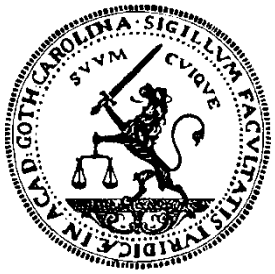

FACULTY OF LAW

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Ecocide – Unveiling its added value

A study of the concept of ecocide as the fifth crime against peace

JURM02 Graduate thesis

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Table of contents

Summary

Environmental degradation is identified by the United Nations as a significant threat to international peace and security and poses profound risks to both humanity and the environment, encompassing every aspect of our existence. This thesis explores the concept of ecocide, broadly understood as mass damage and destruction of ecosystems, severe harm to nature which is widespread or long-term, and its potential recognition as an international crime under the Rome Statute. The primary aim of this thesis is to investigate whether the existing core crimes within the Rome Statute, such as genocide, crimes against humanity and war crimes, can encompass ecocide or if a new legal definition and amendment is necessary to address the legal gaps in international criminal law. The study conducts a legal analysis of the Rome Statute, compares proposed legal definitions of ecocide by the Independent Expert Panel (IEP) and Polly Higgins, and includes a case study of the pending case before the ICC, The Planet vs. Bolsonaro. It also examines contributions from experts and legal scholars to the International Criminal Court (ICC) regarding the criminalisation of environmental destruction.

The findings reveal that the current legal framework can be interpreted to include ecocide as a method of genocide or crimes against humanity. It is, however, clear that these interpretations are possible in certain circumstances. The findings indicate that the current legal framework is inadequate for environmental protection. There is a critical legal gap due to the absence of provisions addressing large-scale destruction and severe environmental harm in peacetime along with the rules on environmental destruction in wartime. Therefore, incorporating ecocide into international law is crucial, whether through international criminal law or a new treaty.

The IEP's proposed definition introduces complexities that could hinder effective prosecution and dilute the severity of the crime by incorporating thresholds and *mens rea* requirements, rather than targeting the real issue of ecocide. The anthropocentric nature of the Rome Statute further limits its effectiveness in directly protecting the environment. The thesis concludes that a systemic shift is essential to address ecocide effectively. Conclusions include developing new environmental legislation inspired by Polly Higgins' advocacy for a global duty of care for the environment.

In summary, while recognizing the advancements in international law, this thesis calls for substantial legal reforms and the creation of dedicated institutions to effectively address and prosecute ecocide, intending to protect the environment and ensure a sustainable future for all.

Sammanfattning

Miljöförstöringar har identifierats av Förenta nationerna (FN) som ett betydande hot mot internationell fred och säkerhet, vilket innefattar risker för både mänskligheten och miljön. I denna uppsats utforskas begreppet ekocid, allmänt förstått som massförstörelse och skadegörelse av ekosystem, allvarlig skada på naturen som är utbredd eller långvarig, och dess potentiella inkludering som ett internationellt brott enligt Romstadgan. Syftet med denna uppsats är att undersöka om de befintliga kärnbrotten inom Romstadgan, såsom folkmord, brott mot mänskligheten och krigsförbrytelser, kan omfatta ekocid eller om en ny juridisk definition och ändring är nödvändig för att åtgärda de rättsliga luckorna i internationell straffrätt och folkrätt. I uppsatsen analyseras Romstadgan och föreslagna juridiska definitioner av ekocid från Independent Expert Panel (IEP) och Polly Higgins vilka också jämförs med varandra. Vidare innehåller uppsatsen en fallstudie av det pågående fallet inför den Internationella brottmålsdomstolen (ICC), The Planet vs. Bolsonaro. Vidare, förs det även en diskussion kring uttalanden och utredningar från experter och jurister till ICC angående kriminaliseringen av miljöförstöringar.

I uppsatsen kan läsaren utröna den nuvarande rättsliga ramen kan tolkas för att inkludera ekocid som en metod för folkmord eller brott mot mänskligheten. Det är dock tydligt att dessa tolkningar endast är möjliga under vissa omständigheter. Vidare, indikerar analysen i uppsatsen att den nuvarande rättsliga ramen är otillräcklig för att skydda miljön. Det finns tydliga rättsliga luckor och det är därför avgörande att inkorporera ekocid i internationell rätt. Detta antingen genom Romstadgan och därmed i internationell straffrätt, genom annan existerande lagstiftning eller helt nya konventioner.

Analysen av IEP:s föreslagna definition visar att det komplexa krav på uppsåt är en av de främsta hindren med definitionen. Denna definition prioriterar politisk genomförbarhet och genomslag i stället för att etablera ett starkt miljöskydd med hjälp av Romstadgan och konceptet ekocid. Romstadgans antropocentriska natur begränsar ytterligare definitionens effektivitet att direkt skydda miljön. Vidare är en slutsats att en systemändring är nödvändig för att skydda miljön. I uppsatsen förespråkas det att ny miljörättslig lagstiftning bör utvecklas med grund i Polly Higgins teori om en global omsorgsplikt för miljön.

Sammanfattningsvis, uppmärksammas framstegen inom folkrätten inom ramen för arbetet med att skydda miljön i denna uppsats, samtidigt som det uppmanas till omfattande juridiska reformer. Detta för att skapa regler och institutioner för att effektivt hantera och åtala ekocid, med målet att skydda miljön och säkerställa en hållbar framtid för alla.

Preface

This thesis marks the end of my five years as a law student in Lund, and it is indeed a time that I will hold dear in my memories. I am grateful for all the opportunities I have had throughout my time in Lund, but mostly because I chose to follow my childhood dream of studying law.

First and foremost, I would like to extend my deepest gratitude to my supervisor, Britta Sjöstedt, for her unwavering support and steadfast belief in me. Her guidance through the various stages of the writing process and the valuable discussions that challenged me have been instrumental in my growth. I am also incredibly thankful for the opportunity to be an assistant at the ILC in the spring of 2023, a chance that came about through her support and recommendation. Thank you Britta for always being there for me and believing in me.

I would like to express my heartfelt gratitude to all of my dear friends whom I have made throughout my journey in both Lund and Geneva. Your companionship and support have meant the world to me. I especially want to thank Amanda Bills, Charlotta Ahlström, and Viktoria Svantesson Thörnblad for always being there for me, offering their unwavering support and kindness. Tack mina fina vänner! Ni har gjort den här resan oförglömlig, och jag är så tacksam att ha er i mitt liv.

Furthermore, a big and heartfelt thank you to my dear colleagues at the Faculty of Law, especially *Nätis*. You have made my time in Lund unforgettable, and I will always cherish our memories and time together.

Son olarak, canım aileme teşekkür etmek istiyorum. Anne ve Ella Özge, her zaman yanımda olduğunuz, beni her koşulda desteklediğiniz ve bana olan inancınızı hiç kaybetmediğiniz için çok teşekkür ederim. Anne, bizim için elinden gelen her şeyi yaptığın, sevgini ve fedakarlığını hiç esirgemediğin için minnettarım. Senin kızın olmaktan gurur duyuyorum ve sana olan sevgim tarif edilemez. Ella Özge, seninle geçirdiğimiz her anı çok kıymetli buluyorum ve kardeşlik bağımız benim için her şeyden değerli. Hepinizi çok seviyorum. Artık ailenin bir avukatı var!

Lund, 14 June 2024

Jasmin Öykü Özdemir

Abbreviations

EU	European Union
FN	Förenta nationerna
IBAMA	Brazilian Institute for Environment Renewable Natural Resources
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal of the Former Yugoslavia
IEP	Independent Expert Panel
IHL	International Humanitarian Law
ILC	International Law Commission
NGO	Non-governmental organisation
NPCC	National Policy on Climate Change
OTP	Office of the Prosecutor
PIL	Public International Law
PSOL	Partido Socialismo e Liberdade
PTC	The Prosecutor
SEI	Stop Ecocide International
UN	United Nations
UNEP	United Nations Environmental Programme

1 Introduction

1.1 Background

Environmental degradation which results in 'large-scale death or lessening of life chances'[1] was identified by the United Nations as one of the main threats to international security, especially considering its potential to undermine 'states as the basic unit of the international system'.[2] The risks which environmental destruction entails and its link between peace and security should be one of the reasons for the push for international change.[3] It can therefore be stated that humanity is at a crossroads, where we must decide if we should take active measures to protect the environment both for the sake of humanity and also nature itself.

The three main planetary issues we face are climate change, pollution and biodiversity loss. As the United Nations (UN) Secretary-General António Guterres stated, we are 'waging a war on nature',[4] a war which will end with everyone losing.[5] The current international criminal legal framework does not address or punish mass environmental damage which results in harm to humanity and destruction of ecosystems, besides of the rules governing environmental protection during armed conflict and the other existing regulations and conventions under international environmental law which include environmental protection.[6] Different UN bodies have suggested and considered the possibility of recognising ecocide as either a method of genocide or as a new international crime. None of these discussions has resulted in any change to the international legal framework.[7]

The term *ecocide* is built in the same manner as *genocide,* the latter developed by Raphaël Lemkin*,* etymologically described as the intention to destroy

[1] UN Doc A/59/565 12.
[2] UN Doc A/59/565 (n 1) 12.
[3] Rosemary Mwanza, 'Enhancing Accountability for Environmental Damage under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity' (2018) 19 Melbourne Journal of International Law 586.
[4] 'The UN Secretary-General Speaks on the Stake of the Planet (*United Nations*) <https://www.un.org/en/climatechange/un-secretary-general-speaks-state-planet> accessed 20 January 2024.
[5] ibid.
[6] Art. 35(3) and (55)(1) Additional Protocol I to the Geneva Conventions; The Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (ENMOD); Convention on Biological Diversity (CBD); see also United Nations International Law Commission (ILC) Report by Special Rapporteur Marie Jacobsson (30 May 2014) UN Doc. A/CN.4/674.
[7] Polly Higgins, Damien Short and Nigel South, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59 Crime, Law and Social Change 251 <https://doi.org/10.1007/s10611-013-9413-6> accessed 15 February 2024.

entire groups, whether they be national, racial or religious.[8] The term *ecocide* consists of the prefix 'eco' and the suffix 'cide'. 'Eco' is a derivation of the Greek *oikos,* which means home or in this case is a reference to the environment and humanity's relation to it. 'Cide' is derived from the Latin verb *cedere* which means to kill. With its derivations, the term ecocide refers to the devastation and destruction of the environment and the detriment of life, taking inspiration from genocide. However, contrary to the term genocide, there is no legal definition of ecocide.[9] Even if the meaning of the two words which ecocide is derived from is seemingly clear, the legal definition of ecocide is more complicated. Significant effort has been made to establish a legal definition which has resulted in the creation of various organisations and suggestions for definitions. The most prominent example is made by Stop Ecocide International and their Independent Expert Panel for the Legal Definition of Ecocide ('the Panel' and 'IEP'), but also Barrister Polly Higgins's efforts to include ecocide in the Rome Statute which the Panel has continued to endorse.[10] The rationale behind the discussions and the suggestions for the crime of ecocide to be established under international law are as explained, the grave risks environmental damage has on our common future and international peace.

The wish to criminalise ecocide has been discussed since as early as the 1970s, but it is more recently that it has been rigorously addressed. The International Criminal Court (ICC) has been urged by lawmakers, academics, and campaigners around the world to start investigating and prosecuting individuals who cause massive destruction and harm the environment. Various groups of experts and academics have sent opinion papers to the ICC where they call for a change of the regime of the court, as they argue that the current system enables environmental damage and harm. In 2016 The Office of the Prosecutor (OTP) published a report as an answer to these calls, on case selection and prioritisation, where they introduced the particular consideration they would give to prosecute crimes which are committed through, or that result in the destruction of the environment as well as the illegal exploitation of natural resources or the illegal dispossession of land.[11] Early this year, on

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[8] Antonio Cassese and others, *Cassese's International Criminal Law* (Third edition, Oxford University Press 2013).

[9] Maud Sarlième, 'Ecocide: Past, Present, and Future Challenges' in Walter Leal Filho and others (eds), *Life on Land* (Springer International Publishing 2021) <http://link.springer.com/10.1007/978-3-319-95981-8_110> accessed 20 May 2024.

[10] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf > accessed 25 March 2024; Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (2nd edition, Shepheard-Walwyn (Publishers) Ltd 2015).

[11] Office of the Prosecutor, 'Policy paper on case selection and prioritisation' <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 12 February 2024, 14.

the 16th of February 2024, the OTP launched a public consultation on a new policy initiative to advance accountability for environmental crimes under the Rome Statute.[12]

The developing position of the ICC to possibly enable the prosecution of environmental crimes within the Court is an important step to place ecocide in a legal context. Even though there is no direct mention of ecocide in the 2016 Report on case selection and prioritisation and 2024 call for public consultation by the OTP, it can still be seen as a breakthrough for the potential of criminal liability for environmental crimes.[13] The current provisions of the Rome Statute only encompass environmental damage as war crimes, criminalizing 'intentionally launching an attack with the knowledge that such attack will cause […] widespread, long-term and severe damage to the natural environment'.[14] Contributions have already been made by a joint comment as an answer to the OTP's 2024 call, by lawyers and scientists at the University of London's Institute of Commonwealth Studies, the Oxford Sustainable Law Programme, and the International Nuremberg Principles Academy. They highlight that the Rome Statute could be better used to address environmental destruction during war and peacetime by broadening the understanding of the core crimes and enabling the inclusion of ecocide, either as an amendment or through already existing core crimes, such as genocide, crimes against humanity and war crimes.[15]

Nevertheless, it must be stated that there are discussions regarding both of these alternative ways forward, the first being the amendment of the Rome Statute to include the IEP's suggested legal definition and the second being the broadening of the current core crimes to enable prosecution for acts of ecocide. There are, however, doubts about whether the proposed definition by the IEP and its inclusion in the Rome Statute is the best way to address ecocide. It is therefore essential to consider the nature of the act and the existing legal framework before making significant changes. While progress has been made in international law to safeguard humanity by defining certain crimes under the Rome Statute as international offences, any amendment to the Rome Statute must acknowledge both the potential and limitations of the

[12] Isabella Kaminski, 'Calls for International Criminal Court to End "Impunity" for Environmental Crimes' (26 March 2024) <https://www.theguardian.com/environment/2024/mar/26/international-criminal-court-end-impunity-environmental-crimes> accessed 1 May 2024.

[13] Office of the Prosecutor 'The Office of the Prosecutor launches public consultation on a new policy initiative to advance accountability for environmental crimes under the Rome Statute' (16 February 2024) <https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability-0> accessed 22 February 2024.

[14] Art. 8(2)(b)(iv) of the Rome Statute; Kaminski (n 12).

[15] ibid; Maud Sarlième and others, 'Comment on OTP Environmental Crimes Policy' <https://www.smithschool.ox.ac.uk/sites/default/files/2024-03/20240316_Comment_on_OTP%20Environmental_Crimes_Policy_Sarlieve_et_al.pdf> accessed 20 March 2024.

ICC, as well as the challenges that may arise from integrating environmental harm into international criminal law.

The primary question raised is therefore whether the existing provisions under the Rome Statute are sufficiently broad to include the concept of ecocide without the need for an amendment. If not, the question is whether the IEP's suggested definition and any potential Rome Statute amendment would fill the legal gaps in international criminal law to make it possible to target the concept of ecocide.

1.2 Purpose and Research Questions

The purpose of this thesis is to investigate the potential of the existing core crimes of the Rome Statute to address extensive environmental destruction that can be coined under the concept of ecocide. To do so, this thesis examines whether the proposed legal definition of ecocide by the IEP can address the potential gaps in international criminal law and if the criminalisation would allow for effective prosecution of ecocide. This thesis, therefore, seeks to ascertain whether acts identified as or similar to ecocide are already covered under the established crimes under the Rome Statute, such as Genocide (Article 6), Crimes against humanity (Article 7) and War crimes (Article 8). The thesis will examine international criminal law, individual responsibility, and the nature of ecocide to provide insight into the proposal while also highlighting potential issues that the proposed amendment may entail. Moreover, this essay aims to compare different definitions of ecocide to establish the potential significance of ecocide and its implications for individual criminal accountability. It will scrutinize the challenges that may emerge in the process of establishing ecocide as an international crime and employing it to prosecute cases of ecological damage. Furthermore, as the proposals have aimed at incorporating ecocide into the Rome Statute the relevant rules on liability will also apply to a new potential crime. This motivates the deliberate choice of investigating the relevant rules under the Rome Statute to establish the associated implications an amendment can have on the questions of liability.

To achieve this purpose, the thesis will answer the following research question:

1. To what extent does the suggested addition of ecocide as a core crime in the Rome Statute fill legal gaps and enhance the effectiveness of the legal framework in existing international criminal law?

This will be done by answering the following sub-questions:

   a. Can the concept of ecocide be addressed through existing provisions under the Rome Statute, such as genocide, crimes against humanity or war crimes?

b. Who holds the capacity to commit ecocide according to the proposed amendments to the Rome Statute, and what are the associated implications and liabilities under international criminal law?

1.3 Delimitations

This essay will only address the legal definitions of the International Expert Panel and Polly Higgins' definition which she submitted to the International Law Commission (ILC). No other definition of ecocide will be considered; however, some may be cited to set the scene for the background, history and current discussion on the topic. Although studies of international criminal law and organisations like the International Criminal Court (ICC) may be included in ecocide research, these topics will not be included in this thesis because they do not directly relate to the study's concerns. In particular, the discussion will not focus on subjects like customary international law (CIL), or the ICC in its entirety. This study is limited to the Rome Statute because the development of the concept of ecocide evolves around the discussions of either interpreting existing articles within the Statute or the amendment of it.

The reason why the IEP's and Higgins' definitions will be analysed is that it has served as the starting point for the discussions regarding the acts of mass environmental destruction, how the international community can act to prevent it and ultimately which place it should have under international law. It has furthermore, evoked discussions which could result in new concepts similar to ecocide such as 'domicile' which is described as the destruction of residential areas in Gaza and 'educide' the targeted destruction of educational infrastructure in Gaza.[16] It can therefore be stated that the IEP's definition has a comprehensiveness and importance within the conversation around the concept of ecocide.

The IEP's and Polly Higgins' definitions will be compared to one another as the latter has resulted in the development of the former, and the analysis of their similarities and differences led to a better understanding of the issues that might be faced when incorporating the concept of ecocide as an amendment to the Rome Statute. It is also important to acknowledge that this thesis has a case study on the submitted case to the ICC called 'The Planet vs. Bolsonaro'. This case study has three main purposes. Firstly, it is to highlight how ecocide can be conducted and by whom. Secondly, it is to enable the comparison between the two definitions and the existing rules in the Rome Statute and thirdly, to apply the IEP's legal definition to a real case to show

[16] Aaron Dumont, 'To Cide or Not to Cide – Ecocide, What Have You Started?' [2024] Völkerrechtsblog <https://intr2dok.vifa-recht.de/receive/mir_mods_00017259> accessed 20 May 2024.

how ecocide could be addressed through the suggested definition. The rationale behind choosing this case is that it is a pending case before the ICC, the organization AllRise whom have filed the case basing their legal argument upon already existing rules on crimes against humanity within the Rome Statute. This enables the comparative analysis of the concept of ecocide, existing rules within the Statute and the impact an amendment would have on ICL and ultimately PIL.

Additionally, it shall be stated that ecocide is criminalised in national law in 15 countries, where Belgium was the latest to adopt an ecocide law with close resemblance to the IEP's legal definition.[17] It should furthermore be stated that the European Union (EU) also has on the 14th of March 2024 adopted a new directive on environmental crime which includes provisions to criminalise cases 'comparable to ecocide'.[18] This directive means all member states have 24 months to align national legislation with the newly adopted directive. The change within the EU will inevitably shift the discussions regarding environmental protection and ecocide, as member states of the union will have to make legislative changes.[19] Even though these aspects of the development of legislation regarding ecocide are interesting and could be addressed, this thesis will only examine the international legal aspects of the potential criminalisation in the international arena and its implications.

[17] 'Existing and Proposed Ecocide Laws' (*Ecocide Law*) < https://ecocidelaw.com/existing-ecocide-laws/> accessed 17 February 2024.
[18] Parliament Directive 2009/123/EC on the protection of the environment through criminal law para 21 of the preamble.
[19] ibid. art. 25.

1.4 Methodology and Materials

The method used for this thesis is a legal doctrinal method, where relevant sources of international law will be examined to identify existing law. The primary objective of a legal dogmatic method is the reconstruction of legal principles and regulations within a system, resulting in an understanding of the content of the applicable law and how it should be understood in a specific context (*de lege lata*). A legal dogmatic method is also considered to allow for a critical analysis of the legal situation, which is visible throughout the thesis and its discussion.[20] When conducting research in international law, the point of departure is taken through Article 38 of the ICJ-Statute, where the sources of international law are established.

Article 38 of the Statute of the International Court of Justice establishes the following sources within international law:

a. 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations'.[21]

The primary sources of international law therefore comprise international conventions, customary law and general principles of law. Article 38(1)(d) of the ICJ-Statute also establishes that judicial decisions and teachings of the most highly qualified publicists may be used when determining the rules of international law.[22] It is worth noting that discussions within legal scholarship persist regarding the nature and scope of these subsidiary means.[23]

When delving into research within the realm of international law, it becomes imperative to consider the inherent nature and framework of the legal norms within the system they inhabit. It is crucial to recognise that international law is undoubtedly shaped by the actions of sovereign States, governing the interactions between these States and their respective organs. Unlike national legal systems, the international legal framework lacks a definitive hierarchical structure similar to a constitution or legislative body, typically present in domestic contexts. International law emerges from the collective actions of sovereign States and governs interactions among States and State organs. This

[20] Jan Kleineman, 'Juridisk metodlära' in Maria Nääv and others (eds.) 'Legal methodology 35'; Hutchinson, (2015), 'The Doctrinal Method: Incorporation Interdisciplinary Methods in Reforming the Law' 130–139.
[21] Art. 38 of the Statute of the International Court of Justice.
[22] Art. 38 of the Statute of the International Court of Justice.
[23] United Nations International Law Commission (ILC) Report by Special Rapporteur Charles C. Jalloh (13 February 2023) UN Doc. A/CN.4/760 para 155.

decentralisation distinguishes international law from its national counterparts, highlighting the need for a nuanced understanding of its sources and application.[24]

In pursuit of this thesis's objectives, which seek to unravel existing norms in international law and assess the efficacy of the proposed definitions of ecocide, particular emphasis is placed on the Rome Statute of the International Criminal Court and proposed definitions of ecocide by Polly Higgins and the Stop Ecocide Foundation International Expert Panel ('IEP' or 'the Panel'). By employing a legal doctrinal methodology, this thesis endeavours to ascertain the applicability of existing legal frameworks within International Criminal Law and evaluate the potential impact of proposed amendments on addressing ecocide within the international legal landscape. This leads to the normative part of the essay, in which the method is utilised to describe how the law is (*de lege lata*) to move on to examine the law as it should be (*de lege ferenda*). Applicable international law will be critically examined to provide a normative discussion, and solutions and conclusions will be offered on the subject. One of the aims of the method is to answer precisely how a norm should be construed when used in a certain context, which reasons why it ought to be applied in this work. In terms of assessing the feasibility of establishing ecocide as a new international crime, the thesis focuses on evaluating one specific proposal: establishing ecocide as a new international crime under the jurisdiction of the International Criminal Court (ICC). This analysis involves examining approaches taken by academics and legal professionals while examining the Rome Statute, which establishes the current international crimes under the ICC's jurisdiction.

The Rome Statute has served as the starting point for the legal analysis of this essay, in terms of the incorporation of ecocide in international law and inherently its potential consequences as an amendment to the Rome Statute and international criminal law. Articles 6 and 7 of the Rome Statute have been the prominent source when applying the legal dogmatic method, as well as the legal definitions suggested by Polly Higgins and the IEP. It shall be stated that these two definitions are a part of doctrine, which is why they fall under the legal dogmatic method. The method has been applied in a way that assesses these two suggested legal definitions as if they were a part of the Rome Statute and a provision under international law.

The rationale behind this descions and the way forward is because of the research questions, examining which potential legal gaps the proposed definitions might fill and to what extent they would effectively target the concept of ecocide in international criminal law. This way of examining the legal framework of the established sources within international law, in this case, the Rome Statute and also doctrinal suggestions for legal definitions, requires

[24] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* (9th edn, Routledge 2022) 9.

treaty interpretation. Even if the Rome Statute is a source of international law, the meaning of the Statute's content has been established and interpreted through the rules of interpretation which are reflected through the Vienna Convention on the Law of Treaties (VCLT). The norms of interpretation of the VCLT are regarded as customary international law, and the convention's content is thus applicable whether or not a State is a party. According to Articles 31– 32, a treaty should be construed in good faith according to its original meaning, considering its aim and object.[25] This has been done when interpreting the Rome Statute and its relevant provisions such as Articles 6, 7, 8, 25 and 30 in light of the concept of ecocide.

The provisions of the Rome Statute have, with the help of the rules on treaty interpterion, been analysed with normative arguments on how they could apply to an area of law which do not exist in international public or criminal law. The inherent question which this normative analysis of both valid law, and doctrinal discussions regarding the concept of ecocide and its suggested legal definitions is to examine the current legal framework and its potential for addressing ecocide with or without the inclusion of a new provision. The rationale behind the interpretation of existing provisions and the proposed definitions is to see whether the definitions or applicable law can be a tool to achieve the maximum protection of the environment as part of the overall purpose of international law, which includes upholding certain fundamental values, in this case, sustainable development and human rights.

The thesis also incorporates case law from international courts and tribunals to illuminate the application and interpretation of international legal provisions. This analysis is crucial for understanding how existing legal norms operate in practice and for assessing the feasibility of incorporating ecocide into international criminal law. Additionally, the work of the International Law Commission (ILC) is examined, as it provides significant doctrinal insights and recommendations that contribute to the development of international law.

[25] Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 177–189.

1.5 Structure

The essay consists of five chapters, where the first chapter provides an introduction that sets the premises for the essay. Chapter two of the essay sets the scene for the concept of ecocide, where the history of ecocide and the two legal definitions proposed by Polly Higgins and the IEP are examined. The purpose of chapter two is to set the foundational background and give the reader an understanding of the two proposed legal definitions, which will later be used in the case study. Chapter three has the purpose of establishing the existing rules within the Rome Statute and how these could be applied to the concept of ecocide. Moreover, it aims to establish the added value of ecocide as an amendment to the Rome Statute. Chapter four contains the case study where the two proposed definitions and the provisions on genocide, crimes against humanity and war crimes are discussed by their application to the pending case before the ICC concerning Bolsonaro and the Brazilian environment, The Planet vs. Bolsonaro. The case study intends to show in which way we could move forward, stick to existing legislation or amend the statute following one of the definitions. The last part of this essay consists of the concluding remarks, which aim to analyse and give a normative discussion to answer the research questions as well as attempt to provide relevant conclusions.

2 The Concept of Ecocide

2.1 A Historical Overview

Ecocide has no internationally accepted legal definition, it is, however, understood as mass damage and destruction of ecosystems, and severe harm to nature which is widespread or long-term.[26] As well as the destruction of the larger areas of the environment as a consequence of human activity.[27] The purpose of this chapter is to give the reader an understanding of the history of ecocide, as well as an explanation of the rationale beyond some of the proposed legal definitions. What this essay means by legal definitions are definitions made by lawyers and scholars in doctrine with the aim of them becoming a part of international law through the creation of new conventions or by the incorporation of them in already existing legislation such as the Rome Statute.

The term ecocide was used and recorded for the first time at the Conference on War and National Responsibility in Washington, where Professor Arthur W. Galston, whose research led to the development of Agent Orange, proposed a new term which he called ecocide and protested in his interviews, letters and academic papers for the act's which he called ecocide to be banned.[28] He is credited for the creation of the term, as his research which created the chemical compound had poisoned human health and destroyed the environment in Vietnam. Even though he did not suggest a legal definition, his contribution to the development, the creation of the term and his understanding of ecocide are essential for the later development.[29]

The meaning of ecocide was well understood for Galston, he described it as massive damage and destruction of ecosystems, even though there was no strict legal definition at the time of the conference. Furthermore, Galston stated that ecocide denoted various measures of destruction which had the aim of damaging or destroying the ecology of geographic areas to the

[26] 'Making Ecocide a Crime' (*Stop Ecocide* International) <https://www.stopecocide.earth/making-ecocide-a-crime> accessed 20 February 2024.

[27] Dictionary, "Ecocide" <http://dx.doi.org/10.1093/oed/2443006619> accessed May 21, 2024; Cambridge Dictionary, "Ecocide" <https://dictionary.cambridge.org/dictionary/english/ecocide> accessed May 21, 2024; Meriam Webster, "Definition of Ecocide" <https://www.merriam-webster.com/dictionary/ecocide> accessed May 21, 2024; Longman Dictionary of Contemporary English Online, "Ecocide" <https://www.ldoceonline.com/dictionary/ecocide> accessed May 21, 2024.

[28] David Zieler, *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment* (University of Georgia Press 2011) <http://www.jstor.org/stable/j.ctt46n5dg> accessed 21 March 2024; Sarlième (n 9).

[29] Zieler (n 28); Anja Gauger and others, *Ecocide Is the Missing 5th Crime against Peace* (Human Rights Consortium, School of Advanced Studies, University of London 2013) 5.

detriment of human, animal, and plant life.[30] Galston emphasised the '*cide'* over the '*eco'*, and denounced and described the devastation resulting from the use of the herbicide Agent Orange as a weapon of war in Vietnam. Galston hoped that the way he emphasised the issue would convince policymakers and lawyers to agree on a definition of the crime of ecocide to have it categorically banned under the treaties which were governing the rules of warfare at the time.[31]

The United Nations Stockholm Conference on the Human Environment in 1972 is an important landmark in the development of the concept of ecocide. The Prime Minister of Sweden, Olof Palme, directly addressed the war in Vietnam as a war of ecocide in his speech. This conference was the first time international attention was being given to the environmental issues which were faced globally, such as environmental degradation and transboundary pollution. This conference did not lead to any establishment of ecocide as an international crime; however, it enabled the establishment of the United Nations Environmental Programme (UNEP).[32] It can thus be stated that the Vietnam War and the usage of Agent Orange were the starting point for both the legal and political discussions around ecocide.[33]

The expanding idea during the 1970s was the idea that the crime of ecocide should be added as the fifth crime against peace and that it should encompass situations in both peace and wartime. Various studies were made, which examined the effectiveness of the Genocide Convention, proposing the adoption of ecocide as well as cultural genocide to the list of crimes.[34] The Sub-Commission on Prevention of Discrimination and Protection of Minorities prepared a study to discuss the effectiveness of the Genocide Convention and proposed the inclusion of ecocide and cultural genocide in the list of crimes. Many governments voiced concern regarding the Genocide Conventions' ineffectiveness, because of the reality of still ongoing genocides around the world. Romania and the Holy Sea spoke out in favour of the inclusion of ecocide within this framework, however, in the following years, the Sub-Commission failed to finally determine what route they were to take; if they thought the best way forward was to move forward with supporting the inclusion of ecocide as a core crime or if they should give the concept further consideration.[35] In the UN report from the 38th Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, no reference is made to the potential discussions which might have occurred in regard to

[30] Gauger and others (n 29) 6. 'In Memoriam: Arthur Galston, Plant Biologist, Fought Use of Agent Orange' (YaleNews, 18 July 2008) <https://news.yale.edu/2008/07/18/memoriam-arthur-galston-plant-biologist-fought-use-agent-orange> accessed 2 May 2024.
[31] Zieler (n 28); Sarlième (n 9).
[32] Higgins, Short and South (n 7).
[33] Sarlième (n 9).
[34] Gauger and others (n 29) 8–11; E/CN.4/Sub.2/SR.658, 53.
[35] E/CN.4/Sub.2/1985/6, 124. See Supportive statements from governments: Austria, Holy See, Ecuador, Israel, Oman, and Romania.

ecocide.[36] The committee recommended that the concepts of ecocide, cultural genocide and ethnocide be studied further, but never moved on to give a concrete suggestion.[37]

One of the first legal definitions was suggested by Richard A. Falk. Falk's definition focused on whether the use of military herbicides or other warfare tactics could be considered environmentally destructive. As this was not the case Falk proposed a new international instrument. Even though Falk made sure that it was clear that ecocide could be committed both in wartime and peacetime, his definition only addressed the international destruction of the environment for military purposes.[38] Falk analysed the methods of warfare used by the Americans in Vietnam and made a comparison between genocide and ecocide. Falk argued that '[s]urely it is not an exaggeration to consider the forests and plantations treated by Agent Orange as an Auschwitz for environmental values, certainly not from the perspective of such a distinct environmental species such as the mangrove tree or nipa palm'.[39] However, developing legislation against environmental destruction in his opinion would contribute to preventing potential disasters. Falk's proposed draft international convention on the Crime of Ecocide would require the Contracting Parties to 'confirm that ecocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'.[40] The lack of political will prevented the draft convention's potential of criminalising ecocide in the 1970's. Falk's proposed instrument laid the basis for the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), which Higgins' and the IEP's legal definitions have taken inspiration from.[41]

John H.E. Fried, educator and specialist in international law and a member of the Lawyers' Committee on Nuclear Policy stated as an answer and part of the excessive legal debate which Falk's proposal led to, regarding the nature of the crime and whether it was a crime of intent or not[42], that ecocide denotes 'various measures of devastation and destruction which aim at damaging or destroying the ecology of geographic areas to the detriment of human life,

[36] E/CN.4/Sub.2/1985/6.
[37] Gauger and others (n 29).
[38] Richard A Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals' (1973) 4 Bulletin of Peace Proposals 80 <http://journals.sagepub.com/doi/10.1177/096701067300400105> accessed 20 May 2024.
[39] ibid; Sarlième (n 9).
[40] Falk (n 38); Sarlième (n 9).
[41] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (adopted 10 December 1876, entered into force 5 October 1978) 1108 UNTS 151 (ENMOD).
[42] John HE Fried, 'War by Ecocide' (1973) 1 Bulletin of Peace Proposals, Universitetsforlaget, Olso, Bergen, Tromsö.; Arthur H Westing, 'Proscription of Ecocide: Arms Control and the Environment' in Richard A Falk, *The Vietnam War and International Law, Volume 4: The Concluding Phase* (Princeton University Press 2015) <https://www.degruyter.com/document/doi/10.1515/9781400868254-011/html> accessed 20 May 2024.

animal life, and plant life' ultimately contributing to the development of the concept of ecocide.[43]

The most significant convention in which the inclusion of ecocide was addressed was the ILC Draft Code of Crimes Against the Peace and Security of Humankind, the predecessor of the Rome Statute.[44] The ILC of the United Nations had been assigned by the General Assembly in 1947 to determine the potential formulations of the principles of international law recognised in the charter of the Nuremberg Tribunal and the judgement of the Tribunal, and to prepare a draft code of offences against the peace and security of mankind, indicating the place of the accorded to Nuremberg principles. This topic was on the agenda of the ILC between 1949 – 1957 and 1982 – 199, the noticeable gap arose because of the difficulties in defining the Crime of Aggression and as a result the General Assembly gave a directive to pause the work on drafting the Code. In 1982, Doudou Thiam was appointed as the Special Rapporteur on the topic in the ILC, and the Draft Code was on the agenda of the Commission once again from 1978 to 1996.[45] There was a proposal for ecocide to be included as Article 26 of the Code of Crimes Against the Peace and the Security of Mankind, it was however removed by the then Chair of the ILC during the finalization of the draft in 1996. Article 26 was removed without being put to a vote, which raised questions about why it was done in this matter.[46]

The time between 1984 and 1996 is considered to be decisive as it was during this time the ILC had extensive engagement about the inclusion of law regarding extensive environmental damage in the Draft Code. Article 26 as the ILC proposed stated that 'an individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced'.[47] Furthermore, considering whether to include acts causing serious environmental damage in the draft codes, led some members to reopen the discussion regarding the nature of the crime and whether the crime is a crime of intent.[48] The criticism evolved around the element of intent in the proposed draft by the Special Rapporteur and its lack of reference to environmental crime and ecocide. Article 26 was, as a result of these debates, reduced to 'wilful and severe damage to the environment'.[49] These discussions and proposals led the governments of

[43] Fried (n 42); Westing (n 42).
[44] Higgins, Short and South (n 7) 261.
[45] Gauger and others (n 29).
[46] Gauger and others (n 29); Higgins, Short and South (n 7) 251, 260–262.
[47] United Nations International Law Commission (ILC) Report by Special Rapporteur Doudou Thiam (1 February 1984) UN Doc. A/CN.4/377, 94–96.
[48] Yearbook of the ILC, 1986, Vol. I see statements by Mr. Stephen C. McCaffrey (USA), 119–20, para.10; Mr Andreas Jacovides (Cyprus), 121, para. 28; Mr Ahmed Mahiou (Algeria), 128, para.11; Mr Doudou Thiam (Senegal; Special Rapporteur on the draft Code), 175, paras.17–18; Yearbook of the ILC, 1986, Vol. II, Pt. 2, 46.
[49] A/CN.4/377 (n 47) 95.

Australia, Belgium, Austria and Uruguay to criticize the re-drafting and the inclusion of the element of intent as ecocide during peacetime is often a crime without intent as it is a result of a consequence of industrial or other activity. The Belgian government stated that the '[…] difference between articles 22 ["war crimes"] and 26 ["wilful and severe damage to the environment"] does not seem to be justified. Article 26 should be amended to conform with the concept of damage to the environment used in Article 22 since the concept of wilful damage is too restrictive.'[50] The Australian government objected because 'the requisite mens rea in Article 26 should be lowered to be consistent with Article 22'[51] and Austria stated that 'since perpetrators of this crime are usually acting out of a profit motive, intent should not be a condition for liability to punishment.'[52]

The element of intent was the main issue for States. Instead of removing this from the draft article, the ILC removed Article 26 altogether without putting it to a vote. What was left after this removal was narrower in scope and all that was voted on was in relation to war crimes, to include environmental damage only in the context of a war crime or to include it as a crime against humanity, which would be applicable in peacetime. This resulted in the Drafting Committee only drafting a draft article on environmental damage in the context of war crimes, the context of the crime as crimes against humanity was left without consideration just as for the ecocide law.[53]

The concept of ecocide was put in the spotlight again with British barrister Polly Higgins and her proposed legal definition of ecocide for its criminalisation. Higgins established wide support for the criminalisation of the act of ecocide in civil society around the world and created a global international network with a set agenda; to criminalize ecocide. Following her death in 2019, the non-profit organisation of which she was a part in establishing Stop Ecocide International ('the Organisation' or 'SEI') established the Independent Expert Panel ('IEP' or 'the Panel') which had the task of drafting a new legal definition of ecocide. This draft was and still has the purpose of being used as the 'draft zero' of the amendment to be introduced in the Rome Statute of the International Criminal Court. The definition which was released by the Panel in 2021 is the starting point for the emerging debate between various scholars and the interest of the public to consider criminalisation.[54]

The IEP's task was to draft a proposal for amendments to the Rome Statute to introduce ecocide as the fifth crime under the jurisdiction of the ICC. They are drawing upon Higgins' argument of amending the Rome Statute to

[50] YbkILC 1996, Vol.II, Pt.1, 18, paras. 27 and 96.
[51] YbkILC 1993, Vol. II, Pt.1, 66, paras. 50 (Australia).
[52] YbkILC ILC 1993, Vol. II, Pt.1, 66 – 68, paras. 30 (Austria).
[53] YbkILC, 1996, Vol. I, 2431st meeting, 21 May 1996.
[54] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n 10).

include ecocide as a core crime, ultimately making it an *erga omnes* regulation as will be explained in the next chapter. The drafting of the Panel's definition led to widespread discussions as it was accompanied by a media campaign, which the Organisation portrayed as a historic event for the cause of environmental protection. It can be stated that the Organisation and Higgins might have taken some inspiration from the Pacific small island states to use International Criminal Law (ICL) and international public law to address climate change.[55] A clear example of the importance of the small island states and their engagement in this question is when the Republic of Vanuatu requested an advisory opinion from the International Court of Justice (ICJ) on the impact of climate change on human rights.[56] The push from Island states in questions regarding climate change and environmental protection has raised awareness globally. The call by Vanuatu and the Maldives during the 18th session of the ICC Assembly of State Parties where they explicitly called for the amendment of the Rome Statute to include the crime of ecocide, is part of these States' agenda to bring environmental justice and protection.[57]

As the aim of the IEP's drafting of the legal definition of ecocide has the purpose of being incorporated in the Rome Statute it must therefore be acceptable to the ICC States Parties or have the capability of laying groundwork for any negation of its potential incorporation. This hindsight is important to highlight as the discussion regarding the future of the proposed amendment is built on the fact that an amendment must be passed through the system of the ICC and thus also the State Parties. The concept of ecocide might not be legally defined within public international law (PIL) or international criminal law (ICL), but it is legislated in 15 countries[58] and soon the EU as stated in the first chapter of this thesis. The crime of ecocide is mostly legislated in the countries of the former USSR and countries that have suffered from mass destruction to the environment such as Vietnam.[59] The ecocide laws in domestic legislation are a direct result of the incorporations of Article 26 of the

[55] 'Expert Drafting Panel on the Legal Definition of "Ecocide" Convened by the Stop Ecocide Foundation' (*Stop Ecocide International*) < https://www.stopecocide.earth/legal-definition> accessed 23 February 2024.
[56] 'The Republic of Vanuatu Pursuing an Advisory Opinion on Climate Change from the International Court of Justice' (*Vanuatu ICJ Initiative*) <https://www.vanuatuicj.com/> accessed 23 February 2024.
[57] 'Statement of Vanuatu, Assembly of States Parties to the International Criminal Court, 18th Session (2–7 November 2019) <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/GD.VAN.2.12.pdf> accessed 23 February 2024; 'Statement of the Republic of the Maldives, Assembly of States Parties to the International Criminal Court, 18th Session (2–7 November 2019) <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/GD.MDV.3.12.pdf > accessed 23 February 2024.
[58] 'Existing and Proposed Ecocide Laws' (n 17); See domestic laws of Armenia, Belarus, Belgium, Chile, Ecuador, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Tajikistan, Ukraine, Uzbekistan, Vietnam, and the EU (Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC).
[59] Existing and Proposed Ecocide Laws' (n 17).

ILC Draft Code of Crimes Against the Peace and Security of Humankind.[60] Although it is interesting to investigate the reasons why the States with ecocide laws are former USSR countries concerning other States who do not have ecocide criminalised, the thesis's goal is to analyse and forecast the definition put forth by Higgins and the Panel within the framework of international law. Evaluating the political reasons behind the laws in the former USSR may be an intriguing topic for future research.

[60] Higgins, Short and South (n 7) 262.

2.2 The proposed legal definitions of ecocide in doctrine

2.2.1 Polly Higgins

This chapter examines the pivotal role of Polly Higgins in advocating for the criminalization of ecocide. Beginning with a brief historical context on ecocide, it delves into Higgins' contributions, her proposed definition, the rationale behind it, and the implications of incorporating ecocide into international law. Through her advocacy, Higgins strived to establish a framework that holds individuals and corporations accountable for environmental destruction while fostering a shift towards more sustainable practices.[61] Her definition will be compared to the definition by the IEP later in this chapter to highlight key differences between the two definitions to provide a suggestion for a way forward in criminalising ecocide.

The late British barrister is the person who contributed to the revival of the concept of ecocide in the 21st century. Higgins was a practitioner of law, specialised in corporate and employment law before she decided to move into her work with environmental activism.[62] Higgins advocated the criminalisation of ecocide both nationally and internationally, through an amendment to the Rome Statute. This is why she co-founded *Stop Ecocide International* ('SEI'), a charity to collect support and coordinate action around the criminalisation of ecocide.[63]

It should be stated that, even though Higgins is considered the person who initiated the current discussion on the criminalisation of ecocide, she had predecessors who also called for action.[64] She did, however, contribute to the revival of the concept of ecocide. This is why there has been a delimitation which directs the analysis of this essay to her and the IEP's suggested definitions because the IEP's definition is a direct result of Higgins' revival of the concept. To understand why the discussions regarding amending the Rome Statute arose, we must understand Higgins' argument and the premises it builds on. This will be done by examining her book *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of our Planet* which was first published in 2010, as well as some of her important individual and co-authored writing.

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[61] 'Home' (*Polly Higgins Ecocide Law Expert)* < https://pollyhiggins.com> accessed 11 March 2024.
[62] ibid.
[63] 'Who we are' (*Stop Ecocide International*) <https://www.stopecocide.earth/who-we-are-> accessed 11 March 2024.
[64] 'In Memoriam: Arthur Galston, Plant Biologist, Fought Use of Agent Orange' (n 30); Falk (n 38); Fried (n 42).

Higgins has described ecocide as the antithesis of life, that it denotes large-scale destruction in whole or in part of ecosystems within a given territory.[65] Additionally, ecocide can be an outcome of external factors such as a '*force majeure* or an 'act of God' such as flooding or an earthquake'.[66] The very nature of ecocide is that the acts which lead to or constitute the consequence which is the destruction of the environment and the biodiversity of a large area of land, are committed either in war or peacetime. The common denominator of the acts is not in which capacity they are committed or with which purpose, it is rather that environmental destruction is the consequence of the act. The fact that such acts which result in ecocide occur because of human economic activity and not as a predetermined attack on the environment, as was understood and stated by Richard A. Falk.[67]

Higgins defines the concept of ecocide as 'the extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished'.[68] This is her generic definition, which covers what she calls ascertainable and non-ascertainable acts of ecocide. Higgins states that ecocide can be classified into two main categories: non-ascertainable and ascertainable ecocide. On the one hand, non-ascertainable ecocide refers to situations where the destruction, damage, or loss to the environment occurs without clear identification of the specific human activities responsible for it, directly impacting the territory itself. On the other hand, ascertainable ecocide involves identifiable human activities leading to destruction, damage, or loss to the environment, enabling the determination of legal liability. Higgins stated, in her argument that economic activity plays a vital role in ecocide especially if it is connected to natural resources and that this can be a driver of conflict.[69]

Higgins stated that the very nature of ecocide leads to resource depredation, and this leads to resource depletion which leads to wars. She continues by describing the transboundary and multi-jurisdictional character of the crime and that it therefore needs legislation of international scope.[70] This distinction underscores the diverse ways in which environmental devastation can occur, ranging from direct causes like nuclear testing and resource exploitation to indirect factors such as pollution and deforestation, with notable examples including the deforestation of the Amazon rainforest and the Athabasca Oil Sands expansion in Canada. It is the ascertainable ecocide which Higgins thought should be subject to criminalisation as there would be a possibility to

[65] Higgins (n 10) 62.
[66] Higgins (n 10) 63.
[67] Higgins (n 10); Falk (n 38); see also section 2.1 of this thesis.
[68] Higgins (n 10) 64–66.
[69] ibid 60–65.
[70] ibid.

determine the 'liability of legal person(s)'[71] which led to her proposed legal definition:

> 'acts or commissions committed in times of peace or conflict by *any senior person within the course of State, corporate or any other entity's activity* which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystem(s) of a given territory(ies), such as peaceful enjoyment by the inhabitants has been or will be severely diminished'.[72]

Higgins' main argument is that the amendment of the Rome Statute will create a 'duty of care for Earth', that the criminalisation of ecocide through the amendment in the Rome Statute will change how individuals, corporations and inevitably States will behave when doing business or making political decisions. Her main argument is furthermore that the way to make sure that international governance of corporate-created ecocide is in place and works is through strict liability for everyone committing ecocide. She states that absolute liability for ecocide is the only way in which the legislation would be rendered effective. She acknowledged ecocide in wartime as well, even though she also stated the fact that it would also be covered under the war crimes. The concept of strict liability places the focus on first preventing the harm and not to 'blame the accused', the main goal of the criminalisation with Higgins' definition is to prevent ecocide, not to punish the perpetrators. She states '[b]y creating a pre-emptive binding obligation, the crime of ecocide is focused on prevention from the outset. It creates a quasi-crime, a regulatory offence, rather than an ordinary criminal offence'.[73]

By doing this, Higgins hoped to raise awareness of the duty of care which has been breached when committing the crime, and through the way the criminalisation is designed it would be tackled not by punishing past wrongful acts and conduct, but by preventing future harm to the enforcement of what she calls 'minimum standards of conduct and care'.[74] This would enable the shift in the focus from the protection of individual interest and the Anthropocene[75] to the protection of public and societal interest.[76] Her main argument is built upon her belief that the criminalisation of ecocide through the amendment of

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[71] Polly Higgins, 'Ecocide Crime' (*Ecocide Law*) <https://ecocidelaw.com/polly-higgins-ecocide-crime/ > accessed 15 March 2024.
[72] Higgins (n 10) section xix 70–72, emphasis added.
[73] ibid 69.
[74] ibid.
[75] The term 'Anthropocene' according to Oxford English Dictionary definition is 'an epoch of geological time during which human activity is considered to be the dominant influence on the environment, climate, and ecology of the earth, a formal chrono-stratigraphic unit with a base which has been tentatively defined as the mid-twentieth century' Oxford English Dictionary 'Anthropocene' <https://www.oed.com/dictionary/anthropocene_n?tab=meaning_and_use> accessed May 21, 2024.
[76] Higgins (n 10) 70.

the Rome Statute would mean that ecocide ultimately becomes an *erga omnes* principle which would make the ecocide binding upon both individuals and States. Higgins' main objective is not to create a crime where punishment is the primary goal, in her opinion the main goal is to prevent future harm. It appears that Higgins' intention with this definition is not of a classical regulatory offence, it is to raise awareness, to create a moral obligation to not commit this crime, just as the crime of genocide. Her main goal is not to make sure that people will be prosecuted as a result of the criminalization, the main goal is to prevent future harm to the environment by creating a legal obligation for all.[77]

A careful reader may wonder how Higgins argued for ecocide becoming an *erga omnes* provision. She stated that incorporating ecocide into the Rome Statute as a fifth crime against peace would elevate it to the status of an e*rga omnes* obligation. The formal recognition of ecocide by the international community would place it alongside universally condemned crimes such as genocide and crimes against humanity, which already carry *erga omnes* obligations. This recognition signifies the severe and universal nature of the harm caused by ecocide, compelling state parties to the Rome Statute and individuals therein to abide by their international legal responsibility to prevent it. Higgins meant that the incorporation of her definition to the Rome Statute would elevate it to a crime of *erga omnes* because of the interconnectedness between environmental protection and the protection of human rights.[78]

Incorporating ecocide into the Rome Statute would create a binding legal duty for all state parties to prevent and prosecute acts of ecocide, extending this obligation beyond national boundaries to the global community. The principle of complementarity within the Rome Statute is crucial here, as it dictates that the ICC acts only when national jurisdictions are unwilling or unable to prosecute crimes. Therefore, this inclusion pressures states to implement national legislation against ecocide, reinforcing their obligation to address it proactively. An *erga omnes* obligation denotes a duty owed by States to the international community as a whole. Recognising ecocide as such implies that the duty to prevent and prosecute it is a fundamental responsibility all states must uphold, irrespective of their direct involvement. This elevation underscores the collective international responsibility, obligating states legally and morally to act against ecocide and promoting a unified global stance on environmental protection.[79] She further stated that it is essential to recognise the power of the incorporation into the Rome Statute, as it is the only global mechanism which has direct access to the criminal justice system of its members. Criminalising ecocide through the Rome Statute, would according to Higgins therefore mean that there would not be a need for a separate treaty or

[77] 'Home' (*Polly Higgins Ecocide Law Expert*) <https://pollyhiggins.com/> accessed 15 March 2024.
[78] Higgins (n 10) 69–71.
[79] Higgins (n 10) 69–71.

Court, the countries that ratify it would have to incorporate it into their national legal systems. This would provide a consistent regulation applicable across boards, enabling the targeting of transnational corporations as well as the nature of ecocide itself, which is a transboundary crime.[80]

A key factor of Higgins's definition of ecocide is what she calls ascertainable ecocide, as explained above. Her way of phrasing her proposal and usage of the term ascertainable suggests that she aimed to shed light on corporations and their activities, as she combines it with the argument of liability for legal persons. The activities of corporations have resulted in what Higgins calls the 'right to pollute'[81], the environmental harm which they have inflicted because of their agenda of having economic profit and the failure to regulate the acts of corporations. Corporate responsibility lies at the very core of this definition, and Higgins pays particular attention to the corporations and their activities describing ecocide as 'a missing atrocity crime of corporate and State responsibility, a missing international crime against peace'.[82] She offers a critical examination of regulatory strategies aimed at controlling corporate pollution, underscoring the inadequacies of previous attempts and advocating for a concept termed 'compromise law' as a potential remedy. It underscores the significant role played by corporations in environmental degradation and contends that existing regulations have essentially granted them the possibility to continue polluting. She identifies the failure of several tries to regulate the corporation's 'right to pollute' resulting in the approach which she calls 'compromise law', she exemplifies this through the Alkali Act 1863 in the UK, which instead of prohibiting certain noxious emissions altogether, imposed the factors the duty to employ 'best practicable means' to reduce such emissions.[83]

The illustration of the Alkali Act of 1863 in the UK serves to exemplify this transition from stringent regulations to more lenient measures, where factories are mandated to minimise emissions using the 'best practicable means' rather than facing outright prohibitions. Higgins furthermore, suggests that this compromise-oriented approach prioritises economic growth over environmental preservation and critiques it for essentially endorsing a 'right to pollute' for corporations. The delicate balance between economic imperatives and the imperative of environmental sustainability within regulatory frameworks calls for a re-evaluation of regulatory frameworks in order for environmental preservation and behavioural change.[84]

[80] Higgins (n 10) 69–71.
[81] ibid 12.
[82] 'Home' (*Polly Higgins Ecocide Law Expert*) <https://pollyhiggins.com/> accessed 15 March 2024.
[83] Higgins (n 10) 60–66.
[84] Higgins (n 10) 63.

Additionally, Higgins argued for the expansion of the definition of environmental damage within the Rome Statute concerning war crimes, to provide valuable guidance on advancing the discourse on ecocide. She suggested that this expansion is particularly significant as it originates from the ILC Draft Codes of Crimes Against the Peace and Security of Mankind, a subject previously examined in this thesis, focusing on how ecocide is integrated alongside the single provision addressing environmental concerns. Higgins argued for the inclusion of ecocide in the Rome Statute. She proposed to either amend the Rome Statute or change the wording of Article 8(2)(b)(iv) from 'military' in the current phrasing of the article to 'widespread long-term and severe damage to the natural environment which would be excessive concerning the concrete and direct overall *military* advantage anticipated'[85] to *community* for environmental damage, which the provision governs. This would according to Higgins enable ecocide to be targetable even in times of peace. Moreover, Higgins argued that given that ecocide is not limited to combat settings, classifying it as a crime against peace therefore is appropriate, either through the creation of the fifth core crime of the Rome Statute or through the rephrasing of the current Article 8(2)(b)(iv) to include ecocide explicitly.[86] However, she still went on to make her proposed definition as she, from my understanding, thought that there was a need for an ecocentric crime in the Rome Statute to effectively target the issue. Higgins pressed the importance of ecocide being explicitly mentioned within a provision, which is why she developed her proposal.[87]

The form of liability which Higgins' proposal entails must also be addressed as she advocated for strict liability for the crime of ecocide, which does not exist in the core crimes of the Rome Statute. She advocated for strict liability meaning that individuals or entities could be held responsible for environmental damage regardless of their intent, or *mens rea.* She listed the four main reasons for her argument. Firstly, Higgins emphasised that ecocide is often a consequence of actions rather than intentional wrongdoing. For instance, she stated that companies involved in energy production may unknowingly contribute to ecocide depending on their methods and locations of operation. While certain extraction methods could lead to liability, the use of renewable energy sources might not. Secondly, Higgins argued that the severity of environmental damage justifies holding individuals or entities accountable even without proof of intent. She drew on court assumptions regarding corporations, suggesting that they cannot possess criminal intent independently of their directors, thus enabling them to commit offences without individual liability.[88]

[85] Art. 8(2)(b)(iv) of the Rome Statute.
[86] Higgins (n 10) 64–66.
[87] ibid 70–75.
[88] Higgins (n 10) 65–70.

Thirdly, her argument for strict liability revolves around the concept of collective responsibility, that the responsibility for the consequences of ecocide should be worn by all parties. She highlights the principle established through Article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which states that genocide is punishable as a crime, and it does not matter whether those committing the crime are 'constitutionally responsible rulers, public officials or private individuals'.[89] The very core of ICL and the Rome Statute is that the responsibility is worn by all, but not judicial persons.[90]

Fourthly, Higgins drew parallels between the functions of the International Court of Justice (ICJ) and the International Criminal Court (ICC). She underscored that while the ICJ primarily resolves disputes between States and offers advisory opinions, the ICC is dedicated to prosecuting individuals for crimes under the ICC's jurisdiction. By advocating for the inclusion of ecocide as the fifth crime against peace within the Rome Statute, Higgins asserts that we can effectively target the environmental damage caused by individuals.[91] She therefore argues for individual responsibility to some extent, while still acknowledging the very essence of ecocide which lies in its transboundary nature and the significant role of corporations in perpetrating such acts. Higgins acknowledges that the core perpetrators of ecocide are often corporations, making it challenging to justify holding individuals solely accountable. In light of this, she suggests an alternative approach: corporate criminal responsibility. This suggestion aligns with initiatives like the EU directive on environmental protection through criminal law, which imposes clear responsibilities on corporate entities.[92] However, this model is notably absent in the Rome Statute, highlighting a critical gap in addressing corporate accountability for ecocide. This is why she, in this author's view, argued for strict liability, as there is a gap in the Rome Statute for the liability of legal persons. This means that we must either expand the ICC's jurisdiction to include legal persons. This is because it currently only has jurisdiction over natural persons and thus only individual responsibility. Another way forward is to create an amendment with liability which allows for their perpetration, as Higgins has proposed, to ensure that everyone responsible is covered if not through the entire entity, then through each individual.[93]

The reluctance of governments to hold corporations accountable and their prioritisation of economic growth over environmental protection encapsulates the essence of Higgins' argument. The authors Eliana Cusato and Emily Jones contend that the issue at hand extends beyond mere legal responsibility; rather, it pertains to the regulatory framework that often favours economic

[89] Article 4 Genocide Convention.
[90] Higgins (n 10) 69–70.
[91] ibid 68.
[92] COM(2021) 851 final Art. 6 and 7.
[93] Higgins (n 10) 69–70.

interests over environmental preservation.[94] Higgins advocated for the necessity of criminalising ecocide to prompt a fundamental shift in the mindset of both corporations and governments. By imposing a duty of care through criminalization, she posits that regulatory compromises, which currently prioritize economic growth, would diminish. Consequently, harmful industrial practices would cease, leading to a natural adaptation of investment strategies across all sectors to align with sustainable practices.[95] Higgins draws parallels between her advocacy for criminalizing ecocide and historical legal transformations, such as the abolition of the slave trade. This analogy underscores her belief that legal change can instigate profound societal shifts. However, Higgins' reliance on corporate adaptability to comply with new environmental regulations may be overly optimistic, given the primary profit-driven motive of corporations. This raises pertinent questions about the efficacy of solely relying on criminalisation to induce behavioural change within corporations.[96]

This chapter has explored Higgins' arguments regarding the criminalisation of ecocide, highlighting her proposed definition, the rationale behind it, and the implications of incorporating ecocide into international law. Through her advocacy, Higgins aimed at establishing a framework that holds individuals and corporations accountable for environmental destruction while fostering a systemic shift towards more sustainable practices. We will now move on to the Panel's suggested definition of ecocide and compare it to the definition by Higgins to give an understanding of the key differences.

[94] Eliana Cusato and Emily Jones, 'The "Imbroglio" of Ecocide: A Political Economic Analysis' [2023] Leiden Journal of International Law 1 <https://www.cambridge.org/core/product/identifier/S0922156523000468/type/journal_article> accessed 20 May 2024; citing Arturo Escobar, 'Construction Nature: Elements for a Post-Structuralist Political Ecology' (1996) 28 Futures 325 <https://linkinghub.elsevier.com/retrieve/pii/0016328796000110> accessed 20 May 2024.
[95] Higgins (n 10).
[96] ibid.

2.2.2 The Independent Expert Panel

The *Independent Expert Panel* ('IEP or the Panel') catalysed the discussion of criminalising ecocide following Higgins' death and the publication of the proposed definition by the Panel has now become the main definition of the discussions regarding the concept of ecocide and its criminalisation. Described as the culmination of years of debate, it significantly differs from Higgins' original legal definition, especially in its reception by States where States such as France and Belgium support amending the Rome Statute accordingly.[97] The proposed definition reads as follows:

> 'Article 8 ter
> Ecocide
> 1. For this Statute, "ecocide" means unlawful or wanton acts committed with the knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.
>
> 2. For the purpose of paragraph 1:
> a) "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
> b) "Severe" means 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;
> c) "Widespread" means 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;
> d) "Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;
> e) "Environment" means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.'

This definition will be analysed alongside Higgins' proposed legal definition and her legal arguments, as it derives from her previous work. Higgins aimed to establish a duty of care, integrating ecocide into the *erga omnes* obligations such as genocide, through an amendment to the Rome Statute. In contrast, the Panel aims to create a practical and effective definition suitable for incorporation into the Rome Statute.[98] The Panel has in the development of its work, stated its aim to draw upon existing precedents and authorities in international treaty and customary law and practice from international courts and tribunals, especially within ICL and the Rome Statute. It should be stated that they do

[97] Darryl Robinson, 'Ecocide — Puzzles and Possibilities' (2022) 20 Journal of International Criminal Justice 313 <https://academic.oup.com/jicj/article/20/2/313/6593930> accessed 20 May 2024.

[98] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n10) 5.

not make any reference to Higgins' definition in the commentary or the core text of the proposed definition.[99]

The Panel's definition proposes a new preambular paragraph for the Rome Statute to introduce concern for environmental harm and its link to natural and human systems, they state that the recommended text offers a 'normative backdrop for the new crime of ecocide'.[100] The Panel recommends that a new crime of ecocide is adopted as an amendment to the Rome Statute as Article *8 ter* of the Rome Statute. The structure of the proposed Article 8 *ter* mirrors Article 7 of the Rome Statute (Crimes Against Humanity), with the first paragraph outlining the crime and the second defining its core elements. Key terms like 'widespread,' 'long-term,' and 'severe' are drawn from existing provisions under Article 8(2)(b)(iv) of the Rome Statute.[101]

The Panel emphasises that their proposed language draws extensively from existing international legal terminology to ensure the compatibility of the ecocide crime's compatibility with the Rome Statute and the broader international legal framework. They make clear references to several key international agreements, including Articles 7, 8, and 30 of the Rome Statute; Articles 35(3) and 55(1) of the 1977 First Additional Protocol to the Geneva Conventions, which concern environmental protection; the 1976 ENMOD Convention; and the International Law Commission's draft on severe environmental damage.[102] Building on the ecocentric provision in Article 8(2)(b)(iv) of the Rome Statute, the Panel has proposed language that broadens the scope of environmental harm to enable the prosecution and criminalisation of ecocide during peacetime. This expanded definition also considers social and economic benefits, reflecting an effort to balance environmental protection with sustainable development principles.[103]

The Panel gives explanations as to what the different terms within the proposed amendment mean, and where the terms have been derived. The phrase 'severe and either widespread or long-term' appears in several legal instruments: Articles 35 (3) and 55(1) of the 1977 First Additional Protocol to the Geneva Conventions (API) which is concerned with the protection of the environment, in Article 8(2)(b)(iv) of the Rome Statute, in the 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD) and the 1991 and the Draft Code of Crimes Against the Peace and Security of Mankind article 26 from the ILC. Notably, there are two variations in how this term is used across these instruments: the disjunctive form ('widespread, long-lasting, *or* severe') in

[99] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n10) 6.
[100] ibid 3.
[101] ibid 7; See also Additional Protocol I to the Geneva Conventions of 12 August 1949 art. 35 and 55.
[102] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n10) 7.
[103] Liana Georgieva Minkova, 'The Fifth International Crime: Reflections on the Definition of "Ecocide"' (2023) 25 Journal of Genocide Research 62 <https://www.tandfonline.com/doi/full/10.1080/14623528.2021.1964688> accessed 20 May 2024.

ENMOD, and the conjunctive form ('widespread, long-term, *and* severe') in Additional Protocol I.[104]

The Panel has a lower *actus reus* in comparison to Higgins', which they define as 'unlawful or wanton acts' likely to result in 'severe and either widespread or long-term damage to the environment'. As stated in subchapter 2.2.1 on Higgins' definition, she only had one threshold for the applicability of the conduct, which is that the conduct must be serious, and the act itself would lead to conviction under strict liability. The issue with the Panel's definition is that it introduces alternative thresholds, that the damage must be severe and widespread or severe and long-term, and that the acts must be unlawful under international or domestic rules or wanton.[105]

The proposal includes the scope *ratione materiae* of the new crime of ecocide, which would according to the Panel help to develop existing law by extending the protection of the environment by international criminal law beyond times of armed conflict to times of peace. This comment is made by the Panel through their statement regarding the proposed languages' similarities with '[…] what is already familiar, having been included in existing international law agreements.'[106] Their proposed definition creates two thresholds for the conduct to be prohibited. Firstly, there must be '[…] a substantial likelihood that the conduct (which includes an act or omission) will cause severe and either widespread or long-term damage to the environment.'[107] The reason behind their proposal for the second qualifier of unlawful or wanton acts, is that the first threshold would be overly inclusive if it was taken alone. They exemplify this by saying that some activities are legal, socially beneficial and responsibly operated to minimize impacts that nonetheless cause or are likely to cause severe and either widespread or long-term damage to the environment. When examining this closer, we see that the underlying argument is that there are acts which might be legal because of their social benefits.[108]

The Panel appears to want to ensure that the goal is not, as Higgins suggests, to instil a sense of duty to protect the environment but rather to ensure that the acts that the Panel wishes to include within the scope of the proposed definition are in line with existing legislation and that the primary goal is to criminalise only to criminalise. The fact that there are acts that are legal and still reach up to the perquisites set even by this definition, should not mean that they should be excluded through the second threshold of unlawful or wanton. It is this author's opinion that any act that falls within any proposed definition should lead to a consequence.

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[104] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n 10) 7.
[105] 'Expert Drafting Panel on the Legal Definition of" Ecocide" Convened by the Stop Ecocide Foundation' (n 55).
[106] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n 10) 6.
[107] ibid 6.
[108] ibid 7.

The second threshold requires proof that the acts committed are 'unlawful or wanton'. With this additional threshold, the Panel draws upon the principles in environmental law, which they state '[…] balance social and economic benefits with environmental harms through the concept of sustainable development.'[109] This author cannot help but ask the question if this targets the real issues at hand. Is it the right way to make sure that a provision balances the social and economic interests in society when the way we have been working with sustainable development and the rights of nature/environment is not working? Sustainable development has not always effectively protected the environment, leading to questions about whether this balance is appropriate.[110] The two thresholds together form what the Panel calls the '[…] need to prove a substantial likelihood of causing severe and either widespread or long-term damage through acts or omissions that are either unlawful or wanton.'[111]

The proposal by the panel seems to have found a mid-point between these two approaches The ENMOD test, the disjunctive form, is considered too low because it might exclude acts that are severe but not widespread or long-term. The conjunctive test, reflecting the Additional Protocol I, is too high, potentially excluding severe and long-term or severe and widespread acts. The Panel's requirement ensures that acts must always be severe, with additional criteria of either widespread or long-term damage.[112] The main difference between the two definitions lies in their underlying objectives. While Higgins' definition is rooted in the ambition to fundamentally alter human behaviour by establishing a legal duty for environmental care, the Panel's approach appears to be more pragmatic, aiming solely for a practical and effective definition that can be integrated into the Rome Statute. Their focus seems to hinge on the deterrent effect of International Criminal Law (ICL), rather than a broader societal transformation.[113]

Critiques of the Panel's legal definition centre around three main points. Firstly, the inclusion of thresholds for reckless disregard and wantonness complicates the *mens rea* requirements, potentially hindering prosecution. Secondly, the *mens rea* and *actus reus* requirements introduce varying standards, leading to potential ambiguity and interpretation challenges. Lastly, concerns arise regarding the anthropocentric nature of the definition, which may dilute its purpose by allowing exceptions for socially or economically beneficial acts.[114] These three points not only serve as critiques of the Panel's

[109] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n10) 5, 7–8.
[110] Cusato and Jones (n 92) 5.
[111] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n10) 6.
[112] ibid 7.
[113] ibid 5–6.
[114] Kevin Jon Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)' [2021] Opinio Juris <https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/> accessed 15 May 2024; Kevin Jon Heller, 'Ecocide and Anthropocentric Cost-Benefit Analysis' [2021] Opinio Juris <https://opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/> accessed 15

definition but also highlight the key distinctions between their approach and Higgins' vision.

The inclusion of wantonness in the definition by the Panel results in a *mens rea* requirement that does not exist in Higgins' definition. The IEP's co-chair, Christina Voigt, has described this as a more realistic or pragmatic approach which would enable states to be more prone to accept an amendment, whereas Higgins' definition rests on strict liability.[115] The Panel's inclusion of the *mens rea* requirement has faced a lot of criticism. Several commentators have noted that recklessness and *dolus eventualis* which the Panel has described as part of the *mens rea* requirement are different *mens rea* standards. The Panel uses the term 'knowledge' in their commentary which leads to a different meaning in relation to Article 30 of the Rome Statute as well as their argument on recklessness and the *dolus eventualis.* Kevin Jon Heller describes this as a misdescription of the *mens rea*, where the perpetrator needs to first know that his or her acts will cause 'severe and either widespread or long-term damage to the environment' as well as the perpetrator also must be aware that the damage will be 'clearly excessive in relation to the social and economic benefits anticipated'.[116]

Heller argues that it will already be difficult to prove that the perpetrator was aware that his or her acts would result in the required environmental damage. He states that the requirement that the perpetrator has to make a judgment that an act which he or she is committing will not be sufficiently beneficial. He makes a connection to the difficulties with the requirements in Article 8(2)(b)(iv) of the Rome statute which requires the perpetrator to be subjectively aware that an attack will cause excessive collateral damage instead of assessing the relationship between military advantage and civilian damage as a reasonable military commander.[117] It is important to note that the strong opposition that prevented the usage of recklessness in the Rome Statute, is reflected in Article 30, which only allows for intent and knowledge as the permissible *mens rea* standard.[118] Concerns with the mens rea standard

May 2024; Kevin Jon Heller, 'The Crime of Ecocide in Action' [2021] Opinio Juris <https://opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action/> accessed 15 May 2024; Kai Ambos, 'Protecting the Environment through International Criminal Law?' [2021] EJIL:Talk! <https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/> accessed 20 May 2024; Jelena Aparac, 'A Missed Opportunity for Accountability?' [2021] Völkerrechtsblog <https://intr2dok.vifa-recht.de/receive/mir_mods_00010937> accessed 20 May 2024.

[115] Christina Voigt, '«Ecocide» as an International Crime: Personal Reflections on Options and Choices' <https://www.ejiltalk.org/ecocide-as-an-international-crime-personal-reflections-on-options-and-choices/> accessed 15 March 2024.

[116] Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n10) 1–6.

[117] Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)' (n 113).

[118] Art. 30 of the Rome Statute.

proposed by the Panel also extend to the wantonness threshold, applicable to acts that are not unlawful.

The issue with the proposed *mens rea* requirement is through the wantonness threshold which applies to the acts which lead to damage but are not unlawful. This prerequisite is defined as 'reckless disregard' for damage which could be excessive in relation to the social and economic benefits anticipated. This is problematic because it firstly, includes a second type of recklessness as an additional *mens rea,* leading to the fact that this crime would be impossible to prosecute. These different *mens rea* requirements for the unlawful acts and the acts which are not expressly prohibited in national or international law. Secondly, the wantonness requirement introduces an anthropocentric cost-benefit analysis of the crime. This anthropocentric approach leads to the purpose of ecocide being diluted through the introduction of the cost-benefit analysis and could be viewed as some form of exception for when ecocide could be acceptable. The application of the wantonness requirement could result in situations where the accused demonstrates severe and widespread or long-term damage to the environment, which still might not lead to responsibility and conviction if the accused could argue that the damage was not excessive in relation to the social or economic benefit that they anticipated.[119] This highlights the tension between the will to ensure economic growth and the protection of the environment which is embodied in the principle of sustainable development in international law.[120]

A vital question is therefore, why the Panel pushes for this amendment to the Rome Statute when it appears that it is not contributing to the actual prosecution of ecocide, but rather winning political points for being a definition that States can easily accept; it is a mere compromise rather than taking a stance against anthropocentrism within international law. It contradicts the initial perspectives on the concept of ecocide, as scholars such as Galston, Higgins, Falk, and others argued for established in this essay. Additionally, it appears impossible to endorse the inclusion of this specific definition of ecocide in the Rome Statute because it will greenwash international law for political feasibility.

In conclusion, the Independent Expert Panel's proposed definition of ecocide marks a significant milestone in the ongoing discourse surrounding environmental crimes and their potential criminalization. While the definition offers a comprehensive framework for addressing acts of ecocide within the context of international law, critiques regarding its *mens rea* requirements and anthropocentric nature highlight the need for further refinement. Despite these challenges, the Panel's definition represents a pragmatic effort to integrate

[119] Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)' (n 113); Heller, 'Ecocide and Anthropocentric Cost-Benefit Analysis' (n 113); Heller, 'The Crime of Ecocide in Action' (n 113).
[120] Cusato and Jones (n 92) 22–27.

environmental protection into the Rome Statute, albeit with some complexities to address. In the subsequent case study, this definition will be applied to a real-life scenario, shedding light on its practical implications and providing valuable insights into its potential strengths and limitations.

3 Can ecocide be prosecuted through the Rome Statute?

3.1 The Rome Statute

There are discussions in doctrine on whether the existing provisions of the Rome Statute can be used for the ICC to exercise its material jurisdiction over issues regarding ecocide, such as the destruction of ecosystems, unsustainable exploitation of natural resources and pollution and contamination.[121] The applicability of the provisions on the crimes of genocide and crimes against humanity will be further described in this chapter. The crime of aggression and war crimes will not be examined as it does not contain any prerequisites for its applicability to issues within the concept of ecocide. Therefore, this part of the essay aims to explain the material jurisdiction of the Rome Statute.

The crimes that fall under the Court's material jurisdiction are those set out in Article 5 of the Rome Statute, the crime of genocide, crimes against humanity, war crimes and the crime of aggression. It is stated that the Court's jurisdiction '[…] shall be limited to the most serious crimes of concern to the international community as a whole'.[122] The crime of Genocide under Article 6 under the Rome Statute was the least problematic crime to be included in Article 5, while the definition of the crime of genocide as contained in Article 6 is identical to Article II of the Genocide Convention, Article III of the Convention had to be harmonised with the section on general principles of law, which are contained in Articles 22– 33 in the Rome Statute. The content of Article II of the Genocide Convention which focuses on the prohibition of public incitement of genocide is found in Article 25 of the Rome Statute and deals with individual criminal responsibility.[123]

The provision on war crimes in ICL, which includes only ecocentric crime, does not apply to the concept of ecocide due to its restrictive scope, which covers only acts committed during armed conflict. This thesis focuses on examining ecocide and the legal gaps within ICL, making Article 8(2)(b)(iv) inapplicable because it limits severe, widespread, and long-term environmental damage to contexts of armed conflict. This provision is therefore seemingly clear in the context of ecocide during an armed conflict.[124] The same limitation applies to the provision on the crime of aggression, which lacks a link to environmental harm except in cases involving nuclear weapons or

[121] Sarlième and others (n 15).
[122] Art. 5 of the Rome Statute.
[123] Kai Ambos (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck/Nomos/Hart 2022) <http://www.bloomsburycollections.com/book/rome-statute-of-the-international-criminal-court-article-by-article-commentary> accessed 3 April 2024, 132–135.
[124] Art. 8(2)(b)(iv) of the Rome Statute.

serious biological or chemical attacks. While military bombardment or invasion can cause environmental damage, whether such acts constitute aggression depends on the specific circumstances. If these acts escalate into armed conflict, Article 8(2)(b)(iv) of the Rome Statute becomes relevant as it addresses the relationship between the act and environmental destruction. Consequently, the Rome Statute's crime of aggression has limited potential to address environmental damage, especially when the perpetrator of ecocide is a corporate entity.[125]

There is, as stated several times, no clear legal definition or legislation of the concept of ecocide. The lack of environmental provisions applicable in peacetime could, however, be viewed as an advantage for legislators, lawyers and ultimately the ICC to broaden the interpretation of the already existing rules or urge to develop new legislation. The challenge of this is the need to have a balance between environmental protection and the structural and substantial integrity of ICL, which can facilitate or prevent legal development. The discussion regarding the applicability of the existing rules on the concept of ecocide is therefore essential for the further analysis of the proposed amendments to the Rome Statute.[126] Before delving into the two articles on genocide and crimes against humanity, it is crucial to emphasise the argument raised in doctrine, that caution is required when considering the expansion of established legal norms. This caution stems from the principle of *nullum crimen sine lege,* which mandates that the law must clearly define both the material and mental elements of a crime for individuals to comprehend what actions constitute prohibited conduct and could potentially lead to criminal liability.[127] With this in mind, if there is a possibility to prosecute ecocide through existing rules in the Rome Statute, this must be communicated in line with the principle of *nullum crimen sin lege,* no crime without law.

[125] Art. 8*bis* of the Rome Statute.

[126] Danuta Palarczyk, 'Ecocide Before the International Criminal Court: Simplicity Is Better Than an Elaborate Embellishment' (2023) 34 Criminal Law Forum 147 <https://link.springer.com/10.1007/s10609-023-09453-z> accessed 1 May 2024, 150–155; Tara Smith, 'Critical Perspectives on Environmental Protection in Non-International Armed Conflict: Developing the Principles of Distinction, Proportionality and Necessity' (2019) 32 Leiden Journal of International Law 759 <https://www.cambridge.org/core/product/identifier/S0922156519000372/type/journal_article> accessed 20 May 2024, 6; Christina Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (1st edn, Cambridge University Press 2019) <https://www.cambridge.org/core/product/identifier/9781108684385/type/book> accessed 20 May 2024, 17; *Climate Change: International Law and Global Governance* (1st edn, Nomos Verlagsgesellschaft mbH 2013) <http://www.jstor.org/stable/j.ctv941w8s> accessed 20 May 2024, 710–715.

[127] Art. 23 of the Rome Statute; Aparac (n 113).

3.2 Genocide (Article 6 of the Rome Statute)

The crime of genocide was defined in 1948 through the Genocide Convention.[128] The crime of genocide was later incorporated verbatim into the Rome Statute of the International Criminal Court.[129] Genocide is defined as 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[130] Prosecuting environmental harm as genocide is challenging for several reasons. One factor is the need for specific intent when committing genocide and that it must be against a protected group.[131] This highlights the anthropocentric aspects of the crime, genocide is intended to protect humans. Even if harm to the environment leads to casualties among a particular group, the prosecutor must show that the harm was done with the specific intention of wiping out, either entirely or partially, that group based on their nationality, ethnicity, race, or religion. The element of 'with intent'[132] is a prerequisite which must be fulfilled for the article to be applicable. The essence of the genocide definition is the '[…] precise description of the special or specific intent requirement.'[133] This requires an intent to destroy a national, ethnic, racial, or religious group. It is quite easy to see how environmental conditions, or their deliberate degradation, could be employed to destroy a specific population, constituting an act of genocide.[134] The issue when assessing this provision's applicability to ecocide and environmental harm in general, is not in showing that the environmental damage has had severe consequences for a particular group, it is rather the perpetrator's intent to destroy the group and the anthropocentric purpose of protection of humans.[135]

The relationship between indigenous peoples, genocide and the environment were discussed in the Whitaker Report of 1985. The Whitaker Report proposed expanding the Genocide Convention to explicitly include environmental destruction, termed 'ecocide' as a form of genocide. Ecocide which the report wanted to include within the crime of genocide encompasses severe

[128] Art. 2 of the Genocide Convention.
[129] Kai Ambos and Otto Triffterer, *Rome Statute of the International Criminal Court: A Commentary* (Third ed, Bloomsbury T & T Clark 2016) 140–144.
[130] Art. 6 of the Rome Statute.
[131] Ricardo Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?' (2020) 31 Criminal Law Forum 179 <https://link.springer.com/10.1007/s10609-020-09393-y> accessed 20 May 2024, 180–182.
[132] Art. 6 of the Rome Statute.
[133] Ambos (n 121) 147–152; Kai Ambos and Otto Triffterer, *Rome Statute of the International Criminal Court: A Commentary* (Third ed, Bloomsbury T & T Clark 2016) 131–142.
[134] Tara Smith, 'Creating a Framework for the Prosecution of Environmental Crimes', *The Ashgate research companion to international criminal law: critical perspectives* (Ashgate 2013) 4.
[135] Payal Patel, 'Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court's Mandate to Prosecuting Environmental Crimes?' (2016) 14 175 <https://lawecommons.luc.edu/lucilr/vol14/iss2/5> accessed 19 March 2024, 176.

and often irreparable harm to the environment, such as nuclear explosions, chemical weapons, serious pollution, acid rain, or rainforest destruction, posing existential threats to entire populations, whether intentionally or due to criminal negligence.[136] The rationale behind this proposal was the recognition that indigenous groups are frequently the silent victims of environmental destruction, with their physical destruction amounting to genocide and necessitating special and urgent action.[137] The case of the Aché Indians in Paraguay during the 1970s serves according to Tara Smith as an illustrative example, where state policies promoting mining and cattle-raising led to the targeted violence against the Aché and the destruction of their forested habitat, potentially resulting in the extinction of the group. This is because of their intertwined way of living with nature, it was the group's way of life which was directly targeted and it ultimately resulted in their destruction just like other indigenous groups.[138] It must therefore be stated that there is indeed a nexus between ecocide and genocide as the destruction of the environment leads to the destruction of the people depending on it. However, the essential question to have in mind is whether the crime of genocide actually can protect the environment itself, this author is afraid that the legal analysis will prove that it will not.

In order to target ecocide within the framework of the crime of genocide, it is crucial to scrutinise the relevant provisions, particularly under Article 6 of the Rome Statute. Deliberate harm inflicted upon the environment may be construed as a method aimed at threatening the survival of a protected group in accordance with Article 6 of the Rome Statute. Particularly, sub-paragraph (c) emerges as the sole provision capable of encompassing the destruction of ecosystems, pollution, and contamination, provided they are intended to create conditions leading to the physical destruction of the group, whether wholly or partially.[139] As Tara Smith rightfully states in her analysis of the provision when considering corporations, the issue with the proof of genocidal intent becomes even more serious. Corporations can use the balanced approach outlined in the sustainable development principle and it would allow the destruction by the reliance on the advancement or benefit for the society ultimately resulting in the requirement of intent to never be fulfilled. Smith exemplifies this through the example of the Marsh Arabs case.[140]

The Marsh Arabs case stands as a stark illustration of how development justifications have been used to justify actions detrimental to indigenous communities. These native Shia Muslims, residing in the Mesopotamian Marshes of Southern Iraq, faced systematic efforts to disrupt their traditional way of life. After their involvement in a failed uprising against the Saddam Hussein

[136] E/CN.4/Sub.2/1985/6, 17 para 33.
[137] E/CN.4/Sub.2/1985/6, 17 para 33.
[138] Smith (n 133).
[139] Sarlième and others (n 15).
[140] Smith (n 133).

government in 1991, the Marsh Arabs became targets of state-sponsored attempts to eradicate their community. This assault took the form of both direct violence and deliberate environmental devastation. The Iraqi authorities drained the Mesopotamian Marshes extensively, leading to the near-complete destruction of this vital ecosystem, with only 7% of the wetlands remaining today. This targeted destruction resulted in the deaths of numerous Marsh Arab individuals and forced many others to flee their ancestral lands.[141] Throughout their actions, the government justified its interventions by framing them as necessary for development and progress.[142] By constructing dams and canals in the region, authorities argued that they were fostering economic growth. However, this simplistic narrative effectively shielded them from accountability for any genocidal intent behind their actions. Consequently, proving such intent becomes exceedingly challenging when attempting to apply genocide provisions to cases involving enumerated acts, particularly when environmental degradation serves as a method of genocide. This is the main and most central issue when trying to apply the provision of genocide on acts which are covered by the enumeration and even harder to prove the genocidal intent in cases in which acts of ecocide are used as a method of genocide.[143]

The destruction of the environment can be a method of genocide, in accordance with Article 6 of the Rome Statute. Sub-paragraph (c) has been suggested to be the only genocidal act which could encompass the destruction of ecosystems, pollution and contamination, provided that the acts fulfil the requirement of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' [144] This requires proving that the perpetrator's insufficient measures were intended to prevent the group's members from sustaining themselves independently. The term 'deliberately' indicates that the perpetrator's actions must aim for the physical destruction of the group, not its immediate annihilation, making evidence of the outcome unnecessary.[145] The *travaux préparatoires* of the Convention on the Prevention and Punishment of the Crime of Genocide, indicate that these imposed conditions of life refer to situations causing a 'slow death'.[146] A broad interpretation of 'inflicting on the group conditions of life' aligns with

[141] Aaron Schwabach, 'Ecocide and Genocide in Iraq: International Law, the Marsh Arabs and Environmental Damage in Non-International Conflicts' [2003] SSRN Electronic Journal <http://www.ssrn.com/abstract=442541> accessed 20 May 2024, 4.
[142] Smith (n 132); Schwabach (n 139); Elihu D Richter and others, 'Malthusian Pressures, Genocide, and Ecocide' (2007) 13 International Journal of Occupational and Environmental Health 331 <http://www.tandfonline.com/doi/full/10.1179/oeh.2007.13.3.331> accessed 20 May 2024, 335–337.
[143] Smith (n 133); Smith (n 125).
[144] Art. 6(c) of the Rome Statute.
[145] Doc E/AC.25/W.1, 6; Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Nijhoff 2009) 980–985. See also Kayishema and Ruzindana (Judgement) para 115; Stakić (Judgment) paras 517– 518; Brđanin (Judgment) 691; Tolimir (Judgment) para 740; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Merits) [2015] ICJ Rep 3, para 161.
[146] UN Doc. A/CN.4/377 (n 47), 126 fn. 114.

the protective intent of sub-paragraph (c). It does not imply that the group members must be confined or under strict control, as it can apply to scenarios where harmful conditions are imposed on free groups. Moreover, the provision does not imply that the group members must be confined or under strict control, as it can accommodate scenarios where conditions of life are deliberately imposed on groups not deprived of freedom.[147] The ILC has argued that it is inherently challenging to precisely define which 'conditions of life' would constitute a breach. The ILC has, however, provided us with examples of genocidal acts which could fall under subparagraph c and thus serve as guidance for its applicability. They enumerate instances of genocide that could come under subparagraph (c) such as placing a group of people on a subsistence diet, reducing required medical services below a minimum, withholding sufficient living accommodations, etc. provided that these restrictions are imposed with intent to destroy the group in whole or in part.[148]

Early instances of genocidal acts which could be covered through Article 6(c) include the man-made famine by Soviet authorities in 1932, which led to the deaths of millions in the Ukrainian Soviet Socialist Republic and the North Caucasus Territory between 1932 and 1933.[149] Another similar starvation program was enforced in the occupied territories during World War II, targeting civilian populations with measures aimed at exterminating prisoners in concentration camps including sadism, inadequate clothing, medical neglect, disease, beatings, hangings, freezing, forced suicides, and shootings.[150]

Establishing evidence that the measures implemented by the perpetrator are intended to deprive the group members of sustenance and general means of living is essential. The ILC has stipulated that subparagraph (c) encompasses various actions, including deportation when executed with the intent to annihilate the group, with the term 'deliberately' underscoring a specific intent for destruction. This necessitates demonstrating that the perpetrator's insufficient measures are intended to hinder the group's members from sustaining themselves independently. The term 'deliberately' in subparagraph (c) implies that the perpetrator's actions must ultimately result in the physical destruction of the group, rather than its immediate annihilation, rendering evidence of the outcome unnecessary.[151]

The more recent Al-Bashir case from the Pre-Trial Chamber provides insight into the interpretation of 'conditions of life'. The Prosecution asserted that the armed forces of the Government of Sudan systematically destroyed the means

[147] Sarlième and others (n 15) 5–7.
[148] UN Doc. A/CN.4/377 (n 47), 126 fn. 114.
[149] Sarlième and others (n 15) 7–10.
[150] Judgment of the Nuremberg International Military Tribunal 1946 (1947) 41 AJIL 172 stating '[the defendants] degraded the standard of life of the people of occupied countries and caused starvation, by stripping occupied countries of foodstuffs for removal to Germany'.
[151] UN Doc. A/CN.4/377 (n 47), 126–128.

of survival for the Fur, Masalit, and Zaghawa civilian populations in Darfur, including food, shelter, crops, livestock, wells, and water pumps. This case illustrates how environmental degradation or damage that infringes upon a group's cultural identity falls within the definition of genocide. Hence, the destruction of a group's cultural identity occurs when environmental harm affects their vital living space, such as indigenous communities or cultural minorities with a spiritual and survival dependency on the environment.[152]

In many circumstances, however, environmental destruction may not be sufficient to constitute genocide. This instance demonstrates how genocide includes activities that undermine a group's cultural identity by harming or destroying their environment. Perpetrators who destroy a group's essential environment, which is necessary for both survival and spiritual connection, effectively eliminate its cultural identity. However, mere environmental destruction does not automatically establish genocide; prosecutors must demonstrate the perpetrator's intent to commit genocide in addition to the environmental damage inflicted. Moreover, addressing irreversible environmental damage presents challenges as prosecution efforts might be too late to prevent permanent destruction. In addition to proving the perpetrator's intent to commit genocide, the prosecution must demonstrate that the *actus reus* was carried out with the intention of causing environmental harm. Furthermore, the issue of permanent environmental damage is problematic as any deterrent effect may prove ineffective by the time prosecution commences.[153]

For the crime of ecocide to fall under the genocide provision, it must be an act which could be considered a slow death, when ecocide is used as a tool to commit genocide. Damien Short argues that the act has little to do with who it is aimed at, directly or indirectly, only that it is focused on destroying a human group. Short furthermore argues for the fact that environmental harm is a way of destroying human groups which could fall under the criteria of 'causing serious bodily or mental harm to members of the group and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.'[154] This understanding is, however, challenged by doctrine and through the definitions proposed by Higgins and the Panel. Eichler argues that ecocide is more than a method of committing genocide, it is genocide in itself. Ascertainable ecocide is always genocide, even without human groups directly or indirectly targeted for destruction. Ecocide is genocide because its literality eliminates everything. Eichler, rightly argues that the more

[152] Sarlième and others (n 15) 6–8.
[153] ibid 6–7.
[154] Damien Short, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide* (Zed Books Ltd 2016) 6.

we argue that ecocide is a method of genocide, the more we fuel the anthropocentric view of what this crime entails.[155]

The legal argument presented suggests that under Article 6 of the Rome Statute, the destruction of the environment can be interpreted as a method to endanger the existence of a protected group, particularly under subparagraph (c). This provision encompasses actions aimed at deliberately imposing conditions on the group that would lead to its physical destruction, either wholly or partially, without requiring proof of the result. The term 'deliberately' implies an intent for long-term harm, not necessarily immediate obliteration. Various historical examples are cited to illustrate how such acts can manifest, including man-made famines, destruction of means of survival, and restrictions on access to vital resources. However, prosecuting environmental destruction alone under subparagraph (c) may face challenges in proving genocidal intent. It's suggested that environmental destruction could contribute to a genocide charge when part of a broader campaign targeting a protected group with accompanying measures.[156]

Even though there are various actions enumerated under the crime of genocide, the most applicable to environmental damage is the proscription on the deliberate inflation of 'conditions of life calculated to bring about [a group's] physical destruction in whole or in part'.[157] For an act to be recognised as genocide rather than a crime against humanity, it must fulfil the *mens rea* of the crime which is to have 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'[158] We cannot disregard ecocide being used as a calculated method to destroy a specific population and therefore amount to an act of genocide.[159] Or ecocide being genocide itself, as Eichler argued.[160]

In conclusion, ecocide can potentially be prosecuted through the crime of genocide, particularly under the provisions of Article 6, sub-paragraph (c) of the Rome Statute. This provision encompasses acts intended to create conditions leading to the physical destruction of a group, including the destruction of ecosystems, pollution, and contamination. However, prosecuting ecocide under the crime of genocide faces significant challenges, primarily in proving genocidal intent. The exceptionally high threshold for intent, coupled with loopholes that entities like corporations may exploit, makes it difficult to effectively target ecocide solely through the lens of genocide.

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[155] Lauren J Eichler, 'Ecocide Is Genocide: Decolonizing the Definition of Genocide' (2020) 14 Genocide Studies and Prevention 104 <https://scholarcommons.usf.edu/gsp/vol14/iss2/9> accessed 20 May 2024, 108–110.
[156] Short (n 153); Eichler (n 154).
[157] Art. 6(c) of the Rome Statute.
[158] Art. 6(c) of the Rome Statute.
[159] Smith (n 132) 52.
[160] Eichler (n 154).

3.3 Crimes against humanity (Article 7 of the Rome Statute)

Crimes against humanity consist of a physical element, which includes acts listed in Article 7(1)(a)-(k) of the Rome Statute. It additionally consists of a contextual element that requires these crimes to be part of a widespread or systematic attack directed against any civilian population, and a mental element requires the perpetrator to have knowledge of the attack.[161] Similar to the crime of genocide, crimes against humanity are prosecutable during non-armed conflicts as well. Article 7 of the Rome Statute defines crimes against humanity as 'acts […] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[162]

To begin with, as stated before, Article 7 includes a list of crimes, which refer to fact-based circumstances that a case must meet and the contextual element of the crime against humanity as delineated from the *chapeau* of the provision. The contextual element of crimes against humanity is met when a case contains the following requirements: any of the acts enumerated under the provision, committed as a part of a 'widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[163]

The first requirement of the provisions contains three other requirements as expressed under Article 7(2)(a). Article 7(2) states that (i) the act must have occurred on more than one occasion; (ii) the act must have been carried out as an attack against civilians; and it must be (iii) 'pursuant to or in furtherance of a State or organizational policy to commit such attack[s]'.[164] When applying the first condition to cases of environmental damage, this implies that the disposal of, for example, waste or toxic material falling under 'other inhumane acts of a similar character causing great suffering, or serious injury to body or to mental or physical health',[165] must have occurred more than one time. Therefore, the dumping of toxic material and waste amounts to one act. If this act happens on more than one occasion, then this would amount to multiple acts as required by the Rome Statute.[166] Secondly, the second condition requires civilians to be persons who do not take part in any armed activities. This is not as hard to prove as other requirements under the provision because all the victims of crimes during peacetime are considered civilians according to the definition.[167] Lastly, the third condition demands evidence

[161] Art. 7 of the Rome Statute; Ambos (n 122); Ambos and Triffterer (n 128).
[162] Ambos (n 122); Ambos and Triffterer (n 128).
[163] Art. 7 of the Rome Statute.
[164] Art 7(2)(a) of the Rome Statute.
[165] Art 7(2)(k) of the Rome Statute
[166] Caitlin Lambert, 'Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?' (2017) 30 Leiden Journal of International Law 707 <https://www.cambridge.org/core/product/identifier/S0922156517000267/type/journal_article> accessed 20 May 2024, 722–725.
[167] ibid 711.

that one organisation or the State in question has 'actively promoted or encouraged' an attack, or failed to prevent its commission. Some questions remain, however, regarding the extent to which one must demonstrate a nexus between the attack and the actions that should be considered unlawful. Further clarifications are needed in order for a case of environmental damage to be considered as an attack amounting to a crime against humanity.[168]

In regard to the second requirement, the prosecutor would have to prove that the attack was either widespread or systematic. On the one hand, in order for an attack to be considered widespread, there must be a significant number of victims as a result of the attack. On the other hand, in order for an attack to be systematic, the prosecutor must be able to prove the 'organized nature of the acts that make up the attack', meaning that the prosecutor must prove the organized method with which the acts were executed.[169] The third requirement of Article 7(1) outlays the *mens rea* of the crime against humanity, which requires that the perpetrator had knowledge of the attack in question (in this case, the environmental destruction). This is a relatively low standard for *mens rea*, as no other requirement is made other than the perpetrator's knowledge of the attack.[170]

Understanding an attack on the environment entails recognising behaviours and actions that lead to the destruction of ecosystems, unsustainable exploitation of natural resources, and pollution or contamination. Such attacks can involve acts outlined in Article 7(1), like forcible population transfer and persecution. Therefore, environmental harm can be prosecuted as a crime against humanity if it meets the criteria of a widespread or systematic attack with the perpetrator's knowledge and intent.[171]

This crime indicates that the crime must be part of a systemic or widespread attack. The *mens rea* requirement involves the perpetrator having knowledge and intention to commit the crime. When looking at the crime and viewing the definition of crimes against humanity, it can be stated that it would be more appropriate to address ecocide under crimes against humanity rather than genocide.[172] This is because this provision has more possibilities for the act to fall under and enable the applicability and prosecution. The genocide provision requires specific intent, as established above, which is what makes it harder to prosecute. As this is not a requirement under crimes against humanity, it makes it easier to prosecute if the rest of the perquisites in the provision are fulfilled. It is crucial to note that an assault on the environment can constitute an attack directed against any civilian population. While traditionally, it has been argued that the civilian population must be the primary target

[168] ibid 720–723.
[169] Sarlève and others (n 15) 8–10.
[170] Ambos (n 121) 167–173; Ambos and Triffterer (n 131) 147–152.
[171] Sarlève and others (n 15) 8–12.
[172] Smith (n 133).

rather than incidental victims, recent interpretations, notably from the Appeals Chamber, suggest that a distinct determination regarding the primary object of the attack is not requisite.[173] The significant aspects of crimes against humanity from an environmental perspective encompass the prohibitions on extermination, forcible transfer of population, persecution, and other inhumane acts, which are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. These actions are governed by Articles 7(1)(b), (d), (h), and (k) of the Rome Statute, consisting of the crimes of extermination, deportation or forcible transfer of the population, persecution and other inhumane acts. Articles 7(1)(b), (d),(h) and (k) will now be examined further.

The acts of crimes against humanity established in Article 7(1) above are somewhat explained in Article 7(2). First off, 'the intentional infliction of conditions of life calculated to bring about the destruction of part of a population' is specifically included in the definition of 'extermination'. The definition of extermination 'includes the international infliction of conditions of life, inter alia, the deprivation of access to food and medicine, calculated to bring of the destruction of a part of a population'.[174] Given this broad definition, the deliberate destruction of ecosystems and the unsustainable exploitation of natural resources could also fall under the crime of extermination. These actions intentionally create adverse conditions that threaten the survival of populations, mirroring the deprivation of essential resources like food and medicine. Thus, the scope of the provision is sufficiently comprehensive to encompass environmental destruction as a form of extermination, as it involves the intentional infliction of conditions detrimental to human life.[175]

The scope of Article 7(1)(b) appears to be able to encompass acts about environmental destruction. A clear example is in the Al Bashir case where the attack on the civilians consisted of the armed forces systematically destroying the means of survival, including food, shelter, crops, livestock and in particular the water supplies coming from wells and water pumps.[176] It must be stated that the wording of Article 7(2)(b) bears resemblance to but is not identical to subparagraph (c) of Article 6 of the Rome Statute, which forbids the deliberate imposition of circumstances aimed at bringing about the physical destruction, in whole or in part, of a group. It is crucial to discern that the crimes of extermination and genocide are legally discrete, as the latter necessitates alignment between the identity of the protected group and the intent of the perpetrator. Conversely, extermination does not demand such alignment,

[173] Katanga (Judgment) para 1104; Ntaganda (Judgment) para 418.
[174] Art. 7(2)(b) of the Rome Statute.
[175] Sarlième and others (n 15) para. 29.
[176] *Al Bashir* (Pre-Trial) para. 96.

with its threshold being significantly lower, focusing instead on cases where mass killings are perpetrated against groups of individuals.[177]

The act of forcibly displacing or deporting a population violates international law when individuals are forced to leave areas where they have a lawful presence.[178] Its applicability to ecocide can be exemplified through the Al Bashir arrest warrant as well, the acts committed by the military, which was the targeted destruction of essential sources for survival such as water wells, led to the 'genuine lack of choice'[179] of the population, instigating their forcible transfer.[180]

Article 7(1)(h) of the Rome Statute defines persecution as the intentional and severe deprivation of fundamental rights against identifiable groups on political, racial, national, ethnic, cultural, religious, gender, or other grounds universally recognised as impermissible under international law.[181] Ecocide, which involves extensive damage, destruction, or loss of ecosystems, can be considered persecution when such harm targets specific groups due to their identity. This includes acts like poisoning rivers, contaminating soil, and destroying culturally significant sites, which severely deprive communities of their right to a healthy environment. Indigenous peoples in the Amazon and pastoralist communities in Mongolia serve as examples of indigenous groups targeted by ecocide, based on their opposition to environmental exploitation and traditional lifestyles. To prosecute ecocide under Article 7(1)(h), it must be shown that the harm was intentional and severe, deprived the targeted group of fundamental rights, and was based on prohibited grounds. Framing ecocide as persecution under this article allows for accountability for environmental destruction that constitutes a crime against humanity, protecting the fundamental rights of those who depend on the environment for their survival and cultural identity.[182]

Lastly, the broad provision of 'other inhumane acts' in Article 7(1)(k) encompasses actions of intentionally inflicting 'great suffering' or 'serious injury to body or mental or psychical health' by the means of an inhumane act of a similar character to any of the other offences mentioned in Article 7.[183] This crime, is of residual character and its open formulation which could enable the widening of the scope of Article 7. It has, however, been stated that this subparagraph 'must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity'.[184]

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[177] Smith (n 132), 10.
[178] Art. 7(1)(d) of the Rome Statute.
[179] Ntanga (Judgment) para 1056.
[180] Sarlième and others (n 15) 14–15.
[181] Art. 7(1)(k) of the Rome Statute.
[182] Sarlième and others (n 15) 15–16.
[183] Art. 7(1)(k) of the Rome Statute.
[184] Kenyatta (Judgment) para. 265–269.

The first element of the crime requires that 'the perpetrator inflicted great suffering, or serious injury to body or mental or physical health.'[185] There are two ways to meet this requirement in situations concerning environmental damage: (i) contamination of waterways, soil, and food chains causing serious physical health injuries, and (ii) forest destruction causing 'great suffering' or serious mental health injuries, especially for Indigenous people whose lives are intertwined with nature and the environment.[186]

Great suffering must result from 'an inhumane act' and be 'of a character similar to any other act referred to' in Article 7(1). While not all instances of grazing, logging, mining, ranching, or deforestation are inhumane, such a characterization could apply to the destruction of sacred sites or culturally important locations for Indigenous communities, even if the underlying activity (e.g., mining) is not inherently inhumane. Similarly, diverting a river for infrastructure, causing severe food and water deprivation and harm to downstream communities, could be an inhumane act.[187]

Article 7(1)(k) does not specifically criminalise environmental degradation. Acts must share similar characteristics (nature and seriousness) with those enumerated in Article 7(1)(a)-(j). Property destruction may not qualify as an 'other inhumane act' under Article 7(1)(k) due to the anthropocentric nature of the offences. The offence is constituted only when environmental damage causes serious harm to a human population. Article 7(1)(k) may not cover most environmental crimes, but it has the potential to be expanded if the ICC considers environmental damage and its consequences for the population, especially in terms of 'severe suffering' under the provision.[188]

The prosecution of environmental destruction cases may thus be possible as part of prosecutions concerning the extermination, deportation, or forcible transfer of population and other inhumane acts, hence as an indirect cause that resulted in these acts. Despite this, crimes against humanity remain the most viable option for prosecuting environmental damage before the ICC, as it requires a lower intent threshold than genocide, and can apply in the context of an armed conflict and during peacetime, in contrast to war crimes. However, as Heller has rightfully noted, the conceptual reason against the application of crimes against humanity on ecocide is that all provisions in the Rome statute are Anthropocentric and would thus not serve the greater purpose with the actual creation of the concept of ecocide. The substantive reason is to avoid attributing the contextual elements of crimes against humanity to the crime of ecocide, which as shown in the analysis above, are not suited to a crime that

[185] Art. 7(1)(k) of the Rome Statute.
[186] Sarlève and others (n 15) 15–17.
[187] Art. 7(1)(k) of the Rome Statute.
[188] Sarlève and others (n 15) 17–18.

focuses on environmental harms. The conceptual reason is to avoid the framing of ecocide as an anthropocentric crime.[189]

In conclusion, this chapter has extensively analysed the intricate relationship between crimes against humanity and environmental degradation within the framework of international law. The discussion has focused on the components of crimes against humanity outlined in Article 7 of the Rome Statute, elucidating their application to various forms of environmental harm, ranging from intentional contamination of water sources to the forced displacement of populations due to ecological destruction. Despite recognising the inherent complexities and challenges associated with prosecuting environmental destruction as a crime against humanity, including conceptual and substantive constraints, it is evident that such prosecutions represent a crucial avenue for fostering accountability and ensuring justice. Moving forward, it is imperative to meticulously refine the legal framework concerning ecocide, foster enhanced international collaboration, and integrate environmental considerations into the fabric of international criminal law. Notably, these legal provisions will be applied to the tangible case study, The Planet v. Bolsonaro, as scrutinised in Chapter 4 of this thesis, thereby underscoring the pressing necessity for robust legal mechanisms to effectively address environmental crimes and uphold the fundamental rights of current and future generations to a pristine and sustainable environment.

[189] Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)' (n 113).

3.4 Relevant Modes of Liability

3.4.1 Criminal responsibility (Article 25(3) (a) and (c) of the Rome Statute)

The purpose of this chapter is to investigate the possible modes of liability within the Rome Statute and what the potential amendment would mean in terms of liability for ecocide within ICL. Relevant provisions will be addressed and analysed through doctrine and cases from the ICC and the *ad hoc* tribunals. The overall purpose of this subchapter is to answer the relevant questions regarding who the potential ecocide committer is. There are four main categories in the Rome Statute which are used to delineate liability. If, or when, the proposed amendment by the IEP becomes a part of the Rome Statute these rules will apply to the crime of ecocide as well as the rest of the core crimes.

The main issue with liability for ecocide under the Rome Statute is that there is no personal jurisdiction over corporations, this is problematic as corporations are the potential main perpetrators of the crime of ecocide. The Stop Ecocide Foundation contends that the ICC could potentially prosecute individuals within corporations, such as CEOs or financiers, for their involvement in the acts constituting ecocide, making them subject to criminal prosecution.[190] The question is whether the existing modes of liability are enough to address the crime of ecocide or not.[191]

It is essential to state that criminal responsibility has two elements, the *actus reus* such as an act or omission which has resulted in the commission of a crime and the *mens rea.* The mental element of criminal responsibility is crucial to determining the scope of criminal responsibility for a particular crime. The task of the prosecutor to collect evidence and meet the set requirement of the specific mental element is harder the more specific the mental element is. The way the mental element is set determines the way the prosecutor works in terms of evidence, if it is the more relaxed mental element for example negligence the task of proving the act is easier because the prosecutor must show a reasonable person in the place of the accused would have avoided the commission of a crime. The definition of the mental element of liability is of particular importance in ICL as the evidence is hard to collect and the link between the crime and high-level perpetrators is often unclear.[192]

There are several ways in the Rome Statute to attribute liability to an individual. The first form which could be applicable is directly under Article 25(3)(a)

[190] 'Making Ecocide a Crime' (n 26).
[191] Oscar Van Den Heede, 'Ecocide as the Fifth Core Crime in the Rome Statute' (2022) 55 NYU Journal of International Law and Politics 435 <https://www.nyujilp.org/wp-content/uploads/2023/05/Commentary5.pdf> accessed 23 March 2024.
[192] Minkova (n 102).

of the Rome Statute. Article 25 of the Rome Statute regulates individual criminal responsibility in detail, which is a product of the difficulties which various tribunals have had difficulties establishing. Paragraph 1 provides that the Court has jurisdiction over natural persons, not over states or organisations. This implies that the potential amendment of the Rome Statute to include ecocide would only enable the ICC to prosecute natural persons when the acts leading to ecocide are conducted by the legal entity of a corporation. The principle of individual criminal responsibility is reiterated in paragraph 2 of Article 25.[193]

Paragraph 3 of Article 25 establishes the various modes of individual responsibility. Subparagraphs (a) and (d) address the modes of criminal participation. Article 25(3)(a) of the Rome Statute provides what we call indirect participation, which means that a person can be liable for acts committed through another person, that the act is indirectly committed. Commissioning, ordering, instigating, aiding and abetting are confirmed as modes of participation for criminal liability. This goes for joint commission, the concept of perpetration by men and contributions to a group crime. The most important difference between the predecessors of international criminal liability and the Rome Statute is the systematization of modes of participation and not the form of participation in itself.[194]

Article 25(3) and its subparagraphs distinguish four levels of criminal responsibility, the commission of a crime; ordering and instigating; assistance and contribution to a crime. It is to be noted that the wording of the provision reflects the difference between commission as liability for the crime as the result of the persons' conduct and the other modes of participation as accessory liability for a crime committed by someone else. This can be seen in the case law of the *ad hoc* Tribunals where ordering, instigating, assisting and contributing to group crimes all require that the crime itself has been committed or at least attempted.[195] The perpetrator shall be criminally responsible and liable for punishment if the requirements for a form of participation are present. There are no explicit gradations in the degree of criminal liability which are provided in Article 25(3)(a)-(d), but the structure of the provision takes a clear stand, that there is a distinction between different modes of participation, which is not just a question of correct phenomenological

[193] Art. 25(3)(a) of the Rome Statute; Panagiota Kotzamani, 'Corporate Criminality and Individual Criminal Responsibility in International Law: Removing the Hurdles from the International Criminal Court's Approach to Perpetration through Control of a Collective Entity' (2020) 20 International Criminal Law Review 1108 <https://brill.com/view/journals/icla/20/6/article-p1108_1108.xml> accessed 20 March 2024; Vrishank Singhania, 'The Proposed Crime of Ecocide – Ignoring the Question of Liability', [2022] Opinio Juris <https://opiniojuris.org/2022/02/16/the-proposed-crime-of-ecocide-ignoring-the-question-of-liability/> accessed 15 May 2024.
[194] Ambos (n 122); Ambos and Triffterer (n 128).
[195] Ambos (n 122); Ambos and Triffterer (n 128).

description. It is rather that the ranking within these subparagraphs established a value-oriented hierarchy of participation in a crime under international law.[196]

Committing crimes under international law usually involves the collaboration of a large number of people, which is why the degree of individual culpability is critical under international law. Case law from the ICTY suggests that identifying forms of participation is a valuable tool for highlighting culpability, and these could be interpreted as descriptive concepts for establishing individual criminal responsibility as well as indicating the degree of individual guilt. To summarise, Article 25(3) is a differentiation mechanism with four levels of participation, where we at the top have a commission as the mode of participation which warrants the highest degree of individual responsibility, on the second level the different forms of instigation and ordering an accessory liability for those who prompt others to commit crimes under international law, on the third level assisting a crime, and finally contribution to a group crime, as the weakest mode of participation on the fourth level.[197]

The reason why this provision is important to decode in relation to ecocide is that ecocide is rarely committed by one single person, it is rather committed by corporations and CEOs do not commit ecocide in their capacity but rather through the corporation they manage. The potential form of criminal responsibility which could be useful for the liability of individuals within a corporation is Article 25(3)(a) of the Rome Statute. This article has been addressed by the ICC several times where it has been confirmed that a leader of an organisation can be criminally liable if this person uses the organisation to commit the crime.[198] In *Katanga* the ICC extended this provision to include persons who commit a crime through an organisation, in which the person holds a superior position and can accomplish the crime by ordering their subordinates whom they control. This can be argued to be a way to hold CEOs liable for their acts, as they use their control over the corporation to conduct their acts which in our case results in ecocide. However, the fact that the CEOs exercise their control over corporations and the employees to commit ecocide would not be enough to meet the standard set out in Article 25(3)(a) of the Rome Statute.[199] It is however, unlikely that this reasoning is applicable in the context of a corporation, as the ICC applies a high standard of *mens rea* in the abovementioned case because the individual must act with the necessary intent and knowledge under Article 30 of the Rome Statute.[200]

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[196] Oscar Van Den Heede, 'Ecocide as the Fifth Core Crime in the Rome Statute' (2022) 55 NYU Journal of International Law and Politics 435 <https://www.nyujilp.org/wp-content/uploads/2023/05/Commentary5.pdf> accessed 23 March 2024.

[197] ibid; Singhania (n 192).

[198] Van Den Heede (n 195); Singhania (n 192).

[199] Katanga (Judgment) paras. 1100–1106; Singhania (n 192).Ambos (n 122); Ambos and Triffterer (n 128).

[200] Prosecutor v. Ongwen, supra note 32, para 2782.

The nature of the crime of ecocide makes it unlikely that a person will intentionally engage in ecocide, and this in combination with the hierarchal structure of the military in the cases where the ICC discusses indirect responsibility based on control over organisations is much higher than the hierarchical structure of corporations, especially multinational corporations.[201] Furthermore, indirect perpetration requires a high degree of control due to the rule's rationale, which is that the indirect perpetrator exercises control over another person to an extent where this person cannot be considered autonomous. In a corporation, this requires that subordinates do not have any room for independent decisions. The structure of for example military juntas have tightly controlled hierarchies which do not enable any room for the subordinates to use their initiative. This is not the case for corporations, juntas operate through directions and corporations through delegation where the CEO is shielded by layers of hierarchies and often through separate legal entities.[202]

The second form of individual criminal responsibility is aiding and abetting based on Article 25(3)(c) of the Rome Statute. Just as in the case for indirect participation, the ICC applies a high *mens rea* standard for this form of liability under the Rome Statute which makes it difficult in this case to hold an individual within a corporation criminally liable in the context of ecocide.[203] This form of liability consists of anyone who aids, abets or otherwise assists in the commission or the attempted commission of a crime under international law which makes him or her legally liable under the provision. An archetypal form of assistance is providing the means for the commission of the crime and liability for assisting the primary perpetrator has been clarified in the jurisprudence of the *ad hoc* Tribunals.[204] The *mens rea* standard of this subparagraph is that a person's contributions need to be 'for the purpose' of facilitating the crime, and it is established that the purpose-requirement denoted a higher *mens rea* standard where it is not enough to show that a person had knowledge that his or her act would facilitate a crime. It introduces a higher subjective mental element and means that the accessory must have lent his or her assistance intending to facilitate the offence, it is not enough to have knowledge.[205] In the case where the proposed definition by the Panel has the requirement of intent, this means that a CEO must have intended to facilitate a wanton act of ecocide by his subordinates. To prove this would be extremely difficult because of the way corporations are organised.[206]

The most promising basis to hold an individual in a corporation liable is through Article 28 of the Rome Statute where the principle of superior responsibility is codified. This provision provides that a superior in an

[201] Kotzamani (n 190) 1108, 1132.
[202] Aparac (n 113); Singhania (n 192).
[203] Aparac (n 113).
[204] See Vasiljevic (Judgment), supra note 9; Blaškić (Judgment), supra note 44–45; Furundzija (Judgment).
[205] Ambos (n 122); Ambos and Triffterer (n 128).
[206]Aparac (n 113); Singhania (n 192).

organisation would be liable for the acts of those under their command and control. The challenges which are discussed in doctrine are for example the higher *mens rea* standard for civilians than it does for military commanders, where the latter has the requirement that they either knew or should have known that their forces were about to commit a crime.[207] In the case of civilians this requirement is that they either knew or consciously disregarded information that their subordinates were about to commit a crime. The reason why Article 28 is the most promising basis for liability in cases of ecocide, is because it criminalises negligent omissions by military commanders, which have led to the commission of crimes by their subordinates. Even if there are discussions in the *travaux préparatoires* to the Rome Statute which states the unwillingness to include recklessness as a mental element there must, to be able to target ecocide, be made an exception just as for Article 28.[208]

Furthermore, Article 28 has a higher *mens rea* for civilians than it does for military commanders, for the latter the requirement is that they either 'should have known'[209] that their forces were about to commit a crime. For civilians, this requirement is that it must be shown that they either knew or 'consciously disregarded information'[210], that their subordinates were about to commit a crime. Given the hierarchical structure of corporations and the lack of access to internal documentation, it would be difficult to prove that a CEO in the case of Article 28 knew or consciously disregarded information that their subordinates performed the criminal act.[211] Moreover, it must be shown that the crime and its concerned activities fall within the effective responsibility and control of the superior, and this would not be possible due to the abovementioned fact of the structure of a corporation.

In conclusion, recognising ecocide as a crime under the Rome Statute would enhance the Statute's effectiveness in addressing environmental atrocities. However, reforms are necessary to overcome the challenges of prosecuting corporate actors. Recommendations may include clarifying the *mens rea* standards and adapting the principles of superior responsibility to better suitcases of corporate ecocide.

[207] Art. 28(a)(i) of the Rome Statute.
[208] Van Den Heede (n 195).
[209] Art. 28(a)(i) of the Rome Statute.
[210] Art. 28(a)(i) of the Rome Statute.
[211] Article 28(b)(ii) of the Rome Statute;Singhania (n 192).

4 Case Study: The Planet v. Bolsonaro

4.1 Background of the case and AllRise's claim

This chapter aims to evaluate the potential liability under the Rome Statute and apply the present framework of international criminal law to the Planet v. Bolsonaro case, which is a pending case before the ICC. Additionally, the goal is to apply the IEP's definition of ecocide to the case to assess its potential efficacy and determine whether it may result in criminal liability for ecocide. The first step in doing this will be to provide an overview of the pending case and discuss the significance of the Amazon for both biodiversity and climate change. Second, in light of AllRise's pending claim, the possibility of prosecuting Bolsonaro for genocide and crimes against humanity through the provisions in the Rome Statute will also be examined in this chapter. Thirdly, the proposed definition of the Panel will be applied to the case to demonstrate how it would function in an actual situation and to determine whether it would result in any modifications to the Rome Statute's currently existing regulations. Finally, the analysis will conclude by applying Higgins' concept of ecocide to evaluate its potential impact. We will now move on to the examination of AllRise's claim.

Jair Messias Bolsonaro was elected as Brazil's president between 2018 and 2022. During his election campaigns, Bolsonaro promised his voters that he would never recognise any indigenous lands during his time in office and that his goal was to open up and facilitate the Brazilian Legal Amazon rainforest ('the Amazon' or 'the rainforest') for corporations and businesses for economic profit. Brazilian Legal Amazon is the name for the rainforest which comprises various biomes within the Brazilian territory.[212] Bolsonaro's views on the environment, indigenous peoples and the Amazon were not unknown when he was elected.[213] Even if the predecessors of Bolsonaro promoted the incorporation of the Amazon into the Brazilian economy and argued for the country's sovereign right over its territories, the time of Bolsonaro in office intensified the push for industrialisation. In addition to their animosity against European nations who backed conservation initiatives in the Amazon, Bolsonaro and his administration allowed further devastation and lawlessness in the region. Bolsonaro encouraged a surge in man-made forest fires, illegal gold mining, logging, and animal trafficking throughout the Amazon. This is noteworthy and crucial due to the Amazon's significance for biodiversity and

[212] Pedro HS Brancalion and others, 'Fake Legal Logging in the Brazilian Amazon' (2018) 4 Science Advances <https://www.science.org/doi/10.1126/sciadv.aat1192> accessed 20 May 2024.

[213] Guilherme De Queiroz-Stein, Carlos Alberto Seifert Jr and Aidee Maria Moser Torquato Luiz, 'Climate Change, Denialism, and Participatory Institutions in Brazil: Effects of the Bolsonaro Government's Environmental Strategy (2019–2022)' [2023] Brazilian Political Science Review <https://www.scielo.br/j/bpsr/a/FByDPnkScQdfsqQ4pBkBXvh/?lang=en#> accessed 20 May 2024.

climate change, as well as its value for over 20 million people, one million of whom are indigenous peoples who live there and depend on the Amazon for all aspects of their lives.[214]

AllRise, an Austrian Human Rights NGO, filed a complaint in October 2021 to the OTP of the ICC accusing Bolsonaro and other members of his government of crimes against humanity through the extensive deforestation in the Amazon.[215] The case is still pending before the ICC and prosecutor Karim Khan is still to decide if he is to initiate preliminary examinations against Bolsonaro and his political allies. Given that no one has ever been found guilty of comparable acts under international criminal law, Bolsonaro and his government members' conviction for environmental destruction would mark a significant turning point.[216]

In order to understand how the Bolsonaro administration's actions have affected the environment, ultimately resulting in the claim by AllRise, we must first grasp the importance of the rainforest in terms of its importance to the climate, human and environmental well-being. The Amazon is a unique biome due to its diversity of animal and plant species, the benefits it provides to human life through direct and indirect interactions with its ecosystems, and the presence of indigenous peoples who live in and conserve the ecosystems through their cultures. The rainforest is regarded as the lungs of the planet, it is also regarded as an essential part of ecological services for local tribes and communities. The Amazon is the only remaining rainforest on Earth of significant size and biodiversity.[217] The Amazon provides food, chemical compounds to create medications, and raw materials for companies, which are all beneficial to urbanised societies. One may, however, argue that one of the most important roles of the Amazon is its role in maintaining planetary health through regulating the Earth's climate by reducing carbon dioxide emissions. It can therefore be stated that the Amazon is not just a beautiful and culturally significant rainforest, it is an essential part of biodiversity preservation, climate regulation, energy production, food and water security, pollination,

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[214] Malayna Raftopoulos and Joanna Morley, 'Ecocide in the Amazon: The Contested Politics of Environmental Rights in Brazil' (2020) 24 The International Journal of Human Rights 1616 <https://www.tandfonline.com/doi/full/10.1080/13642987.2020.1746648> accessed 20 May 2024, 1616–1622.

[215] 'AllRise Commission of Crimes Against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to present, perpetrated by Brazilian President Jair Messias Bolsonaro and principal actors of his former or current administration' <https://www.allrise.at/theplanetvsbolsonaro> accessed 15 May 2024 (hereafter AllRise Claim).

[216] Matthew Gillett, 'Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict' in Carsten Stahn, Jens Iverson and Jennifer S Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (1st edn, Oxford University PressOxford 2017) <https://academic.oup.com/book/26778/chapter/195706176> accessed 20 May 2024, 225–230.

[217] ibid.

natural and biological control of pests, as well as the sources for the regional economy and human health.[218]

AllRise is accusing Bolsonaro and his political allies of crimes against humanity 'for directly and indirectly facilitating and accelerating the devastation of the Brazilian Amazon, leading to the international and uncontrolled environmental devastation of an ecosystem we all need for survival'[219] They argue that the Bolsonaro administration's environmental policy is what facilitated their 'criminal scheme' fuelled by the support of the *Bíblia, Boi e Bala* group ('BBB')[220] a group consisting of evangelicals, rich property owners, cattle and meat industry representatives and former members of security forces and former military personnel. The BBB and the Bolsonaro administration worked together and adopted a series of measures to reach the goal of economic profit through deforestation and harm to the Amazon rainforest. These acts included the legitimising of land-grabbing, granting amnesties for those who destroyed the Atlantic Forest which is a part of the Amazon, and allowing mining, cattle ranching and other forms of economic, industrial and administrative exploitation. These State Policies have resulted in severe harm to the local civilian populations and also our long-term survival because of their consequences for the global climate. [221]

These activities have undermined Brazil's national legislation in several ways. By legitimising illegal land-grabbing, the government has directly contravened Brazilian laws that protect land rights and environmental sanctity, encouraging unlawful activities and weakening the enforcement of existing legal protections. Granting amnesties to individuals who destroyed the Atlantic Forest undermines the rule of law by excusing past illegal activities, setting a precedent that environmental destruction can go unpunished, and eroding the deterrent effect of environmental regulations. Allowing mining, cattle ranching, and other forms of exploitation in protected areas contravenes the Brazilian Constitution, which guarantees the protection of the environment for present and future generations. This directly conflicts with constitutional mandates and existing environmental legislation.[222]

The institutional and administrative reorganisation that occurred during Bolsonaro's time in office further eroded Brazil's socio-environmental

[218] Joel Henrique Ellwanger and others, 'Beyond Diversity Loss and Climate Change: Impacts of Amazon Deforestation on Infectious Diseases and Public Health' (2020) 92 Anais da Academia Brasileira de Ciências <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0001-37652020000100724&tlng=en> accessed 20 May 2024.
[219] AllRise Claim (n 211) 5.
[220] The meaning of 'BBB' is *Bíblia, Boi e Bala* translated to English as Bible, Beef and Bullets; AllRise Claim (n 211) paras 40–42.
[221] AllRise Claim (n 211) p 5–7.
[222] Art. 255 of the Constitution of the Federal Republic of Brazil; AllRise Claim (n 211) 40–45.

protections. The government weakened federal agencies responsible for safeguarding rural communities and the environment by distorting their functions, replacing staff with unqualified military personnel, cutting budgets, removing resources and expertise, and silencing employees. These actions collectively reduce the capacity of these agencies to effectively enforce environmental laws, undermine the transparency and accountability mechanisms crucial for upholding the law, and diminish public trust in these institutions.[223]

Furthermore, AllRise states that Bolsonaro and important figures in his government, like Minister of Environment Ricardo Salles, are to blame for the acts and policies that were mercilessly and unwaveringly pursued against the environment and the Indigenous peoples living in the Amazon. AllRise states that the government's encouragement was the start signal to the *Ruralistas,* a group consisting of entities of organised crime groups, malign corporations, large farmers and politicians, as well as the BBB. The government tolerated and actively encouraged the groups' illegal enrichment at the expense of the Amazon, Cerrado, and Pantanal biomes, which are all part of the Legal Amazon, as well as the communities that inhabit and depend on them. Since January 1st, 2019, this group of unlawful land grabbers, loggers, miners, traffickers, and other criminals have operated deliberately with State support.[224] Two groups are therefore responsible for exploiting the Amazon rainforest. Firstly, state-sanctioned actors whose actions were facilitated and encouraged by the Bolsonaro government, ultimately benefiting the government.[225] Secondly, land grabbers, loggers, miners, traffickers, and other criminals who carried out acts of mass deforestation, illegal mining, and the destruction of the Amazon, as detailed in this section.

What is stated by AllRise in their complaint is consistent with the news coverage during this period and also studies conducted to establish the extent of the caused damage. In 2019, at the beginning of Bolsonaro's presidency, Brazil was the largest greenhouse gas emitter in the world responsible for 2,9% of global emissions.[226] Even though the greenhouse gases dropped globally by 7 % because of the COVID-19 pandemic, the emissions in Brazil increased by 9,5% during the pandemic.[227] Brazil welcomed 2020 with emission rates at their ultimate peak, where 2,16 billion tonnes of carbon dioxide was produced through the exploitation of the Amazon, through fires to free land for

[223] AllRise Claim (n 211) 11 paras. 40–42.
[224] AllRise Claim (n 211) 11 paras. 40–42.
[225] See examples of statements concerning Bolsonaro's environmental policy and view on the Amazon and the Indigenous peoples of Brazil 'What Brazil's President, Jair Bolsonaro, has said about Brazil's Indigenous Peoples' (*Survival International*) < https://survivalinternational.org/articles/3540-Bolsonaro> accessed 10 May 2024.
[226] AllRise Claim (n 211) 20–25.
[227] 'Brazil: Accelerating Deforestation of Amazon a Direct Result of Bolsonaro's Policies' [2020] Amnesty International <https://www.amnesty.org/en/latest/press-release/2020/12/brazil-accelerating-deforestation-of-amazon-a-direct-result-of-bolsonaros-policies/> accessed 11 May 2024.

agriculture, mass deforestation, and logging as presented above. In 2021 the same emissions increased by 12,2% resulting in the emission of 2,42 billion tonnes of carbon dioxide.[228]

The increase in the emissions from Brazil is according to the Brazilian coalition of civil society organisations *Observatório do Clima*[229] a result of the mass deforestation and harm to the Amazon. The escalation of the deforestation and conversion of native vegetation led to the loss of natural habitats accounting for almost half (49%) of Brazil's greenhouse gas emissions where almost most of them stemmed from the destruction of the Amazon (77%) and the Cerrado (9,8%) biomes.[230] Brazil established the National Policy on Climate Change (NPCC) in 2009, aiming to reduce deforestation in the Legal Amazon by 80% by 2020 compared to the average from 1996 to 2005. The limit for yearly deforestation in 2020 is set to 3,925 km².[231] In 2012, Brazil nearly met the reduction target in the Legal Amazon with an annual primary forest loss of 4,571 km², following an 8-year drop in deforestation rates. Since 2013, deforestation in the Legal Amazon has increased by 185%, particularly after the 2018 elections when electing Bolsonaro.[232]

Official data shows that the total deforestation increased from 7,536 km² in 2018 to 10,129 km² in 2019, and 10,851 km² in 2020. In 2020, the Amazon deforestation rates exceeded the NPCC's goal by more than two times. The difference was 6,926 km² or three times the size of Luxembourg. In 2021, deforestation increased to 13,038 km², exceeding the NPCC threshold by more than three times. The disparity between the 2021 predicted deforestation and the NPCC's 2020 objective is approximately 9,310 km², equivalent to the size of Cyprus.[233] The Amazon fires in 2019 resulted in the loss of 529 km² of forest which is a 171% increase between the period of April 2019 and April 2020.[234] The losses of the rainforest during Bolsonaro's time in office are a direct result of the Bolsonaro administration's encouragement of environmental crimes, hostility against indigenous peoples, agrarian reforms and the change of the Federal Justice Department's mandate for the inspection of the

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[228] 'Structural Violation of the Right to a Clean, Healthy and Sustainable Environment Perpetrated by the Brazilian Government: A Submission on Environmental Destruction, Climate Change and Human Rights Abuses in Brazil' <https://wwfbrnew.awsassets.panda.org/downloads/structural_violation_of_the_right_to_a_clean_and_healthy_environment.pdf> accessed 2 May 2024 Annex A.

[229] Raftopoulos and Morley (n 213).

[230] 'Home Learn About Brazil's greenhouse emissions' (*Observatorio do* Clima) <https://seeg.eco.br/en/home/> accessed 1 May 2024.

[231] Art. 19(1) item I of the Brazilian Law 12,187/2009.

[232] 'Structural Violation of the Right to a Clean, Healthy and Sustainable Environment Perpetrated by the Brazilian Government: A Submission on Environmental Destruction, Climate Change and Human Rights Abuses in Brazil' (n 224) Annex A.

[233] ibid.

[234] Jonathan Watts, 'Amazon Deforestation at Highest Level in a Decade' *The Guardian* (18 November 2019) <https://www.theguardian.com/environment/2019/nov/18/amazon-deforestation-at-highest-level-in-a-decade> accessed 15 May 2024.

limitations of unlawful logging and mining in the Amazon, areas where 60% of all deforestation took place.[235]

Brazil's goal of eradicating opposition organisations and environmental legislation to permit development in the Amazon, despite the detrimental social and environmental consequences, is closely linked to arguments about sovereignty. Brazil's goal of eradicating opposition organisations and environmental legislation to permit development in the Amazon, despite the detrimental social and environmental consequences, is closely linked to arguments about sovereignty. The Bolsonaro administration, backed by pro-agriculture and beef lobbies, frames the climate agenda as a conspiracy driven by foreign interests. This narrative is encapsulated in Bolsonaro's assertion that 'the Amazon is ours, not yours',[236] reflecting a nationalist stance that rejects international cooperation and interference. This perspective is rooted in a traditional concept of national sovereignty, which holds that each nation has exclusive control over its domestic affairs. However, the global implications of Brazil's policies, such as mass deforestation, illegal mining, and significant carbon emissions, challenge this absolutist view. The Amazon, a crucial global resource, affects global temperatures, biodiversity, and climate stability. Hence, Brazil's actions are not just national issues but global concerns.[237]

As the protection of the Amazon is essential to meeting climate change targets, the issue of sovereignty is at the top of the agenda for international governance.[238] Bolsonaro's influence in reducing the responsibilities, resources, and legal power of environmental protection agencies, combined with Minister of Environment Ricardo Salas' dismissal of the director in charge of successful anti-mining operations on indigenous lands, has systematically weakened environmental safeguards in the Amazon. This breakdown of authority has increased deforestation. In 2019, IBAMA, Brazil's national environmental authority, imposed the lowest fines for illegal deforestation in almost a decade, and both fines and seizures of illegal timber fell dramatically. During Bolsonaro's first months as president, authorities seized barely a quarter of the illegal timber confiscated the year before. This government's actions have hampered environmental efforts while also removing protection for Indigenous Peoples, particularly those in the Amazon, and have ultimately resulted

[235] 'COP26: Don't Be Fooled by Bolsonaro's Pledges Brazil Still Lacks Credible Plan to Save Rainforest as Amazon Crisis Persists' *Human Rights Watch* (2 November 2021) <https://www.hrw.org/news/2021/11/02/cop26-dont-be-fooled-bolsonaros-pledges> accessed 19 May 2024; 'Rainforest Mafias How Violence and Impunity Fuel Deforestation in Brazil's Amazon' *Human Rights Watch* (17 September 2019) <https://www.hrw.org/report/2019/09/17/rainforest-mafias/how-violence-and-impunity-fuel-deforestation-brazils-amazon> accessed 19 May 2024.

[236] Adriana Erthal Abdenur and Robert Muggah, 'Preserving Brazil's Sovereignty Means Taking Responsibility for the Amazon' [2019] IPI Global Observatory <https://theglobalobservatory.org/2019/09/preserving-brazils-sovereignty-means-taking-responsibility-for-amazon/> accessed 14 May 2024.

[237] Raftopoulos and Morley (n 210) 1620.

[238] ibid.

in the ongoing disaster of mercury poisoning[239] which will be explained in chapter 4.2. Bolsonaro even suggested a law in February 2020 to legalise commercial exploitation of indigenous lands,[240] raising concerns about increased invasion and deforestation. Human Rights Watch emphasised the risks encountered by indigenous activists working to defend the Amazon, such as threats and assault.[241]

The facts provided in this section and the explanation of the claim made by AllRise justify the NGO's argumentation which is that the Bolsonaro administration can be found guilty of crimes against humanity through two ways of reasoning. Firstly, since taking office in January 2019, President Bolsonaro, Mr. Salles, and other members of the Bolsonaro administration have relentlessly pursued a State Policy aimed at the ecosystems of the Brazilian Legal Amazon and its inhabitants. As stated above, this State Policy had the aim to enable, facilitate and encourage the unsustainable exploitation of the Amazon, despite full knowledge of the environmental consequences and criminal consequences in light of national legislation. Secondly, AllRise asserts that as a consequence of this state policy, numerous attacks have occurred, resulting in significant environmental destruction, loss of human life, and various forms of severe physical and mental violence and humiliation against the Amazon and its inhabitants The severity of the climatological, ethnological, and ecological devastation inflicted is such that, according to leading scientific opinion, the effects of this assault will be felt not only locally, but also regionally and globally, for many years to come. This enables the applicability of Article 7(a), (h) and (k) of the Rome Statute which will be elaborated further upon in the next chapter.[242]

Before moving on to the next part of this analysis, it must be stated that there are challenges and opportunities with AllRise's claim. The challenges with this case are both in relation to this case particularly, but also the chosen method when applied to all other possible cases. The anthropocentric nature of the Rome Statute and its well-established crimes against humanity, makes the OTP face a great disadvantage as Voigt and Ambos rightfully point out.[243] There is no legal training within the court to address environmental crimes.

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[239] 'Mercury Exposure Widespread among Yanomami Tribe in Amazon, Report Finds' *VOA-News* (6 April 2024) <https://www.voanews.com/a/mercury-exposure-widespread-among-yanomami-tribe-in-amazon-report-finds-/7557828.html> accessed 2 May 2024; Joel Henrique Ellwanger and José Artur Bogo Chies, 'Brazil's Heavy Metal Pollution Harms Humans and Ecosystems' (2023) 2 Science in One Health <https://linkinghub.elsevier.com/retrieve/pii/S2949704323000136> accessed 20 May 2024.

[240] John Cannon, 'Gold Mining Threatens Indigenous Forests in the Brazilian Amazon' *Mongabey* (8 April 2020) <https://news.mongabay.com/2020/04/gold-mining-threatens-indigenous-forests-in-the-brazilian-amazon/> accessed 12 May 2024.

[241] 'COP26: Don't Be Fooled by Bolsonaro's Pledges Brazil Still Lacks Credible Plan to Save Rainforest as Amazon Crisis Persists' (n 234); 'Rainforest Mafias How Violence and Impunity Fuel Deforestation in Brazil's Amazon' (n 234).

[242] AllRise Claim (n 211) 45.

[243] Voigt (n 114); Ambos (n 113).

The prosecutor and OTP might not think this case is worth pursuing or a priority, which is the second challenge indicated for this case. The OTP might not find their argument sufficient, even though it covers the essential topics of jurisdiction and admissibility. The conflict in Ukraine and Gaza are significant international event to consider. This claim was filed in October 2021, four months ahead of the start of the war in Ukraine, which decreased the likelihood that the OTP would select it quickly. It therefore seems unlikely that the case will be selected prior to the conflicts ending.

This case presents a crucial opportunity as it offers a positive driving force for the ICC's efforts to incorporate the prosecution of environmental crimes or ecocide within its material jurisdiction. It has the potential to establish legal precedent for prosecuting environmental damage and could support efforts to amend the Rome Statute to include ecocide as a new core crime. Additionally, it could illuminate the current gaps in the Rome Statute. Although, as discussed in this essay, environmental damage and ecocide could theoretically be addressed under the crimes of genocide and crimes against humanity, applying an anthropocentric provision to an eco-centric crime would be contradictory to the concept of ecocide and would not result in liability.

4.2 The applicability of the crimes in the Rome Statute

This leads us to the essential question, could Bolsonaro and his political allies such as members of his government, private individuals and corporations have committed ecocide? Ecocide is, as stated several times in this essay, broadly understood as mass damage and destruction of ecosystems and/or the wilful and widespread destruction of the environment.[244] The acts described in the passages above and the consequences of the actions only point to one direction, the mass damage and destruction of the Amazon. The political and legislative initiatives by Bolsonaro such as enabling commercial mining, oil and gas exploration, cattle ranching and agricultural business, and projects on hydroelectric dams and tourism, are what have caused the mass deforestation. This has led to an increase in carbon dioxide emissions and the deterioration of the environment with rich culture and biodiversity.[245]

The potential to prosecute Bolsonaro and his allies, such as ministers at the ICC, is possible through the crimes against humanity exactly as AllRise argues for in their submission to the court, which is outlined previously in this chapter. The court's statements on their intention to push towards investigation and prosecution of international crimes arising out of land grabbing, illegal exploitation of natural resources and environmental destruction in peacetime speaks for a possible change. The launch of the public consultation by the OTP for a new policy initiative to advance the accountability for environmental crimes under the Rome Statute also speaks for a possibility of prosecution through the provision on crimes against humanity.[246]

The applicability of Article 7 of the Rome statute through subparagraphs 7(1)(a), (h) and (k), Article 6 and Article 25(3)(c) as Bolsonaro, Salles and other members of the Bolsonaro administration acted on a State Policy undermining and harming the ecosystem and the people who depend on it. This policy had the ultimate goal, as described above and as seen through several statements by Bolsonaro, to facilitate the unsustainable expropriation of the natural resources of the Amazon for economic profit and political points for successfully lobbying against the Indigenous communities of the Amazon. Furthermore, it also had the encouragement for extended 'rights' to benefit from the environment for land grabbers, illegal loggers, and miners to invade the region resulting in violence and deforestation. The acts have been '[…] dressed up as legitimate economic development in the sovereign interest of

[244] See fn 26 of this thesis.

[245] Jan Rocha, 'Bolsonaro Sends Congress Bill to Open Indigenous Lands to Mining, Fossil Fuels' *Mongabay* (7 February 2020) <https://news.mongabay.com/2020/02/bolsonaro-sends-congress-bill-to-open-indigenous-lands-to-mining-fossil-fuels/> accessed 3 May 2024.

[246] Office of the Prosecutor, 'Policy paper on case selection and prioritisation' (n 11).

the Brazilian people'.[247] The State Policy and acts of the Bolsonaro administration are the widespread attacks on the Amazon and its inhabitants which has resulted in the persecution, murder and inhumane suffering in the region as well as the global population through the increased emissions. The ongoing widespread attack on the Amazon could be stopped through the prosecution with the provisions on Crimes against humanity which, as stated above requires that there must have been an act committed as part of a 'widespread or systematic attack' that was 'directed against any civilian population' and that the accused had 'knowledge of the attack'.[248]

The Bolsonaro regime is attacking the Brazilian Legal Amazon and its inhabitants in order to meet the 'widespread or systematic attack' requirement of crimes against humanity. Furthermore, Bolsonaro has 'knowingly facilitated and promoted' a 'widespread attack upon the Amazon and those who defend and depend on it', through them. Intentionally adopted a governmental policy encouraging and facilitating the criminal attacks and effects of the attacks on the civilian population. Out of the thirty million inhabitants of the Brazilian Amazon, or twelve per cent of the country's total population, seventy per cent are concentrated in the rare urban centres, with the remaining population comprising Indigenous communities. As we can see from the previous chapter the Amazon's vitality for communities' survival is intimately tied to the ecosystems of the Amazon, as they rely on it for natural resources, food, water, shelter, and other necessities. As these attacks were carried out in line with and support an official state policy implemented by the Bolsonaro government, and the attacks were widespread and against a civilian population the perquisites of crimes against humanity seem to be fulfilled.[249]

Furthermore, the explained acts committed by the Bolsonaro administration could ultimately result in the crime of genocide as the destruction of the environment is affecting the indigenous peoples negatively. The administration's encouragement and support of the illegal exploitation of the Amazon has resulted in the ecological disaster which is currently occurring in the Amazon through illicit gold mining and the widespread mercury contamination found among the Yanomami Indigenous peoples. The widespread contamination of rivers and ecosystems caused by the mining operations poses a threat not just to human health, but also to the fragile equilibrium of the biodiversity of the Amazon.[250] The Mercury pollution is affecting the Yanomami community in a way which is threatening their health and ultimately the group's destruction. The acts of the Bolsonaro administration are what enabled and made it easier for these mines to open even though they are illegal.

[247] AllRise Claim (n 211) 9.
[248] Art. 7 of the Rome Statute.
[249] AllRise Claim (n 211) 31–32.
[250] Claudia Vega and others, 'Human Mercury Exposure in Yanomami Indigenous Villages from the Brazilian Amazon' (2018) 15 International Journal of Environmental Research and Public Health 1051 <http://www.mdpi.com/1660-4601/15/6/1051> accessed 20 May 2024.

It could therefore be argued that the Bolsonaro government could be responsible for the crime of genocide as they have facilitated the mining company's acts in the region which have ultimately resulted in the act of genocide where a part of a national, ethnical and racial group has been targeted to kill members of the group, cause serious bodily and mental harm, deliberately inflicting their conditions of life to bring its physical destruction.[251]

The method of facilitating illegal mining [252] in the region by Bolsonaro and his statements regarding his and his government's views on the indigenous peoples, as 'There is no Indigenous territory where there aren't minerals. Gold, tin and magnesium are in these lands, especially in the Amazon, the richest area in the world. I'm not getting into this nonsense of defending land for Indians' and 'We are going to integrate them into society. Just like the army which did a great job of this, incorporating the Indians into the armed forces'.[253] Bolsonaro's statements can be further exemplified, but they all have the common denominator of dehumanising the Indigenous peoples and threatening to destroy their community by imposing his government's policy of profiting and capitalisation of the Amazon and its resources. In this case, environmental destruction is what is causing the deaths of the indigenous peoples. The applicability of the crime of genocide through Article 6(c) of the Rome Statute can therefore be justified as there is an act; the illegal mining, deforestation etc. conducted through the Bolsonaro administration's State Policy, with the clear intent of destroying the indigenous group of peoples by the government which is highlighted in Bolsonaro's and his governments rhetoric against the group and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. As established in chapter 3.2 of this thesis, the main issue with the genocide convention on environmental damage is that it has a high intent requirement, but it is also anthropocentric in the sense that it has been created to protect humans. Bolsonaro's political decisions and statements have made the indigenous peoples suffer a 'slow death' as detailed earlier in this thesis.

Bolsonaro's actions could also be classified as crimes against humanity due to his state policies, which have led to murder, extermination, and other inhumane acts causing serious harm and injury to the communities living in the Amazon. The environmental damage resulting from these policies has

[251] Claudia Vega and others, 'Human Mercury Exposure in Yanomami Indigenous Villages from the Brazilian Amazon' (2018) 15 International Journal of Environmental Research and Public Health 1051 <http://www.mdpi.com/1660-4601/15/6/1051> accessed 20 May 2024.

[252] 'Brazil: Indigenous Rights Under Serious Threat Government Undermines Agency Tasked with Protecting Indigenous Peoples' *Human Rights Watch* (9 August 2022) <https://www.hrw.org/news/2022/08/09/brazil-indigenous-rights-under-serious-threat> accessed 19 May 2024.

[253] 'What Brazil's President, Jair Bolsonaro, Has Said about Brazil's Indigenous Peoples' *Survival International* (12 April 2018) <https://www.survivalinternational.org/articles/3540-Bolsonaro> accessed 20 May 2024.

severely impacted these groups, triggering the application of Article 7. It's important to note that the provision is focused on human victims, rather than environmental damage itself, as the concept of crimes against humanity is anthropocentric, unlike the ecocentric concept of ecocide. The threshold of being part of a widespread or systematic attack directed against any civilian population established under crimes against humanity would be met through the coordinated policy that targeted indigenous peoples was encouraged and facilitated by the government. These acts were widespread, affecting at least 60% of the rainforest, as mentioned earlier. Combined with Bolsonaro's public statements about indigenous peoples, this could fulfil the knowledge requirement. Bolsonaro has repeatedly expressed that he wants the Amazon for corporate exploitation and has argued that indigenous people do not have more rights to the land than the rest of the population.

In greater detail, Bolsonaro can be found guilty of committing crimes against humanity through the crimes of extermination (Article 7(1)(b)), Forcible transfer of population (Article 7(1)(d)), Persecution (Article 7(1)(h)) and Other inhumane acts (Article 7(1)(k)) of the Rome Statute. His State Policy, explained in this thesis, has enabled the continuous extermination through the destruction of the population means for survival through the mass environmental damage to the Amazon. Forcible transfer of indigenous groups from the Amazon because of man-made mass fires, and gold mining causing mercury-poisoned water leaving no choice for the population but to leave their lands. Furthermore, the extensive damage, destruction and ultimately loss of the Amazon ecosystem are deliberately targeted to harm the indigenous groups. This would enable the applicability of the provision as the acts of the government and its corporate allies have resulted in the ultimate widespread, severe and long-term damage to the indigenous groups and also the environment. Ecocide has been used as a tool to conduct crimes against humanity, which leads us to the last crime of other inhumane acts. If none of the other listed crimes would be applicable, this provision could be used as it is the provision which poses the significant possibility for the ICC to broaden its interstation and include environmental damage as a method of crimes against humanity. Ultimately, as established under chapter 3.3 in this thesis, the issue at hand is not whether Bolsonaro could be found guilty of genocide or crimes against humanity, it is that he would be liable for ecocide through the anthropocentric legislation. It is therefore apparent that there is a need for a new ecocentric crime in international law, which is also why we now will move on to assess the IEP's definitions and applicability to the acts of Bolsonaro and his government.

4.3 The applicability of the IEP's definition

In order to answer the research question of this essay, we have to delve into the applicability of the Panel's proposed legal definition for the crime of ecocide to this case which, as stated in the argumentation above, could be seen as a textbook example of ecocide as there is a perpetrator, long-term and widespread damage to the environment. In this example, we have to imagine that the proposed amendment is indeed a part of the Rome Statute and as established in the chapter regarding the Panel's definition. The questions which are aimed at being answered are what is needed in order for the proposed legal definitions applicability and what are the possible effects for this case, would it make a difference considering the possibility we have with the provision on crimes against humanity?

The Panel's definition has two thresholds for prohibited conduct. The first threshold is that there must exist a substantial likelihood that the conduct (which includes an act or omission) will cause severe and either widespread or long-term damage to the environment.[254] The second threshold is that there must be proof that the acts are unlawful or wanton, the Panel states that this is because they consider it necessary to include such a threshold as there are legal, socially beneficial and responsibly operated activities 'impacts that nonetheless cause (or are likely to cause) severe and either widespread or long-term damage to the environment'.[255] The Panel states that this second threshold draws upon the existing environmental law principles and that it balances 'social and economic benefits with environmental harm through the concept of sustainable development'.[256]

When pursuing charges for this offence, these two thresholds would demand that the prosecutor establishes there is a substantial likelihood of causing severe and either widespread or long-term damage through acts or omissions that are either unlawful or wanton.[257] It can be stated that the *actus reus* of this definition is 'unlawful or wanton acts' likely to result in 'severe and either widespread or long-term damage to the environment' and the *mens rea* is '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 specified term 'wanton' or the wantonness requirement is also a *mens rea* requirement as it requires a specific mental state of the perpetrator which is 'reckless disregard for damage which would be excessive about the social and economic benefits anticipated'. The Panel's definition will now be applied to the case The Planet vs. Bolsonaro, to explain how the *actus reus* and *mens rea* can be interpreted through this case study.

The perpetrators in this case are Bolsonaro, his administration, and individuals involved with the destruction of the Amazon such as farmers, businesses

[254] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n10) 7.
[255] ibid.
[256] ibid.
[257] ibid.

and corporations ultimately conducting acts of deforestation and harm to the environment through the Bolsonaro environmental policy. The objective of the definition, the *actus reus*, is the elements of 'unlawful or wanton acts' likely to result in 'severe and either widespread or long-term damage to the environment'. The act, which is defined as '[…] single acts or omissions, or cumulative acts or omissions',[258] conducted in this case is the mass deforestation of the Amazon to open it up for illegal logging, agriculture, mining etc. These acts are prohibited through Brazil's national legislation[259] and nature is protected through the Brazilian constitution,[260] despite this there is no crime of ecocide in the national legislation. The issue with the national legislation seems to be the possibility of conducting the criminalised acts through approvals from governmental authorities as the Articles Protecting the environment in Brazil have exceptions for socially and economically beneficial conducts such as infrastructure projects, mining, the production of timber, agriculture, fishing etc.[261] Even if mass deforestation is illegal in Brazil through national legislation the Bolsonaro administration in power still enabled the destruction of the Amazon to increase. This clearly shows that there is a need for both national legislation on ecocide, as the Socialist Party (PSOL) have suggested in parliament,[262] but also international legislation to make sure that leaders and corporations who carry out the acts which cause mass destruction to the environment will still be held liable even though the acts are in line with the government's policies and supported by the government. The acts can be considered as 'unlawful' when applying the Panel's definition.

To clearly show the possible applicability of the definition, the requirement of 'wanton' will be applied to the same case, even though most of the acts conducted by the encouragement, support and environmental policy of the Bolsonaro administration are illegal in Brazil's national legislation and should thus fall under 'unlawful acts'. This sentence sums up some of the critiques the Panel has received on their definition as the requirement of 'unlawful' acts puts the responsibility on national legislation when the main objective of even considering the creation of a new international regime should be to develop the main purpose of international law, to promote global order and the realisation of humanity's core objectives, which include the

[258] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n10) 10.

[259] See Chapter V Section II on Crimes against the Environment Art. 30-53 and Chapter V Section III on Pollution and other Environmental Crimes Articles 54-55 and 60 on 'The crimes against Flora' in the Environmental Crimes Law.

[260] Art. 255 of the Constitution of the Federal Republic of Brazil.

[261] See Chapter V Section II Article 39, 46, 51 and 52 in the Environmental Crimes Law in Brazil.

[262] 'PSOL e Entidades Querem Transformar Ecocídio Em Crime No Brasil' *PSOL* (2 June 2023) <https://psol50.org.br/psol-e-entidades-querem-transformar-ecocidio-em-crime-no-brasil/> accessed 13 May 2024.

advancement of peace, prosperity, human rights, and in this case environmental preservation and protection.[263]

The threshold of 'wanton' acts states that the acts must be committed with reckless disregard for damage which would be excessive in relation to the social and economic benefits anticipated. The 'social and economic benefits anticipated' is a form of a proportionality test, which serves the purpose of reflecting environmental law principles, as the Panel puts it.[264] In this case study and other real-life cases when applying this suggested definition, this would lead to confusion regarding how it should be applied. Even if the 'wanton' requirement is a part of the *actus reus*, it introduces another *mens rea* element through the inclusion of 'reckless disregard', wantonness is a *mens rea* requirement. For the acts of the Bolsonaro administration to be wanton, they therefore need to be committed with reckless disregard for damage which would be excessive in relation to the social and economic benefits anticipated. The main issue with the wantonness threshold is that for the act to be wanton, the perpetrator must know that his or her act will cause severe and either widespread or long-term damage to the environment and also be aware of the fact that the damage will be excessive concerning the social and economic benefits which he or she can anticipate. How can we prove that the perpetrator, the Bolsonaro administration was aware of the substantial likelihood of their acts to cause the required environmental damage as well as proving that the perpetrator was also aware that the actions could be more excessive concerning the anticipated benefits?

This requires the perpetrator and the prosecutor to think twofold, first, to have knowledge that the perpetrator's acts will cause severe and either widespread or long-term damage to the environment and second, that he or she must make a judgment of value on how much he or she will benefit from the wanton act. The applicability of this part of the provision is very unclear, and we have little guidance from the commentary to the definition, what is for example recklessness within 'reckless disregard'? Heller has posed the question if it is awareness of a substantial likelihood which makes it a recklessness requirement or *dolus eventualis*.[265]

The next step when applying the provision is to look at the *mens rea* of the definition. The perpetrator who commits the acts must know that his or her actions can lead to the substantial likelihood of severe and either widespread or long-term damage to the environment. The *mens rea* of the proposal is what has received the most criticism from various scholars and

[263] Ambos (n 113); Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)' (n 113).
[264] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n10) 7.
[265] Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)' (n 113).

commentators.[266] The inclusion of recklessness and *dolus eventualis* as synonymous in the definition is criticised, as they are two different *mens rea* standards. This in combination with the text itself using the term 'knowledge' makes this part of the definition difficult to interpret as well. The meaning of the term 'knowledge' is clearly defined in Article 30 of the Rome Statute and it is not synonymous with recklessness or *dolus eventualis* standard.[267]

Another key issue is the view of the word 'recklessness', as discussed in the chapter regarding the Rome Statute, is the opposition to including recklessness in the Rome Statute which resulted in Article 30 reflecting the discussions by only establishing intent and knowledge as the permissible *mens rea* standard. The other form of *mens rea* is the wantonness threshold which means that the definition has two *mens rea* standards for one crime. The wantonness requirement is problematic because it introduces a second type of recklessness as it is defined in the proposal as 'reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated'. This makes the crime impossible to prosecute as well as posing different *mens rea* standards to be applied to the one hand unlawful act and the other wanton acts. The wording of this part of the definition introduces an anthropocentric focus on the damage to the environment as there is a cost-benefit analysis to be interpreted by future prosecutors. It is anthropocentric because it implies that it can be acceptable to cause damage in the way described in the definition; severe, widespread or long-term, if the perpetrator shows that the acts which caused the damage were not excessive in relation to the social and economic benefit which they anticipated.

Bolsonaro, could with this definition, argue that the acts are neither unlawful nor wanton. They could do this by proving that there were legal exceptions for the corporations which conducted the deforestation to open up new mines, cattle breeding, agriculture etc. Wanton acts would also be difficult to prove as the purpose of the massive deforestation of the Amazon was because of the social and economic benefits it would have to the country. It would be sufficient to argue that they had made social and economic profits. Therefore, as long as individuals benefit financially, environmental destruction could be justified and this provision would not target all potential impacts of deforestation as the cost-benefit analysis would lead to each party trying to point that their side is correct in the sense that the prosecuted would show evidence that

[266] See Ambos (n 122); Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)' (n 113); Michael Karnavas, 'Ecocide: Environmental Crime of Crimes or Ill-Conceived Concept?' [2021] Opinio Juris <https://opiniojuris.org/2021/07/29/ecocide-environmental-crime-of-crimes-or-ill-conceived-concept/> accessed 20 May 2024; Cusato and Jones (n 93); Rachel Killean and Damien Short, 'A Critical Review of the Law of Ecocide' [2023] SSRN Electronic Journal <https://www.ssrn.com/abstract=4605681> accessed 20 May 2024.

[267] Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)' (n 113).

the act fulfils the cost-benefit requirement and that they should not be liable, and the prosecutor would do the same leading to a 'battle of experts'.[268]

The issues with the possible prosecution through the suggested definition by the Panel are therefore the wantonness criteria and the fact that the definition relies on national legislation to develop the unlawful threshold to be able to be fulfilled. The issue is furthermore, the *mens rea* of the definition as it requires the perpetrator and the prosecutor to think twofold; first, to know that the perpetrator's acts will cause severe and either widespread or long-term damage to the environment and second, that he or she must make a judgment of value on how much he or she will benefit from the wanton act. This complexity of the *mens rea* does not convince this author of the effective prosecution and applicability of the definition, which was one of the Panel's main objectives with the definition.[269] It can therefore be stated that this author thinks that this definition will be difficult to use for this case and that the road taken by AllRise poses a better outcome as it is easier to argue through anthropocentric interest rather than ecocentric within international law.

4.3.1 Liability under the proposed definition and ICL

Another very central issue which needs to be taken into consideration when applying this proposed definition is the question of liability. If we imagine that all of the perquisites are fulfilled in the case of The Planet vs. Bolsonaro, the acts are either unlawful or wanton and they meet the threshold of being severe, widespread or long-term which in itself established a disjunctive/conjunctive requirement[270], who will be held liable with this definition? The definition seems to forget the question of liability, as discussed previously in this thesis. Christina Voigt has stated that the reason for the definition not addressing the question of liability is because the Panel thinks that the already existing rules in the Rome Statute are sufficient.[271] This is in this author's opinion, not entirely true as the main objective which has been established by Higgins is that we need a system change. The main issue which I now intend to address when applying the rules of liability in this case study is to highlight the central issue within ICL, individual responsibility, where the nature of the crime is that it is corporations who conduct the mining, logging, deforestation etc. and in this case with governmental support. The idea[272] is that making CEOs personally accountable will discourage companies from engaging in environmentally harmful business practices. However, the efficacy of this proposal

[268] Heller, 'The Crime of Ecocide in Action' (n 113).
[269] 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n10) 6.
[270] Darryl Robinson, 'Your Guide to Ecocide: Part 1' [2021] Opinio Juris <https://opiniojuris.org/2021/07/16/your-guide-to-ecocide-part-1/> accessed 12 May 2024.
[271] Voigt (n 114).
[272] 'Making Ecocide a Crime' (n 26).

hangs on two critical factors: first, whether CEOs can indeed be held accountable under the Rome Statute, and second, whether holding CEOs accountable will contribute to changes in corporate conduct.[273]

The Panel's definition will not change the current responsibility regime in the Rome Statute, where the court only has jurisdiction over natural persons, or in other words individual responsibility recognised under Articles 25 and 28. The Statute does not have any jurisdiction over legal entities, which does not seem to pose a great issue when it comes to liability for CEOs however, we should think about the purpose of the incorporation of ecocide into the Rome Statute. The approval of ecocide as a crime, if ratified by the States, would not change the existing legal framework as stated by Jelena Aparac and Vrishnak Singhania, which gives the ICC jurisdiction over individuals and not legal entities. Individuals who commit crimes covered by Articles 25 and 28 of the ICC's jurisdiction are prosecuted accordingly. ICL has a long history of holding people accountable for collective crimes, regardless of whether they were committed directly, indirectly through an organisational structure, or as a result of a failure to prevent or punish them. Though no such charges have been brought since 2002, company directors, as the highest-ranking civilian authorities, may be held liable before the ICC for crimes committed by their enterprises. Due to the definition, business leaders could face criminal charges if ecocide is conducted.[274]

As it has been identified in the section regarding modes of liability in the Rome Statute, the central issue in this case with Bolsonaro would be that there are several parties to the act. Bolsonaro did not act alone, he and his government as well as corporations acted together. This is also the case for ecocide in general, a single person cannot commit ecocide alone, and a person can only operate in a bigger network.[275] The only way to solve this issue is through the inclusion of answers to the questions which arise from the lack of an explanation of how legal entities are a part of the crime and that the gap of the ICC, not having jurisdiction over judicial persons is the central issue. It should therefore be considered to include liability for corporations, whether through the amendments to include ecocide within the Court's jurisdiction or by the amendments of the existing rules. The reason for this is that criminalisation will not be effective if we do not see the broader picture as is illustrated with the Bolsonaro case. Bolsonaro encouraged the acts which constitute ecocide but he did not personally start the mass fires to open up the Amazon to corporations. He made it easier for corporations and others to establish in the Amazon, but he could not possibly have had all the information to know to what extent the damage would be. Even if Bolsonaro did know to what extent the damage was, how could the prosecutor prove that he did? It is therefore better to prosecute Bolsonaro through the regime of crimes against humanity

[273] Aparac (n 113); Singhania (n 192).
[274] Aparac (n 113); Singhania (n 192).
[275] Aparac (n 113); Singhania (n 192).

because the links between the acts and the perquisites in Article 7 of the Rome Statute can be established with clear proof and without the issues which occur when reading and interpreting the proposed definition to the amendment of the Rome Statute.

4.4 The applicability of Higgins' definition

As outlined in the section on definitions of ecocide, Higgins' conceptualization and reasons for ecocide are explained. Her theory seeks to create a sense of duty towards the environment, with a specific focus on addressing and altering behaviours leading to ecocide, which would disable individuals and corporations from causing severe damage to the environment. The key element in her subsequent work is her ecocentric approach to the law and the discussion on ecocide. This subchapter aims to apply her theory and definition of ecocide to the case, in the same manner as for the IEP's definition. The rationale behind this is to establish how Higgins' proposal would target a real case of ecocide.

The destructive actions occurring in the Amazon, perpetrated during times of peace, involve high-ranking officials within the Brazilian government, such as Bolsonaro and his Minister for Environment Salles. Through their positions, they facilitate illegal activities like deforestation, mining, cattle ranching, and agriculture, carried out by various entities including farmers, corporations, and criminal organizations. These operations have caused tremendous ecological, climatic, and cultural damage, endangering not only the Amazon's biodiversity but also the existence of indigenous communities and their ancient ways of life. Higgins' approach to comprehending ecocide effectively relates to the situation in the Amazon, where persistent acts cause severe and long-term devastation, indicating a definite case of ecocide. The degradation of the Amazon, also known as the lungs of the Earth, exacerbates climate change and has a global impact on ecosystems and societies. Although many people will not witness the destruction first-hand, the consequences of the Bolsonaro administration's actions are going to be felt universally by humans, animals, and ecosystems.

Higgins' definition of ecocide, as outlined in her work, describes it as 'acts or commissions committed in times of peace or conflict by *any senior person within the course of State, corporate or any other entity's activity* which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystem(s) of a given territory(ies), such as peaceful enjoyment by the inhabitants has been or will be severely diminished'.[276] This definition encompasses both ascertainable and non-ascertainable acts of ecocide, distinguishing between

[276] Higgins (n 10) section xix 70–72, emphasis added.

destruction caused by identifiable human activities and that occurring without clear identification of specific causes.[277]

Aligning Bolsonaro's administration's actions in the Amazon with Higgins' definition reveals a clear case of ecocide. There are clear acts and commissions committed in peacetime, by a senior person within the State (Bolsonaro and his ministers) as well as corporations acting through the government's encouragement. This is causing serious ecological, climate and cultural loss and damage and destruction to the ecosystems of the Amazon, which inevitably is affecting the peaceful enjoyment by the inhabitants. The extensive destruction and damage caused by activities such as deforestation and mining meet the criteria outlined by Higgins. The global implications of Amazon's degradation highlight the urgency of addressing such actions under the framework of ecocide. There is an act committed in peacetime by senior persons of a State, Bolsonaro and his government through their State Policy enabling ecocide in the Amazon, CEOs of corporations conducting illegal mining in the Amazon, and other entities such as the BBB whose acts cause and contribute to the serious ecological damage of the Amazon. The acts also meet the requirement of climate and cultural loss, destruction of the whole ecosystem of the Amazon as well as the rest of Earth threatening the indigenous inhabitants of the territory, the Amazon and the rest of humanity in regard to the increase of emissions altering the climate and benefiting climate change.

Higgins' emphasis on accountability for environmental destruction and the need for a shift towards more sustainable practices resonates strongly with the situation in the Amazon. As Higgins rightly noted, environmental protection in essence is to establish rules that do not only deter such acts but also enable a systemic shift.[278] Bolsonaro's administration, along with other entities involved, must be held responsible for their actions, fostering a sense of duty towards the environment. By criminalizing ecocide under Higgins' proposed framework, there is a clear focus on preventing future harm rather than solely focusing on punishment. This aligns with the overarching goal of raising awareness and creating a moral obligation to avoid committing ecocide, similar to the crime of genocide. Higgins' definition of ecocide effectively targets the issue and is solely ecocentric aligning it with the overall purpose of the concept of ecocide in the beginning.

Additionally, Higgins' advocacy for corporate responsibility and the concept of strict liability for ecocide further strengthens the case for addressing the actions in the Amazon. The transboundary and multi-jurisdictional nature of environmental crimes, particularly those perpetrated by corporations, necessitates a robust framework for accountability. Higgins' proposal addresses this challenge by advocating for strict liability, acknowledging the difficulty in attributing intent or *mens rea* to such offences. The lack of intent essentially

[277] Higgins (n10) 69.
[278] Higgins (n 10) 69–72.

covers the debate on whether environmental crimes have intent when being conducted, as this thesis establishes in Chapter 2.[279]

However, significant challenges remain in implementing Higgins' proposed framework, particularly concerning corporate accountability and regulatory systems. One major obstacle is, in this author's opinion, the reluctance of governments to prioritise environmental protection over economic interests. This reluctance highlights the need for a fundamental shift in mindset to induce behavioural changes within corporations.

Higgins' proposal is radical and difficult for any party to accept easily. There is also a debate about whether we should amend the Rome Statute as the IEP suggests, rather than making substantial legal changes or addressing existing legal gaps as this thesis has presented in the previous chapter. Higgins' definition of ecocide directly targets critical issues, and while it is compelling, it also appears somewhat idealistic. The notion of creating a legal duty of care through ecocide law, as Higgins proposes, faces practical difficulties, particularly in terms of corporate adaptability, which is central to her proposal. A systemic shift, as Higgins rightly notes, is necessary. However, it is uncertain if such systemic change can occur solely through the amendment of the Rome Statute to include her proposal. While her definition effectively addresses the crime of ecocide and could lead to meaningful change, the political tensions between environmental protection and economic growth present a significant barrier. Balancing these tensions is inherently challenging and may hinder the acceptance and implementation of Higgins' proposal. The careful reader might now wonder what the way forward is and this will be answered in the last chapter of this thesis.

[279] Higgins (n 10) 69–72.

5 Concluding remarks

This thesis has examined the concept of ecocide, its proposed legal definitions in doctrine, and whether a potential amendment to the Rome Statute would fill legal gaps and thereby enhance the effectiveness of international criminal law. In order words, what the actual added value of an ecocide law in international criminal law would be? It has investigated whether the concept of ecocide can be encompassed by the existing core crimes of the Rome Statute, such as genocide, crimes against humanity, and war crimes. Additionally, the question of liability under the Rome Statute has been examined, highlighting the potential implications and responsibilities under international criminal law through the potential amendment, for persons committing ecocide. The short answer to the research questions which this thesis has aimed to answer is that the current legal regime is insufficient to protect the environment, but it is not impossible to target the concept of ecocide through existing legislation. The environment can be protected through the protection of humans, and the protection of lives. However, to make a meaningful impact and real change in international law and the protection of the environment, legal gaps must be addressed with legislation targeting environmental damage during peacetime along with the already existing provisions in the Geneva Conventions and the only ecocentric crime of the Rome Statute (Article 8(2)(b)(iv)).

To make it clear, the legal gap is the lack of existing provisions targeting mass damage and destruction of ecosystems and severe, widespread or long-term damage to the environment. This is why one clear conclusion is that we do indeed need legal change to incorporate ecocide into international law, because of the transboundary nature of ecocide. We must have a top-down change, where all States party to the ICC take their responsibility in following the potential inclusion of ecocide in the Rome Statute. The damage to the environment is not limited to the place where ecocide is taking place, as we can see from the case study, if we fail to protect the Amazon we lose the 'lungs of Earth', contributing to the global climate change crisis. While some acts would fall under ecocide according to both linguistic and the suggested legal definitions, the disagreement about the precise legal term and the lack of provisions must still be addressed. This disagreement is one of the main issues to work for change, for ecocide to be criminalised we must have a clear consensus on the meaning and definition of the concept of ecocide. The work done by Polly Higgins and the IEP is the essential starting point for these discussions in order to create legal change.

This thesis has, therefore, critically examined existing legislation in the Rome Statute and compared Polly Higgins' and the IEP's legal definitions of ecocide. As a result of the examination and comparison of the existing rules within international criminal law and the two legal definitions in doctrine. This thesis has established that there are possibilities to prosecute individuals for acts resulting in ecocide with existing provisions in certain circumstances.

These circumstances are clearly stated in the case study of this thesis and chapter two, where the applicability and the broadening of the interpretation of the core crimes in the Rome Statute are assessed. The thesis has enabled the examination of the rules of genocide and crimes against humanity's applicability to the case study of the ecocide in the Amazon. The findings show that we could prosecute Bolsonaro and his government on crimes against humanity or genocide because ecocide is used as a method to commit the crimes. The reason why the war crimes were not found to be applicable is because this provision, as the name indicates, only covers environmental damage in the case of an armed conflict. As there is no armed conflict in the case study, these rules were not applicable. It is important to keep in mind that, although the laws on genocide and crimes against humanity could apply in the case of Bolsonaro, they do so because of certain circumstances where there is a clear connection between environmental damage and human suffering. In other words, there is indeed a *nexus* between the crimes against peace and ecocide.

The key element, which summarises the circumstances when existing provisions could be applicable, is the effect that the acts committed could have on humans. Crimes against humanity and genocide are anthropocentric in the sense that they protect humans, just as the other core crimes in the Rome Statute. The acts result in ecocide, and ecocide becomes both the consequence of the acts, but also the method of committing genocide and crimes against humanity. It can, therefore, be stated that even if the core crimes against peace could be applicable to target ecocide and acts instigating ecocide, it is not because they encompass it *per se*, it is because the acts have an impact on humanity. The acts could result in genocide through Article 6(c) or crimes against humanity through for example extermination, persecution, forcible transfer or other inhumane acts. This highlights the overall anthropocentric purpose of the Rome Statute, which has enabled the discussions in this thesis regarding its overall purpose being human protection, forgetting the essential part of actually protecting the environment as an entity.

This raises the pertinent question of whether the ICC is the appropriate forum to criminalise ecocide. The original intent of the ecocentric idea of ecocide, which is to save the environment from harm caused by human activity, would not be fully fulfilled if it were to be included in an anthropocentric system. But as the debate over ecocide rages on, particularly in light of the environmental crimes committed worldwide, it becomes inevitable that the course chosen by Polly Higgins and the IEP will determine the legal landscape. These two parties have one thought in common; incorporating ecocide into the Rome Statute would create a binding legal duty for all State parties to prevent and prosecute acts of ecocide, extending this obligation beyond national boundaries to the global community. Which would disable corporations, States and State officials from having the right to pollute and then try to repair the environment. This author agrees with this but wants to once again

highlight the importance of the fact that ecocide should be governed by ecocentric legislation.

This author is, therefore, of the opinion that an ecocide law should draw inspiration from Higgins' suggestion to establish a duty of care for the environment, despite the chosen forum. This is because there should not be any right to pollute, we should not try to remedy the harm we have caused, we should try to prevent it. The reason behind this argumentation is that Higgins' argument on creating a duty of care for the protection of the Earth is what would make real change. As Higgins rightly argued, we must have a systemic shift, we must have a top-down legal and societal change where we prioritise the well-being of nature and humans. Her legal definition is well formulated in the sense that it is clear how it would be applicable, as can be seen in the case study. Through her argument on strict liability, we could balance the rules within the Rome Statute to hold the right people accountable. We must have an ecocentric regulation, for an ecocentric crime. It is the environment which is suffering from the actions resulting in ecocide, but also all humans because humanity and the environment are interconnected. Higgins' proposed legal definition is just that, it is ecocentric.

Moving on to the IEP's legal definition, which bears little to no resemblance to Higgins' definition, as has been stated and illustrated in this essay, does not create a duty of care. The IEP's definition is not enough to create a duty of care or a systemic shift. Even if the Panel's definition is well formulated, it will not make a difference other than establishing ecocide as an international provision. The IEP's definition will not fill the legal gap which is the main issue. The solution which we must reach is a legal definition that addresses the absence of the protection of the environment, to hold the people and ultimately States responsible for ecocide. There are three main issues with the IEP's definition identified in this thesis. Firstly, the inclusion of the threshold for reckless disregard and wantonness. Secondly, the varying standards of *mens rea* and *actus reus.* Lastly, the anthropocentric nature of the definition, especially concerning the cost-benefit analysis.

The Panel's approach, which they describe as pragmatic, is designed for political acceptability and integration into existing international legal frameworks. It introduces thresholds and *mens rea* requirements that complicate prosecution and dilute the severity of the crime. This definition prioritises political feasibility over the establishment of a robust legal duty for environmental protection, resulting in a form of greenwashing within international law. The addition of the cost-benefit analysis for lawful acts entails that the perpetrator must think about the anticipated social and economic benefits an act might have and if these benefits are justified, they would not fall under the crime. This author has a hard time understanding why the Panel has framed their definition as ecocentric when it is opening up for anthropocentric benefits. With their definition, a prosecuted person could avoid liability by

arguing and indicating proof of social or economic benefits which arise from the act, even though their act indeed resulted in severe, widespread or long-term damage to the environment. This is this author's main issue with the definition, the cost-benefit analysis in combination with the distinction between unlawful and wanton acts, as well as the unclear *mens rea* and *actus reus* requirements is making the definition difficult to target what it is aiming at, it is not prohibiting ecocide.

A careful reader might wonder what recommendations this author has for the future. It is clear that each of us must drastically change the way we think and reason about the environment, and ultimately how we use it to our advantage to halt climate change and our destruction. That is why we should turn back to Higgins and her revival of ecocide. Her proposed legal definition is more stringent, based on strict liability for ecocide without considering any corporate benefit. In contrast to the Panel's definition, Higgins's definition and theory would enable us to create an ecocide law which is more comprehensive and prohibits harmful acts rather than trying to prosecute individuals for crimes already committed. While Higgins' proposals offer a visionary approach, questions persist regarding the practical challenges of enforcement and the complexities of corporate accountability in a globalised economy.

Although this author has not developed a legal definition for ecocide in this thesis, it is important to note the EU's recently passed directive on the protection of the environment through criminal law will aid in the creation of new national laws within the EU. This will inevitably lead to a renewed awareness of crimes similar to ecocide, which is what is being targeted through the directive. This author is also of the belief that we may explore the intriguing question of whether it would be beneficial to establish a new court with an emphasis on environmental harm. To be able to discuss important topics about international environmental law in a forum devoted to these matters.

Nonetheless, Higgins' advocacy underscores the transformative potential of legal frameworks in catalysing societal change and redefining our relationship with the environment. Higgins' work serves as a poignant reminder of the urgent need for collective action to address environmental crises. As we navigate the complexities of international law, her legacy should inspire and lead us to confront the daunting challenges of our time with courage and determination. By synthesising the insights gained from Higgins' advocacy with broader scholarly discourse, this thesis contributes to a deeper understanding of ecocide as a pressing issue demanding urgent attention on the global stage. In conclusion, Polly Higgins' vision for the criminalisation of ecocide stands as a beacon of hope amidst environmental uncertainty, offering a roadmap towards a more just and sustainable future. As we embark on the next phase of our journey, let us remain steadfast in our commitment to preserving our planet for generations to come.

Bibliography

Literature

Ambos K and Triffterer O, *Rome Statute of the International Criminal Court: A Commentary* (Third ed, Bloomsbury T & T Clark 2016).

Abtahi H and Webb P, *The Genocide Convention: The Travaux Préparatoires (2 Vols)* (Nijhoff 2009).

Cassese A and others, *Cassese's International Criminal Law* (Third edition, Oxford University Press 2013).

Fried JHE, 'War by Ecocide' (1973) 1 Bulletin of Peace Proposals, Universitetsforlaget, Olso, Bergen, Tromsö.

Gauger A and others, *Ecocide Is the Missing 5th Crime against Peace* (Human Rights Consortium, School of Advanced Studies, University of London 2013).

Higgins P, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (2nd edition, Shepheard-Walwyn (Publishers) Ltd 2015).

Hutchinson, (2015), 'The Doctrinal Method: Incorporation Interdisciplinary Methods in Reforming the Law', Erasmus Law Review, Vol. 8, No. 3, 130-139.

Jan Kleineman, 'Juridisk metodlära' in Maria Nääv and others (eds.) *Legal methodology* (2nd edn Studentlitteratur AB 2018).

Linderfalk U, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007).

Mwanza R, 'Enhancing Accountability for Environmental Damage under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity' (2018) (19 Melbourne Journal of International Law 586).

Short D, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide* (Zed Books Ltd 2016).

Smith T, 'Creating a Framework for the Prosecution of Environmental Crimes', *The Ashgate research companion to international criminal law: critical perspectives* (Ashgate 2013).

Orakhelashvili A, *Akehurst's Modern Introduction to International Law* (9th edn, Routledge 2022).

Electronic sources

Ambos K, ‘Protecting the Environment through International Criminal Law?’ [2021] EJIL: Talk! <https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/> accessed 20 May 2024.

Ambos K, (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck/Nomos/Hart 2022) <http://www.bloomsburycollections.com/book/rome-statute-of-the-international-criminal-court-article-by-article-commentary> accessed 3 April 2024.

Aparac J, ‘A Missed Opportunity for Accountability?’ [2021] Völkerrechtsblog <https://intr2dok.vifa-recht.de/receive/mir_mods_00010937> accessed 20 May 2024.

Brancalion PHS and others, ‘Fake Legal Logging in the Brazilian Amazon’ (2018) 4 Science Advances <https://www.science.org/doi/10.1126/sciadv.aat1192> accessed 20 May 2024.

‘Brazil: Accelerating Deforestation of Amazon a Direct Result of Bolsonaro’s Policies’ [2020] *Amnesty International* <https://www.amnesty.org/en/latest/press-release/2020/12/brazil-accelerating-deforestation-of-amazon-a-direct-result-of-bolsonaros-policies/> accessed 11 May 2024.

‘Brazil: Indigenous Rights Under Serious Threat Government Undermines Agency Tasked with Protecting Indigenous Peoples’ *Human Rights Watch* (9 August 2022) <https://www.hrw.org/news/2022/08/09/brazil-indigenous-rights-under-serious-threat> accessed 19 May 2024.

Climate Change: International Law and Global Governance (1st edn, Nomos Verlagsgesellschaft mbH 2013) <http://www.jstor.org/stable/j.ctv941w8s> accessed 20 May 2024.

‘COP26: Don’t Be Fooled by Bolsonaro’s Pledges Brazil Still Lacks Credible Plan to Save Rainforest as Amazon Crisis Persists’ *Human Rights Watch* (2 November 2021) <https://www.hrw.org/news/2021/11/02/cop26-dont-be-fooled-bolsonaros-pledges> accessed 19 May 2024.

Cusato E and Jones E, ‘The “Imbroglio” of Ecocide: A Political Economic Analysis’ [2023] Leiden Journal of International Law 1 <https://www.cambridge.org/core/product/identifier/S0922156523000468/type/journal_article> accessed 20 May 2024.

Dumont A, ‘To Cide or Not to Cide – Ecocide, What Have You Started?’ [2024] Völkerrechtsblog <https://intr2dok.vifa-recht.de/receive/mir_mods_00017259> accessed 20 May 2024.

Eichler LJ, ‘Ecocide Is Genocide: Decolonizing the Definition of Genocide’ (2020) 14 Genocide Studies and Prevention 104 <https://scholarcommons.usf.edu/gsp/vol14/iss2/9> accessed 20 May 2024.

Ellwanger JH and others, 'Beyond Diversity Loss and Climate Change: Impacts of Amazon Deforestation on Infectious Diseases and Public Health' (2020) 92 Anais da Academia Brasileira de Ciências <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0001-37652020000100724&tlng=en> accessed 20 May 2024.

Ellwanger JH and Chies JAB, 'Brazil's Heavy Metal Pollution Harms Humans and Ecosystems' (2023) 2 Science in One Health <https://linkinghub.elsevier.com/retrieve/pii/S2949704323000136> accessed 20 May 2024.

Erthal Abdenur A and Muggah R, 'Preserving Brazil's Sovereignty Means Taking Responsibility for the Amazon' [2019] IPI Global Observatory <https://theglobalobservatory.org/2019/09/preserving-brazils-sovereignty-means-taking-responsibility-for-amazon/> accessed 14 May 2024.

Escobar A, 'Construction Nature: Elements for a Post-Structuralist Political Ecology' (1996) 28 Futures 325 <https://linkinghub.elsevier.com/retrieve/pii/0016328796000110> accessed 20 May 2024.

Falk RA, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals' (1973) 4 Bulletin of Peace Proposals 80 <http://journals.sagepub.com/doi/10.1177/096701067300400105> accessed 20 May 2024.

Gillett M, 'Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict' in Carsten Stahn, Jens Iverson and Jennifer S Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (1st edn, Oxford University Press 2017) <https://academic.oup.com/book/26778/chapter/195706176> accessed 20 May 2024.

Heller KJ, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)' [2021] Opinio Juris <https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/> accessed 15 May 2024.

Heller KJ, 'Ecocide and Anthropocentric Cost-Benefit Analysis' [2021] Opinio Juris <https://opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/> accessed 15 May 2024.

Heller KJ, 'The Crime of Ecocide in Action' [2021] Opinio Juris <https://opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action/> accessed 15 May 2024.

Higgins P, Short D and South N, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59 Crime, Law and Social Change 251 <https://doi.org/10.1007/s10611-013-9413-6> accessed 15 February 2024.

Kaminski I, 'Calls for International Criminal Court to End "Impunity" for Environmental Crimes' (26 March 2024) <https://www.theguardian.com/environment/2024/mar/26/international-criminal-court-end-impunity-environmental-crimes> accessed 1 May 2024.

Karnavas M, ‘Ecocide: Environmental Crime of Crimes or Ill-Conceived Concept?’ [2021] Opinio Juris <https://opiniojuris.org/2021/07/29/ecocide-environmental-crime-of-crimes-or-ill-conceived-concept/> accessed 20 May 2024.

Killean R and Short D, ‘A Critical Review of the Law of Ecocide’ [2023] SSRN Electronic Journal <https://www.ssrn.com/abstract=4605681> accessed 20 May 2024.

Kotzamani P, ‘Corporate Criminality and Individual Criminal Responsibility in International Law: Removing the Hurdles from the International Criminal Court’s Approach to Perpetration through Control of a Collective Entity’ (2020) 20 International Criminal Law Review 1108 <https://brill.com/view/journals/icla/20/6/article-p1108_1108.xml> accessed 20 March 2024.

Lambert C, ‘Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?’ (2017) 30 Leiden Journal of International Law 707 <https://www.cambridge.org/core/product/identifier/S0922156517000267/type/journal_article> accessed 20 May 2024.

Minkova LG, ‘The Fifth International Crime: Reflections on the Definition of “Ecocide”’ (2023) 25 Journal of Genocide Research 62 <https://www.tandfonline.com/doi/full/10.1080/14623528.2021.1964688> accessed 20 May 2024.

Palarczyk D, ‘Ecocide Before the International Criminal Court: Simplicity Is Better Than an Elaborate Embellishment’ (2023) 34 Criminal Law Forum 147 <https://link.springer.com/10.1007/s10609-023-09453-z> accessed 1 May 2024.

Patel P, ‘Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court’s Mandate to Prosecuting Environmental Crimes?’ (2016) 14 175 <https://lawecommons.luc.edu/lucilr/vol14/iss2/5> accessed 19 March 2024.

Pereira R, ‘After the ICC Office of the Prosecutor’s 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?’ (2020) 31 Criminal Law Forum 179 <https://link.springer.com/10.1007/s10609-020-09393-y> accessed 20 May 2024.

Queiroz-Stein GD, Seifert Jr CA and Luiz AMMT, ‘Climate Change, Denialism, and Participatory Institutions in Brazil: Effects of the Bolsonaro Government’s Environmental Strategy (2019-2022)’ [2023] Brazilian Political Science Review <https://www.scielo.br/j/bpsr/a/FByDPnkScQdfsqQ4pBkBXvh/?lang=en#> accessed 20 May 2024.

Raftopoulos M and Morley J, ‘Ecocide in the Amazon: The Contested Politics of Environmental Rights in Brazil’ (2020) 24 The International Journal of

Human Rights 1616 <https://www.tandfonline.com/doi/full/10.1080/13642987.2020.1746648> accessed 20 May 2024.

'Rainforest Mafias How Violence and Impunity Fuel Deforestation in Brazil's Amazon' *Human Rights Watch* (17 September 2019) <https://www.hrw.org/report/2019/09/17/rainforest-mafias/how-violence-and-impunity-fuel-deforestation-brazils-amazon> accessed 19 May 2024.

Richter ED and others, 'Malthusian Pressures, Genocide, and Ecocide' (2007) 13 International Journal of Occupational and Environmental Health 331 <http://www.tandfonline.com/doi/full/10.1179/oeh.2007.13.3.331> accessed 20 May 2024.

Robinson D, 'Your Guide to Ecocide: Part 1' [2021] Opinio Juris <https://opiniojuris.org/2021/07/16/your-guide-to-ecocide-part-1/> accessed 12 May 2024.

Robinson D, 'Ecocide — Puzzles and Possibilities' (2022) 20 Journal of International Criminal Justice 313 <https://academic.oup.com/jicj/article/20/2/313/6593930> accessed 20 May 2024.

Rocha J, 'Bolsonaro Sends Congress Bill to Open Indigenous Lands to Mining, Fossil Fuels' *Mongabay* (7 February 2020) <https://news.mongabay.com/2020/02/bolsonaro-sends-congress-bill-to-open-indigenous-lands-to-mining-fossil-fuels/> accessed 3 May 2024.

Sarlième M, 'Ecocide: Past, Present, and Future Challenges' in Walter Leal Filho and others (eds), *Life on Land* (Springer International Publishing 2021) <http://link.springer.com/10.1007/978-3-319-95981-8_110> accessed 20 May 2024.

Sarlième M, et.al, 'Comment on OTP Environmental Crimes Policy' <https://www.smithschool.ox.ac.uk/sites/default/files/2024-03/20240316_Comment_on_OTP%20Environmental_Crimes_Policy_Sarlieve_et_al.pdf> accessed 20 March 2024.

Schwabach A, 'Ecocide and Genocide in Iraq: International Law, the Marsh Arabs and Environmental Damage in Non-International Conflicts' [2003] SSRN Electronic Journal <http://www.ssrn.com/abstract=442541> accessed 20 May 2024.

Singhania V, 'The Proposed Crime of Ecocide – Ignoring the Question of Liability', [2022] Opinio Juris <https://opiniojuris.org/2022/02/16/the-proposed-crime-of-ecocide-ignoring-the-question-of-liability/> accessed 15 May 2024.

Smith T, 'Critical Perspectives on Environmental Protection in Non-International Armed Conflict: Developing the Principles of Distinction, Proportionality and Necessity' (2019) 32 Leiden Journal of International Law 759 <https://www.cambridge.org/core/product/identifier/S0922156519000372/type/journal_article> accessed 20 May 2024.

‘Structural Violation of the Right to a Clean, Healthy and Sustainable Environment Perpetrated by the Brazilian Government: A Submission on Environmental Destruction, Climate Change and Human Rights Abuses in Brazil’ <https://wwfbrnew.awsassets.panda.org/downloads/structural_violation_of_the_right_to_a_clean_and_healthy_environment.pdf> accessed 2 May 2024.

Van Den Heede O, ‘Ecocide as the Fifth Core Crime in the Rome Statute’ (2022) 55 NYU Journal of International Law and Politics 435 <https://www.nyujilp.org/wp-content/uploads/2023/05/Commentary5.pdf> accessed 23 March 2024.

Vega C and others, ‘Human Mercury Exposure in Yanomami Indigenous Villages from the Brazilian Amazon’ (2018) 15 International Journal of Environmental Research and Public Health 1051 <http://www.mdpi.com/1660-4601/15/6/1051> accessed 20 May 2024.

Voigt C (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (1st edn, Cambridge University Press 2019) <https://www.cambridge.org/core/product/identifier/9781108684385/type/book> accessed 20 May 2024.

Voigt C, ‘«Ecocide» as an International Crime: Personal Reflections on Options and Choices’ <https://www.ejiltalk.org/ecocide-as-an-international-crime-personal-reflections-on-options-and-choices/> accessed 15 March 2024.

Watts J, ‘Amazon Deforestation at Highest Level in a Decade’ *The Guardian* (18 November 2019) <https://www.theguardian.com/environment/2019/nov/18/amazon-deforestation-at-highest-level-in-a-decade> accessed 15 May 2024.

Westing AH, ‘Proscription of Ecocide: Arms Control and the Environment’ in Richard A Falk, *The Vietnam War and International Law, Volume 4: The Concluding Phase* (Princeton University Press 2015) <https://www.degruyter.com/document/doi/10.1515/9781400868254-011/html> accessed 20 May 2024.

Zieler D, *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment* (University of Georgia Press 2011) <http://www.jstor.org/stable/j.ctt46n5dg> accessed 21 March 2024.

News Articles

Cannon J, ‘Gold Mining Threatens Indigenous Forests in the Brazilian Amazon’ *Mongabay* (8 April 2020) <https://news.mongabay.com/2020/04/gold-mining-threatens-indigenous-forests-in-the-brazilian-amazon/> accessed 12 May 2024.

‘Mercury Exposure Widespread among Yanomami Tribe in Amazon, Report Finds’ *VOA-News* (6 April 2024) <https://www.voanews.com/a/mercury-exposure-widespread-among-yanomami-tribe-in-amazon-report-finds-/7557828.html> accessed 2 May 2024.

Office of the Prosecutor ‘The Office of the Prosecutor launches public consultation on a new policy initiative to advance accountability for environmental crimes under the Rome Statute’ (16 February 2024) <https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability-0> accessed 22 February 2024.

‘PSOL e Entidades Querem Transformar Ecocídio Em Crime No Brasil’ *PSOL* (2 June 2023) <https://psol50.org.br/psol-e-entidades-querem-transformar-ecocidio-em-crime-no-brasil/> accessed 13 May 2024.

‘What Brazil’s President, Jair Bolsonaro, Has Said about Brazil’s Indigenous Peoples’ *Survival International* (12 April 2018) <https://www.survivalinternational.org/articles/3540-Bolsonaro> accessed 20 May 2024.

Other web materials

‘AllRise Commission of Crimes Against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to present, perpetrated by Brazilian President Jair Messias Bolsonaro and principal actors of his former or current administration’ <https://www.allrise.at/theplanetvsbolsonaro> accessed 15 May 2024 (hereafter AllRise Claim).

Cambridge Dictionary, “Ecocide” <https://dictionary.cambridge.org/dictionary/english/ecocide> accessed May 21, 2024.

‘Expert Drafting Panel on the Legal Definition of ”Ecocide” Convened by the Stop Ecocide Foundation’ (*Stop Ecocide International*) <https://www.stopecocide.earth/legal-definition> accessed 23 February 2024.

‘Existing and Proposed Ecocide Laws’ (Ecocide Law) < https://ecocidelaw.com/existing-ecocide-laws/> accessed 17 February 2024.

‘Home Learn About Brazil’s greenhouse emissions’ (*Observatorio do* Clima) <https://seeg.eco.br/en/home/> accessed 1 May 2024.

‘Home’ (*Polly Higgins Ecocide Law Expert)* < https://pollyhiggins.com> accessed 11 March 2024.

‘Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text’ (Stop Ecocide International)

<https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf> accessed 25 March 2024.

'In Memoriam: Arthur Galston, Plant Biologist, Fought Use of Agent Orange' (YaleNews, 18 July 2008) <https://news.yale.edu/2008/07/18/memoriam-arthur-galston-plant-biologist-fought-use-agent-orange> accessed 2 May 2024.

Longman Dictionary of Contemporary English Online, "Ecocide" <https://www.ldoceonline.com/dictionary/ecocide> accessed May 21, 2024.

'Making Ecocide a Crime' (Stop Ecocide International) <https://www.stopecocide.earth/making-ecocide-a-crime> accessed 20 February 2024.

Meriam Webster, "Definition of Ecocide" <https://www.merriam-webster.com/dictionary/ecocide> accessed May 21, 2024.

Oxford English Dictionary 'Anthropocene' <https://www.oed.com/dictionary/anthropocene_n?tab=meaning_and_use> accessed May 21, 2024.

Oxford English Dictionary, "Ecocide" <http://dx.doi.org/10.1093/oed/2443006619> accessed May 21, 2024.

Polly Higgins, 'Ecocide Crime' (*Ecocide Law*) <https://ecocidelaw.com/polly-higgins-ecocide-crime/ > accessed 15 March 2024.

'Statement of the Republic of the Maldives, Assembly of States Parties to the International Criminal Court, 18th Session (2-7 November 2019) <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/GD.MDV.3.12.pdf > accessed 23 February 2024.

'Statement of Vanuatu, Assembly of States Parties to the International Criminal Court, 18th Session (2-7 November 2019) <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/GD.VAN.2.12.pdf> accessed 23 February 2024.

'The Republic of Vanuatu Pursuing an Advisory Opinion on Climate Change from the International Court of Justice' (*Vanuatu ICJ Initiative*) <https://www.vanuatuicj.com/> accessed 23 February 2024.

'The UN Secretary-General Speaks on the Stake of the Planet' (*United Nations*) <https://www.un.org/en/climatechange/un-secretary-general-speaks-state-planet> accessed 14 February 2024.

'Who we are' (*Stop Ecocide International*) <https://www.stopecocide.earth/who-we-are-> accessed 11 March 2024.

Official Documents and Reports

International Law Commission (ILC)

Official Documents

ILC, Draft Code of Crimes against the Peace and Security of Mankind, U.N. Doc. A/51/332 (1996) [cit. Draft Code of Crimes against the Peace and Security of Mankind].

YbkILC (1986), Vol. I.

YbkILC (1986), Vol. II.

YbkILC (1996), Vol. II.

YbkILC (1993), Vol. II.

Reports by Special Rapporteurs to the ILC

United Nations International Law Commission (ILC) Report by Special Rapporteur Charles C. Jalloh (13 February 2023) UN Doc. A/CN.4/760.

United Nations International Law Commission (ILC) Report by Special Rapporteur Doudou Thiam (1 February 1984) UN Doc. A/CN.4/377.

United Nations International Law Commission (ILC) Report by Special Rapporteur Marie Jacobsson (30 May 2014) UN Doc. A/CN.4/674.

Other reports

ECOSOC (Ad Hoc Committee on Genocide) 'Draft Report Submitted by Mr. Azkoul, Rapporteur' (30 April 1948) UN Doc E/AC.25/W.1 [cit. E/AC.25/W.1].

ECOSOC (Sub-Commission on Prevention of Discrimination and Protection of Minorities) 'Report by Special Rapporteur Benjamin Whitaker (2 July 1985) E/CN.4/Sub.2/1985/6 [cit. E/CN.4/Sub.2/1985/6].

ECOSOC (Sub-Commission on Prevention of Discrimination and Protection of Minorities) 'Report by Special Rapporteur Nicodème Ruhashyankiko (4 July 1978) E/CN.4/Sub.2/41 [cit. E/CN.4/Sub.2/41].

UNGA 'Report of the High-level Panel on Threats, Challenges and Change concerning A More Secure World: our shared Responsibility' UNGA 59th Session UN Doc A/59/565 (2 December 2004) [cited as UN Doc A/59/565].

International Treaties and Conventions

Convention on Biological Diversity (adopted 5 June 1992) 1760 UNTS. 79, 143; 31 ILM. 818 (CBD) (1992) [cit. Convention on Biological Diversity (CBD)].

Convention on the Prevention and Punishment of the Crime of Genocide, (9 December 1948), 78 UNTS 277 (1948) [cit. Genocide Convention].

Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151 (ENMOD) (1976) [cit. The Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (ENMOD)].

International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125, UNTS 3 [cit. Additional Protocol I to the Geneva Conventions].

Rome Statute of the International Criminal Court, 17 July 1998, as amended on 29 November 2010), UNTS Vol. 2187 (1998) [cit. Rome Statute].

UN, Vienna Convention on the Law of Treaties, 23 May 1969, UNTS Vol. 1155, 331 (VCLT) (1969) [cit. VCLT].

UN, Charter of the United Nations and the Statute of the International Court of Justice, 24 October 1945, 1 UNTS XVI (1945) [cit. Statute of the International Court of Justice].

European Union (EU)

Parliament Directive 2024/1203 of 27 February 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC [cit. COM(2021) 851 final].

Other international materials

Office of the Prosecutor, 'Policy paper on case selection and prioritisation' <https://www.icc-

cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 12 February 2024.

Domestic Legislation

Constitution of the Federal Republic of Brazil (5 October 1988).

Decreto Nº 9.578, 12,187/2009, de Novembro de 2018 [cit. Brazilian Law 12,187/2009].

Lei Nº 9.578, de 22 de Novembro de 1988 [cit. Environmental Crimes Law in Brazil].

Table of Cases

International Court of Justice (ICJ)

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Merits) [2015] ICJ Rep 3.

International Criminal Court (ICC)

Prosecutor v. Bosco Ntanga (Judgment) ICC-01/04-02/06-2359 (8 July 2019). [cit. Ntanga (Judgment)]

Prosecutor v. Germain Katanga (Judgment) ICC-01/04-01/07 (7 March 2014). [cit. Katanga (Judgment)]

Prosecutor v. Uhuru Muigai Kenyatta (Judgment) ICC-01/09-02/11-382-Red (29 January 2012) [cit. Kenyatta (Judgment)]

Prosecutor v. Dominic Ongwen (Judgment) ICC-02/04-01/15 (4 February 2021). [cit. Ongwen (Judgment)]

Prosecutor v. Omar Hassan Ahmad Al Bashir (Pre-Trial) ICC-02/05-01/09 (12 July 2010) [cit. Al Bashir (Pre-Trial)].

International Criminal Tribunal for the Former Yugoslavia (ICTY)

Prosecutor v. Milomir Stakic (Trial Judgment) IT-97-24-T, TC II (31 July 2003) [cit. Stakic (Judgment)].

Prosecutor v. Radoslav Brdjanin (Trial Judgement) IT-99-36-T, TC II (1 September 2004) [cit. Brdjanin (Judgment)].

Prosecutor v Zdravko Tolimir (Judgement) IT-05-88/2-T, TC II (12 December 2012) [cit. Tolimir (Judgment)].

Prosecutor v. Mitar Vasiljevic (Appeal Judgement) IT-98-32-A (25 February 2004) [cit. Vasiljevic (Judgment)].

Prosecutor v. Tihomir Blaskic (Appeal Judgement) IT-95-14-A (29 July 2004) [cit. Blaskic (Judgment)].

Prosecutor v. Anto Furundzija (Trial Judgement) IT-95-17/1-T (10 December 1998) [cit. *Furundzija* (Judgment)].

International Criminal Tribunal for Rwanda (ICTR)

Kayishema and Ruzindana (Judgement) ICTR-95-1-T, TC II (21 May 1999) [cit. Kayishema and Ruzindana (Judgment)].

Nuremberg Tribunal

Judgment of the Nuremberg International Military Tribunal (1946) 41 AJIL 172.