Is there a need for an international crime of ecocide and what are the comparative strengths and weaknesses of using ecocide in the context of the ICC to establish legal accountability for actions which cause mass environmental degradation?

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1. Introduction

According to the United Nations, the environment on planet earth is changing at such rapidity that the window in which humanity can act to counter the drastic environmental changes is gradually closing. Some of the most prominent changes to the environment relate to degradation of land, increased air pollution, desertification, higher rates of greenhouse gas emissions and worsening effects of climate change, to name a few.[1] The severe impacts on the environment, largely spurred on through human agency, have prompted much debate and activism in an effort to prevent further environmental degradation. It was in 2017 that a movement to counter further environmental damage emerged, termed ecocide. The movement, institutionalised in the Stop Ecocide foundation, which was founded by Polly Higgins and Jojo Mehta, calls for the criminalisation of any damage to the natural environment deemed to constitute ecocide.[2] The crime of ecocide, as conceptually proposed by the Stop Ecocide foundation, has been proposed to be included into the ICC's Rome Statute as the fifth crime against peace.[3] In an effort to realise these goals, a panel of international lawyers, assembled by the Stop Ecocide foundation, has been drafting, since November 2020, a crime of ecocide, to be proposed as a Rome Statute amendment.[4] With the movement to criminalise acts of ecocide at the ICC garnering more traction, the choice to implement a crime of ecocide into the ICC's Rome Statue is increasingly being accepted. It is at this point that a pertinent question is to be raised: *Is there a need for an international crime of ecocide and what are the comparative strengths and weaknesses of using ecocide in the context of the ICC to establish legal accountability for actions which cause mass environmental degradation?* In the following this thesis seeks to answer this research question.

The structure and methodology of the thesis

The central research question of this thesis is as follows: *Is there a need for an international crime of ecocide and what are the comparative strengths and weaknesses of using ecocide in the context of the ICC to establish legal accountability for actions which cause mass environmental degradation?* The following section outlines how this thesis has approached answering the aforementioned question, by briefly explaining the structure and methodology of the thesis.

Chapter 2. Providing context- International criminal law and the ICC. In chapter 2, the thesis aims to provide the reader with context to the research question of this thesis. This is achieved in five different sections. Section 2.1. briefly describes what the goals of international criminal law are. This is relevant, as the ecocide movement deems the international criminal court, operating under international criminal law, to be most adequate to counter environmental degradation in the form of ecocide. Section 2.2. goes on to briefly

[1] 'Rate of Environmental Damage Increasing Across Planet but Still Time to Reverse Worst Impacts'(*United Nations*) <https://www.un.org/sustainabledevelopment/blog/2016/05/rate-of-environmental-damage-increasing-across-planet-but-still-time-to-reverse-worst-impacts/> accessed 13 June 2021

[2] 'What is ecocide' (*Stop Ecocide Foundation*) <https://www.stopecocide.earth/what-is-ecocide# >accessed 13 June 2021

[3] Polly Higgins, Damien Short, and Nigel South, 'Protecting the planet: a proposal for a law of ecocide' (2013) 59 *Crime Law Soc Change* 257 <https://doi.org/10.1007/s10611-013-9413-6> accessed 13 June 2021

[4] 'Top international lawyers to draft definition of "Ecocide"' (Stop Ecocide Foundation) <https://www.stopecocide.earth/expert-drafting-panel> accessed 13 June 2021

introduce the birth of the International Criminal Court and its purpose, as outlined in the preamble of the Rome Statute. Section 2.3. explains in detail what the ICC's jurisdiction entails, as laid out in the Rome Statute. Section 2.4. then proceeds to briefly introduce the core crimes of the International Criminal Court, by focusing specifically on the provisions relevant for the analysis of the research question. Chapter 2 is then concluded with section 2.5. which delineates the history about why the crime of ecocide has been excluded from the drafting of the Rome Statute. After context to the thesis has been provided with regards to international criminal law and the International Criminal Court, the thesis moves on to chapter 3 on ecocide formulations and provisions.

Chapter 3. Ecocide formulations and provisions. In this chapter, the thesis seeks to address the first part of the research questions, namely: *Is there a need for an international crime of ecocide?* In order to answer this question, the thesis must first address what current ecocide formulations and provisions exists and what they look like. This is relevant as it seeks to analyse what formulations and provisions for the crime of ecocide that have been proposed and instituted in domestic law, are composed of, and in turn, deemed necessary to provide the environment with protection. This is realised in three sections: section 3.1. looks at what ecocide definitions have been proposed by scholars and notable persons, section 3.2. examines institutions, organisations and political parties addressing ecocide, and finally section 3.3. inspects nations with domestically instituted ecocide provisions, and if national legislation alone is sufficient in holding perpetrators criminally liable for their ecocidal actions.

Chapter 4. Existing methods within criminal law for the protection of environmental damage. After having concluded that, indeed, an international method for the protection of ecocide is necessary, in addition to domestic efforts to hold perpetrators of ecocide criminally liable, the thesis proceeds to examine what current methods within criminal law exist, that offer protection for environmental damage, and whether these methods are sufficient. This is relevant for the first part of the research question asking if there is a need for an international crime of ecocide, as if current methods are sufficient, a separate international crime may not be necessary. The thesis explores the current methods in two sections, with section 4.1. analysing the extent at which the core crimes of the ICC cover environmental cases, and in section 4.2. analysing state responsibility with regards to environmental protection. As these sections will evidence, the current international methods within criminal law are not sufficient to provide adequate environmental protection.

Chapter 5. Ecocide provision as proposed by this thesis. In chapters 3 and 4, the thesis has determined that the existing national and international methods limited to criminal law, are not sufficient to address the growing challenge that is environmental protection from ecocidal actions. Thus, indeed, the efforts to create an international law of ecocide, as inspired by the Stop Ecocide foundation, are well founded. In order to provide the environment with sufficient protection deemed proper and adequate, this thesis has proposed its own ecocide provision, based on information gathered from the previous chapters. This ecocide provision, outlined in chapter 5, is written with the intention of protecting the environment to the fullest.

Chapter 6. Analysis of the proposed ecocide provision via a SWOT analysis. As growing support emerges for an introduction of a crime of ecocide as an autonomous crime into the Rome Statute, the pertinent question as to what the comparative strengths, weaknesses, opportunities and threats of using ecocide in the context of the ICC to establish legal accountability for actions which cause mass environmental degradation, remains. Before this second part of the research question can be answered, the proposed ecocide provision is extensively analysed in section 6.1., in order to sufficiently define its intention and the various elements it is composed of. This is particularly important, as in order to conduct an efficient and effective SWOT analysis, whereby the proposed crime is analysed with regards to the Rome Statute and the ICC, each of its elements needs to be sufficiently defined. Section 6.2. then applies the proposed provision to the Rome Statute, to conduct a SWOT analysis. The extensive SWOT analysis concludes that the weaknesses and threats of applying ecocide to the ICC and its Rome Statute to establish legal accountability for actions which cause mass environmental degradation outweigh the strength of the ICC and opportunities presented to the ICC via the introduction of the proposed crime of ecocide.

Chapter 7. Alternatives to the introduction of a crime of ecocide at the ICC. The conclusion of the SWOT analysis raises the question of what other alternatives there are, other than the introduction of a crime of ecocide into the Rome Statute and the ICC. Chapter 7 briefly outlines some alternatives. Their extensive discussion is beyond the scope of this thesis.

Chapter 8. Conclusion. This final chapter reflects on the previous chapters of the thesis in its aim of answering the research question delineated above.

Methodology. Throughout the entire thesis, secondary material such as books, journal articles, newspaper articles and websites have been utilised in order to provide relevant information and context needed to answer the research question. These materials have also been utilised to conduct analyses to answer the research question by cross-referencing various materials, and analysing the differences and similarities their information contains, as well as utilising them to further understand international statutes and conventions. The material utilised was found using the Tilburg University online library, the Hein Online Library, ProQuest, JSTOR, and Google Scholar. Some common search terms/phrases were ‘ecocide’, ‘ICC and the environment’, ‘ecocide national legislation’, ‘ecocide scholars’, ‘ICC core crimes and the environment’. In Chapter 3, the thesis focuses on various different jurisdictions containing an ecocide provision. This primary material, namely national legislation relevant for this section, was found through google searches and the database Legislation Online, which did not contain all relevant national legislation. Search terms for national legislation were made up of the relevant country and ‘ecocide’, and sometimes ‘penal-’ or ‘criminal code’. The national legislation was used to analyse the national ecocide provisions and to compare them to other national provisions. Primary material such as international conventions and statutes, accessed through google, were also utilised to answer the research question, by using them to understand the current standpoint of the law on environmental matters and to understand if there is place for environmental protection and what it could look like.

2. Providing context – International criminal law and the International Criminal Court

In the following chapter, context to the thesis will be provided by briefly introducing, for one, the goals of the body of law on which the proposed crime of ecocide is to be based, namely international criminal law, and for the other, the ICC, where it is proposed the crime of ecocide is to be introduced, by a panel of international lawyers.

2.1. Goals of international criminal law

International criminal law is considered to suffer from an excessive amount of goals, which can be divided into two broad categories briefly examined below. The first category denotes justifications and goals of ICL that have their origin from domestic "criminal justice" theory. This refers to the theories of "deterrence, incapacitation, denunciation or education, and retribution".[5] Deterrence denotes to using criminal law to deter perpetrators from the commission of particular crimes. Whether or not deterrence is effective is very contested, with some scholars believing deterrence to be highly effective, particularly at the international level, and with others deeming the theory of deterrence to be lacking in substantial evidentiary support at national level and especially at international level[6], as purported by David Wippman[7] or Christopher W. Mullins and Dawn L. Rothe[8]. The popular argument for a lack of deterring effect in international criminal law is that the President of Sudan, Al Bashir, issued with an arrest warrant in 2009 by the ICC, still remains at large and travels freely within the African continent.[9] The theory of incapacitation refers to imprisoning individuals for their previous crimes, so as to, in addition to punishing them for their past crimes, prevent them from committing crimes in the future. This theory is also highly contested, for it involves punishing individuals for crimes they have not yet committed, thus alluding to "a consequentialist argument which is impossible to prove".[10] The theory of denunciation/education refers to utilising international criminal law as a means to educate individuals, and subsequently society, on morality so as to prevent their future commission. The effects of this theory are also hard to support with evidence. Lastly, the theory on retribution "justifies punishment based on the culpability of the accused", instead of by referring to benefits for sociality.[11]

The second category of goals is only applicable to "international criminal justice", and consists of "promot[ing] lasting peace, national reconciliation, or the creation of an impartial and incontrovertible historic record".[12] These goals also do not have a strong evidentiary basis.

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[5] Douglas Guilfoyle, *International Criminal Law* (1st edn, Oxford University Press 2016) 88
[6] Guilfoyle (n5) 88
[7] David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23(2) Fordham International Law Journal 474-475 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1676&context=ilj> accessed 13 June 2021;
[8] Christopher W. Mullins and Dawn L. Rothe, 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment' (2010) 10(5) International Criminal Law Review 776-777, 779, 781 <10.1163/157181210X528414> accessed 13 June 2021
[9] Guilfoyle (n5) 88
[10] ibid.
[11] Alexander K.A. Greenawalt, 'International Criminal Law for Retributivists' (2014) 35(4) U. Pa. J. Int'l L. 972 <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1873&context=jil> accessed 30 May 2021
[12] Guilfoyle (n5) 88

The idea of using international criminal law to promote peace is based on the assumption that conducting prosecutions is pivotal to create long-lasting peace, which itself is highly contested. The concept of "national reconciliation" refers to when societies, after the occurrence of a conflict, internalise the outcome of international criminal law prosecutions so as to move away from the previous conflict. This, however, is extremely difficult to accomplish, and would require society to readjust itself, which is no easy feat. A good example to demonstrate this is the complexity of the conflicts in the Balkan, which were not resolved even after the International Criminal Tribunal for the former Yugoslavia (ICTY) prosecuted individuals responsible for the conflict. In fact, the result was that the ICTY is widely detested in the Balkan. Such sentiment also surrounds the International Criminal Tribunal for Rwanda.[13] The lack of established and respected legitimacy of such international tribunals, or the ICC with regards to particular countries denying its legitimacy, such as the United States, the goal of creat[ing] […] an impartial and incontrovertible historic record" is severely hindered if the verdicts of the tribunals and the court are not approved and viewed as legitimate.[14] [15]

This section is not to function as an expansive analysis of the goals of international criminal law. Instead, this section is to briefly introduce the different concepts and goals that characterise international criminal law, as international criminal law, particularly as applied at the ICC will play a central role throughout this thesis. The rest of this chapter is, however, devoted to briefly examining the ICC and its Rome Statute.

2.2. The birth of the International Criminal Court

The International Criminal Court, established in 2002, is a permanent court, and the first of its kind to be a "permanent international criminal court"[16].[17] The purpose of the ICC is to investigate, and where necessary, try individuals that have been deemed and charged to have committed one or more of the core crimes of the ICC, the core crimes being war crimes, crimes against humanity, crimes of aggression and genocide. According to the preamble, the court is "[d]etermined to put an end to impunity" and work towards the prevention of the aforementioned crimes, by affirming that it will punish "the most serious crimes of international concern to the international community as a whole", as the Rome statute "recogni[ses] that such grave crimes threaten the peace, security and well-being of the world".[18] The following will briefly detail the establishment of the ICC.

The Rome Statute of the ICC was adopted in 1998 after a United Nations General Assembly organised a Preparatory Committee that was to translate the then Rome Statute draft into a finalised treaty. The negotiations around the creation of the Rome Statute were very diverse

[13] ibid. 89-90
[14] Guilfoyle (n5) 88
[15] 'Q&A: The International Criminal Court and the United States' (Human Rights Watch, 2 September 2020) <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states> accessed 13 June 2021
[16] *Rome Statute of the International Criminal Court*, (last amended 2010), 17 July 1998, Article 1 <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> accessed 13 June 2021
[17] Caitlin Lambert, 'Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?' (2017) 30(3) Leiden Journal of International Law 711 <10.1017/S0922156517000267> accessed 13 June 2021
[18] Rome Statute of the International Criminal Court (n16) Preamble

and rarely resulted in quick decisions. One can identity two approaches to the creation of the current Rome Statute, the first being states, particularly Canada and Australia, advocating for "automatic jurisdiction", while the second being most UN Security Council States (particularly China, the US and Russia) advocating for a rather limited jurisdiction of the court. Controversy also revolved around prosecutorial independence of the court with regards to *proprio motu* investigations. Due to the importance and scale of the project of creating an international criminal court, decisions were to be consensus-based. This is, however, not always reflected in the final statute, as consistency is at times lacking with regards to the internal functioning, as well as with regards to the interpretation of the Rome Statute due to lack of a comprehensive travaux préparatoires.[19] Ultimately, this, in addition to the principle of complementarity as outlined below, may be considered to be a contributing reason as to why the ICC has, over a course of 19 years, only "issued arrest warrants for forty people, of which, twelve have either been tried or are in the midst of a trial".[20]

Further insight into the Rome Statute is provided below with an analysis of the ICC's jurisdiction and an introduction of its core crimes.

2.3. Jurisdiction of the International Criminal Court

The International Criminal Court is an international criminal tribunal established by a treaty. Treaty-based tribunals have jurisdiction over either offences that were committed on the territory of a State party to, for instance, the ICC or by nationals of a State party to, for instance, the ICC, or over offences that are susceptible to universal jurisdiction making any State capable of prosecuting the offence regardless of a link connecting the prosecuting state and the offence.[21]

The jurisdiction of the Rome Statute is codified in several articles, the most important being Articles 1, 5, 11, 12, 13 and 17. Article 5 specifies that the jurisdiction of the ICC is limited only to the prosecution of the core crimes of the ICC. The ICC's mandate is considerably broad, making it capable of, up to an extent, as will be explored in chapter 4, section 4.1., also offering protection to the environment for its destruction during peacetime.[22] However, while this may sound promising, there exist limitations to the ICC's mandate, inter alia, in its general limited jurisdictional capacities, which this section will focus on.

"Preconditions to the exercise of jurisdiction".[23] Article 12 of the Rome Statute, titled "[p]reconditions to the exercise of jurisdiction" states in paragraph 1 that states party to the Rome State accept the jurisdiction of the ICC with regards to the core crimes of the ICC as delineated in Article 5.[24] Thus, the ICC is only capable of implementing its mandate to put an end to impunity if the concerned state consents to the jurisdiction of the ICC, evidenced by

[19] Guilfoyle (n5) 84-85
[20] Stuart Ford, 'A Hierarchy of the Goals of International Criminal Courts' (2018) 27(1) Minnesota Journal of Int'L Law 184 <https://minnjil.org/wp-content/uploads/2018/02/Ford_v27_i1_179-244.pdf> accessed 13 June 2021
[21] Guilfoyle (n5) 98
[22] Lambert (n17) 712
[23] Rome Statute of the International Criminal Court (n16) Article 12
[24] ibid.

ratifying the Rome Statute. This provides the ICC with jurisdiction over the territory of the state party to the Rome Statue in which the relevant crimes were committed, also applicable in cases where a crime has been committed "on board a vessel or aircraft" belonging to the state party to the Rome Statute.[25] This is also the case if the individual that committed one of the core crimes of the ICC is a national of a state party to the Rome Statute.[26] Paragraph 3 of this article also details that the ICC can extend its jurisdiction to states not party to the Rome Statute, assuming they accept the jurisdiction of the court, and that there is a relevant crime falling under the scope of the Rome Statute.[27] The ICC does possess the power to infringe on a state's sovereignty, however only in cases where the relevant situation has been referred to the prosecutor of the ICC via the United Nation's Security Council, as stated in Chapter VII of the UN Charter.[28] In such cases, the relevant state does not need to provide consent.

"Personal jurisdiction" of the ICC.[29] The ICC in general is only capable of prosecuting individuals, as Article 25 of the Rome Statute indicates in paragraph 1 by referring to "natural persons".[30] The concerned person will then be held "individually responsible".[31] This means that if the ICC were to prosecute a case with environmental destruction, then an individual and not the corporation or the state will be prosecuted. The individual, according to Article 27 of the Rome Statute will not have to demonstrate any "official capacity", the same way a head of government or other official will not be exempt from being prosecuted and held criminally responsible for the given crime, or receive a reduced sentence because of their title.[32] In other words, the Rome Statute applies equally to all individuals, regardless of title or capacity. A limitation to the ICC's jurisdiction is that it is personal, it only applies to natural persons and not legal persons, meaning corporations themselves cannot be prosecuted for, for instance, environmental destruction, under the Rome Statute. The ICC can however entertain the concept of "superior responsibility" when actions of a, for instance, corporate officer, are considered to be part of the general situation addressed at the ICC. The ICC is also, in theory, capable of prosecuting individuals under "accomplice liability", even if it is "impossible to try the principal offender" under the ICC's Rome Statute. In other words, the ICC can in theory, in cases involving corporations, hold the CEO responsible for the actions of the corporations, but not the corporation itself.[33] The likelihood of this happening, however, is very small, as chapter 6 section 6.2. will evidence.

Jurisdiction ratione materiae of the ICC. As Article 5 of the Rome Statute delineates, the ICC only has jurisdiction over the core crime of genocide, war crimes, crimes against humanity and crimes of aggression.[34] With the Rome Statute limiting the ICC's mandate to end impunity to these four core crimes, with the crime of aggression only coming into force in 2017, the Rome Statute's capacity to protect the environment by criminalising any environmental destruction is severely limited. Chapter 4, section 4.1. will examine in depth the extent at

[25] ibid. Article 12(2)(a)
[26] ibid. Article 12(2)(b)
[27] ibid. Article 12(3)
[28] Ibid. Article 13(b)
[29] Lambert (n17) 714
[30] Rome Statute of the International Criminal Court (n16) Article 25(1)
[31] ibid. Article 25(2)
[32] ibid. Article 27(1)
[33] Lambert (n17) 714
[34] Rome Statute of the International Criminal Court (n16) Article 5

which the existing core crimes are capable of protecting the environment and criminalising environmental destruction. However, it is safe to state that the extent will be quite limited due to the fact that the core crimes solely focus on "humanitarian atrocities" as opposed to also focusing on environmental destruction. This means that if a case with environmental destruction is to be prosecuted at the ICC, then it would have to meet the elements of the core crime, which adopt a human-centred approach. In other words, environmental destruction can only be prosecuted at the ICC if the event resulted in harm to humans.[35]

"Jurisdiction ratione temporis" of the ICC.[36] Article 11 of the Rome Statute, titled "[j]urisdiction ratione temporis" refers to the temporal jurisdiction of the ICC. According to paragraph 1 of this article, the ICC only has jurisdiction with regards to its core crimes when the relevant crime has been committed after the Rome Statute has entered into force. As the Rome Statute entered into force on the 1st of July 2002, any crime committed before that date may not be prosecuted at the ICC. For states that have acceded and ratified the Rome Statute after it has entered into force, the jurisdiction for these states applies only after the date on which the Rome Statute entered into force for the relevant state. The relevant state may also decide that, despite having acceded to the Rome Statute after it has entered into force, the ICC Rome Statute should still apply to crimes committed earlier than the acceding date, and after the date at which the Rome Statute came into force.[37]

Exercise of the ICC's jurisdiction. Even if a potential ICC case met all of the jurisdictional elements delineated above, there is no guarantee that the ICC would prosecute the case. This is due to the fact that the ICC's "focus is not pre-determined". In other words, as the ICC's Rome Statute does not establish the geographic area from which potential cases could be prosecuted, the prosecution of cases relies on the triggering of ICC jurisdiction.[38] This is possible via three methods: The first method with which ICC jurisdiction can be triggered is if the ICC prosecutor initiates an investigation into a given matter without having the state or the UN Security Council trigger the an investigation. This method of referral is, so Article 15 of the Rome Statute, termed *proprio motu*, under the condition that the prosecutor is capable of demonstrating to the ICC pre-trial chamber that there indeed is "a reasonable basis to proceed" with the investigation and prosecution of a given case.[39] This method is considered to be rather controversial due to the fact that the prosecutor could use their power to undertake "politically motivated prosecutions".[40] The second method with which ICC jurisdiction can be triggered is via referral by a state party. This includes if a state party refers itself, so Article 14(1), or if a state not party to the Rome Statute accepts the jurisdiction of the ICC, as delineated under Article 12(3). However, the latter requires a state party to refer the case to the ICC as a state not party to the Rome Statue cannot trigger an investigation into a case.[41] The third method with which the ICC can have its jurisdiction triggered is via

[35] Lambert (n17) 713
[36] Rome Statute of the International Criminal Court (n16) Article 11
[37] Ibid. Article 11(a)(b)
[38] Lambert (n17) 715
[39] Guilfoyle (n5) 106
[40] ibid. 106
[41] ibid. 108

referral by the UN Security Council, as per Chapter VII of the UN Charter. This is only possible if there exists a situation that is deemed to threaten international security and peace.[42]

Admissibility of cases and the ICC's complementary jurisdiction. Even if the ICC's jurisdictional requirements are met, and the ICC jurisdiction has been triggered by one of the mechanisms above, it is still possible that the ICC rejects a given case for prosecution. This is due to the fact that the ICC is a last resort court, meaning that cases at the ICC are only admissible if the case has been investigated or prosecuted at national level and the state has concluded to not prosecute the individual, thus applying the *ne bis in idem* principle, or the relevant state has refused or is incapable of prosecuting the case.[43] [44] Thus, the ICC is to function in a "subsidiary role" that is not to replace a national justice system.[45] In other words, the ICC operates under complementary jurisdiction, meaning that it aims to allow nation states to retain jurisdictional primacy over cases involving the core international crimes that have been committed on their territory or committed by individuals from their nation state.[46] This is due to the fact that if the ICC did not play a "subsidiary role", then it would not be able to prosecute all of the cases that fall under its jurisdiction. Additionally, due to its role, the ICC is encouraging nation states to prosecute and conduct investigations into the relevant cases independently. The main reason, however, why the ICC only complements the national justice system is in order to not interfere with national prosecutorial power.[47]

Thus, so far, in order for a case to be admissible to the ICC, it must not be barred by the principle of complementarity and by the principle of *ne bis in idem*. There exists however a third principle that determines whether a case is admissible, namely gravity. In order for a case to be admissible at the ICC, it must be of "sufficient gravity", meaning it must be of great "concern to the international community".[48] This requirement is however rather redundant as, if a case does fall under one or more of the core crimes, which themselves are already deemed to be of sufficient gravity, then the case itself is of sufficient gravity to be admissible at the ICC. This becomes trickier with cases involving, for instance, environmental destruction, as the ICC would then need to look into "the level of 'social alarm' the alleged conduct caused in the international community" to determine if the gravity is sufficient. Cases involving environmental destruction that resulted in human harm are unlikely to be admissible, due to it likely not meeting the requirement of "social alarm".[49]

The above is aimed to showcase how the ICC's jurisdiction functions and to shed light on how cases are deemed to be admissible for prosecution at the ICC. As the above evidences, there exist many limitations to the application of ICC jurisdiction, due to the fact that the delegates that created the Rome Statute did not intend for the ICC to wield unrestrained power to prosecute at their discretion. Whether or not such a restricted court has the capacity to

[42] ibid. 106
[43] Rome Statute of the International Criminal Court (n16) Article 17(1)(a)(b)
[44] Lambert (n17) 715
[45] Guilfoyle (n5) 110
[46] ibid. 109
[47] ibid. 110
[48] Lambert (n17) 716
[49] ibid. 716

prosecute environmental destruction under the existing core crimes, or via the creation of an additional core crime such as ecocide will be explored in chapter 4, section 4.1. and chapter 6, section 6.2., respectively. For now, the following section will briefly outline the core crimes of the ICC.

2.4. The core crimes of the International Criminal Court briefly explained

The ICC has four core crimes codified in its Rome Statute, namely war crimes, genocide, crimes against humanity and crimes of aggression. In the following these four crimes will be briefly outlined. For the analysis of this section, the thesis did not utilise any case law of the ICC to analyse the application of the core crimes, as this section is merely geared towards introducing the relevant provisions for this thesis from the Rome Statute.

War crimes. In the Rome Statute, the provision on war crimes can be found under Article 8. War crimes is to be understood as encompassing "[g]rave breaches to the Geneva Conventions of 12 August 1949"[50], and can be acts of "[w]ilful killing"[51] or "[t]orture or inhuman treatment, including biological experiments"[52]. War crimes is also to be understood as encompassing "[o]ther violations of the laws and customs applicable in international armed conflict, within the established framework of international law"[53], such as with killing civilians through intentionally directed attacks against them or particular individuals that are not directly partaking in the current hostility[54]. The provision on war crimes, however, also encompasses "violations of the laws and customs applicable in armed conflicts not of an international character".[55] As the provision on war crimes spans several pages in the Rome Statute, this section will only address the provision relevant for this thesis. This provision can be found under Article 8(2)(b)(iv) and states the following: "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;"[56].

Genocide. The provision on genocide can be found under Article 6 of the Rome Statute, which defines genocide as being particular acts that have been "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[57] The most relevant act for this thesis is enumeration c of the genocide article, which concerns"[d]eliberately inflicting on the ground conditions of life calculated to bring about its physical destruction in whole or in part".[58]

Crimes against humanity. According to Article 7(1) of the Rome Statute, crimes against humanity is to denote particular "acts when committed as part of a widespread or systematic

[50] Rome Statute of the International Criminal Court (n16) Article 8(2)(a)
[51] ibid. Article 8(2)(a)(i)
[52] ibid. Article 8(2)(a)(ii)
[53] ibid. Article 8(2)(b)
[54] ibid. Article 8(2)(b)(i)
[55] ibid. Article 8(2)(e)
[56] ibid. Article 8(2)(b)(iv)
[57] ibid. Article 6
[58] ibid. Article 6(c)

attack against any civilian population, with knowledge of the attack".[59] Article 7 lists many such acts that would amount to a crime against humanity. The most relevant acts for this thesis are "extermination"[60], "deportation or forcible transfer of population"[61], "persecution"[62] and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health"[63].

Crimes of Aggression. The crime of aggression has been adopted by the Rome Statute's "Assembly of States Parties during" a Rome Statute Review Conference and has been in effect since 2010.[64] According to Article 8*bis*, the crime of aggression is to denote "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a Sate, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations".[65] As this thesis will evidence in chapter 4 section 4.1., the crime of aggression does not play a central role with regards to the environment, and thus only requires brief mentioning.

This short outline of the core crimes of the ICC's Rome Statute is to function as background information for chapter 4 section 4.1.'s analysis of the core crime with regards to the extent at which they efficiently cover environmental protection in their scope, and also allow for potential prosecution of environmental damage, assuming the relevant case falls under one or more of the core crimes. For this reason, this outline has only been limited to addressing the provisions necessary for the analysis in chapter 4, section 4.1..

2.5. The exclusion of a crime of ecocide from the Rome Statute

As the following chapter on ecocide definitions outlines, the term ecocide is widely used and relatively well understood by the end of the 1970s. However, despite its growing popularity, and the recognition of the importance of this international crime, in the drafting of the Crimes Against Peace, the term ecocide was "completely removed without determination".[66] The concept of ecocide seems to have been erased entirely from "collective memory", despite evidence that many governments, at the time of the term's popularity, were actively engaged in supporting "the criminalisation of ecocide in peacetime as well as in wartime".[67] This is evidenced by the abundance of documents demonstrating how well-reasoned the crime of

[59] ibid. Article 7(1)
[60] ibid. Article 7(1)(b)
[61] ibid. Article 7(1)(d)
[62] ibid. Article 7(1)(h)
[63] ibid. Article 7(1)(k)
[64] 'Understanding the International Criminal Court' (International Criminal Court) 14 <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf> accessed 13 June 2021
[65] Rome Statute of the International Criminal Court (n16) Article 8*bis*(1)
[66] Anja Gauger and others, 'The Ecocide Project – Ecocide is the missing 5th Crime Against Peace' (2012) Human Rights Consortium School of Advanced Study University of London, 2 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiCn_CPlpTxAhUQD2MBHbC8BUoQFjAEegQICBAE&url=https%3A%2F%2Fscripties.uba.uva.nl%2Fdownload%3Ffid%3D651516&usg=AOvVaw27WwSwEiDZMtinQyhcclGF> accessed 13 June 2021
[67] ibid. 2

ecocide was, and how plans were made to include the crime of ecocide alongside the crime of genocide as a crime against peace, in wartime and in peacetime.[68]

Ever since 1984, the International Law Commission (ILC) had considered there to be enough ground upon which one could argue for the inclusion of an article addressing severe damage to the environment. This sentiment was strengthened by the existence of "Article 19 para.3 lit.(d)" in the draft document on state responsibility, addressing the possibility of the inclusion of a provision on environmental destruction as a crime.[69] In 1995, however, the ILC excluded the crime of ecocide, to which many countries responded by asking for at least the inclusion of Article 26 of the draft document, which was then on "crimes against the environment".[70] Article 26 was as follows:

"Article 26. – Wilful and Severe Damage to the Environment
An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall on conviction thereof, be sentenced…"[71]

In the "draft code of crimes against the peace and security of mankind"[72] which preceded and eventually became the Rome Statute finalised in 1998, only three countries adamantly refused the inclusion of the aforementioned Article 26 in the document, while others expressed wanting to expand the "volitional requisite […] to include negligence, and thereby to conform to Article 22 para.2 lit.(d) of the 1991 Draft Code"[73], as in times of peace, the element of intent, as expressed in Article 26, is not applicable, for most ecological crimes in peace-time occur without any intent.[74] [75] The countries that opposed the inclusion of Article 26 are the Netherlands, the United Kingdom of Great Britain and Northern Ireland, and the US.[76] The arguments of the United Kingdom of Great Britain and Northern Ireland and of the US both concerned the wording of "widespread, long-term and severe damage to the natural environment", with the former arguing that there is no "general recognition" of it being an international crime, let alone a "crime against peace and security of mankind", and if one were to recognise such a crime, then one would extend international law too far.[77] The latter argued along the same lines, stating that the proposed article is too vague, and fails to define the parameters of "widespread, long-term and severe damage to the natural environment", particularly the term "wilful", which created confusion regarding the required "volitional state" for a crime to fall under this provision, as, so their argument, wilful can be understood as denoting performing "an act voluntarily" that unintentionally caused environmental

[68] ibid. 2
[69] Martin C. Ortega, 'The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind' (1997) 1(1) Max Planck Yearbook of United Nations Law Online 305 <https://doi.org/10.1163/187574197X00119> accessed 13 June 2021
[70] Gauger (n66) 2
[71] Ortega (n69) 305
[72] Christian Tomuschat, 'Document on crimes against the environment, prepared by Mr. Christian Tomuschat, member of the Commission' (1996) II(1) Extract from the Yearbook of the International Law Commission < https://legal.un.org/ilc/documentation/english/ilc_xlviii_dc_crd3.pdf> accessed 13 June 2021
[73] Ortega (n69) 306
[74] Gauger (n66) 5;
[75] Higgins, Short and South (n3) 260
[76] Tomuschat (n72) 19 §71, §31, §24
[77] ibid. 19 §31

destruction, or it can refer to the imposition of criminal liability for actions that demonstrate intent and knowledge to, in this cause, cause environmental destruction. Thus, there is also, according to the US, a lack of a definition regarding one's mental state for imposing criminal liability.[78] The Netherlands argued that the provision was simply not in line with the criteria outlined in the first part of the commentary.[79] The Special Rapporteur proceeded to essentially side with the aforementioned three countries, and instead proposed a new article in 1995 on war crimes, without ever referring to the environment, as he aimed to be "consistent with the general aim of reducing the number of crimes", which in turn meant Article 26 would have to be deleted. The Commission did not agree with his unjustified reasoning, and instead formed a working group with the aim of having them uncover all possibilities with which the Draft Code could cover the matter of "wilful and severe damage to the environment".[80] While opinions remained divided between the inclusion of the provision on ecocide and the expansion of Article 26, Christian Tomuschat had prepared a paper in 1996 that aimed to facilitate the task of the working group. In his document he concluded that there is justification for the inclusion of an environmental crime, however, this crime "should be an autonomous crime".[81] After several inconclusive proposals by the working groups, by the end of 1996, the draft "proposal was unilaterally removed overnight without record of why this occurred"[82] by the then Chairman of the ILC, Mr. Ahmed Mahiou[83].[84] In the end, the finalised Rome Statute contained "a watered-down version of a war-crime – not a peace crime – against the environment". This provision is nearly entirely based on the definition of an environmental crime as stated in the Environmental Modification Convention of 1977, and can be found under Article 8(2)(b)(iv) on war crimes in the Rome Statute, which goes as follows[85]:

> "Intentionally 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 and direct overall military advantage anticipated;"[86]

A pivotal difference is evident in the abovementioned article, when compared to the 1977 Environmental Modification Convention article. In the draft provision, the article mentioned "widespread, long-term or severe damage", which here has been changed to state "widespread, long-term and severe damage". The result of having changed *or* to *and* is that destruction that is "widespread, long-term and severe" is nearly impossible to pursue any action against.[87]

[78] ibid. 19 §24
[79] ibid. 19 §71
[80] Ortega (n69) 306
[81] ibid.
[82] Gauger (n66) 2, 11
[83] Higgins, Short and South (n3) 261
[84] Ortega (n69) 306-307
[85] Gauger (n66) 3
[86] Rome Statute of the International Criminal Court (n16) Article 8(2)(b)(iv)
[87] Gauger (n66) 3

3. Ecocide formulations and provisions

The following chapter explores various different domains that have provided ecocide formulations and provisions, which this chapter divides into three sub-chapters. The first sub-chapter explores the most important definitions of ecocide that have been proposed by scholars and notable persons, ranging from 1972 up until 2020, with the 2020 provision yet to be made public. The second sub-chapter concerns itself with institutional, organisational, and political party formulations of ecocide spanning from 1972 up until 2017. The final sub-chapter examines existing and potential national legislation on ecocide, and the necessity to create a unified international definition of ecocide.

3.1. Ecocide definitions as proposed by scholars and notable persons

1964, Arthur W. Galston. The term ecocide was first used to describe the widespread destruction caused by "herbicidal warfare" during the Vietnam war.[88] Arthur W. Galston, a plant biologist at Yale University[89], together with other scientists, helped raise awareness to the future dangers of ecocide as a means of "destructive and immoral war", after the US military utilised "Agent Orange", a chemical and herbicide, to defoliate large forested parts of Vietnam, in turn harming animals and humans.[90] In early 1964, Galston and other scientists advocated for a policy to renounce the usage of herbicides in warfare.[91] It was with this action that Galston coined the term ecocide, denoting the destruction of the environment and the detrimental effects on human health as a result of ecocidal actions. The "movement against ecocide" inspired many scholars to critically analyse the Vietnam war as a potential violation of international law.[92] Galston and his group of scientists came to the conclusion that under international law, ecocide has the potential to be "categorically banned by treaties governing the rules of warfare". At the 1970 "War Crimes and the American Conscience" conference called "Technology and American Power", referred to also as the "Conference on War and National responsibility", Galston proceeded to define ecocide.[93] [94] [95] He stated that, just as the Nuremburg trials "condemned the willful destruction of an entire people and its culture, calling this crime against humanity *genocide*", so too can the "willful and permanent destruction of environment in which a people can live in a manner of their own choosing […] be considered as a crime against humanity, to be designated by the term *ecocide*".[96] He proceeded to explain that "autoecocide" has already been committed by developed nations towards its own people, but never has a nation committed ecocide towards another country, with the usage of "chemical defoliants and herbicides". Ultimately, Galston proposed the United Nations would be a suitable body where the crime of ecocide and its formulation can be discussed.[97] Galston's definition of ecocide entails the permanent and willful destruction

[88] David Zierler, *The Invention of Ecocide: Agent Orange, Vietnam and the Scientists Who Changed the Way We Think about the Environment* (University of Georgia Press 2011) 2
[89] ibid. 15
[90] ibid. 4, 2, 16-17
[91] ibid. 2, 14
[92] ibid. 14
[93] ibid. 19
[94] Gauger (n66) 1
[95] Higgins, Short and South (n3) 256
[96] Zierler (n88) 19
[97] ibid. 19

of the environment, thus alluding to a requirement of intent, at which level, however, is not indicated. He does, however, make it clear that ecocide, in his opinion, must not be viewed as merely the destruction of plants, but as a crime against humanity, thus referring to international criminal law. It was Richard A. Falk who would then link ecocide to international law.[98]

1972, Olof Palme. After the term ecocide was first recorded in 1970, Olof Palme, the then Prime Minister of Sweden, in his speech at the United Nations Stockholm Conference addressed the war in Vietnam as an ecocide.[99] With this speech, the United Nations Stockholm Conference focused its attention on issues regarding the environment, particularly relating to "environmental degradation and transboundary pollution".[100] However, the final document of the United Nations Stockholm Conference did not contain any reference to ecocide. The conference did still create the United Nations Environmental Programme.[101] While indeed Palme did not provide a definition of ecocide, the former Prime Minister of Sweden is still worth being mentioned, as his speech as a representative of the Swedish government was one of the first instances where a government showcased willingness to respond critically to an urgent matter, as a means to help "expose the failure of public institutions to protect public values", as is the case with the United Nation's refusal to acknowledge the US' ecocide towards Vietnam, due to the fact that it is a superpower, and the United Nations cannot "pursue effective initiatives without the assenting participation of its most powerful Members", one of which is the US.[102]

1973, Richard A. Falk. Falk believed that the US had committed large scale war crimes in Vietnam, that, inter alia, constitute a genocide. Falk, however, also believed that the atrocities in Vietnam also constitute an ecocide. The element of ecocide becomes evident, according to him, in the US' tactic of separating the inhabitants of the concerned area in Vietnam from their own land, in an attempt to transform the land into an uninhabitable area.[103] To him, the concept of genocide as understood in the context of Auschwitz is similarly applicable to the environmental destruction of Vietnam, with the difference that the environmental destruction in Vietnam constitutes an ecocide, and not, per se, a genocide.[104] Falk further reasoned that the creation of an "Ecocide Convention" would assists in the "future legal condemnation of environmental warfare in Indochina", as was the case with the Genocide Convention formulated after the Nuremberg trials.[105]
In 1973, Falk drafted a document titled "A Proposed International Convention on the Crime of Ecocide", as he believed that the "state system is inherently incapable of organising the defence of the planet against ecological destruction", and that in order to combat this, we must first "[recognise] that we are living in a period of increasing danger of ecological

[98] ibid. 24
[99] Gauger (n66) 3
[100] ibid. 3
[101] ibid. 4
[102] Richard A. Falk, 'Environmental Warfare and ecocide – Facts, Appraisal, and Proposals' (1973) 4(1) Bulletin of Peace Proposals 91< http://www.jstor.org/stable/44480206> accessed 21 February 2021
[103] Zierler (n88) 25
[104] Falk (n102) 84
[105] ibid. 84

collapse".[106] The proposed convention was however also a product of the explorations of the limits of the Genocide Convention in addressing environmental crimes and "ancillary cultural ecocide", which Falk alludes to in his proposed convention.[107] Ultimately, as already indicated previously, Falk's point of departure for the concept of ecocide is Galston's understanding of ecocide, which Falk believed needed to be expanded. Hence, Falk proposed the recognition of ecocide under international law, and that, so Article I of his Convention, any instance of ecocide (which the contracting parties must aim to prevent), committed in times of war or in times of peace, are considered a punishable crime under international law. Falk does not, per se, provide a general definition of ecocide. Instead, he lists in Article II acts that he believes should amount to ecocide:

> "Article II. In the present Convention, ecocide means any of the following acts committed with intent to disrupt or destroy, in whole or in part, a human ecosystem:
> (a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
> (b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
> (c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of the soil or to enhance the prospect of diseases dangerous to human beings, animals, or crops;
> (d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;
> (e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
> (f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives."[108]

The preamble to Article II evidences that Falk believed an element of intent to be required for the listed acts to amount to ecocide. Based on this article, it is evident that Falk primarily focuses on the usage of military grade weapons and means to commit ecocide, and not so much on the corporate motivation for the destruction of the environment, with only one reference to 'industrial objectives', found in paragraph f of Article II. Interestingly, throughout his proposed convention, Falk focuses more on the idea of ecocide as a war crime, with particular definition on intent, and less on the idea of ecocide committed in times of peace, despite having recognised and indicated in his proposed convention that ecocide can be a result of conscious action, and also unconscious action.[109]
Additionally, while Article II is particularly focused on the military, and does not explicitly mention private persons or corporate actions, Article IV outlines that persons can be held

[106] ibid. 92, 93
[107] Gauger (n66) 8
[108] Falk (n102) 93
[109] Higgins, Short and South (n3) 259

criminally liable for acts of ecocide as defined in Article II or Article III.[110] Persons is defined in Article IV as being "[c]onstitutionally responsible rulers, public officials, military commanders, or private individuals".[111] If they are indeed found guilty, they will be punished by being removed from their respective office or leadership positions for an indefinite amount of years.[112] Thus, Falk not only introduces via the proposed convention the concept of ecocide into international law, but he also indicates that all persons who commit ecocide, regardless of title or if they are a regular civilian, will be held accountable. Falk's proposed convention on ecocide was submitted to the United Nations and became part of the investigation lead by the "UN Sub-Commission on Prevention of Discrimination and Protection of Minorities", where it was used to examine the effectiveness of the Genocide Convention of 1948.[113]

1996, Mark Allen Gray. In his 1996 paper on "The International Crime of Ecocide", Gray briefly defines ecocide as the (either wilful, reckless or negligent) commission/omission of a particular act which either allows or fails to prevent ecological destruction and damage, as the below criteria outlines.[114] His definition is motivated by the idea that governments, organisations and even individuals, in committing delicts that are ecocide, are "breach[ing] a duty of care owed to humanity in general".[115] Gray states that ecocide can be derived from international law, and that it is identifiable "on the basis of the deliberate or negligent violation of key state and human rights and according to the following criteria: (1) serious, and extensive or lasting ecological damage, (2) international consequences, and (3) waste."[116] The first criterion can be understood as denoting "either the scale of the harm and the numbers of people and species ultimately affected", such as the destruction of the rain forest and the trading of rare species, or the impact of the destruction on individuals "in terms of social and economic costs", for instance, the Chernobyl disaster. The significance of the ecocidal act can be understood as being large-scale damage of either a particular area or as the number of people affected by the damage, but it can also be understood as the damage being irreversible, such as is the case with damage to body of waters, like rivers, where their stream has been redirected due to damming.[117] The second criterion on international consequences is made up of three manners in which the international requirement of ecocide can be fulfilled. The first manner is that the catastrophe threatens "significant interests and values of the global community", which include one's health, life and resources. The second manner is that the affected persons, as well as the perpetrators, originate from more than one state. Lastly, Gray argues that the catastrophe can only be one that can be "halted, reversed or prevented from recurring through international cooperation.[118] The third criterion on waste argues that that which elevates ecocide from an "international delict to an

[110] Falk (n102) 93. "Article III. The following acts shall be punishable: (a) Ecocide; (b) Conspiracy to commit ecocide; (c) Direct and public incitement to ecocide; (d) Attempt to commit ecocide; (e) Complicity in ecocide" 93
[111] Falk (n102) 93
[112] ibid. 93
[113] Gauger (n66) 9
[114] Mark Allan Gray, 'The International Crime of Ecocide' (1996) 26(2) California Western International Law Journal 218 <https://core.ac.uk/download/pdf/232621738.pdf> accessed 13 June 2021
[115] ibid. 216
[116] ibid.
[117] ibid. 217
[118] ibid.

international crime" is the existence of waste. This is based on the premise that ecocidal acts are intentional acts committed by individuals, governments or organisations, with the knowledge that their actions cause destruction, and no societal benefit.[119] Gray's definition as proposed above, and as he himself admits, has its basis in fault. However, Gray also acknowledges that a law on ecocide could potentially also have its basis in strict liability, as this would best prompt preventative behaviour, whilst simplifying the issue of "proof of knowledge, intent and causation." Thus, based on Gray's definition of ecocide, the crime has its basis in fault.[120] Gray's concept of ecocide has been picked up by scholar Nigel South, who supports Gray's idea of ecocide, and believes that it should be included in international law, with its basis in the idea that ecocide is a threat that breaches one's right to life and health.[121]

2010, Polly Higgins. In 2010, Higgins proposed to the United Nations Law Commission a formulation of an international law of ecocide, as a Rome Statute amendment.[122] In her submission, she stated the following: "Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished."[123] In her definition, Higgins distinguishes between two different varieties of ecocide, the first being ecocide as a result of human action, and the second being as a result of "other causes", to be understood as potentially being natural causes.[124] With this definition of ecocide, Higgins is proposing the creation of a legal framework that "pre-empt[s], prevent[s] and prohibit[s] ecocide".[125] Furthermore, Higgins proposes that the "superior responsibility" principle here does not only apply to large corporations but also to nations, thus creating a "legal duty of care which pre-empts", and legally obliges nations to take action before any damage or destruction, or the collapse of an ecosystem occurs. Higgins also proposes that all nations will be bound by law and a "legal duty of care" to assists concerned countries with any issues that will amount to ecocide, or countries that are currently experiencing the collapse of an ecosystem due to "rising sea-levels or catastrophic events such as tsunamis and floods".[126] Any ecocide that occurs due to human involvement will be the responsibility of the business concerned, as well as the relevant government. Any ecocide that occurs naturally will be the concerned government's responsibility.[127] As previously mentioned, Higgins aims to include this proposal as an amendment to the Rome Statute. She argues that, while ecocide is partly prohibited during times of war, which this thesis will further elaborate on in the ensuing chapter, during times of peace, damage to the environment is regular, mostly due to the actions of corporations and the "heavy extractive industry". By including ecocide as the fifth crime against peace in the Rome Statute, Higgins postulates that it will no longer be lawful to engage in damaging actions against the environment, which are already prohibited and subsequently criminalised during war-time.[128] In her proposed definition, Higgins is advocating for a paradigm shift from an anthropocentric

[119] ibid. 217-218
[120] ibid. 218
[121] Higgins, Short and South (n3) 256
[122] ibid. 257
[123] ibid.
[124] ibid.
[125] ibid.
[126] ibid.
[127] ibid.
[128] ibid.

approach to environmental protection to an ecocentric approach to environmental protection.[129] Higgins' 2010 UN proposal will be further examined as a UN proposal in the ensuing section on institutions concerning themselves with the crime of ecocide.

2020. With the concept of ecocide growing in popularity and importance, a panel of international lawyers are working towards drafting a crime of ecocide that criminalises any destruction of ecosystems, to be introduced at the ICC. The idea, so the panel, is to create a law that would accompany already existing crimes at the ICC, such as the crime of genocide, crimes against humanity and war crimes. So far, the European Union and several island nations facing the threat of rising sea levels have indicated support for a law of ecocide. The panel indicated that, by introducing a crime at the ICC, the ecocide definition they are drafting will have to address "mass, systematic or widespread destruction", largely committed by corporations, as they tend to be the most common perpetrators.[130] As the proposed law on ecocide by the panel of international lawyers is still not finalised, this thesis cannot further explore this aspect.

Concluding observations. The term ecocide was first officially introduced in the 1970s by Arthur W. Galston, after which various scholars presented their own definitions as to what should constitute ecocide. While no definition is exactly like the other, nearly all above definitions as proposed by scholars demand an element of intent. The degree of intent is, however, not always stated, leaving it up to interpretation. Gray specifically refers to the creation of a law of ecocide based on fault while Higgins avoids this matter entirely and instead believes a law on ecocide to mainly focus on the "superior responsibility principle. Some scholars, for instance, also state that persons, governments or organisations can also be held liable according to either, negligence or, as Gray stated, according to recklessness.[131] Gray also further mentioned that the crime of ecocide should have its basis in strict liability, whilst only proposing a law on ecocide that is based on fault[132]. This evidences that indeed Gray does believe a law on ecocide based on fault is perhaps not entirely suited for environmental protection. The difference in opinion by various scholars as to what should constitute criminal liability further hinders the formulation of one single definition for the crime of ecocide.

An issue on which most scholars are dissimilar is the application of the crime of ecocide. There are two areas in which the crime of ecocide is applicable: For one, the crime of ecocide is applicable in cases of, as Falk put it, "environmental warfare"[133], whereby the environment is damaged with intent. For the other, the crime of ecocide is applicable in cases where an act has breached one's right to life and health, and harmed the ecosystem, leading to its collapse.

[129] Rosemary Mwanza, 'Enhancing Accountability for Environmental Damage under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity' (2018) 19 Melb J Int'l L 587-588 <https://heinonline-org.tilburguniversity.idm.oclc.org/HOL/P?h=hein.journals/meljil19&i=607> accessed 13 June 2021
[130] Owen Bowcott, 'International lawyers draft plan to criminalise ecosystem destruction' (*The Guardian*, 30 November 2020) <https://www.theguardian.com/law/2020/nov/30/international-lawyers-draft-plan-to-criminalise-ecosystem-destruction> accessed 24 March 2021
[131] Gray (n114) 218
[132] ibid.
[133] Falk (n102) 84

Further divergence between scholars exists in their emphasis on the crime of ecocide as either a war crime or a crime against humanity, on which there is no overlapping opinion. Some scholars, such as Falk, insist more on ecocide as a war crime and less on ecocide as a crime against humanity, which Galston, for instance, is adamant about.

The idea of including businesses and large corporations into the concept of ecocide as a potential perpetrator first truly emerged with Falk. He, however, did not focus on what role corporations may play in the commission of ecocide, unlike Higgins, who largely focused on the actions of corporations, advocating that they too should be able to be held criminally liable for ecocidal acts that damage the ecosystem and one's right to a healthy environment. It was Higgins who also further built on Gray's idea that not acting in cases where ecocide is being committed, either through natural causes or through human causes, must be accounted for in the definition of ecocide as an obligation on all governments to either assists or prevent further degradation of the environment.

As showcased, there is little to no consensus on what an ecocide definition should encompass, and how it should encompass particular elements. The aim of most scholars, however, is to formulate a definition that prevents further destruction of the environment and human's and animal's habitat. With new methods with which the environment and ecosystems can be damaged, particularly, as put forward by Higgins, by corporations during times of peace, a pertinent question remains as to what extent must the definition encompass corporate liability, in addition to the question of which element of intent is required to hold persons in governments liable for the commission of ecocide? Such questions will be explored in the ensuing chapter 4, followed by chapter 5 which provides this thesis' own proposed provision of ecocide, taking the above elements and questions into account.

3.2. Institutions, organisations and political parties addressing ecocide

As of now, there does not exists a treaty that contains a codification of environmental law or in any which way criminalises destruction of the environment.[134] There have, however, been conversations and proposals made by organisations to (international) institutions, deliberating the formulation of an international law of ecocide. The following section will analyse the most relevant proposals made and considerations had, with many of them deriving their basis from the previously outlined ecocide definitions as proposed by various scholars.

1972, United Nations Conference on the Human Environment, Stockholm. The UN Stockholm Conference was the first UN conference to ever address environmental issues on an international scale. As previously mentioned, the conference itself did not specifically address issues of ecocide. Its focus was environmental destruction during wartime, as well as "transnational pollution and environmental degradation" as causes for environmental destruction, which essentially, at least according to some scholars, and, as outlined below

[134] Anastacia Greene, 'The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?' (2019) 30(3) Fordham Environmental Law Review 1 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1814&context=elr> accessed 13 June 2021

under national legislation, may amount to ecocide.[135] The Stockholm Conference produced several principles of international environmental law which enunciated man's right to life in an environment that "permits a life of dignity and well-being", as well as the principle that the release of toxic material or substances into the environment, with the environment not capable of rendering the toxic material or substance harmless due to its quantity, must be stopped, lest "serious or irreversible damage" to the ecosystem occurs.[136]

2010, Higgins' UN Proposal. As previously stated, Polly Higgins intended her proposal to the UN for a law of ecocide to be an amendment to the Rome Statute, whereby ecocide would be integrated as the missing fifth crime against peace, in order to allow for the ICC to consider cases involving ecocidal actions.[137] Higgins' definition of ecocide, as outlined above, has been amended after her proposal to the UN to a draft model law, whereby she proposed the following: "1. Acts or omissions committed in times of peace or conflict by any senior person within the course of State, corporate or any other entity's activity which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural 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. 2. To establish seriousness, impact(s) must be widespread, long-term or severe".[138]

As regards who could potentially be prosecuted, her amendment does not differ entirely from her initial proposal in the sense that in both cases, the entities accused of violating the proposed law of ecocide will be prosecuted with the difference being that with the amendment, the most senior person is to be prosecuted. This entails that individuals will be held responsible, and not States or corporations themselves, as previously proposed. Regarding the element of intent, Higgins does not require intent to be part of the proposed ecocide law for the ICC, unlike the existing core crimes already defined in the Rome Statute, which require an element of intent, as will be explained in the following chapter. Instead, Higgins proposes the ecocide law to require strict liability, as, so Higgins, ecocide is not a crime for which a particular form of intent is verifiable. Instead, it is a consequential crime, resulting from, for instance, industrial and corporate actions and accidents, where intent to commit ecocidal actions does not exist. A lack of verifiable mens rea on the part of the perpetrators is not the only reason strict liability is preferable to an element of intent: Indeed corporations can be deemed to have ascribed to them the "controlling mind theory", which denotes that there is "a direct connection between the company and the person responsible for the criminal harm", such that the person responsible can be "identified with the company",[139] as they are of a "sufficiently senior, usually close to or at board level [position], to be the 'controlling mind and will of the [corporation]"[140], in order for the corporation to be deemed

[135] ibid. 10
[136] ibid. 10-11
[137] ibid. 2
[138] ibid. 2-3
[139] Richard Mays, 'Towards Corporate Fault as the Basis of Criminal Liability of Corporations' (1998) 2(2) Mountbatten Journal of Legal Studies 39 <https://ssudl.solent.ac.uk/id/eprint/965/1/1998_2_2.pdf> accessed 13 June 2021
[140] 'Control Liability – Is it a good idea and does it work in practice?' (Serious Fraud office, 6 September 2016) <https://www.sfo.gov.uk/2016/09/06/control-liability-good-idea-work-practice/> accessed 13 June 2021

to be criminally liable for the damage that has been caused.[141] However, in practice, this is difficult to realise, particularly if corporations operate under "complex or diffuse[d] management structures", or if the corporation is multi-national, as is the case with many corporations causing environmental destruction.[142] Thus, for simplicity, strict liability is to be utilised, in order to ensure that, inter alia, corporations will be able to be held criminally liable. As regards who Higgins deems to be protected by the amended law on ecocide, inhabitants is to be understood as denoting "indigenous occupants, and/or settled communities of a territory consisting of one or more of the following: (i) humans, (ii) animals, fish, birds or insects, (iii) plant species, (iv) other living organisms".[143] Regarding which actions Higgins deems to amount to ecocide, her draft model law proposed that the impact had must be "widespread, long-term or severe". This wording has been adopted from Article 35 of the Geneva Convention Additional Protocol I, which the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD) defines under Article 1. The term widespread is defined as "encompassing an area on the scale of several hundred kilometres", the term long-term(/lasting) refers to several months, or an entire season, and the term severe denotes "serious or significant disruption or harm to human life, natural and economic resources or other assets".[144]

2012, European Citizens' Initiative: End Ecocide in Europe: A Citizens' Initiative to give the Earth Rights. In 2012, the European Citizens' Initiative, an instrument that aims at promoting and encouraging participatory democracy in the European Union institutions, drafted a proposal for legislative change regarding the environment at the level of the European Union.[145] The proposal made by the European Citizens' Initiative aimed at encouraging the European commission to "adopt legislation to prohibit, prevent and pre-empt Ecocide, the extensive damage, destruction to or loss of ecosystems of a given territory". The initiative required the European Commission to criminalise all acts of ecocide, and to ensure that legal and natural persons will be held responsible for their ecocidal actions, as dictated by the superior responsibility principle.[146] The initiative also demanded that the European Commission prevent and prohibit any ecocidal actions to be committed on European soil or in any maritime area that is covered by legislation of the European Union. The initiative also called for the EU to hold EU nationals and legal persons registered in the European Union, and committing ecocidal actions abroad, accountable. Additionally, the initiative requested for the EU to transition to an economy with its basis in sustainability.[147] The initiative defines ecocide in its Ecocide Directive, under Article 1(1) 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: - (1) the peaceful enjoyment by the inhabitants has been severely

[141] Mays (n139) 39
[142] Serious Fraud Office (n140)
[143] Greene (n134) 4
[144] Greene (n134) 4-5
[145] Alexander Damiano Ricci, 'European Citizens' Initiative – A democratic fiasco?' (voxeurop, 4 December 2019) <https://voxeurop.eu/en/a-democratic-fiasco/> accessed 13 June 2021
[146] 'End Ecocide in Europe A Citizens' Initiative to give the Earth Rights' (European Citizens' Initiative, 2 August 2012) 3 <https://www.europarl.europa.eu/meetdocs/2014_2019/documents/peti/dv/eciendecocideineurope_/eciendecocideineurope_en.pdf> accessed 13 June 2021
[147] ibid.

diminished; and or (2) peaceful enjoyment by the inhabitants of another territory has been severely diminished."[148] This definition is heavily influenced by Higgins' 2010 UN proposal and the amendment of her 2010 UN proposal such that the definition provided by the European Citizens' Initiative is verbatim that of Higgins, with the addition of point (2), regarding other territories. In its Ecocide Directive, the initiative further provides under Article 1(2) on "Risk of Ecocide", what is to be understood as the "potential consequences to any activity" that amounts to ecocide as defined in Article 1(1). The potential consequences of activity that may amount to ecocide are as follows: "(1) peaceful enjoyment by the inhabitants of that territory or any other territory will be severely diminished; and or (2) peaceful enjoyment by the inhabitants of that territory or any other territory may be severely diminished; and or (3) injury to life will be caused; and or (4) injury to life may be caused."[149] The directive further sets out that commission of ecocide may amount to a breach of rights as a "crime against humanity" (Article 2(1)), a "crime against nature" (Article 2(2)), a "crime against future generations" (Article 2(3)), a "crime of ecocide" (Article 2(4)), a "crime of cultural ecocide" (Article 2(5)) and an "offence of ecocide" (Article 2(6)).[150] Perpetrators (legal or natural persons) can be found strictly liable of either committing the act[151] or of "aiding and abetting, counselling or procuring the offence of Ecocide"[152], assuming that the duration, size and impact of the act as set out in the directive, is significant in proportion to the "loss of ecosystem(s)"[153]. The directive also adopts the principle of superior responsibility with regards to acts of ecocide committed by the subordinates of the person responsible for the subordinates, regardless of the superior's intent or knowledge.[154] The directive was intended to be implemented and incorporated in the member states' "Criminal Penal Codes"[155], however the proposal has been withdrawn in January 2013 by the European Citizens' Initiative due to lack of reaching in at least seven EU member states one million signatures.[156]

2016, Office of the Prosecutor of the International Criminal Court: Policy Paper on Case Selection and Prioritisation. In 2016, the Office of the Prosecutor at the ICC published a policy paper on case prioritisation and selection. The policy paper indicated that the Office of the Prosecutor aims to prioritise "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".[157] The Office of the Prosecutor also indicated that when assessing the seriousness of the crimes, it will take into account any damage the environment endured, and how that has affected the relevant communities. The policy paper further states

[148] 'Ecocide Directive' ANNEX (European Citizen's Initiative, 2 August 2012) Article 1(1) <https://europa.eu/citizens-initiative/initiatives/details/2012/000012_en> accessed 13 June 2021
[149] ibid. Article 1(2)
[150] ibid. Article 2
[151] ibid. Article 4
[152] Ibid. Article 2(7)(b)
[153] ibid. 2(8)
[154] ibid. Articles 5, 6
[155] ibid. Article 14(1)
[156] Ricardo Pereira, 'After The ICC Office Of The Prosecutor's 2016 Policy Paper On Case Selection And Prioritisation: Towards An International Crime Of Ecocide?' (2020) 31 Criminal Law Forum 180 <https://ssrn.com/abstract=3654359> accessed 13 June 2021
[157] 'Policy paper on case selection and prioritisation' (ICC, 15 September 2016) §41 <https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf> accessed 13 June 2021

that in cases involving crimes towards the environment, such as land grabbing, the ICC will place its focus on prosecuting the relevant government as well as the responsible individuals.[158] The cases that the ICC will then consider will be based on the degree to which the perpetrator is responsible for the crime, as well as the gravity of the perpetrator's crime, and the possible charges the perpetrator could face.[159] As previously stated, the Office of the Prosecutor aims to focus its case prioritisation on cases involving "destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land", meaning that the ICC prosecutors can now prosecute three manners in which the environment can be impacted. The scope of the ICC prosecutors becomes even more broad when considering that the policy paper states that the ICC prosecutors will assess the impact of these crimes in relation to "social, economic and environmental damage inflicted on the affected communities".[160] This means that potential cases might also include indigenous people having their land forcibly taken away (land grabbing), or cases in which the ecosystem is damaged and destroyed through illegal fishing or mining.[161]

Despite the fact that the policy paper does not mention ecocide specifically, the simple fact that the Office of the Prosecutor at the ICC is broadening its focus area to include cases on environmental destruction and damage, and their potential consequences on surrounding communities, the ICC is still addressing ecocide, as these aforementioned impacts on the environment essentially fall under what most definitions consider ecocide. This, however, does not mean that potential new cases may be considered as a crime of ecocide, as the Rome Statute itself does not contain any mention of ecocide, and cases arriving at the ICC may only be prosecuted based on the defined four core crimes of the Rome Statute. Addressing cases that contain an element of environmental destruction or damage is further limited by the fact that only the core crime 'war crimes' contains any mention of environmental destruction, meaning that the ICC Office of the Prosecutor is further limited by the restrictive Rome Statute.

While this may seem to render the internal policy paper useless, it does still indicate that the Office of the Prosecutor is going to consider potential cases for the ICC by considering whether or not there exists an element of impact resulting in damage on the environment, for which such cases will receive prioritisation.[162] In other words, the policy paper is establishing parameters under which future case selection and prioritisation will take place, by providing principles to guide "the exercise of prosecutorial discretion"[163].[164] By releasing the policy paper on case prioritisation and selection, the Office of the Prosecutor is demonstrating that it intends to shift its focus on environmental crimes, whilst also hinting at the idea that ecocide as the missing fifth crime against peace is missing from the ICC. Through the release of the policy paper, the ICC prosecutors are trying to close the gap that remains after ecocide has been excluded from the draft of the Rome Statute.[165] This policy paper has

[158] ibid. §7
[159] ibid. §34
[160] ibid. §41
[161] Greene (n134) 24
[162] ibid. 24,25
[163] International Criminal Court, 'Policy paper on case selection and prioritisation' (n157) §1
[164] Pereira (n156) 182
[165] Greene (n134) 24, 25

essentially been perceived as an effort to 'green' the Rome Statute of the ICC, and provide victims of environmental damage justice.[166] However, so far, the ICC has done little to clarify the extent at which the existing crimes and its jurisdiction cover crimes of ecocide, which will be explored in chapter 4, section 4.1.. In order for the crime of ecocide to actually be considered at the ICC, an amendment to the Rome Statute would need to be made.

2017, European Greens Congress: Draft Resolution on Ecocide. In 2017, the European Greens Congress produced a draft resolution in support of the international recognition of a crime of ecocide at the ICC. They define ecocide as "a serious and lasting harm to natural planetary communities and their biogeochemical cycles and / or to an ecological system vital to the Earth's ecosystem as necessary to maintain the current conditions of life".[167] As they advocate for the inclusion of the crime of ecocide at the ICC, that which amounts to a "serious [case] of environmental destruction" must include, according to their draft resolution, crimes that cause damage to one's health, and crimes that pose a threat to the planet's safety, in peacetime.[168]

Concluding observations. The above research and analysis showcase the different institutions and organisations that have deliberated an international law on ecocide, and what they deem it needs to encompass. Higgins' ecocide proposal to the UN remained largely the same, and was to a large extent, adopted by the European Citizens Initiative as well. Interestingly, deliberations at the UN led to Higgins' proposal changing to only prosecute the most senior person accused of having committed ecocide, as opposed to having states or corporations be prosecuted for actions amounting to ecocide. The European Citizens Initiative adopted Higgins' initial ecocide definition, where natural and legal persons are to be prosecuted, and not just the most senior individuals, thus alluding to the concept of corporate liability. The inclusion of the concept of corporate liability is vital for the protection of the environment, as most actions that could amount to the general understanding of ecocide are nowadays committed by corporations. Thus, while the European Citizens Initiative could have only affected EU member states and their legislation, it is an important step in the prohibition, prevention and pre-emption of ecocide.

The European Citizens Initiative has included in its formulation of an international crime of ecocide a paragraph particularly addressing actions amounting to ecocide in maritime areas, falling under European Union member state legislation. Higgins' ecocide formulation, the initial proposal and the UN amendment, do not specifically address maritime areas. The only instance where Higgins mentions body-of-water-based events is in her initial proposal, with floods, rising sea levels and tsunamis. Adopting the approach of the European Citizens Initiative with regards to specifically mentioning maritime areas in a formulation of ecocide could provide a clearer understanding of the type of environmental destruction an ecocide formulation is to cover.

[166] Pereira (n156) 183
[167] 'Draft EGP Resolution' (Global Greens and European Greens, 5th EGP Congress, Liverpool, 30 March-2 April 2017) line 75-77 <https://europeangreens.eu/sites/europeangreens.eu/files/9%20On%20Ecocide%20-%20EGP%20Congress%20Liverpool%20_0.pdf> accessed 13 June 2021
[168] ibid. line 79-85

What makes the European Citizens Initiative unique is the inclusion of ecocidal actions committed by registered EU legal and natural persons abroad. By allowing for ecocidal actions committed abroad by registered EU legal and natural persons to be prosecuted, the European Citizens Initiative's broadens to scope of application of its proposed ecocide formulation, which is particularly useful for transnational and extraterritorial ecocidal actions.

As regards the European Greens Congress' formulation of ecocide, their formulation addresses many elements that Higgins, the European Citizens Initiative and several other scholars addressed in their formulations of ecocide, such as the commission of ecocidal actions during peacetime, which amounted to, inter alia, damage to one's health and to the natural environment.

The 1972 UN Conference and the 2016 ICC policy paper do not provide a formulation on ecocide. The discussions and the outcome of the 1972 conference did however contain reference to elements that many proposed ecocide formulations contain, such as one's right to life in an environment that allows a life of well-being. The 2016 ICC policy paper also indirectly refers to ecocide in the sense that it indicates it will prioritise cases for the ICC by considering whether an element of impact resulting in damage on the environment exists. However, as the above has demonstrated, the policy paper cannot allow for the ICC to directly address ecocide in its prosecutions, let alone prosecute a case based solely on ecocide. Thus, the effects of the ICC policy paper are severely limited. Chapter 4, section 4.1. will, in its analysis of the extent at which the core crimes can address environmental damage, take into account where possible the 2016 policy paper, to determine whether the policy paper can have an impact on environmental protection.

3.3. National ecocide legislation

The following section will analyse the various countries which have already instituted in their national legislation laws that criminalises acts of ecocide. The ten countries that have already instituted a variant of a law of ecocide are the Socialist Republic of Vietnam (1990, 1999), the Russian Federation (1996), the Republic of Kazakhstan (1997, 2014), the Kyrgyz Republic (1997), Republic of Tajikistan (1998, 2020), the Republic of Belarus (1999), Georgia (1999, 2019), Ukraine (2001, 2010), the Republic of Moldova (2002, 2018), and the Republic of Armenia (2003).[169] More recently, France (2020) and Belgium (2020) have started processes to include in their national legislation a law criminalising ecocide. After the various implemented provisions, and the proposed laws are presented, the common elements among all (proposed) ecocide laws will be examined, followed by an analysis of the effectiveness of a national ecocide provision in light of holding perpetrators criminally liable for acts of ecocide. This section is then concluded by an analysis of whether an international law of ecocide would be more suitable for holding the perpetrators criminally liable, in addition to existing and potential national legislation of ecocide.

[169] 'Ecocide law in national jurisdictions' (Stop Ecocide Foundation) <https://ecocidelaw.com/existing-ecocide-laws/> accessed 13 June 2021

While the Rome Statute does not contain any provision on an international crime of ecocide, despite heavy debate surrounding its inclusion, many countries chose to incorporate in their national legislation the excluded Article 26 from the draft Rome Statute, criminalising acts of ecocide, with alterations.[170]

Socialist Republic of Vietnam. The first country to criminalise ecocide was Vietnam, highly likely due to the Vietnam War and its detrimental effects on Vietnam's ecosystem, the people and the animals. Vietnam first codified ecocide in Article 278 in its 1990 Penal Code, where it defined ecocide as "destroying the natural environment, whether committed in time of peace or war, constitutes a crime against humanity."[171] In 1999, Vietnam updated its Penal Codes, whereby its ecocide provision can now be found under Article 342 on "Crimes against mankind", stating that "[t]hose who, in peace time or war time, commit acts of annihilating en-mass population in an area, destroying the source of their livelihood, undermining the cultural and spiritual life of a country, upsetting the foundation of a society with a view to undermining such society, as well as other acts of genocide or acts of ecocide or destroying the natural environment, shall be sentenced to between ten years and twenty years of imprisonment, life imprisonment or capital punishment."[172] Vietnam's later ecocide provision is no longer focused solely on the destruction of the natural environment, but instead chose to include ecocide as a crime against mankind, into a broader provision that addresses, inter alia, genocide, as well. What remained the same is that acts falling under this provision must not solely take place in times of war, but can also be committed in times of peace.

Russian Federation. The Russian Federation was the second country to address ecocide in its national legislation, to be found under Article 358 on "Ecocide" in its 1996 Criminal Code. The provision states the following: **"**Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe, shall be punishable by deprivation of liberty for a term of 12 to 20 years."[173] Unlike Vietnam, the Russian Federation chose to address in its ecocide provision the animal kingdom, as well as more concrete examples of what could constitute an act of ecocide. The Russian Federation also did not specify whether or not its provision is applicable in times of war and/or in peace, unlike Vietnam, where it is stated that their ecocide codification encompasses crimes in times of peace or war. Both, Vietnam, in its 1999 provision, and the Russian Federation share a maximum sentence of twenty years. After the Russian Federation adopted a law on ecocide, several former Soviet Union nations proceeded to adopt similar provisions criminalising ecocide, as evidenced below.

Republic of Kazakhstan. Kazakhstan also amended its 1997 Criminal Code provision on ecocide (Article 161) in 2014, whereby its new provision, to be found under Article 169 titled

[170] Gauger (n66) 13
[171] Ecocide Law (n169)
[172] (No. 15/1999/QH10), Article 342, <https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn017en.pdf> accessed 13 June 2021
[173] The Criminal Code of the Russian Federation No. 63-Fz Of June 13, 1996, Article 358, <https://www.wipo.int/edocs/lexdocs/laws/en/ru/ru080en.pdf> accessed 13 June 2021

"Ecocide" remained verbatim to the 1997 provision[174], and states the following: "Mass destruction of vegetable or animal world, poisoning of the atmosphere, land and water resources, as well as commission of other actions, caused or could cause ecological disaster or environmental emergency, shall be punished by imprisonment for the term of ten to fifteen years."[175]The Republic of Kazakhstan's provision is nearly identical with that of the Russian Federation, alluding to the idea that Kazakhstan copied its provision from the neighbouring state Russia, with minor changes to the wording of the provision, as well as a reduced maximum sentence of fifteen years.

Kyrgyz Republic. The Kyrgyz Republic addressed ecocide in its Criminal Code of 1997 under Article 374 titled "Ecocide", which states the following: "Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe, shall be punishable by deprivation of liberty for a term of 12 to 20 years."[176]

Republic of Tajikistan. Tajikistan's 1998 Criminal Codes, amended in 2020, addressed ecocide under Article 400 titled "Ecocide" as the "[m]ass destruction of flora or fauna, poisoning of the atmosphere or water resources, as well as the commission of other actions capable of causing an ecological disaster, [punishable] with imprisonment for a term of fifteen to twenty years."[177] The Republic of Tajikistan's provision has a higher minimum sentence of fifteen years when compared to the Russia's minimum sentence of twelve years.

Republic of Belarus. Belarus' codification of the crime of ecocide can be found in its 1999 Criminal Code under Article 131[178], where ecocide is defined as "mass destruction of the fauna and flora, pollution of the atmosphere and water resources as well as any other act liable to cause an ecological disaster"[179].

Georgia. Georgia's first codification of the crime of ecocide took place in 1999, with the provision, to be found under Article 409 to define ecocide as the "[c]ontamination of atmosphere, land and water resources, mass destruction of flora and fauna or any other

[174] Criminal Code of the Republic of Kazakhstan dated July 16, 1997 No. 167, Article 161, <http://adilet.zan.kz/eng/docs/K970000167_ > accessed 13 June 2021
[175] Penal Code of the Republic of Kazakhstan dated 3 July 2014 No. 226-V of the Law of the Republic of Kazakhstan, Article 169 <https://www.legislationline.org/download/id/8260/file/Kazakhstan_CC_2014_2016_en.pdf > accessed 13 June 2021
[176] Criminal Code of the Kyrgyz Republic No. 68 of 01/10/1997, Article 374 <https://www.wipo.int/edocs/lexdocs/laws/en/kg/kg013en.pdf > accessed 13 June 2021
[177] Criminal Code of the Republic of Tajikistan, Article 400 <https://www.legislationline.org/download/id/8915/file/Tajikistan_CC_1998_am2020_en.pdf > accessed 13 June 2021
[178] 'Information from the Republic of Belarus concerning the scope and application of universal jurisdiction' (United Nations, 1906692E) 1 <https://www.un.org/en/ga/sixth/74/universal_jurisdiction/belarus_e.pdf> accessed 13 June 2021
[179] Ecocide Law (n169)

action that could have caused ecological disaster – shall be punishable by imprisonment extending from eight to twenty years in length".[180] In 2019, the ecocide provision was revised, and is now to be found under Article 409 in Georgia's Criminal Code, stating the following:

1. "Ecocide i.e. contamination of the atmosphere, soil, water resources, mass destruction of fauna or flora, or any other act that could have led to an ecological disaster, - shall be punished by imprisonment for a term of twelve to twenty years.
2. The same act committed during armed conflicts, - shall be punished by imprisonment for a term of fourteen to twenty years or with life imprisonment."[181]

With the new provision on ecocide, relatively similar to the above-mentioned provision on ecocide from other countries, Georgia extended the minimum sentencing for crimes of ecocide from a possible eight years to twelve years. Georgia also specified in its 2019 provision that the codification of ecocide is also applicable in times of armed conflict, whereby the sentencing increased from a minimum of fourteen years to twenty years, and potentially life imprisonment.

Ukraine. Ukraine's Criminal Code of 2001, amended in 2010, contains under Article 441 a provision on ecocide, remaining unamended since 2001. The provision defines ecocide as the "[m]ass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster, shall be punishable by imprisonment for a term of eight to fifteen years.[182] Ukraine's codification of ecocide is also loosely based on its neighbouring countries' provisions on ecocide, with the lowest minimum sentence of eight years for the commission of acts of ecocide.

Republic of Moldova. Moldova's Criminal Code of 2002 contained under Article 136 the codification of a crime of ecocide, and defined it as "the deliberate and massive destruction of the fauna and flora, the pollution of the atmosphere or poisoning of water resources, as well as other acts capable of causing an ecological catastrophe, is punishable by deprivation of liberty".[183] Its codes were amended in 2018, whereby the provision on ecocide, to be found under Article 136, was amended to define ecocide as "[t]he intentional mass destruction of the flora or fauna, the intoxication of the atmosphere or water resources, as well as the commission of other actions that may cause or that have caused an ecological disaster, shall be punished by imprisonment from 10 to 15 years."[184] Moldova's codification of the crime of ecocide resembles that of the Russian Federation, and that of the Republic of Kazakhstan.

[180] ibid.
[181] Law of Georgia Criminal Code of Georgia, Article 409 <https://www.legislationline.org/download/id/8540/file/Georgia_CC_2009_amAug2019_en.pdf > accessed 13 June 2021
[182] Criminal Code of Ukraine, Article 441 <https://www.legislationline.org/documents/action/popup/id/16257/preview> accessed 13 June 2021
[183] Ecocide Law (n169)
[184] Criminal Code of the Republic of Moldova Code No. 985 as of 18.04.2002, Article 136 <https://www.legislationline.org/download/id/8281/file/Moldova_CC_2002_am2018_en.pdf > accessed 13 June 2021

Republic of Armenia. Armenia's 2003 Criminal Code contained under Article 394 on "Ecocide" the following definition of the act: "Mass destruction of flora or fauna, poisoning the environment, the soils or water resources, as well as implementation of other actions causing an ecological catastrophe, is punished with imprisonment for the term of 10 to 15 years."[185] The provision is also similar to the above provisions on ecocide, and shares the same sentencing as Moldova's 2018 provision.

France and Belgium. More recently, France and Belgium have decided to include in their national legislation a provision criminalising acts of ecocide.
Since late 2020, France has been making plans for offenders of the environment, who committed a "general crime of pollution or endanger[ed] the environment", to face a possible minimum prison sentence of three years and a maximum prison sentence of ten years, or a fine as high as €4.5 million. The aforementioned shall be codified in a law on ecocide, in an effort to end "environmental banditry", and is applicable to persons who showcase "intentional violation of climate laws". The prison sentence shall vary based on whether the committed offence is ruled as being an outcome of recklessness, or an outcome of "intentional offence". A prison sentence of ten years is reserved for crimes categorised as "an intentional offense causing irreversible damage to the environment". Regarding the issuing of a fine, applicable to "violators of environmental laws", the amount of a fine will be "up to 10 times the profit they would have generated by throwing waste into the river". As regards the concept of "endangering the environment", France, in its codification, aims to make it possible to hold offenders liable for punishment even before they have committed the "acts of illegal pollution". In general, such cases aim to be dealt with, with France's "special environmental jurisdiction" concept. In this jurisdiction, the offence of ecocide shall be, per the French Constitution, termed and be considered as an offence, as the Constitution does not permit for these actions to be considered a crime. France has also expressed that damage already caused to the environment will be restored, by the creation of a "restoration mechanism".[186]

In 2020, Belgium was one of the first nations in the west to introduce, via its Ecolo-Groen's party[187], into parliament a bill that aims to codify ecocide as a crime within Belgium, whilst also supporting the introduction of ecocide as the missing fifth crime against peace at the ICC, after the Maldives and Vanuatu urged for the recognition of ecocide at the ICC via implementation in the Rome Statute[188], further supported by Sweden[189]. If the proposed bill passes, then Belgium, as a nation operating under universal jurisdiction, will significantly advance the effort of creating an international crime of ecocide. This proposed national

[185] Republic of Armenia Criminal Code, Article 394 <https://www.legislationline.org/documents/action/popup/id/8872/preview > accessed 13 June 2021
[186] Leah Carter, 'France plans to jail 'ecocide' offenders for 10 years under new laws' (*DW*, 22 November 2020) <https://p.dw.com/p/3lgUI> accessed 13 June 2021
[187] 'Ecocide History' (Stop Ecocide Foundation) <https://ecocidelaw.com/history/> accessed 13 June 2021
[188] 'Ecocide law in Brussels' (The Ecologist, 6 October 2020) <https://theecologist.org/2020/oct/06/ecocide-law-brussels> accessed 13 June 2021
[189] 'The Swedish Labor Movement Calls for Ecocide As A Crime' (Stop Ecocide Foundation, 30 May 2020) <https://www.stopecocide.earth/newsletter-summary/theswedish-labor-movement-calls-for-ecocide-as-a-crime- > accessed 13 June 2021

provision criminalising ecocide in Belgium would affect the prosecution of the most notable polluters on an international scale.[190]

Common elements. The most notable commonality, other than the similarity in wording, between the countries with an integrated and already existing national law criminalising ecocide is that most of their definitions assume their ecocide provision is applicable in times of peace and war. Only two countries deem it necessary to indicate that their provision is applicable in times of peace and war, namely Vietnam, both in its 1990 and 1999 provision, and Georgia, however only in its 2019 provision, and not in its 1999 provision. France and Belgium too do not deem it necessary to indicate if their proposed codification of an offence/crime of ecocide in their national legislation would be applicable in times of peace and war.

A further commonality between all existing national legislation is the element of mass[ive] destruction, appearing in nearly all provisions in one form or another, other than in Vietnam's codification, where only an element of destruction is necessary. What all laws lack, however, is clear description of what constitutes mass[ive] destruction, thereby leaving it up to interpretation. The target of the mass[ive] destruction is, however, indicated in nearly all ecocide codifications as being the flora and fauna, alluding to the fact that if harm were to occur to humans as a result of ecocidal actions, then their harm does not fall under these provisions. It is only with Vietnam's 1999 provision that humans are addressed, by referring to destruction of their "source of their livelihood, undermining the cultural and spiritual life of a country, upsetting the foundation of a society with view to undermining such society"[191] The aforementioned falls under potential acts of ecocide and genocide, thus alluding to the idea that Vietnam intended for its ecocide provision to be understood in a context of the core crimes at the ICC, as a crime against peace, alongside genocide and war crimes. The other ecocide codifications do not allude to any core crimes of the ICC, or to any international element in their codification. France too does not, in its proposed codification, allude to any international element.

Interestingly, as regards the prison sentences of the codified ecocide provisions and the proposed French offence, France has the lowest potential prison sentence, with a minimum of three years and a maximum of ten years, whereas most other provisions have as a minimum sentence ten years and as a maximum prison sentence fifteen to twenty years. Interestingly, France aims to include the option of a hefty fine for an intentional violation of climate laws, thus taking a potentially different approach to countries with an existing ecocide provision. As Belgium has not yet indicated what its proposed legislation will entail, no further analysis can be conducted on it.

[190] 'This movement wants to make harming the planet an international crime' (*The Guardian*) <https://www.theguardian.com/climate-academy/2020/sep/16/ecocide-environment-destruction-international-crime> accessed 13 June 2021

[191] Vietnam Penal Code (No. 15/1999/QH10) (n172)

Examination of effectiveness of (existing) national ecocide codifications. The ten countries with an existing ecocide codification in its national legislation, as well as France's proposed legislation, are what could be considered a relatively advanced codification of ecocide. Many definitions that aim to codify an environmental crime limit their scope to violations of existing legislation that encompasses environmental protection. By having those definitions limit their scope to violations of existing legislation, they are essentially allowing for the possibility to ease potential prosecution and sentencing severely, by reducing the punishment of a crime to an infraction or a misdemeanour, instead of considering the actions to amount to a felony.[192] Since such a framework allows for further damage to occur to the environment, there exists "a need to recognise inherent rights of the environment, of other species and water itself, outside of their usefulness to humans".[193] This is already the case for Ecuador and Bolivia, with the former having recognised, in its 2008 Constitution under chapter 7, Article 71 and 72[194], the Mother Earth's rights, and with the latter, in 2010, "adopt[ing] the Law of the Rights of Mother Earth", which accords various rights, such as that of life or the right to be free of pollution, to the environment.[195] This is partly the case with the existing ecocide codifications and France's proposed ecocide legislation: Their definitions nearly all focus, inter alia, on poisoning or contamination of the atmosphere or water resources, and in the case of France, the disposal of waste in rivers. This showcases an important step in the right direction towards recognition of environmental rights. However, in the case of France, its codification is said to focus on actions that violate existing climate laws, and thus does not advocate for the recognition of rights for the environment as perhaps the other countries with existing national legislation might. However, while it is admirable that the aforementioned countries have included in their national legislation a provision that codifies ecocidal actions, the effectiveness of those provisions in terms of holding perpetrators criminally liable is debatable. Most countries, if not all of them, with an implemented ecocide provision, are plagued by a lack of ability to enforce their provision, largely due to the existence of corruption, lack of "independent judiciary and respect for the rule of law".[196] This is evidenced by the 2020 "Rule of Law Index" report produced by the World Justice Project, which measures the rule of law in numerous countries. Here, the concerned countries' scores ranged around 0.50 out of a possible score of 1, with Russia scoring the lowest score of 0.47 and Georgia the highest score with 0.60.[197] As a comparison, France scored a 0.73 and Belgium a 0.79, both considerably higher than the average score of the concerned

[192] Axel Luttenberger and Lidija Runko Luttenberger, 'Challenges in Regulating Environmental Crimes' (Conference Paper, April 2017) 214 <https://www.researchgate.net/profile/Lidija-Runko-Luttenberger/publication/316439431_CHALLENGES_IN_REGULATING_ENVIRONMENTAL_CRIMES/links/58fe2ebeaca2725bd71d138d/CHALLENGES-IN-REGULATING-ENVIRONMENTAL-CRIMES.pdf > accessed 13 June 2021

[193] ibid. 214

[194] Ecuador Constitution, Chapter 7, Articles 71, 72 <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html > accessed 13 June 2021

[195] Sailesh Mehta and Prisca Merz, 'Ecocide – a new crime against peace?' (2015) 17(I) Environmental Law Review 5 <http://arquivos.integrawebsites.com.br/91917/cf5d97b7dd83113ef317f964fecccbbc.pdf> accessed 13 June 2021

[196] 'Ecocide crime in domestic legislation' (Better World Solutions) <https://www.betterworldsolutions.eu/wp-content/uploads/2015/11/Factsheet-Ecocide-Laws-in-10-countries.pdf> accessed 13 June 2021

[197] 'Rule of Law Index 2020' (World Justice Project, 2020) 5-7 <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf > accessed 13 June 2021. Additional information from pages 5-7: Russian Federation: 0.47; Kyrgyz Republic: 0.48, Socialist Republic of Vietnam: 0.49, Republic of Moldova: 0.50, Republic of Belarus: 0.51, republic of Kazakhstan: 0.52, Georgia: 0.60.

countries.[198] In addition to potential corruption in the concerned countries, which hinders the ability to even address any ecocidal actions, the number of perpetrators that could be held liable for mass[ive] destruction is small, in that not many people would fall under this provision. Despite the fact that the number is small, according to Luttenberger and Runko Luttenberger, a large majority of those individuals that potentially committed ecocidal actions are not prosecuted, and if they are prosecuted, then the rather lengthy prison sentences that the various countries set out in their ecocide provisions are often reduced.[199] This points to an important problem: The countries which have codified in their national legislation a crime of ecocide are plagued by corruption and violation of the rule of law, whereas countries such as France, where the rule of law is considerably more respected and maintained, the proposed ecocide codification is to be considered an offence, which will only be viewed as a crime if the French state decides to penalise particular actions via criminal law. This essentially denotes that the offence of ecocide is dependent on action that violates existing national law on the environment.[200] While this is an effective manner to combat the commission of ecocidal actions, it would be far more beneficial to codify a law on ecocide that does not solely rely on violations of existing climate change laws, as they may not be sufficient to protect the environment.

In nation states creating their own provision on ecocide, it is highly likely that not all definitions will be entirely alike, such as is the case with different sentencing between countries with existing ecocide provisions as evidenced above, or different approaches to ecocide, such as between former soviet countries and France, for instance. These differences in provisions allow for organised crime groups, organisation or even corporations to potentially benefit from a lack of unanimous legal definition of ecocide. As many corporations, particularly multi-national corporations, undertake business in foreign jurisdictions, the lack of unanimity with regards to ecocide, may allow for (multi-national) corporations to exercise their corporate activity in a foreign jurisdiction, such that if they ever had a run-in with the law, the particular jurisdiction may be more lenient. This alludes to the concept of forum shopping, whereby organisations, crime groups and corporations may choose to undertake their business and activities in a particular jurisdiction because that jurisdiction proves to be the most lenient with regards to whatever activities they are undertaking.[201]

The necessity of a unified international ecocide law. In order to combat the further mass destruction of the environment and the ecosystem, a unified international definition of ecocide is necessary. This is due to the fact that a unified international definition would allow for actions that could potentially amount to ecocide in one jurisdiction also be considered to amount to ecocide in another jurisdiction. This way, organisations, corporations and organised crime groups would no longer be able to effectively forum shop for a more lenient jurisdiction[202] However, unification alone is not going to guarantee that actions amounting to ecocide are going to be recognised as such, and that the relevant jurisdiction would take

[198] ibid. 6-7
[199] Luttenberger and Runko Luttenberger (n192) 218
[200] ibid. 218-219
[201] ibid. 214
[202] ibid. 214-215

appropriate action against the party committing ecocide. Instead, a unification is only worthwhile under the assumption that the relevant government is willing to take action against ecocidal perpetrators. This leads to the second point as to why there exists a necessity to create a unified international law on ecocide.

In order for a national law on ecocide to be efficient, the relevant nation state would have to ensure that it would enforce the law. The danger exists, however, that particular nation states are plagued with corrupt governments that hinder the enforceability of provisions that counter their interest. This is particularly evident in Guatemala, when in 2015 it became the first country in the world to create a specialised domestic environmental court capable of prosecuting cases that address damage to the environment. The relevant cases concerned African Spanish palm oil company REPSA, whose actions in Guatemala lead to river poisoning, resulting in killing all of the millions of fish in Pasión River and causing a state of emergency in those communities that relied on that river.[203] Locals had brought the case to the environmental court as an act of ecocide. Ultimately, the palm oil company had to seize actions for a period of months, after which it was permitted to return to its activities. During the hearing of the case, a plaintiff that brought the case to the court had been murdered by the palm oil company and several have been harassed. REPSA was, in January of 2016, found to be guilty of having committed ecocide. Indeed, the palm oil company did accept responsibility at first, when pollution of the river became evident through "an accidental overflow of its oxidation ponds due to heavy rains in the region". However, after the river had been tested for toxins, "high levels of the illegal pesticide malathion" had been found in Pasión River that REPSA retracted its statement of having accepted responsibility for its ecocidal actions, and proceeded to deny any involvement in the pollution of Pasión River.[204] Despite the retraction of the statement, the verdict by the court "was upheld at the appellate level".[205]

This case demonstrates the evident fact that many countries are not capable of adjudicating such cases due to corruption and little respect for the rule of law, as evidenced by the murdering and harassment of the plaintiffs.[206] While countries such as France, aiming to create special environmental jurisdiction, or Belgium, a nation operating under universal jurisdiction aiming to prosecute crimes of ecocide regardless of the perpetrator's nationality or country of residence, demonstrate powerful tools to combat the commission of acts of ecocide, they are not enough to put an end to corrupt regimes that perpetuate ecocide, or to halt the commission of the crime of ecocide by perpetrators prepared to pay the probably reduced fine or serve the reduced sentence, largely due to the fact that the existing ecocide definitions do not contain a proper threshold (see the ten countries with a codified definition),

[203] Cindy Woods, 'The Guatemala Ecocide Case: What it Means for the Business and Human Rights Movement' (Justicia en las Américas, 10 March 2016) <https://dplfblog.com/2016/03/10/the-guatemala-ecocide-case-what-it-means-for-the-business-and-human-rights-movement/ > accessed 13 June 2021

[204] ibid.

[205] Payal Patel, 'Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court's Mandate to Prosecuting Environment Crimes? (2016) 14(2) Loyola University Chicago International Law Review 196 <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1202&context=lucilr> accessed 13 June 2021

[206] Alana Marsili, 'A New Court in Guatemala Tackles Ecocide' (Frontlines, November/December 2015) <https://www.usaid.gov/news-information/frontlines/resilience-2015/new-court-guatemala-tackles-ecocide> accessed 13 June 2021

or that they are based on existing laws, which already do not offer high enough protection of the environment (see France). Universal jurisdiction is already a good step in the right direction, namely towards international law, as universal jurisdiction requires the usage of "international legal definitions, as stated in customary international law, of the particular crime the court will provide judgement on.[207] Thus, it is safe to state that in order to combat further (mass) destruction of the environment, the only viable solution is the introduction of a crime of ecocide into international law. Belgium and France, alongside many island nations facing rising sea levels, aim to introduce a definition of ecocide at the ICC, as a fifth crime against peace, with its basis derived from the existing four crimes of the ICC. The question then remains whether or not it is best if the international definition of a crime of ecocide is based on existing legislation, or whether it should be a stand-alone, in the sense that by basing it on other crimes, the scope of application may be limited by the crimes it is based on. This question will be further explored in chapter 4, section 4.1.. Nevertheless, by introducing an international crime of ecocide, the possibility of applying universal jurisdiction to countries, such as Belgium, that operate under it, offers more possibility for the prosecution of crimes of ecocide, rather than a purely national approach to combatting ecocide. This notion has also been recognised by the United Nations.[208]

4. Existing methods within criminal law for the protection of environmental damage

Chapter 3 concluded that there is a need for an international law of ecocide. In the following chapter, the extent at which methods with criminal law are capable of protecting the environment will be examined. So far, international criminal law, as it is currently made up and operates, does not endeavour to criminalise conduct deemed damaging to the environment. Particular areas of international law, however, do contain reference to the environment and its protection, and indeed, these areas are slowly expanding. Increasing interest amongst scholars, governments and organisation, as the previous chapter has evidenced, does exist to link international criminal law with environmental protection. In fact, the panel of international lawyers working on drafting an international crime of ecocide aim to introduce the draft to the Rome Statute. Before discussions about the introduction of an autonomous crime of ecocide to the Rome Statute can even be had, the potential of the ICC and general international law to address environmental crimes will be analysed.

4.1. Extent at which the core crimes of the International Criminal Court cover environmental cases

As chapter 2 evidenced, the Rome Statute does not contain an autonomous provision that criminalises any damage to the environment. Thus, if a case on environmental damage is to be addressed at the ICC, it must fall under one or more of the existing core crimes of the ICC, as listed under Article 5 of the Rome Statute, and as introduced in chapter 2 of this thesis. As

[207] Anthony J. Colonagelo, 'The Legal Limits of Universal Jurisdiction' (2006) 47(1) Virginia Journal of International Law 150 <https://core.ac.uk/download/pdf/216915987.pdf> accessed 13 June 2021

[208] 'Observations on the Scope and Application of Universal Jurisdiction to Environmental Protection' (United Nations Law Division, Environment Programme) <https://www.un.org/en/ga/sixth/75/universal_jurisdiction/unep_e.pdf> accessed 13 June 2021

chapter 2 has also evidenced, the anthropocentric ICC can only prosecute cases of environmental damage that resulted in human atrocities, thus denoting that the ability of the ICC to prosecute environmental crimes before the International Criminal Court is thus very limited to particular instances. These particular instances will be extensively analysed below.

The general rule at the ICC. The ICC's Rome Statute sets out a fundamental rule under Article 30 that provides the required mental element for the ICC in general, applicable unless it is provided otherwise. The article essentially provides that a crime must have been committed with knowledge, either as a consequence or as a circumstance, and intent, either as a consequence or as conduct.[209] Thus, so Article 30, you cannot be liable for your conduct if there is no fault.[210] In the following, the applicability of Article 30 to the core crimes of the ICC will be analysed in depth, in light of the extent at which the core crimes can provide protection for environmental damage under the Rome Statute.

War crimes. The core crime war crime of the Rome Statue contains an eco-centric codification of an environmental war crime, to be found under Article 8(2)(b)(iv), as outlined in chapter 2, section 2.4.. Any violation of this article will result in the concerned individual being held criminally liable, which is an already far greater achievement than other conventions' deterrence in the form of state responsibility.[211] This provision requires that an international attack be committed with an element of intent, in that the attack must have been intentionally launched, thus demonstrating the requirement of knowledge that the attack would result in "widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".[212] The Rome Statute, however, fails to define "damage to the natural environment"[213]. With the Office of the Prosecutor's 2016 policy paper, it is to be expected the paper will exert influence over case selection and prioritisation in presenting cases on environmental damage to the court, on which the court must rule. In doing so, the court may provide clarification on the scope of Article 8(2)(b)(iv) with regards to "damage to the natural environment"[214].[215] It is also possible that the court may provide clarification over whether or not "illegal exploitation of natural resources in conflict situations", such as trafficking and destruction of endangered species, [216] could amount to "pillaging a town or place" as codified in Article 8(2)(b)(xvi) of the Rome Statute[217]. This latter clarification may be particularly relevant with recent resolutions by the Security Council that recognise a linkage between armed conflicts falling under war crimes and the natural resource exploitation.[218] However, it

[209] Guilfoyle (n5) 191
[210] Mwanza (n129) 24
[211] Jessica C. Lawrence and Kevin J. Heller, 'The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute' (2007) 20(61) The Georgetown Int'L Envtl. Law Review 71 <https://heinonline.org/HOL/P?h=hein.journals/gintenlr20&i=63> accessed 13 June 2021
[212] Rome Statute of the International Criminal Court (n16) Article 8(2)(b)(iv)
[213] ibid.
[214] Rome Statute of the International Criminal Court (n16) Article 8(2)(b)(iv)
[215] Pereira (n156) 208
[216] ibid.
[217] Rome Statute of the International Criminal Court (n16) Article 8(2)(b)(xvi)
[218] Pereira (n156) 208

is notable that the policy paper is merely an internal document, and thus does not require the ICC to consider cases involving "damage to the natural environment", meaning that its effects are severely limited.[219]

Regardless of the potential clarifications that may arise with the policy paper's attempt to expand the cases considered at the ICC, the codification of the eco-centric war crime provision itself faces limitations with regard to being able to consider cases involving environmental damage. These limitations arise from the fact that the Article 8(2)(b)(iv) may be interpreted in various manners.

The first manner in which the eco-centric provision may be interpreted is by criminalising "widespread, long-term and severe damage to the natural environment"[220].[221] The difficulty with the first reading is that the prosecution must prove that the damage to the environment is widespread, long-term and severe, the combination of which is hard to demonstrate and find, as not many cases may evidence all the requirements. If such a case were to exist, then the next obstacle to overcome would be the lack of definition for the criteria, as neither the Rome Statute nor the ICC's Elements of Crimes clearly sets out the actus reus of the article.[222] By allowing this uncertainty over which environmental crimes the ICC considers sufficiently severe that they will be prosecuted at the court, the ICC is creating a problem with regards to the principle of legality, which requires all crimes to be as detailed and specific as possible, so as to allow individuals to know which actions are prohibited, and what threshold exists for actus reus and mens rea.[223] This lack of clarity further allows, so Article 22(2) of the Rome Statute, the concerned individual to have the provision, in this case Article 8(2)(b)(iv), to be interpreted in their favour, due to ambiguity of the eco-centric war crimes provision. This concept is grounded in the fact that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy", meaning the provision must be applied as it is.[224] This can only be rectified by providing a definition on the "widespread, long-term and severe" requirement, in order for the environmental war crime article to be applied to its full effect.[225]

With the second manner, if the provision were to be read as being more restrictive, then one would consider any damage to the environment to be "widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete direct overall military advantage anticipated".[226] In other words, an international attack is only prohibited "if, and *only* if, it "would be clearly excessive in relation to the concrete direct overall military advantage anticipated"".[227] Assuming that the requirements of "widespread, long-term and severe" were defined, the broad scope of the proportionality test would still lead to limited capability of protecting the environment during an armed conflict.[228] Regardless of whether the aforementioned criteria were defined, the test is clearly

[219] ibid.
[220] Rome Statute of the International Criminal Court (n16) Article 8(2)(b)(iv)
[221] Patel (n205) 192
[222] Lawrence and Heller (n211) 72
[223] ibid.
[224] ibid.
[225] ibid.
[226] Patel (n205) 192
[227] Lawrence and Hiller (n211) 75
[228] ibid.

geared towards finding any attack to be proportionate. Assuming the criteria were not defined, the vagueness of the criteria not only renders the applicability of the proportionality test nearly useless, but also violates the legality principle, as delineated above.[229]

A third reading of the provision requires any knowledge of the attack to be immoderate or excessive in proportion to the expected advantage, thus requiring the application of balancing tests.[230] The Rome Statute here, as well, does not provide any clarification at what point actions taken will be considered criminal.[231] The lack of clarification on all fronts as regards to the extent at which criminal cases will be considered, and the extent at which they can be prosecuted further supports the fact that the inclusion of the eco-centric element as part of war crimes comes secondary to any military activities under consideration. This becomes very evident with the 1991 oil spill, committed by Iraq during the Gulf War, which led to the Persian Gulf, Kuwait's water source, to be contaminated. Another case demonstrating the aforementioned is NATO's bombing of the Federal Republic of Yugoslavia as part of Operation Allied Force, which resulted in the "destruction of petrochemical, fertilizer and refinery complex" that released gasoline, dichloride and oil into the Danube river that flowed into the Black Sea. Both cases, the Iraqi oil spills and the polluting of the Danube river were not prosecuted as cases falling under the eco-centric environmental war crimes provision. Additionally, there does not exist a jurisdiction that can sanction any activity that could cause "environmental insecurity" resulting from weapons testing, or the process of withdrawal of military forces. Individuals engaging in such activities could potentially protect themselves from the legal repercussions of their environmentally destructive actions by claiming they were unaware that such actions may result in environmental damage, thus complicating the mens rea element of the article.[232]

With regards to the mens rea for cases potentially falling under Article 8(2)(b)(iv), three mens rea requirements arise in order to hold perpetrators liable, all containing problematic elements. The first requirement is that the perpetrator will had to have known in advance that the international attack will lead to "widespread, long-term and severe"[233] damage to the environment.[234] This requirement is problematic, as, for one, it is difficult to state with certainty that the perpetrator's actions would lead to "widespread, long-term and severe" damage to the environment, and for the other, these aforementioned terms are, as previously stated, not defined, thus making it even more unlikely that the perpetrator would be aware that their actions would result in "widespread, long-term and severe" damage to the environment as understood by the ICC.[235]

The second requirement is that the perpetrator subjectively predicted little advantage resulting from the attack from a military standpoint.[236] This requirement is problematic, as it relies on the provisions' statement that the perpetrator anticipated a particular outcome. The

[229] ibid. 76
[230] Patel (n205) 192
[231] ibid.
[232] ibid. 193
[233] Rome Statute of the International Criminal Court (n16) Article 8(2)(b)(iv)
[234] Lawrence and Heller (n211) 78
[235] ibid. 79
[236] ibid. 78

usage of the term anticipation is troublesome, as it insinuates that the proportionality test is subjective and relies solely on the perpetrators anticipation, even if the perpetrator is mistaken or their anticipation is a result of negligence.[237] Thus, commanders that generally overestimate the impact and force of an attack are in fact less likely to be held criminally liable under the eco-centric provision. As the test also does not demand reasonable anticipation but only anticipation with regards to the military advantage of the attack, the test essentially relies on the perpetrator's honesty and not on the reasonableness of their argumentation at the time of the attack.[238]

The third requirement is that the perpetrator consciously came to the conclusion that the attack's result is "clearly excessive"[239].[240] This requirement is problematic as it is not enough for an attack to be considered disproportionate due to it causing "widespread, long-term and severe damage" but it is also required that the perpetrator consciously came to the conclusion that such actions are "clearly excessive"[241].[242] The usage of this "clearly excessive"[243] in the provision is *sui generis* to the Elements of Crimes, as in no other provision is it demanded that the perpetrator "complete a particular value judgement, unless otherwise indicated".[244] In the environmental war crimes provision using "clearly excessive" it creates a requirement for this value judgement to be completed by the perpetrator, and thus becomes the only provision that utilises the "unless otherwise indicated" mens rea exception as stated in Article 30 of the Rome Statute.[245] [246]In creating this requirement, it becomes difficult to conceive a situation in which a commander launched an international attack despite having consciously come to the conclusion that it would lead to "clearly excessive"[247] damage to the environment. It thus becomes more likely that the commander underestimated the environmental damage that would result from the attack or overestimated the military advantage that would results from the attack, both of which would not fulfil the "clearly excessive"[248] "value judgement"[249] requirement.[250] As regards commanders who do not evaluate the excessiveness of the damage to the environment that results from their attack because they do not care about environmental damage will still not be able to be held liable under the environmental war crimes provision, as they have not conducted a "value judgement". Ignorant to knowledgeable military commanders will also not be able to be held criminally liable under Article 8(2)(b)(iv), as they will have to be acquitted if they did not know that they would have to conduct a "value judgement"[251], thus making this subjectivity of this

[237] ibid. 81
[238] ibid. 81
[239] Rome Statute of the International Criminal Court (n16) Article 8(2)(b)(iv)
[240] Lawrence and Heller (n211) 78
[241] Rome Statute of the International Criminal Court (n16) Article 8(2)(b)(iv)
[242] Lawrence and Heller (n211) 82-83
[243] Rome Statute of the International Criminal Court (n16) Article 8(2)(b)(iv)
[244] International Criminal Court (ICC), *Elements of Crimes* (2011) General introduction §4 and footnote 37 <https://www.refworld.org/docid/4ff5dd7d2.html> accessed 13 June 2021
[245] ibid. footnote 37,
[246] Lawrence and Heller (n211) 83
[247] Rome Statute of the International Criminal Court (n16) Article 8(2)(b)(iv)
[248] ibid.
[249] International Criminal Court (ICC), *Elements of Crimes* (n244) General introduction §4
[250] Lawrence and Heller (n211) 83
[251] International Criminal Court (ICC), *Elements of Crimes* (n244) General introduction §4

test extremely problematic.[252] The lack of conviction of perpetrators is further perpetuated by the need for such environmental damage to have been committed as part of military activities, which, due to environmental damage being secondary to military activities, has resulted in barely any successful case prosecutions.[253] [254] In other words, the environment is often not considered in international attacks, thus making it difficult to prosecute such cases due to a lack of, particularly, the proportionality test. Cases with an environmental element are then prosecuted under other provisions and not particularly the eco-centric provision. This is evidenced by the Bosco Ntaganda case, where Ntaganda was convicted of 18 counts of, inter alia, war crimes in the Democratic Republic of Congo, due to having entered into an agreement with a private firm, whereby the latter exploited natural resources in return for money. Regardless of the evident environmental element, Ntaganda's case resulted in him being convicted of, inter alia, the pillaging war crime, related to particular appliances and not the environmental destruction itself.[255] This was also the case with the Jean-Pierre Bemba case, where natural resources were also exploited, with Bemba being convicted of the war crime of pillaging with regards to appliances and goods, versus the exploitation of natural resources. Bemba's case was, however, reversed due to judgement errors.[256] The judgement errors were, for one, in that the ICC had incorrectly "convicted Mr Bemba for specific criminal acts that were outside the scope of the charges as confirmed", and for the other, the trial chamber found that it had erred in its "assessment of whether Mr Bemba took all necessary and reasonable measures to prevent, repress or punish the commission by his subordinates of the other crimes within the scope of the case", particularly with regards to "Bemba's motivation and the measures he could have taken in light of the limitations he faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country". The judgement was also reversed because the trial chamber erred on the matter of whether Bemba tried to refer the crimes to the authorities of the Central African Republic.[257]

Cases such as these demonstrate how there previously has not been recognised a linkage between exploitation and pillage of natural resources and international crimes, particularly falling under the war crimes provision.[258] The International Law Commission has been working on a report that may detail how exploitation of natural resources may amount to a crime of war. This, however, would assume that damage to the environment will only occur during war time with an international element, as is stated in Article 8(2)(b)(iv) and (xvi), and not in times of peace or in times of a non-international armed conflict, which is far more likely to occur than an international one.[259] [260] Due to these limitations, the intended deterring effect and punitive consequences that come with being convicted of an international crime at the ICC no longer apply, as individuals causing environmental damage under the exceptions

[252] Lawrence and Heller (n211) 84
[253] Patel (n205) 193
[254] Lawrence and Heller (n211) 78
[255] Pereira (n156) 209
[256] ibid. 209
[257] 'ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity' (ICC, 8 June 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1390> accessed 13 June 2021
[258] Pereira (n156) 209
[259] ibid. 210
[260] Lawrence and Heller (n211) 85

that limit the ICC's scope will not face criminal liability, which in turn, fails to broaden the scope of cases capable of being prosecuted at the ICC as an international crime of ecocide.[261]

Genocide. The current definition of genocide in the Rome Statute under Article 6 is verbatim that of the 1948 Genocide Convention.[262] Genocide, according to Article 6 of the Rome Statute, is to be understood as particular "acts committed with intent to destroy, in whole or in part, a national, ethnical, or racial or religious group".[263] The genocide codification poses a significantly higher threshold for the recognition of environmental crimes as an act of genocide, when compared to other core crimes at the ICC, as the analysis in this section shows. Despite the fact that the crime of ecocide, encompassing, inter alia, environmental damage, was coined analogous to the crime of genocide, there still exists difficulty in introducing cases involving environmental damage as a crime of genocide. This is due to the fact that genocide requires the evidencing of particular intent when exterminating an ethnic group.[264] Thus, even if an act that causes environmental damage has resulted in the "killing [of] members of [a] group"[265], the prosecutor would still need to evidence the actus reus of the crime of genocide which demands that the act against the environment was committed with intention to "destroy, in whole, or in part, a national, ethnical, racial or religious group"[266].[267] Thus, it is not enough to demonstrate that the head of an organisation of a (transnational) firm knowingly engaged in acts that damage the environment which resulted in, for instance, displacement of particular groups or injury to such groups, as there must be intent to destroy these groups, as well. This is particularly difficult to evidence, as, according to the Rio Declaration, some acts that result in environmental damage are permitted as long as such acts are considered to be significant for the fulfilment of one's "right to sustainable development"[268], thus creating a loophole for corporations to justify their environmentally damaging behaviour as a benefit and advancement for society.[269] Such was the argument with the Marsh Arabs, a "native Shi'a Muslim" group living in Southern Iraq in the Mesopotamian Marshes. After they participated in the attempts to overthrow in 1991 the Hussein government, they were met with "sustained attempts by the State to destroy their group", executed via killings and targeting of the group's environment which they had previously used to survive for several thousand years. The government proceeded to empty out the Mesopotamian Marshes so that now only 7% of them remains. This damage to the natural environment has resulted in the deaths of these Marsh Arabs as well as the relocation of some. The Iraqi government justified its actions, which also included the building of damns on the Euphrates and Tigris river, by stating it was for the development of society, thus using

[261] Pereira (n156) 210
[262] Tara Smith, 'Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law' (25 August 2011) Companion Smith, Tara, Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law (August 25, 2011). COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES, William Schabas, Yvonne McDermott, Niamh Hayes and Maria Varaki, eds., Ashgate Publishers, 2012, 3 <https://ssrn.com/abstract=1957644> accessed 13 June 2021
[263] Rome Statute of the International Criminal Court (n16) Article 6
[264] Pereira (n156)214-215
[265] Rome Statute of the International Criminal Court (n16) Article 6(a)
[266] ibid. Article 6
[267] Pereira (n156) 215
[268] Patel (n205) 189
[269] Smith (n262) 5

the aforementioned loophole to justify environmental destruction and evade potential claims of genocide.[270]

Article 6 of the Rome Statute on genocide lists a number of acts that could be considered to amount to genocide, assuming the chapeau of the article has been met. Out of all of the enumerations, Article 6(c) is the most important enumeration with regards to damage to the environment, and requires "[deliberate] inflict[ion] on the group conditions of life calculated to bring about its physical destruction in whole or in part"[271]. This, of course, must be coupled with the chapeau requirement of "intent to destroy, in whole or in part, a national, ethnical, racial or religious group"[272].[273] The Al Bashir arrest warrant, demonstrating the aforementioned, contains an element of environmental damage that has allowed the case to fall under the crime of genocide. The arrest warrant includes an identified nexus between genocide as defined in the Rome Statute and an act that amounts to environmental destruction, namely contamination of water resources. The Pre-Trial Chamber noted that the act of contaminating water pumps coupled with forced transfer and resettlement of a tribe was committed in efforts to "deliberately [inflict] on the group conditions of life calculated to bring about its physical destruction in whole or in part"[274], and thus amounts to an act of genocide.[275] The crime of genocide not only punishes perpetrators that take lives, but is also capable of punishing perpetrators that violate a group's "cultural integrity" via degradation of the environment.[276] This thus requires perpetrators to expose particular groups to conditions that ruin their "vital living space", such as with indigenous groups that have a spiritual connection to their environment.[277] Such acts would then amount to destruction of this particularly group's "cultural identity", requiring them to relocate or assimilate to a new group and environment.[278] In such cases, the damage to the environment is not sufficient enough for it to actually amount to a genocidal act. As regards the mens rea for genocide, the prosecutors would need to evidence that the perpetrators had motive and direct intent to commit an act of genocide. This, however, does not include showcasing intent or motive for the destruction of the environment that was committed as part of the genocidal act or that resulted as a consequence of the genocidal act. A good case to demonstrate this is the extinction of the Paraguayan Aché indigenous people in the 1970s, after the government promoted mining, oil extraction and cattle raising via transnational firms and state policy on ground that belonged to the Achés, which ultimately resulted in the indigenous group to, with time, go extinct.[279] [280] While on the surface these actions may be considered to amount to genocide, the firms and the government involved did not intend to destroy the Achés, and could thus not be prosecuted as having committed an act of genocide. Had the government and the corporations knowingly caused environmental damage in order to destroy a particular group, then these actions would amount to genocide. This mens rea threshold is

[270] ibid.
[271] Rome Statute of the International Criminal Court (n16) Article 6(c)
[272] ibid. Article 6
[273] Smith (n262) 3
[274] Rome Statute of the International Criminal Court (n16) Article 6(c)
[275] Pereira (n156) 216
[276] Patel (n205) 190
[277] ibid.
[278] ibid.
[279] Smith (n262) 4
[280] Patel (n205) 190

however too high for any case with environmental damage to likely be prosecuted as genocide. Additionally, the high levels of irreversibly environmental damage pose too high and difficult to reach a threshold for any case to actually be prosecuted. Couple this with the fact that when prosecution actually occurs, it is too late for any deterring effects to actually be useful.[281] This poses a great limitation to the protection of the environment, as key in international environmental law is the precautionary element, allowing to protect the environment from potentially damaging acts before they become irreversible.[282] As the analysis of the crime against humanity below will demonstrate, many of the acts falling under genocide also fall under crimes against humanity, however with the difference that they are more prosecutable under that crime than the crime of genocide.[283] [284] Thus, cases with environmental damage will more likely face prosecution as a crime against humanity than a crime of genocide.

Crimes against humanity. As is the case with genocide, crimes against humanity do not have to take place as part of an armed conflict.[285] Article 7 of the Rome Statute codifies crimes against humanity as particular "acts […] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Article 7 contains a list of attacks that fall under this provision, such as "murder"[286], "extermination"[287], "enslavement"[288], or "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".[289] This could, for instance, include contamination of water resources that led to the killing of a population.[290] Out of the enumerated acts that could amount to a crime against humanity, the more relevant enumerations for environmental damage are "extermination"[291], "deportation or forcible transfers of populations"[292], "persecution"[293] and "other inhumane acts"[294], which will be further analysed below.[295] First, however, the extent at which environmental damage could be considered to fall under the provision of a crime against humanity will be analysed via the case that first considered it, namely the Texaco Chevron case at the ICC. Under Article 7(1)(k) of the Rome Statute, an attack against the environment would need to lead to "great suffering, or serious injury to body or to mental or physical health" in order for it to be recognised as a crime against humanity. This, however, emphasises any danger posed to humans, and leaves any environmental damage without actual protection via any legal provision. Any environmental damage would have to result

[281] ibid. 190
[282] Pereira (n156) 216
[283] Smith (n262) 6
[284] Pereira (n156) 215
[285] ibid. 211
[286] Rome Statute of the International Criminal Court (n16) Article 7(1)(a)
[287] ibid. Article 7(1)(b)
[288] ibid. Article 7(1)(c)
[289] ibid. Article 7(1)(k)
[290] Pereira (n156) 211
[291] Rome Statute of the International Criminal Court (n16) Article 7(1)(b)
[292] ibid. Article 7(1)(d)
[293] ibid. Article 7(1)(h)
[294] ibid. Article 7(1)(k)
[295] Smith (n262) 7

from an attack that is "widespread or systematic"[296], which is a difficult threshold to meet. The threshold becomes more easy to meet in cases where actions that harm the civilian population have essentially been authorised to continue through an official policy from an organisation or State that has the required power to issue the policy, despite the fact that the civilian population and the environment is being harmed in the process. The Texaco Petroleum Company together with Chevron is a prime example of the aforementioned, where these two companies built a pipeline in Ecuador that has proceeded to discharge several litres of oil and toxic waste for more than twenty years into the surrounding area, thus contaminating surrounding soil and water, resulting in severe damage to the indigenous civilian population and to the environment.[297] [298] Lago Agrio Victims brought the case to the ICC as a violation of article 7 on crimes against humanity, as the perpetrator of the case, Chevron's CEO, refused to respect the 2011 Ecuadorian civil judgement that required Chevron to pay 9 billion US dollars in damages, and instead continued to aggravate and contaminate the affected area in Ecuador. The Lago Agrio Victims argued that such behaviour amounts to an attack against Ecuador's civilian inhabitants, and thus is to be considered to be a crime against humanity, as Chevron refused to respect the 2011 judgement and its continuation of its activities amount to a "non-violent attack"[299], which is covered under Article 7's crime against humanity.[300] The case was however dismissed by the ICC prosecutor due to the fact that the events in question took place before the ICC's Rome Statute entered into force, and before Ecuador ratified the Rome Statute.[301] After the dismissal of the Ecuadorian case, the Office of the Prosecutor at the ICC published a policy brief in 2016 on case selection and prioritisation, in which it addressed the "illegal exploitation of natural resources or the illegal dispossession of land", analysed in the previous chapter.[302]

Another case with a potentially similar outcome is the Cambodian case where the victims alleged that the ruling elite of Cambodia are conducting widespread and systematic land grabbing on a large scale, which has resulted in 60,000 displaced persons, and as such constitutes a crime against humanity as stated in Article 7 of the Rome Statute, particularly applicable to Article 7(1)(d) on "[d]eportation or forcible transfer of population", which is further defined under Article 7(2)(d) as meaning "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law". The ICC has yet to conduct preliminary examination of the case, however, it seems likely that the case may fulfil the chapeau requirements of Article 7 with regards to evidencing a "widespread or systematic attack directed against any civilian population, with knowledge of the attack"[303].[304] This prediction nevertheless still remains disputed as some have argued that the required state or organisation issued policy is not evident in the Cambodian case with regards to people being forcibly evicted due to interest of non-native investors. This may even be the reason as to why the Office of the Prosecutor at the ICC has yet to address the case that was proposed in

[296] Rome Statute of the International Criminal Court (n16) Article 7(1)
[297] Pereira (n156) 212
[298] Lambert (n17) 708
[299] Ibid. 711
[300] ibid. 710, 711, 708
[301] Pereira (n156) 212
[302] International Criminal Court, 'Policy paper on case selection and prioritisation' (n157) §41
[303] Rome Statute of the International Criminal Court (n16) Article 7(1)
[304] Pereira (n156) 213

2014, as "economic policy" does not fall under international law, and neither does a state or organisation issued policy justify these evictions on "economic grounds", thus making the case potentially un-prosecutable.[305]

Thus, to date, there has not been a case on environmental destruction that has been prosecuted at the ICC as a crime against humanity. As such, the extent at which a case on environmental damage can be prosecuted at the ICC under crimes against humanity remains unclear. The extent will thus be examined in the following, under the assumption that all jurisdictional issues and conditions for admissibility of a given case have been met, in order for the destruction of the environment that took place during peace time and by actors not considered to be state actors, to meet the conditions outlined in Article 7 of the Rome Statute.[306]

The only reason why crimes against humanity can be used to prosecute environmental destruction is due to the elimination of the previously instituted war nexus, requiring a nexus between an armed conflict and a crime against humanity, during the drafting of the Rome Statute. By eliminating this nexus, the ICC opened up potential liability for acts that have been committed during peace time or during war time, and not solely during war time, as was the case previously at the Nuremburg Tribunal and the International Military Tribunal for the Far East.[307] However, despite the elimination of the war nexus, Article 7 still includes "a *chapeau* and a list of crimes known as the 'enumerated offenses'", meaning fact-based circumstances of a given case must, for one, meet the "contextual elements of" the crime against humanity as delineated in the chapeau of the article.[308] The chapeau contains the definition of crimes against humanity as being "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[309] The chapeau is essentially proven by demonstrating that the case contains (1) an attack against civilians, (2) that the attack in question is "widespread or systematic", (3) and that the perpetrator of the act was aware of the attack, thus requiring knowledge[310].[311]

Requirement (1) itself already contains three requirements, as expressed under Article 7(2)(a), whereby the case must demonstrate that (i) the act in question must have occurred on more than one occasion, meaning that, for instance, the act of murder (Article 7(1)(a)) must have occurred more than once. This act must have been carried out as (ii) an attack against civilians, and must be (iii) "pursuant to or in furtherance of a State of organisational policy to commit such attack[s]".[312] When applying (i) to cases involving environmental damage, the disposing of toxic material or waste, falling under "other inhuman acts of a similar character causing great suffering, or serious injury to body or to mental or physical health", must have occurred on more than one occasion. Thus, every time toxic material or waste is dumped, this dumping amounts to one act, which all together would amount to

[305] ibid. 214
[306] Lambert (n17) 718
[307] Ibid. 719
[308] ibid. 719
[309] Rome Statute of the International Criminal Court (n16) Article 7(1)
[310] ibid.
[311] Lambert (n17) 720
[312] Rome Statute of the International Criminal Court (n16) Article 7(2)(a)

multiple acts, as required by the Rome Statute, in order to avoid prosecution of isolated cases. Other acts may also include environmental damage to result in multiple deaths of people, as each death is considered to be one occasion.[313] Requirement (ii) requires civilians to be persons not partaking in any armed activities pursuant to Common Article 3 of the Geneva Conventions, which is rather easy to prove, as all people that are victims for crimes during peace time are, according to the definition, civilians.[314] Requirement (iii), arguably the most important requirement, demands there be evidence that the organisation or state has "actively promoted or encouraged" an attack, or purposefully failed to take any action against its commission.[315] However, the Rome Statue does not provide any guidance on the extent at which one must demonstrate a nexus between the attack and the actions to be considered unlawful, and not at what point the policy is to be considered as having actively been encouraged or promoted.[316] Thus, further clarification is required in order for the case to be able to have its instances of environmental damage be considered as an attack amounting to a crime against humanity.

As regards requirement (2), the prosecutor at the ICC would only have to prove that the attack was either widespread or systematic. As Article 7 demands multiple instances of crimes, it may be interpreted that each act must be either widespread or systematic. This is however not the case, as the context in which the attack occurred must be either widespread or systematic. Notably, in order for an attack to be widespread, there must be a significant number of victims, as the geographical area in which the attack occurred does not constitute the act as having been widespread. However, it may support the argument that the attack was widespread. In order for an attack to be systematic, the prosecutor must demonstrate the "organi[s]ed nature of the acts that make up the attack", meaning there must exist an organised method with which the acts were executed.[317] As regards requirement (3), Article 7(1) lays out the mens rea of the crime against humanity, which require the prosecutor to demonstrate that the perpetrator was aware of the attack in question, which, in this case is environmental destruction. Thus, the Rome Statute sets a low bar for the mens rea, as no other requirement is made other than the perpetrator's awareness of the attack.[318]

Once the chapeau has been proven, the prosecutor of the ICC must then find at least one of the acts listed under Article 7(1) to be applicable to the given case.[319] These listed acts only address acts that resulted in "direct human costs", and not particularly any damage to the environment. Environmental damage may, under Article 7, only be prosecuted indirectly, as Article 7 is primarily a tool to address human harm and not environmental damage.[320] Thus, while particular actions may lead to environmental damage, the perpetrator would have had to have intended for the actions to cause harm to people, and not have the harm to people result from actions that cause environmental damage. As such, the likelihood that all enumerated acts under Article 7 may contain an element of environmental harm, is slim. It is

[313] Lambert (n17) 721
[314] ibid. 721
[315] International Criminal Court (ICC), *Elements of Crimes* (n244) Article 7 Introduction §3
[316] Lambert (n17) 723
[317] ibid. p. 723-724
[318] ibid. p. 725
[319] ibid. 720
[320] ibid. p. 726

far more likely that destruction to the environment may be prosecuted under "extermination"[321], "deportation or forcible transfer of population"[322] , "persecution"[323] and "other inhumane acts"[324], as they are more likely to be the indirect cause of these acts.[325] The rest of the enumerations all refer to acts that cannot be a result of having one's environment destructed. Admittedly, the act of murder may be a result of environmental destruction, however, the act would then essentially amount to "inflicting conditions of life calculated to bring about the destruction of part of a population", which is in fact the act of "extermination", and no longer murder.[326]

Essentially, cases involving environmental destruction may be prosecuted at the ICC, as the Rome Statute per se did not intend for the crime against humanity to be rigid, as evidenced by the rather broad category of "other inhumane acts"[327], intended to allow Article 7 to encompass more than its provision, based on customary international law, and enumerated acts, initially intended.[328] However, while this may create hope that crimes against humanity may at some point prosecute a case with environmental damage, the likelihood of that happening is dependent on the extent at which it "shock[s] the conscience of mankind", which may be rather difficult to achieve as acts that fall under this requirement result in humanitarian atrocity and not damage to the environment, meaning case prosecution is done with the aim of prosecuting acts that caused harm to humans and not the environment. Nevertheless, crimes against humanity may be the most realistic option under which environmental damage may be addressed at the ICC, as this section evidences.[329] It certainly has a lower threshold with regards to intent than genocide, making this crime more accessible for cases with an element of environmental damage.

Crime of Aggression. Article 8 *bis* of the Rome Statute codifies the crime of aggression as being "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations".[330] As the enumerated offences under Article 8 *bis* (2) indicate, the is no coverage under this article for purposeful pollution that is to be considered transboundary. This essentially means that the core crime, crime of aggression, cannot be utilised to cover environmental damage that does not fall short of "nuclear weapons, or extreme biological or chemical attacks".[331] The enumerated acts contain, for instance, an

[321] Rome Statute of the International Criminal Court (n16) Article 7(1)(b)
[322] ibid. Article 7(1)(d)
[323] ibid. Article 7(1)(h)
[324] ibid. Article 7(1)(k)
[325] Smith (n262) 7
[326] Lambert (n17) 728
[327] Rome Statute of the International Criminal Court (n16) Article 7(1)(k)
[328] Lambert (n17) 728-729
[329] Patel (n205) 192
[330] Rome of the International Criminal Court (n16) Article 8*bis*(1)
[331] Smith (n262) 12

"invasion or attack"[332], "bombardment[s]"[333] or "blockades"[334] which are bound to result in damage to the environment, which will likely be treated as a side effect of, for instance, military actions or acts that amount to a crime of aggression.[335] Thus, here too the environment has not been directly addressed, and will thus also not be prosecuted. However, with more attention being paid to the environment and damage to it, it might be that consequences on the environment as a result of an attack may become central to the crime of aggression. However, the difficulty with presenting environmental damage as an act of aggression lies with the fact that such actions may easily turn into situations of armed conflict. If that is the case, then any environmental damage that took place in the context of an armed conflict and that turned into an armed conflict will be governed by the war crimes provision, Article 8(2)(b)(iv) of the Rome Statute.[336] As regards to what extent the crime of aggression may cover environmental damage, due to the incomplete status of the crime of aggression and the lack of existing coverage under international criminal law, it would be very unfeasible to believe Article 8*bis* could be stretched out to provide coverage and thus a route to prosecution for environmental damage caused by the enumerated acts that amount to a crime of aggression.[337]

Concluding observations. The above research analyses to what extent the existing core crimes of the ICC Rome Statute are capable of prosecuting and holding liable individuals that committed environmental damage. Three of the four core crimes, war crimes, genocide and crimes against humanity, are technically capable of addressing, with varying extent, cases involving environmental damage. The most suitable core crime of the Rome Statute is the eco-centric war crimes provision, found under Article 8(2)(b)(iv). However, despite the fact that the Rome Statute is capable of technically addressing, in three of the four core crimes, cases involving environmental damage, the analysis above evidenced that all eligible core crimes, and particularly the unlikely candidate that is the crime of aggression, contains many weaknesses and limitations with regards to the extent at which environmental damage is covered under each respective provision. Thus, based on the above analysis, it can be concluded that the Rome Statute as it currently exists is an unlikely source to adequately offer environmental protection and security in the prosecution of individuals that committed environmental destruction. A solution to the problem of addressing environmental damage at the ICC would be to introduce an autonomous ecocide provision to the Rome Statute, which will be discussed in chapter 6, section 6.2..

[332] Rome Statute of the International Criminal Court (n16) Article *8bis* (2)(a)
[333] ibid. Article 8*bis*(2)(b)
[334] ibid. Article 8*bis*(2)(c)
[335] Smith (n262) 12
[336] ibid. 13
[337] Smith (n262) 13

4.2. State responsibility and environmental protection

In the following sub-chapter, the thesis explores the connection between international criminal law and international humanitarian law (the law of armed conflict) with regards to state responsibility in an effort to "strengthen the international community's ability to preserve vital ecological processes" during war time. Indeed, the connection between these two disciplines does contain its limitations that result in less than effective environmental protection and enforceable state responsibility for such protection.[338] In addition to the limitation, the below explored conventions are also not up to date on methods with which the environment could be damages, and thus do not contain prohibitions on modern warfare and military techniques that destruct and damage the environment.[339] In the following, these points will be extensively analysed.

The Hague Conventions of 1907 are the codification of international law regarding armed conflict. While the laws and the convention's principles codified in it do not refer to the environment, there are certain provisions that can be applied to the environment. Hague Convention II's Article 55 is one of these provisions, and states that the power occupying a territory cannot alter the occupying territory permanently or destroy the territory of the enemy, as well as not use the natural environment and resources of that territory irresponsibly. As some natural resources of the territory and the general environment may be interpreted as being enemy property, they fall under Hague Convention II's Article 23(g), which provides them protection from seizure and destruction by the enemy. However, the Hague Conventions do not specifically specify what parts of the environment and its natural resources, such as air, water, forests or animals, all not belonging to anyone legally, could be considered property. A further limitation is imposed by the fact that no matter how broad you perceive the term property to be, the Hague Convention's ability to protect the environment is limited by the argument that any damage was a necessity for military reasons. This line of argumentation, what constitutes military necessity, has also not been clearly stated and is thus very difficult to argue, with often the argument of military necessity capable of trumping any counterargument. Rare instances where this was not the case is, for instance, when Iraq released oil into the Gulf, which was not a military necessity nor an advantage for Iraq. If indeed a state is found to be guilty under Hague Convention, then the perpetrators would have to compensate the victim state as per Hague Convention Number IV's Article 3. While this may sound promising, the Hague Conventions do not codify criminal responsibility nor any mechanism that enforces the payment of the compensation, leaving the effort to protect the environment largely ineffective.[340] [341]

Common Article 3 of the Geneva Conventions, protecting people not partaking in an armed conflict of an international nature, does not contain any reference to damage to the environment. Nevertheless, it does mention "violence to life and person" in paragraph (1)(a)

[338] Marcos A. Orellana, 'Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad' (2005) 17(673) The Georgetown Int'l Envt'l Law Review 674 < https://heinonline-org.tilburguniversity.idm.oclc.org/HOL/P?h=hein.journals/gintenlr17&i=683> accessed 13 June 2021

[339] Lawrence and Heller (n211) 64

[340] Regina Rauxloh, 'The Role of International Criminal Law in Environmental Protection' in F. Botchway (ed.) Natural Resource Investment and Africa's Development (Edward Elgar, 2011) 428-429 < https://www.researchgate.net/publication/287564114_The_role_of_international_criminal_law_in_environmental_protection> accessed 13 June 2021

[341] Lawrence and Heller (n211) 67-68

of Common Article 3, which includes the prohibition of practicing the scorched earth policy and the usage of any gases deemed to be poisonous, thus indirectly providing protection to the environment.[342] The 1949 Fourth Geneva Convention also provides protection for the environment, as property. Several articles demonstrate this, such as Article 33 of the Fourth Convention prohibiting pillaging, or Article 52 prohibiting the appropriation and destruction of property, in an extensive manner. Similarly, Article 53 outlaws any destruction of property belonging to the occupied state or any other public body, by the occupying power. Article 147 of the Fourth Geneva Convention refers to Article 52, and states that actions that amount to a violation of Article 52, without any justification of such actions being military necessity, whilst being performed deliberately and unlawfully, amount to a grave breach of the Geneva Convention. Such breaches, unlike the Hague Conventions, precipitate criminal and civil liability, thus allowing individuals to be prosecuted for extensive damage to the environment. While this too may sound promising, the caveat of environmental damage being justified by military necessity, here too exists.[343]

After the Vietnam War and the usage of chemical herbicides in Vietnam by the US military, the international scene created three conventions prohibiting certain conduct that took place in Vietnam. The first convention is the 1977 Additional Protocol I of the Geneva Conventions and concerns international armed conflicts, offering protection to victims of such conflicts. The second convention is the 1977 Additional Protocol II of the Geneva Conventions and concerns internal armed conflicts and the protection of victims of such conflicts. The third convention is the 1978 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), which prohibits particular techniques that affect the environment by modifying it. The following will analyse all three conventions and the extent at which they offer protection to the environment.

Additional Protocol I contains two provisions that offer protection to the environment, which, when compared to the Hague Convention, already offers more protection than the Hague Convention ever could. The first provision is Article 35(3) on "[b]asic rules", which prohibits the usage of methods or particular warfare tactics and weapons that can be expected or which are particularly intended "to cause widespread, long-term and severe damage to the natural environment". Article 55(1) on "[p]rotection of the natural environment" requires that during warfare, the environment shall be protected from "widespread, long-term and sever damage". The protection the environment is under includes methods enunciated under Article 35(3), as they, so Article 55(1), my cause harm to "the health or survival of the population". Article 55(2) also prohibits any attacks on the environment as reprisals.[344] Both articles, in their formulation, indicate that excessive damage to the environment as part of military necessity is prohibited, even when it is deemed to be advantageous to the military. This creates a large advantage over both the 1907 Hague Conventions and the Geneva Conventions, both of which allow for the justification of military necessity. However, while this may sound promising, the lack of military necessity as a defence strategy has discouraged

[342] Rauxloh (n340) 429
[343] ibid.
[344] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, < https://www.refworld.org/docid/3ae6b36b4.html> accessed 13 June 2021

many states to ratify the convention. Both, Article 35(3) and 55(1) also contain an element of "objective standard of reasonable foreseeability", as they require methods of warfare and usage of particular weaponry to not be used if it can be foreseen that they will damage the environment and harm the population's health and survivability. Thus, unlike with the Rome Statute where an element of intent must be demonstrated, to varying degrees, the Additional Protocol I does not require evidence of any direct intent, as it is enough to only showcase the forethought that the method or weapon could potentially have caused damage to the environment and people's health and survivability. However, while this may sound promising, the terms used in Additional Protocol I have not been defined, and are thus, due to their vague definition, restrictively interpreted. Commentary on Additional Protocol I by the International Committee of the Red Cross has indicated that the term environment in Additional Protocol I shall not be interpreted as narrowly as in the Hague Convention or the Fourth Geneva Convention, where the environment is only protected if it is considered to be property. Here, however, the term environment is to denote habitual areas of people. However, this commentary is not binding. A further limitation to Additional Protocol I is the large amount of damage the environment has to sustain, as evidenced by the usage of "widespread, long-term and severe" in Article 35(3) and 55(1), in order for the protocol to be effective. Thus, while Additional Protocol I seems to be able to protect the environment from damage, and its inhabitants from health risks, its limitations greatly render the protocol ineffective, and incapable of turning into customary international law.[345]

Additional Protocol II on non-international armed conflicts expands on Common Article 3 of the Geneva Conventions, and does not per se contain any provision on the environment. The idea was to include provisions similar to Article 35(3) and 55(1), only then applicable to internal conflict, however, such provisions were rejected. However, Articles 14 and 15 of Additional Protocol II, while not explicitly providing protection for the environment, do so implicitly. Article 14 on "[p]rotection of objects indispensable to the survival or the civilian population"[346], for instance, prohibits starvation, and thus also any methods used to perpetuate starvation of a populace, such as destroying their agriculture and poisoning their livestock, water resources and crops with gas or employing the scorched earth policy. Article 15 on "[p]rotection of works and installations containing dangerous forces", prohibits attacks on nuclear power stations and water structures, as they may result in severe harm and loss of the civilian populace, through the freeing of threatening forces. Such actions also fall under Article 17 on "[p]rohibition of forced movement of civilians", which prohibits the forced displacement of civilians for reasons other than military necessity or their security.[347] Additional Protocol II also faces limitations in that the protocol does not contain any provisions that enforce the implementation of its provisions, as is the case with the 1907 Hague Conventions. It also does not contain any provision on grave breaches, which are found in Additional Protocol I and the Geneva Conventions.[348] Thus, if you compare Additional Protocol I with Additional Protocol II, then the former offers more protection for the

[345] Rauxloh (n340) 430
[346] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, Article 14 <https://www.refworld.org/docid/3ae6b37f40.html> accessed 13 June 2021
[347] Rauxloh (n340) 430
[348] ibid.

environment, with more enforceability than the latter, consequently protecting the environment more in international armed conflicts than in internal armed conflicts.[349]

While Additional Protocol I and II both respectively contain provisions and mention of the environment, they offer limited protection to it as their focus is on the protection of victims and civilians in international armed conflicts and internal armed conflict, respectively. ENMOD however, if the first treaty of an international nature that specifically concerns itself with impacts on the environment committed during armed conflicts.[350] As the title indicated, the convention concerns itself with environment modification techniques, which Article II of ENMOD defines as being "any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space".[351] According to Article I(1), its threshold is lower than the previous conventions, as it only requires the "environmental modification techniques [to have a] widespread, long-lasting or severe effect" and not a long-term, widespread and severe effect.[352] Furthermore, ENMOD is applicable in both internal and international armed conflicts and does not allow the justification of military necessity. While this may sound promising, its scope in techniques is severely limited, thus allowing for many harmful "conventional combat techniques" to be permitted, such as the US's technique of clearing land in Vietnam via blades attached to a tractor.[353] Due to its restrictive scope, the ENMOD is useless in today's usage of environmental modification techniques, as a large majority of them are not under scope of ENMOD. However, ENMOD does provide that environmental damage in isolation is prohibited, even if you cannot evidence that humans will directly suffer as a consequence.[354] Ultimately, ENMOD too does not offer full protection of the environment during armed conflict, that is capable of being enforced.

Concluding observations.

The above analysis evidences the extent at which the discussed conventions can protect the environment through an international humanitarian law framework that applies in times of war and armed conflict. This framework does "contain a patchwork of norms that could potentially be utilised to establish individual and State responsibility for environmental damage".[355] These norms are, however, not sufficient enough to safeguard environmental integrity during times of war. This is because the relevant provisions either have too high of a threshold, due to the fact that they only offer environmental protection indirectly or if otherwise implied, or due to the fact that the destruction of the environment is justified as being necessary for military purposes.[356] Thus, indeed, an autonomous crime of ecocide seems to be the best option to provide adequate environmental protection. In the following chapter, this thesis will propose its own autonomous ecocide provision.

[349] ibid. 431
[350] ibid.
[351] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977, <https://treaties.un.org/doc/Treaties/1978/10/19781005%2000-39%20AM/Ch_XXVI_01p.pdf> accessed 13 June 2021
[352] ibid.
[353] Rauxloh (n340) 431 and footnote 84
[354] ibid. 431
[355] Orellana (n338) 683
[356] ibid. 684

5. Ecocide provision as proposed by this thesis

The analysis of the above research has clearly evidenced several shortcomings regarding environmental protection, such that the existing methods, in isolation and together, are not sufficient to provide adequate environmental protection. Thus, the thesis proposes the following as an ecocide provision:

Ecocide denotes the massive or long-term destruction or damage to one or more ecosystems or the general global commons, on which human and non-human entities are dependent, as caused by any legal entity during times of peace and/or of war or as a result of a naturally occurring incident.

The crime of ecocide, as proposed, will not simply require the inclusion of the proposed crime of ecocide into the existing legal system, but will demand that any assumptions and principles that currently make up the foundation of our existing legal system that have failed to adequately offer protection to the environment, must radically change. Thus, the proposed crime of ecocide is formulated with the best interest of the environment and its protection in mind, rather than with the limitations of our current legal paradigms. The following will outline how this thesis has come to propose the above definition.

Anthropocentrism versus ecocentrism. Anthropocentrism presents the environment as a resource for humanity, whereby focus is placed on how humans can (further) benefit from the environment. Simply, anthropocentrism is utilitarian-like.[357] Ecocentrism per se does not dispute the fact that the environment does indeed play a role in the functioning of society and humanity in general, however, it differs strongly from anthropocentrism in that it purports that particularly the "nonhuman environment", understood as being "independent of the uses for which human beings may exploit it", must be protected, in addition to the general environment that does not function to support humanities' survival.[358] This is due to the fact that the environment is seen as possessing "moral value in [its] own right".[359] As this thesis has previously evidenced, much international protection of the environment is anthropocentric. Such an approach is ill-suited to provide adequate protection to the (whole) environment.[360] It is thus pivotal to take an ecocentric approach in trying to protect the environment via a formulation of ecocide, particularly as humans cannot be separated from the ecosystem(s) that they belong to, thus necessitating the creation of norms of liability that recognise this. Thus, the proposed crime of ecocide is, and needs to be, ecocentric.

Categories/types of ecocide. This thesis will operate under the theory that there are four different categories of ecocide, as purported by Higgins, Short and South. The four categories are "water pollution", "air pollution", "deforestation and spoiling of the land", and "crimes against animals/non-human species".[361] [362]These four categories/types of ecocide are to be

[357] Lawrence and Heller (n211) 64
[358] ibid. 65
[359] ibid.
[360] ibid. 67
[361] Higgins, Short and South (n3) 252-253
[362] Vanessa Schwegler, 'The Disposable Nature: The Case of Ecocide and Corporate Accountability' (2017) 9(3) Amsterdam law Forum 76 <http://doi.org/10.37974/ALF.307> accessed 13 June 2021

considered as being primary forms, meaning that they are a direct result/consequence of the degradation of the environment and of earth's (natural) resources. These primary forms affect the environment, humans and non-human species alike (as well as the environment they rely on), and result from human interference and action. The following will expand on the four primary types of ecocide.

The first type is water pollution, and refers to pollution of bodies of water in the literal sense, such as through oil spillage or through the dumping of toxic chemicals or pesticides into water.[363] [364] This affects animal species that live in or off of the body of water. Water pollution is also to be understood as denoting "over-fishing, poaching and non-sustainable fishing techniques", endangering targeted animals and disrupting the food chain of other animals.[365] Humans are also affected by water pollution as numerous studies have evidenced a link between consumption of polluted water and cancer. The release of toxic chemicals also affects animal species living off of the water or in the water. All of the above amounts to environmental destruction, and ultimately ecosystem loss.[366]

The second type is air pollution, and refers to the pollution of the air, which is capable of crossing state lines and affecting everyone alike, particularly those humans living in industrial areas. Air pollution also has dire effects on water, animal species, and agriculture. Ultimately, with air pollution steadily on the rise due to increase in globalisation and industrialisation, air pollution will have a detrimental effect on the environment, and may even lead to ecosystem loss through acid rain causing deforestation, or loss of "peaceful enjoyment of living areas" through a rise in diseases and death rates.[367]

The third type is "deforestation and spoiling of the land", and refers to, for instance, logging illegally, which impacts not only animal species, but also the flora of a particular region, such as the Amazon basin and its tribal communities, as well as humans through the usage of particular chemicals or destruction of their natural habitat. Logging can lead to long-term environmental damage, such as drought or soil deterioration. It can also be reason for war outbreaks and relocation of people inhabiting the area to be deforested.[368] [369]

The fourth and last type is "crimes against animals/non-human species" and refers to the mistreatment of animal species, such as by destroying their natural habitat via accepted means, such as for agricultural or industrial reasons, or by polluting their environment via air and/or water. This type of ecocide also refers to illegal hunting/poaching of animal species.[370] Poaching/hunting of animals is often for religious, medicinal or commercial reasons and has seen an increase in recent years, resulting in many (protected) species nearly going extinct, which in turn leads to ecosystem disruption beyond repair.[371]

[363] Higgins, Short and South (n3) 253
[364] Schwegler (n362) 78
[365] Higgins, Short and South (n3) 253
[366] Schwegler (n362) 78
[367] Schwegler (n362) 77
[368] Higgins, Short and South (n3) 253 Schwegler p. 78-79
[369] Schwegler (n362) 78-79
[370] Higgins, Short and South (n3) 253-254
[371] Schwegler (n362) 81

Now that the aspects that constitute ecocide have been defined and explained, the thesis turns to analysing the legal components of the proposed crimes of ecocide.

Legal components of the proposed crime of ecocide. As the previous chapters evidence, there is a lack of unity on what ecocide's legal elements should be, which severely hinders the effectiveness of the efforts to protect the environment, particularly when considering an introduction of ecocide at the ICC which operates under the *nullum crimes sine lege principle*.[372] These differing opinions on what legal requirements and elements a formulation of a crime of ecocide should include will be critically analysed in the following.

The mens rea of a crime of ecocide. Much environmental destruction, such as nuclear incidents or oil spillage, which one might consider to amount to an "environmental offence[…]", is committed without any intent.[373] If the ecocide formulation of Falk, inspired by Galston, is applied, where intent is a central element in the commission of ecocidal actions, then such a restrictive formulation of ecocide would not allow for many instances of ecocide. This is also the case with the inclusion of the mens rea element of recklessness in the formulation of a crime of ecocide, as proposed by Gray.[374] Gray however also recognises that a formulation of ecocide with its basis in strict liability would allow for the encouragement of "preventive behaviour, and advance the polluter pays and precautionary principles" by compelling states, corporations and persons to "pre-emptively address dangerous practices".[375]

Admittedly, not all environmental destruction or damage is of such a degree that it could be considered to damage the planet. It is the many acts of environmental destruction and damage, as well as pollution, that together pose a great danger to the planet and its inhabitants.[376] It is largely due to this argument, and the fact that criminal law dislikes strict liability due to lack of a "blameworthy mental state", that many scholars have argued that an element of intent or recklessness would be needed, as strict liability and negligence alone are not sufficient.[377] [378] However, by allowing for a crime of ecocide to contain a requirement of intent, perpetrators are provided with a loophole to state that their actions were not committed with the intent of causing mass destruction to the environment. Corporations, whose actions are mostly not committed with intent of causing environmental destruction or degradation, or whose actions are an accident or recognised necessary "collateral damage in pursuit of other goals", their environmental impact will not be considered to fall under any ecocide definition that contains an element of intent, no matter the severity of the environmental impact.[379] Thus, with the intention of providing the environment maximum protection, a crime of strict liability is the most appropriate. A crime of strict liability also functions as a strong deterrent for, in this case, ecocidal actions. This strong deterring

[372] Greene (n134) 32
[373] Pereira (n156) 195
[374] ibid.
[375] Greene (n134) 32
[376] Rauxloh (n340) 447
[377] ibid.
[378] Greene (n134) 32
[379] ibid. 33

element of a crime of ecocide stems from its "ability […] to create 'certainty of punishment', which is in turn tied to the relative ease with which the prosecution can prove wrongdoing".[380] This is due to the fact that a crime of strict liability allows for the circumvention of what other mens rea crimes require, such as proof demonstrating intent. This in turn allows for the prosecution to more easily increase the likelihood of punishment and in turn increases the deterring effect of the crime of ecocide based on strict liability, thus providing proper environmental protection, as it requires one to respect the environment to the fullest.[381] A crime of strict liability in the case of ecocide is also pivotal as environmental destruction or damage considered to fall under ecocide is often of such a large scale that it has the potential to be largely irreversible. Therefore, integrating into a crime of ecocide the element of strict liability allows for environmental considerations and proper protection, whilst also allowing for the prevention of environmental damage under international law.[382] The incorporation of a crime of ecocide based on strict liability in the Rome Statute will be explored in the ensuing chapter 6.

Threshold of the proposed crime. In order for a crime of ecocide to adequately protect the environment, it should not be restricted to such a high threshold as the war crimes provision of the ICC currently has, or the threshold of Additional Protocol I's Article 35(3). The threshold they demand would namely require any potential ecocidal event to meet the widespread, the long-term as well as the severe damage requirement, which is near to impossible. Thus, this thesis proposes that the proposed crime of ecocide should be linked to a particular threshold whereby the scale of the damage is to be an indicative factor that would allow the case to amount to a crime of ecocide.[383]

Peace- and wartime crime of ecocide. Currently there does not exist an internationally applicable law criminalising (large-scale) damage of the environment and its ecosystems during times of peace.[384] As a result, the proposed crimes of ecocide dissociates accountability for environmental damage from only applying to times of war. A broader scope of a crime of ecocide would also allow for the proposed crime to harmonise itself with the "reality of contemporary environmental challenges".[385]

Corporate liability and environmental damage. As corporations have been identified to be some of the most prominent perpetrators of environmental damage, the proposed crime of ecocide intends to include them into the scope of perpetrators falling under the proposed

[380] Mwanza (n129) 15
[381] ibid. 25
[382] ibid. 26
[383] Pereira (n156) 197, 199
[384] Bronwyn Lay and Damien Short, 'Timely and Necessary: Ecocide Law as Urgent and Emerging' (2015) 28 The Journal of Jurisprudence 432 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jnljur28&div=5&id=&page=> accessed 13 June 2021
[385] Mwanza (n129) 20

crime of ecocide.[386] This means that corporations could also be held strictly liable for environmental damage they cause. Indeed, officials in corporations are also capable of being held accountable for their complicity in environmental damage that amounts to ecocide as defined by this thesis. In extending strict liability not only to natural persons, but also to corporations, the latter would be required to operate under a "duty of care". This would also apply to natural persons. This way, leaders of large corporations will not be able to evade responsibility which is currently the case, as the larger the corporation the more likely no individual member will be overall responsible of the corporation's actions, whilst also being capable of demonstrating knowledge and intent of their actions. Thus, with a law on ecocide focused on strict liability, leaders of corporations will have their actions assessed on the outcome of their business undertaking, and not whether or not they intended for the environmental damage to come about, which they were knowledgeable about.[387] By taking this approach to a law on ecocide, corporations will have to, in their actions, actively prevent environmental damage, instead of having to potentially pay fines for any damage they caused.[388]

Thus, based on the above argumentation, the proposed crime of ecocide of this thesis is as follows: *Ecocide denotes the massive or long-term destruction or damage to one or more ecosystems or the general global commons, on which human and non-human entities are dependent, as caused by any legal entity during times of peace and/or of war or as a result of a naturally occurring incident.* The exact definitions of this provision are analysed in chapter 6, section 6.1..

6. Analysis of the proposed ecocide provision via a SWOT analysis

This chapter is composed of two sub-chapters. The first sub-chapter concerns the analysis of the various elements that make up the proposed definition. The elements will be briefly defined, so that the proposed provision's introduction to the ICC can be efficiently analysed in sub-chapter two. More specifically, sub-chapter two will conduct a SWOT (strength, weaknesses, opportunities and threats) analysis with regards to introducing an expansive ecocide provision, such as this thesis proposes, into the Rome Statute of the ICC. The SWOT analysis is to determine what the comparative strengths, weaknesses, opportunities and threats are of introducing the proposed crime of ecocide into the ICC in order to establish legal accountability for actions which cause mass environmental degradation and essentially amount to the crime of ecocide as proposed by this thesis.

[386] Julette Jowit, World's top firms cause $2.2tn of environmental damage, report estimates' (*The Guardian*, 18 February 2010) <https://www.theguardian.com/environment/2010/feb/18/worlds-top-firms-environmental-damage> accessed 13 June 2021
[387] Greene (n134) 27
[388] ibid. 28

6.1. The analysis of the legal elements of a crime of ecocide

In chapter 5, the thesis proposed its own formulation of a crime of ecocide. In the following, this formulation will be taken apart to define the various elements that make up the provision. The thesis's proposed formulation of a crime of ecocide is as follows:

Ecocide denotes the massive or long-term destruction or damage to one or more ecosystems or the general global commons, on which human and non-human entities are dependent, as caused by any legal entity during times of peace and/or of war or as a result of a naturally occurring incident.

Legal entities of the proposed crime of ecocide. The proposed crime of ecocide states that it has jurisdiction over any legal entity, which is to mean natural persons and legal persons. Natural persons shall denote, as inspired by Falk, "[c]onstitutionally responsible rulers, public officials, military commanders, or private individuals".[389] Essentially, a natural person here is any person that is in a position of responsibility, either in an organisation or simply in a position of command that would make them superiorly responsible for actions committed under their authority and superiority. Government officials are to also fall under this category, assuming they are in a position of authority and of superior responsibility. Natural persons are to be held "individually criminally responsible" for any ecocidal actions.[390] As regards legal persons, the term shall refer to (non-governmental) organisations, corporations or companies, businesses, governments or any other entity constituting a legal person. States themselves will be considered to be legal persons when their sovereign or an agent of the state is indirectly or directly the operator or proprietor or director of an entity that engaged in actions amounting to ecocide.[391] A given case can involve both natural and legal persons simultaneously. Recognising both aids the prosecution of the case as the defendant may not proclaim nation state or corporate immunity, which leads to the dismissal of charges against them, thus eliminating their shield that has previously protected states and corporations from facing criminal liability.[392] This is particularly relevant, as states and especially corporations are the leading causes for ecocidal incidents.

T*he mens rea of the proposed crime of ecocide*. As the previous chapter indicates, the thesis's proposed crime of ecocide is based on strict liability. However, if knowledge or intent is present, then the relevant court should indeed consider them in the prosecution of the case. Issue arising with regards to the implementation of such a crime at the ICC's Rome Statute will be discussed below.

Ecosystems. The ecocide provision states that damage or destruction must occur to 'one or more ecosystems […] on which human and non-human entities are dependant'. In order for this to be applied accurately, the following shall define what an ecosystem is to entail in the legal sense and how to assess whether or not damage or destruction to the ecosystem is of

[389] Falk (n102) 93

[390] Gwynn MacCarrick, 'Amicus curiae to the International Monsanto Tribunal on the question of Ecocide' (2016) 67-69 <https://www.researchgate.net/publication/342467040_Amicus_curiae_to_the_International_Monsanto_Tribunal_on_the_question_of_Ecocide> accessed 13 June 2021

[391] ibid. 68

[392] ibid.

such a scale that it no longer allows for entities inhabiting that particular area to depend on the ecosystems.

This thesis will adopt the scientific definition of ecosystem, which is "a biological community of interdependent plants, animals and microorganisms that occur in a specific place associated with particular soils, temperatures and disturbance patterns and the physical and chemical factors that make up a community's abiotic, non-living environment"[393]. Based on this definition of ecosystems, the proposed provision on ecocide is to be applied.

Whether or not an ecosystem still operates properly, so that human and non-human entities depend on it, will be assessed based on the "Millennium Ecosystem Assessment" that created four distinct groups defining dependency that include, but are not limited to, "provisioning, regulating, cultural, and supporting services".[394] Provisioning ecosystem functions relate to the provisioning of goods such as fibre, medicinal herbs, food, or necessities such as water or energy, without which an ecosystem is not inhabitable.[395] Regulating ecosystem functions refers to regulation of the ecosystem and benefits derived from it, such as fresh air or water, or disease transmission, without which inhabitants of ecosystems would likely not survive, or at least have their health and well-being severely impacted.[396] Cultural ecosystem services denote, for instance, sacred and cultural environmental habitats or the general flora of a particular region. Environmental damage or destruction to that ecosystem can severely impair the cultural function of ecosystems.[397] Lastly, supporting ecosystem services are integral for the abovementioned three ecosystem services. Thus, no direct link exists between this function and human and non-human entities, but without supporting services the other three ecosystems would not be able to sustain themselves, thus proving this service to be integral to ecosystem functioning.[398]

Any massive or long-term damage or destruction to an ecosystem of such severity that human and non-human entities can no longer depend on it is not directly evident via the breakdown of an ecosystem function. It becomes evident if the ecosystem and its services can no longer support its inhabitants, through one or more of its services. This becomes particularly difficult when assessing cultural ecosystem services. Thus, cases would have to be approached by assessing each individual action of the perpetrator and its impact on an ecosystem in conjunction with the thresholds of the proposed crimes of ecocide. Ultimately, the thesis recognises that this element requires expert analysis, and not simply legal analysis. This thesis advises the usage of, for instance, "post-normal science" in order to navigate these difficult and time-sensitive questions.[399]

[393] ibid. 77
[394] 'Ecosystems and Human Well-Being' in Millennium Ecosystem Assessment (ed.), *Ecosystems and Human Well-being, A Framework for Assessment* (MA and Island Press, 2003) 71 <https://millenniumassessment.org/documents/document.301.aspx.pdf> accessed 13 June 2021
[395] ibid. 76
[396] ibid. 77
[397] ibid.
[398] ibid.
[399] MacCarrick (n390) 81

The general global commons. The inclusion of the global commons is particularly relevant for an all-encompassing provision on ecocide. The global commons are "guided by the principle of the common heritage of mankind".[400] While this thesis recognises that there are many different definitions and perspectives as to what should constitute global commons, this thesis has chosen to define the global commons in the context of the proposed crime of ecocide as follows: The global commons refers to "natural areas to which no single nation state has exclusive rights, as legal ownership is precluded due to their nature or an international agreement", the latter composed of many gaps that allows for many geographical areas to remain uncovered and for harmful human undertakings in the global commons, such as mining, waste disposal or deep-sea fishing.[401] [402] [403]In international law, the global commons consists of five components: "high seas, the deeps-sea bed, the atmosphere, Antarctica, and Outer Space"[404] The global commons has also been expanded to include "resources of interest or value to the welfare of the community of nations", which refers to, for instance, biodiversity or the "tropical rain forests".[405] Addressing the global commons in an all-encompassing definition of ecocide is pivotal, as the global commons are just as susceptible to environmental damage and destruction that can amount to ecocide as ecosystems. As the global commons contains many resources, some of which are hard to reach, the development of technology and science has allowed for increased activity in the global commons, which is not regulated by any laws or policies, leaving the global commons likely to face severe environmental degradation.[406] [407] As is the case with ecosystems, damage and destruction to the global commons requires expert analysis, and not simply legal analysis. Therefore, this thesis here too proposes the usage of "post-normal science".[408]

Ecocidal actions and failure to act. Acting in a manner that brings about ecocide, or failing to act in a manner that may prevent or pre-empt ecocide is in breach of this thesis's proposed ecocide provision. Thus, legal entities, as defined above, can be held liable for positive actions that violate the ecocide provision and constitute an act amounting to ecocide. Legal entities can be also held strictly liable for omission, meaning the failure to act in a manner that prevents the bringing about of ecocide, either through naturally occurring causes or through human agency, with the former only applicable to legal persons as an act or omission. Holding perpetrators liable for omissive actions has already been recognised at the ICTY in the

[400] 'UN System Task Team on the Post-2015 UN Development Agenda – Global governance and governance of the global commons in the global partnership for development beyond 2015' (2013) 5 <https://www.un.org/en/development/desa/policy/untaskteam_undf/thinkpieces/24_thinkpiece_global_governance.pdf> accessed 13 June 2021
[401] 'What is Ecocide?' (End Ecocide) <https://www.endecocide.org/en/what-is-ecocide/> accessed 9 May 2021
[402] 'UN System Task Team on the Post-2015 UN Development Agenda – Global governance and governance of the global commons in the global partnership for development beyond 2015' (n400) 6-7
[403] Meher Nigar, 'Environmental liability and global commons: a critical study' (2018) 60(2) International Journal of Law and Management 436 <https://doi.org/10.1108/IJLMA-01-2017-0002> accessed 13 June 2021
[404] 'Law and Governance of the Global Commons Incubator' (University of Strathclyde) <https://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/ourwork/research/labsincubators/lawandgovernanceoftheglobalcommonsincubator/> accessed 9 May 2021
[405] 'UN System Task Team on the Post-2015 UN Development Agenda – Global governance and governance of the global commons in the global partnership for development beyond 2015' (n400) 5-6
[406] Nigar (n403) 435
[407] 'UN System Task Team on the Post-2015 UN Development Agenda – Global governance and governance of the global commons in the global partnership for development beyond 2015' (n400) 6
[408] MacCarrick (n390) 81

Prosecutor v. Kvočka case, where the accused was deemed to be of sufficiently high rank that he could have halted the crimes and abuses committed by lower-ranking officials over which Kvočka had sufficient authority.[409] [410]

In order for a perpetrator's actions, or lack thereof, to amount to a violation of the crime of ecocide, there must be causality in order for liability to be determined. In other words, one's (lack of) actions that the perpetrator has been charged with must be linked directly to the environmental damage or destruction. As the proposed ecocide provision also aims to pre-empt or prevent environmental damage, the concept must also be extended to "prohibit acts or omissions that may be expected to cause damage, [thus] introducing a forward-looking causal liability". This refers to the principle of precaution that has already been indirectly integrated in the Rome Statute under Article 8 on war crimes, where it states that "intentionally launching an attack in the knowledge that such an attack will cause" a particular damage, thus referring to a "forward-looking causal liability".[411] Gray refers to this concept in his writings, stating that "the precautionary principle provides that, where there are threats of serious or irreversible environmental damage, lack of scientific certainty should not mean the postponing of measures to prevent environmental degradation". Instead, the "precautionary principle should […] make it possible to argue that [liability] can arise form knowledge of failure to realise, where it was reasonable to do so, that the act or omission" would result in, in this case, environmental damage or destruction.[412] [413]

Massive or long-term destruction or damage. The proposed provision on ecocide allows for environmental damage or destruction to either be massive or long-term, thus not restricting potential ecocidal actions to having to meet both criteria. Difficulty arises when defining what massive and long-term entail. This thesis has chosen to rely on the definitions as provided for in ENMOD.[414] Thus, massive destruction or damage is to refer to widespread as "encompassing an area on the scale of several hundred square kilometres". The term long-term as used in the proposed ecocide provision is to refer to long-term/-lasting as "lasting for a period of months, or approximately a season".[415] Admittedly, ENMOD is not to be used to apply to other international documents, however, this thesis hopes that ENMOD would make the necessary exception and allow for a crime of ecocide to be based on the aforementioned criteria's definition. As the Rome Statute also contains mention of "widespread, long term and severe", it would be advisable for the ICC to define these terms applicable within the scope of the Rome Statute.[416]

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[409] ibid. 67

[410] Case No.: IT-98-30/1-A (28 February 2005) 65 <https://www.refworld.org/pdfid/48ad2b772.pdf> accessed 13 June 2021

[411] MacCarrick (n390) 74

[412] Gray (n114) 218 footnote 4 and 219

[413] MacCarrick (n390) 74

[414] International Committee of the Red Cross (ICRC), *Protocols Additional to the Geneva Conventions of 12 August* 1949 1 March 1994, Article 35(3) <https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf> accessed 13 June 2021

[415] ICRC, *Convention on the prohibition of military or any hostile use of environmental modification techniques*, 10 December 1967 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=A951B510E9491F56C12563CD0051FC40> accessed 13 June 2021

[416] Rome Statute of the International Criminal Court (n16) Article 8(2)(b)(iv)

Human and non-human entities depending on one or more ecosystems or the general global commons. The third criterion of ENMOD addresses severity. While the provision does not directly address severity, it contains an element that indicates severity. Severity is defined as "involving serious or significant disruption or harm to human life, natural and economic resources or other assets".[417] This is to apply to the proposed ecocide's definition of 'massive or long-term destruction or damage to the general global commons or to one or more ecosystems on which human and non-human entities' *are dependent.* In other words, the severity of the ecocidal action becomes evident in the fact that destruction or damage has occurred to the general global commons or to one or more ecosystems on which humans and non-humans alike are dependent, thus harming or disrupting "life, natural and economic resources or other assets".[418] Thus, whether environmental damage or destruction amounts to ecocide is decided based on the above thresholds, with the longevity or the massiveness, and severity of the environmental damage or destruction being the indicative factors that would allow a case to amount to a violation of a crime of ecocide, and ultimately be considered at the ICC.

As regards the element of 'human and non-human entities', the proposed ecocide provision recognises that environmental damage or destruction is not merely problematic for the environment and its ecosystems, but also for inhabitants of that particular are. Inhabitants is to be understood as denoting both 'human and non-human entities'. This is particularly important as international law largely "adheres to the reductionist problem of environmental law", meaning that environmental provisions are developed with the intent of protecting parts of the environment and its ecosystems, but not the environment as a whole. This indicates that the law has previously failed to see the "interconnectedness that characterises ecosystems, of which humans are only a part". In other words, international law does not contain "an ecosystems approach of international law", which the proposed crime of ecocide intends to counter by providing protection to all of the environment, and not simply parts of it, and holding perpetrators criminally liable for its damage or destruction.[419]

Duty of care. The proposed ecocide provision is to operate with a duty of care to pre-empt and prevent environmental destruction or damage that could amount to ecocide, regardless of whether or not the environmental damage or destruction occurred as a result of human agency or as a naturally occurring incident. Thus, by integrating a duty of care in the proposed ecocide convention, nations, corporations, as well as individuals "will be legally bound to act before mass damage, destruction of ecosystem collapse occurs".[420] Particularly nations, in having a duty of care imposed on them, are required to assist other nations that require aid to combat or prevent environmental damage or destruction to the ecosystem or the global commons, either in the form of a (potential) natural occurrence or as a (potential) result of human involvement. Corporations owe a duty of care to any ecocidal incident occurring as a (potential) result of human agency.[421] In their actions, corporations are to act pre-emptively and preventatively, so as to not bring about ecocide. Currently, such a duty of care does not

[417] ICRC, *Convention on the prohibition of military or any hostile use of environmental modification techniques* (n415)
[418] ibid.
[419] Mwanza (n129) 22
[420] Higgins, Short and South (n3) 257
[421] ibid.

exist. By creating a legal duty of care (to assist) as part of the proposed crime of ecocide, nation states that cannot manage an environmental crisis on their own are guaranteed to receive assistance from other nations who are required to act pre-emptively.[422] This "legal duty of care" is to also be imposed on "persons in positions of superior responsibility".[423] This includes not only publicly operating persons, but also privately operating persons. Thus, officials in corporations or firms with a position that qualifies them as being superiorly responsible owe a duty of care to not commit, in their actions, any ecocide, meaning they must operate preventatively or pre-emptively. This also applies to officials of governments, such heads of state, or any other position considered to provide them with superior responsibility. Institutions financing actions amounting to ecocide are also to be considered to operate under a duty of care, with their officials that are in a position of superior responsibility to prevent the financing of the crime of ecocide.[424]

6.2. SWOT analysis

In the following section, this thesis will conduct a SWOT (strengths, weaknesses, opportunities and threats) analysis with regards to the introduction of the proposed ecocide provision at the International Criminal Court. This is to determine what the comparative strengths, weaknesses, opportunities and threats of using ecocide in the context of the ICC are to establish legal accountability for actions which cause mass environmental degradation. First, however, the various categories that make up the SWOT analysis will be defined.

The category 'strengths' is to refer to strengths of the ICC with regards to its ability to properly and adequately integrate into its functioning the proposed crime of ecocide. Essentially, this category is to refer to internally originating attributes of the ICC that are helpful in integrating the crime of ecocide into the ICC and its Rome Statute and in achieving the intended purpose of the proposed ecocide provision.

The category 'weaknesses' is to refer to internally originating aspects that limit an introduction of the proposed crime of ecocide, or aspects that the ICC and the Rome Statute lack, so that an introduction might not prove to be fruitful or even possible. In other words, the internally originating (or lack of) attributes of the ICC and its Rome Statute are harmful for the integrating and the achieving of the aim of the proposed crime of ecocide.

The category 'opportunities' refers to potential opportunities that the ICC is presented with when introducing the external attribute that is the proposed crime of ecocide into the ICC.

Finally, the category 'threats' refers to threats to the ICC and the Rome Statute as a whole from externally originating attributes that result from the inclusion of a crime of ecocide into the ICC, and prove themselves to be a harmful to the objective of the proposed crime of ecocide and the ICC.

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[422] ibid. 263

[423] ibid. 264

[424] Polly Higgins, *Eradicating Ecocide : Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws to Eradicate* Ecocide (Shepheard-Walwyn, 2016) 133 <https://ebookcentral.proquest.com/lib/uvtilburg-ebooks/detail.action?docID=4306703> accessed 13 June 2021

Strengths.

International criminal law versus international environmental law. As the thesis has evidenced, there exists a strong need for the creation of an international crime of ecocide. The advantage, or strength, of creating an ecocide provision that operates in the realm of international criminal law as opposed to international environmental law is as follows: International environmental law prefers to operate under a soft law approach, or even customary international law approach. International environmental law, based on scientific development and findings, must be flexible and thus requires negotiation and the cooperation of countries to operate in accordance with the goals of international environmental law. International criminal law prefers to operate under a hard law approach, denoting that there must be firmly established principles and provisions that compel compliance via an enforcement mechanism and an imprisonment mechanism that should function to punish perpetrators violating international criminal law.[425] Creating a law of ecocide that operates in the realm of international environmental law would not allow for proper protection of the environment, as international environmental law is often plagued by vagueness, lack of enforcement measures and a lack of deterring character.[426] International criminal law, under which the ICC operates, could provide adequate protection to the environment as international criminal law is to, inter alia, deter perpetrators from, in this case, committing environmental destruction. By creating a crime of ecocide under international criminal law, legal entities, as defined above, will no longer be able to simply ignore the soft law provision as was capable under international environmental law, or choose to bear the "costs of civilian liabilities as a cost of doing business".[427] This is not to say that civil liability costs in the form of fines are not effective, they are, however only if their cost outweighs the benefits of the legal entity choosing to still carry out its actions. A hard law ecocide provision could however be more suitable for such cases. This is due to the fact that environmental destruction or damage is typically a result of a cost-benefit analysis in favour of carrying out the action and bearing the cost. By making ecocide an international crime, capable of criminalising perpetrators, the deterring effect of international criminal law might contribute to legal entities incorporating into their cost-benefit analysis environmental considerations, ultimately resulting in legal entities operating in a more environmentally friendly and conscious manner.[428] This is due to the fact that deterrence at the ICC operates under the assumption that the perpetrator, here a legal entity as defined above, is a rational actor that carries out its action based on a cost-benefit analysis.[429] This strength of including the proposed ecocide provision as a core crime at the ICC is purely based on a theoretical approach to international criminal law, under which the ICC operates. Whether or not the ICC is truly capable of deterring legal entities from committing ecocide can only be assessed after the inclusion of a crime of ecocide as the fifth crime against peace of the ICC.

[425] Greene (n134) 30
[426] ibid.
[427] ibid. 31
[428] ibid.
[429] Stefano Marinelli, 'The Approach to Deterrence in the Practice of the International Criminal Court' (*International Law Blog,* 6 April 2017) <https://internationallaw.blog/2017/04/06/the-approach-to-deterrence-in-the-practice-of-the-international-criminal-court/> accessed 14 May 2021

Regarding corporate liability under international criminal law, a 1990 UNGA stated that particularly severe environmental degradation is to fall under the scope of international criminal law, with the latter functioning as "*ultimo ratio* to sanction gross environmental damage and" to end to any impunity committed by (multinational) corporations. Thus, the inherently preventative characteristic of international environmental law is to compliment the punitive elements of international criminal law to hold corporations liable for their actions.[430] However, international law does not categorise corporations as having any "legal obligations under international criminal law", largely due to corporations' lack of morality, for they are "legal fictions", and not natural persons. This, however, is contested, because corporations are playing greater roles in society's functioning that it is pivotal for corporations to recognise their "social responsibility", achievable through criminal law, as it would allow for corporations to face the "strongest condemnation of the international community" if they choose to ignore/disregard their "social responsibility". This is particularly effective for multinational corporations, whose condemnation would allow for its subsidiaries to have to realign their values and objectives with their "social responsibility".[431]

Weaknesses.

Intent versus strict liability. One of the weaknesses of introducing the proposed crime of ecocide at the ICC is found in the mental element of the Rome Statute. The Rome Statute dictates under Article 30 titled "[m]ental element", that "unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge".[432] This conflicts with the proposed definition of ecocide's basis in strict liability. The Rome Statute namely demands that intent must be found in, for one, the conduct of the person, as is evident in the statement that intent denotes the "person means to engage in conduct", and for the other, in the consequence of the conduct, as is evident in the statement that the "person means to cause that consequence or is aware that it will occur in the ordinary course of events".[433] Ecocidal actions however do not always occur with intent, many events were accidents. If ecocide were to be included in the Rome Statute, it would have to either be amended to be in line with the Rome Statute's Article 30, or the Rome Statute would have to be amended and allow for the proposed crime of ecocide to fall under the "unless otherwise provided" exception.[434] Amending the Rome Statute will be addressed further below as a threat. If the ecocide law would be amended to be in line with the Rome Statute requirements, there is the risk that the threshold will be too difficult to meet, meaning that no crime that would amount to ecocide under the proposed definition can actually be prosecuted at the ICC.[435] This was also the case with the crime of genocide, whose threshold was too high, that many cases that ended up at the ICC resulted in the perpetrator not being

[430] Rauxloh (n340) 444
[431] ibid. 444-445
[432] Rome Statute of the International Criminal Court (n16) Article 30(1)
[433] ibid. Article 30(2)(a)(b)
[434] Mwanza (n129) 25
[435] Alessandra Mistura, 'Is there Space for Environmental Crimes under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritisation on the Current Legal Framework' (2018) 43(1) Columbia Journal of Environmental Law 224 <https://doi.org/10.7916/cjel.v43i1.3740> accessed 13 June 2021

guilty because no case could meet the threshold. If a crime of ecocide is to face the same fate, then it will be highly unlikely that cases which one would otherwise consider to be ecocide, will result in a guilty reading, because it is nearly impossible to prove that one deliberately intended to massively destruct the environment.[436]

Jurisdiction and sanctions of the Rome Statute. Chapter 2, section 2.3. presented the ICC's jurisdiction as codified in the Rome Statute. Article 12 of the Rome Statute on "[p]reconditions to the exercise of jurisdiction" identified that states must be party to the Rome Statute in order for the ICC to have jurisdiction over its core crimes as set out in Article 5.[437] Indeed, the ICC can also extend its jurisdiction to states not party to the Rome Statute, assuming that they accept the court's jurisdiction.[438] The ICC also has the power to infringe on a state's sovereignty, however only if the relevant case has been referred to the ICC via the United Nation's Security Council, as outlined in Chapter VII of the UN Charter.[439] While these avenues with which the ICC can exert jurisdiction may seem like the ICC could potentially hear any case, exerting jurisdiction over countries other than those that are part of the Rome Statute is difficult. The US, India, China and Russia are some of the most prominent countries that are not party to the Rome Statute, and they are also some of the most prominent polluter countries.[440] China particularly is the "largest emitter of carbon-dioxide in the world" with the US coming in second, followed by India and Russia.[441] With these countries not being part of the Rome Statute, the likelihood that they will be held accountable for ecocidal actions at the ICC are slim to none. This also renders the inclusion of ecocide as the fifth crime against peace at the ICC largely ineffective if the countries with the largest environmental impact cannot be held criminally liable for their actions.[442] Furthermore, the option of addressing countries not party to the Rome Statute via hoping the relevant countries would accept the jurisdiction is also unlikely to be fruitful, as no country would willingly accept ICC jurisdiction only to be held criminally liable for its environmental actions. As regards the mechanism to refer a case to the ICC via the United Nations Security Council, this avenue for the ICC to exert jurisdiction over its fifth crime against peace, ecocide, is highly unlikely to happen, for the following reason: The United Nations Security Council is composed of five permanent members, them being China, Russia, US, France and the United Kingdom. China, Russia and the US are all not members of the Rome Statute. In order for their environmental destruction and damage to be referred to the ICC as per Rome Statute Article 13(b), the Security Council would have to refer the countries themselves. The likelihood of Security Council members referring themselves to the ICC, or agreeing to have themselves referred, or them referring a country in which they are committing environmental damage and destruction, such as with the corporations of prominent polluter states largely operating

[436] Mélissa Godin, 'Lawyers Are Working to Put 'Ecocide' on Par with War Crimes. Could an International Law Hold Major Polluters to Account?' (*Time, 19 February 2021)* <https://time.com/5940759/ecocide-law-environment-destruction-icc/> accessed 24 May 2021
[437] Rome Statute of the International Criminal Court (n16) Article 12
[438] ibid. 12(3)
[439] ibid. 13(b)
[440] 'Who are the world's biggest polluters?' (*Reuters*, 2 June 2017) <https://www.reuters.com/news/picture/who-are-the-worlds-biggest-polluters-idUSRTXRKSI> accessed 15 May 2021
[441] ibid.
[442] Greene (n134) 41

in foreign territory[443], is highly unlikely, particularly as a United Nations Security Council referral has to be unanimous amongst the five permanent Security Council members, and all of the permanent members possess a veto.[444] [445] This indicates that the ICC, particularly with regards to its Security Council referral mechanism, is heavily influenced by political power and support, and can only function if political power and support exists.
In other words, the ICC prosecutor is only likely to address cases if the political support exists, and the likelihood of their success is high and can have an impact on the situation at hand.[446] Additionally, the ICC does not have jurisdiction over the global commons, as the global commons do not belong to any one nation, but are to be shared by all states.[447] Indeed, there are conventions that address the regulation of the particular global commons, however, they are not sufficient to adequately protect the environment from state and corporate interference, as previously stated.[448] [449] Thus, the ICC would need to expand its jurisdiction to include the global commons. This is no easy feat, as this thesis has thus far demonstrated, as the jurisdiction of the ICC contains several limitations that would not allow it to exert its jurisdiction to the global commons, thus excluding a pivotal part of earth's natural environment.

Chapter 2, section 2.3. also outlines the ICC's personal jurisdiction, as codified in Article 25 of the Rome Statute. Briefly, the article indicates in paragraph 1 that the ICC has jurisdiction over "natural persons", which denotes individuals.[450] The concerned person will then be held "individually responsible".[451] This means that if the ICC were to prosecute a case with environmental destruction, then an individual and not the corporation or the state will be prosecuted, as the ICC does not have any jurisdiction over legal persons. Including a crime of ecocide as the fifth crime against peace at the ICC under these circumstances would not allow for the proposed ecocide provision to have its intended effect and prosecute legal entities, meaning natural and legal persons. This is particularly problematic as corporations are the largest cause for environmental destruction and damage during peace time.[452] The relationship between corporations and the ICC and the Rome Statute's superior responsibility doctrine will be further discussed below.
Indeed, the Rome Statute does allow, in theory, for individual prosecution of CEOs of corporations or directors, as chapter 2 identifies. Rome Statute Article 28(b) refers to this, stating that "a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result

[443] Peter F. Doran and others, 'Criminalising 'Ecocide' at the International Criminal Court' (April 16, 2021) 7 <http://dx.doi.org/10.2139/ssrn.3827803> accessed 13 June 2021
[444] Res Schuerch, 'The Security Council Referral Power Under Article 13(b) Rome Statute' in The International Criminal Court at the Mercy of Powerful States. International Criminal Justice Series, vol 13. T.M.C. Asser Press, The Hague, 211 <https://link.springer.com/content/pdf/10.1007%2F978-94-6265-192-0_10.pdf> accessed 13 June 2021
[445] Patel (n205) 185
[446] ibid.
[447] 'UN System Task Team on the Post-2015 UN Development Agenda – Global governance and governance of the global commons in the global partnership for development beyond 2015' (n400) 5
[448] Nigar (n403) 435
[449] 'UN System Task Team on the Post-2015 UN Development Agenda – Global governance and governance of the global commons in the global partnership for development beyond 2015' (n400) 5-6
[450] Rome Statute of the International Criminal Court (n16) Article 25(1)
[451] ibid. 25(2)
[452] Greene (n134) 41

of his or her failure to exercise control properly over such subordinates, where"[453] the superior had information on the crime that was or knew about it, and it was "within the effective responsibility and control of the superior"[454], and the "superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution"[455]. While this may seem promising, applying this article to directors or CEOs of corporations is out of the realm of the intention of this article that is supposed to focus on "[r]esponsibility of commanders and other superiors"[456], as the title of the article suggests.[457] This is further supported by the fact that Article 28(a) focuses on "military commander[s]".[458] The language of this article has its basis in the US v. Yamashita Supreme Court case, on the question "whether a General can be held criminally responsible for war crimes committed by his subordinates", for which a majority concluded that "an army commander had a duty to take appropriate measures in his power to control his subordinate troops and prevent them from committing war crimes".[459] Thus, theoretically, a CEO or director can be held criminally liable with the introduction of a crime of ecocide under Article 28, however as the aforementioned evidences, that was not the intention of this article. If anything, the Supreme Court case further strengthens the anthropocentric focus found throughout the entire Rome Statute. Thus, even with the inclusion of the proposed crime of ecocide as the fifth crime against peace of the ICC, recognised under Article 5 of the Rome Statute, the Rome Statute's articles and its rules of procedure would remain customised to the original core crimes of the ICC, thus making it difficult to apply them in ecocidal cases.[460] Additionally, even if the proposed crime of ecocide were amended to suit the requirement of the Rome Statute of individual criminal responsibility, its application and subsequent ability to offer proper environmental protection, would be limited. Furthermore, in order to provide proper environmental protection, it is pivotal for the proposed crime of ecocide to operate under state liability and corporate liability, both of which are not possible under the current Rome Statute. The inclusion of state liability is particularly relevant, as states are responsible for "land grabbing and other environmental crimes, allowing and sometimes even helping private corporations displace populations or make living conditions unbearable".[461] Indeed, this thesis does recognise the difficulties in prosecuting states under public international law, particularly due to states being sovereign, however, proper environmental protection would require states as one of the biggest perpetrators of environmental degradation to also be held criminally liable.[462] The issue with corporate liability will be expanded on further below. For now, it is important to note that this thesis proposes that, just like states, corporations as a whole are to face the possibility of liability for their environmentally damaging actions that amount to ecocide. Prosecuting individuals is simply not enough, for a corporation can employ a new CEO or hire new staff if one of their employees/leaders is prosecuted for ecocide. A corporation that has been charged with ecocide at the ICC cannot easily, if at all,

[453] Rome Statue of the International Criminal Court (n16) Article 28(b)
[454] ibid. Article 28(b)(ii)
[455] ibid. Article 28(b)(iii)
[456] ibid. Article 28
[457] Greene (n134) 41
[458] Rome Statute of the International Criminal Court (n16) Article 28(a)
[459] Greene (n134) 41-42
[460] ibid. 42
[461] Patel (n205) 185
[462] ibid.

rebrand and distance itself from its charges, thus providing more effective protection of the environment if corporations as a whole are to be held legally accountable.[463]

With regards to the ICC's temporal jurisdiction, Article 11 of the Rome Statute, titled "[j]urisdiction ratione temporis" states in paragraph 1 that the ICC only has jurisdiction with regards to its core crimes when the relevant crime has been committed after the Rome Statute has entered into force. As the Rome Statute entered into force on the 1st of July 2002, any crime committed before that date may not be prosecuted at the ICC. This thesis recognises the importance of maintaining the principle of *nulla poena sine lege praevia*, which prohibits prosecutions taking place ex post facto.[464] However, this can be problematic, as environmental degradation is not always immediately evident. At times it requires several decades before the environmental impact on ecosystems and the global commons can be felt. If the inclusion of ecocide as a fifth crime against peace at the ICC were to take place, then the likelihood of events spanning decades after the commission of the act that took place before 2002 or before a given state acceded and ratified the Rome Statute, thus entering into force for that particular country, is to be addressed at the ICC is slim to none. This results in the ICC only being able to address, at most, single environmentally destructive or damaging events, committed after 2002 or after the relevant state acceded and ratified the Rome Statute. Indeed, the Rome Statute recognises that states may also decide that despite acceding to the Rome Statute after it has entered into force, the ICC Rome Statute can apply for crimes committed earlier than the acceding date.[465] This is particularly relevant for the crime of ecocide, as environmental impact on ecosystems and the global commons are not always immediately evident. However, the likelihood of states accepting ICC jurisdiction for their (supporting of) ecocidal actions is small, and should not be relied on as a method with which the ICC could receive jurisdiction if the concept of ecocide is to be introduced at the ICC.

Ultimately, several jurisdictional limitations exist that would not allow for the proposed crime of ecocide to be integrated as is into the existing Rome Statute, and still have its intended effect of proper environmental protection. These jurisdictional limitations are further spurred on by the political aspect of sanctioning and the ICC's focus not being "pre-determined".[466] International sanctioning in an effort to combat environmental degradation should not function in a similar fashion of how domestic law operates when it punishes particular actions or behaviour. In other words, when addressing environmental crimes amounting to ecocide, there should be an independent body that dictates how the prosecution of the case is to take place, free from governmental intervention. This is not the case with the ICC, which is heavily influenced by powerful states, as the above analysis showcases. States thus operate and sanction behaviour depending on whether or not it benefits them, thus posing great difficulty in holding perpetrators, which are, inter alia, states, accountable. This issue of the ICC cannot (easily) be overcome, and an introduction of the proposed crime of ecocide at the ICC will not

[463] Peter F. Doran and others (n443) 7
[464] Stéphane Bourgon, 'Jurisdiction Ratione Temporis' in Antonio Cassese and others (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (I(3) Oxford University Press 2002) <https://opil.ouplaw.com/view/10.1093/law/9780198298625.001.0001/law-9780199243129-chapter-26> accessed 13 June 2021
[465] Rome Statute of the International Criminal Court (n16) Article 11
[466] Lambert (n17) 715

help matters further. This issue also applies to the prosecution of corporations and corporate activity on foreign territory, under the proposed crime of ecocide, with states not wanting to jeopardise their business dealings abroad, so their sanctioning and support for environmental prosecution is influenced by political will.[467]

Corporations and ICC jurisdiction. The following will analyse the introduction of corporate liability into the ICC's Rome Statute, based on this thesis's proposed crime of ecocide. As this thesis has already demonstrated, the ICC "does not recognise the concept of criminal liability of corporations for international crimes". In order for corporations to be directly liable for their actions, an amendment would need to be made to Article 25 of the Rome Statute to allow the ICC to exert jurisdiction over corporations.[468] Indeed, one could argue that the Office of the Prosecutor's policy paper from 2016 could influence the potential "prosecution of business officials", which in turn would constitute an immense improvement with regards to having corporations be addressed at the ICC. This way, if corporations conduct "aiding and abetting", they could be considered to be a component of a new framework that would allow for corporate staff to be held accountable for having acted in violation of international criminal law. However, while this may sound promising, it would still not allow for corporations themselves to be held criminally liable, but rather officers from the corporations. Furthermore, even if the ICC were to expand its jurisdiction to include corporate accountability, a strong barrier would remain: Particularly multi-national corporations, that operate "in the environmental and natural resources sectors" are protected by a type of "corporate veil" that functions as a shield to protect corporations from being prosecuted for their actions.[469] Such a veil or shield becomes even stronger when considering the complexity of "legal personality between parent companies and subsidiaries recognised in" a multitude of domestic legal systems that limit efficacy of existing "civil remedies" that the local society can make use of against such large corporations, and for the restoration the environment.[470] This limitation becomes even more prominent in the Rome Statute, which has failed to adequately codify effective penalties and effective remedies that would otherwise be adequate on a domestic level. This is particularly astonishing given the ICC's uniqueness with regards to its reparations and restorations mechanism, as outlined below.[471] Thus, while there is a dire need to recognise corporate criminal liability with regards to the environmental damage large multi-national corporations are causing without any or very little legal repercussions on their part, it is questionable whether or not the ICC is the appropriate body. This sentiment is further supported by the fact that not all domestic legal systems are unified in their recognition of corporate criminal liability. In fact, there is much divergence between various legal systems as to whether or not corporations can be held criminally liable. This in turn makes it far more difficult for negotiations to include in the Rome Statute the recognition of corporate criminal liability to be fruitful and result in a unanimous decision to expand the Rome Statute.[472] Further issue is posed with the principle of complementarity of the ICC. In the drafting of the Rome Statute, there was discussion surrounding whether or not legal

[467] Patel (n205) 186
[468] Pereira (n156) 218
[469] ibid. 219
[470] ibid. 219-220
[471] ibid. 220
[472] ibid. 221

entities, such as corporations, are to be included in the jurisdictional and prosecutorial capacity of the Rome Statute. This concept was, however, because of its importance, reluctantly discarded, as it would violate the complementarity of the ICC. The functioning of the ICC as a court of last resort is hindered if legal entities are recognised in the Rome Statute, because many domestic jurisdictions do not recognise legal entities. Thus, if the state in its internal functioning does not recognise legal entities, then the principle of complementarity cannot be fulfilled, as the ICC, according to the principle, can only prosecute a case if the relevant state decides not to or does not have the capacity to prosecute. Not recognising legal entities does not amount to not having the necessary capacity.[473] [474] Thus, if indeed corporate criminal liability is to be introduced into the Rome Statute, then it would not only require significant amendment to the relevant provisions, particularly Article 25 on "[i]ndividual criminal responsibility" and Article 17 on "[i]ssues of admissibility", but also effort to overcome the potential violation of the principle of complementarity.

*Lack of enforcement mechanism*s. The ICC is heavily dependent on cooperation by member states party to the Rome Statute, and any state whose national is to be investigated and/or prosecuted. The ICC namely lacks any "police force or enforcement body" in order to see arrests through, to transfer the arrested person to the detention facility of the ICC in the Hague, to freeze any assets of the wanted/arrested individual and to enforce any ICC sentencing.[475] The ICC has also faced difficulty with regards to state's lack of cooperation on evidence collection, which is one of the leading causes for why the ICC operates slowly, and oftentimes why only a handful of people have been convicted out of several dozen individuals that have had cases brought against them.[476] Indeed, the Rome Statute does not contain any provision that requires states to cooperate with the ICC, meaning if states choose to not cooperate, there are no "repercussions for the offending" state.[477] The ICC can, however, "refer the matter to the Assembly of States parties, or where the Security Council referred the matter to the Court, to the Security Council".[478] If a crime of ecocide, as proposed by this thesis, were to be included in the Rome Statute, and an individual, a state or a corporation, is to be prosecuted, then the concerned state of the national or the government, or the concerned state from which the corporation is registered (and the state in which the corporation is operating) can choose to not cooperate, and the ICC does not have any control over that matter. With regards to trying individual persons that are heads of state and that claim to have immunity, the Rome Statute does not state that heads of state have immunity. However, in its provision, it does not state that this only applies to member states. Thus, if

[473] Jelena Aparac, 'Which International Jurisdiction for Corporate Crimes in Armed Conflicts?' (2016) 57 Harvard International Law Journal 41-42 <https://harvardilj.org/2016/07/which-international-jurisdiction-for-corporate-crimes-in-armed-conflicts/> accessed 13 June 2021
[474] Mwanza (n129) 16
[475] 'How the Court works' (International Criminal Court) <https://www.icc-cpi.int/about/how-the-court-works> accessed 13 June 2021
[476] Fergal Gaynor and Christopher Kip Hale, 'Rome Statute at 20: Suggestions to States to Strengthen the ICC' (*EJIL: Talk!*, 6 August 2018) <https://www.ejiltalk.org/rome-statute-at-20-suggestions-to-states-to-strengthen-the-icc/> accessed 13 June 2021
[477] Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34(6) Fordham International Law Journal 1594 <https://core.ac.uk/download/pdf/144226064.pdf> accessed 13 June 2021
[478] ibid. 1595

the ICC were to receive jurisdiction over a non-member state, the non-member state may argue that its head of state has immunity. This, in turn, limits the effectiveness of the proposed ecocide provision at the ICC, as without enforced cooperation, prosecution is highly unlikely to ever take place.[479] The likelihood that the ICC can rely on the Security Council to enforce cooperation is also low, as the permanent Security Council members of the United Nations are some of the largest polluters, and, as stated above, they are unlikely to refer themselves or countries in which they and their corporations operate. Thus, even with the inclusion of a crime of ecocide into the Rome Statute, there is still the matter of lack of enforcement by states, which is detrimental when wanting the proposed crime of ecocide at the ICC to have its intended effect. Amendments would thus need to be made to the Rome Statute, in order for states to be forced to cooperate with the ICC to increase effectiveness of the court. If the amendments are not well received, some countries may feel compelled to leave the ICC and decrease cooperation via less funding, resulting a less effective ICC. In such a case, the lack of cooperation may become a threat to the ICC.

The ICC's lack of expert knowledge and resources. As the ICC currently operates, it lacks the expert knowledge on prosecuting environmental destruction or damage amounting to a crime of ecocide. This can be related to the make-up of the ICC's 18 judges that all only serve one term of 9 years, nominated by states party to the Rome statute. The election of the ICC's judges takes place during "a meeting of the Assembly of States Parties" via ballot voting.[480] An ICC judge is selected based on a "high moral character and [must] have established competence and experience in criminal law as a judge or prosecutor, or in relevant areas of international law", such as international human rights and humanitarian law.[481] [482] Of the 18 judges, at least half of them must be experienced in criminal (procedural) law and 5 of the 18 judges must have "competence in relevant areas of international law".[483] The areas in which the judges of the ICC must be competent and experienced in reflect the ICC's focus on human-centred crimes. There is no mention of environmental law, and none of the current judges evidence any experience in this legal field. Thus, introducing a crime of ecocide, heavily based on expert opinion and scientific knowledge, wold require the ICC to gain this knowledge via external help and build expertise on environmental law. While this may seem feasible, international environmental law and international criminal law are already very distant and largely unrelated fields that an expert on both is hard to find in order to educate the current judges, let alone one capable of becoming a judge at the ICC. Furthermore, even if the judges were experienced in environmental law in conjunction with international criminal law, the ICC's Office of the Prosecutor would have to possess such knowledge and expertise as well, which is not the case, as most of the Office of the Prosecutor members gained experience and expertise in international criminal tribunals such as that of Rwanda.[484] Thus, even if a crime of ecocide were integrated into the Rome Statute, the likelihood that ICC personnel, such as judges and the prosecutor's office, could effectively prosecute an environmental case is slim to none. The educating of ICC personnel with regards to environmental crimes might

[479] Ibid. 1615
[480] Greene (n134) 38-39
[481] Greene (n134) 39
[482] Patel (n205) 184
[483] Greene (n134) 39
[484] ibid.

also prove to be more costly than it is to establish a court specialised on environmental crimes.[485] [486] In fact, with no expertise or experience on this field, the ICC "could negatively impact the credibility of the court, leaving it open to criticism that the Court's judgement is a result of ignorance or inexperience", thus threatening the already arguable fragile existence of the ICC.[487] The consequences of this are expanded on in the threats section of the SWOT analysis.

In addition to threatening the ICC, inclusion of a crime of ecocide into the Rome Statute may weaken the already unsteady existence of crimes on the environment, thus making the field loose the traction it has gained over the last decade. Lack of experience and expertise would also not allow for victims of environmental degradation and destruction to have their right to due process respected, and ultimately let justice prevail.[488] [489] Proponents for the recognition of environmental crimes have thus argued for the creation of an independent and separate court on the environment, where the personnel, meaning judges and prosecutors, are experts in their field.[490] Alternative avenues to this debate will be explored in chapter 7.

ICC reparations and restorations. Article 75 of the Rome Statute, titled "[r]eparations to victims", states that the "[c]ourt shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".[491] Such a reparation scheme is unique in international law as it allow the victim to receive reparations, either as a restitution, a compensation or as assistance, from a perpetrator that committed one or more core crime(s) of the ICC.[492] [493] Reparations may also be issued from the Court's Trust Fund for Victims (TFV), which is an "independent, non-judicial institution that operates within the Rome Statute system and which can use funds made available by voluntary contributions to complement any money or property collected from the convicted person".[494] The TVF is only consulted if the perpetrator does not possess any assets that could be used to issue reparations.[495] The TFV also provides victims of one or more of the core crimes with assistance for their "material, physical and psychological" needs.[496] The jurisdiction of the ICC established under which conditions the victim, either a natural or legal entity, may receive reparations, assuming that the natural or legal entity has "suffered [personal, and potentially psychological, material or physical] harm, whether directly or indirectly", and there exists sufficient connection between the crime and the harm in order to establish a causal link.[497] The idea that the harm is to be personal to either the legal or natural entity reflects the

[485] ibid. 39-40
[486] Patel (n205) 184
[487] Greene (n134) 39-40
[488] ibid. 40
[489] Patel (n205) 184
[490] Greene (n134) 40
[491] Rome Statute of the International Criminal Court (n16) Article 75(1)
[492] Mark Klamberg (ed)., 'Commentary on the law of the International Criminal Court' (Torkel Opsahl Academic EPublisher, 2017) footnote 621 <https://www.legal-tools.org/doc/aa0e2b/pdf/> accessed 13 June 2021
[493] Mwanza (n129) 23
[494] Rachel Killean, 'From ecocide to eco-sensitivity: 'greening' reparations at the International Criminal Court' (2020) The International Journal of Human Rights 332 <https://doi.org/10.1080/13642987.2020.1783531> accessed 13 June 2021
[495] Mwanza (n129) 23
[496] Killean (494) 332
[497] ibid.

anthropocentric character of the ICC's core crimes that disallows the ICC from "responding to environmental destruction outside the context of a related human rights violation".[498] This is particularly problematic as embedding the crime of ecocide into the Rome Statute as a fifth crime is not enough to actually achieve the goal of environmental protection. The ICC would need to adapt its mechanism for restorations of justice "as a prerequisite to adequate protection of non-human life".[499] Even if the ICC shifted its focus from solely human victims to encompass the environment as well, it is questionable whether the reparations issued are "enough to rehabilitate the damage and restore justice". Even if there were sufficient funds to cover reparations to the environment, the anthropocentric character of the ICC, which would still be the main focus of the ICC, would issue the reparations to its human victims first.[500] Add to this that the ability of the ICC to issue "adequate corrective and reparative justice in a timely fashion" is severely hindered by the amount of time the victims of international core crimes at the ICC had to previously wait to receive their rightfully issued reparations. As the ICC's personnel is not experienced in environmental crimes, the likelihood that the prosecution of the case would be lengthy, and in turn the waiting period for (potential) reparations, that are likely to be issued to human victims first would also be lengthy, reduces the impact of the pivotal reparations and restorations aspect of the ICC.[501]

Assuming expertise and waiting periods are not an issue, there does exist the possibility of expanding the ICC's reparations mechanism to become more adequate for environmental cases falling under ecocide. The ICC could, for instance, "impose fines and forfeitures of property from individuals and corporate perpetrators" whose actions have caused environmental damage and destruction. The ICC could also, as inspired by Article 79 of the Rome Statute, create a trust fund for the damaged global commons and the ecosystems, to be issued to the relevant organisation in case of ecocidal actions, so that the organisation can work on rehabilitating and restoring the environment.[502] While this may sound promising, the issues that would arise in even realising the creation of such a trust fund lie in amending the Rome Statute so that it is no longer focused on human victims, and in amending the Rome Statute to allow for the creation of a trust fund for environmental damage. The problematic issue of amending the Rome Statute will be addressed further below as a threat.

Indeed, one could also argue that the TFV should simply adopt an "eco-sensitive" approach, and, admittedly, it is already working on doing that. The TFV itself claimed that it is attempting to take the environment into considerations in its work, however, the TFV also itself admitted that without proper mechanisms for monitoring and without sufficient resources, its attempts will not amount to much. However, while this may sound promising, the implementation of the necessary mechanism would be separate from the ICC's prosecuting of the relevant case, as the TFV is an independent body.[503] Additionally, as the ICC is focused on human victims, even with the implementation of ecocide and the TFV becoming more eco-sensitive, a majority of the reparations will still be prioritised to be issued to humans rather than reserved for environmental rehabilitation. It is thus more advisable to create a trust fund

[498] ibid. 333
[499] Mwanza (n129) 23
[500] Patel (n205) 187
[501] Mwanza (n129) 23
[502] ibid. 23-24
[503] Killean (n494) 334

specifically for the environment, separate from reparations for human victims. However, as the above-mentioned showcases, this too comes with hurdles, some of which the ICC has no control over, such as with the fact that the extent at which the ecosystem or the global commons has been impacted is only noticeable after time, meaning it cannot be expected that the ICC, in issuing reparations, can not only cover the full cost but also rehabilitate the environment entirely.[504] Additionally, as environmental impact is not always immediately felt, it can be difficult to measure the amount of reparations to be issued, further complicating the issue of issuing reparations. This thesis proposes that the damage done to the ecosystem(s) and/or the global commons would need to be reversed so that no negative consequences of the ecocidal actions are still evident or felt. Indeed, this goes beyond the possibilities of the TFV or any other trust fund the ICC could create. As this is not feasible by creating a body with no judicial powers or a body separate from the court, this thesis proposes that it would be far more beneficial to make compulsory the entire rehabilitation rather than leave it up to a body with no powers. Indeed, this would require much amendments and restructuring of the Rome Statute and the ICC, all of which is theoretically feasible, but realistically unlikely, as the SWOT analysis evidences. This is further supported by the fact that achieving proper environmental rehabilitation would not only require resources in the form of reparations and restorations, but also the abolishment of national practices allowing for ecocidal actions. In other words, the ICC plays a pivotal role in "pursuing transformative reparations" that should "address underlying injustices and avoid replicating discriminatory practices or structures that predated the commissions of the crim[e]", in this case, of ecocide.[505] The likelihood of the ICC achieving this is slim to none, largely due to the fact that the ICC cannot compel a state to act a certain way, such as with resource distribution or compel an organisation, as suggested above, to take over rehabilitation of the environment, thus limiting the capacity of the ICC, particularly with regards to the environment.[506]

Opportunities.

Ecocide rising in importance. By addressing ecocide, as this thesis proposes, at the ICC as the fifth core crime, the ICC is showcasing that environmental degradation as defined under the proposed ecocide provision is to be considered as being of equal importance to the ICC's current four core crimes, particularly that of genocide. No legal entity, as defined by this thesis, would want to stand alongside war criminals or individuals that committed genocide, thus making even the fact that ecocide is considered to be just as grave as the existing core crimes already a deterring factor.[507] However, indeed, as this thesis argues below, there are negative effects to be considered when equating ecocide with, for instance, genocide, or the general existing core crimes of the ICC. This argument is extensively analysed as a threat.

[504] ibid. 335
[505] ibid. 337
[506] ibid. 338
[507] Godin (n436)

Expanded purpose for the ICC. Strict liability for the crime of ecocide has faced much criticism by scholars that are both advocates and critics of a crime of ecocide. Critics argue that a crime of strict liability introduced at the ICC would go against the "the cornerstone principle of criminal law", namely that you are not only at fault because of your actions but also because of your guilty mind. If introduced into the ICC, strict liability, a tool to achieve societal objectives, would symbolise "the use of international criminal sanctions to serve utilitarian ends through deterrence". This is often considered to be contrary to the, characteristic for criminal law, retributistic structure of criminal law, and to the concept that the perpetrator is innocent until proven guilty. For these two reasons, it is argued that many national legal systems avoid the usage of strict liability for crimes, and instead utilise it for "welfare and regulatory type of offences". This argument, however, is largely incorrect, for many Anglo-American domestic legal systems utilise strict liability for more than just "welfare and regulatory types of offences". The retributistic character of the ICC should thus not be its only purpose, for it can serve broader purposes that it has previously been limited to. The ICC, with the strict liability crime of ecocide, could serve a deterring purpose and also support justice on a transnational level. Some scholars have even argued that the ICC's intended purpose has never been simply limited to retributistic purposes, evident in its aim to end impunity. The ICC's intended purpose is also namely described as "advancing international peace and security", which is utilitarian. The ICC is also restorative as it seeks to restore justice by providing victims of its core crimes with reparations. These purposes are to be considered intended because they have been undermined by the ICC's lack of capability to address most cases with an international criminal law element. Because of this drastic limitation, the ICC is provided with a new opportunity to refine its role in the international criminal law sphere with the introduction of a crime of ecocide. With such a crime, the ICC could function as an expressive court, looking to "advanc[e] international peace and security" by addressing cases that contain foundational global standards. Additionally, the crime of ecocide, as this thesis proposes, would assist the ICC in realising its intended purposes in the form of deterrence, due to the strict liability element, and in the form of retribution.[508]

Prosecution of ecocide when countries cannot. Introducing the crime of ecocide to the ICC as a separate crime would allow for the ICC to prosecute ecocidal actions by legal entities, as defined by this thesis, that do not fall in the realm of possibly prosecuted cases on a national level. This is particularly relevant for countries that do not have the means or the ability to prosecute on a national level large environmental cases, such as with Nigeria not being able to entirely overcome legal obstacles to prosecute Shell for its involvement in Niger Delta. Thus, by integrating into the Rome Statute the proposed crime of ecocide, exploited communities in less developed countries, which are normally the target for corporations from developed countries, are given the possibility to have their case heard in an established court. Admittedly, the ICC does have many jurisdictional limitations that would make this difficult, as this thesis has previously demonstrated. As this thesis has also stated, corporations are the main perpetrators of ecocide. The Rome Statute would need to allow for corporations to also be held legally accountable and liable for their actions in order for the ICC to offer these exploited communities to have their case heard.[509] Admittedly, this would assume that the

[508] Mwanza (n129) 25-26
[509] Godin (n436)

ICC possess a sufficient level of expertise and knowledge in order to prosecute a case on ecocide, which, as this SWOT section has demonstrated, is not the case currently.

Integration of ICC core crimes into domestic legislation. With the integration of a crime of ecocide, as this thesis proposes, at the ICC, there exists the possibility that member states party to the Rome Statute would integrate into their national legislation the crime of ecocide as the fifth crime against peace. Integration of the ICC's core crimes into domestic legislation is an important sign of support for the ICC. Particularly ICC member states of the European Union, such as Italy, with its constitution allowing for automatic integration of the ICC's core crimes into national legislation, demonstrate this. Other states such as the Netherlands and Germany have passed legislation in favour or supporting the ICC by criminalising the ICC's core crimes on a national level, in order to allow domestic courts to exert their jurisdiction over these crimes. Such action has also been taken by Spain and Austria. Admittedly, ratifying the Rome Statute does not entail that all member states will integrate in their national legislation the ICC's core crimes. It is usually the EU that showcases strong support for the ICC, as opposed to other member states. One could argue that this too could be the case with the crime of ecocide. Indeed, the possibility does exist that even if the ICC does integrate ecocide, very few nation states would internalise it. However, as this thesis has demonstrated, increasing support for ecocide is rising amongst many states. Some states already have an ecocide provision in their national legislation. Amending the provision to be in line with that of the proposed ecocide provision included at the ICC could potentially happen. This, in turn, would be in line with the complementarity principle as outlined in chapter 2, section 2.3., stating that the ICC is to function as a last resort court.[510]

Threats.

Diminishment of the core crimes of the ICC. With the inclusion of the crime of ecocide at the ICC, many scholars have expressed their concern that ecocide could diminish the ICC's core crimes and particularly affect the core crime genocide by trivialising it.[511] Wesley J. Smith states that "equating resource extraction and/or pollution with genocide trivialises true evils such as the slaughter in Rwanda, the killing fields of Cambodia, the gulags, and the death camps, while elevating undefined environmental systems to the moral status of human populations".[512] Another scholar argues that the term ecocide is far too linked to the term genocide, and should instead be changed to "transnational environmental crime". This was supported by other scholars that argued equating the terms could "create condemnatory responses". These sentiments were also evident at the 1978 International Law Commission's review, where a sub-commission debated the inclusion of "ethnocide" to the convention on genocide. The Special Rapporteur reported that extending the concept of genocide to

[510] Martijn Groenleer, 'The United States, the European Union and the International Criminal Court: Similar values, different interests?' (2016) 13(4) International Journal of Constitutional Law 932-933 <https://doi.org/10.1093/icon/mov054> accessed 13 June 2021
[511] Greene (n134) 37
[512] Ido Liven, 'ICC Urged to Accept 'Ecocide' as an International Crime' (*IPS*, 15 June 2011) <http://www.ipsnews.net/2011/06/icc-urged-to-accept-ecocide-as-an-international-crime/> accessed 16 May 2021

environmental cases that are barely related to the concept of genocide will result in prejudicing the Genocide Convention's effectiveness in a grave manner.[513] Thus, even with the inclusion of a separate crime of ecocide as a fifth crime against peace, critics believe such inclusion could severely affect the effectiveness of the current four core crimes, particularly that of genocide.

The diminishment of the four core crimes is also like to happen if the ICC's willingness to introduce a crime of ecocide as the fifth crime against peace goes against the desires of particular states that are party to the Rome Statute, thus potentially encouraging them to leave the Rome Statute, and with that significantly reducing the chances of the ICC to exert its jurisdiction over the given state's territory for any violation of the core crimes of the Rome Statute. The inclusion of a crime of ecocide at the ICC may also further encourage states that are already not party to the Rome Statute to not consider joining in the future if ecocide, as this thesis proposes, is to be included as a fifth core crime. The (threat of) withdrawal of states from the Rome Statute poses a significant threat to the functioning of "international rule of law" and the ICC's mission to end impunity, however, as state sovereignty prevails, any state party to the Rome Statute may withdraw from the statute as Article 127 Rome Statute states.[514] In 2019, the Philippines became the second nation state to withdraw from the Rome Statute, after Burundi left in 2017. The decision by the Philippines to withdraw from the ICC Rome Statute was spurred on by the opening of preliminary investigations "into accusations that Mr. Duterte and other Philippine officials committed mass murder and crimes against humanity in the course of the drug crackdown". In leaving the Rome Statute, the ICC is no longer the last resort court for the Philippines.[515] Indeed, if states are party to the Rome Statute after the inclusion of ecocide as a fifth crime, and as per Article 121(4)(5) on "[a]mendments" of the Rome Statute, ratify or accept the Rome Statute with said amendment, then the ICC still has jurisdiction on any "on-going proceedings or any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective", and "the ICC retains its jurisdiction over crimes committed during the time in which the State was party to the Statute and may exercise this jurisdiction over these crimes even after the withdrawal becomes effective"[516].[517] Thus, states would have to withdraw either before the inclusion of a crime of ecocide becomes a core crime or not accept or ratify the amendment, otherwise the ICC may still have jurisdiction. Indeed, the acceptance or ratification of an amendment to the Rome Statute with regards to Article 5 containing the crimes over which the court has jurisdiction is not an argument in favour of States remaining party to the Rome Statute. If anything, the Rome Statute would require significant amendment for the inclusion of a crime of ecocide. A state disagreeing simply with the inclusion of ecocide is highly likely to disagree with all of the necessary amendments, thus making the prospect of withdrawing all the more appealing. The many amendments to be

[513] Greene (n134) 38

[514] 'ICC Statement on the Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law' (*ICC,* 20 March 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371> accessed 16 May 2021

[515] Jason Gutierrez, 'Philippines Officially Leaves the International Criminal Court' (*The New York Times,* 17 March 2019) <https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html> accessed 20 May 2021

[516] Rome Statute of the International Criminal Court (n16) Article 121(4)(5)

[517] 'ICC Statement on the Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law' (n514)

made in favour of strict environmental protection, if a strong deterring crime of ecocide as this thesis proposes is to be included, functions as a deterrent for states to join the ICC and ratify the Rome Statute in the first place.

Feasibility of the ICC to incorporate the proposed crime of ecocide. The arguably most difficult issue regarding the inclusion of a crime of ecocide into the Rome Statute is that it that is largely unrealistic. This is due to the fact that the likelihood that a majority of two-thirds of the countries party to the Rome Statute agree to the inclusion of a crime of ecocide, let alone one such as the proposed crime of ecocide with the many amendments that need to be made for it to have its full effect, is highly, if not entirely, unlikely.[518] Amending the Rome Statute would require a member party to the Rome Statute to make a proposal to the Secretary General of the United Nations who will provide all members of the ICC with the proposal.[519] Whether or not the proposal should be discussed must be decided by a majority of the members of the Rome Statute present at the meeting and partaking in the vote.[520] The proposal may then be either reviewed or voted on by "the Assembly of States", with a two-thirds majority indicating that the proposal has been accepted.[521] Noteworthy is that no country possess a veto and the votes are not weighted.[522] A proposal is currently being drafted and to be proposed to the ICC, after Vanuatu's EU ambassador reignited in 2019 the debate about ecocide in stating that action must be taken against environmental destruction and degeneration as a crime at the ICC.[523] Any proposed amendment would then need to approved by 82 states, as a two-thirds majority is required and the ICC currently has 123 states party to the Rome Statute.[524] However, before states can even vote on an amendment, states must first agree on what a crime of ecocide should look like. As there is no legal instrument, treaty, body or convention that contains any mention of a crime of ecocide, drafting an entire law is difficult on its own, let alone an efficient law that also increases the likelihood that states would vote in favour of its inclusion into the Rome Statute. If history is any indication, the creation of the Rome State itself spanned 50 years, and its core crimes were already established in international law. As ecocide has no history in international law, it will be very difficult to have 82 states, with vastly different national legal systems, to agree to any proposal. The crime of aggression, for instance, was not even finalised after the Rome Statute came into force in 2002; it was left to be defined at a later stage due to much disagreement. It was only in 2010 that a definition was agreed upon, and only in 2017 did member states to the Rome Statute agree upon creating it as the fourth crime against peace, with the crime entering into force in 2018, 20 years after the Rome Statute was drafted in 1998. If ecocide is to face the same fate as the fourth crime against peace, it will be another 20 years before the ICC can prosecute actions violating a crime of ecocide. This allows for another 20 years of environmental destruction, which the environment may not have if its degradation becomes irreversible. This is assuming that a definition, as this thesis proposes,

[518] Greene (n134) 42
[519] Rome Statute of the International Criminal Court (n16) Article 121(1)
[520] ibid. 121(2)
[521] ibid. 121(3)
[522] Greene (n134) 6
[523] Sophie Yeo, 'Ecocide: Should killing nature be a crime?' (*BBC,* 6 November 2020) <https://www.bbc.com/future/article/20201105-what-is-ecocide> accessed 20 May 2021
[524] 'Joining the International Criminal Court' (ICC) 1 <https://www.icc-cpi.int/Publications/Joining-Rome-Statute-Matters.pdf> accessed 13 June 2021

is agreed upon by states, which itself is highly unlikely, as it would require many additional amendments to the Rome Statute.[525] For this reason alone, the feasibility of including a crime of ecocide into the Rome Statute is questionable.

Assuming that, indeed, a crime of ecocide has been agreed to be discussed to potentially be included in the Rome Statute, a crime of ecocide as proposed by this thesis would most effectively protect the environment. However, in order for the proposed crime of ecocide to be integrated into the Rome Statute, it would need to be severely amended. The following will briefly analyse the most important amendments to be made, and the likelihood that the amendments will be agreed upon.

For reference, the proposed crime of ecocide is as follows: *Ecocide denotes the massive or long-term destruction or damage to one or more ecosystems or the general global commons, on which human and non-human entities are dependent, as caused by any legal entity during times of peace and/or of war or as a result of a naturally occurring incident.*

Firstly, an amendment would have to be made to Article 5 of the Rome Statute, titled "[c]rimes within the jurisdiction of the court", to be included as enumeration (e) a crime of ecocide. The crime of ecocide would have to be defined just as is the case with the other four core crimes, leaving the definition of ecocide to fall under Article "8ter"[526], so as to avoid having to amend all article numbers of the Rome Statute if ecocide became Article 9. Article 9 on "[e]lements of crimes" and Article 20 on "[n]e bis in idem" in turn would have to include under their scope Article 8ter, on ecocide as defined by this thesis. Additionally, as Article 9 is to "assist the Court in the interpretation and application of"[527], inter alia, "8ter" the amendment to Article 9 would need to specify that legal entities have a duty of care towards the environment, and that their actions or lack of preventative and pre-emptive actions, in addition to any government policy allowing for ecocidal actions, is not to exempt them from facing strict liability charges under the crime of ecocide. This in turn would require, for one, an Article 30 amendment to the Rome Statute that defines the ICC's mental element, to encompass strict liability, or it would require a separate provision only applicable to the crime of ecocide, allowing it to operate under strict liability.[528] The likelihood of the Rome Statute containing a strict liability crime has been analysed previously, which resulted in the conclusion that it is highly unlikely the ICC would adopt such a provision. For the other, the aforementioned would also have to be codified in an amendment that allows the ICC to issue a judgement on a lack of action taken to prevent or pre-empt ecocide and it would also require Article 33 of the Rome Statute on "[s]uperior order and prescription of law" to be amended to not allow approved actions to exempt the perpetrators from being deemed to having committed a crime of ecocide.[529]
A further amendment would need to be made with regards to the severity of the environmental damage or destruction. As this thesis mentions, expert opinion is required to determine damage to the general global commons or to ecosystems on which human and non-human entities are dependent. Thus, with regards to Article 17 of the Rome Statute on

[525] Greene (n134) 42-43
[526] MacCarrick (n390) 117
[527] Rome Statute of the International Criminal Court Article 9(1)
[528] Mwanza (n129) 25
[529] MacCarrick (n390) 123

"[i]ssues of admissibility", the ICC should refer to experts to determine whether or not a particular degree of severity has been reached so that human and non-human entities can no longer depend on either the general global commons or one or more ecosystems. In order to also allow for procedural fairness and due process, the ICC would need to amend its selection of ICC to judges as outlined in Article 36 to include an expert on (international) environmental law and international criminal law, and an expert in the Office of the Prosecutor of the ICC, as outlined in Article 42, on the same fields previously mentioned, as well as on the environment in general. A significant amendment would also be on who the ICC can prosecute. This would require severe amendment to Article 25 of the Rome Statute, on "[i]ndividual criminal responsibility". These many amendments would however not prove to be fruitful if states refuse to cooperate. Thus, an amendment to Article 98 of the Rome Statute would need to be made, in order to force states to cooperate with the ICC, and, in cases of refusal to cooperate, the relevant country should face repercussions.[530]

This section has only focused on some of the most pressing amendments that would still need to be made to the Rome Statute in order to adequately integrate the proposed crime of ecocide. Many pivotal amendments have been excluded, such as victim reparations or the ability to deny jurisdiction over the crime of ecocide pursuant to Article 121 of the Rome Statute. The degree to which the Rome Statute would need to be amended makes it highly unlikely that states would agree to the many amendments, particularly to amendments that allow for easier criminalisation of ecocidal actions due to the strict liability requirement of the proposed crime of ecocide. Thus, even if the ICC were to entertain the idea to discuss the inclusion of a proposed crime of ecocide, the concept would fail, inter alia, because of the many amendments required to effectively integrate the crime.

Concluding observations. The above section analysed via the SWOT analysis what the strength, weaknesses, opportunities and threats are of introducing the proposed crime of ecocide into the Rome Statute of the International Criminal Court in an effort to establish legal accountability for actions which cause mass environmental degradation. While each category of the SWOT analysis produced arguments, some of them vastly outweigh the others. The categories 'strengths' and 'opportunities' have been vastly outweighed by the categories 'weaknesses' and 'threats'. This is evident in that the strengths and opportunities of introducing the proposed crime of ecocide into the ICC can also be realised in other international courts operating under international criminal law if they recognised the proposed crime of ecocide, as becomes evident with the strength of operating in international criminal law, or the opportunity of ecocide rising in importance. This weakness of 'opportunities' is also, for one, due to the fact that the categories 'weaknesses' and 'threats' at times reduce the possibility of potential opportunities of the ICC taking place, such as with the opportunity of the ICC prosecuting ecocide when countries cannot, and for the other, because the opportunity is simply not significant enough to warrant threatening the ICC by diminishing it and its core crimes. Additionally, the arguments outlined in the category weakness are very difficult to overcome, which must also be taken into account when working to introduce ecocide into the ICC. Thus, it is not advisable to use ecocide in the context of the ICC to establish legal accountability for actions which cause mass environmental degradation.

[530] Barnes (n477) 1619

7. Alternatives to the introduction of a crime of ecocide at the ICC

The previous chapter determined that the weaknesses and threats of introducing the proposed crime of ecocide into the Rome Statute of the ICC outweigh the strengths and opportunities. As this thesis deems the ICC to not be suitable for the proposed crime of ecocide, this thesis briefly proposes alternatives to introducing the proposed crime of ecocide as a crime under the Rome Statute of the ICC. Each alternative would have to be extensively analysed and (potentially) compared to other alternatives to determine which avenue is best suited for adequate and proper environmental protection. This thesis does, however, propose that the alternatives below should not be viewed solely in isolation, but also as supporting each other, as there is no panacea for proper environmental protection, but rather a multi-faceted system that can adequately integrate the complexity that is ecocide into modern mechanisms to combat current and future environmental degradation. This, however, is beyond the scope of the thesis. Thus, the proposed alternative avenues and approaches are merely suggestions for further research, and are not extensively analysed here.

A separate international court for the environment. The first alternative, and the arguably most logical one, would be to create an international environmental court for the environment. As this thesis has found, utilising (international) criminal law is the most efficient method with which the environment can be adequately and properly protected. Creating a separate environmental court would solve the issue of having to drastically amend the Rome Statue in order for it to accommodate the crime of ecocide as proposed by this thesis. By creating a separate ecocide convention for the proposed independent environmental court, the proposed crime of ecocide would not be limited to the restrictions and limitations of the Rome Statute, which severely hinder the ICC from addressing pressing environmental cases under its core crimes, and under a potential standalone crime of ecocide. Examples of limitations are, for instance, the ICC operating under strict intent and knowledge requirements, as dictated in Article 30 of the Rome Statute, or the many jurisdictional limitations of the ICC. Creating a separate court would also allow for experienced judges and prosecutors and environmental experts to more efficiently work together and bring about change in favour of environmental protection, rather than having to drastically educate existing ICC judges, staff, and personnel on the relevant law, which might not even result in environmental protection. As the proposed court would only be specialised in environmental crimes, its ability to address environmental damage and degradation would increase, as the ICC must divide its resources and time to prosecute a multitude of cases falling under one or more of the core crimes, thus risking it being overburdened, which would not be the case if an independent environmental court were created. The independent environmental court would also allow for the ICC to be less burdened with an additional crime, that does not lie within its area of expertise, and not within the intended scope of the Rome Statute, as the SWOT analysis evidences.[531]
Indeed, there are shortcoming to creating an independent court. There is currently no convention containing a similar provision on environmental protection as this thesis proposes, and there is also no convention on which the court could be based on. Thus, due to lack of documentation, the drafting process of the convention, and the negotiating process

[531] Greene (n134) 44

of the proposed crime of ecocide is likely to be lengthy. The advantage of using the Rome Statute is that there already is a basis on which the proposed ecocide provision could be based. However, this would come at the severe cost of having to limit the scope of the proposed crime of ecocide for it to even be considered to be included in the Rome Statute. It is thus worth considering whether or not the Rome Statute can be utilised as a basis for the ecocide convention, so that the drafting process can proceed more swiftly. Admittedly, many amendments would need to be made, however, by not utilising the ICC for the proposed crime of ecocide, there is also no danger in its current core crimes being diminished, or the ICC being threatened due to the many required amendments, as outlined in the SWOT analysis. Indeed, there are many more considerations to be had around the efficiency of creating an independent international environmental court based on criminal law. The above was merely to address some evident advantages and disadvantages, however, their extensive exploration is beyond the scope of this thesis.

National Legislation. An alternative avenue to addressing ecocide would be for nations to implement in their national legislation the proposed crime of ecocide, if the creation of an independent international environmental court is unsuccessful, or if the introduction of the proposed crime of ecocide into the Rome Statute is rejected. Indeed, there are shortcomings to addressing ecocide solely on the national level, as this thesis has previously evidenced. One major threat is that nation states fail to implement the proposed ecocide provision, or fail to uphold and respect the proposed ecocide provision due to, for instance corruption or lack of resources, or fail to implement the proposed ecocide provision as it is intended, instead reducing it to a less effective provision. Another major drawback to addressing the crime of ecocide on the national level alone is that environmental degradation amounting to ecocide is rarely confined to a state's territory, thus creating tension in cases of transboundary ecocide cases, if the nations involved do not have the same provisions or if a nation involved does not have any ecocide provision. Indeed, this thesis has proven that national legislation, as a stand-alone method for environmental protection, is not successful, for the very reasons mentioned previously in chapter 3, section 3.3. and above. However, the proposed crime of ecocide addressed in national legislation could be viewed as a starting point until sufficient states recognise the proposed crime of ecocide for it to become customary international law.[532] Indeed, the evident drawback is that this very much is a gamble, and is unlikely to happen timely enough so as to prevent further environmental degradation. Thus, this option should be a last resort, or at least an additional method that could support international recognition of the proposed crime of ecocide, and not be its only driving force.

Enforcing the proposed ecocide provision indirectly. Another alternative to the inclusion of ecocide into the Rome Statute, and to the previously proposed alternative approaches and avenues, is to make the proposed crime of ecocide a transnational crime rather than an international one, that can be indirectly enforced in national courts. This could potentially be possible if the proposed crime of ecocide becomes part of a UN convention whereupon sates that ratified the convention have to implement in their national legislation the provision, and

[532] ibid. 46

apply it to their national courts.[533] This avenue could compliment the aforementioned alternative, where nations implement in their national legislation the proposed crime of ecocide. This alterative is, however, more efficient, as at least, the crime of ecocide is codified in a UN convention, rather than loosely implemented in national legislation. This could also allow the proposed crime of ecocide to more quickly become an international norm, and potentially a norm of customary international law. The benefit of forcing states to implement in their domestic legislation the proposed crime of ecocide, and apply it to national courts, is that more cases have the potential of being heard. It is easy for an international environmental court to become overwhelmed with the multitude of complex ecocidal cases, that having nation states prosecute the cases in their national courts, with a set provision and set definitions applicable to the provision, would allow for environmental protection to be implemented and realised with much more rapidity than in an international court.[534] This is not to say that the international court could thus be forgotten. In fact, this thesis would argue that an international court, in addition to national prosecution, could allow for swifter ecocidal case prosecutions, with the international court potentially functioning as an, inter alia, last resort court, such as is the case with the ICC, so as to not overburden the international environmental court. The international environmental court could then also operate in cases where nation states are ill-equipped to adequately handle a case, such as when the case concerns cross-border ecocide, or when a state is plagued by corruption such that the likelihood that the government would prosecute the given case is slim to none.[535]

Universal jurisdiction. As proposed in chapter 3, section 3.3. on national legislation, universal jurisdiction is a viable method with which nation states can prosecute a case involving foreign individuals. The crimes that fall under universal jurisdiction are war crimes, crimes against humanity, torture and the crime of genocide. Universal jurisdiction is applied in cases where "traditional bases of criminal jurisdiction are not available", such as when the person to be prosecuted is not of the nation state operating under universal jurisdiction, and/or did not commit a crime in the aforementioned nation's territory and not against the aforementioned nation's people, or the state's domestic interests are not otherwise infringed on.[536] The crimes that fall under universal jurisdiction have to be codified in the state's national legislation. At times, universal jurisdiction is authorised by international documents and agreements, such as with the United Nations Convention Against Torture.[537] Thus, if ecocide became an internationally codified crime (perhaps through a United Nations codification as suggested above), with its international document or agreement authorising universal jurisdiction in cases of violation of the international document or agreement, then states, such as Belgium, operating under universal jurisdiction would have the possibility to prosecute crimes against ecocide. Indeed, such an approach would allow for increased accountability and prosecution of (potentially) ecocidal actions and in turn increase protection of the environment. In order for universal jurisdiction with regards to ecocide to be effective, however, the element of corporate and state liability must be taken into account.

[533] ibid. 44-45
[534] ibid. 45
[535] ibid. 45
[536] 'Universal Jurisdiction' (International Justice Resource Center) <https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> accessed 13 June 2021
[537] ibid.

These issues pose difficult-to-solve questions, particularly with regards to state liability and state sovereignty. The issue of corporate liability under universal jurisdiction, however, is gaining more and more traction, and may be well on the way to becoming a realisation. Germany is particularly keen on "significantly expand[ing] corporate criminal responsibility" [538], which can potentially be utilised in cases involving universal jurisdiction. [539]The practical application of universal jurisdiction in cases of ecocide is however beyond the scope of this thesis.

8. Conclusion

In this chapter, the thesis aims to answer the following research question, based on the above research and analysis: *Is there a need for an international crime of ecocide and what are the comparative strengths and weaknesses of using ecocide in the context of the ICC to establish legal accountability for actions which cause mass environmental degradation?*

For the past few years, there has been a growing movement advocating to create an international crime of ecocide and address it at the International Criminal Court. As this thesis has demonstrated, there is a well-founded need to create an international law on ecocide: National legislation has been deemed inadequate to carry the burden of protecting the environment on its own (chapter 3, section 3.3.), and the core crimes of the International Criminal Court have also been deemed by this thesis as not capable of properly addressing environmental degradation (chapter 4, section 4.1.). With regards to international conventions and treaties related to state responsibility, this thesis has also found that they do not adequately protect the environment, as previously illustrated (chapter 4, section 4.2.). Thus, there is a growing need to fill the gap of proper environmental protection in (international) criminal law. Various scholars, institutions, organisations and political parties have proposed their own formulations or provisions on ecocide, and, since 2020, a panel of international lawyers is currently working on a proposal to be published and discussed as a Rome Statute amendment (chapter 2, section 2.1. and 2.2.). Through the many variations of an ecocide provision, this thesis proposes in chapter 5 its own provision of a crime of ecocide: *Ecocide denotes the massive or long-term destruction or damage to one or more ecosystems or the general global commons, on which human and non-human entities are dependent, as caused by any legal entity during times of peace and/or of war or as a result of a naturally occurring incident.* This provision has been applied to the ICC in chapter 6, section 6.2., to determine what the strengths, weaknesses, opportunities and threats are of using ecocide at the ICC to establish legal accountability for actions which cause mass environmental degradation.

At first, the concept of criminalising ecocidal actions at the ICC seems to be a good idea to counter environmental degradation. This is supported by the analysis as laid out in chapter 2,

[538] 'German court exercises universal jurisdiction: Implications for corporate criminal liability under international law' (*Hogan Lovells*, 26 February 2021) <https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2021-pdfs/2021_02_26_german_court_exercises_universal_jurisdiction.pdf> accessed 13 June 2021

[539] Peter F. Doran and others (n443) 8

section 2.5. addressing the large debate around the inclusion of a crime of ecocide into the Rome Statute during the drafting process. However, this thesis believes the concept of introducing a crime of ecocide at the ICC must be examined more closely. In order to achieve this, the thesis has conducted a SWOT analysis, examining the strengths, weaknesses, opportunities and threats of including the proposed crime of ecocide into the ICC to offer adequate environmental protection and to establish legal accountability for actions which cause mass environmental degradation. While there was at least one argument below each SWOT category, as the analysis above evidenced, certain SWOT arguments severely outweighed other SWOT arguments. This was the case for SWOT arguments from the category 'weaknesses' and the category 'threats', that outweighed the arguments from the category 'strengths' and the category 'opportunities', as analysed above. This is largely due to the fact that the proposed crime of ecocide and the Rome Statute do not align, such that an introduction would require a tremendous amount of Rome Statute amendments, a shifting away from a focus on purely anthropocentric crimes and method of operating to a more ecocentric focus, as well as the ICC to overcome certain issues, such as its political dependence, which is highly unlikely to take place. The SWOT analysis also found that the threat to the ICC, its legitimacy and its core crimes, if the proposed crime of ecocide were introduced, does not warrant the introduction of the proposed crime. Thus, the SWOT analysis concludes with the statement that the ICC is not the right body to introduce the proposed crime of ecocide into, to establish legal accountability for actions which cause mass environmental degradation. Instead, other avenues need to be considered.

In chapter 7, this thesis addressed other potential avenues that demand further discussion and research. In brief, the avenues were to create a separate international court for the environment, to address ecocide at national level, to enforce the proposed crime of ecocide indirectly, and lastly to consider applying universal jurisdiction to ecocidal cases. Indeed, there are arguments that speak for and against each of the proposed alternative avenue. Their expansive analysis is however beyond the scope of this thesis. It is, nevertheless, important to note that there are viable alternatives to the ICC. In fact, this thesis holds that there is no one panacea for environmental protection. Instead, this thesis believes that there should be a multi-faceted system, as only that can adequately integrate the complexity that is ecocide into modern mechanisms to combat current and future environmental degradation.

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