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# Ecocide

Addressing the large-scale impairment of  
the environment and human rights

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# ABSTRACT

*The current rate of environmental damage taking place across the world is putting at risk life on our planet. The use of destructive weapons and dangerous extractive industries are leading to massive environmental destruction, as well as violations of human rights. The large-scale impairment of the environment and human rights has even received its own name: ecocide. As a possible way of offering more protection to the environment and human beings, the focal point of this thesis is to analyse to what extent is it necessary and feasible to establish ecocide as an international crime. While ecocide has not yet been legally recognised by the international community, what is being increasingly acknowledged is the indivisibility of human rights and environmental protection. Unfortunately, however, the current protection provided to human rights and the environment is too weak to prevent, stop and redress cases of ecocide. A feasible proposal to enhance such protection is the establishment of ecocide as an international crime under the jurisdiction of the International Criminal Court. Doing so would elevate the gravity of ecocide, acting as a powerful deterrent. The world should not wait to witness another massive environmental catastrophe to establish ecocide as an international crime.*

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ABSTRACT

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# LIST OF ABBREVIATIONS

CESCR	Committee for Economic and Social Rights
CEO	Chief Executive Officer
CIL	Customary International Law
CRC	Convention on the Rights of the Child
ECI	European Citizens Initiative
ECOSOC	United Nations Economic and Social Council
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
HRC	Human Rights Committee
ICC	International Criminal Court
ICESCR	International Convention for Economic and Social Rights
ICCPR	International Convention for Civil and Political Rights
ICJ	International Court of Justice
IEL	International Environmental Law
ILC	International Law Commission
MEA	Multilateral Environmental Agreement
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation Development
UDHR	Universal Declaration for Human Rights
UN	United Nations
UNEP	United Nations Environment Programme
UNSC	United Nations Security Council

# INTRODUCTION

*'[W]e are in the process of discovering the extent to which man's normal activities are destroying the ecological basis of life on the planet'.<sup>1</sup>*

In 1973, the international law scholar Richard Falk acknowledged that human beings had started to realise the extent of the damage being caused by its human-led activities. The use of destructive weapons during warfare, and the impact of extractive industries such as mining, fossil fuel extraction, agriculture and logging, were gradually destroying the planet, and with it the well-being of humanity. Writing 44 years later, I ask myself: has this situation changed much in today's world?

Almost every day there are new reports or new evidence of significant environmental damage taking place across the world, which is simultaneously affecting the livelihoods of millions of people. One of the latest environmental concerns is the devastating social and environmental effect from the industry of palm oil extraction. Extensive areas of tropical forests are being cleared out in order to establish monoculture oil palm plantations that are leading to air, water and soil pollution, soil erosion, the destruction of the habitat of endangered species, as well as increasing social conflicts among local communities whose livelihoods are being completely ignored.<sup>2</sup> Alarmingly, this is merely one example of many. In fact, the amount of environmental damage across the world is taking place at a faster rate than previously thought.<sup>3</sup> The use of highly destructive weapons during wartime and the treatment of the planet as a mere commodity to extract economic growth in both conflict and non-conflict contexts, has led to the increasing rate of violations against

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<sup>1</sup> Richard Falk, 'Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals' [1973] Princeton University 2.

<sup>2</sup> WWF, 'Environmental & social impacts of palm oil production' <[http://wwf.panda.org/what\\_we\\_do/footprint/agriculture/palm\\_oil/environmental\\_impacts/](http://wwf.panda.org/what_we_do/footprint/agriculture/palm_oil/environmental_impacts/)> accessed 16 February 2017.

<sup>3</sup> UNEP, 'Rate of Environmental Damage Increasing Across Planet but Still Time to Reverse Worst Impacts' (UN, 19 May 2016) <<http://www.un.org/sustainabledevelopment/blog/2016/05/rate-of-environmental-damage-increasing-across-planet-but-still-time-to-reverse-worst-impacts/>> accessed 12 February 2017.

human rights and the environment.<sup>4</sup> Due to their recurrence and gravity, the devastating consequences of these activities have even received their own name: **ecocide**.

A literal definition of ecocide is ‘killing our home’ (i.e. ‘killing our environment’). Yet, ecocide does not only entail environmental damage but also significant violations of human rights. The indivisibility of human rights and environmental protection has become clear; without a safe and healthy environment individuals and communities are not able to enjoy their most basic fundamental human rights. Generally, cases of massive environmental harm eventually affect the well-being of human beings, as well as all other living organisms and the non-living components of ecosystems, which, ultimately, are detrimental for the existence of humanity.

## **I. Literature Review**

Throughout the second half of the 20<sup>th</sup> century and the early 21<sup>st</sup> century one finds a relatively small number of academics interested in the concept of ecocide. The devastating human and environmental effects of the Vietnam War marked the beginning of a limited field of literature focused on the need for the international community to address and prevent future cases of ecocide. Richard Falk was the first scholar to properly examine the concept of ecocide, publishing in 1973 a proposed international convention on the crime of ecocide.<sup>5</sup> Later, in 1996, Mark Allan Gray published his analysis of ‘The International Crime of Ecocide’ attempting to demonstrate the existence of the notion of ecocide in international law and examining the possibility of establishing ecocide as an international crime.<sup>6</sup>

With the turn of the century, a rising number of academics became interested in ecocide. In the early 2000s, Christopher Lytton and Franz Broswimmer, for instance, offered two different accounts of ecocide. While Lytton focused on examining existing human rights and environmental legal documents in order to examine any emerging trends in international law and ecocide,<sup>7</sup> Broswimmer focused on narrating

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<sup>4</sup> ‘2016 Update: Fighting for Our Shared Future’ (Earth Law Center, 2016) 3.

<sup>5</sup> Falk (n 1).

<sup>6</sup> Mark Allan Gray, ‘The International Crime of Ecocide’ (1995) 26 California Western International Law Journal 215.

<sup>7</sup> Christopher H. Lytton, ‘Environmental Human Rights: Emerging Trends in International Law and Ecocide’ (2000) 13 Environmental Claims Journal 73.

the historical background of ecocide, offering an account of the way *homo sapiens* have throughout history impacted the environment in devastating ways which can be termed as acts of ecocide.<sup>8</sup> With the increasing awareness of the alarming state of the environment and the international legal loopholes to address such devastating effects, the 21<sup>st</sup> century has also given rise to a number of academics analysing the possible role of international criminal law in addressing ecocide. Authors such as Mark Drumbl, Steven Freeland, Peter Stoett, Frederic Megret, Tara Smith, Polly Higgins, Damien Short and Nigel South, have published articles examining the possibility of using international criminal law as a mechanism to offer more legal protection against ecocide.

Despite an increasing interest among the academic sphere regarding the emerging concept of ecocide, there is still a clear lack of critical analysis of the current international legal framework potentially addressing cases of ecocide, as well as a lack of critical scrutiny of the feasibility of establishing ecocide as an international crime. Some authors mentioned above have indeed offered their views on how to establish such a crime at the international level but the literature is not abundant. The emerging concept of ecocide and its potential development into an international crime is without any doubt an area which is still unknown for many.

## II. Research Question & Methodology

Although the notion of ecocide is not new, it now appears to be gaining much more worldwide attention as daily reports and new evidence demonstrate the devastating effects of environmental challenges. Taking into account the lack of literature and the still lacking public support on the necessity of addressing ecocide at the international level, the research aim of this thesis is to contribute to the discussion surrounding the evolving concept of ecocide, offering a fresh comprehensive analysis of both the necessity and feasibility of making ecocide a new international crime. Specifically, this thesis focuses on the following research question: **to what extent is it necessary and feasible to establish 'ecocide' as an international crime?** The thesis assesses both the necessity of providing more legal protection against ecocide at the

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<sup>8</sup> Franz Broschimmer, *Ecocide: A Short History of the Mass Extinction of Species* (Pluto Press 2002).



international level, as well as the feasibility of establishing ecocide as a new international crime.

Since ecocide as a concept does not yet exist under the field of international law, in order to assess the necessity of establishing a new international law against ecocide the thesis critically examines whether the international legal arena already offers sufficient and effective protection against ecocide through other means. As this thesis regards cases of ecocide as involving violations of both environmental and human rights, the main purpose is to assess whether there is already sufficient and effective international legal instruments in place to protect human rights and the environment, and thus to prevent, stop and redress cases of ecocide. This analysis encompasses an insight into relevant provisions or instruments under international human rights law, international environmental law, international humanitarian law, international criminal law and customary international law. Due to their increasing involvement in ecocide cases, the thesis also explores the international attempts to regulate the role of corporations. This paper does not explore the role of international non-governmental organisations (NGOs), or the role of United Nations (UN) bodies such as the Human Rights Council and the United Nations Environment Programme (UNEP), which also play a key part as strong advocates for the protection of both human rights and the environment.

In terms of examining the feasibility of establishing ecocide as a new international crime, the thesis focuses on assessing the feasibility of one specific proposal: establishing ecocide as a new international crime under the jurisdiction of the International Criminal Court (ICC). In order to do so, the thesis critically examines (1) the approaches taken by academics and legal professionals on how to establish a new international crime of ecocide, and (2) the 1998 Rome Statute,<sup>9</sup> which is the legal instrument establishing the current international crimes under the jurisdiction of the ICC. The thesis does not assess the feasibility of other noteworthy proposals put forward to enhance the protection against ecocide.<sup>10</sup>

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<sup>9</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

<sup>10</sup> Other proposals include: drafting a UN convention against ecocide and the establishment of a new international environmental tribunal.

### III. Outline Guide of the Thesis

This thesis presents the reader with (1) the evolving concept of ecocide, (2) an examination of the current international legal framework relevant to ecocide, i.e. the integrated protection of human rights and the environment, and (3) a critical examination of the possibility of offering more protection against cases of ecocide through the field of international criminal law. Accordingly, the thesis is divided into three chapters, each one focused on answering a sub-question related to the research question previously presented.

Chapter I is devoted to the contextualisation of the concept of ecocide, exploring the question: **what is ecocide?** This section provides an insight into the different definitions provided to the term ‘ecocide’, as well as the institutional historical background of the concept. This chapter also provides an overview of the current status of this concept at the national and international levels. Subsequently, Chapter II is based on the following question: **is there already sufficient and effective international legal protection to prevent, stop and redress ecocide?** Since this thesis regards cases of ecocide as involving the large-scale impairment of both the environment and human rights, the second chapter focuses on examining the current international legal protection offered to the environment and human rights in an integrated manner. Finally, Chapter III examines one of the proposals put forward to enhance the international protection against ecocide: establishing ecocide as a new international crime under the jurisdiction of the ICC. The key question is: **is it a feasible proposal in order to enhance the international protection against ecocide?** Chapter III critically examines the feasibility of this proposal, while putting forward some suggestions on key issues to consider when drafting such a proposal.

# CHAPTER I – CONTEXTUALISATION OF ECOCIDE:

## *What is ecocide?*

The aim of Chapter I is to put into context the relatively unknown concept of ecocide. By examining the different definitions that have been provided for the term, as well as its historical background and its current status in the world, this chapter will provide an initial comprehensive analysis of the concept of ecocide. This contextualisation is essential before considering whether it is necessary and feasible to establish ecocide as a new international crime.

### **I. Defining Ecocide**

The term ‘ecocide’ has no official legal definition. Yet, one finds increasing attempts from academia to appropriately define the term. Notably, Richard Falk, Mark Allan Gray and Polly Higgins have championed the academic work concerning the concept of ecocide. Before examining some of the different definitions awarded for ecocide, it is helpful to first look at the etymology of the word. The word seems to be a play on the word ‘genocide’; but what exactly does it mean? Ecocide derives from the combination of two specifically chosen terms. ‘Eco’ derived from ancient Greek ‘oikos’, which means house or home. ‘Cide’ derived from the Latin verb ‘caedere’, which means ‘to kill’ or ‘cut/strike down’.<sup>11</sup> Hence, a literal translation of ecocide is: ‘killing our home’ (i.e. ‘the destruction of the natural environment’).<sup>12</sup>

#### **a. A Chronological Account Defining Ecocide**

The legal scholar Richard Falk provided one of the earliest definitions for ecocide in 1973. Falk primarily regarded ecocide as an act committed during wartime, referring to environmental damage as a result of war actions, such as the use of weapons of mass destruction, the military use of defoliants and the bulldozing of

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<sup>11</sup> Koffi Dogbevi, ‘Ecocide Law and Monsanto Past and Present Activities’ [2016] 1, 4.

<sup>12</sup> Prisca Merz, Valérie Cabanes and Emilie Gaillard, ‘Ending Ecocide – the next necessary step in international law’ [2014] 1, 4.

forests or crops for military purposes.<sup>13</sup> This view is also mirrored in the definition of ecocide adopted by the author Franz Broswimmer in 2002.<sup>14</sup>

In 1993, Lynn Berat offered a broader definition, making no distinction between acts committed during wartime or peacetime and focusing on the impacts on species in general. Instead of ecocide, Berat used the term ‘geocide’ to refer to the:

intentional destruction, in whole or in part, of any portion of the global ecosystem, via killing members of a species; causing serious bodily or mental harm to members of the species; inflicting on the species conditions of life that bring about its physical destruction in whole or in part; and imposing measures that prevent births within the group or lead to birth defects.<sup>15</sup>

Three years later, in 1996, the Canadian/Australian lawyer Mark Allan Gray provided a broad definition of ecocide but focused specifically on the effects on humanity, rather than on all species in general. Gray referred to ecocide as: ‘causing or permitting harm to the natural environment on a massive scale’, reflecting a ‘breach of duty of care owed to humanity in general’.<sup>16</sup> According to Gray, ecocide had three key characteristics: (1) the act must have caused serious and extensive or long-lasting ecological damage, (2) the damage must have had an international dimension, and (3) the act must have been wasteful (inflicting higher costs on society than benefits).<sup>17</sup>

More recently, in 2010, UK barrister and ecocide law expert Polly Higgins began advocating for ecocide to become an international crime. Her definition of ecocide is the most widely regarded today. Higgins defines ecocide as:

the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely

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<sup>13</sup> Richard Falk, *Revitalizing International Law* (Ames, Iowa University Press 1989) 167.

<sup>14</sup> See: Broswimmer (n 8) 109.

<sup>15</sup> Lynn Berat, ‘Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law’ (1993) 11 *Boston University International Law Journal* 327, 343.

<sup>16</sup> Gray (n 6).

<sup>17</sup> *ibid* in Merz (n 12) 6.

diminished.<sup>18</sup>

In her work, Polly Higgins identifies two types of ecocide: (1) human-caused ecocide; and (2) naturally occurring ecocide.<sup>19</sup> Human-caused ecocide refers to cases whereby human actions, such as dangerous industrial activity, are causing massive destruction to the environment. Naturally occurring ecocide includes damage caused by events such as tsunamis or floods. Both types of ecocide have a very strong negative impact on the world. The following diagram illustrates what is currently happening in the world according to Higgins:<sup>20</sup>



Basically, the current massive damage and destruction of the environment, which is grave enough to constitute cases of ecocide, is leading to resource depletion, which directly leads to conflict among populations competing over the scarcity of resources. In fact, ‘the United Nations Environment Programme (UNEP) has found that over the last 60 years, at least 40 percent of all internal conflicts have been linked to the

<sup>18</sup> Polly Higgins, *Eradicating Ecocide* (2<sup>nd</sup> edn, Shephard-Walwyn 2015) 63.

<sup>19</sup> Polly Higgins, ‘Ecocide, the 5<sup>th</sup> Crime Against Peace’ (TEDx Talks, 2012)

<<https://www.youtube.com/watch?v=8EuxYzQ65H4>> accessed 12 February 2017.

<sup>20</sup> *ibid.*

exploitation of natural resources'.<sup>21</sup> Eventually, many of these conflicts result in war, which again leads to more destruction of the environment during warfare because of, *inter alia*, the use of destructive weapons. The cycle is ongoing.<sup>22</sup> Thus, Higgins does not only regard ecocide as a crime against the environment, but as a crime against humanity, nature, future generations and peace.<sup>23</sup>

Although Higgins' definition of ecocide is the most widespread nowadays, it has not evaded criticism. Peter Stoett believes that Higgins has adopted a definition of ecocide that is too wide or 'maximalist'. Stoett distinguishes between the 'minimalist' and the 'maximalist' approach to ecocide. While the minimalist would focus only on cases of ecocide caused by military actions, the maximalist approach would encompass any neglectful environmental harm, including actions such as air travel.<sup>24</sup> Stoett strongly criticises Higgins' maximalist approach, arguing that Higgins attempts of making a court prosecute 'anyone laying down [a] pipeline is chimerical and hardly get us any further toward a serious debate'.<sup>25</sup>

Overall, despite the absence of an internationally agreed definition, the increasing attempts to define the term and its recurring appearance in academic and legal discourse, as well as in the media, is a clear demonstration that the term is gaining worldwide recognition, clearly becoming at least 'a word of warning'.<sup>26</sup>

### **b. Ecocide & The Indivisible Link Between Human Rights and the Environment**

With the advance of science and technology, it has become clear that the state of the environment can have a direct impact on the fulfilment of human rights. In the same way, the proper fulfilment of human rights can have a direct effect on the health of the environment. In the words of the academic Mark Allan Gray, 'the cohesion and

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<sup>21</sup> UN, 'International Day for Preventing the Exploitation of the Environment in War and Armed Conflict' (6 November 2016) < <http://www.un.org/en/events/environmentconflictday/>> accessed 25 May 2017.

<sup>22</sup> As an example, Higgins mentions the current situation in the Democratic Republic of Congo.

<sup>23</sup> Higgins, 'Ecocide, the 5<sup>th</sup> Crime Against Peace' (n 19).

<sup>24</sup> Peter Stoett, 'Ecocide as a Global Governance Issue: Between Transnational Environmental Crime and Environmental Justice' [2014] Loyal Sustainability Research Centre, 1.

<sup>25</sup> *ibid* 3.

<sup>26</sup> Nigel South, 'Ecocide, Conflict and Climate Change: Challenges for Criminology and the Research Agenda in the 21st Century' in Kristina Kangaspunta and Ineke Haen Marshall (eds.) *Eco-Crime and Justice* (UNICRI 2009) 41.

interdependence of all living things mean that we are harmed as a part of nature...To destroy nature is to destroy ourselves'.<sup>27</sup> The term 'ecocide' essentially embodies such connection and hence, this thesis argues that preventing cases of ecocide means ensuring the effective protection of both **human rights** and the **environment**. As it will be exemplified further below, the majority of - if not all - cases of massive environmental destruction involve violations of both human rights and environmental rights, which may take place both in times of war and peace. Placing emphasis on the effects on humanity might be criticised as taking an anthropocentric approach. The legal academic Mark Drumbl, for example, argued that environmental crimes should focus on the environment as the victim, not humanity.<sup>28</sup> Yet, it is fundamental to understand that any impact on the environment will ultimately affect humankind somehow. As held by the Human Rights Council: 'the need to protect and promote a healthy environment is indispensable not only for the sake of human rights, but also to protect the common heritage of mankind'.<sup>29</sup> In agreement with Judge Weeramantry, 'damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration [of Human Rights] and other human rights instruments'.<sup>30</sup> Acknowledging the indivisibility of human rights and environmental protection is essential to protect the world from ecocide.

### **c. Examples of Ecocide**

Regardless of the exact definition of ecocide, many commentators have agreed that certain environmental disasters constitute cases of ecocide. The most common cited example is the massive environmental destruction, and its consequences on the human population, caused during the Vietnam War. In the words of Polly Higgins, '[t]he Vietnam War proved to be a moment in history that caused us to question our responsibilities to all life, not just human life'.<sup>31</sup> Although many atrocities were committed during the war, one of the most striking techniques was the US's use of the chemical weapon known as Agent Orange. This chemical, also referred to as the

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<sup>27</sup> Gray (n 6) 226.

<sup>28</sup> Mark A. Drumbl, 'Waging War Against The World: The Need To Move From War Crimes To Environmental Crimes' (1998) 22 Fordham International Law Journal 122, 129.

<sup>29</sup> OHCHR, 'Analytical study on the relationship between human rights and the environment' (16 December 2011) A/HRC/19/34 para 24.

<sup>30</sup> *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Separate Opinion of Vice-President Weeramantry) [1997] ICJ Rep 92.

<sup>31</sup> Higgins, *Eradicating Ecocide* (n 18) 93.

‘jungle-eating’ defoliant,<sup>32</sup> destroyed almost half of the South of Vietnam’s mangrove forests,<sup>33</sup> and spread ‘DNA-damaging mutagens throughout Vietnam’s war-torn biological environment’,<sup>34</sup> causing a high rate of miscarriages and birth defects among Vietnamese women. The consequences are still very present today where the current generations are still being born with birth defects due to the exposure to Agent Orange. This is a reality today, which many have forgotten.

Crimes of ecocide have not only been committed during wartime. The most recent examples involve cases that have taken place during non-conflict situations. The oil polluting activities undertaken by the company Royal Dutch Shell in the Niger Delta is a clear example. The most affected region is known as the Ogoniland, located in the region of southeast Nigeria, which is basically covered by pipelines and wells, which have contaminated the water in the area, killing the mangroves and fish.<sup>35</sup> Although Shell ceased its activities in 1993, the contamination continues through its rotting infrastructure. This is menacing not only the local population who are suffering health issues because of drinking polluted water, but the whole ecosystem. Alarming, UNEP published a report where it held that environmental restoration of the Ogoniland region was possible but could take up to 30 years.<sup>36</sup> This case also exemplifies the indivisible link between human rights and the environment. One of the leaders of the Ogoni’s indigenous community stated: ‘If you take the Ogoni case for instance, you pollute their air, you pollute their streams...Now, more people in Ogoni are dying than are being born...Ogoni people are going extinct’.<sup>37</sup> Indeed the link between human beings and the environment is so strong that the destruction of the environment can lead to the extinction of specific groups of people.<sup>38</sup>

Other examples of ecocide include BP’s Deepwater Horizon oil well explosion in the Gulf of Mexico, which resulted in the discharge of 4.9 million barrels of oil,

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<sup>32</sup> Broswimmer (n 8) 76.

<sup>33</sup> Lytton (n 7) 80.

<sup>34</sup> Broswimmer (n 8) 76.

<sup>35</sup> UNEP, ‘Environmental Assessment of Ogoniland’ (2011)

<[http://postconflict.unep.ch/publications/OEA/UNEP\\_OEA.pdf](http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf)> accessed 20 March 2017.

<sup>36</sup> *ibid* 12.

<sup>37</sup> Saro-Wiwa, ‘We Will Defend Our Oil With Our Blood’ in Jeremie Gilbert, ‘Environmental Degradation as a Threat to Life: A Question of Justice?’ (2003) 6 *Trinity College Law Review* 81, 89.

<sup>38</sup> Gilbert (n 37) 88.



posing serious threats to marine life and miles of coastline.<sup>39</sup> Other examples include industrial logging in the Amazon, which is destroying the rainforest and the survival of the indigenous populations within it,<sup>40</sup> Chevron/Texaco's contamination of the Lagos Agro region in Ecuador<sup>41</sup> and the impacts of the palm oil industry in Indonesia.<sup>42</sup>

## II. Historical Background

Although the concept of ecocide is new or unknown for many, it has been present in academic, legal and political discourse for several decades. In fact, although the use of the term 'ecocide' as such can be traced back only to a few decades ago, the act of ecocide is 'as old as recorded history itself'.<sup>43</sup> Lytton refers to Herodotus, the world's first historian, who narrates how as far back as 512 B.C. during the Persian and Scythian War, the Scythians implemented a scorched-earth<sup>44</sup> policy that led to a long-term famine.<sup>45</sup> Unfortunately, its historical background is rather ambiguous, different sources providing different origins. This section will briefly explore the institutional historical background of ecocide, examining the evolution of the use of the term 'ecocide' in the international arena. It is important to explore ecocide's historical background in order to fully understand the concept and its relevance today.

### a. The Institutional Hidden History of Ecocide

The history of the term 'ecocide' can be referred to as a 'hidden history' within the UN;<sup>46</sup> since its early development it has been 'buried in the UN archives'.<sup>47</sup> In recent

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<sup>39</sup> Mark Kinver, 'BP oil spill: The environmental impact one year on' *BCC News* (20 April 2011) <<http://www.bbc.co.uk/news/science-environment-13123036>> accessed 15 March 2017.

<sup>40</sup> See: Daniela Aguilar, 'Illegal Logging and Hunting Threaten Yasuni Isolated Indigenous Groups' (*Amazon Watch*, 22 June 2017) <<http://amazonwatch.org/news/2017/0622-illegal-logging-and-hunting-threaten-yasuni-isolated-indigenous-groups>> accessed 26 June 2017.

<sup>41</sup> See: Judith Kimerling, 'Transnational Operations, Bi-National Injustice: Chevrontexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador' (2007) 31 *American Indian Law Review* 445, 458.

<sup>42</sup> See: WWF (n 2).

<sup>43</sup> Lytton (n 7) 81.

<sup>44</sup> Scorched-earth is 'the act of an army destroying everything in an area such as food, buildings, or equipment that could be useful to an enemy' (*Cambridge Dictionary*) <<http://dictionary.cambridge.org/es/diccionario/ingles/scorched-earth-policy>> accessed 5 March 2017.)

<sup>45</sup> Lytton (n 7) 81.

<sup>46</sup> Damien Short, 'End Ecocide Conference: the launch of worldwide new campaign for International Justice for the Earth' (Brussels, 19 October 2014) <<https://www.endecocide.org/end-ecocide-conference-launch-worldwide-new-campaign-international-justice-earth/>> accessed 3 March 2017.

years, academics such as Professor Damien Short, and lawyers such as Polly Higgins, have tried to uncover old documents to understand and trace the history of ecocide. Additionally, the research undertaken by the Human Rights Consortium of the School of Advanced Study of the University of London has been instrumental in uncovering the institutional historical background of ecocide.<sup>48</sup>

The concept firstly emerged around the 1970s during the horrors of the Vietnam War. Specifically, the word ‘ecocide’ was first recorded at the Conference on War and National Responsibility that took place in Washington in 1970. At this conference, the American biologist and Professor Arthur Galston called for an international agreement to prohibit ecocide.<sup>49</sup> Then, in 1972, the Prime Minister of Sweden, Olof Palme, in his opening speech at the UN Stockholm Conference on the Human Environment, explicitly referred to the Vietnam War as an ‘outrage sometimes described as ecocide’.<sup>50</sup> The horrors of the Vietnam War also had a strong impact among the scientific community. The author David Zierler accounts how the use of strong chemicals during the war led to a movement of scientists advocating for ecocide to become a crime at the international level.<sup>51</sup>

Subsequently, in 1973, Richard Falk drafted and published an International Ecocide Convention where he stated that the international community should recognise ‘that man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace’.<sup>52</sup> His draft Convention was eventually considered by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, who were considering a potential revision to the 1948 Genocide Convention because of criticisms of lack of effectiveness. Due to potential linkages between ‘genocide’ and ‘ecocide’, the Sub-Commission examined the prospects of expanding the crime of genocide to include cases of ecocide.

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<sup>47</sup> *ibid.*

<sup>48</sup> Anja Gauger and others, ‘Ecocide is the missing 5<sup>th</sup> Crime Against Peace’ (Human Rights Consortium, University of London 2013).

<sup>49</sup> ‘History’ (*Eradicating Ecocide*) <<http://eradicatingecocide.com/the-law/history/>> accessed on 10 February 2017.

<sup>50</sup> Dogbevi (n 11) 4.

<sup>51</sup> David Zierler, *The Invention of Ecocide* (The University of Georgia Press, London 2011) in Bronwyn Lay and others, ‘Timely and Necessary: Ecocide Law as Urgent and Emerging’ [2015] *The Journal Jurisprudence* 431, 433.

<sup>52</sup> Falk (n 1) 21.

The man who coined the term ‘genocide’, Raphael Lemkin, had a much wider perception of genocide than the one outlined in the 1948 Genocide Convention. For Lemkin, genocide included what he referred to as the cultural dimension,<sup>53</sup> referring to ‘the destruction of a nation’s or ethnic group’s way of life’.<sup>54</sup> Lemkin tried to integrate this dimension into the Genocide Convention, but the proposal was rejected.<sup>55</sup> In 1973, the idea of using environmental destruction as a method of cultural genocide is what the Sub-Commission decided to explore further,<sup>56</sup> concluding that it would constitute an ‘exaggerated extension’ of the crime of genocide, rendering the Convention even more ineffective by making it less applicable in practice.<sup>57</sup>

The idea of ecocide then resurfaced again in 1985 when the Whitaker Report was conducted and published by the Special Rapporteur Benjamin Whitaker.<sup>58</sup> The purpose was again to discuss the Genocide Convention and whether to include ecocide within it. This time there was more support towards its inclusion. As stated in the report:

Some members of the Sub-Commission have...proposed that the definition of genocide should be broadened to include cultural genocide or “ethnocide”, and also “ecocide”: adverse alterations, often irreparable, to the environment... which threaten the existence of entire populations, whether deliberately or with criminal negligence.<sup>59</sup>

The final report merely stated that they should further analyse the possibility of including ecocide into the Genocide Convention.<sup>60</sup> Yet, no more mention of ecocide was to be found in any further reports.

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<sup>53</sup> Short (n 46).

<sup>54</sup> Dogbevi (n 11) 4.

<sup>55</sup> Polly Higgins, Damien Short and Nigel South, ‘Protecting the planet: A proposal for a law of ecocide’ (2013) 59 *Crime, Law and Social Change* 251, 258.

<sup>56</sup> Nicodème Ruhashyankiko, ‘Study of the Question of the Prevention and Punishment of the Crime of Genocide’ (Sub-Commission on Prevention of Discrimination and Protection of Minorities, 4 July 1978) E/CN.4/Sub.2/416.

<sup>57</sup> Short (n 46).

<sup>58</sup> Benjamin Whitaker, ‘Whitaker Report’ (2 July 1985) E/CN.4/Sub.2/1985/6.

<sup>59</sup> *ibid* para 33.

<sup>60</sup> Short (n 46).

Subsequently, in 1987 the International Law Commission (ILC) was given instructions to consider the possibility of establishing an international crime on extensive environmental destruction.<sup>61</sup> The ILC has the mandate to promote ‘the progressive development of international law and its codification’.<sup>62</sup> Members of the ILC are ‘persons of recognized competence in international law’,<sup>63</sup> who ‘sit in their individual capacity and not as representatives of their Governments’.<sup>64</sup> Since the beginning of their mandate (1947), the ILC had been charged by the UN General Assembly to develop ‘the principles of international law recognised in the charter of the Nuremberg Tribunal and in the judgment of the Tribunal’ and to ‘prepare a draft code of offences against the peace and security of mankind’.<sup>65</sup> Around the late 1980s the ILC began to considerably engage with the prospect of including environmental destruction as one of the international crimes to be included in this Draft Code of Offences Against the Peace and Security of Mankind.<sup>66</sup> The following three options were considered as to how to include such a crime in the Draft Code:

- 1) as a stand-alone article;
- 2) as part of crimes against humanity; or
- 3) as part of war crimes.<sup>67</sup>

After consideration, the final 1991 version of the Code contained 12 crimes, including Article 26 which stated that ‘[a]n individual who willfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to...]’.<sup>68</sup> By 29 March 1993, a total of 24 States had replied to the Secretary-General regarding the Draft Code, with only three States opposing the inclusion of an environmental crime.<sup>69</sup> Yet, because the environmental crime was highly contested, the UN set up a Working Group to further

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<sup>61</sup> Note: no specific mention of the term ‘ecocide’.

<sup>62</sup> Statute of the International Law Commission (adopted 21 November 1947) UNGA Res 174(II), Article 1.

<sup>63</sup> *ibid* Article 2 (1).

<sup>64</sup> ILC, ‘Membership’ <<http://legal.un.org/ilc/ilcmembe.shtml#a5>> accessed 1 May 2017.

<sup>65</sup> UNGA Res 177 (II) (21 November 1947).

<sup>66</sup> UN, ‘The Work of the International Law Commission’ (7th edn, New York 2007).

<sup>67</sup> Merz (n 12) 5.

<sup>68</sup> ILC, ‘Report of the International Law Commission on the work of its 43rd session’ (29 April–19 July 1991) UN Doc A/46/10, 107.

<sup>69</sup> These States were the Netherlands, the UK and the USA (‘History’ (n 49)).

discuss its inclusion in the Code.<sup>70</sup> The final decision was to propose only the inclusion of ‘wilful and severe damage to the environment as a war crime’.<sup>71</sup>

The final text of the Code was adopted in 1996, laying the basis for the 1998 Rome Statute, which established the ICC. Now, the only notion remaining of ‘international environmental crimes’ is to be found under Article 8(2)(b)(iv) of the Rome Statute, which states that ‘intentionally launching an attack in the knowledge that such attack will cause...widespread, long-term and severe damage to the natural environment’ is a war crime. Ultimately, although a notion of what may constitute ecocide remained, the term ‘ecocide’ disappeared from official UN discourse.

### **III. Ecocide Today**

#### **a. Existing Legal Provisions Addressing Ecocide**

Despite the UN’s non-recognition of ecocide at the international level, ten States have incorporated the crime of ecocide into their national constitutions. Currently, the crime of ecocide is recognised in the following criminal codes:

- Criminal Code of the Russian Federation, Article 358<sup>72</sup>
- Criminal Code of Kyrgyzstan, Article 374<sup>73</sup>
- Criminal Code of Tajikistan, Article 400<sup>74</sup>
- Criminal Code of Belarus, Article 131<sup>75</sup>
- Criminal Code of Georgia, Article 409<sup>76</sup>
- Criminal Code of Vietnam, Article 342<sup>77</sup>
- Criminal Code of Ukraine, Article 441<sup>78</sup>

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<sup>70</sup> UN, ‘The Work of the International Law Commission’ (n 66) 105.

<sup>71</sup> *ibid.*

<sup>72</sup> Chapter 34 ‘Crimes Against the Peace and Security of Mankind’ (adopted 13 June 1996, entered into force 1 January 1997).

<sup>73</sup> Chapter 34 ‘Crimes Against the Peace and Security of Mankind’ (adopted 16 July 1997).

<sup>74</sup> Chapter 34 ‘Crimes Against the Peace and Safety of Mankind’ (adopted 21 May 1998, entered into force 1 September 1998).

<sup>75</sup> (adopted 2 June 1999, entered into force 9 July 1999).

<sup>76</sup> Chapter XLVII ‘Crime Against Humanity, Peace Security and International Humanitarian Law’ (adopted 22 July 1999, entered into force 15 February 2000).

<sup>77</sup> Chapter XXIV ‘Crimes of Undermining Peace, Against Humanity and War Crimes’ (adopted 21 December 1999, entered into force 1 July 2000) No.15/1999/QH10.

<sup>78</sup> Chapter XX ‘Criminal Offenses Against Peace, Security of Mankind and International Legal Order’ (entered into force 1 September 2001).

- Criminal Code of the Republic of Moldova, Article 136<sup>79</sup>
- Criminal Code of the Republic of Armenia, Article 394<sup>80</sup>
- Criminal Code of Kazakhstan, Article 169<sup>81</sup>

Although only ten States have recognised the crime of ecocide at the domestic level, other States have adopted laws recognising the rights of nature, and/or have established courts dedicated to environmental matters. In 2008, for example, the new Ecuadorian Constitution included a chapter devoted to the Rights of Nature, giving people the legal right to defend nature's rights in a court of law.<sup>82</sup>

Unfortunately, in practice the actual implementation and enforcement of the rights of nature/environment is highly contested.<sup>83</sup> The effectiveness of these laws is dependent on many factors, including the respect of the rule of law and the independence of the judicial system, and many of the countries recognising ecocide as a crime in their national constitutions are ranked by Transparency International in very high positions for corruption and low respect for the rule of law.<sup>84</sup> Hence, the effectiveness of these ecocide laws is highly dubious. This is why international law is extremely important. Facing the limitations of national and regional regulations, international law plays a vital role in raising global awareness of issues of international concern and pressuring States to act or refrain from acting in certain ways. Hence, as an issue of global concern, it is important to examine the concept of ecocide from the international perspective.

### **b. Increasing Support Towards an International Law Against Ecocide**

Besides the introduction of domestic ecocide laws, throughout the 21<sup>st</sup> century there have been several international mock trials concerning cases of ecocide. The

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<sup>79</sup> Special Part: Chapter I 'Crimes Against the Peace and Security of Humanity, War Crimes' (adopted 18 April 2002, entered into force 12 June 2003).

<sup>80</sup> Chapter 33 'Crimes against peace and human security' (adopted 18 April 2003, amended 7 July 2005, entered into force 12 September 2005).

<sup>81</sup> Chapter 4 'Crimes Against Peace and Human Security' (adopted 3 July 2014).

<sup>82</sup> Article 71 provides that '[e]very person, community, people or nationality will be able to demand the public authority the enforcement for rights of nature...'

<sup>83</sup> Natalia Greene, 'The Politics of Rights of Nature in Ecuador' (9 March 2015) <<http://environment.yale.edu/envirocenter/post/conversation-with-natalia-greene-about-the-rights-of-nature-in-ecuador/>> accessed 10 March 2017.

<sup>84</sup> 'Ecocide crime in domestic legislation' (*Eradicating Ecocide*) <<http://eradicatingecocide.com/wp-content/uploads/2012/06/Ecocide-National-Criminal-Codes1.pdf>> accessed 26 February 2017.

latest one, for example, took place in The Hague in October 2016, where eminent judges were called upon to hear testimonies against the company Monsanto for human rights violations, crimes against humanity and ecocide, and to deliver a legal opinion.<sup>85</sup> Another similar mock trial concerning ecocide was undertaken in the UK Supreme Court.<sup>86</sup>

Additionally, in 2012, a European Citizens Initiative (ECI) was launched calling for support to criminalise Ecocide in Europe. Unfortunately, the initiative did not receive enough support<sup>87</sup> and has been withdrawn. Nevertheless, the initiative still demonstrates the increasing public awareness to criminalise ecocide. Currently, there are two noteworthy international campaigns, ‘End Ecocide’<sup>88</sup> and ‘Eradicating Ecocide’,<sup>89</sup> advocating for the inclusion of ecocide into the Rome Statute as a new international crime under the jurisdiction of the ICC. This proposal will be further explored in Chapter III. Broadly, the aim of the proposal is to stop the cycle of ecocide by creating a law that disrupts it: an international law of ecocide.<sup>90</sup>

One may ask themselves: but why should ecocide be dealt at the international level? There are several reasons. The most obvious reason is that environmental problems are not limited to territorial boundaries. Nowadays, it has become clear that what happens in one State may very well impact the well-being of another State, even far away. An example of this is the river pollution incident that took place in China in 2005, whereby an explosion of a petrochemical plant in China caused a major spill of cancer-causing chemicals in the Songhua River, which ultimately spread to Russia.<sup>91</sup> This case exemplifies the increasing transnational impact of environmental damage, which makes the call for international cooperation and intervention more critical. Furthermore, domestic environmental regimes are restricted by geographical

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<sup>85</sup> For more information: <http://www.monsanto-tribunal.org>

<sup>86</sup> Damian Carrington, ‘Test trial convicts fossil fuel bosses of ‘ecocide’ *The Guardian* (5 October 2011) < <https://www.theguardian.com/environment/damian-carrington-blog/2011/sep/29/ecocide-oil-criminal-court> > accessed 16 April 2017.

<sup>87</sup> An ECI needs at least 1 million signatures in one year in order to be discussed at the European Commission.

<sup>88</sup> Official website: <https://www.endecocide.org>

<sup>89</sup> Official website: <http://eradicatingecocide.com>

<sup>90</sup> Higgins, ‘Ecocide, the 5<sup>th</sup> Crime Against Peace’ (n 19).

<sup>91</sup> Nat Green, ‘Positive Spillover? Impact of the Songhua River Benzene Incident on China’s Environmental Policy’ (*Wilson Center*, 7 July 2011) <<https://www.wilsoncenter.org/publication/positive-spillover-impact-the-songhua-river-benzene-incident-china-s-environmental>> accessed 12 April 2017.

limitations and in many occasions, States (mainly developing ones) are powerless against the interests of big transnational corporations.<sup>92</sup> Many States have weak and corrupt governments that are driven by economic interests, ignoring human rights and the environment; again, this underlines the importance of offering protection at the international - as well as regional - level.<sup>93</sup>

#### **IV. Conclusion of Chapter I**

This chapter has put into context the concept of ecocide. Although ecocide has no established legal definition, there have been several attempts to define it. Broadly speaking, ecocide can be understood as the killing of our environment, but it is crucial to understand that the majority of - if not all - cases of massive environmental destruction involve both environmental damage and violations of human rights, which may take place in times of war and peace. Essentially, this thesis regards **ecocide as embodying the large-scale impairment of the environment and human rights during times of war and peace.**

Although the concept of ecocide has a rather dubious history within the institution of the UN, the act of ecocide has existed for thousands of years. Ecocide has gained increased global attention since the Vietnam War, leading to the establishment of criminal ecocide laws in ten States, along with an increasing number of States introducing laws and courts aimed at protecting the environment. Additionally, there has been increasing support towards criminalising ecocide at the international level. There are several reasons why advocates strongly urge the international community to take steps against ecocide at the international level, making one wonder why is there not already an international ecocide law? Maybe there is already in place a rigorous international legal framework protecting human rights and the environment in an integrated manner? This will be further discussed in the following chapter.

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<sup>92</sup> Rebecca Bratspies, 'Do We Need a Human Right to a Healthy Environment?' (2015) 13 Santa Clara Journal of International Law 31, 43.

<sup>93</sup> For a more in depth discussion see: Rajendra Ramlogan, 'Creating International Crimes to Ensure Effective Protection of the Environment' (2008) 22 Temple International & Comparative Law Journal 345.



# CHAPTER II – CURRENT INTERNATIONAL LEGAL PROTECTION OF HUMAN RIGHTS AND THE ENVIRONMENT:

## *Is there already sufficient and effective international legal protection to prevent, stop and redress ecocide?*

Having put into context the concept of ecocide, this thesis proceeds to analyse whether the current international legal framework already provides sufficient and effective protection against cases of ecocide. As explored in the previous chapter, preventing cases of ecocide entails protecting both human rights and the environment together. Hence, in order to examine whether there is already sufficient and effective mechanisms in place at the international level to prevent, stop and redress cases of ecocide, this chapter looks into the existing international framework of legal protection provided to human rights and the environment in an integrated manner.

### **I. Protection Provided by International Human Rights Instruments**

The body of international human rights law challenges the classic view of State sovereignty by envisioning the treatment of one State's nationals as a matter of international concern.<sup>94</sup> Following the creation of the UN, an increasing number of international human rights treaties have been adopted, along with committees (treaty bodies) to monitor the compliance of the human rights protected under each treaty. However, these monitoring processes have limited enforcement mechanisms. These enforcement mechanisms entail (1) fairly weak reporting duties, whereby States have to compile a periodic report outlining their compliance with the human rights guaranteed in the respective treaty, and (2) an equally weak optional inter-State and

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<sup>94</sup> Hari Osofsky, 'Learning from Environmental Justice: A New Model for International Environmental Rights' (2005) 24 Stanford Environmental Law Journal 71, 82.

individual complaints system.<sup>95</sup> Despite lacking in enforcement, international human rights law has a powerful role in protecting individuals and communities by setting universal standards and pressuring States to comply with these standards. The main question is: does the international human rights field offer any kind of protection to the environment and thus, offer protection against ecocide?

### **a. Environmental Rights within International Human Rights Treaties**

When human rights treaties began to be drafted and adopted by the international community, environmental issues were not yet an important matter of concern.<sup>96</sup> Consequently, one finds very few references to environmental matters in international human rights instruments.<sup>97</sup> Unlike civil, political, economic, social and cultural rights, environmental rights<sup>98</sup> constitute a late arrival to the body of human rights law.<sup>99</sup> Indeed, the first internationally recognised human rights document, the 1948 Universal Declaration of Human Rights (UDHR),<sup>100</sup> contains no reference to environmental rights. In fact, up until today there is still no international binding agreement recognising an explicit right to a healthy environment.

Despite the absence of an explicit right, some legal academics argue that there exist environmental rights within human rights instruments, basing their argument on the implicit link between some human rights and environmental concerns.<sup>101</sup> Concerning the right to life, for example, some academics claim that this right does not only comprise a negative obligation on States to refrain from any arbitrary deprivation of life, but it also entails a positive obligation to ‘take all possible measures to prevent violations of the right to life by others’.<sup>102</sup> This means that States

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<sup>95</sup> Manfred Nowak, ‘The Need for a World Court of Human Rights’ (2007) 7 HRLR 251, 252.

<sup>96</sup> Dinah Shelton, ‘Human Rights, Health & Environmental Protection: Linkages in Law & Practice’ (2002) WHO Health and Human Rights Working Paper Series No.1, 6  
<[http://www.who.int/hhr/Series\\_1%20%20Sheltonpaper\\_rev1.pdf](http://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf)> accessed 16 May 2017.

<sup>97</sup> *ibid.*

<sup>98</sup> Rights relating to environmental protection.

<sup>99</sup> John H. Knox, ‘Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Preliminary Report’ (24 December 2012) A/HRC/22/43 para 7.

<sup>100</sup> UDHR (adopted 10 December 1948) UNGA Res 217 A(III).

<sup>101</sup> Lytton (n 7) 74. See also: Glazebook, ‘Human Rights and the Environment’ (2009) 40 VUWLR 293, 295; Shelton (n 96).

<sup>102</sup> Ramcharan in Gilbert (n 37) 84. See also: Gray (n 6) 255.

must ‘take all the possible measures to safeguard the environment’,<sup>103</sup> whose degradation might endanger human life. In fact, the new draft general comment<sup>104</sup> on the right to life, issued by the Human Rights Committee (HRC), clarifies that States Parties to the International Covenant on Civil and Political Rights (ICCPR)<sup>105</sup> should take ‘adequate measures to protect the environment against life-threatening pollution, and work to mitigate other risks associated with natural catastrophes, such as droughts’.<sup>106</sup> The HRC further notes that States Parties ‘should also develop contingency plans designed to increase preparedness for natural and man-made disasters, which may adversely affect enjoyment of the right to life, such as...industrial pollution’.<sup>107</sup> Without doubt, the nexus between the right to life and environmental protection has become clear.

International human rights treaty bodies have also acknowledged the implicit link between other human rights and environmental protection. For example, the Committee on Economic, Social and Cultural Rights (CESCR) has clarified that the right to the highest attainable standard of health, under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>108</sup> ‘embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as... a *healthy environment*’<sup>109</sup> (emphasis added). Additionally, the CESCR has also acknowledged that there is a human right to water, which depends on the ‘environmental purity of the water’;<sup>110</sup> the CESCR provided that ‘States parties should ensure that natural water resources are protected from contamination by harmful substances...and combat situations where aquatic ecosystems...pose a risk to human living environments’.<sup>111</sup> Although these statements made by the CESCR are merely general comments (i.e. declaratory statements with non-binding force), they may gradually

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<sup>103</sup> Ramcharan in Gilbert (n 37) 84.

<sup>104</sup> ‘General comments’ or ‘general recommendations’ are interpretations of rights contained in human rights treaties, produced by the respective human rights treaty bodies.

<sup>105</sup> ICCPR (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI).

<sup>106</sup> HRC, ‘Draft general comment No.36, Article 6: right to life’ (2 September 2015) CCPR/C/GC/R.36/Rev.2 para 28.

<sup>107</sup> *ibid.*

<sup>108</sup> ICESCR (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI).

<sup>109</sup> CESCR, ‘General Comment No.14: The Right to the Highest Attainable Standard of Health’ (11 August 2000) E/C.12/2000/4 para 4.

<sup>110</sup> OHCHR, A/HRC/19/34 (n 29) para 60.

<sup>111</sup> CESCR, ‘General Comment No.15: The right to water’ (20 January 2003) E/C.12/2002/11 para 8.

create a body of human rights norms relating to environmental protection, constituting strong evidence of the developing trend to integrate human rights and environmental concerns,<sup>112</sup> which may also be interpreted as evidence of emerging<sup>113</sup> or even actual established international law. These statements play a key role in underlining the importance of providing sufficient and effective protection against ecocide.

In theory, when States ratify international human rights treaties, they have to adopt the necessary domestic measures and legislation to ensure compliance with the rights enshrined in those treaties.<sup>114</sup> Where governments fail to effectively do so, the international human rights system has put in place mechanisms to hear complaints. Hence, it seems logical that when environmental harm may threaten or violate the fulfilment of the rights enshrined in those treaties, States have the obligation to take certain steps to avoid such harm.<sup>115</sup> Under the ICCPR<sup>116</sup> and the Convention on the Rights of the Child (CRC),<sup>117</sup> States have the general obligation to respect and ensure the rights provided by the respective treaties. For example, in order to safeguard children's right to health, Article 24(2)(c) of the CRC requires that States Parties 'take measures to address the dangers and risks that local environmental pollution poses to children's health in all settings'.<sup>118</sup> This obligation also entails that States Parties should 'regulate and monitor the environmental impact of business activities that may compromise children's right to health, food security and access to safe drinking water and to sanitation'.<sup>119</sup> Under the ICESCR, however, States have the general obligation to take steps towards the full enjoyment of the rights recognised by the treaty.<sup>120</sup> For example, Article 12 of the ICESCR requires that States Parties take the necessary

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<sup>112</sup> John H. Knox, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Mapping Report' (20 December 2013) A/HRC/25/53, paras 26-27.

<sup>113</sup> It is possible that over time these comments will shape State practice, even to the extent to emerge into new customary international law (Bratspies (n 92) 59).

<sup>114</sup> Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights In Context* (3<sup>rd</sup> edn, Oxford University Press 2008) 1156.

<sup>115</sup> Knox, A/HRC/25/53 (n 112) para 45.

<sup>116</sup> ICCPR (n 105) Article 2 (1).

<sup>117</sup> CRC (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res 44/25, Article 2 (1).

<sup>118</sup> Committee on the Rights of the Child, 'General comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) CRC/C/GC/15.

<sup>119</sup> *ibid.*

<sup>120</sup> ICESCR (n 108) Article 2 (1).

steps to improve all aspects of environmental hygiene.<sup>121</sup> Despite the different terminology used to describe States' general obligations, some main duties have become clear regarding the environment.<sup>122</sup> As put forward by the Special Rapporteur John Knox,<sup>123</sup> States have two main obligations: '(a) to adopt and implement legal frameworks to protect against environmental harm that may infringe on enjoyment of human rights; and (b) to regulate private actors to protect against such environmental harm'.<sup>124</sup> These obligations may be referred to as the 'substantive obligations' relating to environmental protection.<sup>125</sup>

International human rights treaties also recognise several procedural rights, which play a significant role in protecting the environment. These include the rights of freedom of expression and peaceful assembly and association, the right to seek, receive and impart information, the right to participate in government and the right to effective legal remedies. These rights are recognised under the UDHR,<sup>126</sup> the ICCPR,<sup>127</sup> as well as other international human rights treaties addressed to specific vulnerable groups such as the International Labour Organization's (ILO) Convention No.169 (concerning indigenous and tribal peoples)<sup>128</sup> and the UN Declaration on the Rights of Indigenous Peoples.<sup>129</sup> Public participation, for example, requires that potentially affected people are provided with the right to ask for a specific project to be redesigned or abandoned.<sup>130</sup> In fact, failing to consult or effectively consult the people who might be affected by a new undertaking constitutes a human rights violation.<sup>131</sup> Ultimately, these procedural rights are of vital importance when influencing the adoption of environmental policies. Informing the public of environmental matters, and considering the public's opinion when taking

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<sup>121</sup> Andrew Clapham and Mariano Garcia Rubio, 'The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health' 3 (2002) Health and Human Rights Working Paper, para 52.

<sup>122</sup> Knox, A/HRC/25/53 (n 112) para 46.

<sup>123</sup> Special Rapporteur on human rights and the environment, appointed in 2012.

<sup>124</sup> Knox, A/HRC/25/53 (n 112) para 46.

<sup>125</sup> *ibid.*

<sup>126</sup> UDHR (n 100) Articles 7, 8, 19, 20 and 21.

<sup>127</sup> ICCPR (n 105) Articles 2, 19, 21, 22 and 25.

<sup>128</sup> ILO, Indigenous and Tribal Peoples Convention, C169 (adopted 27 June 1989, entered into force 5 September 1991) Articles 6, 7, 14 and 15.

<sup>129</sup> (adopted 2 October 2007) UNGA A/RES/61/295, Articles 18, 19, 29 and 32.

<sup>130</sup> Sara De Vido, 'General Principles and the Duty to Undertake an EIA: Relationship, Requirements and Practice' in Hebel, Hofmann, Proelb and Reiff (eds) *Protecting the Environment for Future Generations* (ESV 2017) 116.

<sup>131</sup> *ibid.*

environmental decisions will result in a better reflection of the needs of those mostly concerned, resulting on a better protection of the environment as well as the general fulfilment of human rights.<sup>132</sup>

The field of human rights law has also recognised the intensified consequences that environmental destruction can have on certain groups of vulnerable persons. The most obvious example is the detrimental effects on indigenous populations. Human rights law provides heightened protection to these members of groups in certain vulnerable situations. For example, Article 7(4) of the ILO Convention No.169 (concerning indigenous and tribal peoples) provides that ‘Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit’. The need to safeguard the environment or the lands that indigenous people inhabit is also enshrined under Articles 14 and 15 of this Convention. More recently, the UN has also recognised the important relationship between the environment and indigenous peoples. The 2006 UN Declaration of the Rights of Indigenous Peoples provides that ‘Indigenous peoples have the right to the conservation and protection of the environment and...States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination’ (Article 29). Additionally, States are required to consult and cooperate with the indigenous peoples concerned, obtaining their free and informed consent, before allowing the initiation of any project which affects their lands, territories or other resources (Article 32(2)). Moreover, in cases of adverse environmental impact, States must provide effective mechanisms for just and fair redress (Article 32(3)).

The field of international human rights law has also recognised how children are especially vulnerable to environmental concerns. The CRC provides that in all actions concerning children, ‘the best interests of the child shall be a primary consideration’.<sup>133</sup> As clarified by the Committee on the Rights of the Child, these actions include environmental regulations.<sup>134</sup> More specifically, within the CRC there are two articles explicitly referring to the environment. Article 24(2)(c) CRC,

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<sup>132</sup> Knox, A/HRC/22/43 (n 99) paras 25-26.

<sup>133</sup> CRC (n 117) Article 3 (1).

<sup>134</sup> Committee on the Rights of the Child, ‘General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)’ (29 May 2013) CRC/C/GC/14 paras 19-20.

regarding children's right to health, provides that States Parties shall take appropriate measures to 'combat disease and malnutrition...taking into consideration the dangers and risks of *environmental pollution*' (emphasis added). Also, Article 29(1) CRC, concerning education, states that 'State Parties agree that education of the child shall be directed to...the development of respect for the *natural environment*' (emphasis added). Moreover, on September 2016, the Committee on the Rights of the Child dedicated a general discussion day on 'Children's Rights and the Environment'.<sup>135</sup> Here, the Committee committed itself to 'provide more robust guidance on children's rights in the environmental context'<sup>136</sup> and clearly held that when 'governments fail to protect children from environmental risk factors, this constitutes a violation of children's rights'.<sup>137</sup>

Finally, the ICESCR also recognises an important obligation relevant for the protection of the environment. This is the duty of international cooperation with respect to human rights.<sup>138</sup> This obligation is also found in the Charter of the UN.<sup>139</sup> This obligation is of particular importance when considering environmental threats of a global dimension, such as ecocide, which requires international cooperation and action.

### **b. Quasi-Jurisprudence of International Human Rights Treaty Bodies**

Most of the human rights treaties have set up committees entitled to hear individual and/or State complaints of human rights abuses where victims can request reparations. Yet, complaints can only be brought against States, not individuals or non-State actors, such as companies. Additionally, such complaints can only be brought forward when: (1) the State has ratified or acceded to the treaty that provides the rights which have allegedly been violated; and (2) the State must have also accepted the competence of the committee to hear such complaints.<sup>140</sup> If the complaint is admissible the respective committee produces a decision where it states

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<sup>135</sup> For more information: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2016.aspx>

<sup>136</sup> Committee on the Rights of the Child, 'Report of the 2016 Day of General Discussion' (September 2016) 38.

<sup>137</sup> *ibid.*

<sup>138</sup> ICESCR (n 108) Article 2 (1).

<sup>139</sup> UN, 'Charter of the United Nations' (adopted 24 October 1945) 1 UNTS XVI, Articles 55 and 56.

<sup>140</sup> OHCHR, 'Individual Complaint Procedures under the United Nations Human Rights Treaties' (2013) Fact Sheet No.7 Rev.2.

whether the State has or not violated the respective rights. Such decisions contain recommendations addressed to the State party, but they are not legally binding on the State.<sup>141</sup> The only enforcement mechanism existing to ensure that States comply with such recommendations is a follow-up procedure undertaken by these committees. Needless to say, this enforcement procedure is quite weak. Nevertheless, the decisions taken by these committees exhibit the ‘important characteristics of a judicial decision’.<sup>142</sup> The views of the committee represent an ‘authoritative determination’<sup>143</sup> of the provisions under the respective instrument, clarifying States’ duties in regards to their human rights obligations, including those relating to the protection of the environment. Hence, they may be considered more than mere recommendations.<sup>144</sup>

Unlike human rights treaties, environmental treaties do not generally establish complaint procedures.<sup>145</sup> Due to the lack of such procedures, it has become increasingly common for victims of environmental harm to bring their cases to international, regional and national human rights bodies.<sup>146</sup> At the international level, however, the development of an environmental dimension of protection through human rights has been rather modest.<sup>147</sup> Most cases with an environmental dimension have been brought before the HRC, under Article 27 of the ICCPR.<sup>148</sup> In general, these cases have concerned environmental impacts on the traditional life of individuals belonging to minorities.<sup>149</sup> Nevertheless, only a small number of these cases have been successful. In *Ilmari Lansman*,<sup>150</sup> for example, the Committee took a restrictive view on the role of environmental protection in the fulfilment of human rights and concluded that ‘measures that have a limited impact on the way of life of

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<sup>141</sup> *ibid.*

<sup>142</sup> HRC, ‘General Comment No.33’ (5 November 2008) CCPR/C/GC/33 para 11.

<sup>143</sup> *ibid* para 13.

<sup>144</sup> Manfred Nowak and Elizabeth McArthur, ‘The United Nations Convention against Torture’ [2008] Oxford Commentaries on International Law, 722.

<sup>145</sup> Shelton, ‘Human Rights, Health & Environmental Protection’ (n 96) 10.

<sup>146</sup> IHRC, ‘Human Rights and the Environment’ (*Icelandic Human Rights Centre*) <<http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-the-environment>> accessed 20 April 2017.

<sup>147</sup> Francesco Francioni, ‘International Human Rights in an Environmental Horizon’ (2010) 21 EJIL 41, 53.

<sup>148</sup> Article 27: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’.

<sup>149</sup> Francioni (n 147) 53.

<sup>150</sup> HRC, Communication No. 511/92 (1994) CCPR/C/52/511/1/1992.



persons belonging to a minority will not necessarily amount to a denial of the right under Article 27'.<sup>151</sup> A similar restrictive approach has also been reflected in other cases brought to the Committee.<sup>152</sup>

At the same time, there have also been bold instances where the Committee has acknowledged the importance of the environmental dimension of human rights. In *EHP v. Canada*,<sup>153</sup> although the case was declared inadmissible due to the lack of exhaustion of domestic remedies, the Committee acknowledged that the dumping of nuclear waste next to the housing of individuals could amount to a serious threat to life, contrary to the right to life as guaranteed under the ICCPR. Another example of a case where the Committee took a more favourable approach to environmental protection is *Lubicon Lake Band v. Canada*.<sup>154</sup> Here, it was found that there had been a violation of Article 27 due to the harmful environmental impacts on the traditional lands of an indigenous community, caused by practices of gas and oil extraction.<sup>155</sup>

Generally, although individuals do have the possibility to bring human rights cases based on environmental harm before international human rights bodies, such cases must be linked to an existing human right; the general degradation of the environment is not sufficient to bring a case. In other words, a general right to a healthy environment *per se* is not provided; a clear casual link between the environmental harm and the abuse of a right protected under a human rights treaty must be established. Cases where no casual link can be established are therefore left to the mechanisms offered by the field of international environmental law.<sup>156</sup> Moreover, the body of human rights law creates rights for individuals exercisable against States, offering no possibility of holding companies accountable for any damage caused to the environment and communities. Additionally, another important limitation is that the existing human rights complaint procedure system 'seems to be very little known in the world, and/or the billions of human beings in all regions of the world entitled to

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<sup>151</sup> *ibid* para 9.

<sup>152</sup> See for example: HRC, *Bordes et al. v. France* (22 July 1996) Communication No. 645/1995; HRC, *Brun v. France*, Communication No. 1453/2006 (2006) UN Doc. CCPR/C/88/D/1453.

<sup>153</sup> HRC, Communication no. 67/1980 (1990).

<sup>154</sup> HRC, Communication No. 167/1984 (1990) U.N. Doc. Supp. No. 40 A/45/40 1.

<sup>155</sup> Francioni (n 147) 53. A similar approach was also taken in the case of *Francis Hopu and Tepoaitu Bessert v. France*. (Communication No. 549/1993, UN Doc. CCPR/ C/60D/549/1993/Rev/1, 29 Dec. 1997. This case involved a broad interpretation of Article 17 ICCPR).

<sup>156</sup> Dinah Shelton, 'Legitimate and necessary: adjudicating human rights violations related to activities causing environmental harm or risk' (2015) 6 *Journal of Human Rights and the Environment* 139, 143.

lodge complaints with the UN treaty bodies have little confidence in this procedure'.<sup>157</sup> Overall, it can be concluded that although the human rights complaint system may offer some protection, it is indeed limited and not enough to provide general protection to the environment and the proper fulfilment of human rights.

## **II. Protection Provided by International Environmental Instruments**

Traditionally, the question of environmental protection has not been a core matter of international legal concern. Rather, it has been viewed as a political and scientific question.<sup>158</sup> Nevertheless, the increasing trends of environmental degradation across the world have clearly led to an increase in the field of international environmental law (IEL). Yet, unlike the field of human rights law, IEL is largely reduced to inter-State relations, awarding individuals and other non-State actors an extremely limited role. IEL has mainly focused on establishing State responsibility, rather than focusing 'directly with the conduct of individual polluters'.<sup>159</sup> As the UN Convention on the Law of the Sea (UNCLOS)<sup>160</sup> states very clearly: 'States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the maritime environment. They shall be liable in accordance with international law'.<sup>161</sup> Although it is obviously important to hold States accountable for non-compliance, the issue is that nowadays non-State actors play a crucial role as both '*shapers* and *violators*' of IEL.<sup>162</sup>

Another limitation of the field of IEL is that it is mainly reliant on State willingness; the bulk of IEL is based on voluntary instruments. States mainly resort to the so-called 'soft-law' approach, whereby most instruments are non-binding in nature. Additionally, such instruments lack effective enforcement mechanisms to ensure State compliance.<sup>163</sup> In 2000, Robert McLaughlin wrote that 'the only truly universal enforcement mechanism available under current IEL is the force of public

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<sup>157</sup> Nowak (n 95) 254.

<sup>158</sup> Gilbert (n 37) 81.

<sup>159</sup> Alan E. Boyle, 'Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs', in Robert McLaughlin, 'Improving Compliance: Making Non-State International Actors Responsible for Environmental Crimes' (2000) 11 *Colorado Journal of International Law and Policy* 377, 381.

<sup>160</sup> UNCLOS (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

<sup>161</sup> *ibid* Article 235 (1).

<sup>162</sup> McLaughlin (n 159) 386.

<sup>163</sup> *ibid* 380.

opinion'.<sup>164</sup> Today in 2017, besides some limited provisions entailing punitive measures, the situation remains largely the same.

Taking into account these characteristics and limitations of the field of IEL, the question to examine is: does this field of law provide any kind of protection against cases of ecocide? As it will be explored below, there is indeed an increasing recognition of IEL's interconnectedness with human rights, as well as a slowly emerging trend to use punitive measures as enforcement mechanisms, which may be key factors in enhancing the protection against ecocide.

### **a. International Recognition of the Indivisibility of Human Rights and the Environment**

Although the body of IEL does not have at its core the protection of human beings, States' recognition of the indivisibility of human rights and environmental protection has been slowly emerging, notably from several international environmental conferences. The UN Conference on the Human Environment, held in Stockholm in 1972, can be considered the first international event that clearly established the indivisibility of human rights and the environment. Principle 1 of the Stockholm Declaration<sup>165</sup> declares that '[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'.

The Stockholm Declaration established the basis for what is now known as 'the environmental approach to human rights',<sup>166</sup> whereby environmental protection is considered to be a precondition for the full enjoyment of human rights.<sup>167</sup> The Declaration set out 26 non-binding principles concerning the environment and development. Notably, Principle 21 declares that although States are entitled to exploit their own natural resources as they wish, they must ensure that when doing so they do not cause damage to the environment of other States. On one hand, Principle 21 affirms the core international principle of sovereignty by declaring that States

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<sup>164</sup> *ibid* 385.

<sup>165</sup> Declaration of the UN Conference on the Human Environment (adopted 15 December 1972) UNGA A/RES/2994 (Stockholm Declaration).

<sup>166</sup> Dinah Shelton, 'Human Rights and the Environment: Problems and Possibilities' (2008) 38(1/2) *Environmental Policy and Law* 41, 42.

<sup>167</sup> *ibid*.

retain an ultimate ‘sovereign right’ to exploit their own resources.<sup>168</sup> On the other hand, it also introduces the duty of States not to cause transboundary environmental harm, which is a key duty in avoiding cases of ecocide. This principle reflects the tension between balancing the principle of sovereignty and the need to address environmental matters at a global level. In fact, this tension might be considered one of the underlining reasons why the field of IEL is principally based on voluntary agreements and soft-law mechanisms.

Some legal scholars claim the Stockholm Declaration is evidence of the recognition of ‘a human right to an environment of quality’.<sup>169</sup> Other academics argue that the Declaration led to a ‘ripple effect’ revealed in the development towards recognising an independent right to a healthy environment.<sup>170</sup> In 1987, for example, the Brundtland Commission<sup>171</sup> recognised that ‘all human beings have the fundamental right to an environment adequate for their health and well-being’.<sup>172</sup> Similarly, in 1989, during The Hague Declaration on the Environment,<sup>173</sup> States Parties recognised the duty to preserve the ecosystem, as well as the right to live in dignity in a viable global environment.<sup>174</sup>

The strong link between human rights and the environment has received more recognition with the start of the 21<sup>st</sup> century.<sup>175</sup> This has mainly been a consequence of the impact of climate change. The 2015 Paris Agreement on Climate Change<sup>176</sup> (Paris Agreement) represents the most recent acknowledgment by the international community of the importance of tackling climate change to protect human rights. In fact, it is the first climate agreement - of binding nature - to give explicit recognition to the relevance of human rights within the issue of climate change.<sup>177</sup> This

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<sup>168</sup> McLaughlin (n 159) 383.

<sup>169</sup> Glazebrook (n 101) 296.

<sup>170</sup> Lytton (n 7) 79.

<sup>171</sup> The Brundtland Commission was in charge of uniting States to cooperatively pursue sustainable development. It formally dissolved in 1987.

<sup>172</sup> ‘Our Common Future Report’ (1987) Article 1.

<sup>173</sup> (11 March 1989) 28 ILM 1308, 1309. But only signed by 24 Heads of States.

<sup>174</sup> Glazebrook (n 98) 299.

<sup>175</sup> Ben Boer and Alan Boyle, ‘Human Rights and the Environment’ (Asia-Europe Meeting, Copenhagen, October 2013) 5.

<sup>176</sup> UN Framework Convention on Climate Change (UNFCCC), (adopted 12 December 2015, entered into force 4 November 2016).

<sup>177</sup> HRC, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (1 February 2016) A/HRC/31/52 para 20.

recognition is definitely very significant, but the Paris Agreement should be seen as ‘only the beginning’;<sup>178</sup> time will determine whether States effectively fulfil the Agreement, ensuring the implementation of the commitments made.

Overall, in the field of IEL there has been an important gradual trend since the 1970s of recognising the indivisibility of environmental protection and human rights. Yet, this trend has been merely reflected in non-binding statements, showing reluctance by States to adopt binding obligations. Although these statements may be regarded as mere ‘bold words’,<sup>179</sup> they form part of the so-called soft-law that can constitute evidence of the development of new customary international law.<sup>180</sup> This means that ‘[l]inking international environmental law with human rights law, soft law manifests *opinio juris* - the conviction of acting legally and morally - underlying the customary law relevant to ecocide’.<sup>181</sup> Hence, one should not undervalue the importance of these non-binding statements when considering a potential emerging law of ecocide.

### **b. Procedural Environmental Rights**

Throughout the last decades, States have negotiated an increasing number of multilateral environmental agreements (MEAs) addressing different challenges, such as the disposal of hazardous substances, marine pollution and climate change. Although many of these MEAs primarily focus on creating rights and obligations only for States, thus not providing individuals the right to directly invoke them,<sup>182</sup> many do guarantee a number of procedural human rights supporting environmental protection. These procedural rights were enshrined under Principle 10 of the Rio Declaration,<sup>183</sup> which provides that individuals shall have the right to access information, the opportunity to participate in decision-making processes and access to justice concerning environmental matters.

Although not legally binding, Principle 10 of the Rio Declaration has influenced the development of binding environmental laws setting out these procedural rights.

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<sup>178</sup> *ibid* para 22.

<sup>179</sup> Higgins, *Eradicating Ecocide* (n 18) 99.

<sup>180</sup> Gray (n 6) 247.

<sup>181</sup> *ibid* 247.

<sup>182</sup> Boer and Boyle (n 175) 8-9.

<sup>183</sup> Rio Declaration on Environment and Development (adopted 3-14 June 1992) A/CONF.151/26.

Several environmental treaties require States to ensure the public's access to environmental information. Examples include the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade<sup>184</sup> (Article 15) and the UN Framework Convention on Climate Change<sup>185</sup> (Article 12). Other environmental treaties specifically provide for public participation, which is very closely linked with the rights of freedom of expression and of association;<sup>186</sup> examples include the Stockholm Convention on Persistent Organic Pollutants<sup>187</sup> (Article 10) and the Convention on Biological Diversity<sup>188</sup> (Article 14(1)). Finally, concerning the duty to provide access to legal remedies, it is also possible to identify several MEAs endorsing this right. An example is UNCLOS<sup>189</sup> (Article 235).

Concerning procedural environmental rights, most notable has been the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Convention).<sup>190</sup> Its preamble recalls that 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights', and that 'every person has the right to live in an environment adequate to his or her health and well-being'. The main purpose of the Convention, however, is strictly procedural in nature; it mainly aims to guarantee that the public is given the possibility to participate in the protection of the environment. States Parties are required to ensure three procedural rights in their domestic jurisdictions: (1) access to information concerning the environment; (2) public participation in environmental decision-making matters; and (3) access to justice in environmental matters.

The Aarhus Convention is one of the very few examples where States have established an environmental monitoring and enforcement body. Yet, the Aarhus Compliance Committee does not ensure States' compliance with IEL generally, it only focuses on the compliance at national level of these procedural environmental

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<sup>184</sup> (adopted 10 September 1998, entered into force 24 February 2004) 2244 UNTS 337.

<sup>185</sup> UNFCCC (n 176).

<sup>186</sup> John H. Knox, 'Human Rights, Environmental Protection, and the Sustainable Development Goals' (2015) 24 *Washington International Law Journal* 521.

<sup>187</sup> (adopted 22 May 2001, entered into force 17 May 2004) 2256 UNTS 119.

<sup>188</sup> (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

<sup>189</sup> UNCLOS (n 160).

<sup>190</sup> (adopted 28 June 1998, entered into force 30 November 2001) 2161 UNTS 447. Signed by 35 States and the European Community.

rights.<sup>191</sup> Additionally, the Aarhus Convention only involves States Parties who are members or who have consultative status at the Economic Commission for Europe.<sup>192</sup> Hence, the Convention does not provide worldwide protection. Nevertheless, Article 19(2) of the Convention provides that any other State member of the UN may accede to the Aarhus Convention, subject to approval by the Meeting of the Parties. Hence, the benchmarks put forward under Aarhus could potentially become worldwide standards. Nonetheless, while there is no doubt that strong compliance of these procedural rights leads to a healthier environment,<sup>193</sup> it is difficult to argue that the mere guarantee of procedural rights constitutes enough protection for the environment and human rights.

### **c. International Environmental Crimes**

Some environmental offences have acquired the status of ‘international environmental crimes’. These encompass environmental offences involving activities taking place across national borders or which impact the world as a whole. Yet, their mandate is limited to transnational harm concerning hazardous wastes,<sup>194</sup> ozone-depleting substances,<sup>195</sup> illegal fishing,<sup>196</sup> and wildlife trade.<sup>197</sup> Importantly, although no explicit mention is made of the concept of human rights in their respective conventions, these instruments do offer indirect protection to certain human rights. The Basel Convention,<sup>198</sup> concerning the control of hazardous wastes, for example, makes multiple references to ‘human health’. Importantly, it explicitly defines ‘environmentally sound management of hazardous wastes or other wastes’ as taking all practicable steps to ensure the protection of human health and the environment against the adverse effects of these wastes.<sup>199</sup> Another key example is CITES<sup>200</sup> which

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<sup>191</sup> Shelton, ‘Legitimate and necessary’ (n 156) 141.

<sup>192</sup> Such as USA and Canada.

<sup>193</sup> Knox, A/HRC/22/43 (n 99) para 42.

<sup>194</sup> Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes and their Disposal (adopted 22 March 1989, entered into force 4 May 1992) 1673 UNTS 126.

<sup>195</sup> Montreal Protocol on Substances that Deplete the Ozone Layer (16 September 1987, entered into force 1 January 1989) 1522 UNTS 3.

<sup>196</sup> International Whaling Commission, International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72. There are also significant regulations imposed by regional fisheries management organisations (RMFOs).

<sup>197</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (adopted 3 March 1973, entered into force 1 June 1975) 993 UNTS 243.

<sup>198</sup> Basel Convention (n 194).

<sup>199</sup> *ibid* Article 2(8).

<sup>200</sup> CITES (n 197).

recognises that wild fauna and flora constitute part of our natural environmental systems and must be protected for present and future generations.<sup>201</sup> Hence, although no direct reference is made to human rights, by protecting different aspects of the environment the implementation of these conventions simultaneously protect human beings. Thus, at first glance, one could argue that they provide significant protection against ecocide.

Moreover, these instruments are of importance because they are legally binding and comprise enforcement mechanisms, which is uncommon within the field of IEL.<sup>202</sup> Generally, these conventions require States to criminalise specific environmental offences at the domestic level and to impose penalties varying from imprisonment to simply paying fines or restorative damages.<sup>203</sup> These enforcement mechanisms constitute examples of ways to offer further protection to the environment. Unfortunately, in practice, many environmental crimes take place within States with weak governments, which lack effective institutions to prosecute such crimes.<sup>204</sup> This is why the UN General Assembly, in July 2015, called upon its Member States to adopt more effective measures to prevent and counter environmental crimes;<sup>205</sup> their call can be interpreted as a tacit articulation of the need for an international ecocide law.<sup>206</sup> In fact, efforts to use international criminal law to further protect the environment and human rights have now emerged from environmental activists, civil society, academics, legal professionals and the public in general.<sup>207</sup> Chapter III will focus on the prospect of making ecocide a new international crime.

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<sup>201</sup> *ibid* preamble.

<sup>202</sup> The great majority of MEAs are silent on how to address treaty breaches, offering no mechanism of compensation, reparation or sanctions (Bratspies (n 92) 47).

<sup>203</sup> Lay (n 51) 438.

<sup>204</sup> *ibid* 438.

<sup>205</sup> UNGA, 'Tackling illicit trafficking in wildlife' Res 69/314 (30 July 2015) UN Doc, 3.

<sup>206</sup> Lay (n 51) 438.

<sup>207</sup> Frederic Megret, 'The Problem of an International Criminal Law of the Environment' (2011) 36 *Columbia Journal of Environmental Law* 195, 202.



### III. Other International Legal Instruments Providing Protection to Human Rights and the Environment

#### a. International Humanitarian Law

International humanitarian law is the law focused on governing armed conflict; i.e. the law of war or *ius in bello*. This body of law is largely composed of the 1899 and 1907 Hague Conventions and the four 1949 Geneva Conventions and their Additional Protocols. These instruments enact rules on States to limit the methods and means of conducting warfare, while also providing protection for some classes of persons and objects. Additionally, this field of law has adopted specific environmental protections, which could theoretically constitute protection against ecocide in times of war.

Article 35(3) of Protocol I to the Geneva Conventions<sup>208</sup> prohibits States Parties ‘to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment’. Additionally, Article 55(1) stipulates that ‘[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population’. Similarly worded, Article 1(1) of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)<sup>209</sup> prohibits States Parties from engaging in ‘military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party’.

In theory, these provisions are of great relevance when considering the protection of the environment and humanity against cases of ecocide in times of war. Yet, these provisions have some important shortcomings that limit their effectiveness in practice. Firstly, both instruments establish very high thresholds, particularly Protocol I. It is indeed very difficult to prove that the damage has risen to ‘widespread, long-term *and*

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<sup>208</sup> ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3.

<sup>209</sup> ENMOD (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151.

severe damage'<sup>210</sup> (emphasis added). This damage must also be weighed against the military aims of the perpetrator. Secondly, what constitutes the 'environment' is not defined within the instruments, leaving both documents quite nebulous.<sup>211</sup> Moreover, Protocol I fails to provide definitions of what constitutes 'widespread', 'long-term' and 'severe'. This results in a 'high, uncertain and imprecise threshold'.<sup>212</sup>

Additionally, while the prohibition under ENMOD does not make a distinction between international and non-international armed conflicts, Protocol I is only relevant in times of international armed conflicts. Unfortunately, today most conflicts are of a non-international nature and many examples of wide-spread, long-lasting and severe damage to the environment have taken place during non-international wars.<sup>213</sup> The Rwandan civil war is a clear example; here, the internal war had devastating environmental consequences due to, *inter alia*, the poaching of endangered mountain gorillas and the massive destruction of agricultural lands and national parks caused by land mining.<sup>214</sup> Additionally, in recent years there have been increasing debates about today's 'new wars' that fall outside the classic distinction between internal and international armed conflicts.<sup>215</sup> This potential new category of armed conflicts would also fall outside the protection of Protocol I.

Finally, another important hurdle is the lack of effective enforcement mechanisms. Although a 'grave breach' of the provision set under Protocol I would entail criminal sanctions,<sup>216</sup> ENMOD does not set any mechanism for civil or criminal liability in cases of breach; a breach would merely allow a complaint to be taken to the UN Security Council (UNSC), who may then decide to initiate an inquiry.<sup>217</sup>

Overall, the effectiveness of these provisions is highly debatable. In fact, the International Committee of the Red Cross and the UN Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic Waste have argued

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<sup>210</sup> Timothy Heverin, 'Case Comment: Legality of the threat or use of nuclear weapons: environmental and humanitarian limits on self-defense' (1997) 74 Notre Dame Law Review 1277, 1296.

<sup>211</sup> *ibid* 1296.

<sup>212</sup> UNEP, 'Protecting the Environment During Armed Conflict' (2009) 11.

<sup>213</sup> Stoett (n 24) 5.

<sup>214</sup> Jessica Lawrence and Kevin Heller, 'The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime' (2007) 20 GIELR 29.

<sup>215</sup> For a more deep discussion see: Jed Odermatt, 'Between Law and Reality: 'New Wars' and Internationalised Armed Conflict' (2013) 5 Amsterdam Law Forum.

<sup>216</sup> Protocol I (n 208) Article 85(5).

<sup>217</sup> ENMOD (n 209) Article V(3)-(4).

that Article 55 of Protocol I is becoming ‘increasingly salient’ and that it should be reconsidered how to make use of this Article in practice.<sup>218</sup> Additionally, ENMOD has been referred to as a ‘phantom treaty’.<sup>219</sup> Some commentators have claimed that the Convention has never played a role on governmental decision-making.<sup>220</sup> Even the ILC acknowledged its loopholes and appointed a Special Rapporteur to identify existing rules of armed conflict that are relevant in terms of protecting the environment.<sup>221</sup> Generally, although these instruments are important in recognising environmental protection in times of war and are definitely to be considered a milestone in international law for adopting a rather ‘ecocentric’<sup>222</sup> approach, taking into account the shortcomings outlined above, it can be said that their relevance nowadays is very limited.

### **b. International Criminal Law**

International criminal law addresses crimes that are considered so serious that they must be redressed by the international community.<sup>223</sup> Under this area of law, an important document that criminalises international crimes is the Rome Statute.<sup>224</sup> Drafted in 1998, the Statute established the first permanent international criminal court (the ICC), with jurisdiction over four international crimes: (1) crimes against humanity, (2) war crimes, (3) the crime of genocide, and (4) the crime of aggression.<sup>225</sup>

At first glance, the Rome Statute does not seem to provide any environmental protection. Yet, if one looks carefully, Article 8(2)(b)(iv) is of great relevance when examining the existing international protection against environmental destruction leading to human rights abuses. The Article provides that ‘launching an attack in the knowledge that such attack will cause...widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete

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<sup>218</sup> IHRC (n 146).

<sup>219</sup> Stoett (n 24) 5.

<sup>220</sup> *ibid.*

<sup>221</sup> See: Marie Jacobsson, ‘Second report on the protection of the environment in relation to armed conflicts’ (28 May 2015) ILC A/CN.4/685.

<sup>222</sup> An ecocentric approach, as opposed to an anthropocentric approach, acknowledges the importance of protecting the environment even those elements that play no key role in human survival (Lawrence and Heller (n 214) 5).

<sup>223</sup> Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (Sweet & Maxwell 2013).

<sup>224</sup> Rome Statute (n 9).

<sup>225</sup> *ibid* Article 5.

and direct overall military advantage anticipated' is a war crime. Firstly, it is important to note the ecocentric approach of this provision and its potential to criminalise cases of ecocide. Secondly, this provision also overcomes the limitations of international human rights law, whereby only States can be held accountable. International criminal law entails individual criminal responsibility, thus focusing on holding individuals accountable, rather than States. This is important because as the Nuremburg Tribunal famously held, '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.<sup>226</sup>

Yet, the protection offered by this Article has many limitations. Firstly, it focuses only on wartime situations and, within these situations, only cases of international armed conflict.<sup>227</sup> Thus, it offers no protection for incidents taking place during peacetime or during internal conflicts, such as civil wars. Secondly, the wording of the Article has been the focus of much academic debate concerning the unclear meaning of what constitutes 'widespread, long-term and severe'.<sup>228</sup> Not only do these terms pose uncertainty, but also other key words within the Article, such as: 'clearly excessive', 'concrete', 'direct', and 'overall military advantage'.<sup>229</sup> Adding to its vagueness, the provision also sets an extremely high threshold by requiring the crime to implicate all three elements: widespread, long-term and severe damage.<sup>230</sup> Indeed, 'history has demonstrated that proving destruction *widespread, long-term and severe* is almost impossible to prosecute'.<sup>231</sup> This strict and high threshold is reinforced by the fact that in order to establish the crime, the damage must also be 'clearly excessive' and full intention needs to be established for liability. It is indeed very difficult to imagine that the ICC can ever arrive to the conclusion that an individual actually 'knew'<sup>232</sup> that the attack would cause incidental widespread, long-term and

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<sup>226</sup> *The Trial of Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany* [1950] 447.

<sup>227</sup> Excluding non-international armed conflicts.

<sup>228</sup> Merz (n 12) 6.

<sup>229</sup> For a more in depth discussion of the vagueness of this provision see: Lawrence and Heller (n 214).

<sup>230</sup> This differs from ENMOD, which only requires at least one of the elements to be satisfied.

<sup>231</sup> Christian Tomuschat, 'Crimes Against the Environment' [1996] in Martin Mason, *Doomsday Scenarios* (2015) 26. Other legal scholars which agree with this point of view include Tara Smith, 'Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law' [2013] *The Ashgate Research Companion* 46, 53.

<sup>232</sup> ICC, *Elements of Crimes* (2011) Article 8(2)(b)(iv)(3).

severe damage.<sup>233</sup> Hence, it is not surprising that up until today no individual has been convicted for this crime. Moreover, since there has been no prosecution of this crime, there is no legal precedent to clarify the scope of environmental damage needed to trigger criminal liability.<sup>234</sup>

Overall, this provision is too restrictive, making it extremely difficult for parties to be held liable for environmental crimes committed in times of war. In fact, some commentators have gone as far as stating that this Article ‘imposes impossible conditions for the prosecution of environmental war crimes’<sup>235</sup> and that its protection constitutes a ‘cause for limited celebration, considerable disappointment, and some concern’.<sup>236</sup> Due to this limited or even non-existent protection there has been increasing support towards the ‘greening’ of international criminal law.<sup>237</sup> Moreover, as it will be explored in Chapter III, there have also been calls for introducing a new stand-alone environmental crime of ecocide under international criminal law.

### **c. Customary International Law**

Customary international law (CIL) is regarded ‘as evidence of a general practice accepted as law’.<sup>238</sup> For a norm to become part of CIL two requirements must be satisfied: (1) there must be evidence of State practice; and (2) there must be evidence of *opinio juris*, whereby States believe that such behaviour is a legal norm.<sup>239</sup>

Within this field, an issue that has been widely debated among legal scholars is whether States have a customary duty to care for the environment and whether CIL recognises a right to a healthy environment.<sup>240</sup> Since more than 70% of the world’s national constitutions have provisions concerning environmental protection,<sup>241</sup> some commentators argue that this sets the basis for the existence of an emerging customary norm under international law.<sup>242</sup> Nevertheless, since such provisions differ

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<sup>233</sup> Lawrence and Heller (n 214) 21.

<sup>234</sup> Smith (n 231) 55.

<sup>235</sup> *ibid.*

<sup>236</sup> Mark Drumbl, ‘Waging War Against The World’ (n 28) 135.

<sup>237</sup> See: Peter Sharp, ‘Prospects for Environmental Liability in the International Criminal Court’ (1999) 18 *Virginia Environmental Law Journal* 217.

<sup>238</sup> UN, Statute of the International Court of Justice (adopted 18 April 1946), Article 38.

<sup>239</sup> Ramlogan (n 93) 357.

<sup>240</sup> OHCHR, A/HRC/19/34 (n 29) para 12.

<sup>241</sup> *ibid* para 30.

<sup>242</sup> *ibid* para 12.

greatly from State to State, it is difficult to claim a universal standard concerning environmental protection.

What is becoming less controversial is States' duty to avoid transboundary environmental harm. This duty was first recognised in the Trail Smelter arbitration case (*US v Canada*)<sup>243</sup> in the 1930s. Later, in 1996, it was recognised by the International Court of Justice (ICJ) in its renowned advisory opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*.<sup>244</sup> Here, the ICJ held that '[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'<sup>245</sup> (emphasis added). Transnational environmental harm has actually been the key focus of several cases brought before the ICJ.<sup>246</sup> Yet, it is important to remember that the ICJ can only address inter-State disputes; accordingly, holding private individuals or corporations accountable is not possible.

This duty to avoid transboundary environmental harm extends to a State duty to undertake environmental impact assessments (EIAs).<sup>247</sup> An EIA entails the evaluation of potential environmental, social, economic and health impacts before a certain undertaking is initiated and where the undertaking's non-negligible impact on the environment is uncertain.<sup>248</sup> Without doubt, undertaking thorough EIAs are essential to prevent environmental catastrophes and human rights violations (i.e. ecocide). This duty, however, does not stem from an established international treaty; it is considered to form part of CIL.<sup>249</sup> Since there is no internationally recognised mechanism on how to undertake an EIA, it is perceived as a flexible mechanism which varies from project to project.<sup>250</sup> This means that, besides some basic requirements, such as public

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<sup>243</sup> 3 R.I.A.A. 1905 (1941).

<sup>244</sup> Advisory Opinion, 1996 ICJ 226.

<sup>245</sup> *ibid* 820, para 29.

<sup>246</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, 1997 ICJ Rep 7; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* 2010 ICJ Rep 14; *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)*, ICJ (31 March 2014). The duty of preventing transboundary harm was further recognised and elaborated by the ILC in its 2001 Draft Articles on Transboundary Pollution.

<sup>247</sup> This duty was acknowledged by the ICJ in *Pulp Mills on the River Uruguay (Argentina v Uruguay)* in 2010. See De Vido (n 130).

<sup>248</sup> De Vido (n 130) 90, 112.

<sup>249</sup> *ibid* 119.

<sup>250</sup> *ibid*.

participation and consultation,<sup>251</sup> the content of an EIA is impossible to precisely define under CIL.<sup>252</sup> Hence, it appears that the quality of EIAs undertaken across the world may vary extensively. In fact, EIAs in developing countries usually suffer from a lack of attention to sufficient impacts, as well as public participation.<sup>253</sup> Hence, the duty to undertake EIAs under CIL does not necessarily guarantee the prevention of ecocide.

Even if States have the duty to prevent transboundary environmental harm and to undertake EIAs, there are some situations involving a multiplicity of States, which makes burden sharing problematic. An example is greenhouse gas emissions that are leading to rising sea levels. Who is to be held responsible and ensure effective redress to the inhabitants of sinking islands? It is far from clear what exactly is the scope of States' extraterritorial obligations in such cases.<sup>254</sup> Despite the increasing recognition of a customary norm to prevent such harm, the extent of such obligations is still very ambiguous. Although it is not the purpose here to delve into the debate concerning this evolving or actual customary norm, it is important to note that the debate exists and that maybe in the future the norm will fully crystallise with a clear scope of what it entails, offering more concrete protection to the environment and human rights.

#### **IV. International Attempts to Regulate Corporations' Actions Concerning Human Rights and the Environment**

Today, a great majority of cases of massive environmental destruction that classify as examples of ecocide have been caused or induced by activities undertaken by corporations. Hence, it is also crucial for this analysis to explore the international framework regulating corporations' actions concerning human rights and the environment. Since States are the traditional subjects of public international law,

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<sup>251</sup> *ibid* 98-102.

<sup>252</sup> *ibid* 91.

<sup>253</sup> Jennifer Li, 'Environmental Impact Assessments in Developing Countries: An Opportunity for Greater Environmental Security?' (2008) Working Paper No 4, 1 < <http://www.fess-global.org/workingpapers/eia.pdf> > accessed 11 July 2017. See also: Agbazue and Ehiemobi, 'The Challenges of the Environmental Impact Assessment Practice in Nigeria' (2016) 5 IJSRET 338; Tetsuya Kamijo, 'How to improve EIA system in developing countries? A quantitative literature review' (Conference of the International Association for Impact Assessment, Montreal, 4-7 April 2017) < <http://conferences.iaia.org/2017/final-papers/Kamijo,%20Tetsuya%20-%20How%20to%20Improve%20EIA%20System%20in%20Developing%20Countries.pdf> > accessed 11 July 2017.

<sup>254</sup> Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 EJIL 613, 641.

governments, in principle, play a key role in regulating and adjudicating abuses by business enterprises;<sup>255</sup> such abuses include activities that damage the environment, which are likely to result on human rights violations. As stated by the Special Representative on the issue of human rights and transnational corporations and other business enterprises, ‘the State duty to protect against non-State abuses is part of the very foundation of the international human rights regime’.<sup>256</sup> Similarly, human rights bodies and regional courts have also explicitly mentioned States’ duties to avoid human rights abuses being committed by non-State actors.<sup>257</sup> Hence, in theory, States have the key duty to ensure that businesses do not infringe human rights, which might entail preventing environmental harm.<sup>258</sup>

In terms of the duties imposed on business entities themselves, the CESCR has recently clarified that ‘under international standards, business entities are expected to respect Covenant rights regardless of whether domestic laws exist or whether they are fully enforced in practice’.<sup>259</sup> Yet, there are actually no binding international obligations imposed on corporations regarding the protection of human rights and the environment. As outlined below, one can only find soft law instruments.

Firstly, in 1999, as an attempt to intensify cooperation between the private sector and the UN, former UN Secretary-General, Kofi Annan, launched the UN Global Compact.<sup>260</sup> The initiative is purely voluntary, based on ten principles relating to, *inter alia*, human rights<sup>261</sup> and the environment,<sup>262</sup> which companies party to the initiative have to align with when undertaking its actions. Yet, the initiative has received extensive criticism, mainly due to its non-binding nature, the lack of an

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<sup>255</sup> John Ruggie, ‘Business and human rights: mapping international standards of responsibility and accountability for corporate acts’ (19 February 2007) A/HRC/4/35, para 18.

<sup>256</sup> Knox, A/HRC/25/53 (n 112) para 58.

<sup>257</sup> For some examples check Knox, A/HRC/25/53 (n 112) paras 60-61 and CESCR, ‘General Comment No.24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities’ (23 June 2017) E/C.12/GC/24.

<sup>258</sup> This has been the standpoint of several human rights bodies, such as the CESCR (General Comment No.15 para 23), the African Commission (*Ogoniland* case, para 57) and the European Court of Human Rights in *Hatton v UK* (2003, para 98) and *Lopez Ostra v Spain* (para 51).

<sup>259</sup> CESCR, ‘General Comment No.24’ (n 257) para 5.

<sup>260</sup> For more information: <<https://www.unglobalcompact.org>>.

<sup>261</sup> Principles 1 and 2.

<sup>262</sup> Principles 7,8 and 9.



effective monitoring mechanism and the lack of a system of sanctions for non-compliance.<sup>263</sup>

More recently, in 2011, the Human Rights Council endorsed the Guiding Principles on Business and Human Rights.<sup>264</sup> These Guiding Principles are also reflected in the Organisation for Economic Co-operation Development (OECD) Guidelines for Multinational Enterprises (MNE).<sup>265</sup> Principle 1 of the Guiding Principles clearly states that States are required to ‘protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises’.<sup>266</sup> The principles also state that corporations have the duty to respect human rights, which potentially could include those ‘environmental human rights’ implicitly found under the human rights field.<sup>267</sup> Nevertheless, regardless of the well-established link between many companies’ environmental impact on human rights abuses, the principles have no explicit focus on environmental protection. Moreover, these Guiding Principles do not constitute binding instruments; they are mere principles. Yet, as ‘politically authoritative and socially legitimated norms’,<sup>268</sup> they may serve as a platform to build more robust approaches to human rights and environmental obligations for non-State actors.<sup>269</sup>

Additionally, in February 2015 the UN Guiding Principles Reporting Framework<sup>270</sup> was launched as a tool for companies to report on how they are respecting human rights in accordance with the UN Guiding Principles and the OECD MNE Guidelines. Yet, it is not a mandatory framework, and the reports are not examined by any kind of official body. Although it is an important initiative pressuring companies to be more transparent, it is merely a reporting system that cannot be compared with the legitimacy of a judgment.

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<sup>263</sup> Carolin Hillemanns, ‘UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights’ (2003) 4 German Law Journal 1065, 1066.

<sup>264</sup> HRC, ‘Human rights and transnational corporations and other business enterprises’ (6 July 2011) A/HRC/Res/17/4. Guidelines available online at: <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)>.

<sup>265</sup> (2008). Available online at: <<http://www.oecd.org/corporate/mne/1922428.pdf>> The OECD only encompasses 35 Member States, so this thesis does not consider these guidelines to be of ‘universal’ application.

<sup>266</sup> John Ruggie, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) A/HRC/17/31, principle 1.

<sup>267</sup> Knox, A/HRC/25/53 (n 112) para 59.

<sup>268</sup> John Ruggie, ‘Business and Human Rights’ [2013] 168, 169.

<sup>269</sup> Bratspies (n 92) 64.

<sup>270</sup> For more information: <http://www.ungpreporting.org>

Alarming, notwithstanding these soft attempts to regulate companies, evidence of the role of transnational corporations committing environmental and human rights abuses frequently appears throughout the world. The recent ruling by the UK High Court concerning a case of oil pollution committed by Royal Dutch Shell in the Niger Delta is a reinforcement of the strong need to prevent these powerful transnational corporations from committing these abuses.<sup>271</sup> By strictly interpreting corporate law, the parent company Shell could not be legally held responsible in the UK for the actions of its subsidiaries in Nigeria. This case underpins today's reality of how multinationals avoid accountability by hiding behind the actions of its subsidiaries.<sup>272</sup>

Overall, these international attempts to regulate the business sector can be considered soft-mechanisms, which in practice have limited effect in preventing, stopping and redressing cases of ecocide. It is not surprising, therefore, that an increasing number of scholars, legal professionals and policy-makers advocate for more robust control of the business sector, with the purpose of limiting their negative impact on human rights and the environment. For example, a noteworthy suggestion that has been put forward is to establish a World Court of Human Rights<sup>273</sup> with the capability of receiving and examining complaints of human rights violations committed by non-State actors, including transnational corporations which would be encouraged to recognise the jurisdiction of the Court.<sup>274</sup> Without doubt, the establishment of such a Court would ensure more corporate accountability; its duties could even be extended to be able to receive and examine complaints relating to environmental human rights, thus constituting more protection against ecocide.

## V. Conclusion of Chapter II

Having analysed the current international legal framework relating to the protection of human rights and the environment, where does the international

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<sup>271</sup> See: Adam Vaughan, 'Nigerian oil pollution claims against Shell cannot be heard in UK, court rules' *The Guardian* (26 January 2017) <<https://www.theguardian.com/business/2017/jan/26/nigerian-oil-pollution-shell-uk-corporations>> accessed 16 March 2017.

<sup>272</sup> See: James Donnelly-Saalfield, 'Irreparable Harms: How the Devastating Effects of Oil Extraction in Nigeria have not been Remedied by Nigerian Courts, the African Commission, or U.S. Courts' (2009) 15 *Hastings W.N.W.J. Env'tl. L. & Pol'y* 371.

<sup>273</sup> See Nowak (n 95).

<sup>274</sup> *ibid* 256.

community stand today? Are we witnessing emerging trends to respond to ecocide? Although there is still no global recognition of the concept of ecocide *per se*, it is clear that the international community increasingly recognises the indivisibility of human rights and environmental protection. Yet, this recognition does not yet provide sufficient or effective protection to prevent, stop and redress cases of ecocide.

Under international human rights law, while there is no explicit right to a healthy or clean environment, it is possible to find some references and implicit protections relating to environmental issues. Generally, the legal mechanisms offered by the international human rights system seem to afford more protection than that of the international environmental framework. This mainly stems from the fact that under human rights law, individuals have standing to claim their rights, whereas IEL is normally only concerned with imposing obligations on States, providing non-State actors a very limited role. Both fields of law, however, clearly lack effective enforcement mechanisms which limit their role in protecting the world against ecocide.

Regarding the fields of international humanitarian law, international criminal law, and customary international law, although there has been some focus on addressing cases of environmental and human rights abuses, these do not offer enough nor adequate protection against cases of ecocide. The provisions or laws guaranteeing such protection are generally unclear. What is more worrying, however, is the absence of binding obligations, concerning human rights and the environment, on businesses. Truly effective protection of both human rights and the environment will only be afforded when States, individuals and other non-State actors have enforceable rights and duties.

Overall, since the current system of international integrated protection to human rights and the environment is too weak, establishing ecocide as an international crime seems to be necessary as a way of offering more protection against ecocide. This leads to the next important question: is it feasible to establish ecocide as a new international crime? The next chapter will critically examine one of the proposals that have been put forward: establishing ecocide as an international crime under the jurisdiction of the ICC.

## **CHAPTER III – ECOCIDE AS AN INTERNATIONAL CRIME UNDER THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT:**

### *Is it a feasible proposal in order to enhance the international protection against ecocide?*

Taking into account the inadequacy of the current international legal framework to offer sufficient and effective protection against cases of ecocide, it is critical for the international community to remedy this deficiency. A proposal that has been put forward to enhance such protection is to introduce ecocide as a new international crime under the jurisdiction of the International Criminal Court (ICC). As mentioned in Chapter I, this proposal is currently being pushed forward by two international campaigns: ‘End Ecocide’ and ‘Eradicating Ecocide’.<sup>275</sup>

The international criminalisation of ecocide is just one of the proposals that have been suggested by academics and legal professionals to respond to the increasing challenges caused by massive environmental degradation. This proposal actually builds on earlier ones to introduce more rigorous environmental crimes into the international legal field, including previous calls to an offense of ecocide,<sup>276</sup> or geocide<sup>277</sup> or criminalising harm caused to future generations.<sup>278</sup> These proposals are also linked with other suggestions such as drafting an international convention against ecocide<sup>279</sup> and the establishment of a new international environmental tribunal.<sup>280</sup>

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<sup>275</sup> See page 18.

<sup>276</sup> See: Falk (n 1); Gray (n 6); Lytton (n 7).

<sup>277</sup> See: Berat (n 15).

<sup>278</sup> See: Sebastien Jodoin, ‘Crimes Against Future Generations’ (2010) 10 Intergenerational Justice Review 10.

<sup>279</sup> See: Falk, (n 1) 21; and Arthur Westing, ‘Proscription of Ecocide’ [1974] Science and Public Affairs 26.

<sup>280</sup> See: Michelle Maloney, ‘Building an Alternative Jurisprudence for the Earth: The International Rights of Nature Tribunal’ (2016) 41 Vermont Law Review 129. See also: Amedeo Postiglione, ‘A More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations’ (1990) 20 *Envtl. L.* 321; Audra E. Dehan, ‘An International Environmental Court: Should There Be One?’ (1992) 3 *Touro J. Transnat’l L.* 31; Kenneth F.

Criminalising ecocide is not simply the wish of a small number of environmental advocates; this desire is indeed gaining widespread international support, from politicians,<sup>281</sup> legal professionals,<sup>282</sup> academics<sup>283</sup> and the public in general.<sup>284</sup> Moreover, faced with the alarming state of the environment and its impact on human populations, this issue is to become more and more salient. In fact, the recent Paris Agreement on Climate Change<sup>285</sup> is a clear indication of the increasing willingness of the international community to act against environmental degradation. Drawing on this new impetus to offer more protection to the environment and human rights, this chapter focuses on assessing the feasibility of establishing ecocide as an international crime under the jurisdiction of the ICC.

This chapter will firstly provide an overview of the proposal to establish ecocide as an international crime under the jurisdiction of the ICC, followed by an outline of the relevant core features of this Court. Thereafter, the chapter will examine the arguments in favor of establishing such a crime, as well as the key issues to consider when drafting a new law of ecocide under the jurisdiction of the ICC. The examination of these core issues will be essential to determine whether such a proposal is feasible, and if not, how to make it feasible. Taking this analysis into account, the chapter will finalise with a summary of suggestions on key points to consider when drafting a new international criminal law of ecocide which is technically and politically feasible.

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McCallion and H. Rajan Sharma, 'Conference on International Environmental Dispute Resolutions: Environmental Justice. Without Borders: The Need For an International Court of the Environment to Protect Fundamental Environmental Rights' (2000) 32 *George Washington Journal of International Law and Economics* 351.

<sup>281</sup> Example: Ecuadorean President Rafael Correa calling for international action to criminalise environmental crimes, at the opening of COP21. Read more at: <<http://www.telesurtv.net/english/news/Ecuadors-Correa-Proposes-World-Court-of-Environment-Justice-20151130-0007.html> and <http://eradicatingecocide.com/2015/12/04/president-correa-calls-for-eco-crimes/>>.

<sup>282</sup> Namely, British barrister Polly Higgins and French lawyer Valerie Cabanes.

<sup>283</sup> These academics will be mentioned throughout this chapter.

<sup>284</sup> See page 18.

<sup>285</sup> UNFCCC (n 176).

## I. Overview of the Proposal to Establish Ecocide as the 5<sup>th</sup> International Crime

In April 2010, UK based barrister and ecocide law expert Polly Higgins submitted a proposal to the International Law Commission (ILC)<sup>286</sup> for an international law of ecocide.<sup>287</sup> Higgins' proposition was based on amending the 1998 Rome Statute, to include under the jurisdiction of the ICC a new stand-alone crime of ecocide. Ecocide would thus become the 5<sup>th</sup> international crime under the ICC's jurisdiction. Ecocide can be conceptualised as an international crime because it leads to:

breaches against humanity, nature and future generations; heightened risk of conflict; diminution in the quality of life of all inhabitants of a given territory and of territories further afield; diminution in the health and well being of inhabitants, arising out of or leading to catastrophic disaster, food poverty, water pollution and shortages, and unnatural climate change.<sup>288</sup>

The issue is, Higgins argues, that the legal world today prioritises polluters over people and the planet; in order to shift this balance we need to adopt new international laws that apply to all of us as a collective, putting the people and the planet above the polluters.<sup>289</sup> In many cases, national jurisdictions are unable to address transboundary challenges without the support of the international legal system;<sup>290</sup> countries are either overburden at the domestic level or, as explored in Chapter II, there is a void within international law, which does not effectively respond to problems of ecocide. Thus, Polly Higgins, along with a growing number of advocates, call for immediate action at the international level.

There are currently two noteworthy international campaigns<sup>291</sup> advocating for the inclusion of the so-called crime of ecocide into the Rome Statute. Both campaigns have drafted 'model laws' or 'model amendments' as examples of how to include

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<sup>286</sup> For a brief background of the ILC see page 15.

<sup>287</sup> Polly Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet* (2<sup>nd</sup> edn, Shephard-Walwyn 2010).

<sup>288</sup> *ibid*; Polly Higgins, Damien Short and Nigel South, 'Protecting the planet after Rio – the need for a crime of ecocide' [2012] Centre for Crime and Justice Studies, 5.

<sup>289</sup> Polly Higgins, 'Seeding Intrinsic Values: How a Law of Ecocide will Shift our Consciousness' (2012) 1 *Cadmus Journal*, 9.

<sup>290</sup> Lay (n 51) 445.

<sup>291</sup> 'Eradicating Ecocide' and 'End Ecocide'.

such a crime into the Statute.<sup>292</sup> The following list encompasses some of the key **common** features both campaigns propose for a new law of ecocide. Broadly, according to these campaigns, a law of ecocide would:

- criminalise massive environmental damage, which may also entail harm to human beings and other living organisms;<sup>293</sup>
- include jurisdiction over cases taking place in times of war and peace;
- include the possibility to hold fictional persons (legal persons) liable; and
- include the possibility to provide restorative remedies, namely environmental restoration.

Indeed, having explored the ineffectiveness to address cases of ecocide under the current international legal framework, it seems evident that an effective way to ensure that cases of ecocide do not go unpunished would be by introducing ecocide as a distinct and new international crime under the jurisdiction of the ICC.<sup>294</sup> The Rome Statute may be regarded as ‘one of the most powerful documents in the world, assigning ‘the most serious crimes of concern to the international community as a whole’ over and above all other laws’;<sup>295</sup> hence, the idea is that introducing ecocide as a new crime would elevate the gravity of the crime to such a level that it would create a global duty of care to prevent, prohibit and pre-empt ecocide.<sup>296</sup>

This proposal may seem to many as asking for a rather ‘radical’<sup>297</sup> change, which may sound ‘utopian’ within today’s world.<sup>298</sup> It is not straightforward whether this proposal is either technically or politically feasible. On one hand, there are academics,

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<sup>292</sup> To read the proposal put forward by the ‘Eradicating Ecocide’ campaign (led by Polly Higgins) check: <<http://eradicatingecocide.com/the-law/the-model-law/>>; and to read the proposal of the ‘End Ecocide’ campaign (led by Valerie Cabanes) check: <[http://valeriecabanes.eu/wp-content/uploads/2016/06/ICC-Amendments-Ecocide-ENG\\_June21-2016.pdf](http://valeriecabanes.eu/wp-content/uploads/2016/06/ICC-Amendments-Ecocide-ENG_June21-2016.pdf)>

<sup>293</sup> Mainly referring to damages/destruction caused by dangerous industrial/corporate activity.

<sup>294</sup> Juliette Jowit, ‘British Campaigner Urges UN to Accept “Ecocide” as International Crime’ *The Guardian* (London, 9 April 2010) <<https://www.theguardian.com/environment/2010/apr/09/ecocide-crime-genocide-un-environmental-damage>> accessed 14 March 2017.

<sup>295</sup> ‘What is Ecocide’ (*Eradicating Ecocide*) <<http://eradicatingecocide.com/the-law/what-is-ecocide/>> accessed 10 February 2017.

<sup>296</sup> *ibid.*

<sup>297</sup> Megret, ‘The Problem of an International Criminal Law of the Environment’ (n 207) 202; see also: Ludwik A. Teclaff, ‘Beyond Restoration – The Case of Ecocide’ (1994) 34 *Natural Resources Journal* 933, 934.

<sup>298</sup> Drumbl, ‘Waging War Against The World’ (n 28) 145; and Megret, ‘The Problem of an International Criminal Law of the Environment’ (n 207) 254.

such as Mark Drumbl<sup>299</sup> and Peter Stoett,<sup>300</sup> that argue that extending the jurisdiction of the ICC to judge cases of environmental crimes, and more specifically ecocide, ‘might not be the most effective way to sanction such crimes’,<sup>301</sup> and that expecting that it will is ‘chimerical’.<sup>302</sup> On the other hand, a significant number of other academics, such as Robert McLaughlin,<sup>303</sup> Frederic Megret,<sup>304</sup> Steven Freeland,<sup>305</sup> Rajendra Ramlogan<sup>306</sup> and Mohammed Saif-Alden Wattad,<sup>307</sup> strongly argue in favor of introducing such jurisdiction under the realm of the ICC. So, is the ICC the right forum to enhance the protection against ecocide? This chapter aims to examine if this proposal is feasible.

## II. Salient Features of the ICC

On 17 July 1998, 120 States adopted the Rome Statute. By 1 June 2002, 60 States had ratified the Statute, which officially led to the establishment of the first permanent international criminal court, based in The Hague, Netherlands. Today, 124 States are parties to the Rome Statute. The Statute was a culmination of a century of efforts to address the massive grave violations of human rights that took place.<sup>308</sup> Hence, it may be considered a ‘milestone in humankind’s efforts towards a more just world’.<sup>309</sup>

### a. Jurisdiction & Operation of the ICC

The preamble of the Rome Statute states that the ICC has jurisdiction over the ‘most serious crimes of concern to the *international community* as a whole’<sup>310</sup>

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<sup>299</sup> Drumbl, ‘Waging War Against The World’ (n 28); Mark A. Drumbl, ‘International Human Rights, International Humanitarian Law, and Environmental Security: Can the ICC Bridge the Gaps?’ (2000) 6 ILSA 305.

<sup>300</sup> Stoett (n 24).

<sup>301</sup> Drumbl, ‘Waging War Against The World’ (n 28) 145.

<sup>302</sup> Stoett (n 24) 13.

<sup>303</sup> See McLaughlin (n 159) 378.

<sup>304</sup> Megret, ‘The Problem of an International Criminal Law of the Environment’ (n 207) 195.

<sup>305</sup> Steven Freeland, ‘Human Rights, the Environment and Conflict: Addressing Crimes Against the Environment’ (2005) 2 SUR International Journal on Human Rights.

<sup>306</sup> Ramlogan (n 93).

<sup>307</sup> Mohammed Saif-Alden Wattad, ‘The Rome Statute & Captain Planet: What lies between ‘Crimes Against Humanity’ and the ‘Natural Environment?’’ (2009) 19 Fordham Environmental Law Review 266.

<sup>308</sup> Sharp (n 237) 221.

<sup>309</sup> ICC, ‘About’ <<https://www.icc-cpi.int/about>> accessed 10 March 2017.

<sup>310</sup> Rome Statute (n 9).



(emphasis added). Specifically, the Court has jurisdiction over the following four crimes, as long as they have been committed after the 1<sup>st</sup> of July 2002:<sup>311</sup>

- (1) crimes against humanity;
- (2) war crimes;
- (3) the crime of genocide; and
- (4) the crime of aggression.<sup>312</sup>

The ICC will only intervene and prosecute such crimes when the relevant national legal systems are unable or unwilling to do so.<sup>313</sup> This is referred to as complementary jurisdiction, which is one of the cornerstones of the functioning of the ICC. Violations of international crimes may only be referred to the ICC by either (1) a State Party of the ICC; (2) the UN Security Council (UNSC); and (3) the ICC Prosecutor.<sup>314</sup> Additionally, another very important feature of the ICC is that it only has jurisdiction over natural persons.<sup>315</sup> This differs from the traditional approach of international law whereby States are the sole subjects.

#### **b. The ICC's Environmental Dimension**

The ICC has the primary purpose of addressing crimes involving human rights abuses.<sup>316</sup> Hence, at first glance it seems that the Rome Statute is not an environmental document.<sup>317</sup> Yet, as explored in Chapter II, there is one ground for environmental liability under Article 8(2)(b)(iv), establishing certain attacks to the natural environment as a war crime. As previously explored, in practice this Article offers very limited environmental protection due to the important limitations surrounding its applicability and enforcement. These limitations, such as its very high threshold, explain why up until today no party has ever been convicted for this crime.<sup>318</sup> Moreover, the provision does not extend to cases of massive environmental harm taking place during non-conflict situations. Taking this into account, and as

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<sup>311</sup> *ibid* Article 11.

<sup>312</sup> *ibid* Article 5(1).

<sup>313</sup> *ibid* Article 17(1)(a).

<sup>314</sup> *ibid* Article 13.

<sup>315</sup> *ibid* Article 25.

<sup>316</sup> Sharp (n 237) 218.

<sup>317</sup> *ibid*.

<sup>318</sup> See pages 38-40 for an insight into the limitations surrounding Article 8(2)(b)(iv).

argued in Chapter II, the protection offered under Article 8 is not sufficient and effective enough to address cases of ecocide.

Recently, however, there has been an important shift in the position of the ICC in regards to environmental crimes. On 15 September 2016, the Office of the Prosecutor published its Policy Paper on Case Selection and Prioritisation.<sup>319</sup> Here, the ICC Prosecutor stated that the ICC ‘will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land’.<sup>320</sup> Hence, the mass forcible evictions that may take place due to actions such as land grabbing could be potentially tried at the ICC as an international crime.<sup>321</sup> More specifically, this means that ‘private sector actors could now be put on trial for their role in illegally seizing land, flattening rainforests or poisoning water sources’.<sup>322</sup> The ICC has the power to hold natural persons accountable, which includes Chief Executive Officers (CEOs) and other high executives of corporations. Hence, increased focus on environmental crimes constitutes an important deterrent for the private sector who may nowadays freely commit massive human rights abuses and environmental destruction in the name of ‘development’ and ‘progress’.<sup>323</sup>

Although this statement marks a great step forward towards addressing cases of ecocide, it does not mean that the ICC has extended its jurisdiction. It still only has jurisdiction over the four crimes listed under Article 5 of the Statute. However, it has now made clear that it will pay particular attention to these crimes committed through environmental means. More importantly, this shift towards the ‘greening’ of

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<sup>319</sup> Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’ (15 September 2016) <[https://www.icc-cpi.int/itemsdocuments/20160915\\_otp-policy\\_case-selection\\_eng.pdf](https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf)> accessed 12 April 2017.

<sup>320</sup> *ibid* para 41.

<sup>321</sup> Richard Rogers in John Vidal and Owen Bowcott, ‘ICC widens remit to include environmental destruction cases’ *The Guardian* (15 September 2016) <<https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases>> accessed 12 May 2017.

<sup>322</sup> Alice Harrison in Vidal and Bowcott (n 321).

<sup>323</sup> Tara Smith, ‘The International Criminal Court will start prosecuting people who commit crimes against the environment’ *Business Insider* (23 September 2016) <<http://www.businessinsider.com/international-criminal-court-prosecution-crimes-against-environment-2016-9?IR=T>> accessed 10 April 2017. A significant example put forward in this article is the effects of today’s palm oil industry.

international criminal law means that ecocide might one day become the 5<sup>th</sup> international crime under the jurisdiction of the ICC.

### **III. Arguments in Favor of Establishing Ecocide as the 5<sup>th</sup> International Crime**

One can identify several good arguments for establishing ecocide as the 5<sup>th</sup> international crime under the jurisdiction of the ICC. Firstly, if the purpose of the ICC is to address the ‘most serious crimes of concern to the international community as a whole’,<sup>324</sup> one can argue that the extensive destruction of the environment, and its detrimental effects on humanity, certainly constitutes one of these global concerns. Generally speaking, the crimes under the ICC’s jurisdiction have been labelled of ‘international’ concern because of their strong impact on peace and safety of the international community.<sup>325</sup> Since a great number of environmental catastrophes taking place today affect more than one State, with ramifications for the international community more generally, it is clearly something that needs to be addressed at the international level. Therefore, it is appropriate that such cases should be dealt with by an entity that has been established by, and is generally accepted by, the international community (i.e. the ICC).<sup>326</sup>

Secondly, although the Rome Statute primarily addresses crimes concerning human rights abuses, the treatment of the environment is directly linked to many of the human rights abuses taking place today. Hence, it would not seem out of place to include ecocide as one of the new crimes. Another key characteristic of the crimes under the ICC’s jurisdiction is that they are considered so reprehensible in nature that international intervention is justified.<sup>327</sup> The question is: does ecocide reach such a threshold? While genocide and ecocide definitely constitute different types of harm, they can both result in similar extents of death and destruction.<sup>328</sup> Citing again the example of Shell’s polluting activities in the Niger Delta, these have arguably led to the extinction of the Ogoni indigenous community.<sup>329</sup> Hence, it can be argued that

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<sup>324</sup> Rome Statute (n 9) preamble.

<sup>325</sup> Lay (n 51) 436-7.

<sup>326</sup> Freeland (n 305) 132.

<sup>327</sup> Lay (n 51) 436-7.

<sup>328</sup> *ibid* 436-7.

<sup>329</sup> See page 11.

ecocide can reach the necessary threshold to be considered a crime so reprehensible that international intervention is justified.

Thirdly, since the ICC only began its work on 2002 it is still a young court and thus, it is not difficult to envision new expansions in its work as part of its development. One could claim that the door is open for future international criminalisation of new outrageous acts that shock ‘man’s conscience’.<sup>330</sup> ‘[C]riminal theory is a living institute’;<sup>331</sup> this means that not only the scope and definition of existing crimes may change over time, but also new types of crimes may arise, which the criminal domain should take into account. As clearly stressed under Article 10 of the Rome Statute: ‘[n]othing...shall be interpreted as limiting or prejudicing in any way *existing or developing* rules of international law’ (emphasis added). This is very important, especially in the 21<sup>st</sup> century, where new forms of criminal activity continuously evolve as technology keeps evolving.<sup>332</sup> Ultimately, the Statute was drafted with the option of being amended<sup>333</sup> and thus, with the possibility to expand the ICC’s jurisdiction and operation. Moreover, considering that the Rome Statute already criminalises the ‘widespread, long-term and severe damage to the environment’ taking place during armed conflict, why should such an act not be equally unacceptable during peacetime?<sup>334</sup>

Fourthly, another reason to introduce ecocide as a new crime under the Rome Statute is that criminal law constitutes the most powerful jurisdiction to enforce regulation and prohibit dangerous activities within societies.<sup>335</sup> It plays a very significant deterrent role. Moreover, leveling up a crime to the international level entails a higher degree of condemnation than domestic crimes.<sup>336</sup> Consequently, its deterrent effect is also elevated. Some advocates argue that establishing ecocide under the field of international criminal law would not only constitute a prohibition but it would also ‘pre-empt and prevent the most grievous of harm’.<sup>337</sup> The possibility of holding accountable companies’ CEOs definitely creates a deterrent effect whereby

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<sup>330</sup> Wattad (n 307) 268.

<sup>331</sup> *ibid* 275.

<sup>332</sup> A clear example is cyber-crime.

<sup>333</sup> Articles 121 and 122.

<sup>334</sup> Frederic Megret, ‘The Case for a General International Crime Against the Environment’ [2010] 6.

<sup>335</sup> Lay (51) 448.

<sup>336</sup> Wattad (n 307) 267.

<sup>337</sup> Lay (n 51) 448.

corporations would analyse very carefully the consequences of new projects. Hence, it would create a pre-emptive duty to ensure their actions do not lead to potential or actual abuses of human rights and environmental damage.<sup>338</sup> In other words, there would be a significant increase on corporate accountability. This is of critical importance since there is constantly new evidence and new reports documenting how harmful human activity is dramatically and irreversibly altering the planet;<sup>339</sup> pre-emptive, as well as punitive action is thus extremely necessary.

Finally, in the words of the academic Peter Sharp, taking into account that it ‘took a number of genocidal wars, three ad hoc tribunals, and millions upon millions of needless deaths to erode the international resistance to a permanent international criminal court’,<sup>340</sup> are we willing to wait for the same thing to happen to the environment and humankind? Hopefully the international community has learnt their lesson and will react before the next disaster. The ICC, as an already established and working court with a strong deterrent role, represents a unique opportunity to use its machinery to act before the world experiences another environmental tragedy with devastating consequences for humankind and the entire ecosystem in general.

Overall, the ICC seems to be the right forum to enhance the international protection against cases of ecocide. This makes one wonder: why is there not already an international criminal law against ecocide under the jurisdiction of the ICC? What are the main issues surrounding the drafting of an international ecocide crime? Can these issues be overcome? The following section will delve into these issues.

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<sup>338</sup> Cindy Woods, ‘The Guatemala Ecocide Case: What it Means for the Business and Human Rights Movement’ (*DPLF*, 10 March 2016) <<https://dplfblog.com/2016/03/10/the-guatemala-ecocide-case-what-it-means-for-the-business-and-human-rights-movement/>> accessed 3 March 2017.

<sup>339</sup> Bratspies (n 92) 41.

<sup>340</sup> Sharp (n 237) 224.

## IV. Drafting Ecocide as the 5<sup>th</sup> International Crime:

### *Main issues to consider*

There are several difficulties involved in establishing ecocide as a crime, not to mention an international crime. This section examines the main issues to consider when drafting an international crime of ecocide, focusing on its challenges and whether these are surmountable. Besides the Rome Statute, different perspectives put forward by academics and legal professionals on how to draft an international law of ecocide, including the proposals of the ‘End Ecocide’ and ‘Eradicating Ecocide’ campaigns, will be critically examined. The key aim is to assess the best way of drafting a proposal that is both technically and politically feasible.

#### **a. Defining the Elements of Ecocide:**

##### **The Act (Actus Reus)**

Defining the act of the crime of ecocide is probably what constitutes the biggest challenge.<sup>341</sup> Legally speaking, when defining a crime, right or obligation under law, such provision must be able to be interpreted and enforced by the courts. Hence, it must be sufficiently clear and non-controversial.<sup>342</sup> The issue with the term ‘ecocide’ starts with the fact that there is no common international established definition of what constitutes the ‘environment’. The meaning of environment varies depending on the context; some cultural traditions do not even recognise the term ‘environment’.<sup>343</sup> Broadly, one can differentiate between the natural and man-made environment. Within the context of ecocide, the underlining goal of establishing it as a crime is to shift the world’s current presumption that the natural world is a product for human consumption, to view it as a shared natural resource that all of us have the duty to care for. The focus is on protecting the natural world. A definition of ecocide would, therefore, need to explicitly make reference to the ‘natural environment’. This means that as a starting point, States would need to arrive at consensus on what the ‘natural

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<sup>341</sup> The complex task of reaching consensus on a definition is underlined by the difficulty of the international community to reach an agreement concerning the definition of the already existing crime of aggression under the Rome Statute. It was not until 2010 that the States Parties achieved international consensus on the definition of aggression.

<sup>342</sup> This criminal law principle is known as *lex certa*, referring to the need of the law to be clear.

<sup>343</sup> Committee on the Rights of the Child, ‘General Discussion’ (n 136) 8.

environment’ encompasses, addressing questions such as: does the natural environment extend to all global commons?<sup>344</sup> Does it include the protection of all living organisms, as well as the non-living components of ecosystems, such as natural resources? Maybe because of the rather vague meaning of the term ‘environment’, lawyers Polly Higgins and Valerie Cabanes have made use of different terms when defining the crime of ecocide, such as ‘ecosystem’ or ‘ecological system’. In any case, whichever term is used, a clarification of its meaning and scope should be considered and included as part of the law.

Having arrived at consensus on what constitutes the environment, the main difficulty will still lie in defining the scope of the objective element of the crime. Polly Higgins and the ‘Eradicating Ecocide’ team have proposed the following definition:

...‘ecocide’ means any of the following when committed recklessly, in peacetime or times of conflict:

- (a) acts or omissions which cause or may be expected to cause
- (b) failure to prevent, where climate-related events cause or may be expected to cause
- (c) failure to assist, where climate-related events have caused
  - (i) widespread, or
  - (ii) long-term, or
  - (iii) severe

loss or damage to, or destruction of ecosystem(s) of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely diminished.<sup>345</sup>

This definition takes into account vital aspects to include as part of an international law of ecocide. Notably, it acknowledges that cases of ecocide can be committed both

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<sup>344</sup> Broadly, the global commons are those parts of the world that fall outside any sovereign territory - to which all nations have access to. These include the High Seas, the Atmosphere, the Antarctica and Outer Space. (UN, ‘Global governance and governance of the global commons in the global partnership for development beyond 2015’ [2013] 5).

<sup>345</sup> ‘The Model Law’ (*Eradicating Ecocide*) <<http://eradicatingecocide.com/the-law/the-model-law/>> accessed 15 February 2017.

in times of war and peace, while also extending protection to all ‘inhabitants’ of an ecosystem. Nevertheless, the definition also encounters several difficulties. Firstly, the proposal includes the criminalisation of ecocide resulting from ‘climate-related events’ (i.e. natural disasters). This would include cases occasioned by, *inter alia*, tsunamis, earthquakes and hurricanes. Higgins’ intention is basically to create a law that does not just govern corporate and State activity but that also imposes a legal duty of care on all nations to give assistance when cases of natural ecocide occur.<sup>346</sup> This proposal seems to go beyond the boundaries of possibility. The crime of ecocide must be able to be ascertainable. This means that an individual or perpetrator must be able to be identified as responsible for the crime. This defers from non-ascertainable ecocide, which involve cases caused by natural disasters; these situations may be regarded as an ‘act of God’<sup>347</sup> where finding one perpetrator is basically impossible. Realistically, States would not be willing to accept a definition so broad as to encompass the consequences of natural disasters. Hence, when talking about ecocide as an international crime, one should exclusively refer to human-caused ecocide. This type of ecocide should include cases ranging from the devastating effects of using destructive weapons during wartime, to the damaging consequences of corporate activities taking place in non-conflict situations.

Secondly, the *actus reus* proposed by Higgins may be linked to the one found under Article 8(2)(b)(iv), which also refers to ‘widespread, long-term and severe damage’ to the natural environment. The problem is that, as explored in Chapter II, such *actus reus* has many limitations which deter the effective protection of the article, making it almost useless.<sup>348</sup> What is the exact meaning of ‘widespread’, ‘long-term’ and ‘severe’? One finds no clarification under the Rome Statute. One could argue that the definition should be worded in broader or more flexible terms. Professor Drumbl, for instance, argued that ‘it may be preferable to reduce the threshold of responsibility not to “widespread, long-term and severe” harm, but instead to “harm” more generally’.<sup>349</sup> In fact, several environmental treaties, such as UNCLOS,<sup>350</sup> refer to damage to the environment without defining the type or degree

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<sup>346</sup> Higgins, ‘Ecocide, 5<sup>th</sup> Crime Against Peace’ (n 19).

<sup>347</sup> Martin Mason, *Doomsday Scenarios* (AMF Publishing 2015) 27.

<sup>348</sup> See pages 38-40.

<sup>349</sup> Drumbl, ‘Waging War Against The World’ (n 28) 129.

<sup>350</sup> UNCLOS (n 160) Article 194(2).



of such harm.<sup>351</sup> Yet, simply talking about environmental ‘harm’ is rather misleading because the harm needs to reach a specific threshold to be able to be considered an international crime. Thus, speaking of ‘grave’, ‘severe’ or ‘massive’ harm would be more accurate. Professor Teclaff, for instance, has suggested to simply include all kinds of transnational environmental harm that may be regarded as ‘massive’,<sup>352</sup> while another commentator has suggested that the simple qualification of ‘severe’ would be enough.<sup>353</sup> Although simplifying the definition to ‘massive’ or ‘severe’ harm will encounter criticisms for its vagueness, much of the corpus of international criminal law was primarily based on broad standards, known as the ‘*chapeaux* of international offences’,<sup>354</sup> which have been gradually refined through courts’ jurisprudence.<sup>355</sup> Henceforth, an initial broad definition of ecocide could subsequently be redefined through the jurisprudence of the ICC.

The use of the terms ‘severe harm’ as part of the definition leads to a final challenging question: what type of and extent of environmental harm should be regarded as severe enough to trigger the crime of ecocide? When assessing the ‘gravity’<sup>356</sup> of the case, the main difficulty for the Court will lie in distinguishing between what may be legal or legitimate and illegal or illegitimate environmental destruction.<sup>357</sup> Yet, IEL already provides indications of what types of environmental crimes are illegal.<sup>358</sup> It is the scale or massiveness of such destruction that should raise the environmental offence into an international crime.<sup>359</sup> In fact, as suggested by Valerie Cabanes, whether the case of environmental harm is grave enough to constitute ecocide could even be determined with the help of already established organisations such as UNEP or other specialised independent scientific and environmental organisations.<sup>360</sup> Moreover, gathering inspiration from IEL and in order to overcome criticisms of vagueness, it would be very helpful to draft a law

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<sup>351</sup> Gray (n 6) 244.

<sup>352</sup> Teclaff (n 297) 934.

<sup>353</sup> Karen Hulme (2012) in Merz (n 12) 8.

<sup>354</sup> Megret, ‘The Case for a General International Crime against the Environment’ (n 334) 6.

<sup>355</sup> *ibid.*

<sup>356</sup> The ICC decides what cases to take on based on a criterion of ‘gravity’ as part of the admissibility criteria under Article 17 of the Rome Statute.

<sup>357</sup> Megret, ‘The Problem of an International Criminal Law of the Environment’ (n 207) 221-222.

<sup>358</sup> Examples include Basel (n 194) and CITES (n 197).

<sup>359</sup> Teclaff (n 297) 953.

<sup>360</sup> Valerie Cabanes, ‘Amendments to the Rome Statute’ <[http://valeriecabanes.eu/wp-content/uploads/2016/06/ICC-Amendements-Ecocide-ENG\\_June21-2016.pdf](http://valeriecabanes.eu/wp-content/uploads/2016/06/ICC-Amendements-Ecocide-ENG_June21-2016.pdf)> accessed 10 February 2017.

which includes a list of non-exhaustive environmental offences which constitute examples of ecocide. For instance, based on the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,<sup>361</sup> marine pollution by the dumping of wastes or other matter could constitute an example of ecocide.

### **The Mental Element (*Mens Rea*)**

In the field of criminal law, behavior is generally evaluated not only considering the physical act, but also the mind-set of the wrongdoer at the time of committing the act.<sup>362</sup> This is also the case for the international crimes found under the Rome Statute. The Statute holds that ‘a person shall be criminally responsible and liable for punishment for a crime...only if the material elements are committed with *intent* and *knowledge*’<sup>363</sup> (emphasis added). A lesser degree of this state of mind is also provided for, whereby awareness of the consequences ‘in the ordinary course of events’ is also to be regarded as ‘intention’.<sup>364</sup>

The issues surrounding the extreme remoteness of some environmental offences are linked to the difficulties of establishing the *mens rea* element of the crime. Except in those cases where the cause-effect is very clear, it can be extremely difficult to show that the accused intended to ‘cause that consequence or [was] aware that it [would] occur in the ordinary course of events’.<sup>365</sup> The challenge becomes even more difficult in instances where the severity and general scale of the environmental harm does not become evident until many years after the act took place; the ones affected might be the next generations.<sup>366</sup> In these situations, how is it possible to establish that the perpetrator intended to cause such harm? Indeed, the degree of remoteness between knowingly causing massive destruction of the environment and the subsequent damage can be very high.

Interestingly, the two model proposals of how to include a crime of ecocide into the Rome Statute differ on the *mens rea* element of the crime. The ‘End Ecocide’ campaign calls for a crime of strict liability, whereby there is no need to demonstrate

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<sup>361</sup> (adopted in 1972, replaced by the 1996 London Protocol, entering into force on 24 March 2006) 1046 UNTS 120.

<sup>362</sup> Drumbl, ‘Waging War Against The World’ (n 28) 130.

<sup>363</sup> Rome Statute (n 9) Article 30(1).

<sup>364</sup> *ibid* Article 30(2)(b).

<sup>365</sup> *ibid* Article 30.

<sup>366</sup> Megret, ‘The Problem of an International Criminal Law of the Environment’ (n 207) 209.

intent or knowledge on the part of the accused (no mental element). Meanwhile, the ‘Eradicating Ecocide’ campaign has proposed a crime based on ‘reckless knowledge’.<sup>367</sup> This means that to be held liable, the perpetrator ‘knew or should have known that serious harm will or would occur as a result of their actions or failure to take action’.<sup>368</sup> These different perspectives strongly highlight the difficulty in arriving at consensus on the mental element of the crime.

The issue of the mental element of a crime of ecocide has been a point of difference among academics. Mark Allan Gray, for example, views the crime of ecocide as not requiring intentionality.<sup>369</sup> According to Gray, strict liability would encourage preventive behavior, thus advancing the ‘precautionary principle’.<sup>370</sup> In doing so, a law of ecocide would become ‘a powerful preventative measure’,<sup>371</sup> shifting the burden from the famous environmental principle ‘the polluter pays’ to ‘the polluter does not pollute’;<sup>372</sup> i.e. avoiding the extensive damage in the first place. Additionally, the imposition of a strict liability crime would also overcome all the issues of causation and proof of intent that a fault-based crime of ecocide would entail.<sup>373</sup> A commentator has gone as far as arguing that ‘[i]ntent may not only be impossible to establish without admission but...it is essentially irrelevant’.<sup>374</sup>

On the other hand, there are also a number of scholars that argue in favor of establishing a crime based on intention. Peter Stoett, for example, argues that the law of ecocide demands a ‘concerted, systemic effort with intent’.<sup>375</sup> In his article, Stoett refers to Steven Freeland who suggests that a potential new environmental crime under the ICC should be regarded as ‘a deliberate action committed with intent to cause significant harm to the environment’.<sup>376</sup> Richard Falk also presented the crime

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<sup>367</sup> ‘Why Ecocide Crimes are Crimes of Recklessness’ (*Eradicating Ecocide*, 27 February 2017) <<http://eradicatingecocide.com/2017/02/27/why-ecocide-crimes-are-crimes-of-recklessness/>> accessed 9 March 2017.

<sup>368</sup> ‘The Elements’ (*Eradicating Ecocide*)< <http://eradicatingecocide.com/the-law/the-elements/>> accessed 9 March 2017.

<sup>369</sup> Gray (n 6) 216.

<sup>370</sup> *ibid* 218. The ‘precautionary principle’ basically means that ‘[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’ (Rio Declaration (n 183) Principle 15).

<sup>371</sup> Higgins, ‘Protecting the planet’ (n 55).

<sup>372</sup> *ibid*.

<sup>373</sup> Gray (n 6) 218.

<sup>374</sup> Westing (n 279).

<sup>375</sup> Stoett (n 24) 7.

<sup>376</sup> Freeland in Stoett (n 24) 7.

of ecocide as based on ‘intention’.<sup>377</sup> Similarly, Mark Drumbl argues that the logic in establishing ecocide as a crime would be in criminalising the significant harm to the natural environment when undertaken with willfulness, recklessness, or negligence.<sup>378</sup> He argues that ‘it would be important for the effectiveness of the ecocide provision to capture not only the *mens rea* standard of criminal law, but also negligence, reasonable foreseeability, willful blindness, carelessness, and objective certainty standards’.<sup>379</sup>

Regarding these different perspectives, what would be the best option for the *mens rea* element of the crime of ecocide? On one hand, establishing ecocide as a crime of strict liability would undeniably pressure corporations and governments to undertake thorough assessments of the potential environmental and social consequences of activities they wish to undertake. Furthermore, requiring intent could create a legal loophole, whereby companies or their executives would be able to escape liability by claiming that they did not know what was happening or could happen.<sup>380</sup> This might be the reason why the States that have already established the crime of ecocide in their criminal codes<sup>381</sup> have made it a strict liability offence (i.e. none of them set out a test of intent as part of the crime).<sup>382</sup> On the other hand, since environmental harm may be a consequence of unexpected circumstances or involuntary action, liability in such cases raises important issues of substantive fairness.<sup>383</sup> Simply put: intending to kill someone should trigger severer consequences than killing someone by accident. A criminal conviction, especially of international character, conveys a very strong stigma and moral guilt, which needs to be carefully considered. Cases of non-intentionality should entail less grave penalties; yet, if the mental element is not even considered then all cases will be treated equally which will blur all levels of stigma.

Taking into consideration issues of stigmatisation and fairness, this paper argues that a potential new crime of ecocide should encompass intentionality, as well as recklessness. Although it might have been very difficult in the past to provide proof to establish *mens rea* of environmental crimes, presently we live in an era where science

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<sup>377</sup> Falk (n 1) 21.

<sup>378</sup> Drumbl, ‘Waging War Against The World’ (n 28) 142.

<sup>379</sup> *ibid* 143.

<sup>380</sup> Higgins, ‘Protecting the planet’ (n 55).

<sup>381</sup> See pages 16-17.

<sup>382</sup> Higgins, ‘Protecting the planet’ (n 55); and Dogbevi (n 11) 5.

<sup>383</sup> Megret, ‘The Problem of an International Criminal Law of the Environment’ (n 207) 223.

and technology are continuously evolving. Such developments now allow companies to determine the possible risks of their actions, who should provide to the relevant States detailed information on the social and environmental impacts of their activities and put in place measures of due diligence.<sup>384</sup> Hence, it would be very difficult for CEOs and executive boards to claim that they did not know about the consequences of their actions. If intentionality is not evident,<sup>385</sup> the ICC, maybe with the help of organisations such as UNEP, should assess what a ‘reasonable man’ in that same situation would have done.<sup>386</sup> CEOs and members of executive boards would find it very hard to argue that a reasonable man would have not undertaken a thorough assessment of the possible environmental and human consequences of venturing into a specific project or activity. Thus, it would be very hard to successfully claim that they should not have known about the possible consequences. Hence, the inclusion of a *mens rea* element based on intentionality and recklessness would ensure both fairness of the justice system, and the end of impunity of reckless actions taken by many multinationals nowadays.

## **b. Other Technical Issues**

### **Criminal Responsibility**

When defining a crime, it is vital to consider who exactly can be held accountable for that crime. The Rome Statute limits the jurisdiction of the ICC to individuals (natural persons). For the crime of ecocide, individual criminal accountability would constitute a very important deterrent role to ensure CEOs or executive boards of corporations thoroughly examine potential undertakings to ensure they will not cause illegitimate environmental damage. Many environmental cases, however, can become very complex, making it very difficult to determine a specific individual responsible for the harm. Some cases of environmental harm may be ‘unlocalizable’ in that the harm originates from several locations at the same time, such as global warming.<sup>387</sup> In many instances there will be numerous actors and stakeholders involved in the environmental offence, which will make burden sharing problematic.<sup>388</sup> Yet, with the

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<sup>384</sup> CESCR, ‘General comment No 24’ (n 257) para 50.

<sup>385</sup> This will probably be the situation in most cases; environmental damage is normally not intended but seen as collateral damage resulting from corporate activities.

<sup>386</sup> McLaughlin (n 159) 394.

<sup>387</sup> Megret, ‘The Problem of an International Criminal Law of the Environment’ (n 207) 213.

<sup>388</sup> *ibid* 213.

advancement of science and technology, the identification of the source of harm is much easier than in 1998, when the Rome Statute was adopted. Moreover, the issue of a multiplicity of actors is not new for international criminal law.<sup>389</sup> Taking the example of the 1994 Rwanda genocide, the regime of international criminal law managed to address a crime involving an unprecedented multiplicity of individuals.

Nowadays, multinational corporations and governments are involved in many cases of ecocide. Accordingly, the possibility of holding these actors accountable must be considered. Referring to a potential ecocide convention, Drumbl argued that it is important that responsibilities ‘apply equally to natural persons, legal persons, public authorities, and states’.<sup>390</sup> Drumbl further argued that ‘State responsibility is particularly crucial in order for civil damages and restitution to be viable remedies’.<sup>391</sup> Polly Higgins agrees with this point of view, proposing that the ICC should have jurisdiction over States Parties for the purpose of ecocide crimes.<sup>392</sup> Yet, other scholars, such as Freeland, argue that international law is not yet capable of extending criminal liability to States.<sup>393</sup> What is clear is that, in accordance with the mechanics of public international law, States would need to agree to be held as subjects of international criminal law under the ICC, and it is highly likely that the majority will not be willing to do so.

Concerning companies, for the ICC to be able to hold legal entities accountable, the Rome Statute would need to be amended for this purpose. Such a proposal was actually rejected at the Rome Conference when the Rome Statute was adopted.<sup>394</sup> Moreover, as explored in Chapter II, the international community has been unable or hesitant to establish binding obligations on such entities. Hence, convincing States of the need to amend the Statute to extend criminal liability for legal entities and States themselves may constitute a very difficult task which does not seem politically feasible at the present moment. To make the proposal more palatable for the international community, focusing on individual accountability is more likely to be successful. This is especially important given the need for urgent action against cases

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<sup>389</sup> Megret, ‘The Problem of an International Criminal Law of the Environment’ (n 207) 236.

<sup>390</sup> Drumbl, ‘Waging War Against The World’ (n 28) 144.

<sup>391</sup> *ibid* 144.

<sup>392</sup> ‘The Model Law’ (n 345).

<sup>393</sup> Freeland (n 305) 116-119.

<sup>394</sup> Megret, ‘The Problem of an International Criminal Law of the Environment’ (n 207) 225.

of ecocide. This is not to say that efforts to extend such accountability to legal entities should cease. These efforts, however, should become a critical matter for advocacy once the crime is established.

### ***Legal Standing***

A situation can be referred to the ICC by either (1) a State Party of the ICC; (2) the UNSC; or (3) the ICC Prosecutor.<sup>395</sup> Concerning cases of environmental harm, the issue is that many situations involve the complicity of States. Hence, many cases involving States Parties would not be brought forward due to fears of impairing State relations or indictments against State officials themselves. The same issue would happen with the UNSC, which is a very politicised body. This is why the role of the ICC Prosecutor may be seen as essential. The fact that the ICC Prosecutor has the ability to commence its own investigations means that politically sensitive cases are more likely to be investigated than simply relying on States to bring cases forward.

The challenging question to consider is: should the Statute be amended to provide the possibility for individuals and other non-State actors to bring a case forward? In 1996, before the establishment of the ICC, Gray argued that if ecocide were to be criminalised ‘every individual should have standing’.<sup>396</sup> He based his argument on the notion that ‘ecocide is a direct assault on the most fundamental interests of every individual on the planet’.<sup>397</sup> Although this would be ideal because every individual would be entitled to protect and represent the planet before a court, such a proposition faces several limitations. If individuals were to be given standing then the Rome Statute would need to be amended to this purpose. Such an amendment, however, is not likely to be welcomed by the majority of States who would probably fear the risk of ‘floodgates’, whereby the court would receive a vast wave of complaints leading to abundant workload and thus, impairing its effectiveness.

Considering other types of non-State actors, another idea would be providing NGOs with legal standing in an equal basis as States Parties and the UNSC, and thus, allowing them to refer cases of ecocide on behalf of individuals. At the moment, the Rome Statute limits NGOs’ role to providing relevant information to the ICC

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<sup>395</sup> Rome Statute (n 9) Article 13.

<sup>396</sup> Gray (n 6) 227.

<sup>397</sup> *ibid.*

Prosecutor,<sup>398</sup> who is not legally obliged to consider such information. Yet, if NGOs were provided legal standing the ICC Prosecutor would be required to at least consider the referral. This proposition could ensure that cases of ecocide which involve the complicity of States do not remain immune. Yet, at the same time, given the high and increasing number of NGOs across the world, opening the door to all NGOs would not be a realistic idea, raising again the ‘floodgates’ issue. For States to be convinced to amend the Statute to allow NGOs to bring claims of ecocide to the ICC, an NGO needs a certain level of legitimacy among the international community. Hence, an idea would be to provide standing only to those NGOs who already have a consultative status at the UN Economic and Social Council (ECOSOC), such as Greenpeace International.

Finally, another interesting proposition which has been put forward is the one of creating a new role for UNEP, establishing it as an ‘environmental equivalent of the UNSC’.<sup>399</sup> This means UNEP would have standing to refer cases of ecocide to the ICC. At first glance, this suggestion seems quite noteworthy because considering UNEP’s environmental expertise it could properly judge whether a case has reached the threshold of ecocide or not.<sup>400</sup> Yet, like the UNSC, the UNEP cannot be regarded as a forum free from political influence. UNEP is an intergovernmental organisation, where States make voluntary contributions.<sup>401</sup> In fact, as December 2016, the top 15 States contributing to UNEP’s fund added for 89% of the total income.<sup>402</sup> Since UNEP relies heavily on the funding of certain States, it is fair to assume that the top donors exert some undue influence on its agenda setting. Thus, it is likely that UNEP would be criticised for not being independent, risking to damage the effectiveness of dealing with ecocide cases and the role of the ICC.

### **Remedies**

Another important issue to consider when drafting the crime of ecocide is the remedies that would be provided. Within the field of criminal law, ‘there can be no

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<sup>398</sup> Rome Statute (n 9) Article 15(2).

<sup>399</sup> McLaughlin (n 159) 408.

<sup>400</sup> *ibid.*

<sup>401</sup> For more information: <http://www.unep.org/about/funding/donors-and-contributions/member-states>

<sup>402</sup> UNEP, ‘Funding for UN Environment’ <<http://www.unep.org/about/funding/donors-and-contributions/member-states>> accessed 30 May 2017.



crime without punishment'.<sup>403</sup> Concerning the Rome Statute, Article 77 provides that the ICC may impose one of the following penalties: imprisonment, a fine or a forfeiture of proceeds, property and assets derived from that crime. In terms of environmental harm, the main aim should be to firstly prevent environmental damage<sup>404</sup> and secondly, to repair it when it occurs.<sup>405</sup> Nevertheless, the Statute seems to provide no possibility for the discontinuation, restitution and remediation of the harm. Currently, the ICC does not have injunctive powers, which would be vital to ensure the discontinuation of possible harmful practices. Additionally, with no restorative powers, the Court does not seem able to compel an environmental clean up either.<sup>406</sup> Yet, the ICC has established a Trust Fund<sup>407</sup> for victims and their families, which purpose may be extended to not only assisting victims of environmental crimes but also to support environmental clean ups necessary for the well-being of victims, communities and the environment more generally. Overall, in agreement with Polly Higgins and Valerie Cabanes, if ecocide were to be introduced into the Rome Statute, it would need to be accompanied by an extension of the available remedies provided by the Court, to include a process of environmental restorative justice, as well as injunctive powers. This constitutes a key amendment to consider when drafting the inclusion of ecocide into the Statute.

### Expertise

Another issue concerning the introduction of international environmental competences into the ICC is that '[j]udges and prosecutors on the ICC will likely not have expertise in the area of environmental law, policy or science'.<sup>408</sup> An initial idea to address this issue would be to expand the required competences of new judges to include the extensive knowledge of and experience within the field of environmental law. Meanwhile, due to this lack of expertise, the current judges and prosecutors of the ICC would need to be trained to obtain the appropriate knowledge in order to guarantee a good administration of justice. Although training would entail high costs and time that States Parties might be hesitant to agree to, using the ICC as an already

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<sup>403</sup> Drumbl, 'Waging War Against The World' (n 28) 144.

<sup>404</sup> As reflected by the environmental concept of the precautionary principle.

<sup>405</sup> Teclaff (n 297) 951.

<sup>406</sup> Drumbl, 'Waging War Against The World' (n 28) 150.

<sup>407</sup> Rome Statute (n 9) Article 79.

<sup>408</sup> Drumbl, 'Can the ICC Bridge the Gaps?' (n 299) 327.

established mechanism would be much cheaper than establishing a new separate tribunal to deal with the crime.<sup>409</sup> Alternatively, a scientific environmental panel focused on dealing with crimes of ecocide could be established within the ICC.<sup>410</sup> Additionally, for very technical scientific matters, the expertise of already established forums, namely independent scientific organisations, could also be taken advantage of, thus avoiding the high costs of establishing a complete new institution or mechanism. For example, although UNEP's independency is arguable, the ICC could take advantage of UNEP's function as a "data bank" for environmental-related knowledge'.<sup>411</sup>

### **The Process of Amendment**

Polly Higgins argues that all the Rome Statute needs is 'simply' an amendment to introduce ecocide as the 5<sup>th</sup> crime under the jurisdiction of the ICC.<sup>412</sup> Such a statement underestimates the task and appears rather naïve. Although procedurally it might seem simple, politically convincing States to do so is not a straightforward task.

Article 121 of the Rome Statute provides that firstly any State Party may propose an amendment, then a majority of States Parties will need to agree to take up the proposal and if so, finally an adoption will require a consensus of a two-thirds majority of the States Parties (i.e. 82 States). Small Island Developing States and Andean States, such as Ecuador, Peru, Bolivia and Colombia, who are some of the most affected by environmental concerns, might be willing to propose such an amendment. Yet, the big challenge will be convincing the other States Parties, or at least 82 of them, to agree to this amendment. Amending the Statute will not only take time but also a financial commitment. The issue is that the ICC only has a limited budget, and there will be those who argue why 'ecological harm should take precedence over more established crimes such as drug trafficking, human trafficking, terrorism or use of nuclear weapons'.<sup>413</sup>

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<sup>409</sup> McLaughlin (n 159) 405.

<sup>410</sup> *ibid* 406.

<sup>411</sup> *ibid* 408.

<sup>412</sup> Polly Higgins, 'Leadership and A Law of Ecocide' (TEDx Talks, 7 August 2013) <[https://www.youtube.com/watch?v=zoYq7\\_x41D4](https://www.youtube.com/watch?v=zoYq7_x41D4)> accessed 18 April 2017.

<sup>413</sup> Lyla S. Sunga in Tjitske Lingsma, 'Could ecocide become the fifth crime against peace in the Rome Statute?' (*ejolt*, 8 December 2015) <<http://www.ejolt.org/2015/12/ecocide-become-fifth-crime-peace-rome-statute/>> accessed 12 May 2017.

Moreover, another important issue to consider is that, in accordance with Article 121(5), an amendment proposing to include a new crime under Article 5 will only enter into force for those States Parties which have accepted the amendment. Hence, a potential inclusion of ecocide into the Statute would still not guarantee universality of the crime. Yet, since Article 12(3) of the Rome Statute allows non-State Parties to accept the ICC's jurisdiction over specific situations, the ICC could potentially prosecute the crime of ecocide committed anywhere in the world.<sup>414</sup>

Ultimately, what is important to understand is that amending the Rome Statute is procedurally possible; the main challenge is one of a political nature. The following paragraphs will briefly outline why gathering State support might be a difficult task, requiring what some might call a 'political miracle'.<sup>415</sup>

### **c. Wider Schematic Issues**

#### ***Sovereignty, Economic Development and State Support***

To add to the technical limitations examined above are the wider limitations linked to the field of public international law. One of the cornerstones of international law is the principle of sovereignty, whereby States have the power to choose whether to accept to be bound by international regulations. An underlining issue related to this is the fact that key international players of the world are not parties to the Rome Statute, simply because they are not willing to accept such jurisdiction. More alarmingly, while China, India, Russia and the US are not members, they also constitute some of the biggest contaminators in the world. This makes one wonder whether a crime of ecocide under the jurisdiction of the ICC would even be effective if such States cannot be held accountable. While some perpetrators would remain immune, there is no doubt that an international law of ecocide would constitute a gradual shift of the norms of the corporate culture; the mere prospect of being individually held accountable before the ICC is very likely to shift behaviors among the corporate world.<sup>416</sup> It could definitely encourage a code of moral duty for humanity vis-à-vis the environment.

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<sup>414</sup> Lawrence and Heller (n 214) 12.

<sup>415</sup> Stoett (n 24) 9.

<sup>416</sup> Bronwyn Lay, 'International ecocide law could criminalise Reef destruction' (*Eureka Street* 22 September 2016).

Moreover, because of the close links between environmental concerns and economic development issues, States are generally not willing to place binding environmental regulations that might limit their control over their resources and territory. Today's development worldwide has mainly been based on the exploitation of natural resources. Environmental harm usually occurs as a collateral part of an industrial process that simultaneously usually provides benefits to a population, community or society in general. Taking the example of the oil industry, it is well known that many of the activities undertaken by this industry are having enormous detrimental effects to the environment and to the survival of communities; nevertheless, it also provides an important or even essential inflow of financial resources and jobs, especially in developing States. Thus, the prohibition of all type of harm to the environment is not politically or economically possible.<sup>417</sup> In agreement with Professor Teclaff, '[a]n effective international regime is an essential prerequisite to a world free of the fear of ecocide, but, if and when it is installed, it may give no more than a breathing space unless it is built upon a reconciliation of the twin needs for *economic development* and *environmental preservation*'<sup>418</sup> (emphasis added). Finding the right balance between economic development and environmental protection still constitutes one of the biggest challenges to achieve international consensus on how to address ecocide.

Certainly, establishing such a crime will need 'unprecedented levels of global solidarity'.<sup>419</sup> Does this mean that advocates of criminalising ecocide are relying on a miracle to happen? One hopes not. Ultimately, it is a political question. States Parties must be convinced of the need of adopting such a scheme; without State support the agenda towards criminalising ecocide will never be set. In order to pressure States, efforts so far have been mainly concentrated on publicly spreading the alarming state of the environment and the increasing cases of environmental degradation. Indeed the need of urgently acting to protect the environment is clear. Instead, advocates should focus on emphasising the reasons why States should not fear the inclusion of ecocide within the Rome Statute.

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<sup>417</sup> Teclaff (n 297) 951.

<sup>418</sup> *ibid* 956.

<sup>419</sup> Megret, 'The Problem of an International Criminal Law of the Environment' (n 207) 217.

One can identify several reasons why States Parties should not fear the establishment of a new crime of ecocide under the ICC. A clear reason is the fact that the ICC has a subsidiary role to domestic jurisdictions. The principle of complementarity,<sup>420</sup> which is a cornerstone of the ICC, means that the ICC would only consider cases of ecocide when States are ‘unwilling or unable’ to prosecute them, i.e. respecting State sovereignty. The ideal solution would be for all States to criminalise ecocide at the domestic level, and only when they cannot do so the ICC would intervene. This would also be highly beneficial for the ICC, which would not have to consider high volumes of cases. Secondly, since the ICC is based on holding individuals accountable, States should not fear intrusion into their sovereignty. Quoting Robert McLaughlin, ‘an environmental Pinochet would be subject to ICC jurisdiction, while an environmental Chile would remain apparently insulated’.<sup>421</sup> Focusing on individual criminal responsibility, States should not be worried of being accused of misconduct. Overall, what is important to understand is that gathering State support is not an impossible task. In agreement with Mark Drumbl, ‘the notion of what is politically realistic is, as it has always been, essentially elastic’.<sup>422</sup>

## **V. Summary of Suggestions:**

### ***Towards a feasible proposal to establish ecocide as the 5<sup>th</sup> international crime***

The proposal to establish ecocide as the 5<sup>th</sup> international crime under the jurisdiction of the ICC involves a significant number of issues that need to be very carefully considered when advocating for the establishment of this new crime. Taking into account the analysis undertaken above, the following is a summary of the suggestions that are considered to make this rather ‘radical’ proposal more feasible or palatable for the international community.

#### 1) Elements of the crime of ecocide:

- the definition of ecocide should be broad and flexible (its broadness would be gradually redefined through the ICC’s jurisprudence);

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<sup>420</sup> Rome Statute (n 9) Article 17.

<sup>421</sup> McLaughlin (n 159) 389.

<sup>422</sup> Drumbl, ‘Waging War Against The World’ (n 28) 145.

- a possible general definition could be:
  - ‘For the purpose of the Rome Statute, ecocide means any human-caused severe harm to an ecosystem(s), committed intentionally or recklessly, in peacetime or times of conflict’;
- a non-exhaustive list of offences that may constitute ecocide if the threshold of gravity is attained should also be included. Inspiration to draft these examples should be obtained from existing IEL. An example could be ‘marine pollution by dumping of wastes or other matter’; and
- a definition of the meaning and scope of ‘ecosystem’ or ‘natural environment’ should also be provided.

2) Determining the gravity of environmental harm:

- the gravity of the case should be determined with the help of already established independent scientific environmental organisations; and
- UNEP could also help by providing environmental-related information, which might be very helpful to determine the gravity of a case.

3) Criminal responsibility:

- taking into account the urgent need to act against ecocide, the initial focus of the proposal to criminalise ecocide should be merely on individual responsibility. Considering the impossibility up until today of imposing international legal obligations relating to human rights and the environment on businesses, convincing States of extending responsibility to legal entities will require a long period of time, which the world does not have if we continue damaging the planet at the current rate;
- yet, once the crime is established, increasing pressure should be placed on States to extend liability to legal entities, as well as to States Parties themselves.

4) Legal standing:

- apart from the three types of applicants already enjoying legal standing under the ICC, well-recognised NGOs, such as those who enjoy consultative status

at ECOSOC, should be allowed to refer situations of ecocide on an equal basis as the other three applicants.

5) Remedies:

- the crime of ecocide should be accompanied with an extension of available remedies provided by the ICC;
- remedies for ecocide should include processes of environmental restorative justice;
- the ICC should also be provided with injunctive powers allowing it to order the cessation of harmful practices and thus, avoiding on-going environmental harm; and
- the ICC's Trust Fund should be used to assist victims of ecocide and their families, as well as to support environmental clean ups necessary for the well-being of victims, communities and the environment.

6) Addressing the lack of environmental expertise of the ICC:

- the ICC's judges and prosecutors should receive specific training on environmental matters;
- alternatively, a separate scientific environmental panel, within the ICC, composed of judges with extensive expertise on the matter could be set up to deal with cases of ecocide; and
- concerning the appointment of new judges, the required competences of candidates should be extended to include the extensive knowledge of and the experience within the field of environmental law.

7) Gathering State support:

- State support is essential to setting the agenda towards the international criminalisation of ecocide;
- civil society, the public in general, as well as those States mostly affected by environmental degradation, should place greater focus on gaining State support by not only stressing the reasons why the international community needs to urgently act to protect the environment, but by also carefully presenting the reasons why States should not fear an intrusion to State sovereignty and their economic development; and

- the analysis offered in Chapter II concerning the lack of sufficient and effective international legal protection towards cases of ecocide should also be strongly taken into account when advocating for the necessity of urgently accepting such a proposal.

## **VI. Conclusion of Chapter III**

The aim of this chapter has been to critically examine the feasibility of establishing ecocide as the 5<sup>th</sup> international crime under the jurisdiction of the ICC. The core idea is that by using the ICC as an authoritative power of enforcement and deterrence, the international community would ensure stronger protection against cases of massive environmental destruction.

At first glance, the prospect of criminalising ecocide at the international level seems rather ‘radical’ because of all the technical and political hurdles it would need to overcome. Drafting an international crime of ecocide requires careful consideration of issues such as the physical and mental elements of the crime, criminal responsibility, legal standing and remedies. Although considering these issues and arriving at consensus will take effort and time, these hurdles are not insurmountable. Indeed, a new law of ecocide would require substantial amendments to the Rome Statute, but these amendments are legally and technically feasible.

The main difficulty will be to elaborate a politically feasible proposal for criminalising ecocide. Without State support the agenda towards establishing ecocide as the 5<sup>th</sup> international crime can never be set. By joining efforts and gaining worldwide public support, those States mostly affected by cases of ecocide can trigger the process of amending the Rome Statute to include ecocide. Hence, what is vital is to draft a politically-appealing proposal. Overall, it is argued that the proposal is very ambitious, but feasible. The increasing evidence and daily reports of massive environmental catastrophes taking place across the world definitely calls for radical and urgent action. Establishing ecocide as an international crime under the jurisdiction of the ICC could be the radical action the international community needs.



# GENERAL CONCLUSION

In light of recurrent news concerning the destruction of the environment across the world, which is affecting the livelihoods of millions of people, this thesis focused on the following research question: **to what extent is it necessary and feasible to establish ‘ecocide’ as an international crime?**

Ecocide as a concept does not yet exist under the field of international law, yet throughout the last decades it has been gaining worldwide attention. This thesis has formulated its own view of the concept, regarding ecocide as cases of massive environmental destruction leading to the large-scale impairment of the environment and human rights. Despite the gravity of the consequences of ecocide, the current integrated protection afforded by the international legal framework to human rights and the environment is too weak to prevent, stop and redress ecocide. Hence, establishing ecocide as an international crime can be considered a necessary way of enhancing such protection. Elevating the gravity of ecocide to the status of an international crime would act as a powerful deterrent, pressuring States and non-State actors to carefully examine possible impacts on the environment and human rights before any new undertaking.

A feasible way of establishing ecocide as an international crime is by introducing ecocide under the jurisdiction of the ICC. Indeed, defining ecocide as a crime will be a challenging and lengthy task due to the need for States to arrive at consensus on several difficult issues such as defining the objective and subjective elements of the crime. Since the ICC is currently not properly equipped to address cases of ecocide, mainly due to the lack of expertise on environmental issues and the lack of appropriate available remedies for environmental catastrophes, another challenging task will be for States to arrive at consensus on which amendments are necessary to the Rome Statute. Yet, the amendments that the Statute needs to properly equip the ICC are not to be considered overwhelming. By providing the ICC with environmental expertise and extending its powers to include orders for the restoration and cessation of environmental harm, the ICC as an already established functioning Court would be capable of effectively offering more protection against ecocide. What

is key to start the whole process is State support. Hence, while the proposal is procedurally feasible, gathering political support is the more challenging task. Yet, this task is not to be considered implausible. By gathering public support and persuading States of the necessity of creating an international crime against ecocide by reassuring them that they should not fear an intrusion into their sovereignty by doing so, it is very possible that one day ecocide will be established as a new international crime.

This proposal is limited to regarding ecocide as a concept to be addressed at the international level. Although robust protection against ecocide at the international level is considered to be essential due to the fact that cases of ecocide affect the international community as a whole, protection at regional and domestic levels is also crucial. Further studies should focus on examining to what extent the establishment of this crime within those domestic jurisdictions that already recognise ecocide as a crime has been effective in preventing and redressing cases of ecocide. Additionally, the proposal of establishing ecocide as an international crime is also limited to using the ICC as an already established forum. Further studies could focus on examining the feasibility of creating a new international environmental court specifically established to deal with ecocide.

Overall, creating an international crime against ecocide is both necessary and feasible. What is clear is that the world should not wait for another massive environmental disaster with devastating effects on humankind to realise the necessity of establishing ecocide as a new international crime. A feasible way of doing so is by introducing ecocide under the jurisdiction of the ICC; this would ensure the end of impunity for those who commit ecocide and provide more protection to the environment and humankind.

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