The Adoption of Ecocide as the New Anthropocenic Crime Under International Criminal Law

A look forward for the accountability of environmental destruction and the potential of prosecuting ecocide and the associated risks.

Emanuela A. Alexandru

June 2022

Thesis for International Law and Global Governance (LLM)

Department of Public Law and Governance

Student number: 2024204

Word count: 13780

Supervisor: dr. M.-C. Petersmann

Second reader: dr. L. Grover

Table of Contents

Introduction

The massive amount of greenhouse gas emissions and the rapid anthropogenic destruction of ecosystems contributes to the acceleration of the ongoing climate crisis, loss of livelihoods and biodiversity.[1] Although existing environmental crimes cover to a certain extent this destruction, large scale collateral damage is still caused by corporations for profit gain.[2] Scientific evidence points to the staggering rate of transboundary climate disasters.[3] As a result of anthropogenic destruction of ecosystems, there is a growing discourse on the need of geoengineering, and more movements such as 'green neo-liberalism' and 'Anthropocene justice' are emerging as a consequence.[4] Despite this significant progress, the need of unconditional development and aggressive exploitation imbedded in our structured society remains still the root cause of degradation of ecosystems and environmental destruction.[5] There is a growing sense of despotism and frustration on the perceived inadequacy amidst some communities regarding the speed of climate change action at the international and national level.[6]

To recognize the crime of ecocide has been a long-standing aspiration. The term 'ecocide' was first used in the 1970s at the Conference on War and National Responsibility by a group of scientists guided by Arthur Galston, an American plant biologist from Yale University.[7] They framed ecocide as a means of "destructive and immoral war" after the US military defoliated large forested parts and led to devastating effects on river ecosystems in Vietnam utilizing a herbicide and defoliant chemical called "agent orange".[8] In 1972, the Swedish Prime Minister Olof Palme made a reference to 'ecocide' in his opening speech at the UN Conference on the Human Environment that took place in Stockholm.[9] In the following year, a first draft Ecocide Convention

[1] Darryl Robinson, 'Ecocide: Puzzles and Possibilities', (2022) JICJ, Forthcoming 5.
[2] Commission on Crime Prevention and Criminal Justice, 'Criminalizing Ecocide: A New Deterrent to Crimes that Affect the Environment', 31st Session side event, Co-hosted by Socialist International Women and The Stop Ecocide Foundation (18 May 2022).
[3] Variath A. Anil, (eds) 'Living in the Era of 'Ecocide': Need for Ecological Governance to Protect the Rights of Nature' (2021) Maharashtra National Law University Mumbai 1-13.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] B. Tord, 'The emergence of popular participation in world politics: United Nations Conference on Human Environment 1972' (1996). <http://folkrorelser.org/johannesburg/stockholm72.pdf.> accessed 25 May 2022/
[8] David Zierler, 'The Invention of Ecocide: Agent Orange, Vietnam and the Scientists Who Changed the Way We Think about the Environment' (2011) University of Georgia Press 2.
[9] Stop Ecocide Foundation, 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Legal text (June 2021).

was published, intending to recognize ecocide as an international crime during war and peace.[10] The drafter of the Convention, Richard Falk, noted that 'man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace'.[11] The years that followed, many scholars have made further contributions for the conceptualization of ecocide.[12] Till the late 1990s, the main trends that were identified in the literature with regard to the incorporation of ecocide into the Rome Statute were the creation of ecocide as an autonomous international crime or in pair with war crimes, crimes against humanity or genocide. Benjamin Whitaker, the UN Special rapporteur, campaigned and stand up for the recognition of 'ecocide' in pair with genocide as 'adverse alterations, often irreparable, to the environment … whether deliberately or with criminal negligence'.[13]

Crook and Short bring a new perspective to the debate with the discussion of the conceptual and legal nexus between ecocide and genocide, where the land grabs by developed countries and extractive industries which often result in the grabbing of indigenous land should be regarded as the principal vector of genocide that is induced ecologically. For Crook and Short, genos represents the indigenous people.[14] According to them, the debate surrounding the creation of the ecocide crime should focus on ecocide as a means to an end, the primary driver of genocide, rather than the creation of an autonomous crime in international law. Thus, fields like political ecology and environmental sociology should function as a starting point of further inquiries in relation to genocide studies, to cohere a theoretical apparatus that can elaborate on the genocide-ecocide nexus and illuminate the driving factors of genocidal and ecocide social death.[15]

Lindgren articulates the importance of the creation of ecocide as an autonomous crime under the jurisdiction of the ICC that prosecutes environmental perpetrators for ecocide acts or

[10] Richard A Falk, 'Environmental Welfare and Ecocide Facts, Appraisal and Proposals' (1973) 9 Rev BDI 1.
[11] Stop Ecocide Foundation (n 9).
[12] See Ludwik A. Teclaff, 'Beyond Restoration – The Case of Ecocide' 1994) 34 Natural Resources Journal 933, 934; Falk, Richard A. "Environmental Warfare and Ecocide Facts, Appraisal and Proposals."; Berat Lynn, 'Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law', page 327- 340. Boston University International; Grey, Mark Allan. "The International Crime of Ecocide." Page 215; Freeland, Steven. Crimes against the Environment- A Role for the International Criminal Court? Page 358; Mishkat Al Moumin, 'Mesopotamian Marshlands: An Ecocide Case'. The Georgetown International Environmental Law Review.
[13] Stop Ecocide Foundation (n 9).
[14] Martin Crook and Damien Short, 'Marx, Lemkin and the Genocide–ecocide Nexus', (2014), 18:3 Intl J Hum Rts 298-319.
[15] Ibid.

ecologically induced cultural genocide.[16] Similarly to Crook and Short, Lindgren adheres to the genocide-ecocide nexus and the genocidal effects of ongoing ecological and cultural destructions that is embedded in the form of accumulation and consumption at the heart of modern industrial societies and their continuous growth crossing ecological limits. Another attempt made by the Lindgren, which is similar to Crook and Short's line of argumentation, is the framing of cultural genocide as a distinct instance of ecocide that should be recognized accordingly. Lindgren concludes his argument providing more insight on why the failure to recognize the crime of ecocide at the international level and the genocidal effects attached to it is rooted in the legal and epistemological legal disregard of alternative life-systems and their intrinsic right to life in international law. The complicit jurisprudence of international law that values and outweighs the modern overconsuming life over the right to life of alternative ecological life-systems can be restored by the creation of an ecocide crime linked to genocide. The criminalization of the act of ecocide can act as a starting point of decolonization of the political and economic gains of modern industries and the destruction of alternative social, cultural and ecological life-systems.

Meheta and Merz consider the proposal for the creation of ecocide as a fifth crime under the ICC in light of the rights of future generations and the right to cultural subsistence of indigenous people as principal arguments for its creation.[17] They make an interesting correlation between the right to life and the right to a healthy environment as a claim for the creation of ecocide as a crime against peace. In their view, the recognition of ecocide as an autonomous crime will make space for the adoption of trans-generational provisions and future generations' juridical defense. Moreover, the vulnerability of indigenous people who depend on their surroundings for a living is also a strong argument in the Meheta and Merz's opinion, particularly for cultural ecocide. They advocate for the right of indigenous peoples to be engaged by means of a prior informed consent in projects that are likely to affect their territories.[18]

The recognition of ecocide as an international crime was further shaped by Polly Higgins, a Scottish lawyer who dedicated the last decade of her life to bring awareness for the urgent need of

[16] Tim Lindgren, 'Ecocide, Genocide and the Disregard of Alternative Life-systems', (2018), 22:4 Intl J Hum Rts 525-549.
[17] Sailesh Meheta and Prisca Merz, 'Ecocide: A New Crime Against Peace' (2015) 17 Envtl L Rev 3.
[18] Ibid.

adopting laws that could stop and criminalize the destruction of our planetary habitat.[19] Higgins explains that the etymological foundation of the term 'ecocide' derives from the combination of the Greek *oikos* (home) and the Latin *caedere* (to kill).[20] In 2010, she proposed to the UN Law Commission an amendment to the Rome Statute to include ecocide as follows:

> 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 or will be severely diminished.[21]

Higgins' proposal had been seeking support from layers, heads of state and business leaders.[22] As a way of complimenting Higgins aspirations, in 2020 the Stop Ecocide International (SEI)[23] commissioned an Independent Panel of Experts (IEP)[24], to come up with a core text and commentary on the creation of a legal definition of ecocide aimed at serving as a basis for the amendment of the Rome Statute of the International Criminal Court (ICC). The Panel was constituted by twelve prominent lawyers with backgrounds and expertise in environmental, criminal and climate law.[25] The Panel proposed the definition as Article 8 *ter* of the Rome Statute as follows:

---

[19] Richard Kotter, 'Eradicating Ecocide: Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws Needed to Eradicate Ecocide' (2014) 71(2) International Journal of Environmental Studies 228-233.

[20] Manuel Rodeiro, 'Environmental Transformative Justice: Responding to Ecocide' (DPhil thesis, City University of New York CUNY 2020).

[21] Femke Wijdekop, 'Against Ecocide: Legal Protection for Earth' (2016) *Great Transition Initiative* 2.

[22] Ibid.

[23] Co-founded by Polly Higgins and Jojo Mehta in 2017.

[24] The Independent Expert Panel for the Legal Definition of Ecocide is a foundation commissioned by the Stop Ecocide foundation, created in November 2019. Chaired by Phillipe Sands QC and Dior Fall Sow this expert drafting panel developed in November 2020 on the request of interested parliamentarians in Sweden to draft a definition of 'ecocide' that can act as an amendment to the Rome statute of the International Criminal Court. The panel consisted of international criminal lawyers, environmental lawyers and legal scholars with a range of backgrounds and perspectives: Jojo Metha, Chair at Stop Ecocide foundation (conventor), Kate Mackintosh, Executive Director of Promise Institute for Human Rights and Richard J. Rogers, Executive Director at Climate counsel (co-deputies), Rodrigo Ledo, (Director at Fundacion Internacional Baltasar), Tuiloma Neroni Slade (Former International Criminal Court Judge), Syeda Rizwana Hasan (Chief Executive at Bangladesh Environmnetal Lawyers Association), Charles C Jalloh, (Professor at Florida International Law University), Valerie Cabanes (International jurist and human rights expert), Pablo Fajaro (Environmental lawyer), Christina Voigt (Professor at University of Oslo) and Alex Whiting (Former International Criminal Court Prosecutions Coordinator). The panel reported a core definition text and commentary in June 2021.

[25] Stop Ecocide Foundation (n 9).

> [u]nlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.[26]

The ICC has jurisdiction over the most serious crimes that are deemed to be of international concern namely, genocide, crimes against humanity, war crimes and crimes of aggression.[27] They were all solidified after the Second World War as a result of the human atrocities that took place at that time. Since then, there has been no change in the Rome Statute. The hope of the Panel, expressed in the introductory part of the legal commentary, is the inclusion of the crime of ecocide in the Rome Statute as a way of extending serious environmental harm protections, already recognized as a matter of international concern.[28]

An international crime of ecocide could criminalize 'unlawful or wanton' acts threatening the most severe environmental harms, thus strengthening and underpinning existing regulatory measures being undertaken globally to protect the environment. The new crime would provide a practical route to prosecute individuals who in committing crimes that affect the environment are often involved in several kinds of organized crime. But importantly, the introduction of ecocide under the jurisdiction of the ICC will provide a sobering check and guardrail for corporation leaders and decision makers contemplating extractive projects which significantly endanger ecosystems.[29]

This thesis lies at the intersection between international environmental law and international criminal law. International environmental law (IEL) aims at protecting and regulating the environment and natural resources in a multitude of ways. However, the question of responsibility and accountability is a missing attributable link between the protection offered by IEL principles, and the conduct prohibited. In this regard, the purpose of international criminal law (ICL) is to contribute to ending impunity and hold perpetrators of the most serious crimes of

[26] Ibid.
[27] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, (4th edn, OUP 2019) 147.
[28] Stop Ecocide Foundation, (n 9).
[29] Richard Rogers, Executive Director at Climate Counsel, 'Ecocide Law and Climate Justice' (10 November 2020), Event hosted by Stop Ecocide International <https://www.youtube.com/watch?v=8ctiWD4F-bw> accessed 28 March 2022.

international concern accountable for their conduct.[30] For this reason, this thesis will be centered around the following question: *To what extent can individuals be held criminally liable for environmental destruction under the proposed ecocide crime (definition) under the Rome Statute; and what are the benefits and shortcomings of prosecuting environmental destruction under the proposed definition?*

The first chapter aims to provide an analysis on the extent to which the core international crimes enshrined in the Rome Statute are capable of protecting the environment. The second chapter will situate the ecocide debate within two opposing poles, anthropocentrism and ecocentrism. The third chapter will then address the elements of the ecocide proposed definition, the impact threshold and the fault standard. With the purpose of providing a theoretical basis for the analysis conducted in the third chapter of this thesis, this chapter will also engage with some of the current academic critical commentaries and reactions of jurists with expertise in ICL. This thesis will then end with a hypothetical fact scenario in which a potential case of ecocide will be assessed in light with the proposed legal definition by the IEP and the required thresholds for establishing individual culpability. The discussion will revolve around the challenges of the proposed definition of ecocide by the Panel, how it claims to fight against impunity of environmental crimes in practice and the limitations of the proposed definition. The hypothetical can serve as a mapping exercise in which the definition of ecocide and its key components proposed by the IEP can be applied to landmark cases of environmental destruction. This provides for estimates of the shortcomings and advantages of the proposed definition. The importance of using this mapping exercise is to show the implications of the individuals *versus* collective or state-based liability and whether with the creation of ecocide as an international crime there will be a possibility of attributing one case of environmental destruction to an individual under the ICC? Is this a utopian circumstance desired by the drafters or is there a way to maximize the potential of the ecocide provision by affirming individual criminal responsibility for environmental destruction?

The objective of this thesis is to highlight the current anthropocentric approach to environmental protection which is centered around the idea that the environment must be protected

[30] Kate Mackintosh, 'A New Tool for Just Transition: The Crime of Ecocide Through a Human Rights Lens' (4 May, 2021) event hosted by End Ecocide Sweden, Olof Palme International Center, the Promise Institute for Human Rights at UCLA School of Law. < https://endecocide.se/webinar-may-4-the-crime-of-ecocide-through-a-human-rights-lens-a-new-tool-for-just-transition/> accessed 4 May 2022.

and the use of natural resources regulated for the benefit of humans.[31] To date, however, the planetary climate change crisis demands a change in the way we view and construct our anthropocentric political institutions and concepts of justice separating the human and non-human; the living and the non-living.[32] In contrast, an ecocentric approach to environmental protection which foregrounds the idea that the 'non-human environment' as 'independent of the uses for which human beings may exploit it' should be mirrored in the way we frame our institutions, regularize conduct and conceptualize ideas of justice.[33]

The inclusion of ecocide in the Rome Statute is at the core of this shift in ideas. The crime of ecocide will create individual criminal responsibility for key decision makers at the highest level. It is fundamentally about changing norms and deterring the harmful practices by creating a necessary parameter for a genuine shift of direction. It is about creating a new and healthy taboo in a form of personal criminal responsibility.[34]

[31] Jessica C Lawrence and Kevin Jon Heller, 'The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute' (2007) 20 Geo Int'l Envtl L Rev 61.
[32]Dipesh Chakrabarty, *The Climate of History in a Planetary Age*, (UCP 2021) 13.
[33] Jessica C Lawrence and Kevin J Heller, (n 31) 64.
[34] Richard Rogers, (n 29).

Chapter 1. Prosecuting individuals for environmental damage under the Rome Statute

In this chapter, the extent to which the international crimes enshrined in the Rome Statute are capable of protecting the environment will be examined. As it stands, ICL does not endeavor to criminalize conduct damaging the environment. However, the increasing interest for the expansion and strengthening of IEL among scholars, organizations and national governments is contributing to the creation of a clearer link between international criminal law and environmental protection. This fact is evidenced by the work of a Panel of international lawyers who drafted an international crime of ecocide and proposed its inclusion in the Rome Statute. Before discussing the challenges of the proposed definition, the potential of the ICC to address environmental crimes will be analyzed.

1.1. International Criminal Crimes and Environmental Harms

The Rome Statute enshrines four core crimes against peace within the jurisdiction of the ICC, namely genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8) and the crime of aggression (Article 8-*bis*).[35] As it stands, there is no autonomous provision in the Rome Statute that holds perpetrators responsible for environmental damages. Therefore, the only possible way for environmental harms to be addressed before the ICC is to fall under one or more of the existing core crimes, as stated under Article 5 of the Rome Statute.

In general terms, Article 30 of the Rome Statute sets out the fundamental rule regarding the required mental element, applicable unless provided otherwise. As the article provides, a crime must be committed with knowledge, either as a circumstance or as a consequence, and intent, either as to conduct or a consequence.[36] Accordingly, the language of the article limits convictions to cases where direct or oblique intent is provided, thereby excluding recklessness and negligence as a conviction basis. Thus, a high *mens rea* threshold is the embodiment of the no liability without fault principle, a cornerstone of criminal law.[37] For the purpose of setting the scene for the following chapter, the applicability of Article 30 to the core crimes enshrined in the Rome Statute

[35] Rome Statute of the International Criminal Court, (last amended 2010), 17 July 1998.
[36] Douglas Guilfoyle, *International Criminal Law* (1st edn, Oxford University Press 2016) 192
[37] 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

will be analyzed, in light of the extent to which environmental protection is encompassed under each core crime.

1.1.1 The anthropocentric focus of international criminal crimes

1.1.1.1. War Crimes

The sole provision under ICL that provides for responsibility of perpetrators for environmental damage is war crimes. Article 8(2)(b)(iv) of the Rome Statute expressly states that:

> 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.[38]

A violation of this provision would in theory lead to the criminal liability of the concerned individual, which is an already greater deterrent to wrongdoing of state responsibility than other 'toothless' prior conventions.[39] Moreover, the use of the disjunctive 'or' suggests that the article does not condition the individual criminal responsibility on damage to the environment that leads to human atrocities, taking a more ecocentric approach.[40] Another strength of the provision compared to other international agreements that are applicable only to state parties is the fact that Article 8(2)(b)(iv) can provide a ground for prosecution of environmental war crimes committed anywhere in the world as stated in Article 12 of the Rome Statute, which allows the consent of non-parties to the ICC jurisdiction in specific situations.[41]

The scope of the provision is limited for a number of reasons. First, given the applicability of the provision only in the context of an international armed conflict, the crime excludes the majority of cases of environmental destruction as a result of harmful acts that occur during peacetime.[42] Second, the crime sets a high threshold that results in the prosecution of 'the most invidious

[38] Rome Statute of the International Criminal Court, (last amended 2010), 17 July 1998, Article 8(2)(b)(iv).
[39] Jessica C Lawrence and Kevin J Heller, (n 31) 71.
[40] Ibid.
[41] Ibid.
[42] Melanie Schneider, '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?' (2021) (BA Thesis, Tilburg University).

offender' as the perpetrator must have knowledge that the attack will cause 'widespread, long-term and severe damage to the natural environment', and must commit the unlawful act with the intent of causing severe damage, hereby excluding cases of recklessness and negligence.[43]

Third, the unlawful act is prosecutable only if there is a proof that the damage would be 'clearly excessive in relation to the concrete and direct overall military advantage anticipated'. While Article 8(2)(b)(iv) prohibits 'widespread, long-term and severe damage to the natural environment', there is no clear definition of these terms enshrined in the Rome Statute. Therefore, it remains unclear which conduct this provision aims to criminalize as sufficiently devastating to justify criminal responsibility and conviction.[44] This goes against the legality principle which requires crimes to be as specific as possible and to indicate the conduct prohibited as clearly as possible to their addresses in terms of both the objectives of the crime and requisite *mens rea*.[45] Another difficulty that arises is that the prosecution must prove that the environmental damage that occurred was a combination of the terms mentioned above – a combination that is hard to demonstrate and find.[46]

The ambiguity of the provision also raises concerns with regard to the rule of lenity expressed in Article 22(2) of the Rome Statute, which states that 'the definition of a crime shall be strictly constructed and shall not be extended by analogy. In the case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted'. Therefore, the lack of clarity allows the interpretation of the provision in favor of the accused. A rectification to this will only be possible if the Assembly of States party to the ICC will agree on the adoption of a clear definition of 'widespread, long-term and severe damage'. Until then, the early ICC's attempts to enforce this provision will be doomed by the rule of lenity as expressed above.[47]

Even if a clearer definition of the terms 'widespread, long-term and severe damage' will be conceptualized, the broad scope of the proportionality test will still impede the ability of Article 8(2)(b)(iv) to protect the environment during armed conflict.[48] As stated before, this Article prohibits 'intentionally launching an attack (…)' if and only if, this attack 'would be clearly

[43] Liemertje J Sieders, 'The Battle of Realities: the Case For and Against the Inclusion of 'Ecocide' in the ICC Rome Statute', The Criminal Law Protection of our Common Home, The International Framework, (2020) RIDP 29.
[44] Jessica C Lawrence and Kevin J Heller, (n 31) 71
[45] Ibid.
[46] Melanie Schneider (n 42).
[47] Ibid.
[48] Ibid.

excessive in relation to the concrete and direct overall military advantage anticipated'.[49] This proportionality standard overrides Article 51(5)(b) of the Geneva Conventions' Additional Protocol I, which prohibits attacks that 'may be expected to cause injuries or damage to civilians which would be excessive in relation to the concrete and direct military advantage anticipated'.

The differences in the wording of the provisions clearly show a higher threshold expressed in Article 8(2)(b)(iv) that allows cases of environmental war crimes to evade the justice of the ICC.[50] In addition, the vagueness of the terms 'clearly excessive', 'concrete', 'direct', 'overall' and 'military advantage' raise serious legal concerns, making it even more difficult to establish what kind of attack will be proportionate on the part of the perpetrator or that the ICC could establish after the commission of the crime what kind of attack it was not.[51]

The requirement of knowledge of the attack as immoderate or excessive in proportion to the expected advantage requires a balancing test as well. The Rome Statute once again remains silent on any clarifications on actions that are considered criminal and the agreed grounds of prosecution. This lack of clarification further supports the idea that the inclusion of an ecocentric element as part of war crimes comes secondary to any military considerations.[52] This is also illustrated in many cases of environmental harms being committed as a byproduct of war. One such case is the 1991 oil spill during the Gulf War committed by Iraq, which led to the contamination of the Persian Gulf.[53] Similarly, the NATO's bombing of the former Republic of Yugoslavia resulted in the pollution of the Danube river that flowed into the Black Sea.[54] To the surprise of many, none of these cases were ever prosecuted under Article 8(2)(b)(iv).[55]

Another limitation of Article 8(2)(b)(iv) is the subjectivity of its required *mens rea,* which makes it even harder for the prosecution to prove that the concerned perpetrator knew the attack would be disproportionate.[56] As stated in the Elements of Crimes, a perpetrator is criminally liable under this provision if:

---

[49] Rome Statute of the International Criminal Court, (n 35), Article 8(2)(b)(iv).
[50] Sieders, (n 42) 34.
[51] Jessica C Lawrence and Kevin J Heller, (n 31)78.
[52] 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 U Chicago Intl L Rev 196 <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1202&context=lucilr> accessed April 3, 2022
[53] Ibid.
[54] Ibid 193.
[55] Ibid.
[56] Ibid.

> The perpetrator knew that the attack would cause incidental (…) widespread, long-term and severe damage to the natural environment and that such (…) damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[57]

This provision encompasses three requirements under which perpetrators could be held liable under Article 8(2)(b)(iv), all containing problematic elements. The first requirement concerns the knowledge of the damage. It is difficult to prove that the perpetrator knew that the attack was intended to cause widespread, long-term and severe damage. This is problematic, as, for one, these terms are not defined in the Rome Statute nor its Elements of the Crimes and for the other, in the absence of a clear definition, it is difficult to state with certainty that a perpetrator would consciously intend to bring about the attack that would cause widespread, long-term and severe damage to the environment.[58] Moreover, even proving that the perpetrator was aware that the intended attack would result to some amount of environmental destruction will not suffice according to the more specific knowledge required by Article 8(2)(b)(iv).[59]

The second requirement refers to the military advantage anticipated by the perpetrator in determining the excessive damage to the environment. The usage of the term 'anticipation' is problematic as it insinuates a subjective assessment made by the perpetrator, excluding the probability of the perpetrator as mistaken or their anticipation as a result of negligence.[60] This proportionality test does not demand a reasonable anticipation, but an anticipation with regards to the military advantage of the attack, which makes it clear that the honesty of the perpetrator is at play rather than the reasonableness or their argument at the time the attack was made.[61]

The last *mens rea* requirement under Article 8(2)(b)(iv) is that the perpetrator consciously came to the conclusion that the result of the attack is 'clearly excessive'. Therefore, the attack of the perpetrator is not criminal because the perpetrator possessed the knowledge that such an attack will lead to widespread, long-term and severe damage to the environment and because the perpetrator did not anticipate that the result of the attack would lead to a significant military

[57] International Criminal Court (ICC), Elements of Crimes (2011), Art. 8(2)(b)(iv)(3).
[58] Melanie Schneider (n 42).
[59] Jessica C Lawrence and Kevin J Heller, (n 31)78.
[60] Ibid. 81.
[61] Ibid.

advantage. Moreover, with the last requirement of the provision, the perpetrator has to determine that the conclusion of such actions is clearly excessive.[62] The usage of the term 'clearly excessive' is *sui generis* in the Elements of the Crimes which implies that the perpetrator must complete 'personally a value judgment, unless otherwise indicated'.[63] The 'clearly excessive' requirement under Article 8(2)(b)(iv) is the only provision that qualifies under the exception 'otherwise indicated' value judgment in the Elements of the Crimes: 'as opposed to the general rule set forth in paragraph 4 (…) this knowledge element requires that the perpetrator make the value judgment as described therein'.[64]

The wording of this requirement, therefore, makes it more difficult to conceive a situation where this will be clearly depicted from the course of events as intended by the perpetrator, which launched an attack despite having consciously concluded that the attack will result in a 'clearly excessive' environmental damage.[65] In practice, a scenario that is more likely to happen is that the military commander underestimates both the damage to the environment and the military advantage that will occur as a result of the intended attack. Both, however, will not suffice under the 'clearly excessive' value judgment.[66] Therefore, both ignorant and knowledgeable perpetrators will not be held criminally liable under Article 8(2)(b)(iv) as they could plead an excuse for not knowing that they have to carry out a value judgment.[67]

Another limitation with regard to the applicability of Article 8(2)(b)(iv) is the fact that the damage to the environment has to be committed as part of military activities. This had an impact on the amount of successful prosecutions before the ICC mainly due to environmental destruction being secondary to military activities.[68] Therefore, the limited context of the current rules on armed conflict applicable during war time is ineffective in the context of environmental crimes.[69] To illustrate this point, in the *Bosco Ntaganda* case for instance, Ntaganda was found guilty of 18

[62] Ibid.
[63] International Criminal Court (ICC), Elements of Crimes (2011) General introduction §4 and footnote 37.
[64] Ibid, footnote 37.
[65] Jessica C Lawrence and Kevin J Heller, (n 31)83.
[66] Ibid.
[67] Ibid. 84.
[68] Ibid. 78.
[69] Ricardo Pereira, 'After The ICC Office Of The Prosecutor's 2016 Policy Paper On Case Selection And Prioritization: Towards An International Crime Of Ecocide?' (2020) 31 Crim LF 180 < https://ssrn.com/abstract=3654359> accessed 4 April, 2022.

counts of war crimes and crimes against humanity in the Democratic Republic of Congo.[70] Ntaganda entered in a contract with a private company that exploited natural resources in return for remuneration. Regardless of the evident environmental dimension of the case, Ntaganda was still convicted of the pillaging war crime related to several appliances, but not natural resources.[71] Similarly, in the *Bemba* case, the ICC convicted Bemba for the war crime of pillaging with regards to the appliances of goods, while no charge was found for the exploitation of natural resources.[72] These cases show the lack of a recognized linkage between the exploitation and pillage of natural resources and international crimes, particularly those falling under the war crime provision.

All the above-mentioned limitations impact the deterring effect and the punitive consequences that come with being convicted by the ICC for committing an international crime. Individuals that cause environmental damages are not found guilty due to the exceptions for criminal liability that limit the ICC's scope. This, in turn, points to the broad scope of cases that are capable of being prosecuted as international crimes of ecocide at the ICC.[73]

1.1.1.2. Genocide

The crime of genocide has been defined in 1948 in the Genocide Convention and has since been transcribed into the Rome Statute of the ICC.[74] Article 6 of the Rome Statute defines genocide as 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[75] To begin with, compared to the other core crimes of the Rome Statute, the crime of genocide poses a significant higher threshold for the recognition of environmental damage as an act of genocide. A number of limitations make it difficult to prosecuting cases of environmental damage as falling under the crime of genocide. One of the reasons is the special intent requirement of genocide when exterminating an ethnic group.[76] To illustrate this point, even if the *actus reus* which caused environmental destruction led to the killing of members of a group, the prosecutor

[70] International Criminal Court, 'ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity' (8 June 2018) Press Release <ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity | International Criminal Court (icc-cpi.int)> accessed 4 April, 2022.
[71] Ibid. 209.
[72] Ibid.
[73] Ibid. 210.
[74] Tara Smith, 'Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law' (2011), in William A. Schabas, Yvonne McDermott, Niamh Hayes and Maria Varaki (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2012).
[75] Rome Statute of the International Criminal Court, (n 35), Article 6.
[76] Pereira, (n 65) 214.

would need to prove that the *actus reus* was committed with the intent to 'destroy, in whole, or in part, a national, ethnical, racial or religious group'.[77] Therefore, showing that a perpetrator engaged in acts that caused environmental damage which resulted either in the displacement of a particular group or caused injury to the particular group, will not suffice, as the intent requirement to destroy these groups has to be present as well.[78] This becomes even more worrisome in the context of corporations. In accordance with the balanced approach enshrined in the sustainable development principle, whereby acts that result in damaging the environment can be legal if such acts are significant for the fulfilment of one's right to sustainable development, corporations can use this as a justification for environmental destruction on the premise of the benefit or advancement of society.[79] One example of this development justification is the case of native Shi'a Muslims living in the Mesopotamian Marshes in Iraq. In 1991, this group attempted to overthrow the Hussein government, which proved unsuccessful and in fact led to attempts by the State to destroy the group in return. These attempts by the Hussein government to destroy the Marsh Arabs took the form of direct killings but also the destruction of their environment that the group used for their living and survival for thousands of years, by constructing a dam that led to a remain of only 7 percent of the total wetlands in the Mesopotamian Marshes in Iraq. This case clearly shows how the destruction of an ecosystem has resulted in the death and disposal of local people living in the area. On the part of the Hussein government, the building of dams and canals, actions which led to the draining of the Marsh Arabs, was done with the intent to develop that area, an unreasonable justification that was hiding evidence to prove genocidal intent and environmental destruction.[80]

Article 6 of the Rome Statute encompasses a list of acts that could amount to genocide if the *chapeau* or contextual element is met. For the purpose of this thesis, Article 6(c) is most relevant when it comes to environmental damage. Article 6(c) requires '[deliberate] inflict[ion] on the group conditions of life calculated to bring about its physical destruction in whole or in part'[81], which must be coupled with the intent to bring about the destruction, in whole or in part, of a particular group.[82] The arrest warrant of Al Bashir illustrates this condition.[83] The arrest warrant

[77] Rome statute of the International Criminal Court, (n 35) Article 6(a).
[78] Patel, (n 50) 189.
[79] Smith, (n 69) 5.
[80] Ibid.
[81] Rome Statute of the International Criminal Court, (n 35) Article 6(c).
[82] Smith, (n 69) 3.
[83] Pereira (n 65) 216.

contained an environmental element that led to the case being prosecuted under the crime of genocide. The environmental element identified a nexus between the contamination of water resources as an act that amounts to environmental destruction and genocide. The Pre-Trial Chamber found that this water contamination act coupled with the forced transfer and resettlement of a tribe was committed with the intent to 'deliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part'.[84] This case shows that the core crime of genocide encompasses cases of violations of a group's 'cultural identity' through the degradation or destruction of its environment.[85] Therefore, if a perpetrator inflicts environmental harms on the 'vital living space' of a particular group – such as indigenous communities or cultural minorities that have not only a dependency relationship with the environment for their survival, but a spiritual connection as well – this amounts to the destruction of this group's 'cultural identity'.[86] And yet, in such cases, the damage to the environment does not suffice for amounting to a genocidal act. The prosecutor will still need to prove the perpetrator's intent to commit the genocidal act, which does not include the destruction of the environment that resulted as a consequence of the *actus reus* that was committed.[87] In addition, the question of irreversible environmental damage is also problematic since by the time the prosecution occurs, any deterring effect might be useless given the possible irreversible destruction that took place.[88]

1.1.1.3. Crimes against humanity

Similar to the crime of genocide, crimes against humanity are prosecutable during non-armed conflicts as well.[89] Article 7 of the Rome Statute defines crimes against humanity as 'acts […] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Out of the enumerated acts that fall under this provision, under Article 7(1)(k) of the Rome Statute, an attack against the environment needs to result in 'great suffering, or serious injury to body or to mental or physical health' in order to fall under the crime against humanity provision. The anthropocentric emphasis on danger to humans leaves the ecocentric harm to the environment without protection under any legal provision. Moreover, the

[84] Pereira, (n 65) 216.
[85] Patel, (n 50) 190.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Pereira, (n 65) 216.

environmental damage that occurs has to result from a 'widespread or systematic attack', which is a significantly high threshold to meet.[90] To date, there is no case on environmental destruction that has been prosecuted as a crime against humanity at the ICC. In the following section, the extent to which a case of environmental destruction can be prosecuted as a crime against humanity will be examined under the presumption that there are no issues of jurisdiction nor of admissibility conditions in order for the destruction of the environment to meet the conditions required by Article 7 of the Rome Statute under crimes against humanity.[91]

To begin with, as stated before, Article 7 includes a list of crimes, which refer to fact-based circumstances that a case must meet and the contextual element of the crime against humanity as delineated from the *chapeau* of the Article.[92] The contextual element of crimes against humanity is met when a case contains the following requirements: an attack against civilians that is 'widespread or systematic' and perpetrated with an awareness of the attack.[93]

The first requirement contains three other requirements as expressed under Article 7(2)(a). Article 7(2) states that (i) the act must have occurred on more than one occasion; (ii) the act must have been carried out as an attack against civilians; and it must be (iii) 'pursuant to or in furtherance of a State or organizational policy to commit such attack[s]'.[94] When applying the first condition to cases of environmental damage, this implies that the disposal of, for example, waste or toxic material falling under 'other inhumane acts of a similar character causing great suffering, or serious injury to body or to mental or physical health', must have occurred more than one time. Therefore, the dumping of toxic material and waste amounts to one act. If this act happens on more than one occasion, then this would amount to multiple acts as required by the Rome Statute.[95] Secondly, according to Common Article 3 of the Geneva Conventions, the second condition requires civilians to be persons that do not take part in any armed activities. This is not as hard to prove as other requirements under the provision because all the victims of crimes during peace time are considered civilians according to the definition.[96] Lastly, the third condition demands evidence that one organization or the state in question has 'actively promoted or encouraged' an attack, or

[90] Melanie Schneider (n 42).
[91] Caitlin Lambert, 'Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?' (2017) 30(3) LJIL 711
[92] Ibid, 718.
[93] Rome Statute of the International Criminal Court, (n 35) Article 7(1).
[94] Ibid., Article 7(2)(a).
[95] Lambert, (n 84) 721.
[96] Ibid.

failed to prevent its commission.[97] Some questions remain, however, regarding the extent at which one must demonstrate a *nexus* between the attack and the actions that should be considered unlawful.[98] Further clarifications are needed in order for a case of environmental damage to be considered as an attack amounting to a crime against humanity.[99]

As regard to the second requirement, the prosecutor would have to prove that the attack was either widespread or systematic. On the one hand, in order for an attack to be considered as widespread, there must be a significant number of victims as a result of the attack. On the other hand, in order for an attack to be systematic, the prosecutor must be able to prove the 'organi[s]ed nature of the acts that make up the attack', meaning that the prosecutor must prove the organized method with which the acts were executed.[100] The third requirement of Article 7(1) outlays the *mens rea* of the crime against humanity, which requires the that the perpetrator had knowledge of the attack in question (in this case, the environmental destruction). This is a relatively low standard for *mens rea*, as no other requirement is made other than the perpetrator's knowledge of the attack.[101]

In sum, environmental damages may be prosecuted at best in an indirect way under Article 7, as the provision primarily addresses harm to humans and not to the environment.[102] Moreover, the *mens rea* requirement under Article 7 demands the intention of the perpetrator to cause harm to humans and thereby leaves out the possibility of intended harm to humans via actions that caused environmental damages. The likelihood of having an environmental harm element attached to one of the enumerated acts under Article 7 is therefore rather slim.[103]

The prosecution of environmental destruction cases may thus be possible as part of prosecutions concerning the extermination, deportation or forcible transfer of population and other inhumane acts[104], hence as an indirect cause that resulted in these acts.[105] Despite this, crimes against humanity remain the most viable option for prosecuting environmental damage before the

[97] International Criminal Court (ICC), Elements of Crimes, Article 7 Introduction para. 3.
[98] Lambert, (n 84) 723.
[99] Melanie Schneider (n 42).
[100] Ibid.
[101] Ibid, 725.
[102] Ibid, 726.
[103] Melanie Schneider (n 42).
[104] Rome Statute of the International Criminal Court, (n 35) Article 7(1)(d)- (k).
[105] Smith, (n 69) 7.

ICC, as it requires a lower intent threshold than genocide, and can apply in the context of an armed conflict and during peace time, in contrast to war crimes.

The legal commentary fails to offer an explanation on why the IEP aimed for the inclusion of ecocide as a fifth international crime instead of a twelfth crime against humanity. Heller offers a substantive and a conceptual reason in this regard.[106] The substantive reason is to avoid attributing the contextual elements of crimes against humanity to the crime of ecocide, which as shown in the analysis above, are not suited to a crime that focuses on environmental harms. The conceptual reason is to avoid the framing of ecocide as an anthropocentric crime.[107]

1.1.1.4. Crime of Aggression

Article 8 *bis* of the Rome Statute defines the crime of aggression as:

> 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.[108]

By looking at the enumerated offences covered by Article 8 *bis* (2), there is no link to environmental damages as covered by this provision that 'falls short of the use of nuclear weapons, or extreme biological or chemical attacks'.[109] Certainly, the result of a bombardment or invasion of a State by the military forces of another could lead to environmental destruction. The circumstances of such an action would determine if the attack qualifies as an act of aggression or not. However, in the same vein, such attack could easily evolve into an armed conflict, at which point the provision governing the *nexus* between the act and the environmental destruction would be Article 8(2)(b)(iv) of the Rome Statute.[110] Therefore, the extent to which the crime of aggression under the Rome Statute can address environmental damage is rather limited.

---

[106] Kevin J Heller, 'Skeptical Thoughts on the Crime of Ecocide: That Isn't', Opinio Juris, 23 June 2021, <http://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/> Accessed 12 March 2022.
[107] Ibid.
[108] Rome Statute of the International Criminal Court, (n 35) Article 8 *bis*(1).
[109] Smith, (n 69) 12.
[110] Ibid. 13.

The anthropocentric nature of the ICC limits the standing of cases of environmental destruction to particular instances. As depicted from the analysis above, the ICC can only prosecute cases of environmental damage that resulted in human atrocities. The failure of environmental regulation, ICL and even national regulations to prevent the widespread destruction of the environment call for an urgent strengthening of protection in the face of the environmental challenges facing our planet.[111] Explicit protection to the environment is only granted during war as prescribed by Article 8(2)(b)(iv). As already noted, the application of this provision in this regard is limited by its high thresholds.[112] Outside wartime, protection of the environment can only be granted from crimes against humanity or genocide. However, this approach comes with limitations as well mainly because of the anthropocentric character of the current ICL framework which does not endeavor to criminalize conduct that impacts ecosystems and humans alike.[113]

[111] Rachel Killean, 'From Ecocide to Eco-sensitivity: "Greening" Reparations at the International Criminal Court, (2021), Intl J Hum Rts 8.
[112]Ammar Bustami and Marie-Christine Hecken, 'Perspectives for a New International Crime against the Environment: International Criminal Responsibility for Environmental Degradation under the Rome Statute' (2021) 11 Goettingen J Int'l L 162
[113] Ibid.

Chapter 2. The Dichotomy between anthropocentrism and ecocentrism

This chapter begins to highlight the two strands that are at the heart of the recognition of ecocide under the Rome Statute debate, namely anthropocentrism and ecocentrism. As highlighted in the previous chapter the anthropocentric traits of the ICC are uncapable of addressing large scale environmental damage. The adoption of ecocide as a fifth crime against peace, on par with 'the most serious crimes of international concern' attempts to remedy this accountability gap.[114] The IEP argued that with the inclusion of ecocide in the Rome Statute, the anthropocentric traits of ICL could be remedied by a "shift in consciousness" and the need of better protection awarded to the non-humans such as ecosystems.[115]

2.1. Anthropocentrism

An anthropocentric approach to environmental protection is centered around the idea that the environment must be protected and the use of natural resources regulated for the benefit of humans.[116] Since the sixteen century, this idea has been embedded in our modern societies.[117] Scholars have identified that anthropocentric traits can be observed as inherent in most forms of human knowledge and as a result, the acknowledgement of the ecosystems' importance is only instrumental.[118] The anthropocentric bias towards nature lies at the root of ecological crises.[119] In its common meaning, anthropocentrism is referred to as an ideology that advocates humanity as the root value.[120] Although various definitions have been provided by multiple scholars[121], anthropocentrism involves the 'planetary-scale subordination of nonhuman organisms that denies that they have value in their own right'.[122] Therefore, the idea of only humans being worthy of ethical considerations and the nonhumans as means to human ends is at the core of

[114] Rome Statute of the International Criminal Court, (n 35) Preamble.
[115]Stop Ecocide foundation (n 9).
[116] Jessica C Lawrence and Kevin J Heller, (n 31) 64
[117] Haydn Washington, 'Human Dependence on Nature: How to Help Solve the Environmental Crisis' (1st ed) (2017) Routledge 68.
[118] Ibid. 68
[119] Hellen Kopnina et al. 'Anthropocentrism: More than Just a Misunderstood Problem' (2018) J Agric Environ Ethics 109-127.
[120] Ibid. 115.
[121] In 'Competing Narratives and Complex Genealogies: the Ecosystem Approach in International Environmnetal Law (2015) Journal of Environmental Law 91-117 de Lucia identifies various positions to anthropocentrism ranging from resourcism to soft stewardship.
[122] Ibid. 115

anthropocentrism.[123] Anthropocentric attitudes have shaped the way law categorizes, constructs and protects nature,[124] In this regard, anthropocentrism acts as an exclusion mechanism through which modern laws disadvantages both humans and ecosystems.[125] Conceptualizing ecocide from an anthropocentric perspective would complement the approach of the Rome Statute that deals with international crimes of humanity concern which emphasize the wellbeing of humans in prohibitions of harm.[126] Following this line of reasoning, harm to human beings extends to harm of the living environment in the sense that by way of having a duty to protect human rights, includes the protection of ecosystems upon which humans rely.[127]

2.2. Ecocentrism

In contrast, an ecocentric approach to environmental protection foregrounds the idea of that the 'non-human environment' is 'independent of the uses for which human beings may exploit it'.[128] Ecocentrism involves the acknowledgement of the intrinsic values of nature, and fosters the idea of affording equal attention to ecological integrity and the good functioning of ecosystems.[129] Some ecocentric positions have also advocated for the recognition of natural entities as legal subjects.[130] Ecosystems are thus considered as wholes, composed of humans and non-humans alike as closely interrelated.[131] Similarly with the anthropocentrism concept, ecocentrism has been defined and interpreted in various ways by different scholars.[132] At the heart of the ecocentrism belief lies the perception of environment as having intrinsic values as opposed to any utilitarian or instrumental value it might bring for the benefit of humans.[133] In this regard, due to the philosophical relevance of non-human entities, they ought to be subject to a duty of care that should structure legal as well as social practices.[134] If nature is thus considered to be of an intrinsic value, nature becomes worthy of protection independent from its instrumental value to humans. The

[123] Ibid.
[124] Vito de Lucia, 'Competing Narratives and Complex Genealogies: the Ecosystem Approach in International Environmnetal Law (2015) Journal of Environmental Law 91-117.
[125] Ibid. 95
[126] Rob White, 'Ecocide and the Carbon Crimes of the Powerful' (2018) 37 U Tas L Rev 95
[127] Ibid. 103.
[128] Jessica C Lawrence and Kevin J Heller, (n 31) 64
[129] Vito de Lucia (n 115) 99
[130] Ibid. 104
[131] Ibid. 105
[132] Rob White, 'Ecocentrism and Criminal Justice' (2018) Theoretical Criminology 343.
[133] Rob White (n 120) 103
[134] Rob White (n 126) 344

conceptualization of ecocide from an ecocentrism perspective as proposed by the IEP in their draft legal commentary for the amendment of the ICC Rome Statute emerges from the premise of earth stewardship.[135] Accordingly, ecocentrism approaches to ecocide attempt to criminalize and establish degrees of responsibility for activities that are harmful for the health of ecosystems.[136] In contrast to the anthropocentric attitudes towards nature that pertain in our modern law, ecocentrism emphasizes the necessity of according non-human entities that are affected by anthropocentric acts or omissions, the chance to seek redress before a court as right holders.[137]

Some scholars have suggested the reading of the existing core crimes in light with a green narrative for remedying this accountability gap.[138] Similarly, in 2013 The Office of the ICC Prosecutor issued a Policy Paper on Preliminary Examinations in which a reference to 'environmental damage' was made as a factor to be considered by the Office of the Prosecutor in the preliminary stage of a possible situation that might trigger investigations.[139] In 2016, the ICC Prosecutor expressed the intention of investigating and prosecuting international crimes of environmental impact such as land grabbing, illegal exploration of natural resources and environmental harms occurring during peacetime.[140] Both Policy Papers suggest the intention of the ICC Prosecutor to hold accountable more individuals that have committed acts that have resulted in environmental destruction as a decisive factor for starting investigations in the context of the core crimes under the Rome Statute.[141] These efforts however, are still at the level of proposals as no cases of environmental damage have been prioritized under the Rome Statute.[142] Mwanza[143] has argued that a paradigm shift that promotes a different set of values from the current ICL rules that fail to address the environmental damages is needed. In a similar fashion, Phillipe Sands, made clear that the intention of the IEP's proposal was to "make the protection of the environment an end in

[135] Rob White, (n 124) 103
[136] Ibid.
[137] Ibid. 104.
[138] Rachel Killean, 'From Ecocide to Eco-sensitivity: Greening Reparations at the International Criminal Court', (2021) Intl J Hum Rts 323.
[139] The Office of the Prosecutor, 'Policy Paper on Preliminary Examinations', (November, 2013), ICC, para. 65, 16.
[140] OTP, 'Policy Paper on Case Selection and Prioritization' (2016).
[141] Rachel Killean (n 102) 331.
[142] Ammar Bustami and Marie-Christine Hecken (n 106) 149.
[143] Mwanza Rosemary, 'Enhancing Accountability for Environmnetal Damage under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity', (2018) Melb J Int'l L 590.

itself".[144] The statement made by Sands advocates the green narrative of defining an ecocentric provision that allows for this paradigm shift from anthropocentrism to ecocentrism. Although a promising initiative, a shift from a human-oriented protection perspective to an ecosystem perspective is quite a radical shift as noted by some authors.[145] This shift implies the reconstruction of our attitude towards nature that dismantles the fence that divides humans from nature.[146] Whether this paradigm shift can be achieved with the recognition of ecocide as a crime against peace under the Rome Statute is subject to the inquiries in the following chapters.

[144]Mia Swart, 'The Revolution does not happen overnight': Philippe Sands on ecocide and its links to Nuremberg (2021) Aljazeera Centre for Public Liberties and Human Rights < https://liberties.aljazeera.com/en/the-revolution-does-not-happen-overnight-aj-speaks-to-philippe-sands-on-ecocide-and-a-life-in-environmental-lawyering/> accessed 12 March 2022.
[145] Vito de Lucia, (n 115) 104.
[146] Ibid. 105

Chapter 3. Ecocide as a fifth international crime under the Rome Statute

This chapter begins to examine the IEP's proposal of Article 8*ter* and the required two thresholds for establishing accountability of mass environmental destruction. In this manner, this chapter will function as an outline for the analysis of a hypothetical ecocide case presented in the following chapter. After outlining the proposed criteria for establishing individual culpability, this chapter will examine the guilty state of mind needed for an individual to be held criminally liable under the proposed definition of ecocide as provided by the Panel. This inquiry will be conducted against the current criticism raised by scholars and legal practitioners in the fields of ICL and IEL.

3.1. The proposed ecocide definition and the unique characteristics of the crime

For the purpose of this analysis, The Panel recommends that a new crime of ecocide be adopted as Article 8*ter* of the Rome Statute. This definition is based on a recognition of key components of ecocide: (1) wanton, (2) severe, (3) widespread, (4) long-term, (5) environment.[147]

3.1.1. The required ecocide thresholds for establishing responsibility and accountability for environmental destruction

The proposed definition of ecocide by the IEP demands two thresholds for prohibited conduct under which an individual can be held criminally accountable for acts of environmental destruction. The first relates to the types of actions that might amount to ecocide and the second relates to the gravity of the acts, referred to as types of harm that might amount to ecocide. The first threshold requires knowledge of 'a substantial likelihood that the conduct (which includes an act or an omission) will cause severe and either widespread or long-term damage to the environment'.[148] The commentary and core text goes further and addresses in this regard the acknowledgement of certain circumstances which, even if considered 'legal, socially beneficial and responsibly operated', can lead to severe, widespread or long-term damages to the environment. For this purpose, the second threshold proposed by the Panel demands that the acts

[147] Stop Ecocide Foundation, (n 9); The terms will be defined throughout the subsections of this chapter.
[148] Ibid.

are either 'unlawful or wanton'.[149] The latter is closely related to the concept of sustainable development.[150]

3.1.1.1. First threshold

The first threshold requires knowledge of 'substantial likelihood of severe and widespread or long-term damage to the environment'. The first requirement under this threshold is the perpetrator's awareness of the severity of the crime. The Panel defines severe as 'damage which involves serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources'.[151] These are ways in which judges can assess the severity of the crime. The choice of terms 'grave impacts on human life' links environmental destruction to human rights violations. This is not new since many human rights bodies have recognized that humans' ability to live and their ability to live in dignity and well-being is impacted by the environment. Furthermore, another important aspect of this crime is that compared to the other four core crimes of the Rome Statute, the crime of ecocide is not exclusively anthropocentric, leaving the possibility of prosecuting cases of environmental destruction without having to prove any harm to human beings. Therefore, this crime extends to cases of natural and cultural resources as well. The latter is especially important in the context of indigenous communities around the world and the possible dimension of cultural genocide as part of the ecocide crime.[152] According to the second requirement under this threshold, there has to be a substantial likelihood of not only severe but also widespread or long-term damage. Widespread is defined as 'damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings'.[153] Just like severe, the term widespread recognizes not only the harm to humans but also harms to other species and ecosystems.[154] On the other hand, long-term is described as 'damage which is irreversible or

[149] Ibid.
[150] Stop Ecocide Foundation (n 9)
[151] Ibid.
[152] Sailesh Meheta and Prisca Merz (n 17) 3
[153] Stop Ecocide Foundation, (n 9).
[154] Ibid.

which cannot be redressed through natural recovery within a reasonable period of time'.[155] Both of those qualifiers are intended to set high thresholds. The disjunctive 'or' suggests that a perpetrator would be liable for crimes that led to environmental damages under the ecocide provision when there is sufficient 'knowledge of substantial likelihood' of severe and either widespread or long-term environmental damage can be established. This alternative is especially relevant when thinking of possible ecocide cases, where a severe damage which was also irreversible occurred, but perhaps only concerned a very small area or, conversely, cases where the environmental damage was widespread but perhaps would not be redressed within a reasonable period of time. In both scenarios, the harms should nonetheless be prohibited.

Minkova draws some reflections on the draft text for the crime of ecocide proposed by the Panel of Independent Experts. She touches upon specific aspects of the proposed definition such as the perspective on the humans-nature relationship and the mental element of liability that have raised some concerns amongst legal experts.[156] The second point of reflection that adds to the engagement of Minkova with the debate on the IEP's definition of ecocide is the conceptual ambiguity of the mental element of ecocide. Already in the first paragraph of the text, the drafters make it clear that the accused has to have 'knowledge that there is a substantial likelihood' that as a result of their action, severe, widespread or long-term environmental harm is caused. Subsequently, if one takes a close look at the commentary of the IEP, the drafters express their proposed threshold for the mental element of liability as recklessness or *dolus eventualis*. Therefore, Minkova raises her concerns on the ambiguity of the mental element of ecocide stating that all these composing elements stand for three different requirements. She then makes her argument around the latter position based on the nature of the term 'knowledge' as codified in the Rome Statute and interpreted by the ICC.

The prerequisite of *mens rea* under Article 8 *ter* demands from an individual to have knowledge of that substantial risk: 'unlawful or wanton acts committed with knowledge'.[157] The guilty state of mind required by the draft definition of the crime of ecocide has been subject to criticism as it departs from Article 30(3) of the Rome Statute, which defines knowledge as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of

[155] Ibid.
[156] Liana Georgieva Minkova, 'The Fifth International Crime: Reflections on the Definition of Ecocide (2021) Journal of Genocide Research 89.
[157] Ibid.

events'.[158] Therefore, Article 30(3) sets a higher standard, whereby the perpetrators have to be 'virtually certain' that their actions will result in forbidden consequences.[159] Subsequently, if one takes a close look at the commentary of the Panel, the drafters express their proposed threshold for the mental element of liability as recklessness or *dolus eventualis*.[160] The Panel motivated this decision by stating that the default rule of *mens rea* under Article 30 of the Rome Statute is too restrictive and excludes cases of elevated likelihood of inducing severe or either pervasive or long-term environmental destruction, according to the high thresholds for the consequences within the definition.

Minkova thus advocates for the removal of the term 'knowledge' altogether if ambiguities were to be avoided. She then concludes that if the term knowledge is to be removed, the drafters should consider its substitution with 'awareness of a substantial likelihood'.[161]Although this initiative will amount to replacing the actual threshold of the mental element as codified in Article 30 of the Rome Statute, the support of this view lies on the complexities attached to ecocide and the anticipation of environmental harm not necessarily intended or certainly known.

3.1.1.2. Second threshold

The second threshold of the ecocide crime under Article 8 *ter* requires the criminalized acts to be either 'unlawful or wanton'. While the qualifier 'unlawful' is self-evident and refers to acts that are harmful and prohibited by law, the problem that arises is that not all acts that are destroying the environment and that should be prohibited are currently unlawful.[162] For this reason, the qualifier of 'wanton' emphasizes the intent to cover acts that are not currently unlawful under national or international law. Wanton is defined as 'reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated'.[163] Consequently, acts that may not be unlawful but nonetheless completely out of balance with any kind of principle of

[158] Rome Statute of the International Criminal Court, (n 35) Article 30(3).
[159] Heller, (n 97).
[160] Liana Georgieva Minkova, (n 147) 8.
[161] Ibid.
[162] K. Heller, 'The Crime of Ecocide in Action', Opinio Juris, 28 June 2021, <http://opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action/> Accessed 12 March 2022
[163] Ibid.

sustainable development are protected by this qualifier. The Panel therefore acknowledges the possibility of cases of environmental destruction as possibly falling under the ecocide provision even when they may appear as legitimate (i.e., when the environmental damage was necessary for legitimate human development).

As regards the term 'wanton' as a balancing test between the excessive damage and the 'social and economic benefits anticipated', some scholars have argued that the term in itself is intended to introduce another *mens rea* prerequisite as part of the ecocide crime, as it is not essential for the concerned perpetrator to have knowledge of the 'substantial or either widespread or long-term environmental damage'.[164]

The second paragraph of Article 8ter contains an anthropocentric element which allows for a cost-benefit test of an environmental harmful activity, when assessing whether the activity can fall under the ecocide heading or not. For Minkova, this test goes against the symbolic value of the criminalization of ecocide by the ICC. Minkova believes that it is particularly this juxtaposition of socio-economic benefits on the one hand and the environmental harm on the other that degrades the interlinked relationship between nature and humans and leaves an open door for potential cases where people may benefit from the degradation of the environment still.[165]

The Panel also crafted the crime of ecocide as a crime of endangerment rather than material harm.[166] Therefore, if the criminal act is creating a risk of harm to the environment, then the substantial likelihood of severe and either widespread or long-term harm is fulfilled. In other words, the ICC prosecutor does not have to wait for that harm to manifest. According to Prokeinova and Blazek, the ecocide crime should recognize environmental degradation and damage induced by humans as crime of strict liability.[167] This will exclude the claims made by corporations that they did not have knowledge about the seriousness of the ecosystem destruction leaving their exploitations reported either as accidents or collateral damage. If implemented, the crime of ecocide will represent a legal duty of care to 'pre-emptive help' upon all nations.

---

[164] Sarthak Gupta, The Proposed Definition of "Ecocide": An Attempt to Constitute Fifth International Crime?, (2021) Jurist < https://www.jurist.org/commentary/2021/07/sarthak-gupta-ecocide-fifth-international-crime/.> Accessed 29 March 2021.
[165] Ibid.
[166] Stop Ecocide Foundation, (n 9).
[167] Margita Prokeinova and Radovan Blazek, 'Will Ecocide Become an International Crime?', (2020), DCo Intle, Archivo Penale.

Prokeinova and Blazek then suggest that each sanction should be subject to two basic functions: deterrent and reparable feature. With regards to the former, they suggest the deterrence of potential subjects from committing an offense, or in cases where the offence occurs, the deterring effect should be applied as to ensure the prevention of its continuation. Subsequently, the reparable feature stands for the restoration of the consequences and the return to the original state prior to the offence. Another interesting remark made by Prokeinova and Blazek is the restorative justice element attached to crimes against the environment as a means to recompensate for such offences of the humans and nonhumans affected. Therefore, instead of focusing on punishing the perpetrators and awarding responsibility for crimes directed to the environment, Prokeinova and Blazek argue that our shift of focus should be on making sure that the polluter does not pollute in the first place. The dual character of the ecocide crime then resorts to the prohibition of the destruction of the ecosystems and the creation of a legal duty of care upon entities in a position of superior responsibility.[168]

Providing absolute evidence of the acts committed by the concerned perpetrators and the environmental harm that occurred as a result of these acts is, as illustrated in Chapter 3 of this thesis, hard to prove. Whilst proving that the act is causing a substantial risk is a reasonable threshold. Under the abovementioned thresholds, the prosecutor would need to prove that as a result of acts or omissions (either unlawful or wanton) there is a substantial likelihood of causing severe and either widespread or long-term damage to the environment.[169]

One of the critiques raised by Heller with regard to the definition of ecocide offered by the IEP resorts to the limited resemblance of the term of ecocide with the concept of genocide that inspired it. In his argument, Heller draws a parallel from the specific intent required as the essence of genocide to rid the world of specific groups and definition of ecocide as offered by the Panel, where no 'group-like' traits were mentioned in the drafted commentary text. However, it would be both practically impossible and undesirable to limit the ecocide crime to the destruction of specific groups of animals or plants. For this, Heller argues that the proposed crime of ecocide is much closer in nature and structure to a crime against humanity.

[168] Ibid.
[169] Stop Ecocide Foundation (n 9).

Chapter 4. Hypothetical fact scenario

This chapter sets out a hypothetical fact scenario involving hazardous environmental damages in the hopes of demonstrating the applicability of the IEP's definition of ecocide and its potential challenges. For this purpose, this chapter aims to explore an ecocide hypothetical in view with the ecocide definition and its required thresholds for individual culpability as defined by the Panel. The hypothetical essentially serves as a mapping exercise[170] in which the facts of a case are evaluated on the basis of the legal commentary proposed by the Panel with the aim of drawing estimations on how an ecocide case can be dealt with before the ICC in practice. This exercise is a Socratic legal method used predominately by doctrinal professors for guiding students on how to develop analytical skills by means of implicit teaching that will enable students to apply in-class experiences to real life situations.[171] At the core of this method is the belief that by means of supposition thinking, a person endeavors in providing an imagination of possibilities.[172] In addition, a hypothetical fact scenario will not only contribute to the identification of the entry points in international legal and judicial architecture to pursue claims of mass environmental destruction, but also point out the blind spots of the definition of ecocide as it stands. Nicolas Rescher has defined an interference as hypothetical when the truth of its underlying premises or propositions is not absolute and can be questioned or subject to further inquiries.[173] The discussion will revolve around the challenges of the proposed definition of ecocide by the Panel, how it claims to fight against impunity of environmental crimes in practice and the limitations of the proposed definition. Issues pertaining to the science or evidence of the case fall outside of the scope of this analysis.

As provided in the second chapter of this thesis, environmental offences fall short under the scope of the current international core crimes of the Rome Statute. The amendment of the Rome Statute as proposed by the IEP to include ecocide would contribute to ending impunity and

[170] Alice M. Noble-Allgire, 'Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report into a Doctrinal Course' (2002) 3 Nev LJ 32
[171] Anthony S. Niedwiecki, 'Lawyers and Learning: A Metacognitive Approach to Legal Education' (2006) 13(1) *Widener Law Review* 33
[172] Jonathan St B T Evans, 'Hypothethical Thinking: Dual Processes in Reasoning and Judgement'(2007) *Psychology Press* 49.
[173] Nicholas Rescher, 'Hypothetical Reasoning: Studies in Logic and the Foundation of Mathematics. (1964) *North-Holland Publishing Company Amsterdam* 2.

hold individuals, companies and countries accountable for mass environmental degradation. The most valuable repercussion in this sense is the accountability of individuals who hold a position of command or superior responsibility if they engage in acts that harm the environment.[174]

In order to have a holistic understanding of the ecocide legal definition as defined by the Panel, this chapter intends to use a hypothetical fact scenario to illustrate how it would apply in practice. The question of who is be held accountable is also a question that environmental laws and the governments that passed those laws failed to adequately address. [175]

The choice of conducting a hypothetical analysis is a result of an identified gap in the IEP's proposed legal commentary, namely the lack of possible types of conduct that could fall under the legal definition of ecocide. The chapter will highlight some of the criticism raised by scholars regarding the lack of liability of Articles 25 and 28 of the Rome Statute when it comes to the ecocide crime.[176] The reason why this chapter intends to dive into the limited discussion on modes of liability (Article 25 and 28 of the Rome Statute) lies on the collective character of the most atrocious examples of environmental destruction. The collective nature of grave environmental destruction cases is not new when compared with the current international core crimes enshrined in the Statute. Referred to as expressions of collective criminality,[177] international core crimes apply not only to individuals that hold a high position in the military or political hierarchies, but also to those individuals who contributed by means of less significant inputs. The collective criminality is also reflected in the contextual requirements as well, where attack, plans or armed conflicts typically involve more than one individual taking part in the hostilities. For this reason, and for the sake of this chapter's analysis, hypothetical scenarios of ecocide must be read in light with international modes of liability that assign liability to the large numbers of the individuals involved in these collective criminal systems.[178]

---

[174] Brodowski, Dominik et al. (eds. 2014) *Regulating Corporate Criminal Liability*. Cham: Springer 273.
[175] Thomas Hamilton, Marc Tiernan, 'Who could be held responsible for ecocide under the Rome Statute?', Rethinking Secondary Liability for International Crimes (2022), < https://rethinkingslic.org/blog/criminal-law/115-who-could-be-held-responsible-for-ecocide-under-the-rome-statute> accessed 22th May, 2022.
[176] Ibid.
[177] Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', (2007) 5:1 JICJ 109–133.
[178] Hamilton T and Tiernan M. (n 169).

4.1. The deforestation of the Amazon: a case of ecocide

As already established in the introduction of this thesis, investigations of this nature are of immediate need in the face of the devastating climate change impacts, global health and security threats.[179] In October 2021, an Austrian environmental group called AllRise filled an official complaint before the Office of the Prosecutor of the ICC accusing the Brazilian President Jair Bolsonaro of crimes against humanity as a result of his role in the destruction of the Amazon forest.[180] For the purpose of this analysis, this section will engage with the complaint for establishing a factual analysis of the harm occurred. However, the question will resume to whether or not the deforestation of the Amazon would qualify as ecocide under the IEP definition. Therefore, acts that amount to crimes against humanity as claimed by the AllRise environmental group in the report will not be covered. The intention is to use their line of argumentation for proving the environmental harm that occurred as a result of Bolsonaro's policy that facilitated forest degradation and other environmental crimes. No arguments on the attributable link between this policy and the impact on the local communities will be covered for the purpose of this analysis.

The complaint starts by explaining the gravity of the nature of the attack as 'criminality of the very highest order'.[181] The impact of Bolsonaro's policy that led to mass deforestation and unconstrained natural resources exploitation extends beyond the suffering inflicted upon the local communities. Scientific evidence shows that global consequent devastation and fatalities will occur, as a result of this rapid deforestation acceleration, its significant addition to climate change and the extreme weather changes. Given the complexity and depth of the nature of the impacts involved, this case will function as a hypothetical for the analysis below.

[179] AllRise, 'Communication under Article 15 of the Rome Statute of the International Criminal Court regarding the Commission of Crimes Against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to present, perpetrated by Brazilian President Jair Messias Bolsonaro and principal actors of his former or current administration', Submitted in The Hague on October 12, 2021, 8.
[180] Ian Profiri, 'Brazil president accused of crimes against humanity for rainforest destruction', U. Calgary Law School, CA, (2021) < Brazil president accused of 'crimes against humanity' for rainforest destruction - JURIST - News> accessed (20 May, 2022)
[181] AllRise (n 170) 8.

4.2. Applicability of the ecocide crime

The IEP's definition of ecocide is 'unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts'.[182] For hypothetical cases of ecocide (i.e., those that meet the definition of ecocide) to bring about the individual liability of environmental destruction, these cases must meet the following elements: (1) substantial likelihood that the conduct will cause 'severe and either widespread or long-term damage to the environment and (2) that the act is 'unlawful or wanton'.[183] In addition, the *mens rea* of the ecocide crime as defined by the Panel requires awareness of the substantial likelihood of severe and either widespread or long-term damage.[184]

4.2.1. Actus reus

4.2.1.1. Substantial likelihood of causing either widespread or long-term severe damage to the environment

This section will point to Mr Bolsonaro, Mr Salles and the rest of Bolsonaro's administration criminal policy plan and the unbridled economic exploitation acts that led to the destruction and degradation of the Amazon rainforests, as widespread, long-term severe environmental damage.[185]

The identified acts pursued by Bolsonaro and his administration that led to the widespread or log-term severe damage to the environment in the Brazilian Legal Amazon are a combination of drivers such as legal and illegal mining operations, agriculture expansion and infrastructure development. The same political and commercial groups that have enabled Mr Bolsonaro's election in order to facilitate their own financial enhancement are the ones that have facilitated the necessary resources to develop these industrial plans.[186] As mentioned in the beginning of this chapter, the immense impact of the widespread and long-term severe environmental damage caused by these acts extend to regional and global levels as well. The Brazilian Legal Amazon is a crucial safeguard in climate change mitigation processes.[187]

[182] Stop Ecocide Foundation (n 9).
[183] Ibid.
[184] Ibid.
[185] Ibid, Para. 65, 21.
[186] Ibid, Para. 34, 13.
[187] Ibid.

The Amazon Biome, referred to as a vital organ that sustains human and environmental health alike is left extremely vulnerable as a result of the acts committed and knowingly facilitated by the President Jair Bolsonaro and his administration that led to widespread and long-term damage felt locally, regionally and globally.[188] The damage occurred pertained to the efficiency of the Amazon Biome's functions through the practice of mass deforestation, the conversion of land that was deforested into cattle ranching and the vast forest fires that were made intentionally in 2019.[189] From a regional level, the impact that was observed first and foremost was the change in the air quality and the rainfall patterns. At the global level, the severity of the environmental harm has converted the Amazon forest from a significant carbon sink that can help mitigate the adverse impacts of climate change, to a carbon source. The likelihood of the uncontrolled acceleration of this damage revolving into extreme weather changes around the Earth becomes a fact rather than an assumption. [190]

The impact of the mass deforestation in the Amazon rainforest contributes also to the acceleration of the loss of biodiversity of the Brazilian flora and fauna, which plays a crucial role in human life globally.[191] Moreover, the balance within the ecosystems of the Brazilian Legal Amazon is also distorted by the human inflicted forest degradation leading to disease carrying species to thrive.[192]

In recent years, deforestation rates have begun to rise while protection effectors have proven insufficient to address these challenges. In addition, the evidence presented by the AllRise's filled complaint before the ICC shows that Bolsonaro's administration has sought to use the Constitution as a mechanism for legitimizing his acts that led to the widespread and long-term severe damage to the environment. He did so by eviscerating the laws, individuals and agencies who contributed to this mass of exploitative forces.[193]

Bolsonaro's administration intentionally sought to undermine the protections under the 1988 Constitution, with full knowledge of the consequences of the mass of exploitative acts carried out with violent rhetoric and events that stimulate and reward them.[194] Evidence shows that by

[188] Ibid, para. 1, 8.
[189] Ibid, Para. 7, 8
[190] Ibid.
[191] Ibid, Para. 9, 9.
[192] Ibid, Para.10, 9.
[193] Ibid, Para. 19, 10.
[194] Ibid, Para. 20, 11.

pursuit of their common design, Bolsonaro and the key ministers that he could oversee contributed to the rise levels of greenhouse gas emissions arising as a result of the deforestation practices. The total amount has been noted to exceed the total amount of annual greenhouse gas emissions in the major industrial nations.[195]

Bolsonaro's policy is not an ecocide simply because he carried it out even though he knew that it was substantially likely to cause widespread or long-term severe environmental damage, but his policy plan must also meet the wanton criteria. To establish wantonness, the criminality of his policy plan depends on whether he acted with reckless disregard for damage which will be clearly excessive in relation to social and economic benefits anticipated.[196]

4.2.1.2. Unlawful or wanton

Upon his election, Mr Bolsonaro assured his criminal scheme will be facilitated by political, commercial and criminal groups that will share his ambitions and corrupt motives. Many of them had a military function, former security forces and rich property owners.[197] Amongst their adopted measures, they intended to regularize land-grabbing practices, mining opportunities in the Brazilian Legal Amazon, cattle ranching and other exploiting measures, even granting amnesties to those that were behind the destruction of the Atlantic Forest.[198] As a result, they have engaged in practices that eradicated the socio-environmental protections of the Amazon and have neuter any federal action in charge of the protection of the environment and the local communities through silencing their agents, the replacement of the federal personal by former military forces and the slashing of their resources.[199]

The anti-environmental measures pursued by Mr Bolsonaro and his administration aimed at controlling and exploiting the Brazilian Legal Amazon were carried out though a web of

[195] Ibid, Para. 22, 11.
[196] K. Heller, 'The Crime of Ecocide in Action', Opinio Juris, (28 June 2021), <http://opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action/> Accessed 12 March 2022.
[197] AllRise (n 170) Para. 40, 14.
[198] Ibid.
[199] Ibid.

exploitative groups. The illegal traffickers, land-grabbers, loggers and other such criminal entities have pursued these acts since 1 January 2019 in furtherance of the State's Policy.[200]

4.2.2. Mens rea

From January 2019 onwards, Mr Bolsonaro, Mr Salles and the rest of the administration under Bolsonaro's control have engaged in planning and pursuing a State Policy that targeted the ecosystems that made up the Brazilian Legal Amazon.[201] The objective of the State Policy was clear cut, namely to further the unbridled exploitation of the Brazilian Legal Amazon' natural resources, by any cost and in full knowledge of the consequences that the facilitation of this policy would have on the environment.[202] The enrichment of the interconnected web of groups was also a motive that brought about the realization of the State's Policy plan. In the absence of the contributions made by key actors from Bolsonaro's administration and members of the Brazilian Congress, the furtherance of the policy would not have been possible. For this purpose, Bolsonaro made sure that he had all the necessary assistance from these organized webs of criminal benefactors.[203]

The widespread, long-term severe environmental damages came out as a consequence of the State policy that encompassed criminal acts at the expense of the health of the ecosystems that made up the Brazilian Legal Amazon.[204] Based on scientific opinion, the gravity of the ecological, ethnological and climatological destruction that was inflicted and resulted in the widespread, long-term severe environmental devastation will be felt at a regional and global scale for many years to come.[205]

In full knowledge of his policy' consequences and with single-minded determination, Mr Bolsonaro and his administration have actively facilitated environmental destruction in all forms against the Brazilian Legal Amazon. The deforestation practices that led to the degradation of forests and other measures such as illegal logging, farming, mining, cattle ranching with criminal

[200] Ibid, Para. 41, 14.
[201] Ibid, Para. 25, 12.
[202] Ibid, Para. 26, 12.
[203] Ibid, Para. 27, 12.
[204] Ibid, Para. 28, 12.
[205] Ibid, Para. 29, 12.

cortege consequences on the local level and beyond have changed drastically and went up since Mr Bolsonaro's election.[206]

4.2.3. Examining the case of the Amazon as a case of ecocide in light of the ICC's modes of liability

The ICC has already started elaborating on the outer limits of the accomplices' mode of liability, in relation to Article 25(3)(c) referring to the 'purpose requirement' and Article 25(3)(d) establishing the low thresholds of the *actus reus* and the *mens rea* requirements. For this purpose, under Article 25(3)(d) the required *actus reus* for an individual who assist a group and is thus an accomplice seems to be defined very broadly as 'any other contribution' which leaves the floor open for minor contributions as well as falling under this requirement. The *mens rea* requirement on the other hand sets a 'simple knowledge' threshold.[207]

As mentioned in Chapter 2 of this thesis and in light of the criminalization of the contributors, under the IEP's legal definition of ecocide, individuals who collectively contributed to a 'substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts' could be liable of ecocide crimes.[208] Due to the collective nature of possible ecocide crimes, this section will answer the question whether individuals could be criminally liable under the proposed crime of ecocide. The IEP's commentary does not make any reference to individual liability as being limited only to those most responsible for ecocide.[209] Therefore, given the broadness of the ecocide definition as offered by the Panel along with the expansive ICC interpretations of Articles 25(3)(c) and (d), one can assume that individual liability could extend to minor contributors as well.[210]

Mr Bolsonaro, Mr Salles and other key actors of the Bolsonaro administration intentionally aided, abetted and otherwise assisted the commission of these crimes with the purpose of seeking to exploit the Biomes of the Brazilian Legal Amazon.[211] They pursued a State Policy that will

[206] Ibid, Para. 66, 22.
[207] Hamilton T and Tiernan M (n 169).
[208] Ibid.
[209] Ibid.
[210] Ibid.
[211] AllRise, (n 170) Para. 42, 15.

enable their financial enrichment. Through targeted measures and actions, Mr Bolsonaro, Mr Sales and other key ministries of the administration have willfully facilitated the widespread, long-term severe environmental destruction.[212]

The acceleration of the exploitative activities, supported and facilitated by Mr Bolsnaro, Mr Sallles and the rest of the criminal interconnected web by means of adopting policies and laws that will permit such activities, point to the knowing harmful consequences for the Biomes and the severe damage caused to the environment.[213] For these reasons, they are criminally liable for aiding, abetting and assisting in the commission of these harmful activities by virtue of Article 25(3)(c) and Article 25(3)(d).[214]

The analysis above showed that there is an ongoing widespread or long-term severe environmental damage against the Brazilian Legal Amazon on a surface of more than 5 million km2, the impact of which has extended to regional and global levels as well. Despite the awareness of Mr Bolsonaro and his administration of the substantial likelihood of severe and either widespread or long-term damage, they have developed and facilitated a State Policy that enabled and encouraged the exploitative measures and acts against the Brazilian Legal amazon. Taken together, the acts described led to a substantial likelihood of causing either widespread or long-term severe damage to the environment in the full knowledge of this damage, amount to acts of persecution for the purpose of IEP's definition of ecocide.

If one applies the foregoing claims to the case of the Amazon, the policy adopted by Bolsonaro and his administration that caused severe, widespread environmental damage to the Amazo, would fit the ecocide definition of the Panel. In a similar vein, criminal prosecution would be directed against Bolsonaro or any other member of his organization who was sufficiently aware of the substantial likelihood of causing this damage to the environment. As to the elaborated threshold of seriousness, the damage caused by the adoption of a number of policies and acts directed for the exploitation and degradation of the Legal Amazon would have to be either severe or widespread. The consequences of these acts were felt not only at the national level, but have extended both regionally and globally. Since the suggested crime of ecocide is a crime of endangerment rather than a crime of strict liability, these direct impacts on the ecosystem of the Amazon as such would already be of a sufficient scale to meet the criteria of severe damage to the

[212] Ibid, Para. 43, 15.
[213] Ibid, Para. 44, 15.
[214] Ibid, Para. 45, 14.

environment. Moreover, the situation in Ecuador easily reaches the conditions for being widespread as well as long-term, although one of these criteria would have to be met according to the present suggestion. The geographical area affected by the pollution covers a huge area thereby meeting the criteria of "damage which extends beyond a limited geographical area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings". Lastly, the long-term damage of the acts committed by the administration of Bolsonaro and himself is without doubt since the legal Amazon destruction cannot be redressed through natural recovery within a reasonable period of time. This impossibility of the Legal Amazon to go back to its natural state points to the irreversible damage in great parts, thereby adding to the long-term dimension of the damage caused. Moreover, the policy implemented by Bolsonaro and his administration started prior his election period in 2019 until the present day. Consequently, the acts committed by Bolsonaro would meet the seriousness threshold as required by the proposed IEP definition of ecocide.

Further, the fault standard under the definition would have to be proven with regard to the acts of Bolsonaro and his administration. Given that the environmental group that brought the claim before the ICC managed to meet the *mens rea* of the crimes against humanity based on the acts committed by Bolsonaro and his organization, the prosecution would most certainly succeed in proving at least *dolus eventualis* in committing the crime of ecocide.

Conclusion

This thesis aimed to answer the question at the core of the ecocide debate: *To what extent can individuals be held criminally liable for environmental destruction under the proposed ecocide crime (definition) under the Rome Statute and what are the benefits and shortcomings of prosecuting environmental destruction under the proposed definition?*

As the impacts of climate change and other forms of environmental destruction become more visible by the day, increased attention has been given towards combating actions detrimental to the environment using international criminal law as a vehicle for accountability. A Panel of twelve prominent lawyers and academics announced a proposal for a new international crime of 'ecocide' as a step towards deterring future environmental disasters.

The creation of ecocide as an autonomous international crime would result in a universal liability framework. There are currently no such frameworks under international environmental law as states are reluctant to ratify these kinds of provisions. As a result, breaches of IEL do not often face serious consequences. It is a failure in providing legal barriers against the structural continuation and intensification of ecological harms. A universal liability framework would promote the protection of nature's right to life but also to the prevention of structurally reoccurring cultural and physical genocide caused by continuing ecological destruction.

Chapter 1 showed that the anthropocentric nature of the ICC limits the standing of cases of environmental destruction to particular instances where humans are directly harmed by the environmental damage. Currently, the ICC can only prosecute cases of environmental damage that resulted in human atrocities. The failure of environmental regulation, international criminal law and even national regulations to prevent the widespread destruction of the environment call for an urgent strengthening of protection in the face of the environmental challenges facing our planet.
As a consequence of the anthropocentric traits of the ICC unpacked in the previous chapter The adoption of ecocide as a fifth crime against peace, on par with 'the most serious crimes of international concern' attempts to remedy this accountability gap.[215] The IEP argued that with the inclusion of ecocide in the Rome Statute, the anthropocentric traits of ICL could be remedied by a "shift in consciousness" and the need of better protection awarded to the non-humans such as

[215] Rome Statute of the International Criminal Court, (n 35) Preamble.

ecosystems.[216] Some scholars have suggested the reading of the existing core crimes in light with a green narrative for remedying this accountability gap.[217] This shift is best captured by the dichtonomy between anthropocentrism and ecocentrism as briefly highlighted in Chapter 2 of this thesis. While anthropocentric perspectives to environmental protection emphasize the need of regulating and protecting the ecosystems for the benefit of humans, ecocentrism recognizes the intrinsic value of nature as independent from the utilization of humans.

Chapter 3 highlighted some of the current criticism that revolves around the content of the IEP's definition. The field can be characterized as having indeterminate theoretical bounds particularly when questioning the definition and its content. As it stands, ecocide itself is not a crime under international law. Only during wartime can harmful acts against the environment be prosecuted. To enable the ICC to prosecute individuals against environmental destruction also during peacetime, one possibility would be to make ecocide the fifth crime under the ICC statute. Another trend identified in the reviewed literature is the extension of the scope of the core crimes of the Rome Statute in order to reach environmental dimensions as well. However, this initiative has proved to be insufficient and major challenges have been highlighted in this regard.

Chapter 4 aimed at challenging the application of the IEP's ecocide definition through a hypothetical fact scenario. While the deforestation of the Amazon as a result of the State Policy pursued and facilitated by Bolsonaro and his administration seems to meet the proposed elements of the crime of ecocide, questions remain as to the substance of the terminology chosen by the Panel and the definitional issues portrayed by the ICL jurists presented in the analysis. Specifically the ambiguities of the *mens rea* of ecocide and balancing test between the excessive damage and the social and economic benefits anticipated under the wantonness requirement. Therefore, an international crime of ecocide could criminalize 'unlawful or wanton' acts threatening the most severe environmental harms, thus strengthening and underpinning existing regulatory measures being undertaken globally to protect the environment. The new crime would provide a practical route to prosecute individuals who in committing crimes that affect the environment are often involved in several kinds of organized crime. But importantly, the introduction of ecocide under the jurisdiction of the ICC would provide a sobering check and guardrail for CEOs and decision-makers contemplating major extractive projects which significantly endanger ecosystems. the

[216]Stop Ecocide foundation (n 9).
[217] Rachel Killean, 'From Ecocide to Eco-sensitivity: Greening Reparations at the International Criminal Court', (2021) Intl J Hum Rts 323.

crime of ecocide would create individual criminal responsibility, for key decision-makers at the highest level.[218]

The vast majority of widespread environmental destruction is not caused by a single person, or even a small group of people and can rarely be attributed to a single event. Rather, environmental degradation of this magnitude is caused by the cumulative impacts of multiple often thousands or even millions of people and corporate entities over a period of years or even decades. Over the course of this time, governments, prime ministers, ministers and bureaucrats will finish their political mandates and new individuals will bear the costs of their choices. Many of them either might lawfully approve developments that contribute to this degradation or willfully turn a blind eye to unlawful activities that contribute to the cause of widespread environmental destruction. Put simply, IEL is largely ill-equipped to address the primary causes of environmental decline in ecosystem collapse.[219] Following the same line of reasoning, but in the context of ICL discourse, it becomes apparent that the inclusion of ecocide in the Rome Statute would partially account for this shift in consciousness. Firstly because at the heart of the ICL discipline is the embedded idea of subject-object dichotomy which cannot be refuted solely with the recognition of ecocide as an ecocentric crime under the Rome Statute. Secondly, the ICL current approach aims to criminalize environmental harm as long as this harm has in the first place resulted in harm to humanity. These anthropocentric traits will still hold in the ICL structured discourse even in the aftermath of the inclusion of ecocide in the Rome Statute.

[218] Richard Rogers, Executive Director, Climate Counsel, 'Ecocide Law and Climate Justice'(2020), Event hosted by Stop Ecocide International < https://www.youtube.com/watch?v=8ctiWD4F-bw> Accessed 11 March 2022.
[219] Stop Ecocide International, 'Webinar: Ecocide as a new international crime', (2020), < https://www.youtube.com/watch?v=5fdPu7Rxnic> Accessed 12 March 2022.

Bibliography

Primary Sources

Rome Statute of the International Criminal Court, (last amended 2010), 17 July 1998.

International Criminal Court (ICC), Elements of Crimes (2011)

Secondary Sources

Alice M. Noble-Allgire, 'Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report into a Doctrinal Course' (2002) 3 Nev LJ 32

AllRise, ‘Communication under Article 15 of the Rome Statute of the International Criminal Court regarding the Commission of Crimes Against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to present, perpetrated by Brazilian President Jair Messias Bolsonaro and principal actors of his former or current administration’, Submitted in The Hague on October 12, 2021, 8.

Ammar Bustami and Marie-Christine Hecken, 'Perspectives for a New International Crime against the Environment: International Criminal Responsibility for Environmental Degradation under the Rome Statute' (2021) 11 Goettingen J Int'l L 162

Anthony S. Niedwiecki, 'Lawyers and Learning: A Metacognitive Approach to Legal Education' (2006) 13(1) *Widener Law Review* 33

Antonio Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’, (2007) 5:1 JICJ 109–133.

B. Tord, 'The emergence of popular participation in world politics: United Nations Conference on Human Environment 1972' (1996). <http://folkrorelser.org/johannesburg/stockholm72.pdf.> accessed 25 May 2022/

Brodowski, Dominik et al. (eds. 2014) *Regulating Corporate Criminal Liability*. Cham: Springer 273.

Caitlin Lambert, ‘Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?’ (2017) 30(3) LJIL 711

Commission on Crime Prevention and Criminal Justice, ‘Criminalizing Ecocide: A New Deterrent to Crimes that Affect the Environment’, 31st Session side event, Co-hosted by Socialist International Women and The Stop Ecocide Foundation (18 May 2022).

Darryl Robinson, ‘Ecocide: Puzzles and Possibilities’, (2022) JICJ, Forthcoming 5.

David Zierler, ‘The Invention of Ecocide: Agent Orange, Vietnam and the Scientists Who Changed the Way We Think about the Environment’ (2011) University of Georgia Press 2.

Dipesh Chakrabarty, *The Climate of History in a Planetary Age*, (UCP 2021) 13.

Douglas Guilfoyle, *International Criminal Law* (1st edn, Oxford University Press 2016) 192

Haydn Washington, ‘Human Dependence on Nature: How to Help Solve the Environmental Crisis’ (1st ed) (2017) Routledge 68.

Hellen Kopnina et al. ‘Anthropocentrism: More than Just a Misunderstood Problem’ (2018) J Agric Environ Ethics 109-127.

Ian Profiri, ‘Brazil president accused of crimes against humanity for rainforest destruction’, U. Calgary Law School, CA, (2021) < Brazil president accused of 'crimes against humanity' for rainforest destruction - JURIST - News> accessed (20 May, 2022)

International Criminal Court, ‘ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity’ (8 June 2018) Press Release <ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity | International Criminal Court (icc-cpi.int)> accessed 4 April, 2022.

Jessica C Lawrence and Kevin Jon Heller, 'The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute' (2007) 20 Geo Int'l Envtl L Rev 61.

Jonathan St B T Evans, ‘Hypothethical Thinking: Dual Processes in Reasoning and Judgement’(2007) *Psychology Press* 49.

K. Heller, ‘The Crime of Ecocide in Action’, Opinio Juris, 28 June 2021, <http://opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action/> Accessed 12 March 2022

Kate Mackintosh, ‘A New Tool for Just Transition: The Crime of Ecocide Through a Human Rights Lens’ (4 May, 2021) event hosted by End Ecocide Sweden, Olof Palme International Center, the Promise Institute for Human Rights at UCLA School of Law. < https://endecocide.se/webinar-may-4-the-crime-of-ecocide-through-a-human-rights-lens-a-new-tool-for-just-transition/> accessed 4 May 2022.

Kevin J Heller, ‘Skeptical Thoughts on the Crime of Ecocide: That Isn’t’, Opinio Juris, 23 June 2021, <http://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/> Accessed 12 March 2022.

Liana Georgieva Minkova, ‘The Fifth International Crime: Reflections on the Definition of Ecocide (2021) Journal of Genocide Research 89.

Liemertje J Sieders, ‘The Battle of Realities: the Case For and Against the Inclusion of ‘Ecocide’ in the ICC Rome Statute’, The Criminal Law Protection of our Common Home, The International Framework, (2020) RIDP 29.

Manuel Rodeiro, ‘Environmental Transformative Justice: Responding to Ecocide’ (DPhil thesis, City University of New York CUNY 2020).

Margita Prokeinova and Radovan Blazek, 'Will Ecocide Become an International Crime?', (2020), DCo Intle, Archivo Penale.

Martin Crook and Damien Short, ‘Marx, Lemkin and the Genocide–ecocide Nexus’, (2014), 18:3 Intl J Hum Rts 298-319.

Melanie Schneider, ‘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?’ (2021) (BA Thesis, Tilburg University).

Mia Swart, ‘The Revolution does not happen overnight’: Philippe Sands on ecocide and its links to Nuremberg (2021) Aljazeera Centre for Public Liberties and Human Rights < https://liberties.aljazeera.com/en/the-revolution-does-not-happen-overnight-aj-speaks-to-philippe-sands-on-ecocide-and-a-life-in-environmental-lawyering/> accessed 12 March 2022.

Mwanza Rosemary, ‘Enhancing Accountability for Environmnetal Damage under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity’, (2018) Melb J Int’l L 590.

Nicholas Rescher, ‘Hypothetical Reasoning: Studies in Logic and the Foundation of Mathematics. (1964) *North-Holland Publishing Company Amsterdam* 2.

OTP, ‘Policy Paper on Case Selection and Prioritization’ (2016).

OTP, ‘Policy Paper on Preliminary Examinations’, (November, 2013).

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 U Chicago Intl L Rev 196 <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1202&context=lucilr> accessed April 3, 2022

Rachel Killean, ‘From Ecocide to Eco-sensitivity: “Greening” Reparations at the International Criminal Court, (2021), Intl J Hum Rts 8.

Ricardo Pereira, ‘After The ICC Office Of The Prosecutor’s 2016 Policy Paper On Case Selection And Prioritization: Towards An International Crime Of Ecocide?’ (2020) 31 Crim LF 180 < https://ssrn.com/abstract=3654359> accessed 4 April, 2022.

Richard A Falk, 'Environmental Welfare and Ecocide Facts, Appraisal and Proposals' (1973) 9 Rev BDI 1.

Richard Kotter, ‘Eradicating Ecocide: Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws Needed to Eradicate Ecocide’ (2014) 71(2) International Journal of Environmental Studies 228-233.

Richard Rogers, Executive Director at Climate Counsel, ‘Ecocide Law and Climate Justice’ (10 November 2020), Event hosted by Stop Ecocide International <https://www.youtube.com/watch?v=8ctiWD4F-bw> accessed 28 March 2022.

Richard Rogers, Executive Director, Climate Counsel, ‘Ecocide Law and Climate Justice’(2020), Event hosted by Stop Ecocide International < https://www.youtube.com/watch?v=8ctiWD4F-bw> Accessed 11 March 2022.

Rob White, ‘Ecocentrism and Criminal Justice’ (2018) Theoretical Criminology 343.

Rob White, 'Ecocide and the Carbon Crimes of the Powerful' (2018) 37 U Tas L Rev 95

Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, (4th edn, OUP 2019) 147.

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

Sailesh Meheta and Prisca Merz, ‘Ecocide: A New Crime Against Peace’ (2015) 17 Envtl L Rev 3.

Sarthak Gupta, The Proposed Definition of “Ecocide”: An Attempt to Constitute Fifth International Crime?, (2021) Jurist < https://www.jurist.org/commentary/2021/07/sarthak-gupta-ecocide-fifth-international-crime/.> Accessed 29 March 2021.

Stop Ecocide Foundation, ‘Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Legal text (June 2021).

Stop Ecocide International, ‘Webinar: Ecocide as a new international crime’, (2020), < https://www.youtube.com/watch?v=5fdPu7Rxnic> Accessed 12 March 2022.

Tara Smith, ‘Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law’ (2011), in William A. Schabas, Yvonne McDermott, Niamh Hayes and Maria Varaki (eds.), *The Ashgate Research*

Thomas Hamilton, Marc Tiernan, ‘Who could be held responsible for ecocide under the Rome Statute?’, Rethinking Secondary Liability for International Crimes (2022), < https://rethinkingslic.org/blog/criminal-law/115-who-could-be-held-responsible-for-ecocide-under-the-rome-statute> accessed 22th May, 2022.

Tim Lindgren, ‘Ecocide, Genocide and the Disregard of Alternative Life-systems’, (2018), 22:4 Intl J Hum Rts 525-549.

Variath A. Anil, (eds) ‘Living in the Era of ‘Ecocide’: Need for Ecological Governance to Protect the Rights of Nature’ (2021) Maharashtra National Law University Mumbai 1-13.

Vito de Lucia, ‘Competing Narratives and Complex Genealogies: the Ecosystem Approach in International Environmnetal Law (2015) Journal of Environmental Law 91-117.