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Ecocide, environmental harm and framework integration at the International Criminal Court

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ABSTRACT

As the International Criminal Court (ICC) increasingly focuses on environmental harm, and with ecocide formally proposed for adoption into the Rome Statute, the normative adjustments needed to accommodate this ecocentric shift require urgent analysis. Other branches of international law, such as environmental, human rights, and humanitarian law, will be critical in environmental harm proceedings. However, the conceptual basis to incorporate extrinsic law at the ICC under Article 21 of the Rome Statute has not been adequately explored, jurisprudence on it is inconsistent, and its practical implementation remains *ad hoc*.

In seeking to reconcile the Rome Statute with its broader legal context, a well-known doctrine for the incorporation of disparate bodies of law is that of systemic integration, which has been espoused by Martii Koskenniemi and the International Law Commission. Yet, a deeper analysis reveals that this hermeneutically-bound approach is overly restrictive for the ICC's environmentally-oriented activities. In its place, the article proposes a new approach called 'framework integration'. The article pre-emptively addresses potential challenges to this novel theory, including the risks of the Court acting *ultra vires* and perpetuating inconsistent legal standards. This normative examination provides insights for the ICC and for other institutions charged with redressing atrocity crimes, which is particularly apposite for existing offences harming the environment as well as the proposed crime of ecocide.

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International Criminal Court; Ecocide; systemic integration; framework integration; environmental harm

> Both international environmental law and international criminal law are booming disciplines in their own right, but their interaction remains, apart from a few exceptions, curiously under-explored. Mégret (2011, 201)

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Introduction

Ecological destruction afflicts all areas of world (Robinson, 2022), from the Amazon[1] to Ukraine.[2] Criminal accountability for the worst acts against the environment provide one means to heighten its protection.[3] The World's first permanent International Criminal Court ('ICC'), which is designed as a last resort institution when domestic authorities are unable or unwilling to act,[4] is showing concerted interest in addressing environmental harm.[5] In late 2024, the crime of Ecocide was proposed for inclusion in the Rome Statute.[6] A few months earlier, the ICC Office of the Prosecutor ('OTP') announced its launch of 'a comprehensive policy paper on Environmental Crimes', which has since been disseminated for public consultation.[7] That builds on the OTP's 2013 and 2016 policy papers.[8] These efforts respond to calls for ecocentric regulatory reform,[9] particularly in relation to ecocide.[10] Against this backdrop, it is critical to examine the ICC's normative framework applicable to environmental harm.

At present the ICC's framework is overwhelmingly anthropocentric in nature (Gillett 2022a, 6). Consequently, the shift to encompass ecocentric interests creates normative challenges. Adjudicating environmental crimes will require the Court to apply rules and principles extrinsic[11] to the Rome Statute, including from international environmental law ('IEL'),[12] international humanitarian law ('IHL') (when the charges are linked to armed conflict), and international human rights law ('IHRL').[13] This is particularly applicable for the proposed crime of ecocide (Falk, 1973), which lies at the intersection of these branches of international law.[14] Consequently, examining how to emmesh these disparate strands of international law is essential. Yet the mechanics of incorporating external sources of law under the ICC's normative framework remain opaque and undeveloped.

A leading doctrine for reconciling various strands of international law is that of 'systemic integration' espoused by international law scholar Martii Koskenniemi.[15] Although it is technically formulated as a method of interpretation, systemic integration has been hailed as a means to integrate parties' international obligations under extrinsic instruments.[16] In relation to the ICC, Campbell McLachlan argues that, as an international tribunal, it must engage in systemic integration (McLachlan, 2024, p. 320). Yet there are fundamental incongruities between systemic integration, proposed by Koskenniemi under Article 31(3) of the VCLT, as compared to the terms of the pivotal ICC provision – Article 21 of the Rome Statute, in both form and function. Overlooking those differences may lead to misplaced reliance on systemic integration and undervalue the far broader integrative potential of Article 21. The present article seeks to remedy that gap.

The study shows that more than mere interpretation is required by the ICC's uniquely formulated 'sources of law' provision. As the fulcrum provision, Article 21 requires the Court to apply not only the Rome Statute instruments but also 'where appropriate, applicable treaties and the principles and rules of international law'.[17] This green light for the application of extrinsic legal sources is consequential. It provides the normative potential for a harmonious incorporative approach to international law.[18]

Despite this potential, Article 21 does not explain *how* extrinsic sources are to be incorporated. Moreover, ICC jurisprudence has done little to clarify this issue.[19] With the OTP policy on environmental harm and the proposed crime of ecocide highlighting the relevance of a range of sub-branches of international law, increasingly pressing questions arise concerning how to identify the relevant external principles, assess their

'relative normativity',[20] prioritise them, and potentially de-conflict those extrinsic legal rules. Smooth integration is necessary to avoid exacerbating the fragmented current state of international law,[21] which is particularly evident in relation to environmental protection.[22]

In keeping with the scholarly mission to develop and synthesise normative systems (Peters, 2013), this article proposes an innovative theoretical approach for the coherent incorporation of IEL and other sub-branches of international law before the ICC, called 'framework integration'. Framework integration reconceptualizes systemic integration for the purpose of ICC proceedings.[23] Importantly, the analysis articulates four criteria to facilitate framework integration, namely: adjudicative coherence, the principle of effectiveness (*effet utile*), substantive proximity, and de-fragmentation. It highlights the specific benefits and challenges that will arise from using framework integration for environmental harm.

Examining how to incorporate extrinsic law in environmental cases before the ICC is a novel line of inquiry,[24] which has not been analysed in detail.[25] Previous works have highlighted the relevance of IEL principles under the Rome Statute,[26] and the links between IHRL, IHL and ICL, but have not looked at how to harmoniously integrate these sources under Article 21 of the Rome Statute.[27] Separately, there has been a 'proliferating critical scholarship on ecocide' (Minkova, 2024), attacking IEL and ICL at the broad conceptual level.[28] However, some of these works omit any viable means of disentangling normative tensions under the current system of international criminal law (e.g. Cusato & Jones, 2023). Typical of this approach is to advocate for a radical re-thinking of the entire international criminal law initiative. There are even assertions that the 'emphasis on accountability' for Rome Statute crimes is borne of a 'primitive urge' to punish (Cusato & Jones, 2023, p. 61). While these generalised debates lie outside the purview of the present article, it must be stressed that individual criminal accountability is justified for war crimes, crimes against humanity, genocide, and aggression, whether or not the underlying sentiment is labelled as 'primitive',[29] and a similar form of accountability for ecocide should not be dismissed on this basis.

With ecocide and environmental harm prosecutions on the horizon, it is imperative to examine the legal bases on which they can proceed at the ICC,[30] The endeavour can yield important insights for other institutions, such as Colombia's Special Jurisdiction for Peace, which draws on ICL, IHL, IHRL and domestic criminal law, and is actively prosecuting environmental harm.[31] More fundamentally, the approach of framework integration proposed in this article provides a potent means to defragment international law and thereby enhance its stability.[32] Given the legitimacy crisis of international law and the growing questions of identifying applicable law among multiple branches,[33] the article seeks to contribute to the normative coherence and effectiveness of the international legal system as a whole.[34]

Seeking a means to re-integrate external branches of international law into the autonomous field of international criminal law

To assess the integration of international criminal law within the broader body of international law, it is instructive to review how the former developed and branched off from the latter. Although international criminal law only truly crystallised as an autonomous

discipline following the end of the Cold War,[35] its conceptual basis was laid several centuries earlier. Taking notions of Statehood developed by Vitoria and others and centred on the principle of *pacta sunt servanda*, Grotius articulated a 'common law among nations' that was both independent of the ecclesiastical ties of those former thinkers (so much so that his seminal work *De Jure Belli ac Pacis* was banned by the Catholic Church for 275 years) (Vreeland, 1917), and a rebuke to the Machiavellianism which had been the predominant approach to inter-State relations during the preceding century (Scharf, 2022). Building on Grotius's recognition of the right to punish acts beyond their borders if they 'enormously violate the laws of nature and nations' (Grotius, 1925), Henri Donnedieu de Vabres advocated for a 'system of universal jurisdiction' based on the '*universality of the right to punish*' (Donnedieu de Vabres, 1922–1923). Core principles laid down by these thinkers, such as *aut dedere dut judicare*,[36] were early signs of potential systematicity.

That first phase of conceptual development precipitated a second wave of progressive codification of rules of IHL which predicate international criminal law, including the 1863 Lieber code, the Hague Convention of 1899, and the Geneva Conventions of 1949.[37] However, the codification process was punctuated and irregular, with core tenets emerging in a decentralised way, often in reaction to specific atrocities or wars. Crimes against humanity were first mentioned as such in relation to the 1915 extirpation of the Armenians in Turkey; war crimes developed on the basis of IHL created following Henry Dunant's witnessing of the battlefield suffering at Solferino; and genocide as a reaction to the Holocaust.[38] Although the Nuremberg and Tokyo tribunals did not address genocide as such, they constituted the first major application of the other offences now seen as constituting international criminal law. They also saw the conceptual basis for distinguishing international from domestic crimes, with the International Military Tribunal defining an international crime in the *Hostages* case as 'an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances'. Yet, the situationally-bound nature of the Nuremberg and Tokyo trials means they cannot be equated with the full establishment of an independent domain of international criminal law *per se*.

After the developmental hiatus during the Cold War, international criminal law truly crystallised as a definitive branch of international law in the 1990s. The creation of the Yugoslav, Rwandan, Sierra Leonean and other *ad hoc* tribunals saw international judges produce a wealth of jurisprudence fleshing out the key concepts and contours of international criminal law. In parallel, States successfully negotiated the enshrinement of the core international crimes in a systemic manner in the Rome Statute of the ICC.[39] This phase cemented international criminal law's existence as an autonomous normative framework, and saw it infused with independent positions on issues such as the 'overall control' test for State responsibility and head of State immunity for atrocity crimes, which diverged from those of the ICJ.[40] International criminal justice also stood distinct from, though related to, domestic frameworks. Through these connections at various levels, international criminal justice can be seen as a developed system of 'multi-level jurisdiction that is organized along with principles of subsidiarity and deference' (Stahn, 2019, p. 20).

However, dissents regarding the conceptual basis for international criminal law have persisted. These have often replicated Judge Pal's attack on the organisational basis for international criminal law, as set forth in his dissent in the Tokyo trial, that.

> [N]o particular group of nations can claim to be the custodian of the 'common good'. International life is not yet organized into a community under the rule of law. A community life has not even been agreed upon yet. Such an agreement is essential before the so-called natural law may be allowed to function in the manner suggested.[41]

Whereas critiques in the 1990s were narrowly and legalistically framed, such as Slobodan Milošević's challenge to the International Criminal Tribunal for the former Yugoslavia on the basis that the UN Security Council lacked the power to establish a criminal tribunal (Abtahi & Dawson, 2016), recent years have seen a resurgence of questions regarding the legitimacy and cohesiveness of the system of international criminal law as a whole, with a focus on its 'democratic deficit', fragmentation, and a perceived anti-African bias or selectivity against the global South.[42] These important critiques highlight the need to ensure that international criminal law rests on theoretically sound underpinnings and functions as a part of the broader system of international law, in line with its foundational principles and secondary rules.

To this end, in recent years efforts have been made to reconcile the rules of international criminal law back into the broader corpus of international law.[43] With cross-cutting issues arising before multiple international institutions, from the UN Security Council, to the ICJ, to the ICC,[44] and with secondary principles of international law such as the role of peremptory norms increasingly being raised before these bodies, there is a growing appreciation of the risks of fragmented sub-branches of international law. Inconsistent approaches, and potentially outcomes, for the same allegations depending on the international forum chosen contravenes the predictability and legitimacy of international law and provides potent fodder for those seeking its downfall (Perez-Leon-Acevedo, 2024, p. 400; Webb, 2013, p. 5; Cryer, 2009, p. 395). Ecocide epitomises this risk of divergence, as it inherently implicates the criminal and environmental branches of international law and will typically have ramifications for human rights and humanitarian law. Predictability is particularly important in the environmental context, so that people seeking to engage in necessary activities such as buildings hospitals, schools and infrastructure, can plan their behaviour accordingly.[45]

However, approaches to the incorporation of external international law branches into the applicable framework of international criminal law have varied both theoretically and in practice. At the *ad hoc* tribunals for the former Yugoslavia and Rwanda, IHL was a core contributory stream for the doctrinal developments (even if those developments sometimes formed schisms with established interpretations of IHL).[46] Yet, beyond IHL, those tribunals did not delve into other sub-branches of international law with any regularity. Similarly, ICC jurisprudence has heavily relied on IHL, along with IHRL. Though it has addressed the inter-relationship with the United Nations Charter,[47] it has avoided deep engagement with the conceptual basis for those inter-connections.

On the specific connections with extrinsic legal sources, ICC jurisprudence lacks consistency and coherence.[48] Some chambers have shown concerted resistance to extrinsically based practices,[49] while others have embraced procedures with no basis in the

Statute.[50] This jurisprudential confusion exacerbates the lack of scholarly attention paid to the integration of the Rome Statute's terms with broader international law.

The theory of systemic integration

Lacking doctrinal or scholarly guidance from within the field of international criminal law for the incorporation of extrinsic sources, it is apposite to ask whether systemic integration can provide a viable means to do so. Campbell McLachlan proposes systemic integration as the vehicle for this task, asserting that Article 21 of the Rome Statute is an effort to 'fashion the principle of systemic integration into a specific rule on applicable law' (McLachlan, 2024, pp. 310–311). Stating that systemic integration has been relied on in hundreds of decisions of 'all the major international and regional specialized tribunals', he advocates that this approach should be adopted at the ICC, but does not explore the normative basis to do so in any depth (McLachlan, 2024, p. 4). In this light, it is timely to assess the contours of systemic integration and its fit with the Court's Rome Statute system.

Systemic integration, as developed by the ILC, was advanced by Martii Koskenniemi (who was also the Chair of the ILC 2006 study group) and others as a means of harmonising international law.[51] Whereas systemic integration was most authoritatively set out by the ILC's 2006 study group on the fragmentation of international law,[52] it was also articulated by Koskenniemi in his own capacity.[53]

In light of Article 31(3)(c)'s of the Vienna Convention's requirement to take into account 'any relevant rules of international law applicable in relations between the parties', Koskenniemi and the ILC study group asserted that this 'article gives expression to the objective of "systemic integration" according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact' (International Law Commission, 2006, p. 106). In essence, systemic integration seeks to use extrinsic sources of international law to produce interpretations consistent with that broader context. At the same time, the ILC complemented systemic integration's hermeneutical role through the 'conflict-solution techniques' of *lex specialis*, *lex posterior* and *lex superior*. Together, these methods contribute to forming a 'purposive' legal system (Koskenniemi, 2005, paras. 30, 34), which has been of 'continuing influence' and 'practical utility' for scholars working across a broad spectrum of international law domains to examine interrelationships between their field and others (McLachlan, 2024, p. 4).

However, systemic integration's focus on interpretation significantly limits its utility at the ICC.[54] Article 21 of the Rome Statute goes well beyond interpretation. Instead, it allows the Court to 'apply' extrinsic sources to fill gaps in the ICC's regulatory regime. Using external sources to fill substantive or procedural lacunae in this way functionally surpasses the interpretive role of Article 31 of the Vienna Convention.[55] Interpretation fundamentally requires a piece of text to be interpreted and that text must be interpreted in good faith in accordance with the ordinary meaning of its terms in context and in light of its purpose.[56] Just as interpretating a piano piece in light of external influences differs qualitatively from adding additional instruments to it in order to form an ensemble, there is a qualitative distinction between interpreting one legal source in light of external sources and using those external legal sources to coherently fill gaps left by the original legal source.

To give an example, the Independent Expert Panel's definition of ecocide refers to 'damage to the environment' without defining what this means.[57] In relation to animals, that gap could be filled by using the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) treaty to determine which acts against animals and plants qualify as relevant forms of damage to the environment.

In this light, there is a disconnect between systemic integration's ambitious purpose of incorporating rules into a coherent system of international law, and its narrow framing for interpretive purposes. More than just interpretation of the Rome Statute's terms is required to redress environmental harm. Instead, substantive content will need to be integrated into the Court's legal sources, consistently with Article 21. To do so in a coherent and principled way, the following section examines how systemic integration can be reconceptualised under the Rome Statute's normative framework.

Reconceptualizing systemic integration as 'framework integration' under Article 21 of the ICC Statute

The core basis for the incorporation of international law into the Rome System is the uniquely formulated Article 21, as noted above.[58] Yet Article 21's terms not only allow the Court to 'apply' a range of sources, including external law comprising 'applicable treaties'[59], and the principles and rules of international law, but also set out a hierarchy of sources of law.[60] This three-tiered cascade of applicable norms differs from the Statute of the International Court of Justice, which sets out its three primary sources without a hierarchy, and then adds two 'subsidiary means' for determining legal rules (Schabas, 2016, pp. 515–516).

Whereas an objective of Article 21 was to restrain judicial discretion and thereby increase legal certainty,[61] its terms permit considerable latitude. Given its fundamental role in framing the Court's normative basis, and its role as a conduit to the external legal instruments of public international law, it is important to examine the structure and wording of this 'master key' provision.[62]

At the ICC's first tier, Article 21(1)(a) refers to the Statute, Elements of Crimes and its Rules of Procedure and Evidence.[63] The mandatory term 'shall' means that the judges must first look to look to those internal sources, in that order, as has been confirmed in multiple decisions.[64]

External international legal materials fall under Article 21(1)(b), which applies 'in the second place'. This means resort can be made to it where a matter is not settled by the Rome System, leaving a 'lacuna' in the regulatory framework.[65] This does not simply require that the primary sources are silent on a matter. Instead, it must be shown that there is an objective under the Rome Statute which is not fulfilled by its terms.[66]

In the third place, if paragraphs (a) and (b) fail to resolve the issue, Article 21(1)(c) allows for the application of 'general principles of law derived by the Court from national laws of legal systems of the world.'

This funnelling leads to a relatively narrow window for the use of extrinsic materials under Article 21(1)(b).[67] Moreover, the Statute requires that its law be interpreted consistently with international human rights law under Article 21(3), that the definition of a crime shall be strictly construed, that it shall not be extended by analogy and that ambiguity shall fall in favour of the accused as set out in Article 22(2). It adds that the

Elements of Crimes shall assist the Court's interpretation and application of Articles 6–8*bis*. Given that the Rome Statute contains several interpretive bulwarks, it may be asked whether there is any space for external legal sources to be applied under Article 21, particularly in relation to substantive crimes.

However, when examined in detail, significant gaps in the ICC's coverage appear, particularly in relation to environmental harm. For example, to address environmental harm the Court would typically need to determine whether acts that result in environmental harm were legal or illegal in nature. This may be informed, for example, by looking at the CITES on animal trading, as set out above, or looking at the World Heritage Convention to determine whether a natural site had outstanding universal value to qualify for special legal protection. External instruments may similarly be required to discern whether any other grounds for excluding criminal responsibility could be raised under Article 31(3) of the Rome Statute or mistake of law under Article 32 (Robinson, 2022, pp. 342–343). These could include exceptions, such as those set out under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972) and its 1996 Protocol and the Convention on Prevention of Pollution from Ships (1973). Additionally, IEL principles such as the precautionary principle could potentially impact the *mens rea* element, as discussed below, and external sources such as the Convention on Environmental Modification (ENMOD) and IHL instruments are likely to be either applied or used as aides to flesh out and interpret the elements of widespread, long-term and severe, which are contained in the war crime under Article 8(2)(b)(iv) as well as in leading formulations of ecocide such as that proposed by the Independent Expert Panel (Gillett 2022, pp. 99–104).

Already, the Court's practice has seen several procedural questions require resort to external legal sources.[68] IHL and IHRL have been drawn into the Court's jurisprudence, including in the context of Article 8 war crimes,[69] in analyses of persecution as a crime against humanity under Article 7, and in fair trial assessments.[70] The VCLT itself has been relied on several times, even though it is technically an extrinsic treaty of international law, only applicable under Article 21(1)(b) because the Rome Statute (and other primary instruments) do not contain a complete internal interpretive guide.[71]

Having examined the structure of Article 21 and its hierarchy of sources, the specific terms of Article 21(1)(b) itself must be taken into account to assess its application to extrinsic legal instruments. At the outset, it must be noted that the meaning of the pivotal phrase 'where appropriate', regarding the circumstances in which external materials may be applied, remains unclear (Hochmayr, 2014, pp. 664–666). This phrase appears to be situational in nature, referring to circumstances in which there is a gap in the primary legal sources on a germane issue. However, it could also have a second filtering nature, controlling the *types* of external materials which may be relied on under Article 21(1)(b). In this respect, claims have been made in leading texts that Article 21(1)(b) is a narrow provision only referring only to 'those treaties of general application that form the basis for the definitions of crimes over which the Court has jurisdiction, such as the Geneva Conventions, the Genocide Convention, and the Convention on the Rights of the Child.'[72] However, that assumption is questionable, as Article 21 includes no such explicit limitation to sources of law concerning substantive crimes.[73] In fact, its wording refers to the Court's Rules of Procedure and Evidence, which address matters going well beyond substantive crimes.[74] Given that Article 21(1)(b) also

already includes a subordinating phrase ('in the second place') it would be duplicative to also interpret 'appropriate' as only referring to where gaps are left by Article 21(1)(a) and it is instead open to read 'appropriate' to also have a filtering character. In this way, Article 21(1)(b) would be given a construction whereby resort should only be made to external sources when the primary sources under Article 21(1)(a) are insufficient to meet an aim of the Statute, and where the external sources being used are relevant to resolving the gap in the internal regulatory framework.[75]

Looking to its other operational terms, Article 21 requires that the extrinsic legal source is 'applicable'. For treaties, this would imply that the instrument is applicable within the relevant context (typically the territorial jurisdiction where the crimes occurred).[76] A narrower reading of Article 21 requiring parallel acceptance by States is proposed by Pellet, whereby external treaties could only be applied where 'two or more States agreed to accord it some specific jurisdiction or to require the application of particular principles' (Pellet, 2002, pp. 1069–1070). Nonetheless, the more flexible reading of 'applicable' above aligns with the broad wording of Article 21, which differs from the more constrictive terms of Article 31(3)(c) of the Vienna Convention (referring to extrinsic sources 'applicable in the relations between the parties' and thereby implying a parallelism requirement).[77]

Under Article 21(1)(b)'s terms, principles of customary international law would also be presumptively applicable.[78] Such principles have been utilised for example in the Jordan litigation surrounding its failure to arrest Al-Bashir.[79] However, the rigour of the Court's identification of applicable customary international law has been questioned (Schabas, 2016, p. 522). Whatever the merits of those criticisms, it is clear that there is an absence of structured guidance as to how extrinsic materials should be identified and applied under Article 21, which has no doubt contributed to the Court's mixed approaches to using customary international law. Beyond treaty and customary law, there are so-called 'soft law' materials, such as declarations and UN General Assembly Resolutions. These may be used as indicia of the principles of international law, but could not be directly applied in a binding sense *per se*.

Whereas Article 21's structure is relatively clear, it does not comprehensively specify how to apply its terms to integrate international law. The Rules of Procedure and Evidence note the relevance of Article 21 to national laws (Rule 63(5)) and human rights law on the admissibility of evidence (Rule 72(2)), as well as aggravating circumstances (Rule 145) and offences against the administration of justice (Rule 163), but provide no overarching guidance concerning other branches of international law. To remedy the lack of guidance, one could look to Koskenniemi's systemic integration via Article 31(3)(c) of the Vienna Convention. Yet, significant incongruities emerge when it is superimposed onto Article 21 of the Rome Statute as set out herein. Although the Court itself has frequently referred to Article 31 of the Vienna Convention to interpret the Rome Statute and associated internal instruments,[80] it has done so in a confused manner, sometimes not specifying the basis for doing so,[81] and generally leaving it unclear whether the Vienna Convention interpretive approach only applies to provisions of the Rome Statute or also to provisions of external sources of law applicable under Article 21(1)(b).[82]

This confusion demonstrates the Court's conflation of two separate notions – the Article 21 Rome Statute process for determining and prioritising the applicable law (referred to herein as the 'identificatory' function) and the Article 31 Vienna Convention

process for interpreting provisions of international law (referred to herein as the 'interpretive' function).[83] Whereas applying an extrinsic law is different to interpreting an internal provision in light of extrinsic law,[84] the conflation can be seen in examples such as the *Katanga* Trial Judgment, where the Court appeared to bundle all the processes together as one extended form of interpreting the Rome Statute.[85] Further confusion arises from Pre-Trial Chamber I's reading of 'interpretation and application' to refer only on 'interpretation', rather than distinguishing between the different functions.[86] Grover observes a similar lack of precision in the jurisprudence of the *ad hoc* tribunals, 'with judges not always specifying whether they are invoking a legal source as an aid to interpreting a statutory provision or applying it directly to a set of facts' (Grover, 2010, p. 549).

The merging of the identificatory and interpretive functions can also be seen in academic commentary (e.g. McLachlan, 2024, pp. 310–311). Collapsing the identificatory and interpretive functions into one process ignores the explicit distinction between these functions within Article 21 itself (see Manley et al., 2023, p. 774).

Given that prosecuting environmental harm will require the incorporation of substantive provisions of extrinsic law, and given that systemic integration is narrowly conceived as an interpretive function (as discussed above), the present study proposes a new concept of 'framework integration'. It contends that framework integration is a more fitting approach than systemic integration for the process enabled of incorporating external sources via Article 21(1)(b) at the ICC. Article 21(1)(b) does not stop at interpretation, but potentially permits the integration of substantive sources of international law that are extrinsic to the Rome Statute. This reconceptualised approach of framework integration seeks to realize that promise by allowing for the identification, interpretation[87] and application of external sources of law, consistent with Article 21 of the Rome Statute, and thereby ensuring a systemic approach consistent with the normative constitutional foundations of the Rome Statute system. However, the way in which framework integration manifests under Article 21 requires exploration, as the terms of the article itself do not provide comprehensive guidance for judges looking to utilise it.

The need to reimagine conflict removal principles for framework integration under Article 21(1)(b)

In espousing his narrow version of systemic integration, Koskenniemi's ILC report refers to three conflict removal techniques: '(a) specificity (*lex specialis*); (b) temporality (*lex posterior*); and (c) status (*jus cogens, obligations erga omnes* and Article 103 of the Charter of the United Nations)', which he appears to closely connect with systemic integration (International Law Commission, 2006, para.412). However, in the ICC context, these techniques do not provide a means to identify and prioritise the relevant law, which is the first step in resolving an issue, before interpretation can occur. Moreover, although these rules can reduce friction between legal systems, they do not facilitate integrating them coherently into a unitary system (Colangelo, 2016, p. 21).

Each of these de-conflicting methods has specific operational limitations under the Rome Statute system. For example, the *lex specialis* rule would hold that matters expressly addressed by IHL should be regulated by that body of law. Rules such as Article 50(1) of Additional Protocol I would require that '[i]n case of doubt whether a person is a civilian,

that person shall be considered to be a civilian'.[88] However, the presumption of civilian status could obviate the need to prove a key element of crimes, namely, the protected status of the victim and effectively reverse the burden of proof, in violation of Article 67(1)(i) of the Rome Statute. The incongruity of the *lex specialis* principle in the context of environmental harm is particularly apposite, given that ecocide brings together various fields of law and requires them to operate collectively and concurrently.[89]

The *lex posteriori* principle would also come up against limitations under the Rome Statute and in practice. The Rome Statute already partly deals with the issue through Article 24(2) concerning 'a change in the law applicable to a given case prior to a final judgement'. Moreover, if applied strictly at the ICC, a collection of States Parties could simply agree on a new treaty or provision and claim that it supersedes the relevant rule in the Rome Statute. That would conflict with the terms of the Rome Statute, which has its own amendment procedure for crimes under Article 121(5).

Similarly, the appeal to the status of the law (*lex superior*) would be incongruent with the language and logic of the Rome Statute. As detailed above, Article 21 of the Rome Statute sets out its own hierarchy of sources of law. According to the International Law Commission, a treaty would be void (in whole or in part) if it clashed with *jus cogens* principles.[90] However, the Rome Statute itself incorporates several of the peremptory norms,[91] such as genocide and 'the basic rules of international humanitarian law'.[92] The ICC is the international judicial institution which applies these norms most frequently. If there were a clash as to the interpretation of those *jus cogens* or any others which potentially could impact on the applicable law, the Court would have to use the sources under Article 21 of the Rome Statute to address that clash, effectively making the Rome Statute the superior source of law in this context.

These de-conflicting rules can provide useful methods for traditional questions of treaty interpretation and application. But they do not provide a comprehensive set of secondary norms capable of ensuring the coherent application of extrinsic law in the context of the Rome Statute. Consequently, a differing set of criteria is set out below to facilitate the use of framework integration of external legal sources in ICC proceedings.

Proposed criteria for framework integration

Article 21(1)(a) provides clear guidance regarding the Court's internal law.[93] However, Article 21(1)(b) then facilitates the application of external sources without elaborating in detail the modalities to do so. In order to harmoniously apply the Rome Statute within the wider context of international law, criteria are proposed below for the selection, prioritisation, and interpretation of the applicable law.[94] Each criterion has a basis in the Rome Statute normative system and flows from the requirements of Article 21(1)(b) that the Court shall apply 'where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'.[95] These criteria are not framed hierarchically, but instead to be considered collectively. However, the de-fragmentation of international law more broadly is a secondary consideration compared to the other three criteria, as de-fragmentation constitutes both an impact as well as a selection factor for the use of extrinsic sources of law.

Adjudicative coherence as a criminal court

Adjudicative coherence can be used as a context specific analytical tool to examine whether the application of sources of law before the ICC would result in an 'incoherent judicial process, which would see the feasibility of the proceedings seriously impaired or jeopardized'.[96] The principle of adjudicative coherence emanates from the ICC's identity as a criminal court. That identity requires that certain values take precedence, including personal culpability, legality, and fair labelling.[97] These values can be seen, for example, in the introduction to the Elements of Crimes for crimes against humanity:

> 'Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.'[98]

According to the adjudicative coherence test, if any key facets essential to the Court's operations are inherently jeopardised by a phenomenon or procedure proposed before the Court, then that phenomenon or procedure is incompatible with the Court's identity as a judicial institution. Essential Court facets include the investigation and presentation of inculpatory and exculpatory evidence, respect for fair trial rights of the accused, the protection of victims and witnesses, the maintenance of efficient and expeditious proceedings, and the entering of a well-reasoned judgment and sentence.[99] The Court's two overarching obligations are the need to ensure accountability for atrocity crimes and the principle of legality, which accords with the Rome Statute drafters' goal of listing 'crimes within the Court's jurisdiction exhaustively and in as detailed and clear a manner as possible so that states and their agents could know with reasonable certainty what the outer reaches of prohibited conduct were and what obligations they had under the Rome Statute.'[100]

For the identification and prioritisation of external sources of law, adjudicative coherence assists to triage provisions based on their fit with the Court's core facets.[101] For example, provisions such as Articles 9, 14, 15 of the ICCPR (and their customary counterparts reflected in the UDHR) are inherently relevant to a judicial institution and can complement the Court's existing due process provisions (Grover, 2010, p. 562). Similarly, the Court can incorporate the power to stay proceedings for abuse of process in order to avoid undermining the integrity of a trial and, more broadly, the legitimacy of the Court.[102] As a further example, if the Court were to send witnesses back to countries in which they face a real risk of persecution,[103] it could undermine core facets of the Court's operations, including obtaining evidence (due to the 'chilling effect' this would have on other witnesses) and, arguably, the protection of witnesses.[104] In these instances, adjudicative coherence would augur in favour of integrating external legal protections, such as the principle of *non-refoulement*.[105]

In this context, it is important to note that, whilst the principle of legality is axiomatic, it is not an excessive stricture which prevents the court from conducting its work of discerning the law (Grover, 2010, p. 547). In particular, it does not bar progressive and dynamic interpretation of ICC law.[106] What this principle requires is that, at minimum, the judicial interpretation of an offence is reasonably foreseeable at the

relevant time to an accused receiving legal assistance.[107] Bearing in mind these explanations, the adjudicative coherence criterion is consequently a means of harmonising international law through the application of international criminal law, while respecting the latter's autonomous existence and underlying mores as an anti-impunity movement rather than a purely humanitarian one (Stahn, 2019, p. 26).

Effet utile

A further criterion proposed to form part of the framework integration approach for the ICC is that of *effet utile* or 'effectiveness' (*ut res magis valeat quam pereat*).[108] Although it is closely related to the telelogical approach to interpretation signalled by Article 31(1) of the Vienna Convention's reference to the object and purpose of a treaty, it also draws on Article 26's principle of *pacta sunt servanda* and Article 32(b)'s direction to avoid manifestly absurd or unreasonable results (such as the provision no longer having any practical utility whatsoever). Moreover, *effet utile* is used in the context of framework integration for the purpose of identifying relevant sources of law along with being an interpretive maxim. In relation to interpretation, support for its use can be seen in the *Katanga* Trial Chamber holding that 'in interpreting a provision of the founding texts, the bench must dismiss any solution that could result in the violation or nullity of any of its other provisions'.[109]

The principle of effectiveness directs the Court to select external sources of law which will help ensure the operability and efficacy of the internal provisions of the Rome Statute system. For example, although the existence of a subpoena power is not explicitly included in the Rome System instruments, the Court was able to use the importance of obtaining witness testimony in order to rely on a mix of external materials to fulfil internal objectives recognised in the Rome Statute.[110] The *ad hoc* tribunals also used the principle of *effet utile* to discern applicable laws, including in relation to subpoenas.[111]

However, an overly teleologically framed principle of effectiveness, if prioritised above all other considerations, can lead to abuses and even the re-writing of the Statute, to the detriment of the principle of legality (Robinson, 2008, p. 929). For this reason, in the construction of criteria of framework integration, the principle of effectiveness must not be used to override adjudicative coherence.

Substantive proximity to relevant Rome Statute objectives

The next criterion used to assist framework integration is that of substantive proximity to the relevant Rome Statute objectives. These objectives will usually be expressed in a provision of the Rome Statute, or else under the Preamble. As a factor for framework integration, the proximity test can assist to select and prioritise external sources of law with the adjudicative coherence and effectiveness criteria to resolve the matter. Because of its nature as a qualitative filtering criterion which can relativise multiple sources based on the substantive similarity of the external legal sources to the issue under consideration, it differs from the *lex specialis* test which focuses on the relative specificity of the instruments in order to determine if one source displaces another.[112]

The proximity factor can provide a helpful guide to ascertaining external sources of law.[113] Adapted for this purpose, the specific indicators of proximity are: (i) terminological identity or similitude of the external source with the Rome System objective or

provision under examination; (ii) relevancy of the subject-matter of regulation; (iii) (in the case of external treaties in particular) complete or partial overlap of Signatory Parties with the parties to the dispute; and (iv) temporal proximity, in the sense of being applicable at the time of the events in question. The greater the terminological identity, subject-matter relevancy, coverage of the parties, and temporal proximity to the provision or objective under examination, the higher the priority should be given to the external source of law with those features.

To provide an example, when determining what law to apply to add content to the elements of 'severe', 'damage' and 'unlawful' in the context of environmental harm, texts such as CITES, ENMOD or the Paris Pact on Green House Emissions would be particularly relevant because of their linguistic and substantive proximity to the objective of identifying and redressing harms meeting those elements. Other principles referring to the term 'severe' such as the Torture Convention or *ad hoc* tribunals' jurisprudence on the meaning of torture, would be less relevant to environmental harm because of the different conduct they address. However, unlike the *lex specialis* rule, the proximity test does not displace other bodies of law. Instead, it can assist to determine the range of bodies of external law of relevance and their relative weight when integrating diverse strands relating to a specific issue.

De-fragmentation of international law

A subsidiary criterion for framework integration is that of de-fragmenting international law. This factor stems from the Court's identity as an international organisation, existing within the matrix of international law. De-fragmentaiton is particularly important for environmental harm, which implicates multiple fields of international law.[114]

De-fragmentation through framework integration can provide important precedent and guidance for other courts and tribunals applying international law in the context of criminal trials, including in relation to environmental protection, such as the Special Jurisdiction for Peace in Colombia (the JEP), which must apply multiple legal branches harmoniously, notably ICL, IHRL, IHL and the Colombian Criminal Code.[115] There is similar potential for the International Tribunal on the Law of the Sea to reconcile various sub-fields of international law, as its Convention requires that, when deciding cases, it 'shall apply this Convention and other rules of international law not incompatible with this Convention'.[116] Moreover, the Outer Space Treaty of 1967 requires a harmonious integration of legal sources, as Article III provides that State Parties shall carry on activities in outer space 'in accordance with international law, including the Charter of the United Nations.'[117] As international organisations put multiple strands of law law into effect and create jurisprudence, harmonisation of international law can be enhanced.

At the jurisprudential level, the application of extrinsic materials to de-fragment international law has precedent. This maxim was captured by President Verzijl in the Georges Pinson arbitration, where he stated: '[e]very international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.'[118] In a similar manner, Pauwelyn advocates the '[f]all-back on other norms of international law for areas not covered by a treaty' (Pauwelyn, 2003, pp. 202–206). A comparable approach has been adopted by the ICJ, including in relation to environmental law in the *Gabcíkovo-Nagymaros* case.[119] More recently, Robert Cryer lamented that it is unfortunate that 'the [ICC] has tended

too often toward the view that the Rome Statute creates something close to a self – contained regime, rather than a part of a system of international criminal law enforcement' (Cryer, 2009, pp. 396–399). In operational terms, the extent to which the application of extrinsic sources of law in ICC proceedings will assist the de-fragmentation of international law can be assessed by a counter-factual review of the risk of increased legal discrepancies created by the Court proceeding to determine an issue without reference to that external law. If a hermetically sealed approach is likely to increase legal fragmentation, this augurs in favour of seeking means to harmoniously integrate external sources concerning overlapping matters.

When applied in light of the preceding analysis, framework integration provides a vehicle for effective incorporation of separate legal sources which goes beyond the hermeneutic systemic integration, which is particularly apposite in environmental cases implicating multiple areas of law with differing foundational principles. Because it encompasses both the selection of legal sources as well as their prioritisation, interpretation, and application, it can allow bodies such as the ICC to contribute to the harmonisation of general international law.

Implementation of framework integration for ecocide and environmental harm

Having proposed framework integration as a means to fuse disparate strands of international law and having identified four criteria for its utilisation at the ICC (Robinson, 2022, p. 325), it is timely to apply this approach in the context of proceedings for environmental harm.

Ecocide, as currently formulated,[120] represents a confluence of ICL, IEL, IHRL, and IHL (Gillett, 2023). The principle of legality is particularly important in the context of environmental harm, especially ecocide, because much of the conduct at issue will be seen by some sectors of society as productive and socially beneficial. In this respect it differs from offences such as murder, torture or rape, which are inherently wrongful and lacking in social utility.[121]

Interpreting legal provisions within one branch of law is a relatively linear process. For bilateral treaties in a subject area, for example, 'each State brings to the negotiating table a lexicon which is derived from prior treaties (bilateral or multilateral) in which it has entered with other States' (McLachlan, 2005, pp. 283–284). However, identifying, prioritising, interpreting and applying provisions from a range of external sources of law under a framework such as the Rome System is more complex. Not only may the lexicon differ, but the normative and conceptual framework may involve radically different baseline understandings of behaviour, obligation, and enforcement.[122] Consequently, to illustrate areas in which the new approach of 'framework integration' can facilitate the integration of other branches of international law, as well as the challenges that may arise in this endeavour, they are analysed through this lens sequentially.

International environmental law

IEL can assist the implementation of ICL by delineating and notifying the types and levels of environmental harm which are unlawful and/or wrongful (Robinson, 2022, pp. 332–

334). Guidance for its integration into ICL can be taken by analogy from its integration into other branches of law. For example, in its General Comment 36 on the right to life, the Human Rights Committee referred to several key IEL principles, including the precautionary principle, access to information, sustainable use of resources, environmental impact assessment reports, and notification to other States about emergencies.[123] In relation to IHL, the International Law Commission (International Law Commission, 2022) and the International Committee of the Red Cross (ICRC, 2020) have both looked at how IHL can protect the environment, but neither engaged in any systematic integration of the frameworks of IEL and IHL. Hulme and others have sought to reconcile IEL and IHL by looking at 'how far IEL obligations in nature conservation treaties can bolster existing protection offered by international humanitarian law', but without taking the further step of systemically integrating IEL/IHL into ICL.[124]

In some instances, IEL instruments provide a basis for identifying unlawful conduct, such as in the case of illegal trafficking of hazardous wastes[125] and unlawful maritime pollution.[126] These can support the listing of prohibited underlying acts of ecocide, which is essential in order to know what ecocide encompasses in accordance with the principle of legality.[127] Sources from IEL could also assist to substantiate the meaning of the term 'severe',[128] which is a necessary element of Article 8(2)(b)(iv) of the Rome Statute and is also present in the major proposed definitions of ecocide.[129] Moreover, the precautionary principle could impact on the interpretation and application of the *mens rea* element of launching attacks with knowledge of the risk to the environment under Article 8(2)(b)(iv),[130] as well as the requirement that the accused foresee harm which would be 'clearly excessive in relation to the concrete and direct overall military advantage anticipated'. Most instances of severe environmental harm are likely to involve indirect intent rather than a specific intent to harm the environment. Formulations of indirect intent usually revolve around the knowing assumption of risks and the failure to take preventive measures.[131] The precautionary principle will inform the determination of assuming the risk of harm and taking 'available and appropriate measures'.[132] In this way, an accused who argues that it was unclear that such harm would eventuate as the science was indeterminate (and thereby seeks to be excused from criminal culpability) would not be successful as long as they knew of the risk that such harm would likely occur as a result of their actions. However, a court assessing whether to integrate the precautionary principle in this manner would have to determine whether it unduly encroached into the area of redefining the crime in violation of Article 22's requirement of strict interpretation of substantive crimes, as set out above.

A doctrinal example from IEL is the performance of an environmental impact assessment when undertaking activities potentially harmful to nature, which can be relevant to the prosecution of environmental crimes at the ICC (Gillett 2022, pp. 113–114). Along with the ICJ, which recognised this obligation in the *Pulp Mills* case,[133] and the ITLOS,[134] other bodies have also noted it as a requirement which should be undertaken such as before launching military operations.[135]

Another IEL principle is that of sustainable development. The IEP makes sustainable development the central consideration on which its definition of ecocide pivots (Minkova, 2024, p. 3, 24). This principle may also be of relevance to formulating reparations for crimes harming the environment, particularly if they involve environmental remediation. Support for incorporating this principle can be found in the ICJ comment in

Gabcíkovo-Nagymaros on a provision of a 1977 Treaty between the parties on the 'Protection of Nature'. It found that this provided for an evolving incorporation of new environmental norms, including sustainable development. However, sustainable development should not be used simply to prioritize anthropocentric interests over eccentric ones.[136]

There are additional IEL principles relevant to determining the endangerment or risk of exhaustion of species and natural resources, and the need to uphold the interests of future generations,[137] which could be relevant to the gravity of an attack on the environment, both for the general purposes of admissibility and where endangerment or exhaustion is linked to a specific element of a charged crime.[138] For example, the WTO Appellate Body referred to IEL instruments, including the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, and the CITES to define 'exhaustible natural resources' in the *Shrimp Turtles* case (McLachlan, 2005, pp. 302–303; Hafner & Binder, 2006, p. 170).

Incorporating these IEL principles under the Court's normative system through framework integration would advance the interests of defragmenting international law. Although questions may arise about the adjudicative coherence of resorting to the more evolutive and open-texted principles of IEL in the context of an ICL trial,[139] and although they are not particularly proximate to the language and objectives of the Rome Statute as currently formulated,[140] particularly as IEL principles tend to be consultative rather than prohibitive (Robinson, 2022, pp. 326–327), they do not necessarily present contradictions with the principle of legality. Given that they could enhance the effectiveness of the Rome System's application to redress environmental harm, the test of framework integration would support the application of these IEL sources of law to the ICC's activities via Article 21(1)(b).

International human rights law

Human rights are central to the Rome Statute.[141] This is explicitly reiterated in Article 21(3)'s requirement that the Court must interpret and apply its legal sources consistently with 'internationally recognized human rights'. There is a considerable body of literature on the interconnections of IHRL and ICL (as well as with IHL).[142] On this front, the principle of legality is explicitly referred to under Article 22(2), and adherence to due process human rights is also required under Article 21(3). As Luban States, 'the legitimacy of international tribunals comes not from the shaky political authority that creates them, but from the manifested fairness of their procedures and punishments' (Luban, 2010).

There are several specific ways in which IHRL can provide relevant input to the ICC's activities. As noted above, these include stays to uphold the integrity of proceedings and the principle of *non-refoulement* for the protection of witnesses.[143] Other areas of IHRL that have been suggested for incorporation into the application of RS, such as hate speech qualifying as incitement to genocide, could be deemed overly expansive and thereby 'inconsistent under Article 21(3) with the accused's right to freedom of expression, and therefore impermissible' (Grover, 2010, p. 562), and so require close examination to ensure adherence to adjudicative coherence.

For its part, the Inter-American Court of Human Rights has referred to IEL and IHL in relation to environmental IHRL matters.[144] It has held that IEL can be resorted to 'when defining the meaning and scope of the obligations assumed by the States under the American Convention'.[145] Separately, Mistura has noted that the Council of Europe adopted an

enumerated version of environmental crimes (Ecocide) in its recent Directive, rather than an unenumerated version such as that proposed by the IEP, which could be seen as violating the principle of *nullum crimen sine lege*.[146] This example reinforces the need to integrate IHRL principles when applying ecocide and environmentally-linked charges. Based on the foregoing, IHRL can assist the conduct of environmental proceedings under ICL to inform the level of specificity required of the prohibitions.

Additionally, the recently recognised human right to a clean, healthy and sustainable environment could be used as the basis for a charge of the crime against humanity of persecution, particularly as a 'fundamental right', given its intersection with the right to life, private and family life and security.[147] Depriving people of this right would have dual anthropocentric and ecocentric impacts. To support the existence of this right, the Court would likely look to international human rights law, as elaborated by the Inter-American Court on Human Rights, as well as the United Nations Human Rights Council and the General Assembly. At the same time, the terms of the crime of persecution cannot be unlawfully exceeded, lest human rights liberalism could undermine criminal law liberalism (Danner & Martinez, 2005). As Robinson notes, the Court must be careful not to transpose a victim-focused teleological reasoning directly from human rights law, as that regime focuses more on a 'broad and liberal construction to maximize protection for beneficiaries' rather than 'the special moral restraints which arise when fixing guilt upon an individual actor' (Robinson, 2008, pp. 928–929).

On a related track, for crimes involving the misappropriation and destruction of property, such as the war crimes of pillage or the destruction of enemy property, ownership is a key element on which IHRL can provide guidance. In relation to the abuse of ownership rights, the African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights have issued relevant jurisprudence, including that 'Indigenous peoples' right to collective property over natural resources – grounded in their cosmovision – appears particularly relevant to determine how natural resources can be used' (Martini, 2024, p. 378). Jurisprudence on collective rights from the Inter-American Court of Human Rights could also provide 'pertinent guidance' to assess reparations for victims by the Trust Fund for Victims of the ICC.[148] This may be transposed onto environmental harm cases, particularly given that human rights courts are increasingly finding violations based on harm to nature.[149] Utilising these IHRL concepts can add to the *effet utile* to the Rome Statute's provisions by enabling them to be applied to circumstances of environmental harm and to provide specific remedies therefor.

Based on the preceding analysis, it can be seen that IHRL lies at the heart of adjudicative coherence. IHRL is also an important means to give effect to the provisions of the Rome Statute, is in several respects proximate in formulation to the Rome Statute's articles, and can assist to defragment international law. As long as not used exclusively to expand terms at the expense of due process rights, IHRL can assist to realize the provisions of the Rome Statute in relation to the environment. At the same time, IHRL norms indicate that any version of ecocide which the court adopts should contain enumerated underlying offences in an equivalent form to those contained in the formulation of other crimes under the Rome Statute (Mistura, 2018, p. 199; Gillett, 2022). Without that specificity as to the nature of the prohibited conduct constituting ecocide, both internal and external IHRL protections will conflict with the efforts of the Court to redress environmental harm.

International humanitarian law

Environmental harm is particularly acute during military conflicts, as regulatory bodies charged with protecting nature are hampered and even dismantled (Hulme, 2022, p. 1160). Given that most existing crimes capable of application to environmental harm are war crimes, IHL will likely feature centrally if prosecutions for these offences eventuate in connection withe armed conflict. Others have set out detailed descriptions of the potential integration of IEL principles with IHL.[150] Nonetheless, there will often be a tension between the protection of the environment and the application of IHL principles, which traditionally considered harm to nature largely as collateral battlefield damage rather than criminal *per se*.[151] Moreover, adjustment is required to integrate IHL into the ICL context, as IHL is typically interpreted in order to maximise protection for beneficiaries without overarching concern for the strictures of due process and individual criminal liability (Robinson, 2008, pp. 928–929).

IHL provisions of particular relevance will include those on specially protected objects, such as natural heritage, and those on civilian objects, for the purpose of classifying facets of the environmental as enemy property in the context of war crimes such as Article 8(2)(e)(xii) (as well as its international armed conflict corollary Article 8(2)(b)(xiii) – both addressing destruction of enemy property). The work of the ICRC, such as in its distillation of customary international humanitarian law,[152] and its principles on the protection of the environment during armed conflict will provide useful guidance on matters inherent in, but not directly addressed by, the provisions of the Rome Statute.[153] One promising topic in this respect is protected zones, which are areas that should not be subjected to attacks by the belligerent parties, and which can extend to areas of ecological significance.[154] These legal sources can give *effet utile* to the Rome Statute's terms and its underlying goals (particularly if an ecocentric rationale is explicitly adopted under the Statute), by substantiating and therefore enabling them to be applied to concrete cases in an environmentally protective manner.

Incorporating these IHL principles when addressing cases of environmental harm under the framework of the ICC is inevitable. The test of adjudicative coherence will require heavy emphasis on adhering to the principle of legality, particularly in terms of importing presumptions from IHL regarding the status of persons and objects. However, for Article 8 in particular, framework integration portends significant potential to de-fragment international law by allowing the Court to apply IHL provisions in a consistent, transparent and predictable manner.

The branches of international law reviewed above are not the complete universe of potentially applicable rules and principles under framework integration. For example, if environmental harms occur in outer space, then international space law may well be relevant (von der Dunk, 2021, pp. 188–190). If environmental harm is used in conjunction with acts designed to spread fear among populations or compel governments or international organisations to take action, the law of terrorism may apply.[155] International law may even be applied as part of the wider defences available to accused *via* framework integration, such as necessity and *force majeure*, which have been developed in public international law, as well as concepts like official reliance and estoppel. As with IEL, IHRL, and IHL, each of these extrinsic sources of law presents promises of enhanced effectiveness but also pitfalls of potential overreach, and so must be carefully mediated in

line with the cautions set out herein. The construct of framework integration, along with the proposed de-conflicting criteria above, provides a means to conduct that triage in a structured and principled way, responsive to the unique character and requirements of the ICC as an international criminal institution.

Overarching challenges and insights

Based on the preceding analysis, it can be seen that framework integration, together with the facilitating criteria elaborated in this article, provides a robust means of allowing the Court to incorporate external law. However, several overarching challenges are likely to arise in doing so, particularly at the normative level, which necessitate close attention to avoid creating doctrinal confusion.

The most obvious risk is that framework integration provides a vehicle for the Court to disregard the textual limits of its founding instruments.[156] However, by placing adjudicative coherence and the principle of legality at the core of framework integration, it cannot be used as excuse to circumvent textual strictures of the Rome System documents (Hafner & Binder, 2006, p. 172). For example, a 'natural person' in Article 25(1) of the RS cannot be interpreted to mean 'corporation' or any other type of legal 'person', simply by reference to the fact that some instruments of international law use the term 'person' in that broader sense.[157] Similarly, it would stretch natural language to interpret 'organisation or institution' in Rule 85(b) (which determines entities that can qualify for victim status) to include naturally occurring non-anthropocentric phenomena, such as environmental features (albeit, it can be read to include organisations that protect such features). In keeping with its name, framework integration is designed to complement and augment the Court's legal resources rather than provide a means of circumventing or avoiding them.

A related but more complex legal challenge is that framework integration could see States having to uphold and enforce external treaties via the Rome System. This argument holds that allowing the use of extrinsic treaties to flesh out the substantive law that the Court can apply could effectively result in States being bound by those external treaties. Pointing to the ECHR, Rachovitsa claims that systemic integration may lead to 'the indirect application of and supervision over other treaties under the guise of interpretation, thereby raising serious implications for a court's mandate and legitimacy' (Rachovitsa, 2017, p. 561, 570–571). Transposed to the ICC, this expansive approach would conflict with the drafters' preference for listing crimes explicitly in the Rome Statute (Grover, 2010, p. 568).

Here, it should be noted that framework integration is designed to uphold the objectives of the Rome Statute.[158] To the extent the implementation of Rome Statute obligations involves using extrinsic legal sources, such as *via* Article 21, it does not render States party to external treaties, nor does it make the ICC legally obliged to ensure compliance with those external treaties *per se*.[159] In line with the test of adjudicative coherence at the core of framework integration, the Court should only 'apply' external substantive obligations where there is a basis to do so in text of the convention before them, which in the case of the Rome Statute is the test set out under Article 21(1)(b) where gaps arise under the Court's primary instruments which State Parties are bound to uphold.

A collateral issue raised by the use of extrinsic legal sources is the potential variation in the precise formulation and application of crimes depending on which State party's territory or nationals are in question. For example, if CITES is used to flesh out the terms of ecocide or any of the existing crimes with potential applicability to the environment, as suggested above, then the question would arise whether that covers non-States Parties to CITES, such as Kiribati, Marshall Islands, and Nauru, all of which are ICC States Parties. For this challenge, it should be noted that variation in the crimes that apply to different States as a jurisdictional matter is not an insurmountable problem. In fact, it is envisaged in Article 121(5) of the Rome Statute in relation to any amendments creating new substantive crimes, which only apply to those States which adopt them.

But the variation in the elements and contours of crimes, which differ as a matter of law depending on the States in question, would raise concerns. At the normative level, it would beg the question of whether an individual from a State Party to the extrinsic treaty is convicted of the same crime as the individual from the non-State Party to that external treaty. Although differences in the interpretation of the contours of a crime over time does not inherently mean a violation of the principle of legality,[160] the concurrent existence of different interpretations could raise objections by an accused subjected to a more exacting construction of the crime.

One potential resolution is to only apply treaties that are also reflective of customary international law.[161] Limiting external sources to those reflecting customary international law would assist to mitigate challenges that the Court is progressing on different normative tracks in different cases. Adherence to custom would also accord with the views of several key players involved in the drafting of the Rome Statute, including the Chair of the Committee of the Whole and the Court's First President, Philippe Kirsch.[162] However, that approach to Conventions would render the word 'treaties' in Article 21(1)(b) redundant, as the relevant content would have to be part of the principles and rules of customary international law. It would also deprive the Court of considerable normative inspiration deriving from treaties setting out standards relevant to the protection of the environment. Consequently, the Court will have to pay particular attention to applying treaties with limited subscription and closely scrutinise customary international law whenever possible to discern a parallel basis for their application of external sources. While challenges will arise, that emphasis on drawing multiple legal sources together, both conventional and customary in nature, will contribute to the harmonisation of international criminal law with other branches of international law.

At the underlying conceptual level, there is a further risk of the ICC's anthropocentric orientation being incompatible with a sudden and strong shift toward an environmental focus. Framework integration of IEL and other extrinsic sources of law could be seen as exacerbating this risk. For practical purposes, the Court is currently ill-equipped to address environmental cases in a large-scale manner (Gillett 2022, p. 316, 335–345). At the normative level, a homeostatic reflex may lead the Court to subsume the ecocentric facets under traditional requirements, such as individual human suffering and standing to brings claims and assume victim status, thereby anthropocentricizing ecocide. As a bulwark against this assimilation, the adoption of ecocide (and increase in the prosecution of environmental harms) should be accompanied by an increase in appropriate resources, including scientific investigators and potentially judges with

relevant experience or expertise, to enable it to effectively conduct these functions. The Court will also benefit from frequent dialogue with relevant institutions such as the bodies created by key environmental treaties, like the Biological Diversity Convention, potentially facilitated through the ICC OTP's Scientific Advisory Board. This provides a promising means of remaining updated regarding changes to laws and approaches in other sectors and adjusting ICL practices or alerting legislative bodies, such as the Assembly of State Parties, as needed.

Inverting the preceding critique, others argue that IEL itself has been coopted by the interests of development. This argument is used to paint ecocide as a trojan horse, instrumentalising the ICC to cement the legitimacy of 'business as usual' (Verschuuren, 2017) at the expense of achieving 'environmental justice'.[163] That critique is predicated on the 'limitless pursuit of growth' being considered 'unsustainable'.[164] If those critiques were used as springboards to propose specific adjustments to the elements of ecocide, which is currently being debated in multiple jurisdictions, they could potentially make a significant contribution to redressing environmental harm. For example, they could augur in favour of a definition with a deontological prohibition of underlying acts of sufficient gravity, such as the removal of animal habitats, irrespective of their social and economic utility.[165] Forging IEL together with ICL in a mutually strengthening manner, rather than one of reducing to the lowest common denominator (as is arguably risked by the Independent Expert Panel's centralisation of the principle of sustainable development),[166] provides a means to accentutate the contributions of each domain while adhering to the core tenets of accountability and legality required at the ICC.

Noting these critiques and the proposed ways in which framework integration can respond to them, its use nonetheless raises a further structural concern. It can be asked whether the transition from systemic to framework integration will constitute a destabilising step at the meta-level, by changing the way in which branches of international law will be fused. Just as adjusting the law reduces its predictability, adjusting the secondary test by which the law is interpreted and applied will generally impact its consistency to an even greater degree. Although that is a serious concern, it ultimately does not provide grounds to reject the adoption of framework integration. This is because the current approach under Article 21 of the Rome Statute leaves a significant *lacuna* in terms of how to identify and prioritise external sources of law, which systemic integration as currently formulated is unable to address. That gap results in heightened unpredictability, which requires remediation. For environmental harm, the gap is particularly problematic as unlike other violent crimes,[167] there are many acts that harm the environment which are not inherently wrongful. This necessitates detailed and robust legal standards to guide the conduct of legal and natural persons, which in turn requires the incorporation of multiple strands of law, including environmental, humanitarian and human rights, into the application of international criminal law. Framework integration offers a structured and predictable means of identifying and incorporating relevant external sources of law, particularly when prosecuting novel and untested charges such as environmental harm and ecocide. When applied rigorously and in a coherent manner, as set out above, framework integration can enhance the Court's normative structures, while reducing uncertainty as it steps into the new realm of environmental regulation.

Final conclusions

With environmental harm on the ICC's horizon, the Court's ability to draw on external branches of international law faces a moment of reckoning. Just as all war crimes cases at the court to date have made greater or lesser reference to IHL, any environmental crimes case will inevitably see reference made to instruments and principles of international environmental law. The Rome Statute framework leaves rooms to assimilate such extrinsic sources of international law, particularly via Article 21(1)(b). However, the latitude granted to the judges under Article 21 is not complemented by guidance for the exercise of that power. The traditional concept of systemic integration is not apposite in the Rome Statute context, as it is explicitly limited to interpretation rather than predicate step of identifying the 'appropriate' laws which can then be subjected to interpretation and application.

To remedy this gap and to ensure normative coherence, this analysis has formulated the novel approach of 'framework integration'. This conceptual mechanism is bespoke for the ICC, and covers the identificatory and interpretive functions, while also guiding the normative assessments of other courts charged with harmonising disparate strands of international law. Framework integration provides a means of ensuring that the integration of external sources of law is conducted in a transparent, principled, and structured manner. It permits a dynamic legal intertwining of branches of law while remaining faithful to the Rome Statute framework and the fundamental precepts of international law formation.

Using framework integration to draw external sources into international law can import significant advantages for the adjudication of environmental harm. Environmental law instruments and principles can inform and instantiate factors, including the lawfulness of conduct harming the environment, as well as the 'severe' element and *mens rea* 'criteria' of crimes encompassing harm to nature, along with the proposed crime of ecocide. In this way, these external sources can provide legal reference points on which the ICC judiciary can rely in reaching their conclusions. IHL principles provide an additional source of legal guidance to mediate between the interests of the environment and those of belligerents and civilians caught up in armed conflict. Spanning the confluence of all provisions is IHRL, including its elaboration of due process rights and its identification of a substantive right to a clean, healthy and sustainable environment. Beyond environmental harm, the analysis herein has important ramifications for any areas where the Court may need to resort to extrinsic legal sources. Prosecutions for aggression or involving new forms of evidence such as digital materials, can find guidance in the approach to framework integration that this study has articulated. Normatively, because of Article 21's pivotal importance for the Court's situating of the Rome Statute as a part of the system of international law, the criteria set out herein provide a means of coherently achieving that integrative function, while respecting the Court's axiomatic principles of legality and due process.

Challenges arise from using framework integration, include exposing the Court to allegations of acting ultra vires and binding States to treaty provisions they may not have signed up to. Yet careful management of these risks can be achieved. Key to this are the four complementary principles, namely, adjudicative coherence, *effet utile*, substantive proximity, and de-fragmentation of international law. Framework integration,

as developed in this article, emerges from the prospect of redressing ecocentric harm *via* the hitherto essentially anthropocentric ICC. Examining the fault lines produced by the Court's ecocentric expansion is critical for the identification of moderating criteria by which external legal sources, particularly international environmental law, could be meaningfully drawn into the Rome Statute framework to assist the judges' deliberatie while respecting the Court's core obligations. Through the innovative normative approach of framework integration, the conceptual underpinnings of the ICC's functioning within the broader context of international law can be strengthened, not just systematically but also systemically, and its ability to redress grave attacks on the environment can be deepened and reinforced.

Notes

1. See, e.g. Climate Counsel, Greenpeace Brasil, Observatorio do Clima (2022).
2. See, e.g. Rekrut (2024).
3. Criminal sanctions are not a panacea but part of a multi-faceted process involving inputs from the education, economic, and scientific sectors, along with the legal system.
4. Rome Statute, Article 17(1).
5. See, for example; Kostin (2024) (noting that Ukrainian prosecutors have been working closely with the ICC on environmental harm including the destruction of the Kakhovka Dam).
6. Business and Human Rights Resource Centre (2024).
7. See ICC (2024); https://www.icc-cpi.int/sites/default/files/2024-12/2024-12-18-OTP-Policy-Environmental-Crime.pdf.
8. ICC: Office of the Prosecutor's Policy Paper on Preliminary Examinations, November 2013, para.65; ICC: Office of the Prosecutor's Policy Paper on Case Selection and Prioritisation, 15 September 2016, para.41.
9. See, e.g., Freeland (2015).
10. See, e.g. Gillett (2022); Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text, June 2021, www.stopecocide.earth/expert-drafting-panel.
11. Alain Pellet refers to Rome Statute law as 'proper law' and extrinsic sources as 'external law'; Pellet (2002).
12. See Burdon Dasbach (2024).
13. See Gillett (2023).
14. Gillett (2023) referring to Independent Expert Panel and Gillett definitions of ecocide (both definitions draw on international environmental law, as stated in their accompanying commentaries). See also Burdon Dasbach (2024).
15. See below under 'The theory of systemic integration'.
16. See Koskenniemi (2005). See further McLachlan (2005). Note that the ILC suggested that the term 'interpretation' could be interpreted in a broad manner to include 'giving content' to a rule; ILC, 'Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (finalized by Mr. Martti Koskenniemi), 56th Session, Geneva 3 May-4 June 2004 and 5 July-6 August 2004, A/CN.4/L.663/Rev.l, at para.52. However, interpretation ultimately is the attribution of meaning to express terms rather than adding substantive content to complement the existing content of a treaty.
17. Rome Statute, Article 21(1)(b). See also Maučec (2021).
18. See Hafner and Binder (2006) referring to Belgium's declaration concerning Article 31(l)(c) of the ICC Statute upon ratification, dated 28 June 2000, and Colombia's declaration upon ratification, dated 5 August 2002.
19. See Hochmayr (2014); McLachlan (2024, pp. 311–312) (providing examples where external sources were reviewed in ICC jurisprudence without a detailed examination of Article 21's functioning).

20. Shelton (2003) (assessing the problems of deciding the order of priority between competing rules which are applicable to the legal matter or dispute).
21. McLachlan (2005, p. 284) (citing Brierly – 'the development of specialized fields of international law, if progressed in isolated compartments, could lead to serious conflicts of laws within the international legal system'); International Law Commission (2006), UN Doc. A/CN.4/L.682 and Add.1: 85, as corrected, U.N. Doc. A/CN.4/L.682/Corr.1 (11 August 2006), para.486 ('normative conflict is endemic to international law'); Stahn and van den Herik (2012); Webb (2013) (arguing that there are few instances of fragmentation, such as on the specific intent for genocide, but that the overall picture is one of genuine integration in relation to genocide); Cryer (2009) (noting that the ICC Elements of Crimes depart from customary international law on the 'manifest pattern' contextual factor for genocide).
22. Bruch et al. (2021) (reviewing 'international humanitarian law, international environmental law, international criminal law, international human rights law, the United Nations (UN) Charter, and so on' and finding that 'a fragmented and unclear legal framework protects the environment in times of armed conflict').
23. See below under the heading 'Reconceptualizing systemic integration as 'framework integration' under Article 21 of the ICC Statute', where the analysis highlights the conflation made in ICC jurisprudence between the identificatory and interpretive functions required under Article 21.
24. In her study on systemic integration, Rachovitsa refers to the ICC in passing, but makes no mention of Article 21 of the Rome Statute; Rachovitsa (2017). In his study on IHRL and ICL, Galand refers to IHRL having a systemic effect on ICL, but does not refer to environmental harm in any respect; Galand (2019). In her study on systemic integration and climate change, Feria-Tinta makes no reference to international criminal law and does not question the limited interpretive framing of systemic integration; Feria-Tinta (2024). In his study on systemic integration, Campbell McLachlan briefly refers to Article 21 of the Rome Statute but does not address environmental harm in this context; McLachlan (2024). Anne Peters reviews systemic integration and mentions the ICC, but does not refer at all to Article 21 and does not examine how extrinsic materials would be applicable under the Rome Statute; Peters (2017).
25. Several authors have commented on the application of ICL and IHL, and in some cases IHRL, to environmental harm, without assessing how these branches of law would be integrated under the Rome Statute. See, e.g. Rekrut (2024) (commenting on ICL and IHL, without mentioning Article 21 of the Rome Statute or any other theory of integration). Others have talked about integrating IHL and IEL, but also without addressing integration under the Rome Statute in any detail; Hulme (2022) (looking at how IEL can apply during armed conflict, so as to 'mirror and reinforce IHL protections'); Bruch et al. (2021); van Steenberghe (2022). Other views focus on the Court's utilisation of the Vienna Convention for interpretation without looking at other extrinsic sources of law, e.g. Manley et al. (2023); Jain (2017); Robinson (2022, pp. 334–335) (calling for IEL to be incorporated into ecocide but without any discussion of the means to do so and without mentioning Article 21).
26. Gillett (2022, pp. 170–174). But see Pardy (2002).
27. See, e.g., Cryer (2022) (containing no reference to systemic integration or to Article 21 of the Rome Statute).
28. See, e.g. Ruhl (1997); Kooijman, 2023; Cusato and Jones (2023).
29. Of course, it is not claimed that ICL is a panacea capable of resolving these threats in and of itself; see Gillett (2022, 40).
30. See Nishimura (2022) (noting that the international community seeks a 'system of international law that should strive for coherence and consistency'). See also Grover (2010) ('[i]f judges invoke diametrically opposing canons of interpretation for crimes in the Rome Statute, they may call into question the legitimacy of international criminal law, as they may appear to be invoking a particular interpretive canon because it yields a desired

outcome.'). Grover also notes 'in terms of a hierarchy of applicable sources of law for purposes other than protecting the rights of the accused, little or no thought was given to the relationship between internationally recognized human rights and the Rome Statute' … [similarly] 'in terms of normative hierarchies, little or no thought was given to the relationship between internationally recognised human rights and the 'international law of armed conflict'; Grover (2010, p. 559).

31. See, JEP: Macro Case No. 5 Decision of 1 February 2023, paras. 500, 1029–1030. On anti-personnel mines, the JEP noted that these particularly impacted sites that are sacred to indigenous and other special communities, including lagoons, moors, and riverbanks.
32. See Colangelo (2016); King and Thornhill (2003, pp. 52–53) ('law's unique social function is, therefore, to stabilize normative expectations over time'; '[l]aw allows at least for the possibility of expectations being based on established norms so that it is possible to anticipate whether conduct will be legal or illegal, subject to the law or not subject to the law'); Perez-Leon-Acevedo (2024).
33. See, e.g. von der Dunk (2021).
34. See Klabbers et al. (2009, pp. 135–142); Shany (2014).
35. Although many refer to the Nuremberg trials as the emergence of international criminal law, at that point it was still *ad hoc* and inherently linked to armed conflict. After the end of the Cold War, the requirement of armed conflict was removed from crimes against humanity and a permanent international criminal court was established.
36. See Grotius (1925, pp. 527–529).
37. Scharf (2022, pp. 25–26). Though ICL has since differentiated itself from IHL and IHRL, though maintaining a close inter-connection, Stahn (2019) ('International criminal law has gradually distinguished itself from other bodies of law, such as international humanitarian law or human rights law'.).
38. See Bergsmo et al. (2014).
39. See Schabas (2011, pp. 1–16); Bergsmo et al. (2014).
40. See Peters (2017).
41. Tokyo Tribunal, Judgment of The Honorable Justice Pal, Member from India.
42. Simpson (1997, pp. 4–11); Sander (2015); Iommi (2020); Popovski (2012). See also Torbisco-Casals (2021).
43. See, e.g. ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06 OA5, Judgment on the Appeal of Mr Ntaganda Against the 'Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9' (Appeals Chamber), 15 June 2017, para. 53 ('[T]he expression "the established framework of international law" in the chapeaux of article 8(2)(b) and (2)(e) as well as in the Introduction to the Elements of Crimes for article 8 of the Statute, when read together with article 21 of the Statute, requires the former to be interpreted in a manner that is consistent with international law, and international humanitarian law in particular'). See also McLachlan (2024, pp. 311–312).
44. Libya and Sudan constitute earlier examples, whereas Russia's full-scale invasion of Ukraine in 2022 and the Israel-Hamas conflict have also seen multiple jurisdictions engaged in litigation.
45. Colangelo (2016, p. 34) (referring to 'the "presumption of catholicity," that is a presumption toward using as much of the universe of international legal sources and materials available as possible to resolve disputes. Although such rule predation may not always be purposeful, it nonetheless places actors subject to multiple sets of laws in difficult and maybe even impossible positions when it comes to compliance with "the law"').
46. See, e.g. ICTY: *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72, 2 October 1995, para.204; Gutierrez Posse (2006).
47. ICC: *Prosecutor v. Lubanga* (ICC-01/04- 01/06), Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', 21 October 2008, para. 51 (implicitly accepting

the ICC-UN Relationship Agreement as a source of law, without mentioning Article 21(1)(b), despite the fact that the Prosecution had asserted that as a basis for the Relationship Agreement's relevance at trial level); Hochmayr (2014, p. 667).

48. See Goy (2012).
49. See the rejection of witness proofing by some chambers; ICC: *Prosecutor v. Lubanga* (ICC-01704-01/06), Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, para. 44; Schabas (2016, p. 519).
50. See, e.g. the no-case to answer decision in the Ruto and Sang case; ICC: *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* Public redacted version of Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr, 05 April 2016.
51. See International Law Commission (2006, paras. 410 et. seq).
52. International Law Commission (2006, para. 410); McLachlan (2024, p. 4) (noting that the notion underlying systemic integration first found authoritative expression in the ICJ *Oil Platforms* case); ICJ: *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (6 November 2003).
53. See Koskenniemi (2005, p. 253).
54. On the meaning of 'interpretive methods', see Djeffal (2015).
55. See Grover (2010, p. 459). See also Perez-Leon-Acevedo (2024, pp. 401–402) (in the context of reparations arguing that not just interpretation but adapted incorporation of principles from the IACtHR is required).
56. Hafner and Binder (2006, p. 172); Manley et al. (2023, p. 779). In the context of non-written rules, the process differs from treaty interpretation as it first requires the identification of the rule and then the establishment of its parameters. While some equate this to the process of treaty interpretation, they are quite distinct processes. See Lekkas and Merkouris (2022, p. 187).
57. The definition adds qualifiers of 'severe and either widespread or long-term' but does not define what forms of damage to the environment are envisaged.
58. See Hochmayr (2014, p. 655) (noting that 'Article 21 of the International Criminal Court (ICC) Statute represents the first international law provision specifying the law to be applied by an international criminal court'). In the Statutes of most other international and hybrid courts there was no provision on the applicable law; Bitti (2015); Schabas (2003); Di Gianfrancesco (2021).
59. The French version of the Statute clarifies that the term 'applicable' relates to treaties ('*les traités applicables et les principes et règles du droit international*').
60. ICC: *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, Trial Chamber II, 7 March 2014, ('Katanga Trial Judgment'), para.39. Flynn (2020) ('As an international treaty, all recognized sources of international law would generally apply to the Rome Statute […]. However, the drafters of the Rome Statute were more particular as to the sources of law that should apply to the Rome Statute, and the manner in which they should apply.').
61. Hochmayr (2014, p. 656) citing Caracciolo (1999, pp. 212–224).
62. The expression draws inspiration from McLachlan's reference to systemic integration as a 'master key', and adapts it to the context of the ICC.
63. In this respect Article 21(1)(a) has a 'hierarchy within the hierarchy'; Bitti (2015, pp. 416–417). Although Article 21(1)(a) makes no hierarchy between the sources, Article 51(5) of the Rome Statute states that, 'in the event of a conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.' Flynn (2020, p. 57). For a different view on the Elements of Crimes under Article 21(1)(a), see Cryer (2009, pp. 396–401).
64. See e.g. ICC: *Situation in the Democratic Republic of Congo*, Case No. ICC-01-04-168, Judgment on the Prosecutor's Application for Extraordinary Review, paras.33–34 (13 July 2006).
65. *Katanga* Trial Judgment, para.39.
66. Democratic Republic of the Congo, Appeals Decision 2006, para. 39 ('No gap is noticeable in the Statute with regard to the power claimed in the sense of an objective not being given effect to by [their] provisions'). ICC: *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse

Arido against the decision of Trial Chamber III entitled 'Decision on Sentence pursuant to Article 76 of the Statute', 8 March 2018, ICC-01/05-01/13-2276-Red, paras 75–76 ('The nature and type of the concerned power, as well as of the matter to which it relates, are relevant considerations to determine whether there are gaps justifying recourse to subsidiary sources of law or invocation of "inherent powers"'). See also Bitti (2015, pp. 426–427); Hochmayr (2014, p. 664).

67. For example, Bitti takes a restrictive view of Article 21: 'the external sources of law mentioned in Article 21(1)(b) and (c) of the Statute should be of limited use before the ICC and indeed have been of limited use apart from some very isolated jurisprudence', Bitti (2015, pp. 433–434).
68. See, e.g., ICC: *Prosecutor v. Ruto and Sang*, 'Reasons for the Decision on Excusal from Presence at Trial under Rule 134 quater, Ruto and Sang' (ICC-01/09-01/11), Trial Chamber V(A), 18 February 2014, paras.56–60.
69. See Hochmayr (2014, pp. 664–666).
70. Hochmayr (2014, pp. 674–675). Cassese has also recognised the need to look to extrinsic treaties, such as in the context of assessing whether weapons are indiscriminate or cause unnecessary suffering; Cassese (2008, p. 50).
71. See also Manley et al. (2023, p. 774).
72. See deGuzman (2022), fn 26. Dapo Akande also refers to treaties related to substantive crimes as those of primary relevance under this provision, but allows for other treaties to also be residually relevant; Akande (2009).
73. A footnote that would have specified that 'international law' means 'public international law' was not retained in the final version of the Rome Statute; UN Doc. A/CONF.183/C.1/WGAL/L.2, p. 2, fn. 2; Schabas (2016, p. 519).
74. Rome Statute, Article 21(1)(a).
75. On this basis, the term 'appropriate' supports the proximity criterion for framework integration set out below.
76. The ICTY permitted such an approach in the Tadić case, where it concluded that the Statute allows for the application of international agreements that are binding on the parties at the time of the offence, conditional on them not conflicting with peremptory norms; ICTY: Tadić Jurisdictional Decision, IT-94-1-AR72, 2 October 1995, paras. 143– 144. See further, by analogy, see Permanent Court of Arbitration (2003, paras. 93–105).
77. See Panel Report, *EC – Measures Affecting the Approval and Marketing of Biotech Products*, paras. 7.49–7.95, esp. 7.75, WTO Doc. WT/DS 291–293/R (29 June 2006). See Peters (2017, pp. 693–694).
78. Subject to any question of persistent objector status.
79. See ICC: *Prosecutor v Al-Bashir,* Judgment in the Jordan Referral re Al-Bashir Appeal, Appeals Chamber, ICC Case No 02/05-01/09-3 (6 May 2019).
80. See, e.g., ICC: *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04–01/06 A5, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, 1 December 2014, para.277; ICC: *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05–01/08–3343, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para.70; ICC: *Democratic Republic of Congo,* Decision 2006, para.33.
81. See, e.g., ICC: *Situation in Bangladesh/Myanmar* (Decision, 14 November 2019) ICC-01/19, para. 55.
82. See *Katanga* Trial Judgment, para.47 (considering that under article 31(3)(c) of the Vienna Convention on the Law of Treaties, the interpretation of the applicable law can also be informed by external sources providing context).
83. The distinction is mentioned in Hochmayr (2014, pp. 656–657). In addition to the identificatory and interpretative functions, there is also the applicative function; see Urs (2024, p. 12). Koskenniemi hints at taking his approach to systemic integration beyond interpretation, stating 'although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret *and apply* that instrument in the context of its relationship to its normative environment – that is to say "other" international law' (emphasis added). However, the rest of his study shows that he did not take this approach beyond the

confines of interpretation; International Law Commission (2006, para. 423). Another use of extrinsic legal sources may be as 'evidence of acceptance and recognition' of the bindingness of a legal norm, such as a *jus cogens* norm; International Law Commission, 2022 Study on Jus Cogens Principles, conclusion 8. See also Hafner and Binder (2006, p. 172); Hochmayr (2014, p. 662).

84. Pauwelyn (2003, pp. 203–204) referring to the *Lockerbie* case, ICJ Reports 1992, para. 42.
85. See ICC: *Katanga* Trial Judgment, para.47.
86. See Bitti (2015, pp. 436–437) citing ICC: *Situation in the Democratic Republic of the Congo,* Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, Katanga, 10 March 2008, ICC-01/04-01/07-257, PTC I, ICC, 10 March 2008. But see ICC: Appeals Chamber in *Prosecutor v. Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute, ICC-01/04-01/06-772, 14 December 2006, para.37.
87. Technically, Article 31 of the VCLT could still be used to conduct the interpretive function, insofar as it does not clash with Article 21 of the Rome Statute. Given that the Rome Statute, including Article 21, does not exhaustively specify how to interpret its terms, this allows for resort to Article 31 of the VCLT in accordance with the terms of Article 21(1)(b) of the Rome Statute. Consequently, interpretive guides, such as the 'ordinary meaning' and 'object and purpose' tests remain valid under the framework integration approach.
88. See Article 52(3) of API for a corresponding presumption for protected objects.
89. See Gillett (2023).
90. See ILC 2022 Jus Cogens study, Conclusions 10–11.
91. See ILC 2022 Jus Cogens study, Conclusion 23 'non-exhaustive list' referring to the prohibition of aggression, the prohibition of genocide, the prohibition of CAH and the prohibition of torture, for example.
92. See, e.g. Bitti (2015, pp. 438–439). But he also argues that there is no such basis to distinguish between the superior status of the law in question (at 440).
93. See ICC: *Lubanga* Appeal Judgment, para.277. But see Maučec (2021, p. 24).
94. See Colangelo (2016, Part V) (referring to 'precise and concrete "coherence methods" (as opposed to conflict methods), to use in advancing international law's systemic coherence through decisional cross-fertilization in resolving disputes').
95. Adjudicative coherence emanates from the institution's identity as a Court, which is reflected in the Preamble and Article 1 of the Rome Statute among other provisions. *Effet utile* emanates from the Preamble's requirement 'to put an end to impunity for the perpetrators of [atrocity crimes]' and ensure their 'effective prosecution' as well as the structure of Article 21(1)(a) to (c) which provides a cascading web of normative sources designed to avoid the Court lacking a legal basis to act. Substantive proximity emanates from the multiple references throughout the Statute to international law (25 references), the law of armed conflict/IHL (around 8 references), human rights law (3 references), and several more in the Elements of Crimes, demonstrating a graduated focus on these areas (if ecocide is adopted into the Rome Statute, references to IEL will likely also be added). De-fragmentation also emanates from the multiple references to the Court's Statute taking account of international law.
96. Gillett (2022, pp. 49–50). For an example of an interpretive approach approximating adjudicative coherence in the context of an international criminal trial, see STL, Judgment, *Ayyash et al.* (STL-11-01/T), Trial Chamber, 18 August 2020. paras. 5917–5918. See also Di Gianfrancesco (2021).
97. See *Katanga* Trial Judgment, para.50 referring to Article 22. The principle also encompasses the notion of *lex certa*; ICC: *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, paras. 128–131. See also Grover (2010, p. 550) (the 'principles underpinning a liberal criminal justice system are those of personal culpability, legality, and fair labelling'); Robinson (2008); Jacobs (2014).
98. ICC Elements of Crimes, Article 7 Crimes against humanity, Introduction: 3.

99. Rome Statute, Article 74(5). Gillett (2022, pp. 50–51).
100. See Report of the Ad Committee on the Establishment of an International Criminal Court (1995), UN Doc A/50/22, paras. 52, 57, and Report of the Preparatory Committee on the Establishment of an International Criminal Court (Proceedings of the Preparatory Committee during Mar.–Apr. and Aug. 1996), UN Doc A/51/22, paras.52, 180, and 185; Grover (2010, p. 552).
101. But see Koskenniemi (2005, p. 253) ('one man's coherence is not necessarily that of another's.'). See also 303–320, 488.
102. ICC: *Lubanga* Decision to Stay Proceedings 2008. See also Grover (2010, p. 561) ('a suspect or accused may have other rights protected under customary international law or a treaty ratified by the state of which he or she is a national').
103. ICC: *Prosecutor v. Katanga*, Decision on the Application for the Interim Release of Detained Witnesses DRC-D02- P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, Situation in the Democratic Republic of the Congo, ICC-01/04-01/07-3405-tENG, TC II, ICC, 1 October 2013, para.30; Bitti (2015, pp. 439–440).
104. Threats against witnesses for which the Court typically has a duty of care are those arising from or linked to the witnesses' interactions with the Court.
105. Conversely, other rights, such as social and cultural rights are not central to the Court's operation, though it is conceivable that such rights may be relevant, such as in the context of reparations.
106. Maučec (2021, p. 26). Similarly, see Shahabuddeen (2004, p. 1017).
107. ECHR: *SW and CR v. United Kingdom* App No 47/1994/494/576, ECHR (1995) Series A, Nos 335-B and 335-C, at paras 36 and 34; Grover (2010, p. 554); Van Schaak (2008). See also ICTY: Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, IT-99-37-AR72, Appeals Chamber, 21 May 2003, para.38.
108. See ICC: *Situation in Uganda*, Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, ICC-02/04-01/05, 9 March 2006 para. 25 (noting that this is also referred to as 'useful effect' or 'principle of effectiveness, whereby 'a treaty as a whole, as well as its individual provisions, must be read in such a way so as not to devoid either the treaty as such or one or more of its provisions of any meaningful content').
109. *Katanga* Trial Judgment, para.46.
110. ICC: *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2. 17 April 2014.
111. Schabas (2003, p. 860), referring to e.g. ICTY: *Blaškić* Subpoena decision, para.21; *Tadić* Jurisdictional Decision, para.204; and *Barayagwiza* Decision of 3 November 1999, para.46.
112. Whereas *lex specialis* holds that the particular or specific law which derogates from the general law will be applicable in the situation, the substantive proximity criterion is not focused on the specificity of the external source of law but rather its alignment with the Rome Statute objective. The broadening out from the *lex specialis* principle to a more holistic integration of different branches of international law has also been reflected in the ICJ's jurisprudence; compare *DRC vs Uganda*, (para.216) with the *Nuclear Weapons* Advisory Opinion (para.25).
113. See Merkouris (2015).
114. See Shelton (2003, pp. 148–149); Gillett (2023).
115. See Interim Article 5 of the Colombian Constitution, as amended by Constitutional Act 01 of 2017 (granting the JEP jurisdiction over crimes committed before 1 December 2016 in the context of the conflict with the FARC-EP).
116. United Nations Convention on the Law of the Sea, Articles 288, para.1, and 293, para.1.
117. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 1967, 610 U.N.T.S. 205.

118. Per Verzijl P, *Georges Pinson case*, Franco-Mexican Commission (Verzijl, President), AD 1927-8, No. 292, para.50.
119. ICJ: *Case Concerning the Gabcíkovo--Nagymaros Project* (Hungary v. Slovakia), Judgment, ICJ Reports 1997, para.140.
120. For leading formulations of ecocide, see IEP (2021) and Gillett (2022a) definitions referenced above.
121. Gillett (2023). See also Schabas (2003, p. 887).
122. Robinson (2008, pp. 927–928). For example, see the term 'person' as used in an international criminal law context, such as Article 67 in the Rome Statute, as opposed to how the term 'person' is used in international trade law – https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2552/download.
123. HRC: General comment No. 36, Article 6: right to life, CCPR/C/GC/36, 3 September 2019, para.62.
124. See Hulme (2022, p. 1156).
125. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 UNTS 57, 22 March 1989, Article 9.
126. Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1340 UNTS 61, 17 February 1978, and annexes.
127. See Gillett (2022) definition of ecocide, which links the enumerated underlying acts to existing IEL conventions; Gillett (2023).
128. See Hulme (2022, pp. 1165–1166) (in the context of the corresponding IHL provisions – Articles 35(3) and 55 of Additional Protocol I).
129. See IEP and Gillett (2022) definitions referenced above.
130. See also Hulme (2022, p. 113, 1168) (commenting on the precautionary principle's analogues in IHL).
131. Gillett (2022, 348) setting out a proposed definition of Ecocide, with a *mens rea* element focused on 'Wilfulness'.
132. See Hulme (2022, p. 1167).
133. See ICJ: *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, ICJ Reports 2010, para.204.
134. ITLOS: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Seabed Disputes Chamber of ITLOS, Advisory Opinion of 1 February 2011, paras 145–150.
135. Report of the International Law Commission of its 66th Session, held between 5 May–6 June and 7 July–8 August 2014, A/69/10, para.209.
136. ICJ: *Gabcíkovo – Nagymaros,* para.140.
137. ICJ: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Reports 226, para.29.
138. On gravity, see Urs (2024).
139. See Robinson (2022, p. 325).
140. The Rome Statute has an overwhelmingly anthropocentric formulation at present; Gillett (2022, 354).
141. ICC: *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, ICC-01/04-01/06-772, para.37.
142. On ICL and IHRL, see, e.g., McDermott (2016); Galand (2019). On IHRL and IHL, see, e.g., Oberleitner (2015); Kolb and Gaggioli (eds.) (2013). See also Lemos (2023).
143. See above under the heading 'Adjudicative Coherence as a Criminal Court'.
144. Feria-Tinta (2024, p. 25) citing *inter alia* Inter-American Court of Human Rights, The Environment and Human Rights (Advisory Opinion, 15 November 2017) Series A No 23.
145. Inter-American Court of Human Rights, The Environment and Human Rights Advisory Opinion, paras. 43–45.

146. Mistura (2018) ('A general definition of 'environmental crime' would likely breach such principle, as it poses a high risk of vagueness and potential over-breadth of coverage.'). See also Killean and Short (2024)).
147. See Martini (2024); Martini et al. (2023).
148. Perez-Leon-Acevedo (2024, pp. 391–393) citing Filing on Reparations and Draft Implementation Plan, *Lubanga* (ICC-01/04-01/06-3177-Red), TFV, 3 November 2015, paras 219–35.
149. See, e.g. IACtHR: *Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina* (Merits, Reparations and Costs, Judgment) IACtHR Series C No 400 (6 February 2020) para 202; ECtHR: Verein KlimaSeniorinnen Schweiz and Others v. Switzerland. (2024). Grand Chamber of the European Court of Human Rights, Application no. 53600/20.
150. See, e.g. Hulme (2022).
151. See, e.g. ICTY: Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (2000), paras.14–15, 90–91.
152. ICRC Customary International Humanitarian Law Study, Volume I book3 at Rules 43–45.
153. ICRC (2020). See also International Law Commission, 'Principles on the protection of the environment in relation to armed conflict', now reflected in United Nations General Assembly resolution 77/104.
154. See Gillett (2022b).
155. See STL: Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Case No. STL-11-01/I), Appeals Chamber, 16 February 2011.
156. See, e.g. Rachovitsa (2017, pp. 563–564).
157. See, e.g. Special Tribunal for Lebanon: Public Redacted Version of Judgment on Appeal, NewTV S.A.L. and Al Khayat (STL-14-05/I/CJ), Appeals Chamber, 8 March 2016 Contempt Cases; Public Redacted Version of the Judgment, Akhbar Beirut S.A.L. and Al Amin (STL-14-06/I/CJ), Contempt Judge, 15 July 2016.
158. See above under the heading of 'Reconceptualizing systemic integration as 'framework integration'.
159. See, by analogy, ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, judgment (Grand Chamber), 9 April 2024, para.453–455 (referring also to *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, para.167, 17 January 2023).
160. See ECtHR: *Jorgić v. Germany*, App. No. 74613/01, §§ 89–116 (12 July 2007).
161. On the interplay of customary international law and the Rome Statute instruments, see Cryer (2009, p. 399); Grover (2010, pp. 564–566).
162. Kirsch (2006, p. 79, 80). See also Grover (2010, pp. 568–569, 576); von Hebel and Robinson (1999).
163. See Minkova (2024, p. 7).
164. See Minkova (2024, p. 3).
165. In this respect, see the author's proposed definition of ecocide, which does not pivot on the notion of sustainable development, which is only an element in relation to the final underlying act of ecocide.
166. See Stevenson (2013) arguing that compliance with IEL can in fact lead to adverse impacts on the environment.
167. See above under the heading 'Implementation of framework integration for ecocide and environmental harm' referring to murder, torture or rape.

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