopt all existing environmental legislation into their national legal system in order to obtain E.U. membership. This requirement is coupled with the mandate of effective enforcement to the prevailing standards.⁵⁷⁷

A helpful mechanism in the proliferation of E.U. environmental policy has been the E.C.J.'s willingness as a judiciary to create case law that assists in the strengthening of international protection. In the *ADBHU* case, the court incorporated environmental priorities into a supranational context. Paragraph 12 of the judgment stated "that the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantively impaired."⁵⁷⁸ Rulings like this continue to define the thin line between free trade interests in environmental protection. As seen in this ruling however, concerns such as environmental protection, are given superior status in certain circumstances.

The E.C.J. has also strengthened the plaintiff's position in litigation against polluters. In *Handelskwekerij GJ Bier v. Mines de Potasses d'Alsace*, the Court dealt a polluter that discharged tens of thousands of tons of chloride into the Rhine River. The Court ruled that victims of transboundary pollution may bring suit in the jurisdiction of their choice that is either where the harm occurred, or within the country where the event that gave rise to the harm occurred.⁵⁷⁹ Although legal scholars argue that this promoted forum shopping, it is undeniable

that parties wishing to bring suit against polluters have been empowered to bring accountability to environmental polluters in the E.U.⁵⁸⁰

Legislation aimed at the protection of the natural environment is another expansion of positive environmental regulations within the European Union over the past two decades. A provision that is in line with this growth, Directive 2008/99/EC, articulates the enforcement of criminal law in relation to environmental protection. This is an important nexus between criminal and environmental law. The application of criminal law upon members has largely been shielded from the European Union's jurisdiction. Criminal justice, including environmental criminal justice, is an arena in which European Union effectiveness has fallen short. Through the various treaties and covenants established by the E.U., under this sphere of law, member states have not granted full power over such matters to the Union. Nevertheless, cooperation among and between the Member States and the E.U. is at an all-time high, resulting in effective implementation of environmental criminal law provisions.

European Criminal Law is a new body of legal provisions, and its use has become increasingly noteworthy. It is a well-known fact that cooperation on forums previously foreign to the competence of the Union is currently one of the most exciting zones of E.U. legislation and policy formations. The criminal justice system is within this area, and the European Court of Justice has been interpreting and adjudicating cases that have been brought under this field of law. This is a positive development for the E.U., as it exerts its jurisdiction over national actors to effectively protect the environment.

VII. Current Concerns with European Union's Policing of Environmental Crimes and Solutions

The E.U. is a leader in international policy formation, and it is during global conventions that it thrusts its political power with large international entities. World leaders are aware of the Union's power, and they must be keen to the possibility that Union policies will be pressed upon individual states.

The European Union is a mix of many components, including the right of members to partake in treaty drafting.⁵⁸¹ Its authority has been developed by separate treaties that define and

allocate power to the Union.⁵⁸² It is important to note that member states remain independent with powers outside those enumerated within the E.U.

While sovereignty of the members is a prevailing concern, the E.U. has gained considerable power from the member states. This can be seen in the ECJ, where the court submits orders that are to be followed by all member states and even if it overrides decisions by the independent countries. The rationale behind this power of the ECJ, revolves around the need for a substantive norm of law to govern Europe in certain areas of concern.⁵⁸³ When a single judiciary governs multiple states, individuals residing in the many nations effectively become citizens of the larger body.

The Parliament is the legislative branch of the E.U., but it is striking to see that this body has very limited decision making powers.⁵⁸⁴ This organ cannot promulgate law, lacks the power of the purse, and it cannot elect representatives who can perform legislative duties.⁵⁸⁵ The limited power vested in this E.U. organ primarily rests in its veto powers. The reason for this limited authority is clear; member states are not willing to establish a central power that will be authoritative over their domestic governments.⁵⁸⁶ The E.U.'s controlling votes remain entrenched in the several administrations that are comprised of officials from the member states. The format of voting allows for a minority of states to retain veto powers over matters that could affect the entire group.⁵⁸⁷

The fragmentation of control could pose a problem in addressing environmental crimes. The need to act quickly when an environmental crime occurs is almost always necessary. Having a system that is not self-aware of what mechanisms it can use to act and with what authority, can hinder the whole operation. It is also crucial to outline the level of enforcement authority available to allow for effective implementation of regulations.

A fundamental problem the E.U. faces comes from the divided interests its member states face when they vote in favor of the entire body and their domestic interests.⁵⁸⁸ The system creates pressure that is placed upon the sovereign states to gain additional votes for their favored legislation. This is evidenced by the U.S. Senate demanding that the U.S. be allocated additional votes, equal to Great Britain in 1919.⁵⁸⁹ The Soviet Union demanded the same compensation to equalize their share with those totaled by the United States in the mid 1940's.⁵⁹⁰ Maintaining voting power that is equal to opponents creates a major issue. This causes conflict when attempting to advance the interests of environmental protection.

The protection of the environment is an important issue that is discussed greatly among international leaders.⁵⁹¹ The E.U. has taken the opportunity to promulgate environmental policy. Concurrently, the United States has disfavored the Union's attempts to protect these vital interests. Regardless, European leaders have paved the way for law and policy in the field of environmental law.⁵⁹²

Another important aspect of this international body is its member states ability to assert their individualized policy concerns. This is illustrated by the divided perspectives and priorities for enhancing environmental protection. Support is strong in Germany and Scandinavia but less in Portugal and Ireland.⁵⁹³ Regardless of individual state preferences, the Union has promulgated strict environmental policies by impressing high standards of environmental health upon all countries.⁵⁹⁴

The E.U. has shifted towards regulating environmental policy that affects its entire member pool. Environmental policy however, exists for issues that are not international in nature. An example of this is the European model for solid waste disposal. Though the E.U. is furthering the application of its regulation equally, it becomes frustrated when attempting to impose costs upon business and producers in fair divisions.⁵⁹⁵

NGOs have become an accepted and promoted aspect within Europe. They have been a part of the decision making process within the Union since its inception. Recommendations and reports appear alongside E.U. policy implementation and legislation as NGOs employ multi-level lobbying strategies when they address the European Commission and European Parliament. Their role within the E.U. has been one of great import given the lack of information that the European Commission operates with.⁵⁹⁶ The disappearance of NGOs from the policy creation process would be similar to "driving with eyes shut."⁵⁹⁷ Throughout the history of the European project, these international organizations have led to the growth of democracy and intelligent planning for the continent.

NGOs have taken a foothold in the field of environmental protection. There exists an NGO which is comprised of several environmental support administrations called the European Environmental Bureau. This NGO is financially supported by the E.U., and it helps to promulgate policy that the E.U. supports.

In addition to NGOs, Europe has developed other organizations to help spread its environmental policies throughout the continent. These organizations in conjunction with the

E.U., have been a positive force in overseeing the environment through regulations developed at the transnational level.⁵⁹⁸ These policies are often pressed forward by the individual member states that are in support of additional environmental protections.⁵⁹⁹

An example of the E.U.'s influence on environmental regulation can be seen by their far reaching efforts in reducing greenhouse gas emissions during the 1997 Kyoto Protocol negotiations.⁶⁰⁰ During these talks, Europe communicated a growing concern in reference to the emissions of greenhouse gases. They called for all developed states to reduce their greenhouse gas emission by 15% from levels emitted in 1990. Several countries did not accept that reduction number and agreed to a lower percentage. The E.U. was the most ambitious in its proposed reductions, which is encouraging in light of the great harm that these emissions inflict upon the environment.⁶⁰¹

Analogous to the enforcement agreements seen in the wake of the 1997 Kyoto Protocol is the European effort to create an international enforcement agency. The E.U. is a leader in this field as it has defined international enforcement agencies which require member states to adhere to regulation.⁶⁰² These agencies are well respected and followed by the European population. This is the key component in maintaining high environmental standards through enforcement mechanisms.⁶⁰³

The E.U. is now seen as the transnational organization that is given the authority to promulgate environmental policy and law that will be binding upon all member states. That is the correct approach and the best method to remedy and sanction environmental disasters.

VIII. The European Union as a Model for a Global Union

The European Union is a model for more comprehensive global cooperation in an effort to protect the environment. The European method has laid down a foundation to prosecute and remedy crimes of transnational environmental import. The E.U. model has implemented environmental criminal provisions for environmental crimes by imposing duties on its institutions, member states, and private citizens. A very similar model is needed in order to deal with the realities of environmental crimes and their transnational character on a global scale.

The European Union model for addressing environmental crimes has been outlined previously in this Chapter. This process can guide world leaders in adopting a global union to combat environmental crimes. There are several aspects of the E.U. that make a global union an

attractive option for combating global environmental degradation. However, there are drawbacks that must be factored in.

A. Positive aspects of the European Union as a model for a Global Union

Prior to the eastern expansion beginning in 2004, the E.U. was a smaller international government with less member states and conflicting interests. After 2007, the European institution almost doubled in size. Scholars immediately began to forecast a divided and sluggish government that would be unable to strike concord between the many nations.⁶⁰⁴ However, the E.U. stayed relatively the same, passing laws and effectively enforcing them as it did prior to 2004.⁶⁰⁵ This has been credited to the informalization of European negotiation, where proposed policies are debated and hashed out prior to large votes and decisions.⁶⁰⁶ A Global Union can also use the same model of negotiation and policy development that has been in effect since the eastern expansion. Such a scheme of negotiation and legislation can be effectively used for a large body of member states that can encompass an international government that exceeds the size of the E.U.

There are also several positive aspects that can be pinpointed when observing the European model of international integration. For our purposes, the most attractive aspect of this model is its ability to review and penalize environmental criminals. The E.U. is known as a Community of Laws⁶⁰⁷ which bases its regulations on the provisions articulated in Article 6(1) of the Treaty of the European Union.

The right to a clean and healthy environment is regarded as a fundamental right by many leaders. The boundaries of this right and actions that infringe upon it are adjudicated by the European judiciary. This is an important component of the European Model that is extremely desirable if a global union is established to combat environmental crimes. This global governing body must have a court of proper jurisdiction to adjudicate crimes if it is to be capable of properly sanctioning environmental crimes. The European Court of Justice serves as an effective judicial protection of the environment that is ingrained in the European legal order. This right and the protective shield obtained from it, is clearly one of the laws common to the constitutional traditions of the member states. The implementation of a holistic procedure will push individual nations to include within their constitutions, protective measures to safeguard environmental interests.

The Global Union should be structured with modified with guidance from the European Union as it presents the most advanced system for a practical international diplomacy and institutionalized enforcement mechanisms. A recommendation for this expansion can be summarized briefly in several points.

First, the EU model should be considered for its effective ability to achieve diplomatic consensus. The E.U. acts in large part by its ability to come to agreement on a wide array of issues. Unlike domestic legislatures that bicker and cease government operations, as seen in the United States with their recent 2013 government shutdown, the E.U. climbs above their differences to institute effective laws that benefit the commons. In context of the environment, the Global Union could follow this by instituting the same mechanisms used to achieve such cooperation when making decisions for the environment.

Next, the E.U. provides individuals standing to bring suit against parties across the European Union. Jurisdictional boundaries have been limited and rules of jurisdictional exercise have allowed courts to reach farther than before when adjudicating cases. Within the Global Union, a similar approach will allow for individual parties to bring violators of international regulation to justice. It will avoid the limitations of courts and allow for more cases to be adjudicated in venues favorable to common citizen litigants.

The European Union is also ahead of its American in Chinese counterparts in standards stretching from manufacturing to energy consumption. In essence, the highest standards in the world are their minimum. The Global Union can attempt to achieve such standards while balancing the interest of economic growth. However, the analysis will be shifted away from business and towards sustainability, which in the long run will boost human prosperity.

The Lisbon Treaty is a recent attempt by the E.U. to emulate a form constitution that establishes and sets out authority for its institutions on a cohesive and single agreement. The Global Union must create a constitution to serve as its core document to govern its institutions, and set forth its principles. The right to a clean environment would be one of the fundamental rights set forth in this constitution. Courts and laws that are created under the Global Union could not violate this fundamental right, and a court inside the Union would adjudicate such issues by interpreting the constitution.

This court or courts will be charged with rendering fair and balanced decisions, in line with the mission set forth at the founding of the Union. The job of the Courts will be to

determine the meaning of the constitution and set out orders that require states and citizens to comply with them. A proposed method of establishment would involve multiple courts in different fields of law. For instance, an International Environmental Supreme Court would be the international court of last resort in the area of environmental law. Courts under the hierarchy can be assigned to already existing courts, such as domestic high courts.

B. Drawbacks of the European Union as a model for a Global Union

Over recent years, the weakness of the E.U. has taken center stage during the economic recession that was started in 2008 by a melt-down of the global financial system. Shortly after the world entered into the “great recession,” certain European states have found it difficult to maintain current payments on their public debt. None has been as prevalent as Greece which totaled over €363 billion in public debt during the year 2011.⁶⁰⁸

Traditionally, a single state that defaults on their public debt payments could be contained depending on the size of the country, and the nature of their debts. Within the E.U. however, each state is inextricably tied the other member states through their common currency, the Euro. A default in Greece could have resulted in a total collapse of the European project or pushed the political mechanisms that bind the E.U. to the brink of dysfunction. A Global Union would have to take a clear lesson from recent world events so it may create the infrastructure to protect itself against near calamity.

It is worth noting however, that even though the E.U. has faced severe issues with member states being overburdened by their public debt. The economic bloc’s GDP per capita in purchasing power is three times that of Brazil’s, four times that of China, and nine times that of India.⁶⁰⁹ Scholars have argued that the E.U. is not in absolute decline, but in a relative drawback as the entire global economy has slowed. It is imperative for a global union to be decentralized economically and committed jointly to the goal of sustainable development, in order to protect the progress in environment protection from the utter effects of economic drawbacks.

Additional drawbacks to following Europe as a model for a Global Union revolve around the notion that globalization has been an economic force that has imposed unwilling nations to unwanted policies and influences. Resistance to globalization, whether through terrorist violence like that directed at the World Trade Center in 2001, or through increasingly oppressive immigration and detention policies directed against noncitizens,⁶¹⁰ may prevent the continuing

development of a global order. The United States has a strong interest in facilitating this development and ensuring a global order incorporates a strong commitment to human rights, including environmental protection. It is difficult to distinguish between policies and practices that “impose” values on unwilling cultures, and policies and practices that foster communication, consensus, and adherence to particular values. However, characterizing efforts to develop communication and consensus on national and global adherence to human rights norms such as environmental protection and criminalizing those protection as “imposition” of values, serves only to frustrate communication and change.

It seems that Western Cultures have a leading interest in encouraging and nudging the development of a world order that outlines that a strong commitment to human rights. These rights would include the protection of environmental. A key aspect to the Global Union would be an enforcement mechanism to penalize criminals who violate environmental regulations. It is very difficult to separate the difference between policies that impose ideas on unwilling societies and ideas that are in place to further communication and adherence to certain basic fundamental rights. Another concern centers on the capability of an effective judicial body adjudicating cases of environmental crimes. It has been argued that fundamental rights without access to judicial review would have little enforcement power and be dismissed as irrelevant. To have this model work properly, sovereign states would have to give up some power over domestic matters to a court that would have international jurisdiction. This is necessary for this Global Union to properly enforce its goal of protecting the environment and criminally penalizing those who act in an interest against the global good. If a court can be established, and a proper enforcement mechanism adopted, the world’s nations can put to rest concerns of an international body being incapable of handling such a vast undertaking. An impartial court, with prosecutors, judges, and enforcement officials would be able to effectively control the contamination of our water, land and air.

CONCLUSION

I. Status of International Criminal Law Currently

The Deepwater Horizon Oil Spill in the Gulf of Mexico may yet allow for a renewed interest in the possible use of criminal charges for the damage done to the Gulf waters and coast. Currently, there has been debate on whether to prosecute the corporate executives of BP further within the United States, but as seen with the Chernobyl radioactive cloud, pollution in many cases does not respect territorial boundaries. Currently, there exists no legal platform to remedy the situation on an international level.

The International Criminal Court's jurisdiction covers crimes that cause the deliberate destruction of the environment, forcing mass exoduses of civilians.⁶¹¹ For many years the international community has been challenged when attempting to find a legal formula that is suitable for redress of international crimes against the environment. This need is urgent in light of the obvious incompetence of national forums to effectively provide a solution to this complex problem. Environmental activists have continuously called the mass destruction of ecosystems an international crime against peace. They urge for a codified classification of such crimes under this category, which will place these acts on the same level of genocide and crimes against humanity.

There is a growing possibility that international crimes against the environment may one day fit into the jurisdiction of the ICC. This Court has shown that it is very efficient in penalizing polluters through criminal sanctions. Pressure will continue to mount as domestic systems of law are incapable and unwilling to handle transnational polluters. Within a nation, environmental offenses may fall under a range of watery offenses that do not punish in accordance with the seriousness of the crime.

Opponents of this categorization argue that the illegal act of environmental degradation may not necessarily be targeted toward a specific state or population. They also assert that environmental crimes are not crimes against the humanity, under the original guise of the classification. Rather than understanding the consequences of the crime, they seek to artfully play with legal classifications to strip enforcement power. Observing the conduct and the result, what makes an illegal environmental act a crime against humanity is the considerable impact it

creates by destroying the living conditions of man. Such global acts should fall under a special category of crimes operating under the conditions of globalization.⁶¹²

A. Current International Treaties

A number of international treaties contain mandates for criminal sanctions that address violations of certain environmental norms embodied within their texts. However, all of these agreements unanimously fall short of expressly asserting international jurisdiction over illegal environmental conduct, exacting punishment, or designating an international body for enforcement. They have also failed to create an international system independent of state mechanisms to deal with these crimes.⁶¹³

These international conventions have handled the issue of environmental crimes against the environment with general directives. They require member states to follow a certain protocols of handling criminal conduct, while leaving specific details to domestic decision making. States have varied in their individual implementation of these treaties for multiple reasons; chief among them is the resilience of the perpetrators committing prohibited acts, corruption and the cost of implementation. It is important to note that many attempts to create the desired level of protection on the international level through criminal sanctions were frustrated and stymied during their genesis. An example of such an event took place at the Rome Conference when the body adopted the ICC statute to include a regime for criminal liability for moral personas. This was rejected like many other initiatives that could have brought advancement to the protection of the environment.

Currently, the laws that have been adopted to penalize criminal conduct is limited in scope and application. There is an incompetent range of laws that have been adopted by several nations. International bodies have been created to prosecute and penalize war crimes and human rights criminals, but there is no binding jurisdiction for international law when it comes to the matter of environmental crimes. The boundaries and circumstances of environmental crimes do not have an international legal definition. There is a distinguishable difference between crimes against human rights and war crimes. It is often said that “most polluting activities not only cause costs for society, but also generate some benefits.”⁶¹⁴ Such an argument continues to stem efforts attempting to categorize environmental crimes as a severe breach of international conduct.

The directives and aspirations of many international treaties have failed to bring results because of their lack of enforcement mechanisms.⁶¹⁵ For example, at the 1992 UN Conference on Environment and Development (the Earth Summit), the Convention on Biological Diversity (CBD) was born. Here, one hundred and ninety two nations, including the governing body of the European Union, are now parties of that convention.

In April 2002, the parties to the CBD committed themselves to significantly reducing the loss of biodiversity by 2010.⁶¹⁶ Predictably, that goal was never achieved. Rather than oversee the reduction of bio diversity, international leaders have become stewards of a world that is losing its vibrant spread of organisms.

The Kyoto Protocol is another global agreement that aims to deter international environmental criminal law. The Protocol introduced flexibility mechanisms which were defined as methods to achieve the reduction of emissions in an effort to stem climate change.

Further treaties have been adopted and proposed for the purposes of protecting the global environment. The Economic and Social Council of the United Nations reached resolution 1994/15 in 1995, wherein it called upon the community of nations to “consider acknowledging the most serious forms of environmental crimes in an international convention.” The 1994/15 resolution also urged member states to give consideration to the need for law enforcement resources. This monetary support would be used to address environmental crimes and facilitate the prosecution of international crimes, in particular environmental crimes. The takeaway from the meeting of these nations was an urging to strongly consider the viability of establishing an international criminal court.⁶¹⁷

According to sources within the U.N., there are now more than 500 international treaties and other agreements related to the environment. The majority of these accords have been concluded in recent years.⁶¹⁸ Making agreements however, is only a step towards a tremendous goal. The difficulty lies not in the creation of treaties, but applying the agreed upon principles to practice and enforcement them. Countries that embrace a treaty by becoming a signatory state are not bound by its accords until its internal legislative bodies ratify the treaty.

B. Failure of Individual States

The role of a given state in implementing international treaties can be examined by analyzing the process by which a treaty can be implemented and enforced through their penal

code. Civil and criminal statutes can be used to implement environmental treaties by states. Nations usually create or authorize existing administrative agencies to carry day to day implementation of environmental treaty obligations.

Environmental treaties usually require states to enact penal laws to enforce its provisions with respect to “prohibited activities.”⁶¹⁹ Ambiguity arises under this mandate as most treaties do not provide a definition for the “prohibited acts.” Signatory nations may use administrative regulations to impose penalties for violating set levels of toxic discharge, maintaining improper permits or keeping a false account. Here, the control of criminal conduct merges with the administrative scheme. The concept of environmental harm is usually not presented; it is the protected interest of the administrative measure itself, and not the ecological value. This highlights some of the failures of individual states in implementing international criminal environmental law.

C. Failure of Domestic Legislation

There have been strides made on the domestic level with creating laws and enforcement mechanisms to prosecute environmental infractions, but a gap remains. Nation states have generally recognized that legal persons as well as natural persons can be held criminally liable. However, when attempting to prosecute and charge corporate actors, it becomes difficult to follow through with current principles. This is because it is hard to distinguish between individual actors within the corporation. With various layers, and hidden aspects of corporate business, prosecution is almost unmanageable. A shift in the paradigm to hold certain individuals within corporations consistently responsible for certain acts would cure this.

Sovereign states are naturally concerned about their security and Economy. This in turn pushes environmental protection down on the priority list as other short term benefits are found to be far more attractive. This has made the growth and effectiveness of domestic legislation non-existent in terms of environmental protection.⁶²⁰ The goal of regulating environmental crime is challenging for individual states.⁶²¹ Domestic governments have natural weaknesses that are difficult to overcome, and interstate cooperation is a necessary mechanism to solve this crisis involving a lack of regulation. International cooperation has proven to be the correct mechanism for combatting similar international challenges in the past.⁶²² For instance, cohesive efforts led to the elimination of cholera that ravaged human populations.

Corruption at the state and corporate level has proven to be the most challenging obstacle to neutralize for preventing environmental crimes. Public officials under domestic governmental regimes continue to take bribes or other consideration without consequences. To combat this issue, efforts should push for administrative reform. Corruption prevention is the most effective and historically successful way to combat this type of problem. Another beneficial focus should be drawn to developing easy to access technology that reduces human interaction in areas of trade in natural resources. The proper use of technological advances can be a game changer in promoting transparency. Online access for the average citizenry and media organizations can create a self-check system for heavily regulated industries.⁶²³

Individual nations in regional agreements also differ in their domestic circumstances, and this often leads to exceptions and exemptions being applied to that specific country. Such exceptions often remain as the steadfast rule. Also, sovereignty issues have held back the full integration of international law into domestic law. Nations often use the sovereignty argument as a shield to defend their views on the social cost of progress and the contradicting benefits that coincide pollution control.⁶²⁴ These nations argue that their privilege as a sovereign country allows them to use all the means within their disposal to obtain economic success on par with the affluence enjoyed by the developed countries. The argument draws valid points as many developed countries exploited the natural resources within their own territories and beyond to obtain their current financial status. A counter argument must be made to insure developing nations that the time has come and gone for the quick exploitation of the environment for immediate benefit. If we continue to use our natural resources and pollute the planet, any short term gain will be offset by the diminishing returns of the future.

II. Regional Cooperation

Regional efforts have proven to be more dynamic in their agreements. Many mandate states to resort to criminal sanctions to reinforce their environmental protection. The international community must accept that environmental crimes demand a committed and sustained global response. The success of this initiative requires proper regional cooperation between all interested parties. There have been some global mechanisms, both governmental and non-governmental, that have taken this burden in an attempt to connect groups and help create regional cooperation.⁶²⁵

The consequences for failing to adequately address environmental crimes are potentially disastrous. There exist well-funded criminal organizations that continually profit from exploiting the environment. The Environmental Investigation Agency has urged “the international community to wake-up to the menace of environmental crime and show the necessary political will to tackle the criminal gangs plundering our planet for a quick profit.”⁶²⁶ The reality of environmental crimes requires an appropriately measured response that will regulate it down to a level that no longer threatens the life of wild animals and the health of humans. Similar to other criminal conduct, the intolerable level of environmental crime is still unknown. Regardless of this measurement, a sufficient regulatory response is still required from all parties that aim to police environmental crimes. Observing historical data, initiatives that have attempted to reach this mark have fallen short.

Regionally located organizations seem to be better equipped than global institutions, both in efficiency and implementation terms, to deal with the burden of implementing effective environmental policies.⁶²⁷ Regional cooperation is most effective in policing and regulating environmental crimes.⁶²⁸ Local organizations have access to additional information because of their personal relationships to regional entities. This makes it easier to create cooperation among states with similar cultures and environments.

In an effort to implement sound environmental law, regional regimes have developed to connect and reinforce the common interests of various nations.⁶²⁹ Local institutions include the Council of Europe, The Organization of Economic Cooperation and Development, The Asian Regional Partners Forum on Combating Environmental Crime (ARPEC), and the environmental security regime established for the Baltic Sea region. ARPEC, which embodies many regional organizations, has made the fight against environmental crimes a paramount goal, and is an example of such cooperation.⁶³⁰ This organization was created because of the unfortunate reality of a flourishing illegal trade in commodities such as endangered wild flora and fauna, ozone depleting chemicals, and hazardous waste. The black market that seeks and distributes these products seriously undercuts the burgeoning progress of several environmental protection agreements. More importantly, the continuation of this trade furthers the endangerment of humans and their health and safety.

A. European Union

The European Union is a group of sovereign democratic countries that envision a continent which respects human rights and peace. They have formed an agreement in various treaties for their commitment to each other and the greater good. This international governing organization is empowered with sovereign authority and an independent legal power that has jurisdiction over its citizens. Coupled with proper enforcement mechanisms, the E.U. is a fully functioning governing organization that is able to legislate laws, and punish violators.

The interpretation and application of these laws are determined by the European Court of Justice. Its functions embrace actions such as treaty infringement proceedings (Article 169 EC), actions for annulment (Article 173 EC) and complaints of failure to act (Article 175 EC). The ECJ seems to be the proper adjudicatory organ for complaints of international environmental crimes. This Court has the authority of the community to preside over such cases. The power of the ECJ stems from its ability to bind subjugated states to orders that are issued. This is necessary to establish a proper response to environmental crimes. The model of the E.U. can serve as the foundation for a broader and more comprehensive Global Union. This proposed international governing body will take away the strongest mechanisms of the E.U., which include imposing duties on domestic institutions and private citizens. This direct application of international law is the appropriate enforcement device that is needed to deter and sanction environmental criminals.

A strong and united supranational forum that allows for unambiguous regulations and decisive acts of punishment, with binding enforcement mechanisms, is the clear choice for an environmental protection scheme. Especially promising about the E.U. is the way it handles situations when a conflict of law arises. Here, the ECJ grants the Union's law supremacy over national laws of the member states.⁶³¹ Regulatory administrative law concerning the environment remains at the heart of environmental protection for the European Union member states. The current international environmental enforcement and criminal sanction provisions are minimal at best. The E.U. has enumerated⁶³² the readily necessary introduction of penal provisions and standards from the European Union will be productive from a policy perspective.

B. Criminal Sanctions and the European Union

A sound and comprehensive legal structure is needed to combat international environmental crimes. The 2007 Directive proposal serves as an instructive piece of international

legislation that forms a basis for the development of proper criminal enforcement mechanisms.⁶³³ This proposal aims to formulate a set of grave environmental crimes to be labeled as criminal conduct throughout the E.U. The provisions are applicable to water, soil, and living beings (animals, plants, etc.). It also encompasses certain species conservation.⁶³⁴ The agreement enumerates the list of acts that constitute criminal offenses. This list is instructive for an international organization that aims to criminally sanction environmental crimes.

Corporations continue to be the main perpetrators of international environmental crimes. They use the illegal methods of bribery and monetary pressure. The best method to tackle this increase in corporate money and its distasteful use is by installing sanctions to strike a balance. Binding sanctions that are uniformly applied seems to be the best way of fighting back against international companies. Such measures would deter their unlawful conduct. The European Union provides the choice to enforce criminal sanctions on corporations, and this was a policy compromise that aimed to downplay the concerns of certain States that do not provide for criminal liability for corporate entities. A number of these states have articulated that criminally punishing corporations goes against their legal provisions. Punishing corporations criminally is the best way to deter acts of environmental crimes.

C. International Court of Justice

The International Court of Justice has been established to adjudicate crimes against fundamental rights. The ICJ may be the proper forum to sanction environmental crimes that are counter fundamental human rights. Customary international law has been defined as a legal body of accepted norms that branch from general practices of states that owe each other a standard legal obligation. This obligation has been cultivated over an extensive period of time, and it is now developed into *jus cogens*. The International Court of Justice (ICJ) has held that “multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.”⁶³⁵

Recently, there have been numerous conventions and agreements by international tribunals that have reinforced the conclusion that grave environmental harm constitutes a basic violation of customary international law. This practice between states illustrates a clear pattern of willingness by nations to be bound by customary legal obligations through international and domestic law.

The ICJ has developed into a proper forum to adjudicate crimes against the environment. The duty not to cause grave environmental harm has been witnessed in numerous cases by many international tribunals. These tribunals have recognized that environmental harm that poses severe risk to health and life of humans is illegal under customary international law.

The very first case to recognize this concept of international environmental law is *The Trail Smelter* case, which expressly recognized that international liability may stem from supranational actions that cause grave environmental harm.⁶³⁶ The breadth of scholarly opinion, together with judicial authority in this field, supports the proposition that the duty to prevent the most serious forms of environmental harm. There is an agreement in particular that harm that is suffered on an international scale should be guarded against under basic rights established by customary international law.⁶³⁷

D. Failure of Proposed International Environmental Courts

Currently, there is no intact judicial tribunal with explicit mandatory jurisdiction, right to monitor, right to serve, or legally bind parties to orders for sanctions on international environmental crimes. There exist only a few treaties that allow for the monitoring of noncompliant parties to established international norms.⁶³⁸ The International Court of Justice (ICJ), technically has the power to exercise jurisdiction over international environmental cases, but it has not exercised this power in nearly 40 years. Furthermore, this unused jurisdictional power is expressly limited to conflicts between state parties. This implicitly excludes private citizens, corporations and NGOs from procuring standing in these cases.

The Statute of the International Criminal Court (ICC), which has expressly defined its jurisdiction over the most grave international concerns, does not expressly confront the issue of its jurisdictional power to prosecute environmental crimes. In Article 22 of the Statute of the ICC, the provisions ensure jurisdiction over environmental crimes by the ICC would need an amendment of the Statute.⁶³⁹ This cause for concern was highlighted in the language of Article 19(d) of the International Law Commission's Draft Articles on State Responsibility. It stated, “a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment” shall constitute an international crime.⁶⁴⁰

It is evident that there is lack of compliance with these international conventions that national courts have instituted in adjudicating crimes against the environment. There is strong

advocacy for an international court to exercise universal jurisdiction over such cases. The need for world-wide coordination of existing international courts and tribunals exists.⁶⁴¹

III. Exemplary Models to Criminally Sanction Environmental

There are two primary organizations that are models for a comprehensive attack on environmental crimes. These two models are the European Union and the International Criminal Court. Both are fully able to adjudicate crimes against the environment.

A. *International Criminal Court*

The Rome Statute created a court with “jurisdiction over the most serious crimes of concern to the international community”⁶⁴² This Statute gives this International Court jurisdiction over crimes against humanity, war crimes, the crime of genocide, and the crime of aggression.⁶⁴³ This Court’s primary purpose is to address human rights abuses without expressly extending its jurisdiction over grave environmental crimes; acts that deeply deprive humans of a safe and healthy environment. The only express mention of environmental sanctions in the Statute states that it is a war crime to “intentionally launch an attack in the knowledge that such attack will cause... long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”⁶⁴⁴

Although environmental crimes are not expressly articulated as under the jurisdiction of the International Criminal Court, their inclusion is not only legally proper but necessary to fulfill the purpose of the Rome Statute. For the International Criminal Court to have the power to properly address the violation of the “most serious crimes of international concern,”⁶⁴⁵ it must have the power to prosecute crimes that gravely harm the environment. The perverse nature of that environmental harm is inherent in the core crimes enumerated by the Statute. It is an important conclusion to draw that environmental harm is inherently inseparable from the Rome Statute’s core crimes.

The ICC would only be responsible for hearing offenses that rise to the same level of egregiousness as those covered in the Rome Statute. With the limited resources and the singular nature of the ICC, effectiveness would be reduced if all environmental matters were brought to the court without a gate keeping mechanism. The issue would arise as to whether the signatory

states of the Rome Statute would allow the ICC to increase its jurisdiction. If so, the ICC would be a useful tool in beginning the process of prosecuting these crimes.

For the inclusion of environmental law under the jurisdiction of the ICC, there are three roles that the court must fulfill to give the environment the same treatment as other crimes against humanity. The ICC must serve as a criminal court, a watchdog court, and a world security court in the realm of environmental protection.⁶⁴⁶ The first role as a criminal court is similar to the system seen in many domestic judicial institutions. Through this core function, the ICC should engage in the investigation, prosecution and sentencing of parties that engage in illegal pollution or violation of the environment. It is important to note that domestic cooperation is key in allowing the investigation of matters involving corruption and corporate dereliction of duty. As a watchdog court, the ICC serves the function of supervising signatory states to comply with their obligations *egra omnes*.⁶⁴⁷ This effectively gives the ICC a form of enforcement power to keep nation states in line. In the context of environmental criminal law, the court should investigate and prosecute parties that do not comply with international law directed at protecting the environment. To fully be able to perform this function however, the international community must specifically create, through the United Nations, a comprehensive environmental protection regime which the ICC can adopt and enforce. Once this is achieved, the Court can continue its duty by enforcing compliance among member states.

Within the context of this dissertation, the final role as a World Security Court is arguable the most important aspect of the ICC. The environment is a fragile resource that can cause severe damage to the human race if infringed upon. For example, mass pollution and climate change has led to thousands of environmental refugees. The existence of these refugees and the degradation of their homes present a significant issue for world security. As natural resources are further depleted and local habitats less untouched by global corporations, a drastic change to the human environment can cause a catastrophic impact to the security of nation states. The ICC can bring criminal enforcement against actors who contribute most to the instability of global security. The end would undoubtedly be a safer world.

B. European Union

The objectives of environmental protection demand a comprehensive approach employing a range of mechanisms that will influence the actor's conduct. These range from

public participation to the use of criminal sanctions. Regulatory environmental administrative law remains at the very heart of individual European nations' mechanisms for environmental protection. Very recently, the EU issued a new Directive on the Protection of the Environment through Criminal Law (2007 Directive Proposal, Directive Proposal) which follows the example of both the Council of the European Union and the Council of Europe.⁶⁴⁸

The ECJ's ability to choose the legal grounds and mechanisms for the protection of the environment has mustered opponents. From this Directive, the Union must force member states to provide for effective criminal sanctions for violators of international environmental laws. The Directive provides the framework for environmental protection and penalties against polluters. The same proposed arguments that led to this Directive Proposal in the field of environmental protection can easily extend to other common policies while encompassing the four freedoms of movement, persons, goods, services and capital.

Several E.U. treaties, including the 1992 Treaty on the European Union, continue to emphasize the protection and sustainability of the natural environment. That Treaty was especially important as it provided for an express enumeration of environmental goals. It stated, that the Union should "aim at a high level of protection" of the environment within its scope.⁶⁴⁹ Continuing with the purpose of that agreement is the 2007 Treaty of Lisbon, which forms the fundamental legal goals of the EU. The covenant touched domestic and international spheres of environmental protection.⁶⁵⁰

These agreements have been effectuated to meld regulations by creating the proper infrastructure for environmental protection in the E.U. Individualized enforcement is also centralized on the domestic level. Currently there are more than 175 different forms of regulations that expressly speak to the protection of the environment and the European Union's control over such matters. These matters include the pollution of the water and air, waste disposal, nature conservation and nuclear energy. The E.U.'s regulations speak to the free flow of information that is pertinent to the protection of the environment, liability for criminal acts, and the formation of the European Environmental Agency.

In 1992, the dispensing of justice became an integral part of the European Project. Measures have been made to guarantee certain rights and minimum standards across the E.U. However, these initiatives have not enjoyed the same legal status as regulations and directives that are commonplace in other areas. Rather, through the use of so-called "framework decisions,"

a much higher degree of discretion is reserved to member states. E.U. institutions also have a lower level of competence to propose amendments.

European criminal law is a new body of law that has become increasingly glaring. Cooperation on the forums previously untouched by the E.U. is currently one of the more exciting areas of Union legislation and policy formation. The criminal justice system is within this area and the Court of Justice has been interpreting and adjudicating cases that have been brought under European Criminal Law. That is a positive outlook for the European Union and its jurisdiction over these environmental crimes.

III. Suggested Methods to Increase International Cooperation

Interests of nations vary differently and can be based on numerous circumstances. For instance, global climate change talks are generally divided between the developing world and the developed. Developing nations are hesitant to reduce their consumption of greenhouse gases that play an important role in the industrialization and economic growth of their countries. All while the developed nations attempt to persuade the developing countries into sacrificing carbon consumption to reduce greenhouse gas emissions. Location, colonial history, current economic conditions, natural resources, and military security all factor in to the varied interests of nations.

Establishing environmental criminal law and the appropriate mechanisms will receive its fair share of discord and discontent from certain parties around the world. This dissertation proposes alternative methods of increasing the viability of an eventual comprehensive scheme. This system should eventually prosecute and sentence violators of international law within the environmental spectrum.

A. Promoting Regional Cooperation Towards a Unified World Order

Since the establishment of the League of Nations in 1919 after World War I, the international community has viewed international government organs as a mechanism to solve difficult problems that are unmanageable on the domestic level. The United Nations, the successor entity to the League of Nations, was established after World War II in an effort to decrease the probability of War and increase the dialogue between countries. The U.N. has served as a global government, but it lacks true enforcement power among member states. There

are numerous procedural road blocks that disallow democratic policies by bind signatory states, mainly the veto powers of the U.N. Security Council.

This inability to act during difficult situations is best exemplified during the genocides of Rwanda in 1994 and Darfur in 2004. U.S. Secretary of State Colin Powell delivered an emotional and persuasive speech to the United Nations regarding Darfur on September 9, 2004.⁶⁵¹ Unfortunately, the U.N. Security Council and the Secretariat failed to apply the term genocide to the massacres occurring in Sudan.⁶⁵² This eerily resembles the stance of the United Nations during the horrific acts in Rwanda that led to the massacre of at least 500,000 people. In both situations, the U.N. failed to protect innocent people by remaining silent in the midst of an international crisis.

The factors behind this delayed response stems from the inability of the U.N. Security Council to handle matters of pressing concerns in the immediate. This exemplifies a fundamental failure of global governance in contemporary international politics. Other instances of conflict and disagreement can be seen within the U.N. in more recent years. International outcry for sanctions and intervention against Kim Jong Un of North Korea and Bashar Al-Assad of Syria meet resistance from China and Russia on the security council. It is generally known that members of the U.N. Security Council will vote in favor of their private interests above those of the international community.

In light of these conflicting interests in our premier international body, the United Nations, implementation of environmental criminal law must be pushed from separate angles. Rather than attempting a full international adoption of an aggressive system designed to investigate, prosecute, and reduce this types of crime, smaller attempts at local regional governments should be explored. We can take note from the historical legislation designed to combat human trafficking. The issue of women and children being trafficked became a part of a growing social reform movement in the U.S. and Europe during the late 19th century. After numerous international agreements in light of these movements, an international conference on White Slave Traffic ratified earlier treaties from 1901 and 1904.⁶⁵³ The agreements created a foundation for international bodies and domestic governments to protect against human trafficking.

This leads us to the presumption that grass roots movements touching on different regions of the world can eventually lead to international recognition and adoption of

comprehensive legislation. In addition to the supranational union, the E.U., there are numerous regional unions, governments and alliances that can be lobbied to enact reforms implementing environmental penal law. These entities are the African Union (AU), Arab League, Association of Southeast Asian Nations (ASEAN), Caribbean Community (Caricom), Central American Integration System (SICA), Commonwealth of Independent States (CIS), Commonwealth of Nations, Cooperation Council for the Arab States of the Gulf (CCASG), Eurasian Economic Community (EurAsEc), North Atlantic Treaty Organization (NATO), South Asian Association for Regional Cooperation (SAARC), Turkic Council (Turkon), Union of South American Nations (UNASUR) and the Union State.

A good place to begin would be in the African Union. On January 30, 2007, the A.U. was established to promote democratic principles and institutions within the continent of Africa.⁶⁵⁴ With its own charter, the A.U. has worked tirelessly to de incentivize parties within Africa from participating in military coups.⁶⁵⁵ Similar to the ICC, the A.U. has proposed the African Court of Justice and Human Rights (ACJHR) to be a regional tribunal in Africa.⁶⁵⁶ This court would “create the world’s first combined state-level and individual-level criminal accountability mechanism for human rights violations on an international scale.”⁶⁵⁷

The A.U. along with its proposed court brings a new dimension to the promotion of environmental criminal law. The ability for more local international governments to prosecute crimes allows environmental activists and academics the ability to achieve smaller victories for the greater good. Like other international movements, every large body of law protecting human rights had their start at an incident or local level. Eventually, the world catches on and large international frameworks are created to protect human rights and liberties. With a push on regional governments to include a criminal law regime to prosecute and bring environmental polluters to justice, the world may one day accept the need to institutionalize a global mechanism to do the same.

B. Model of Harmonization

There have been occasions throughout the history of international cooperation that international laws and regulations have been implemented by numerous agencies with unified success. As we seek to find ways for an international regime to assist in the application of international criminal law, it is important to branch out to other areas of developing law. One of

these examples stems from the banking industry that received a jolt of international attention after multiple bank failures in the 1970s and 80s. During this period, the world became well aware of the effects of bank failures and the danger of the domino effect regardless of national boundaries.⁶⁵⁸

In light of these bank failures, the international community has sought to create the minimum level of capital requirements that banks were mandated to hold in order to protect against further failures.⁶⁵⁹ The Basel Committee, an international body that provides a forum for cooperation on bank supervisory matters, agreed to look into the matter of under capitalization in 1982. A year later, the Congress of the U.S. expressed its own concern with the passage of the International Lending and Supervision Act that mandated U.S. bank regulators to cooperate with foreign counterparts, insuring proper bank capitalization.⁶⁶⁰

The main elements that propel the adoption and concord between the involved international actors stem from two origins. First, there must exist an issue that the international community as a whole has given attention too, in a public and formal way. Second, domestic governments must implement and support the recommendations and attitudes of the community of nations. Coupled with both of these elements, domestic enforcement can be achieved even for the most complicated international issues.

With international environmental criminal law, efforts must be focused on tackling these issues with both prongs. To begin however, an international agreement must be reached that shows public concern and focus that the environment deserves. As proposed in the earlier models, the adoption or resolution of any of these examples can provide for the fundamental ground work to progress international environmental criminal law. With the establishment of the foundation needed to move forward, the second phase must revolve around the domestic legislators of the nations involved.

V. INDIVIDUAL STATE LAW ENFORCEMENT IS INEFFECTIVE

Domestic laws have time and again shown that they are ineffective in policing crimes against the environment. Nations continue to exploit their native lands in hope of prosperity. Many countries, especially developing states, are the unfortunate dumping grounds for First World Nations as well as powerful corporations. Various interests groups take advantage of the

naivety of the indigenous residents and their money hungry political officials. These criminal syndicates continue to use the tactics of bribery to ensure corrupt officials allow them to use third world countries as toxic waste dumping grounds. These are examples of wide spread problems that individual nations cannot effectively protect against.⁶⁶¹

Developing nations rely on strong companies to invest in their land and economy. These corporations, armed with limitless financial assets, play a controlling role in the political and economic development of nation states. This puts tremendous pressure on these developing countries. In a global economy, a country who does not fall in line with corporate demands, risks losing a substantial amount of economic benefit. This could in turn harm the security interests of a specific country. Deregulation of law enforcement has also meant many problems for these exploited countries. Many of these nations have implanted what is known as “free trade zones” in which companies strategically placed themselves. This relocation allows corporate entities to navigate any criminal or environmental regulations in place to their favor. Wherever these “free-trade zones” are established there is an enormous and long lasting environmental harm. International law has yet to clearly state whether a corporation operating abroad can or should be forced to follow the environmental laws of its home country. Until this question is decisively answered transnational corporations will be allowed to continue their exploitation of these countries.

Corruption also severely interferes with a nation’s ability to combat environmental crimes. Corruption itself has been recognized as a global issue and over the years, international covenants have been signed to combat it. This includes the OECD Convention of Combating Bribery of Foreign Public Officials in International Business Transactions (ratified 1999), the Council of Europe Civil Law Convention on Corruption (ratified 2001), the Criminal Law Convention on Corruption of the Council of Europe (ratified 2002), and the United Nations Convention Against Corruption (ratified 2006).⁶⁶² The largest of these was the Convention Against Corruption signed under the banner of the United Nations by 150 nations. This criminalized numerous conducts under the umbrella of corruption.

The laws to combat corruption have already been laid down. Strict enforcement is the only element that is missing in creating a global community that lacks corrupt political systems. The United States, United Kingdom, and Germany are the leading nations fighting corruption on the global stage.⁶⁶³ Germany has been second to the U.S. in the number of tried bribery cases,

and third to both the U.K. and the U.S. in the cases charged.⁶⁶⁴ These three nations are optimal examples of how the global community should tackle political corruption.

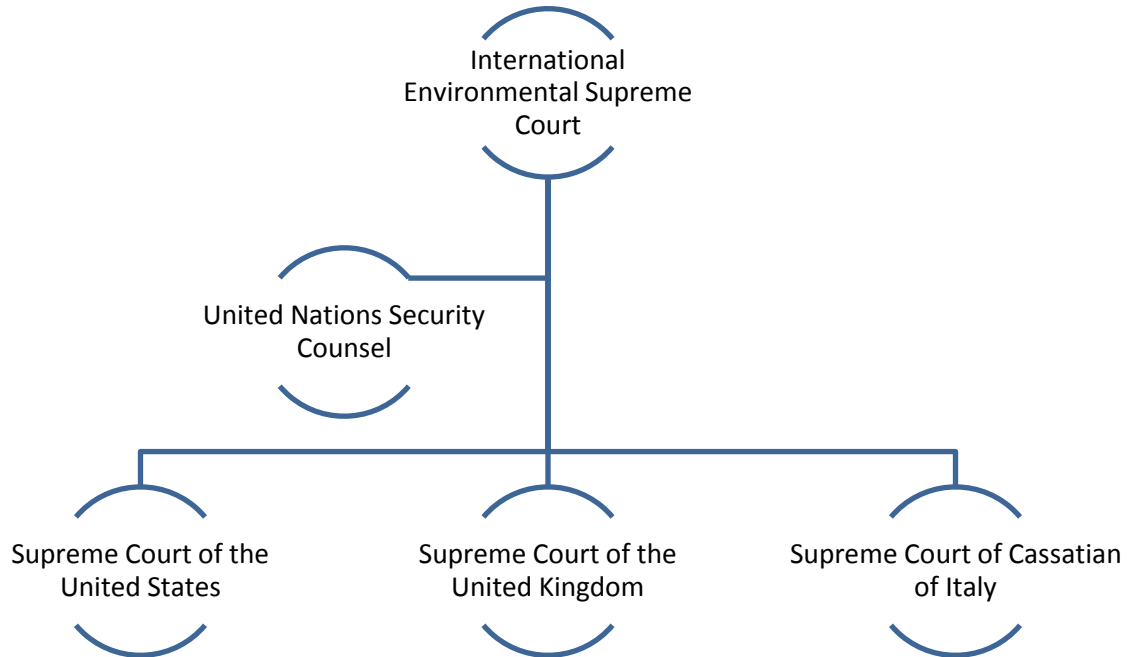
In light of current U.S. policies against corruption, coupled with its enforcement powers backed by the Federal Bureau of Investigation, the Security and Exchange Commission, and the Department of Justice, corporations have adjusted their conduct to avoid illegal conduct. Companies now implement comprehensive compliance control regimes to insure their noninvolvement in corruption activities. This self-policing in the private sector is a boost to enforcement interest of states attempting to reign in political bribery.

These three countries teach us that fighting corruption must be a priority of the nation state. If done correctly, corporations will find that participating in corruption is against their financial interest. Through a comprehensive penal system of fines, lost contracts, and public relations efforts, company directors will seek to adjust practices to fall in line with domestic regulations that take root from international law.

With economic growth comes numerous problems that are attached to environmental damage. This clearly illuminates the need for an International Environmental Court and an enforcement mechanism against corruption. The need is even more glaring in light of the interconnectedness of the global economy in the 21st century.

VI. International Environmental Supreme Court

This dissertation proposes a key method in creating uniformity and an adjudication process that is effective for the international community. An International Environmental Supreme Court (IESC), would be a supreme body that would be a court of last resort. The following diagram charts how a such a court could established within a legal hierarchy:



To implement this system, traditional notions of jurisdiction and sovereignty would have to be addressed. All nations place their own courts of last resort as the supreme body of jurisprudence that is responsible for dispensing ultimate justice within territorial boundaries. However, these courts are limited in scope and adjudicate matters not based on international interests, but those set out by citizens from their own country. Therefore, single courts charged with dispensing justice on the environment, a category that affects all nations, only issues orders and opinions in line with national interests and doctrine.

This proposal does not call for an ultimate international court that would be a court of last resort for all matters. It only seeks to establish a system of international adjudication in matters involving the *environment*. Its strict limits of subject matter would allow nations to be friendlier to the idea of a higher bodied court superseding domestic institutions.

The referral system can be based in two proposed ways. First is through a referral from the United Nations Security Council. In this instance, for criminal matters, a prosecutor would be assigned from a neutral nation to bring a complaint against the violators. Through an international grand jury of sorts, a diverse panel would determine if such a complaint is well founded through the presentation of evidence. If so, an indictment would be issued and either a

summons or a warrant for arrest. The arrest warrant could be executed by signatory states that are willing to participate in the court's application.

Matters adjudicated within domestic court systems face a different form of referral. Here, the Supreme Court of the United States for example can adjudicate a matter and issue an order granting or denying a petitioner's application. In instances where the court feels unable to comfortably exercise its jurisdiction, for example when multinational corporations begin putting political pressure on domestic judges, it may formally refer the matter to the IESC. This would have allowed Ecuador to refer the Texaco-Chevron matter to the IESC in light of corporate corruption tactics. Once the IESC has heard the matter, it can issue order upon which domestic states would be bound by international law.

For the IESC to remain effective, it should also have the ability to exercise jurisdiction over matters that are being heard in domestic courts; when those cases are being improperly handled by the courts. At any time during proceedings, a petition can be lodged to the IESC by parties who are engaged in litigation. The grant of certiorari would be determined after a fact finding hearing in which the moving party would have the burden of showing impropriety of the domestic tribunal. Once established, the IESC would exercise jurisdiction and move the case into its court.

Within many nations, lawyers and judges themselves are disciplined and managed by their court of last resort, or another judicial body. The IESC should be granted some form of review for attorney and judge statuses when it is shown that impropriety has been alleged. This would require an additional surrender of sovereignty on the part of the nations as the IESC would govern lawyers in a limited manner. This type of authority could proceed in the form of sanctions, forbidding travel or seizing assets for those attorneys and judges who are culpable in corruption or environmental destructions schemes.

The IESC would also be armed with special knowledge cultivated through its specialization. Marshalling international experts in the field of environmental study, the Court can implement studies and rely on crucial findings to assist in its decision making process. It could also provide these experts on request to nations who require scientific or technical consultation. This will also assist in the competency of the court to hear these matters. Given the delicate nature of sovereignty issues, integrity and competency in a judicial body is paramount for participants to agree and follow court order.

The ICC serves a solid example for the proposed international structure of the IESC. The IESC should consist of three chambers, pretrial, trial, and appeal. Each division receives eight judges from signatory states. The office of the Prosecutor would also be attached to the institution to bring action against parties who violate international law protecting the environment. In addition, the common law of both the United States and the European Union serve as sufficient legal back drop to begin issuing opinions. Although the judges themselves will decide the area of law that they find influential, these common law areas are established on fundamental rights such as privacy, liberty, and property. Using the ICC as an example, and the environment as its guiding principle, the IESC can do much to change the way criminals are prosecuted on the international scale.

VII. The Need for a Global Union

The growth of an increasingly global marketplace coupled with a growing concern for environmental protection has resulted in a complex scheme of regulations and treaties. Corporations are now capable wielding tremendous power around the world, and their actions continue to produce criminal consequences for the environment. Furthermore, environmental harm is transboundary in nature and must be regulated by a global court. It is this reality that urges the need for a Global Union.

Within the past decade, new efforts to put enforcement powers into international agreements have been initiated by creating new supranational enforcement authorities. What is unique about the E.U. is that it already has very well developed institutional authorities to make its members comply with adopted standards. European governments have learned how to work through such structures, and their citizens have become accustomed to obeying international law. Thus, the European Union can be a persistent force for tugging other states towards following the European example; an example that teaches countries how to hand over bits of their sovereignty to a supranational institution in order to combat transborder issues. This is the best mechanism available for a comprehensive protection scheme for the environment.

There are several attractive aspects of the European Union that serve as a model for a Global Union. Effective judicial protection of the environment is necessary to combat environmental crimes. Within Europe, a central judiciary is able to prosecute and adjudicate

cases that would otherwise not be pursued on a domestic level. This should be one component of an international body that governs environmental protection across the world.

It is important to note the differences between the charter of the United Nations and a possible constitution of the Global Union. The charter of the U.N. was not designed to be a constitution, but rather an affirmation and commitment to certain beliefs. As stated in the preamble of the charter, its purpose is to solidify the principles of peace, human rights, social progress, and freedom. Furthermore, the charter is not the supreme law for which all signatory states are bound to. In domestic constitutional governments, the constitution serves as the source of all law, and a guiding force in common law.⁶⁶⁵ In comparison to this type of legal system, the U.N. Charter was created after the acceptance of many other sources of international law, “including fundamental elements of international law such as the Genocide Convention which requires its signatories to prevent, stop, and punish genocide....”⁶⁶⁶ For a new Global Union, a charter would be inappropriate as it would not create the legal system needed to combat issues like environmental criminal conduct.

To establish this Global Government, member states would draft and approve a Constitution with a judiciary, an enforcement mechanism, and representative form of legislative development. Its principles should be based on the inherent values of human rights and environmental protection, similar to the principles laid out in the U.N. Charter. The fundamental rights listed in the Constitution should, without modification in substance, become legally binding on all signatory states as an integral part of the Constitution. The purpose of this is to create a new legal system that uses this constitution as the supreme law of the global community. Rather than using separate domestic systems and laws to settle international issues, one common legal scheme, with grand humanist principles, can be utilized to push an enlightened agenda of progress.

A unified effort from all nations is required to take the appropriate steps to secure our environment. The models vary and the methods to implement change are challenging. Individual nations on their own cannot achieve what requires a global community to accomplish. With academic recommendations, and in depth analysis of current systems, we can build a better world by building a better supranational government.

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²⁸⁸ 33 U.S.C. §2701 et seq. (1990) (The Oil Pollution Act (OPA) of 1990 streamlined and strengthened EPA's ability to prevent and respond to catastrophic oil spills.

²⁸⁹ United Nations Convention of the Law of the Sea, Art. 56, Par. 1 reads in relevant part: 1. In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in this Convention.

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³⁸⁰ These other harms include: Disaggregating air pollution and sulfur dioxide by 42%; nitrous oxides by 65%; hydrocarbons by 104%; carbon monoxide by 105%; and particulate matter by 43%. See *supra* note 64 at 189-90.

³⁸¹ Part 5 of the NAFTA Environmental Side Agreements lays out the mechanisms of dispute resolution in Part 5 Sections 22-36. NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION, Part 5, 32 I.L.M. 1480 (1993).

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