ECOCIDE – THE NEED FOR A FIFTH INTERNATIONAL CRIME

A critical analysis of the proposed Definition of Ecocide

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<tr>
<td><strong>ASP</strong></td>
<td>Assembly of State Parties</td>
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<td><strong>ENMOD</strong></td>
<td>Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques</td>
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<td><strong>EU</strong></td>
<td>European Union</td>
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<td><strong>ICC</strong></td>
<td>International Criminal Court</td>
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<td><strong>ICJ</strong></td>
<td>International Court of Justice</td>
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<td><strong>ICL</strong></td>
<td>International Criminal Law</td>
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<td><strong>ICTR</strong></td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td><strong>IEP</strong></td>
<td>Independent Expert Panel</td>
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<td><strong>IPCC</strong></td>
<td>Intergovernmental Panel on Climate Change</td>
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<td><strong>NDCs</strong></td>
<td>Nationally Determined Contributions</td>
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<td><strong>OTP</strong></td>
<td>Office of the Prosecutor</td>
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<td><strong>RDS</strong></td>
<td>Royal Dutch Shell</td>
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<td><strong>SDGs</strong></td>
<td>UN Sustainable Development Goals</td>
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<td><strong>UN</strong></td>
<td>United Nations</td>
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<td><strong>UNDRIP</strong></td>
<td>United Nations Declaration on the Rights of Indigenous Peoples</td>
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<td><strong>UNFCCC</strong></td>
<td>United Nations Framework Convention on Climate Change</td>
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<td><strong>UNSC</strong></td>
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1 INTRODUCTION

1.1 Introduction to the Topic

For centuries we have used criminal law to steer the behavior of the individual and deter
the community from acting against the law. The most horrendous acts in the past century and
the criminal prosecution of acts such as genocide and crimes against humanity show that inter-
national criminal law (ICL) has become an important cornerstone of our society. However, we
live in an era in which we have to fear other destructive acts, as not only the existing core crimes
threat international peace and security but also acts against the environment. According to the
report of the Intergovernmental Panel on Climate Change (IPCC) form August 2021\(^1\) the con-
sequences for our ecosystems will be disastrous if we keep destroying the environment at this
pace.\(^2\) Nonetheless, not only climate change-related matters pose a threat to our ecosystems but
also water contamination, the deforestation of the Amazon and biodiversity loss, for instance.

In solving and preventing environmental damages from happening, international criminal
law could potentially be seen as a useful and effective tool in achieving that goal. ICL is espe-
cially known for its repressive effect, which also contributes to the prevention of further similar
criminal acts. In contrast to International Human Rights Law or International Environmental
Law for instance, ICL can actually change the behavior of the society and punish the individual.

In connection with the destruction of the environment, there has long been a discussion
on whether crimes against the environment should become an international crime and so far, there is no codified international treaty that deals with those issues.\(^3\) Questionable in that regard
is what elements should be included in such a criminal offense in order to make it as precise as
possible and to include the most severe environmental destructive acts. For that reason, the Stop
Ecocide Foundation convened an Independent Expert Panel (IEP) for the Legal Definition of
Ecocide which submitted a draft of the Legal Definition of Ecocide to the International Criminal
Court (ICC) on June 22, 2021.\(^4\) However, before that proposal turns into hard law and gives the
ICC jurisdiction there are many things which need to be put into consideration. Among other

\(^{1}\) IPCC. Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the
Sixth Assessment Report of the Intergovernmental Panel on Climate Change, April 4, 2022 (Cambridge Univer-

\(^{2}\) “Should the crime of ‘ecocide’ be enshrined in law?” The Herald, October 6, 2021. https://www.heraldscot-

\(^{3}\) Anastacia Greene, “The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Impera-

\(^{4}\) “Top International Lawyers unveil Definition of ‘Ecocide’,” Stop Ecocide International, accessed August 30,
ecocide.
things, it needs to be kept in mind that the prevailing principle in criminal law is individual criminal responsibility meaning that only individuals and not corporations like e.g. Shell plc (RDS) itself could be held responsible. That differs significantly from International Environmental and Human Rights Law and therefore must be approached from a different angle. Another innovation would be the jurisdiction of the ICC in times of peace. Since the entry into force of the Rome Statute on July 1, 2002 the four core crimes genocide, crimes against humanity, war crimes and the later-on adopted crime of aggression have been prosecuted. Never before did judges of the ICC have to deal with crimes in times of peace. The reason behind that is that the establishment of the ICC happened against the backdrop of punishing crimes in times of war after experiencing a state of impunity of world leaders in the 20th century.

Criminalizing ecocide is a difficult but important task. However, it is not only about identifying those responsible and punishing them but about changing consciousness of the people and their moral beliefs because finally “[l]aw can change our values and understanding.” It is therefore time to make changes as so far, there is no exclusive environmental crime on the international level.

1.2 Research Question, Scope and Structure of the Thesis

In this master thesis, I shall explore the scope of application by the ICC of the recently proposed Definition of Ecocide focusing mainly on substantive law and on whether the proposal could do justice. Some procedural challenges will and even have to be addressed briefly for the sake of completeness, for example the operation of the Office of the Prosecutor (OTP) and the functioning of the judges. Some general issues, however, like immunity, various modes of criminal liability (e.g. the involvement of others in the crime), jurisdiction or the problem of corporate responsibility are not addressed in depth in this elaboration. This is mostly due to the variability of circumstances and the fact that some procedural problems cannot be adjusted for merely a single isolated case or crime. Regardless, it will be assumed throughout this whole

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9 Polly Higgins, Eradicating ecocide (London: Shepheard-Walwyn, 2010), X.
elaboration that the ICC is the competent court although it is the court of last resort since the principle of complementary jurisdiction prevails in ICL.\textsuperscript{10} Moreover, grounds for excluding criminal responsibility – also called \textit{defences}\textsuperscript{11} - are not part of the discussion. It also has to be particularly emphasized that this thesis contains very few political discussions and references to international environmental law as this would exceed the scope and would not necessarily help in answering the main research question which is as follows:

\textit{How could the new proposed Definition of Ecocide be applied by the ICC?}

To answer the research question, the issue will be analyzed in three main sections. In chapter two, a short presentation of the development of the term ecocide itself will serve as a form of an introduction to the topic. It is crucial to understand the background of ecocide in order to infer future developments. In the same chapter the sub-question will be answered, what reasons speak in favor of a criminalization? That part could not be disregarded and had to be discussed as well, as it is important for providing an overall picture of the issue. In the chapter that follows, the new proposal will be thoroughly discussed and analyzed. In that context, the expression of criticism was indispensable. Another subchapter will also take a look at the global impact that has already been made by laws on the domestic level and the advocacy of the criminalization of ecocide on the international level. In the fourth chapter this will be put into context while trying to scrutinize it from a critical perspective. Strictly speaking, selected current events which damage the environment will be subsumed under the proposed law of ecocide to demonstrate the law’s practical applicability and to draw conclusions which help in answering the research question.

1.3 \textbf{Use of Sources and Methodology}

In International Law the point of departure for identifying sources is Art. 38 of the Statute of the International Court of Justice (ICJ).\textsuperscript{12} The sources listed in that provision such as international conventions and custom and general principles were used as far as possible in answering the research question. As the crime of ecocide is not codified yet, a consultation of other

\textsuperscript{10} Robert Cryer et al, \textit{An Introduction to International Criminal Law and Procedure} (Cambridge: Cambridge University Press, 2010), 5.
international as well as domestic legal instruments was required to make comparisons and draw conclusions regarding future developments. However, for the purpose of substantiating relevant arguments a few judicial decisions were applied. Due to the novelty of the topic, a resulting lack of jurisprudence on the matter and a thorough scientific research with regards to the definition of ecocide, it was mostly relied upon sources such as NGOs’ statements and reports, newspaper articles and opinionated articles and blogs by legal scholars. Most of the materials were drawn upon to combine different existing views in order to come to a justifiable result. In helping understand the general approach of the organs of the ICC, information provided by the Court itself has been frequently used although it is not of legal value *per se*.

The selection of sources is justified by the fact that this study would not be accurate if it did not include social and economic aspects in addition to the legal dimension. The lack of access to elaborate legal information, however, limits one in the choice of a research method, meaning that

“[w]hen traditional international law techniques reach their conceptual and methodological limits, we need to look for help in other disciplines.”

Therefore, this study is a socio-legal examination of the recently proposed Definition of Ecocide. Whereas, a pure doctrinal research method focuses on “building a theoretical framework for analysis,” a socio-legal approach has the advantage of supplementing a mere legal analysis and consideration. A doctrinal approach is therefore seen as an integral part of a socio-legal methodology.

Although the application of law was mostly conducted in a legal manner, some statements remain assumptive as this elaboration does not deal with a codified and existing law and therefore rather focuses on the legal situation *de lege ferenda*. The codification of an international environmental crime does not only come with legal issues but is also associated with many

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16 Ibid., 3.
17 Ibid.
moral and socio-ethical discussions. Only by applying a socio-legal methodology the question can be answered as to whether and how the law could affect behavior in society.\(^{18}\)

The idea to penalize acts of ecocide on the international level is not something that has only emerged in the recent years but rather represents a lengthy process which has started many years ago when serious anthropogenic damages to the environment were first observed. Currently, there are many advocates who are drawing increasingly more attention to ecocide trying to stop the planet from further falling apart as we are facing many unaddressed environmental challenges.

To create a broader understanding of the topic, the following chapter seeks to give an overview of the development of the notion of ecocide while simultaneously drawing attention to the reasons for its criminalization.

2.1 The History of Ecocide

The term “ecocide” is relatively new and tends to be misunderstood. The word consists of the two elements *eco* and *-cide*, the first referring to the environment as such and the second one deriving from the Latin word *killing*. Very roughly put, ecocide thus means the killing or the destruction of the environment and can be used independently of a discussion about humanity.

Although environmental damages caused by human interference have been known long before, the term itself was first used in the early 1970s by Professor Arthur W. Galston at the Conference on War and National Responsibility in Washington. The driving force was the use of Agent Orange by the US army in the Vietnam War (1955 – 1975), a mixture of herbicides which was used to defoliate forests and clear crops. As a result Vietnam’s territory is visibly and most importantly permanently scarred, and to this day the scars serve as a reminder of all atrocities of the war. Moreover, even now many decades after the war, the Vietnamese soil shows a high concentration of TCDD (2,3,7,8-Tetrachlorodibenzo-p-dioxin). Those kinds of dioxins found in soil are being absorbed by the crops and other plants and this way eventually

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19 See chapter 2.1.
end up in the food chain. Studies show that the dioxins contained in Agent Orange finally lead to an abnormally high rise of miscarriages, birth defects, cancer and other health disorders. By preventing similar acts from happening not only would we do something for the environment that we live in, but we would protect the human species as well.

Professor Galton was just the first to summarize those environmental damages and name them ecocide. In the following years many academics as well as legal scholars started arguing for the criminalization of ecocide, the first major mention taking place at the United Nation (UN) Stockholm Conference on the Human Environment. In short, the then Swedish Prime Minister Olof Palme accused the USA of ecocide practices in Vietnam. Although ecocide has not found any reference in the resultant Stockholm Declaration, the international community became aware of the problem. Shortly after, in 1973, the International Convention on the Crime of Ecocide was proposed making Richard E. Falk one of the first to create a formal definition of ecocide. According to him “man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace.” That makes ecocide an undeniable international matter. Still, the convention was not adopted as it lacked sufficient support. Nevertheless, the draft marks a big step towards the criminalization of ecocide.

As more and more scholars started to advocate the idea that ecocide should become a criminal offence on the international level, the inclusion of the crime in the Code of Crimes Against the Peace and Security of Mankind was proposed in the 1980s. Ecocide was never accepted as a ICC core crime and was not adopted in the Rome Statute, leaving it a non-punishable act on the international level. Although the reasons for that remain unclear, it seems reasonable to assume that some states were afraid the inclusion might interfere with their sovereignty and politics and might affect their economy too strongly.

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Another failed attempt to criminalize ecocide was to include it in the Genocide Convention in 1978.31 Richard A. Falk who proposed and promoted that idea compared crimes of genocide and ecocide looking at previous armed conflicts and came to the following conclusion:

“(…) just as the Genocide Convention came along to formalize part of what has already been condemned and punished at Nuremberg, so an Ecocide Convention could help carry forward into the future a legal condemnation of environmental warfare in Indochina.”32

In this respect, environmental warfare has been seen by Falk as a form of (intentional) ecocide during times of war which can be defined as

“the deliberate and illegal destruction, exploitation, or modification of the environment as a strategy of war or in times of armed conflict”33

Although the Convention on Ecocide was never adopted, Falk was trying to make a shift in the consciousness of the community, and therefore his analysis marks another milestone. As a matter of fact, that gave the next incentive to protect our planet from further falling apart.

One of the most important and influential advocates in the last period was Scottish lawyer Polly Higgins. As co-founder and expert of the NGO Stop Ecocide Foundation34 she has been actively fighting for the recognition of the crime of ecocide giving herself the title “lawyer of the earth.”35 Her dedication was remarkable, inspirational and to some extend contagious as she built a network of other highly-dedicated scholars and academics who started promoting and supporting her ideas. Although Poly Higgins passed away at a young age and did not achieve her goals, eventually after half a year36 of hard work and dedication the Independent Expert Panel for the Legal Definition of Ecocide has filed its legal definition of ecocide on June 22nd 2021 with the ICC making it one of her biggest achievements. Currently, the most-known frontline fighters in that regard are Philippe Sands and Jojo Mehta who take on Higgins work together with many other high-ranked supporters. Thus, while there is still a lot to be done and a

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31 “History,” Ecocide Law.
35 García, “The History of Ecocide, a New Crime Against Humanity.”
long process ahead, perhaps in a few years there will be another international crime added to
the catalogue of the Rome Statute.

2.2 The Need for an International Crime of Ecocide

Speaking of ecocide in a more futuristic manner, there are already a few countries which
have criminalized acts of ecocide on the national level. It is no longer utopian to assume that
an international crime of ecocide is possible and this also makes clear that the criminalization
is demanded by the population. It is most urgent to address those destructive acts on the inter-
national level as some challenges may only be addressed by the international community as a
whole. Moreover, there is no other international crime under which those harmful environmen-
tal acts could be subsumed. In recognition of this, the Office of the Prosecutor has made an
interesting statement on September 15, 2016: From that time, it should be given

“[…] particular consideration to prosecuting Rome Statute crimes that are committed by
means of, or that result in, inter alia, the destruction of the environment, the illegal ex-
ploration of natural resources or the illegal dispossession of land.”

Addressing the destruction of the environment shall be one of the OTP’s priorities when select-
ing cases. It is also important to stress, that the crime of ecocide is different in that harm to
humans “is not a prerequisite for prosecution.”

Nonetheless, it seems that the recognition of a crime of ecocide is overdue and necessary.
For the most part it is environmental issues and damages we are facing on a daily basis that
need to be addressed from a criminal law perspective, as criminal law can steer the behavior of
the individual. The world is in need of a binding force, not just symbolic agreements between
states. As a natural consequence it would put ecocide offenders on an equal footing with say
perpetrators of genocide or crimes against humanity. The offenders would thus, inter alia, be

37 See chapter 3.3.
38 Environmental damage might, however, potentially result in prosecution under Art. 7 ICC Statute according to
one opinion, as I shall demonstrate in chapter 4.2.
39 The Office of the Prosecutor, “Policy paper on case selection and prioritization,” ICC, September 15, 2016,
40 Ibid., para 7.
mes.com/opinion/project-syndicate/prosecuting-ecocide.
removed from society giving them no opportunity to commit such a crime again, and both the society and the perpetrators themselves could benefit from that.

The following subchapters present some of the most important environmental problems we are facing at present, including concrete examples like climate change, the deforestation of the Amazon and water contamination. Additionally, there is a strong interplay with human rights and animal rights which must not remain unnoticed in this elaboration. However, this is not an exhaustive list.

2.2.1 Climate Change

Probably one of the most discussed environmental issues nowadays is climate change which is mostly caused by anthropogenic interference.\(^{43}\) Severe consequences of global warming can already be observed all over the world: melting glaciers causing the sea-level to rise, the increase in species extinction and constant heat waves all over the planet, to name a few.\(^{44}\) In contrast to only nationwide occurring environmental issues, Climate Change Law addresses the international community as a whole since only a joint effort can lead to a positive outcome. The driving forces in combating global warming are the United Nations Framework Convention on Climate Change (UNFCCC),\(^{45}\) the Kyoto Protocol\(^{46}\) and most importantly the Paris Agreement.\(^{47}\) Although those legal instruments put obligations on states, they do not have an independent and effective enforcement mechanism. As a result, the international community is forced to rely on what has been “loosely” agreed on by the state parties. By making ecocide an international crime, though, the fight against climate change would obtain a new and most-likely stronger ground. That is because the failure to reduce greenhouse gas emissions would result in a greater deterrent effect. Just like any other criminalization, it would make the individual more likely to abide by the law. Most importantly, companies would be forced to think


\(^{47}\) UN General Assembly, Paris Agreement, 12 December 2015, available at: https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch_XXVII-7-d.pdf.
about the consequences as early as the decision-making process.\textsuperscript{48} The reason for the international scope of the crime is self-explanatory: burning fossil fuels in one country affects other nations worldwide. The internationalization of ecocide would contribute to a mutual consideration safeguarding not only the environment on our planet itself, but also our own and future generations’ lives on earth. Simultaneously, the principle of “prohibition of transboundary harm”\textsuperscript{49} would be given a different meaning and scope of application.

\subsection{2.2.2 Deforestation of the Amazon}

Closely interlinked to the topic of Climate Change is the deforestation of the Amazon in South America. Although the Amazon rainforest may not necessarily be called “the lungs of the world,”\textsuperscript{50} it still produces a quite relevant amount of our world’s oxygen and absorbs and stores a large quantity of CO\textsubscript{2}.\textsuperscript{51} The reason as to why the rainforest is so essential, is that the largest biodiversity can be found there, making it one of the most important ecosystems worldwide and “[b]iodiversity is, in a sense, what makes a place breathe, live, and stay healthy and beautiful.” In order to keep the balance in the ecosystem, we need to make sure to maintain the species diversity on our planet.

Nevertheless, the last few years the international community has witnessed a gradual destruction of that ecosystem due to the state of Brazil, or to be more precise, the president Jair Bolsonaro, knowingly failing to protect the rainforest.\textsuperscript{53} In his speech before the UN he

\begin{itemize}
\item \textsuperscript{49} Prohibition of transboundary harm: “the obligation to not cause harm to the environment of other States and to areas beyond any jurisdiction.” Christina Voigt. “State Responsibility for Climate Change Damages.” Nordic Journal of International Law 77 (2008): 1 – 22 (7).
\item \textsuperscript{54} Jonathan Watts, “Amazon rainforest ‘will collapse if Bolsonaro remains president’”, The Guardian, July 14, 2021. [https://www.theguardian.com/environment/2021/jul/14/amazon-rainforest-will-collapse-if-bolsonaro-remains-president](https://www.theguardian.com/environment/2021/jul/14/amazon-rainforest-will-collapse-if-bolsonaro-remains-president; Rhett A. Butler, “Countering Bolsonaro’s UN speech, Greenpeace releases Amazon
reassured that there would be a decrease in deforestation of the Amazon\textsuperscript{54} but with no prospect for that so far. Not only were endangered animal species harmed by logging and fires, but also many individuals, especially indigenous peoples, who do not have sufficient land rights\textsuperscript{55} which could actually help reduce deforestation notably.\textsuperscript{56} The international community, however, has so far not been able to interfere as it lacks any sufficient legal grounds in that respect. One way to prevent more harm is to address the matter from a criminal law perspective as in this way individuals could be targeted and brought to justice.

2.2.3 Indigenous Peoples’ Rights

As already mentioned, environmental destruction does not only affect the environment itself but also the less protected groups of people. According to Art. 29 § 1 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)\textsuperscript{57} indigenous peoples have the right to the conservation and protection of the environment and states are obligated pursuant to Art. 32 to mitigate adverse environmental impacts. Indigenous peoples greatly rely on raw materials from their environment which safeguard their livelihood, and they are dependent on a clean and healthy environment. Moreover, they are deeply connected to the nature that surrounds them in a very cultural and spiritual manner and in ways our civilized society does not fully understand. Therefore, instead of destroying their habitats like e.g. the lands in the Amazon we should use their wisdom to do the complete opposite – learn how to protect nature.

Still, not enough attention is paid to preventing harm to the indigenous community. Nonetheless, the mere fact, that there already exists an international declaration on the right of those groups and includes, inter alia, land rights\textsuperscript{58} makes it clear that a greater protection is highly necessary and demanded. Moreover, the existing legal instruments seem not to be entirely effective as many indigenous groups are forced to leave their lands and are threatened with


\textsuperscript{58} Art. 26 § 2 UNDRIP.
extinction due to environmental destruction.\textsuperscript{59} Therefore, the next step would be to criminalize any harmful act to their environment and consequently violations of their rights which would then entail a shift from state responsibility to individual responsibility. Accordingly, that would create a greater margin for the protection of human rights from a less human rights law perspective and a more criminal law one.

### 2.2.4 Water Contamination

Another severe environmentally damaging occurrence is water contamination. Major oil spills like the Deepwater Horizon oil spill\textsuperscript{60} have been a serious issue. Besides that, plastic pollution in the oceans and the contamination of rural and urban waters\textsuperscript{61} like for example the rivers in Goa, India cause a threat to the environment.\textsuperscript{62} Especially the Great Pacific Garbage Patch seems to be concerning for many different reasons like its size, for instance, but also because no country or individual wants to take responsibility for it.\textsuperscript{63} Not only are the micro-plastics threatening the flora and fauna of the oceans\textsuperscript{64} but also the pacific people’s livelihood and health are at stake due to the toxins contained.\textsuperscript{65} Although criminal law is not retroactive,\textsuperscript{66} meaning that it is now too late to hold past polluters accountable, future incidents could be prevented from happening so that the contamination does not reach an even greater extend.

We must bare in mind that in some cases the contaminants are more difficult to be determined than others. Irrespective of this fact, water contamination is an issue which should

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\textsuperscript{60} The Deepwater Horizon oil spill from April 20, 2010 was the biggest oil spill in history in which the petroleum extended over more than 57,500 square miles (149,000 square km) of the Gulf of Mexico. \textit{Encyclopædia Britannica}, s.v. “Deepwater Horizon oil spill,” accessed September 25, 2021. \url{https://www.britannica.com/event/Deepwater-Horizon-oil-spill}.

\textsuperscript{61} “What is Ecocide?” Stop Ecocide International, accessed September 26, 2021. \url{https://www.stopecocide.org/what-is-ecocide}.


\textsuperscript{63} “Great Pacific Garbage Patch,” National Geographic, October 9, 2012. \url{https://www.nationalgeographic.com/encyclopedia/great-pacific-garbage-patch/}.

\textsuperscript{64} Ibid.


receive more international attention and should become a criminal offence. In this regard, the mere existence and cleanup campaigns of organizations and institutions like e.g. The Ocean Cleanup⁶⁷ do not promise positive prospects for the future.

### 2.2.5 Protection of Rights of Nonhuman Species

Considering that ecocide is not entirely anthropocentric, the crime does not only address the damage that can be done to humankind but also to the nonhuman species on this planet. Our cohabitants may therefore also need protection of their rights. Whether animals actually have certain rights and what kind of rights should be considered⁶⁸ is a topic for another elaboration but it can be agreed on, that they at least should be ensured the right to live, in particular in a clean and healthy environment. Due to the many destructive environmental acts we commit on this planet, more and more animal species are threatened with extinction⁶⁹ as not only they get targeted but also their habitats. Our goal as the most superior and intellectual species on the planet, should be to take care of our cohabitants as they are unable to fight for their own rights. It falls within the obligation of mankind to secure a safe environment for wild animal species and maintain the balance in the ecosystem. In that field there exist for example the Convention on Biological Diversity⁷⁰ and the Convention on International Trade in Endangered Species of Wild Fauna and Flora⁷¹ but so far, there is no international law directly forbidding and punishing acts directed against the life and environment of nonhuman species. Beyond pollution, there are other activities that deserve more focus at an international level, such as the illegal poaching of 20,000 African elephants being killed for their Ivory.⁷² While significant, this is only one example. As ICL steers the individual’s behavior and holds individuals responsible it would be an appropriate tool in combating those acts.

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⁶⁷ The Ocean Cleanup aims for removing 90% of the ocean plastic, “The Ocean Cleanup,” The Ocean Cleanup, September 24, 2021. [https://theoceancleanup.com](https://theoceancleanup.com).
    Tim Boekhout van Solinge, “Deforestation Crimes and Conflicts in the Amazon,” 273, 274.
2.2.6 UN Sustainable Development Goals

Another key aspect supporting the inclusion of the crime of ecocide in the Rome Statute is that it might help in achieving the UN Sustainable Development Goals (SDGs). The term “sustainability is understood as a form of intergenerational ethics in which the environmental and economic actions taken by present persons do not diminish the opportunities of future persons to enjoy similar levels of wealth, utility, or welfare.”73

The aim of the agenda is, therefore, to protect the environment and its natural resources by environmental consideration in every kind of process in order to ensure future generations the same access to ecosystems and their resources. In that context, the UN has been working for decades on the elaboration of the SDGs and ended up concluding 17 of them which include goals such as no poverty, clean water and sanitation, responsible consumption and production and life on land.74 Criminalizing ecocide would not only punish the ones responsible for serious acts against the environment but it would also secure the preservation of the environment, its resources and non-human inhabitants. Having a healthy environment is the basis for all the other SDGs and the functioning of society and economy.75 In this respect, a large number of countries has already recognized the right to a safe, clean, healthy and sustainable environment.76 By this means, states are drawing attention to the urgency of dealing with environmental issues. Destroying the planet we live in should not be taken less seriously than all the other international crimes. Living sustainably means living in harmony with nature.

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75 Higgins, Eradicating ecocide, 129.
3 THE CRIME OF ECOCIDE AS THE FIFTH ICC CRIME

Evidently, a large part of the international community demands the criminalization of environment-damaging acts and pushes towards an internationally recognized crime. Nevertheless, still many issues arise in the context of the proposed Crime of Ecocide. One of them is, that the crime in principle would only apply to individuals of states that formally accepted and ratified the ICC Statute. In other words, the Court must have jurisdiction according to Art. 12 ICC Statute, i.e. territorial jurisdiction or jurisdiction over nationals of states’ parties. Nevertheless, if it constituted another core crime the United Nations Security Council (UNSC) could refer such a situation to the ICC pursuant to Art. 13 (b) ICC Statute and under Chapter VII of the Charter of the UN as it could concern the threat to peace. In those cases, neither the national nor territorial state’s consent would be needed. In plain language this means that there exists the possibility of the involvement of states which are not parties to the statute. However, the UNSC’s actions are often paralyzed due to the veto rights of the five permanent members.

In this chapter, the focus will be on the IEP’s proposed definition of ecocide. In that context, mainly the substantive law will be presented whereby it is also critically questioned. Furthermore, the status of ecocide in national law will be discussed and the amendment process provided for in the Rome Statute will be outlined in light of the latest 2010 amendment. Whether the Assembly of State Parties (ASP) will actually recognize ecocide and take any further steps in making it the next core crime, shall not be discussed in this elaboration.

3.1 The Proposed Legal Definition of Ecocide

Under international law an international crime is

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“a prohibition or positive duty, incumbent on individuals, with its formal source and definition in customary international law and for the breach of which the perpetrator is punishable as a matter of customary international law.”

The four core crimes mentioned in Art. 5 ICC Statute which formed under customary international law naturally fulfill all these requirements. The global attention that the criminalization of environmentally harmful acts has received in the last decades and the proposal of a crime of ecocide alone indicate the emergence of customary law.

All of the existing international crimes are anthropocentric in nature and merely Art. 8 § 2 (b) (iv) ICC Statute comes with some environmental elements which only come into effect during armed conflict. What is special about ecocide, though, is that it is a crime that can also be committed in times of peace. The background is that most of the environmental damages happening now do not occur in times of war. Moreover, with that proposal a shift from that anthropocentric approach is being pursued, making it the first criminal offence in the catalogue of the ICC that would not constitute a crime against humankind directly but against the environment.

However, to even open an investigation before the ICC, ecocide must consist of two elements as any other international crime mentioned in the Rome Statute, namely the actus reus and the mens rea. Only if both elements are cumulatively fulfilled a prosecution can be considered. The Independent Legal Panel on the Definition of Ecocide has provided the requirements for both elements and defines ecocide as:

“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.”

The proposal goes even one step further and includes an amendment of the Rome Statute, namely the addition of a preambular paragraph 2 bis, an addition to Art. 5(1) and the new Art.

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As of today, the preambular does not speak of the environment being threatened which means that environmental concerns can only be read indirectly into the existing paragraphs.

In the following sections this definition, including all of its terms, will be thoroughly examined and the IEP’s commentary will serve as the main source.

3.1.1 Actus reus

As already mentioned, first of all the crime of ecocide requires objective criteria which need to be met. When taking a look at the proposed definition of ecocide the *actus reus* requires for the act to be *unlawful* and also demands

“a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.”

Starting with the seemingly self-explanatory term *unlawful* the IEP had to answer the question of what kind of prohibition should set the benchmark. As there are not too many prohibitions and environmental laws prohibiting certain conducts on the international level, the experts deem it necessary to refer to national laws. In the Panel’s opinion “there is no reason that national illegality […] should not be part of an international law definition.”

What is meant by the terms *severe*, *widespread* and *long-term damage* is also explained in the Panel’s commentary. First of all, the definition of ecocide differs greatly from all other international crimes in its wording as the Panel decided to use a formulation that is between a conjunctive and a disjunctive one. As for war crimes in Article 8 (2) (b) (iv) Rome Statute the conjunctive is used (widespread, long-term and *severe*) which means that both elements need to be present together. Other international legal instruments use the disjunctive formulation like for example Art. 1 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD) (widespread, long-lasting or *severe*). In this regard, a disjunction refers to an alternative presence of those criteria. In connection with

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85 Stop Ecocide International, *Commentary and Core Text*, June 2021, 5. https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6db/t/60d7479c8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf.
86 Ibid.
87 Ibid., 10.
ecocide, the disjunctive is not considered sufficient while the conjunctive on the other hand seems to create a too high threshold. Every damaging act to the environment must therefore be severe but it is enough if the damage has either a widespread or long-term effect. This way the most harmful acts are supposed to be captured by the definition according to the Panel.

Secondly, the terms itself which are defined in Art. 8 ter ICC Statute of the proposal are also thoroughly explained in the commentary.

Art. 8 ter (2) (b) ICC Statute defines severe as

“damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources.”

What stands out immediately is the reference to cultural resources which is a novelty in connection with that term. With that formulation the IEP intends to include also cultural aspects which are especially of value for the indigenous community.

The term widespread is not a new addition to the statute and can already be found in Art. 7 ICC Statute. In Art. 8 ter (2) (c) it is to be understood 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.“

When interpreting that term, the IEP agreed that there should not be a limitation to a certain geographical scale as for instance climate related matters do not stay in a definable area. Moreover, in some cases it is sufficient for a population of a certain city or area to be affected and therefore damaging acts do not need to have a large geographical range.

Whereas the term widespread focuses on the geographical scope, long-term has a temporal dimension. From the commentary it becomes evident that the Panel had to consider what a reasonable period of time should be. On the one hand, the experts did not want to limit the period to several months to trivialize certain events. On the other hand, decades seem to set a

89 Stop Ecocide International, Commentary …, 8.
90 Art. 1 of the ENMOD Convention for example is interpreted differently and the wording “other assets” is used instead. UN General Assembly, Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976 – Understandings, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=A951B510E9491F56C12563CD0051FC40.
91 Stop Ecocide International, Commentary …, 8.
92 Ibid.
way too high threshold. After careful consideration the Panel concluded that the wisest way to handle the problem is to add the word *irreversible* to the definition. This way, arbitrary decisions could be avoided and the case could be decided on a case-by-case basis meaning that it would depend on the special circumstances of a given situation. Finally, the term was defined in Art. 8 ter (2) (d) as

“damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time.”

Another conspicuous aspect of the proposal is the Panel’s definition of the term *environment* which has not been done in international law before. The only mention was made in the ICJ’s Advisory Opinion on the Legality of the Threat or use of Nuclear Weapons93 which can still not be considered an official definition. According to the IEP’s commentary, defining what the environment is, turned out to be a difficult task. Nonetheless, it was crucial to establish what this term encompasses as in ICL - in contrast to environmental law for instance - more clarity and transparency are needed since the rights and freedoms of individuals are at stake. Based on scientific sources, however, and an elaborate discussion, Art. 8 ter (2) (e) of the Statute ended up defining the environment as

„[...] the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space."

According to one of the members of the Panel inspiration was drawn, above all, from jurisprudence, international treaties and custom.94

### 3.1.2 Mens rea

Furthermore, the *mens rea* is required. In other words, this volitional element requires the act to be carried out with a certain state of mind to establish a criminal liability.95

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93 “The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.” “Legality of the Threat or Use of Nuclear Weapons,” Advisory Opinion, 1. C.J. Reports 1996, p. 226, para 20, available at: https://web.archive.org/web/20171031110117mp_/http://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.


In this particular case the act must be *wanton* and the perpetrator must act with *knowledge*. To try avoiding misunderstandings the IEP has also provided definitions of those terms.

Although the terms *unlawful* and *wanton* seem to be interlinked as they are applicable alternatively, *wanton* has a subjective component, whereas *unlawful* is entirely objective. For that reason, *wanton* is part of the *mens rea* criterion and logically it does not refer to unlawful acts. Consequently, “for lawful acts, the wantonness of the act would be the “criminalizing” element.”

In the proposal *wanton* is defined as

„with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated”

The term itself would not appear in the ICC Statute for the first time as it is already referred to in Art. 8 (2) (b) (iv) regarding war crimes. Conventionally, it is interpreted as intent or in reckless disregard of prohibited consequences. The prohibited consequences in the case in point would be the damage to the environment, according to the Panel. From the definition used in Art. 8 ter of the statute it can be inferred that a proportionality test is needed similar to that in Articles 8(2)(a)(iv) and 8(2)(b)(iv) ICC Statute for instance, in order to comply with environmental law principles like that of sustainable development. In that case the damage and the social and economic benefits must be weighed against each other as even beneficial projects can create a severe and either widespread or long-term damage to our ecosystem. By including the term *wanton* especially developing countries could be given a chance of exonerating themselves. Perhaps, ensuring the economic development in those countries was another intention of the IPE when incorporating that word into the definition. After all, only the most serious acts should be captured so that economic activities that are conducted in a sustainable manner are not affected.

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96 Voigt, “«Ecocide» as an international crime;...”
Regarding the requirement of knowledge, it should be noted that in that context it would be unwise to compare the means rea of ecocide to that of genocide. Whereas genocide calls for a specific intent, ecocide deems knowledge to be sufficient as environmental damage is hardly ever done deliberately. In its structure ecocide therefore rather resembles Art. 7 ICC Statute, namely crimes against humanity. However, in contrast to Art. 30 (3) ICC Statute which describes knowledge as the “awareness that a circumstance exists or a consequence will occur in the ordinary course of events”, the IEP’s definition of knowledge sounds somewhat like recklessness. This is ultimately confirmed in the Panel’s commentary. The reasons provided by the experts are simply to not keep the definition too narrow and make sure the offense “capture[s] conduct with a high likelihood of resulting in severe and either widespread or long-term damage to the environment.” Otherwise it would have to be proven that the person committing the crime was certain that the consequences will occur and consequently only very few acts would be captured. Therefore, the term knowledge is to be understood as recklessness or even dolus eventualis.

However, what may seem clear and self-evident to some people may be rather confusing and imprecise to others. Although the members of the panel coming from multiple backgrounds and with different areas of expertise have spent months trying to work out the most appropriate definition, it is impossible to have thought everything through. What is peculiar in that regard is e.g. that instead of the word recklessness the Panel has decided to use the word knowledge even though it is interpreted more as the former. If they decided for recklessness in their definition, ecocide could simply become another exception to Art. 30’s default mens rea. Another question that may come to one’s mind in that context is what exactly is meant by with reckless disregard. Although the Panel has defined knowledge, recklessness was not further elaborated on.

Moreover, the proportionality test in connection with the term wanton does not seem entirely suitable. If the protection of the environment is coveted and of supposedly highest priority, there should not be room for acceptable damages of such gravity. In addition, it might be difficult to prove that the perpetrator was aware that the damage would be clearly excessive to the benefits anticipated. In relation thereto, the IEP provides no definition for the term clearly

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101 Ibid.
102 Ibid.
103 Ibid.
which may make the distinction between a mere excessive damage and a clearly excessive one challenging.

### 3.1.3 Concluding Remarks

In conclusion, the crime of ecocide was supposed to be the first ICC crime that is not entirely anthropocentric in nature\(^\text{104}\) but especially with the proportionality test the opposite is noticeable. According to one strong opposing opinion, in other words it might be said that “it’s fine to destroy the environment as long as humans benefit enough from the destruction.”\(^\text{105}\) Therefore it is questionable whether by making ecocide an international crime it is actually really an attempt to protect mostly the ecosystems of our planet.

Ultimately, especially the mental element of the definition seems to be partly imprecise and it seems like a completely new type of *mens rea* requirement is introduced into the statute.\(^\text{106}\) Additionally *dolus eventualis* was neither defined nor categorized by the IEP. Furthermore, one may ask oneself, why there are not any examples listed in the proposed Art. 8 ter ICC Statute. The article entails no list of acts as the definition is rather supposed to set out the fundamentals. It is therefore for the judges and prosecutors to decide whether a certain act falls under the definition which means that it does not fall in the area of competence of the legislator. An exhaustive list would possibly not reach its goal since it is par excellence impossible to include all the possible scenarios in one paragraph. Furthermore, such a catalogue of acts would “potentially carry[…] the notion of “justifying” acts that are not explicitly listed.”\(^\text{107}\) The only option would be the inclusion of a general clause under which a variety of cases could fall. Looking at the other core crimes and their provisions in the ICC Statute, it becomes evident that such a catalogue could fulfil its purpose. A list of examples can be found in Art. 7 ICC Statute for instance. From the formulation “other inhumane acts of a similar character” in Art. 7 (1) (k) ICC Statute it can be inferred that the list of crimes against humanity is not exhaustive. Consequently, such a solution does not seem entirely impossible in connection with the crime of ecocide.

\(^\text{104}\) An entirely ecocentric approach would have been less likely to be supported by the states and in one of the expert’s opinion it had to be kept realistic. Voigt, “«Ecocide» as an international crime: Personal reflections on options and choices.”


\(^\text{107}\) Voigt, “«Ecocide» as an international crime: Personal reflections on options and choices.”
Although, looking at it from an overall perspective, the IEP has done groundbreaking work in the elaboration of a definition, one major change is missing. While international criminal law only recognizes individual responsibility most environmental damage is caused by corporations.\textsuperscript{108} Only if the Rome Statute included a corporate responsibility or a similar principle in the new ecocide definition, the law could be applied effectively and to its full potential.\textsuperscript{109} But even when prosecuting individuals, namely corporate directors, the OTP’s operations could only be justified by the inclusion of a provision on that.\textsuperscript{110} Those individuals might be physically far from the crime and it would be difficult to substantiate why they are being targeted.\textsuperscript{111}

However, it is a matter of how the judiciary would apply the proposed law in each specific case as only then it could be determined whether the law fulfils its purpose and is efficient. On the other hand, it is not up to those organs to define the criminal acts as it is the legislator who has to abide to the principle of legality and especially to \textit{nullum crimen sine lege certa}.\textsuperscript{112} Accordingly, states will only ratify or accept an amendment to the ICC if they can also implement that wording in their national laws. The less elaborate the definition is, the more likely states are to reject the amendment.

### 3.2 Amendment of the Rome Statute

In order for the proposed crime to be included in the ICC catalogue the ICC Statute needs to be formally amended. The submission of the proposal to the ICC by the Independent Expert Panel was just the first step. At large, every amendment process is time-consuming and lengthy and involves a more or less political debate of the parties to the statute.

The last amendment was made in 2010 with the addition of the crime of aggression to the ICC catalogue.\textsuperscript{113} The adoption of the definition of the crime took years of groundwork\textsuperscript{114} and another amendment could take just as much time. The inclusion of the crime of aggression, however, was especially sensitive since the crime is closely linked to politics. The protection

\begin{footnotes}
\item[109] Ibid.
\item[110] Ibid.
\item[111] Ibid.
\item[114] Ibid.
\end{footnotes}
of the environment, on the other hand, might be less political and of such current relevance, that work could progress faster. In contrast to the proposed crime of ecocide, though, aggression has already been considered a crime back in the 1940s and it was defined by the UN General Assembly in 1974.\textsuperscript{115} Aggression has been well known to the international community at least since then, making it easier to codify it. Inasmuch as the 2010 amendment contained the inclusion of Art. 8 bis, 15 bis and Art. 15 ter in the Statute, it needs to be seen that the proposal in question does not contain that many provisions. It can therefore be assumed that before another amendment will be formally proposed to the Assembly of State Parties, the proposal will most likely have to be adjusted and further specified. In particular, specific triggering mechanisms are not included which, however, are visible in connection with the crime of aggression in Art. 15\textit{bis} and \textit{ter} of the Statute. The states would be more likely to adopt a fifth crime if it was sufficiently defined. Apart from that, according to Art. 121 (1) ICC Statute any state party to the statute can propose an amendment. The proposal would turn into hard law if at least a 2/3 majority voted in favor (Art. 121 (3) ICC Statute). Currently, 123 states\textsuperscript{116} constitute the ASP meaning that at least 82 states would have to agree to an amendment. It is therefore up to one member state to propose the amendment in one of the sessions in New York, which could be as early as December 2022.\textsuperscript{117}

Since the proposal has been informally sent to the ICC, ecocide has attracted a lot of attention among various states around the globe. Many countries have already publicly declared their support and seek the inclusion of a fifth ICC core crime.\textsuperscript{118} The fact that states all over the world address the matter and speak of the urgency of the crime’s recognition is a first step forward. This might ensure future votes in favor of an amendment and might positively affect the decision of other state parties.


\textsuperscript{118} Besides the EU (European Union) as a union of states, the following countries officially support the law of ecocide: Samoa, Bangladesh, Vanuatu, Finland, Belgium, Ireland, West Papua, UK, Mexico, Spain, Chile, France, Scotland, Canada, Luxembourg, Netherlands, Portugal, Sweden, Maldives, Vatican. “Leading States, Key Dates,” Stop Ecocide International, accessed March 19, 2022. https://www.stopecocide.earth/leading-states.
3.3 Ecocide on the National Level

There are already a few countries that have criminalized acts of ecocide on the national level and states which have declared their support of the International Crime of Ecocide. In this regard, the EU Parliament has assured its support of the recognition of the crime as well.\(^{119}\) This astonishing development is already creating a huge global impact and highlights the urgency of the matter. At the same time, should the new crime of ecocide be incorporated into the Rome Statute each ratifying state would have to adopt an ecocide crime on the domestic level. It is a matter of implementation of the Rome Statute which is supposed to help in fulfilling the principle of complementarity.

Before the Definition of Ecocide was even proposed to the ICC a few states had adopted a crime of ecocide on the domestic level. The first one was Vietnam which made ecocide a crime in response to the environmental atrocities happening during the Vietnam war.\(^{120}\) But also countries such as Russia, Kazakhstan, Kyrgyz Republic, Tajikistan, Georgia, Belarus, Ukraine, Moldova and Armenia are included in that enumeration.\(^{121}\) However, a large share of other countries has environmental crimes enshrined in their criminal codes which go much more in depth and focus on specific types of acts. In Germany, for instance, the criminal code contains a whole section on environmental crimes and includes nine offences in total.\(^{122}\) Those offences include, inter alia, the pollution of water, soil contamination, unlawful handling of waste and the causation of noise. If we stick to the example of Germany, many situations have been decided by the German criminal courts.\(^{123}\) The inclusion of very specific acts clearly makes it more likely for the prosecutors to open investigations and for the judges to look into those cases.


\(^{120}\)Greene, “The Campaign to Make Ecocide an International Crime: …,” 19; Gauger et al., The Ecocide Project: …, 12.


crimes against International Law”)\textsuperscript{124} would have to be made, resulting in the inclusion of a new provision on ecocide.

Nonetheless, it is interesting to see how existing crimes of ecocide are applied by the judges on the domestic level. Thus far, the worldwide prosecution has not been too successful: In 2012 an ecocide crime was investigated in the Kyrgyz Republic but the case was dismissed due to lack of evidence.\textsuperscript{125} A few years later, in 2015 a massive spill of palm oil in Guatemala caused a stir as the substance was poisonous and the responsible company was charged with ecocide.\textsuperscript{126} Although successfully charged, no real justice has been done as the palm oil industry reopened again.\textsuperscript{127}

As can be inferred from those examples no real environmental justice has been achieved so far. One cause for injustice may be that most countries that have criminalized ecocide rank high in corruption.\textsuperscript{128} Nevertheless, that could make a turn since there is already such great pressure from the outside and bigger attention is paid to the environment. In view of the recent developments in Ukraine, investigations have been opened which will look into environmentally damaging acts of the Russian military.\textsuperscript{129} That could be a milestone for other countries to investigate these crimes on a more regular basis.

Apart from that, many nations are already acting by approaching the problem from a different angle. In the absence of an ecocide law, human rights and environmental law turned out to be a useful tool in combating climate change for example. In that context, many judicial decisions have been made in favor of the plaintiffs’ requests like for instance in the Urgenda\textsuperscript{130}


\textsuperscript{128} Data about those countries can be retrieved from Transparency International. In Russia, for instance, about 27 % of public service users paid a bribe in the previous 12 months and in Ukraine it was 23 % . “Countries,” Transparency International, accessed March 8, 2022. https://www.transparency.org/en/countries/afghanistan?redirected=1.


and Royal Dutch Shell\textsuperscript{131} cases in the Netherlands in which the Dutch courts urge the state and company to cut their CO$_2$ emissions. Another noteworthy example is the German Constitutional Court’s decision\textsuperscript{132} in which the judges required the legislator to regulate greenhouse gas emissions reduction targets more closely in order to secure the civil rights and liberties for future generations. In other words, climate protection is a fundamental human right. The next step would therefore be to penalize acts of ecocide to try securing those human rights just like it is done in the case of the right to life for instance. After all, homicide is also considered a criminal offense.

Summarising, criminalizing and prosecuting acts of ecocide on the national level would definitely help in moving forward. On the flip side, the codification of the crime on the international level would definitely change the perspective in the domestic arena as well.


\textsuperscript{132} BVerfG, Beschluss des Ersten Senats vom 24. März 2021 - 1 BvR 2656/18 u.a.
4 ECOCIDE IN CONTEXT

To put the above discussed definition into context, it is crucial to subsume current events under the proposed offence and analyze how the crime would be prosecuted in practice. As already mentioned before, there are many examples that speak for the criminalization of ecocide and the most relevant and alarming ones should be discussed in the following subchapters. The Deforestation of the Amazon, a Climate Change example and the Pacific Garbage Patch will therefore be elaborated here. The selection is not accidental and is based on the fact that those cases differ greatly from each other and deal with different legal and factual issues. Although Criminal Law is not applicable retroactively, it lends itself to put current events into context to demonstrate how the law could be applied in similar cases in the future. In that regard, it is important to stress that how the law is to be applied, depends on the approach of the ICC prosecutor and judges. Only after taking a closer look at their mode of operation a reasonable conclusion can be drawn. Nevertheless, the final result remains hypothetical and there is no guarantee for the correctness of the application, as not all information is available in full.

4.1 The General Approach of the Prosecutor and Judges

First of all, it is crucial to take a look at the functioning of the prosecutor and the judges to be able to make an assessment for it is up to those to decide whether a certain act falls within the definition. In that context, the legislator is only of secondary importance. What can be said about the prosecution’s approach is that a general willingness to prosecute environmental crimes is already given.133 In this section, however, only information that is essential to the following subsumption will be illustrated. Based on the OTP’s policy paper the prosecution cannot charge for acts of ecocide so that it will not be discussed further.

Currently, the Office of the Prosecutor working under the jurisdiction of the Court consists of the Prosecutor and the Deputy Prosecutor and approx. 380 staff members from over 80 different nationalities.134 A fluid work flow is only possible due to the composition of the OTP which consists of three main divisions which are set out in the Regulations of the Office of the Prosecutor: The Jurisdiction, Complementarity and Cooperation Division, the Investigation Division and the Prosecution Division.135 The work of the OTP begins only when the Court’s

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133 See chapter 2.2. The Office of the Prosecutor, “Policy paper on case selection and prioritization.”
jurisdiction can be exercised in accordance with Art. 13 Rome Statute. It is either the Prosecutor who investigates on his own or when a situation is referred to the OTP by either a state party or the UNSC. However, before opening an investigation the prosecutor has to conduct preliminary examinations pursuant to Art. 15 ICC Statute and, among others, analyze whether there are also no investigations on the domestic level for the same crime. In assessing whether all criteria for the opening of an investigation are fulfilled, the OTP has a wide discretion in deciding who to investigate and to prosecute.\(^{136}\) The Prosecutor’s greatest power lies in Art. 15 (1) ICC Statute also known as the \textit{proprio motu} referral which means that the prosecutor can investigate a situation on his own. Nonetheless, the Office can invoke help from national authorities and other organizations like the UN or NGO’s according to Art. 15 (2). The same applies in case of an investigation pursuant to Art. 54 (3) (c) where the OTP strongly relies on cooperation of the states. If there is reasonable basis for an investigation the OTP will begin to send its investigators, advisors and also prosecutors to the countries in question in order to gather all necessary information.\(^{137}\) In that context, also victims and witnesses play an important role in gathering evidence. Once there is sufficient evidence the OTP may request the Pre-Trial Chamber to issue a warrant of arrest or a summons to appear (Art. 58 ICC Statute) and this is where the judges come in.

The Court is currently composed of 18 judges who come from different backgrounds; both education and origin. In each of the three divisions (Pre-Trial, Trial and Appeals Division) there are always judges who are experts in criminal law and procedure and international law\(^{138}\) which does not necessarily mean that environmental law is their area of expertise. This can be justified by the fact that environmental matters only form a fraction of international crimes. Merely war crimes contain an environmental element in Art. 8 § 2 (b) (iv) ICC Statute and although the Court has dealt with war crimes before, the judges have hardly any experience with environmental issues. The reason for that is that the provision has not been used in court until now.

Abstracting from this, the judges must be independent in their operation pursuant to Art. 40 of the Statute and have to remain impartial. Only by ensuring those principles all the remaining maxims can be safeguarded.\(^{139}\) Their significance for international justice is thus enormous. In assessing guilt their decision solely needs to be based on the evidence admitted at trial (Art.


\(^{137}\) “Office of the Prosecutor,” International Criminal Court.


\(^{139}\) Cassese, \textit{International Criminal Law}, 349.
It is therefore of upmost importance for the OTP to gather as much sufficient information as possible. However, the Pre-Trials Chamber’s role is limited to issuing orders at the request of the prosecutor (Art. 57 (3) ICC Statute). The judges’ essential work starts with the beginning of the trial proceedings. In this stage they unfold great power since they can determine the time and course of the questioning of witnesses, for instance. Based on Regulation 44 of the Regulations of the Court, the judges are also authorized to instruct experts.

However, the causation could be problematic where it is rather difficult or par excellence impossible to gather all necessary evidence and scientific data. In solving this

“the court [should] apply the precautionary principle […][w]here there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect.”

That would result in a shift of the burden of proof to the defendant as it would be up to them to prove that they have prevented any harm from occurring or at least tried to minimalize it. Although the implementation of environmental law principles would be a novelty in international criminal, it is highly necessary to apply those in connection with the crime of ecocide. This is the only way to do justice to the environment.

In conclusion, both the prosecutor and the judges have a key role in ICL as their course of action influences future cases and the faith of the defendants.

4.2 Deforestation of the Amazon

When it comes to the deforestation of the Amazon many attempts have already been made to prevent further damages from happening. Indigenous groups have made allegations against the Brazilian president Jair Bolsonaro before the ICC, inter alia, for crimes of genocide and he has also been accused of crimes against humanity. According to the ICC judge Sir Howard

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140 Ibid., 378.
142 Higgins, Eradicating ecocide, 126.
143 Ibid., 126, 127.
Morrison QC crimes against humanity should be a sufficient basis for prosecution if an environmental crime was grave enough to affected a large group of people.\textsuperscript{146} When looking at the statistics and the growing pressure from the indigenous peoples, the application of Art. 7 ICC Statute cannot be ruled out completely. According to a report of the Brazilian organization CIMI already 182 indigenous peoples were killed in 2020 when confronting their invaders\textsuperscript{147} and the destruction of the amazon has caused the displacement of many indigenous communities.\textsuperscript{148} Due to the violation of human rights many activists have been arguing that Bolsonaro has to be held responsible for the destruction of the Amazon in one way or another.\textsuperscript{149} This stems from the fact that since Bolsonaro has taken office in 2019 the deforestation of the Amazon rainforest has only been increasing.\textsuperscript{150} Nonetheless, this seems to be a challenging process as Bolsonaro has not been addressing indigenous peoples directly but was rather targeting their territories.

Looking at it from a hypothetical perspective, if the crime of ecocide was adopted the way it was proposed to the ICC, the Brazilian president could be facing ecocide charges. That is due to the fact that apart from the many human rights violations his anti-environmental policy has led to a huge biodiversity loss and an increase in CO\textsubscript{2} emission rates by 10 \% which contribute to climate change.\textsuperscript{151} Assuming Brazil had ratified or accepted the amendment in accordance with Art. 121 (4) Rome Statute and all the other general admissibility criteria were fulfilled, the Court would have to take a closer look at the material and mental element of the crime of ecocide. As an aside it should be noted that nothing stands in the way of issuing an arrest warrant of a sitting head of state since it has been done in the case of Al-Bashir before.\textsuperscript{152}


Starting with the first criteria of the definition, either the omission of a required act – the required act being the prevention of the deforestation of the Amazon by private parties – or the positive acts by Bolsonaro must be wanton or unlawful. In the case of ecocide, the wanton-ness of an act refers to legal acts, as already mentioned before, meaning that the terms are mutually exclusive in principle and have to be present alternatively. Since the president has taken office, he has implemented a lot of measures which encourage the destruction of the Amazon and the extraction of its resources. Among other things, the Environmental Department has cut the funds for environmental agencies and institutes by approx. 30% making it more difficult to implement environmental policies and counteract deforestation. Therefore, the president has committed an act besides the omission of counteracting forest fires and illegal mining. Those measures could be unlawful. According to the IEP an unlawful act may be based on what is illegal in domestic criminal legislation. Clearly the mining of raw materials in the Amazon violates Art. 231 of Brazil’s Constitution as it is happening on protected indigenous territory. According to Art. 2º law no 8.176/91, Art. 55 law no 9.605/98 in connection with Art. 70 of the Brazilian Penal Code mining in that territory entails also criminal consequences. Consequently, at least those acts are unlawful.

Either way, it also has to be taken a look at the wantonness criterion as the unlawfulness only concerns mining and as already mentioned, the terms are mutually exclusive. Cutting down and burning the forest for instance are therefore a separate matter. When carrying out an

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153 The term act “includes single acts or omissions, or cumulative acts or omissions” as stated by the Panel in its commentary on page 7 and 10. Consequently, no further elaboration is needed on whether omissions are equivalent to positive actions and whether an omission is sufficient to constitute the offense. That also means, it is not necessary to resort to Art. 28 ICC Statute.


155 Gonzaga, "Bolsonaro is a catastrophe for the environment."


157 Constitution of Brazil, October 5, 1988, English version available at: https://www.refworld.org/docid/4c84820b2.html.


assessment as to whether the (lawful) measures are disproportionate it can be seen that some projects are economically profitable: Brazil has always been a leading beef exporter and soy producer, but is also rich in natural resources like e.g. gold, aluminum and diamonds.

Therefore, the enhancement of agriculture and mining in the Amazon rainforest has major economic benefits for the whole country. Nevertheless, the overall picture is decisive. By applying the principle of sustainable development it becomes clear that the downsides are severe: The Amazon rainforest is one of the biggest carbon sinks on the planet as it stores around 123 tons of carbon. Consequently cutting and burning down trees is contributing to global warming as scientific research has shown that the dying of the forest will impede rainfalls. Moreover, the rainforest provides a home for many species and the own climate that is prevailing in that area negatively affects the biodiversity causing the extinction of some of the non-human inhabitants of the forest. The benefits anticipated are therefore clearly disproportionate in many respects. And although it would be hard to accuse Bolsonaro of intend, it can be assumed that he was acting with reckless disregard at least. To prove that is the responsibility of the prosecutor.

However, greater problem lies is the determination of the knowledge criterion. The mental element is usually most difficult to establish as there needs to be sufficient evidence for the presence of it. In the given case, it therefore has to be proven beyond reasonable doubt that the president has at least acted with the awareness that in the ordinary course of events those grave consequences might occur - the consequences here being a severe and either widespread or long-term damage to the environment. The severeness of the damage can firstly, already be inferred from what has been mentioned above. Secondly, also cultural values inherent in the environment are seriously compromised by depriving indigenous peoples of their land. In

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164 The principle of sustainable development requires “the states to reconcile economic development with protection of the environment.” Sands, Peel, Principles of International Environmental Law, 197.


addition to that, the terms widespread and long-term are present. As it happens, the rainforest cannot be restored within a reasonable period of time as it has been existing for millions of years and the adverse impact the forest clearing would have on the global climate cannot be reversed quickly. Therefore, those acts in question also cause a widespread damage.

Proving Bolsonaro’s awareness of those consequences, however, appears to be more difficult. In order to achieve that, the prosecutor would most likely make use of witnesses such as Raoni Metuktire and documents through which Bolsonaro’s intentions would be confirmed. On the other hand, various NGO’s such as the Climate Observatory, Amazon Watch or Rainforest Trust for instance could be called upon to determine whether the consequences for the ecosystems are that grave. In this context, it goes without saying that the information must be checked for credibility and reliability, which is ensured by Regulation 24. At this point, it is also important to stress, that what distinguishes the Court from other international tribunals like the International Criminal Tribunal for Rwanda (ICTY) or the International Criminal Tribunal for the former Yugoslavia (ICTR) is the guiding principle of complementarity. Therefore, the ICC only has jurisdiction if the state in question is either unwilling or unable to prosecute. This in turn means that, in this given case the prosecutor can most likely not rely on the cooperation of national authorities.

In principle, dolus eventualis is already sufficient for the existence of the subjective elements of the offense and therefore there will most likely be enough evidence to proof the mens rea already. This class of intent is very clearly explained in the German Legal System and is characterized by the volitional element. That element includes the perpetrator’s attitude towards the occurrence of the factual result which can range from indifference to “reconciliation.” Regarding the cognitive element it is sufficient that the perpetrator considers the occurrence of success possible.

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170 ICC, Regulations of the Office of the Prosecutor.
173 Ibid., 140; BGH, Urteil vom 20. November 2018 - 1 StR 560/18, para. 7.
174 Ibid.
As the head of state, Bolsonaro must be aware of the danger his actions are causing to the environment especially since cases against him have already been filed with the ICC. He therefore seems to be “reconciled” with the damaging consequences. Interestingly, this type of intent is not directly included and named in any provision of the ICC Statute. It could therefore initiate a discussion among the judges as it has before in the Katanga case. However, by adopting the crime of ecocide a dolus eventualis would be included in the provision as envisioned by the IEP.

In conclusion, it becomes evident that Bolsonaro’s acts cause an environmental emergency and could result in the fulfilment of the offense. For the international scope and relevance of those acts speaks the fact that the deforestation contributes to climate change all over the globe and that the pollution resulting from mining can be traced back hundreds of kilometers.

4.3 Royal Dutch Shell as an Example that adversely affects Climate Change

Climate change is probably one of the most serious environmental problems we face today. As already mentioned above, the IPCC fears a great existential crisis if we keep contributing to global warming at this pace. One of the main ideas of the international society is to prevent the increase of greenhouse gas emissions. As the definition of ecocide also covers acts of omission the law might be seen as a useful tool in achieving that. Among all the companies worldwide that impact the global climate, Royal Dutch Shell causes one of the biggest threats to climate change. In 2020 RDS has emitted 63 tons of carbon dioxide into the atmosphere and today it is commonly known that

“[the] presence [of greenhouse gases] exerts a warming influence on the Earth. Scientific evidence suggest ‘unequivocally’ that continued increases in atmospheric concentrations

176 Stop Ecocide International, Commentary …, 11.
178 The name Royal Dutch Shell has recently been changed to Shell plc but due to the applied case law and in order to avoid confusion the former is used.
of selected greenhouse gases due to human activities leads to an enhanced ‘greenhouse effect’ and global climate change."\(^{180}\)

In recognition of that, the Rechtbank Den Haag has ordered RDS in its judgement to cut down its emissions by 45% by 2030\(^{181}\) making it a landmark decision in that field. Climate action is taken on all over the globe nowadays demanding countries to comply with their climate agreements such as the Paris Agreement and the therefrom resulting Nationally Determined Contributions (NDCs). The private sector is also obligated to actively decrease emissions meaning that also Shell is not entirely free in its decisions. Companies of the Shell group

„must adhere to the applicable legislation and their contractual obligations. Each Shell company bears operational responsibility for the implementation of ‘climate change policies and strategies.’\(^{182}\)

From a human rights perspective especially, the right to life and health may be infringed by those actions.\(^{183}\) When it comes to ICL, so far no provision has been applicable to those kinds of cases. However, with the penalization of ecocide Shell’s actions might also become subject to criminal prosecution.

Assuming the crime of ecocide was incorporated into the Statute without further amendment, Shell’s CEO could be held criminally accountable for damaging the environment, which includes the atmosphere according to the IEP. The company itself cannot be punished due to the prevailing principle of individual responsibility in ICL and the exclusion of corporate responsibility from the definition of ecocide. Yet, it can be inferred from the Dutch civil law suit against RDS that the CEO bears the accountability\(^{184}\) for climate change.\(^{185}\) The following analysis will therefore be done on the basis of the CEO’s responsibility.


\(^{181}\) Rechtbank Den Haag, 26 mei 2021, ECLI:NL:RBDHA:2021:5339, para. 5.3.

\(^{182}\) Ibid., para. 2.5.1.

\(^{183}\) Ioane Teitiota v. New Zealand, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020, available at: https://docstore.ohchr.org/Service/FilesHandler.ashx?enc=6QkGI1d%2fIPPRiCAqKh7vhsjvIjqI84ZFd1DNPlSOEKG9gsB9gee9DBbQOEh5NHn%2fUqYqUMRgqAMBUPEmGjVv115ueyf0YlsDu0dp9yZLW4jePTlgY0yjbRLV1mhxR- mFomP8%2hgyRhxKt%3d%3d.

\(^{184}\) By that it is not referred to criminal liability but rather to the CEO’s responsibility for RDS’s management.

\(^{185}\) Rechtbank Den Haag, 26 mei 2021, ECLI:NL:RBDHA:2021:5339, para. 2.5.6.
Starting with the obvious, an act or omission of the defendant must be present. In this case an act of omission is given, as the CEO does not cut down the CO₂ emissions. Conversely, depending on the interpretation, this can also be understood as an act. The conduct itself is not unlawful, as it is not criminalized on the domestic level and there are no international provisions penalizing that kind of behavior. If that were the case, the case brought against RDS in the Netherlands would have been brought before a criminal court already. Still, the wantonness criteria might be fulfilled. At this point, the disproportionality test is to be conducted in order to establish whether the harm to the environment is still within reasonable limits. Clearly, the RDS’s benefits are mostly economic but there are also social advantages. Currently, RDS operates in over 70 countries worldwide and thanks to that approx. 82 thousand people have employment. The more the company expands its business the more unemployment can be counteracted. At the same time, the company provides its goods to the citizens and thus contributes to the prosperity of society. However, that does not necessarily imply a connection between those social benefits and the high CO₂ emissions and it is up to the prosecutor to prove that the environmental impact outweighs the anticipated benefits. In that context, the burden of proof lies with the prosecutor.

Whether the CEO has acted with knowledge is questionable and has to be assessed in a detailed manner. In the event of insufficient evidence, the principle of the benefit of the doubt applies to the accused in accordance with Art. 66 Rome Statute. It is therefore of utmost importance to gather proof that would allow the prosecutor to open an investigation. The CEO must have been aware of the fact that his actions would cause harm to the environment in the ordinary course of events. Conversely, an awareness of near certainty that the environment will be harmed, is not necessary. However, at least after the decision of the Hague District Court the CEO must be aware of the harm that he and his company are causing to the environment.

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187 Ibid., 108.
190 Cryer et al. An Introduction to ..., 433.
191 Stop Ecocide International, Commentary ..., 11.
The acquiescence is at least sufficient for the establishment of intent as it constitutes *dolus eventualis*.

Moreover, the anticipated damage must be *severe* and either *widespread* or *long-term*. For the severity of those consequences already speaks the earth’s temperature rise which is mostly based on anthropogenic emissions\(^\text{192}\) and the adverse consequences that this entails. By the same argument it can be claimed that the damage is also *widespread*. According to the preambular of the Paris Agreement and Art. 2 (2); 4 (3), (19), states have a common responsibility to confront climate change as global warming affects all states. Ultimately, emissions do not adhere to national borders. Although the Paris Agreement only obligates states (and not individuals) it can be used to illustrate the seriousness of the problem. At the same time, that does not mean that the private sector is not obligated to mitigate emissions. As already mentioned above, the company has to follow the climate change policies and strategies.

What’s more, the consequences of the failure to reduce CO\(_2\) emissions will also have a *long-term* effect on the environment. Scientists are already claiming that the effects of climate change are irreversible especially the sea level rise, a change in the weather pattern, the melting of Arctic ice, the extinction of species and the acidification of oceans\(^\text{193}\). Unquestionably, that is covered by the definition of *long-term*. In that context, it must not be proven that the damage has already occurred, as ecocide is “a crime of endangerment rather than of material result.”\(^\text{194}\)

Still, there needs to be sufficient evidence for the likelihood of harm and for that the prosecution will have to rely on reports and scientific research of climate change experts pursuant to Art. 15 (2) and Art. 54 (3) (c) ICC Statute. The same specialists who were called on in the RDS case like e.g. Milieudefensie or Greenpeace Nederland can probably be consulted and relied on in the given case.

In addition to that, the issue of *causation* arises, the same as with regards to all other criminal offences.\(^\text{195}\) The conduct must be causal for the consequences stipulated in the criminal offence.\(^\text{196}\) This requirement, however, proves to be particularly difficult in connection with environmental destruction which


\(^\text{194}\) Stop Ecocide International, *Commentary ..., 12*.


\(^\text{196}\) Ibid.
“[…]sometimes occurs as result of a dramatic event […], but often it occurs as a result of many small, undramatic actions, by many individuals over many years.”197

The Court therefore has to rely on strong evidence because causation may be very difficult to prove as usually not only one individual is responsible for a severe and either widespread or long-term damage.198 In the present case, it needs to be proven that RDS’s greenhouse gas emissions (under the management of the CEO) account for a sufficient portion of global emissions and that this part can actually contribute to global warming. The amount of CO₂ that is being emitted into the atmosphere by Shell can be determined quite accurately: it amounts to 1.6 % of the global carbon budget.199 Consequently, the causation nexus must be affirmed in the present case. In evident cases the judges would not even have to resort to the precautionary principle.

After that rough application of the law to the concrete case, it can be seen that a criminal prosecution of RDS’s CEO cannot be excluded. Notwithstanding this, many other major CO₂ emitters such as Vistra Engery, Xcel Energy and BP200 could be held criminally accountable in the future if ecocide turned into the fifth crime against peace. As a study by CDP shows, only 100 companies worldwide are responsible for over 70 % of the greenhouse gas emissions201 and especially those companies should be held accountable.

4.4 The Great Pacific Garbage Patch

The new offence aims at capturing the most egregious crimes of various kinds which threaten our ecosystems in their existence. This not only includes climate matters but environmental pollution. One of the greatest pollution problems we are facing nowadays occurs in the pacific. The reason as for why the Great Pacific Garbage patch receives so much attention is the extent of the pollution: Although the exact size of the garbage patch is difficult to establish

197 Greene, “The Campaign to Make Ecocide an International Crime…,” 34.
198 Ibid.
as the waste is constantly moving with ocean currents, the area has been estimated to be the size of the U.S. state of Texas or even Afghanistan. In that context, it is troubling that the debris spreads all the way to the sea bed because this way it causes a great danger to marine wildlife: Microplastics as well as bigger waste like e.g. fishing nets threaten the fauna since animals can get caught in the debris or even feed on plastics. Indirectly this also may affect human health as we are the end consumers and those substances are introduced to the human bodies as well. Another aspect that needs to be bared in mind, is the fact that oceans serve as carbon sinks and the containment of trash and plastic in the water decreases the oceans’ capacities to store CO₂. In very simple terms, this means that the ocean pollution affects our climate. After all that has been said, it is only logical to assume that the Great Pacific Garbage Patch poses a great threat to the environment and it could be subject to criminal prosecution.

For that to be the case, the present event must be subsumed under the proposed definition of ecocide. Nevertheless, before the various terms come into use, it must be clarified who the responsible offender is. Interestingly, around 80 % of plastic waste comes from the land and less from ships and offshore oil rigs as one might assume. Scientists have found out that the top six ocean polluters are Asian countries, namely China, Indonesia, Philippines, Vietnam, Sri Lanka and Thailand. From this it can be concluded that it is not difficult to establish which country is responsible for the pollution but criminal law is known to be based on the principle of individual responsibility. For a state party to refer a case to the prosecutor pursuant Art. 13 (a) or for a prosecutor to act proprio motu in accordance with Art. 15 (1) ICC Statute a sufficient basis for investigation must be given. Conversely, an investigation will not be initiated on the basis of a mere presumption. Based on Regulation 29 (3) of the Regulations of the Office of the Prosecutor even if preliminary examinations were made, an investigation could not be opened due to the lack of a reasonable basis. Unless new evidence is presented which could

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204 “Garbage Patches,” National Oceanic and Atmospheric Administration.
205 Ibid.
207 Ibid.
208 Encyclopedia Britannica, s.v. “Great Pacific Garbage Patch.”
210 ICC, Regulations of the Office of the Prosecutor.
incriminate a concrete individual with a superior responsibility the Great Pacific Garbage Patch case will not even be considered an international crime in the future.

Beyond that, the issue of causation arises just like in the Shell case. The conduct must be sufficiently relevant to lead to one of the consequences named in the proposed crime. Nonetheless, tracing the origin of the waste seems to be an imposition.

Thus, the present example shows that international criminal law cannot do justice to all environmentally damaging events. In the future it might serve as a just tool in combating harm done to our ecosystems but not every event will fall under the definition of ecocide. Unless a change of circumstances occurs, the ICC would most likely not apply the definition to the present event.

4.5 Other Current Examples

The above mentioned and thoroughly analyzed examples are the ones that attract the most public attention currently. Nonetheless, we must not lose sight of the fact that there are grave environmental issues everywhere that the world may just not be made aware of. A larger attention should be paid to the Athabasca oil sands for instance. Located in Canada it is one of the largest oil reserves on our planet. Although very beneficial, the extraction of bitumen (a form of oil) may result in contamination of the groundwater or river and the energy that is taken to mine is causing a high emission of greenhouse gases. Mining is frequently referred to as environmental menace in general. The Nickel mines in the Swedish Arctic, the Uranium mining in Caetite, Brazil or the Rio Tinto’s Uranium Rössing mine in Namibia are other examples of that. As an orientation which events could be considered an act of ecocide the Environmental Justice Atlas serves as a good starting point. Among other things, the Deepwater Horizon oil spill is named and many river pollutions all over the world. Great attention is especially paid to climate-related matters, biodiversity threat and loss, pollution, contamination and nuclear power.

Nonetheless, what must not go unnoticed is the current conflict in Ukraine which is causing a great stir for many reasons: First of all, the ICC has already opened investigations on the

situation of Ukraine as, up to this point, 41 countries have referred the case to the Court.\footnote{\textsuperscript{216} The allegations concern war crimes, crimes against humanity and even genocide. “Ukraine,” International Criminal Court, accessed April 8, 2022. \url{https://www.icc-cpi.int/ukraine}.} Second of all and most important for this study to mention is the environmental degradation that is taking place \textit{in situ}. Of particular concern is the targeting of nuclear power plants which – should this be the case – would lead to an environmental catastrophe in the Ukraine but also in other European countries. It is therefore interesting to see how the situation will evolve in the context of an international ecocide crime because although the proposed offence is applicable during peacetime, it must conversely be applicable during armed conflict, too. However, to clarify this once again, criminal law is not retroactive so it would just be interesting to see if the definition could be applied hypothetically.
5 CONCLUSION

The purpose of this thesis was to establish how the ICC could apply the proposed definition of ecocide to current environmentally destructive events. Simultaneously, the elaboration focused on reasons which speak in favor of the inclusion of such a crime and its international significance. Whether air or water pollution, protection of flora and fauna or sustainable development, as the elaboration shows, all of the examples mentioned basically lead back to the protection of human welfare and human rights. In summary, the penalization of ecocide therefore primarily serves the preservation of current and future generations on earth.

In answering the main research question, several insights were gained. Most importantly, the findings and analysis show that there is no clear and definite answer to it. The entire context has to be taken into account: First of all, every environmentally threatening situation that could be referred to the prosecutor is dealing with different issues. The deforestation, water contamination and the pollution of the atmosphere differ greatly from one another as they already address different parts of our ecosystems. Whereas some matters would be more of procedural nature like for instance the evidence procedure or the issue of finding the right person in charge, others would fail at the subsumption under the definition of ecocide as there is also the matter of causation. That just shows that the definition would not be applicable to every single event. Moreover, if state parties or the UNSC would not be convinced who is responsible or if an incident would even fall under the definition, they would most likely not refer a situation to the prosecutor.

Secondly and in connection with what has just been said, the prosecutor would not make use of the propriu motu referral himself if he had doubts. And most cases would not even be sufficient to initiate the prosecutor’s independent action like e.g. the Great Pacific Garbage Patch. The reason for that is, that not all individuals are held criminally responsible before the ICC. Only individuals holding a superior responsibility can be prosecuted by the Court and, in most cases, it is the ordinary citizen who pollutes the environment.

Another essential finding that needs to be highlighted, is that the judges of the court would have to apply environmental law principles. Notably, the precautionary principle would have to be implemented to establish causation. In addition to that, the principle of sustainable development plays a major role when conducting a proportionality test with regard to the term wanton. Only under interpretation of environmental law principles can the offense be applied accurately to the cases. It is only reasonable to assume, that those maxims would have to become a permanent fixture.
Environmental dilemmas like Bolsonaro’s deforestation politics and the Shell plc case could fall under the definition of ecocide and it is probable that similar events in the future could lead to a criminal prosecution by the ICC. One of the many questions that arises in that regard is, nevertheless, whether punishing those pollutants would be justifiable. Where is the limit if we start holding CO₂ emitters criminally accountable? After all, is e.g. imprisoning someone for emitting too much CO₂ into the atmosphere a reasonable and adequate solution to our ecological plight? Would it be defensible to penalize a mere “breach of contract”?

Although the goal of this proposal is to do environmental justice – even if only symbolically – it is impossible to close the legislative gap and hold everyone accountable and address all environmental degradation. Some environmentally challenging matters will have to stay unaddressed. Criminal law can therefore be seen as only one path among many in ensuring justice. Perhaps there might be other possibilities of doing so like for instance asserting state responsibility before ICJ.

In that context, it needs to be seen that law is not only about the effectiveness but also about symbolism. Most of the time environmental crimes do not even make the news which is why the incorporation of the crime into the Rome Statue would create more awareness. More public attention will be attracted if a crime falls under the jurisdiction of the ICC. The main focus for now is therefore on raising awareness globally and a shift in perspective. Should the definition of ecocide, however, be incorporated into the statue, it will not only be about punishing the responsible persons but also about achieving an overall deterrent effect which is supposed to stop the individual who has a superior responsibility from committing environmental crimes. Precisely these individuals have the power to make decisions that can have a huge impact.

Lastly, it is unclear which countries would accept or ratify an amendment of the statute, especially knowing that the proposal in question may be subject to change. However, that question and whether this crime would actually counteract or even prevent environmental destruction and what the effects of prosecuting ecocide would be, are not answered here and could be the subject of another elaboration.

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