ASSESSING ECOCIDE AS THE FIFTH INTERNATIONAL CRIME UNDER THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

(THESIS)

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Student Number: 19410662

INTERNATIONAL PROGRAM

UNDERGRADUATE STUDY PROGRAM IN LAW

FACULTY OF LAW

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ASSESSING ECOCIDE AS THE FIFTH INTERNATIONAL CRIMES UNDER THE JURISDICTION OF INTERNATIONAL CRIMINAL COURT

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MOTTO

Don't compare yourself to others. Just like the sun and the moon; they shine when it's their time.

DEDICATION

This thesis is wholeheartedly dedicated to:

First and foremost, I express my profound gratitude to Allah *Subhanallahu wa ta'ala*. It is with immense gratitude that I acknowledge the ease and fluidity granted to me by Allah, enabling me to conclude my thesis successfully. I sincerely thank Allah for consistently bestowing upon me a sense of tranquility, fortitude, concentration, well-being, efficiency, and resilience. I am deeply grateful for the presence of those who have supported me in completing my thesis.

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Lastly, I dedicate this achievement to myself as a token of self-appreciation. This is a tribute to my perseverance and unwavering determination as I emerge triumphant in completing my thesis despite the myriad challenges, tears, and struggles accompanying this path.

LANGUAGE ADVISOR APPROVAL PAGE

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Karya Ilmiah ini akan saya ajukan kepada Tim Penguji dalam Ujian Pendadaran yang akan diselenggarakan oleh Fakultas Hukum Universitas Islam Indonesia.

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Yang Membuat Pernyataan,

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PREFACE

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ABSTRACT

This thesis explores the potential inclusion of Ecocide as an international crime within the jurisdiction of the International Criminal Court (ICC), considering the Travaux Préparatoires and Commentaries of the Rome Statute, as well as the associated challenges and opportunities. The Agent Orange case during the Vietnam War serves as a stark warning. Critics and proponents alike advocate for a more robust legal framework. The thesis employs normative legal research with three approaches, namely the statutory, historical, and conceptual approach, focusing on expert opinions and scrutinizing key treaties such as the Rome Statute and the Vienna Convention on the Law of Treaties. The research findings suggest that Ecocide can indeed be classified as an international crime within the ICC's jurisdiction. Nevertheless, significant challenges persist, including the imperative need for a globally accepted definition of international crimes. Several theories support the incorporation of Ecocide into the ICC's jurisdiction, including the universal criminality theory, the *Malum in Se* theory, and the ten penal characteristics. The ICC's consideration of environmental destruction marks a significant shift. State practices and domestic efforts to criminalize Ecocide in various countries bolster the case for its classification as an international crime. While international criminal law has advanced, environmental law has not kept pace with these developments. The inclusion of Ecocide within the ICC's *ratione materiae* is not without its challenges, which encompass defining a damage threshold, addressing corporate liability gaps, and determining intent standards. Proposing "Ecocide" as a fifth international crime presents opportunities to bridge gaps in environmental law, redefine corporate responsibility, and forge links between environmental protection and human rights.

Keywords: Ecocide, International Crimes, International Criminal Court, Treaty Interpretation.

CHAPTER I

INTRODUCTION

1.1. Background

The earth faces significant threats; the prospects for humanity and other species are at stake due to a multitude of actions. Presently, there is ample evidence of various criminal activities and instances of harm inflicted upon the environment, both on human and non-human life. These documented cases include acts such as industrial pollution, unlawful disposal of toxic waste, uncontrolled logging, and more. In response to this pressing issue, numerous criticisms and suggestions have been put forth to develop a more effective and appropriate legal framework. Irrespective of the magnitude of the detrimental effects caused, the exploitation of natural resources and the degradation of the environment have recently been recognized as either illegal or, at the least, extremely dangerous actions with intergenerational and multinational ramifications.

The infamous case of Agent Orange during the Vietnam War is one of the examples of massive destruction against the environment, whose effects are not only materialized during the commission of the crime but also to the present time. Agent Orange, a chemical compound primarily developed by Monsanto and Dow Chemical, combines two conventional herbicides (2,4-D and 2,4,5-T) that had been used independently in the United States since the late 1940s.[1] It earned its name

[1] Institute of Medicine (US) Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides. (1994). Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam. *National Academies Press (US)*. https://doi.org/10.17226/2141. (***Institute of Medicine***

from the orange-striped barrels in which it was transported.[2] Dioxin, a highly toxic substance, constitutes the lethal component of Agent Orange and is accountable for various health complications.[3]

To expose communist guerrilla fighters supporting the National Liberation Front (Viet Cong) of South Vietnam, US military forces used Agent Orange to defoliate about five million acres of forests during the Vietnam War (1955–1975).[4] Consequently, Vietnamese and Viet Cong troops were deprived of food and shelter due to the destruction of the forest cover and crops.[5] Scientists are of the opinion that various illnesses—such as cancers, diabetes, and birth defects in Vietnamese civilians, U.S. and Vietnamese war veterans, and their offspring— can be traced conclusively to Agent Orange exposure.[6] Even worse, such effects are not limited to persons who experienced the war firsthand. On the other hand, environmentalists continue to re-establish and re-green the forest due to the difficulties of growing plants in heavily contaminated areas.[7] These massively destructive effects of herbicidal warfare in the Agent Orange case gave birth to the term "Ecocide."

The term "Ecocide" was first recorded in the 1970s at the Conference on War and National Responsibility, Washington, which was derived from the inextricable

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(US) Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides, 1994)

[2] *Id*.

[3] *Id*.

[4] Eggens, & Deursen. (2021). *Environmental crimes in International Law: An exploration of the possibilities for the criminalization of ecocide*. Deviance Incubator. Retrieved May 26, 2023, from https://devianceincubator.wordpress.com/2021/06/01/environmental-crimes-in-international-law/ (***Eggens & Deursen, 2021***)

[5] Institute of Medicine (US) Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides, 1994

[6] Eggens & Deursen, 2021

[7] *Id*.

"sister" – "genocide."[8] Genocide was made from the Greek word "*genos"* meaning tribe or race and the Latin "*cide*" meaning destruction.[9] Likewise, "Ecocide" is a combination of the Greek word "*oikos"*, meaning house/home (habitat/environment), with "*cide"*, meaning to kill.[10] The formulation shares the same vein as the formulation of the term "Genocide" according to the Polish jurist Rafael Lemkin in November 1944.[11] Like genocide, Ecocide can and often does lead to cultural damage and destruction, it can be direct and indirect; it can be the destruction of a territory and it can also be the undermining of a way of life—ecological as well as cultural.[12]

From the first introduction of Ecocide in the 1970s, onwards, academicians and legal experts debated the criminalization of Ecocide including the requisite elements to make Ecocide as international crime.[13] The inclusion of Ecocide as international crime has massively discussed afterwards, for example by the United Nations International Law Commission [*ILC*] for inclusion in the Code of Crimes Against the Peace and Security of Mankind (now is Rome Statute), and by the Sub-

[8] Gauger, Rabatel-Fernel, Kulbicki, Short, & Higgins. (2012, July). Ecocide is the missing 5th Crime Against Peace. In *http://www.sas.ac.uk/hrc/projects/ecocide-project*. School of Advanced Stud. Retrieved May 26, 2023, from https://sas-space.sas.ac.uk/4686/ (***Gauger et al., 2012***)

[9] Lynch. (2006). The Greening of Criminology: A Perspective on the 1990s. In *Green Criminology* (1st ed., pp. 79–95). Routledge.

[10] Stop Ecocide Foundation. (2021, June). Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text. (***Stop Ecocide Foundation, 2021***)

[11] *Id.*

[12] Higgins, P., Short, D., & South, N. (2013, February 6). Protecting the planet: a proposal for a law of ecocide. *Crime, Law and Social Change*, *59*(3), 251–266. https://doi.org/10.1007/s10611-013-9413-6 (***Higgins et al., 2013***)

[13] Gauger et al., 2012, p.4.

Commission on Prevention of Discrimination and Protection of Minorities for inclusion in the extension of the Convention on Genocide.[14]

Ecocide gained more attention as the speech of the Prime Minister of Sweden, Mr. Olof Palme, at the United Nations [*UN*] Stockholm Conference on the Human Environment in 1972, stated the Vietnam War as an "Ecocide".[15] In 1973, Richard A. Falk drafted an Ecocide Convention, recognizing "that man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace."[16] In 1985, UN Special rapporteur Benjamin Whitaker advocated the inclusion of "Ecocide" into the definition of "genocide", describing it as "adverse alterations, often irreparable, to the environment… whether deliberately or with criminal negligence."[17]

Accordingly, some experts strive to put Ecocide as one of international crimes under the jurisdiction of the International Criminal Court [*ICC*]. In the practice, the International Criminal Court has several times demonstrated the inclusion of environmental assessment in determining the case. The Prosecutor of ICC considers the following aspects in investigating and prosecuting Rome Statute crimes: conduct which "constitutes a serious crime under national law, such as the illegal

[14] *Id*.

[15] Riegert, & Aggestam. (1996). The emergence of popular participation in world politics - United Nations Conference on Human Environment 1972. Department of Political Science, University of Stockholm., p.5.

[16] Gauger et al., 2012, p.4.

[17] *Id*.

exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment."[18]

Rising from the optimism of ICC's historical record in considering environmental aspects in determining the admissibility of the case, as an effort to criminalize Ecocide, legal experts started to formulate the definition of Ecocide to be proposed as international crime under the jurisdiction of International Criminal Court. According to Poly Higgins, a U.K.-based lawyer, she proposed the following as an amendment to the Rome Statute:

> "Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished."[19]

Another definition is also proposed by the Independent Expert Panel for the Legal Definition of Ecocide [*the Expert Panel*]. The Expert Panel was formed in 2020 consisting of twelve lawyers specializing in criminal, environmental and climate law to draft a practical and effective definition of the crime of "Ecocide".[20] They proposed the definition of Ecocide as follows: "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."[21]

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[18] Office of the Prosecutor. (2016, September 15). *Policy Paper on Case Selection and Prioritisation*. International Criminal Court., (***OTP Policy Paper, 2016***), para. 7.

[19] Higgins. (2015). Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet. Shepheard Walwyn. (***Higgins, 2015***)

[20] Stop Ecocide Foundation, 2021.

[21] *Id.*

The proposed definition of Ecocide reflected some aspects regulated in Article 8 (2) (b) (iv) of the Rome Statute concerning war crimes against the natural environment.[22] The definition comprises three aspects:

a) The prohibited damage: "widespread", "long-term", and "severe"

b) Proportionality test: wanton damage must "be clearly excessive in relation to the social and economic benefits anticipated"

c) Intent and knowledge element: knowledge of the substantial likelihood

Article 8(2)(b)(iv) of the Rome Statute becomes the only explicit clause in the Rome Statute that allows the prosecution of crimes against the environment.[23] However, the Article can only be applied in incredibly specific circumstances in which during wartime, negating the possibility of the crimes against the environment committed in peacetime. The above-mentioned formulation of the Ecocide, extending the protection toward the natural environment both in times of armed conflict and peacetime, differs from the existing clause in the Rome Statute under Article 8(2)(b)(iv).

Alternatively, Article 7 (1) (a—k) concerning crimes against humanity opens an opportunity for the prosecution of the crime which used environmental destruction as a tool to create humanitarian destruction; this article is specifically applicable when the crimes committed beyond the time of armed conflict or in the peacetime.[24] The Rome Statute describes Crimes Against Humanity as "acts when

[22] *Id.*

[23] Eggens & Deursen, 2021.

[24] Durney. (2018). Crafting a Standard: Environmental Crimes as Crimes Against Humanity Under the International Criminal Court. *Hastings Environmental Law Journal*, *24*(2), 413–430. (***Durney, 2018***); Smith. (2011, August 25). Creating a Framework for the Prosecution of

committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[25] "Attack" is defined as a "course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[26]

"Attack" defined in the Rome Statute specifically required to be conducted "against civilian population."[27] It opens a room for debate whether an attack against the environment that extensively adversely affects the human or civilian population may be concluded as an "attack" within the definition of the Rome Statute. Perceiving the anthropological approach of ICC, arguably, this approach does not include environmental destruction in viewing the harm, as the crimes within the Court's jurisdiction only extend to actions negatively affecting people.[28] However, some experts are of the opinion that, if environmental destruction can be used as evidence to create human suffering, the Rome Statute may leave room for interpretation of environmental destruction or harm within its jurisdiction.[29]

Nevertheless, it remains challenging to criminalize environmental harms under the ICC's existing legal framework. It adds a "very significant substantive and evidentiary hurdle that would not help the prosecution of environmental crimes"

Environmental Crimes in International Criminal Law. In William Schabas, Yvonne McDermott, Niamh Hayes and Maria Varaki, *Companion to International Criminal Law: Critical Perspectives* (pp. 45–62). Ashgate Publishers. (***Smith, 2011***).

[25] International Criminal Court. (1998, July 17). *Rome Statute of the International Criminal Court.*, Article 7 paragraph (1). (***Rome Statute***)

[26] Rome Statute, Article 7 paragraph (2) (a).

[27] *Id*.

[28] Durney, 2018.

[29] Durney, 2018; Smith, 2013.

that the Court's and its Statute's inherent anthropocentrism embraces an instrumental view of environmental harm and requires a correlation to actual human harm is innate.[30] Consequently, many people have called for the ICC to recognize Ecocide as a fifth crime against peace for many years.[31]

In order to assess the possibility of including Ecocide as international crime under ICC's jurisdiction, it is necessary to look at— according to the method of interpretation provided by 1969 Vienna Convention on the Law of Treaties [*VCLT*][32] specifically Article 31 and 32— the *Travaux préparatoires* or the preparatory works of the Rome Statute, also the commentary of the Statute.

Therefore, in this thesis, the writer will assess: *first*, the possibility of listing Ecocide under the jurisdiction of ICC using the method of interpretation provided by the VCLT through the Statute's *Travaux préparatoires* and commentaries. Analyzing the reasoning of listing only four crimes in the final draft of the Rome Statute, the characteristics of the four crimes and how Ecocide relates to them. *Second*, assessing the challenges, opportunities in listing Ecocide as the ICC's crimes, and the urgency to define one.

[30] Mégret, F. (2013, June 24). The Case for a General International Crime against the Environment. *Sustainable Development, International Criminal Justice, and Treaty Implementation*, 50–70. https://doi.org/10.1017/cbo9781139507561.006

[31] Higgins, P. 2010.

[32] United Nations. (1969, May 23). *Vienna Convention on the Law of Treaties.* (***VCLT***)

1.2. Problem Formulation

1.2.1. Given the absence of an authoritative definition of international crimes, whether Ecocide is International Crimes according to the *Travaux préparatoires* and commentary of the Rome Statute?

1.2.2. What are the challenges and opportunities to include Ecocide as international crimes under Rome Statute?

1.3. Research Objectives

1.3.1. To analyze whether Ecocide is International Crimes according to the *Travaux préparatoires* and commentary of the Rome Statute

1.3.2. To analyze the challenges and opportunities to put Ecocide as international crimes under the Rome Statute

1.4. Originality of the Research

This research centers on the potential inclusion of Ecocide as the fifth international crime under the jurisdiction of the ICC. Numerous writings discuss Ecocide and theories of international crimes, and the writer will compare these works with the current research to establish its originality.

First, in "Protecting the Planet: A Proposal for a Law of Ecocide" (2013), Higgins, Polly, Short, Damien, and South, Nigel advocate recognizing Ecocide as an international crime and propose an alternative earth jurisprudence. They trace Ecocide's evolution and call for its establishment as the fifth crime against peace. In contrast, the researcher's study explores the challenges and potential of

designating Ecocide as the fifth international crime. This exploration is enriched by legal scholars, jurists' perspectives, preparatory materials, and draft commentaries.

Second, the sources encompass the Independent Expert Panel's document proposing the definition of Ecocide, along with commentary, with the aim of establishing it as a fifth international crime under the Rome Statute. In contrast, the upcoming discussion conducts a comprehensive analysis of this proposed Ecocide definition, encompassing perspectives from both Rome Statute drafters and contemporary legal experts, facilitating a well-rounded understanding.

Third, the sources encompass a chapter authored by Oliver Dörr in "Vienna Convention on the Law of Treaties: A Commentary," where he analyzes treaty interpretation according to the Vienna Convention. This differs from the upcoming discussion, which solely focuses on commentary concerning Articles 31-33, delving into treaty interpretation. The thesis seeks to precisely interpret international crimes, drawing on expert and drafter insights firmly rooted in principles of treaty interpretation.

Fourth, In "Ecocide: An Ambiguous Crime?" on the EJIL Talk! Blog, J. de Hemptinne critiques the Independent Expert Panel's Ecocide definition. The article raises concern about potential legal and political consequences due to its lack of clarity, which might hinder effectiveness. Unlike the article's focus on ambiguity, this thesis centers on specific aspects: the definition's contentious loopholes, including the issue of corporate defendant liability.

Fifth, a 2019 article by A. Greene, "The Campaign to Make Ecocide an International Crime," examines the feasibility and ethics of establishing Ecocide as

an international crime, delving into historical context and legal jurisdiction. While the source provides comprehensive coverage, the forthcoming discussion concentrates on defining international crimes related to Ecocide. This analysis assesses opportunities, challenges, and the ICC's jurisdiction for potential prosecution, differing from the historical emphasis in the article.

Sixth, a chapter authored by C. Stahn in "A Critical Introduction to International Criminal Law," titled "International Crimes," offers an in-depth exploration of the subject. It covers individual responsibility, victim remedies, and field reevaluation, emphasizing crimes from the Rome Statute's drafting and their evolution. In contrast, the thesis focuses specifically on integrating Ecocide into international crimes. It examines Ecocide's inclusion within the existing framework, emphasizing its role as an international crime against peace. The study assesses its interpretation, potential for adaptation, and the international community's perspective.

No	Sources	Discussion	Difference
1.	Higgins, Polly & Short, Damien & South, Nigel. (2013). *Protecting the planet: A proposal for a law*	The essay proposes Ecocide as an international crime, criticizes current justice and legal systems, and suggests an alternative	Instead of advocating, the thesis explores the challenges and potential of listing Ecocide as the fifth international crime. It

	of Ecocide. Crime, Law and Social Change. 59. 10.1007/s10611-013-9413-6.	earth jurisprudence. It traces Ecocide"s recognition from debates about genocide to consideration by the UN and advocates for its establishment as the fifth crime against peace.	draws on the perspectives of legal scholars and eminent jurists in addition to preparatory works and drafts commentary.
2.	Independent Expert Panel for the Legal Definition of Ecocide	The document presents a proposed definition of Ecocide and its commentary, as proposed by the Independent Expert Panel. The proposal aims to amend the Rome Statute by adding Ecocide as the fifth international crime.	The thesis will analyze the proposed definition of Ecocide and view it from the perspectives of both the drafter of the Rome Statute and contemporary legal experts.
3	Dörr Oliver (2012) "Interpretation of Treaties," in Dörr	This book provides a detailed analysis and interpretation of the	This thesis will focus only on the commentary of

	Oliver and K. Schmalenbach (eds) *Vienna Convention on the law of treaties A commentary*. Berlin, Heidelberg, Germany: Springer Berlin Heidelberg, pp. 521–604.	Vienna Convention on the Law of Treaties articles through its commentary.	Articles 31-33 of the Vienna Convention on the Law of Treaties regarding the interpretation of treaties since this thesis will precisely interpret international crimes through the glasses of the drafters and legal experts. Rules of treaty interpretation would be an excellent foundation for the analysis.
4	Hemptinne, J.de (2022) *Ecocide: An ambiguous crime?*, *EJIL*. EJIL: Talk! Blog of the European Journal	The article critiques the definition of Ecocide proposed by the Independent Expert Panel, citing its potential legal and political	Unlike the article, the thesis will specifically discuss the most contentious aspect of the loopholes of the proposed definition,

	of International Law. Available at: https://www.ejiltalk.org/Ecocide-an-ambiguous-crime/	implications. The author argues that the definition"s ambiguity may cause problems in its implementation.	such as the corporate liability of the defendant.
5	Greene, A. (2019) The campaign to make Ecocide an international crime: Quixotic quest or moral imperative?, FLASH: The Fordham Law Archive of Scholarship and History. Available at: https://ir.lawnet.fordham.edu/elr/vol30/iss3/1	The article discusses the need for international laws to address environmental destruction and the proposal to include Ecocide as a crime against peace. This journal also focuses on the history of Ecocide and the discussion of the right forum to prosecute the crime of Ecocide.	This thesis will focus on the definition of international crimes in the light of Ecocide and its possible opportunity and challenge. This thesis will not discuss the history of Ecocide in detail and only focus on the ICC as the possible forum of prosecution.

6	Stahn, C. (2019) "International Crimes," in *A Critical Introduction to International Criminal Law*. Cambridge, United Kingdom: Cambridge University Press, pp. 15–116.	The book provides an overview of international criminal law, including individual responsibility, victim remedies, and rethinking the field. This thesis focuses on the chapter about international crimes, which covers proposed crimes during the Rome Statute"s drafting and their evolution.	This thesis will center on exploring how Ecocide can be incorporated into the concept of international crimes. Specifically, it will examine how the international community can interpret the legal framework of international crimes to include Ecocide as a crime against peace.
7	International Law Commission. (1994) "Draft Code of Crimes against the Peace and Security of Mankind," in	The draft codes refer to the preparatory work of the Rome Statute, which includes the original commentary made by the drafter during the drafting and negotiation phase.	The thesis intends to interpret the Rome Statute using the draft codes as per Article 32 of the VCLT, which allows the interpretation of a

	Yearbook of the International Law Commission 1991. New York, United States: UN, pp. 101–107.	While not explicitly stated, the draft codes provide insight into why the existing international crimes were ultimately decided to be classified as "international crimes."	treaty through its preparatory work. The thesis will analyze these documents to determine whether Ecocide can be considered as the fifth international crime under the ICC"s jurisdiction.

1.5. Definition of Terms

The aim of defining the terms is to prevent any misunderstandings and discrepancies in interpretation associated with the terms used in the proposal's title. In line with the research title, "Assessing Ecocide as the Fifth International Crime under the Jurisdiction of the International Criminal Court," the terms that require explanation are as follows:

1.5.1. Ecocide

Poly Higgins, a U.K.-based lawyer, proposed the following as an amendment to the Rome Statute: "Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to

such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished."[33]

According to the Independent Expert Panel for the Legal Definition of Ecocide, Ecocide means "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."[34]

1.5.2. International Crimes

Defining "international crimes" has been the subject of international discussion. Despite the major development of international criminal law, no internationally agreed definition of "international crimes" has been met. This reflects the challenges in defining "international crimes" since there is no single, unified, authoritative source to which numerous experts may refer.

The practices of international criminal tribunals, states, the International Law Commission, and various scholars have produced a number of similar but related ideas of international crimes.[35] IMT Charter (London Charter) and IMTFE Charter, containing crimes committed during the Second World War, simply stated its jurisdiction for crimes that "quite literally crossed borders."[36] Furthermore, the

[33] Higgins et al., 2013.

[34] Stop Ecocide Foundation, 2021.

[35] Heller, K. J. (2016). What is an International Crime? (A Revisionist History). *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.2836889, pp. 357-361. (***Heller, 2016***)

[36] Greenawalt, A. K. (2020, May 7). "What is an International Crime?" *The Oxford Handbook of International Criminal Law*, 293–316. https://doi.org/10.1093/law/9780198825203.003.0013. (***Greenawalt, 2020***)

IMT"s *Hostage* case[37] and STL *Interlocutory Decision on Applicable Law*[38] both prescribe international crimes as a crime that is so severe they are deemed universally criminal. Aside from that, the landmark case of *Eichmann* by the District Court of Jerusalem invokes the "universality of the crimes" as a basis to prosecute crimes against humanity.[39] The chamber of the UK House of Lords in *Pinochet* also notes that "there are some categories of the crime of such gravity that shock the conscience of mankind and cannot be tolerated by the international community. Any individual who commits such an action offends against international law."[40] Further, the ILC"s 1984 Draft Code indicates that international crime contains an international dimension that affects "peoples, races, nations, cultures, civilizations, and mankind when they conflict with universal values."[41]

1.6. Literature Review

1.6.1. The Crime of Ecocide

Ecocide as a concept demonstrates a lengthier historical lineage compared to specific proposals and approaches examined thus far within the discourse.[42]

[37] United States Military Tribunal at Nuremberg. (1949). *Law Reports of Trials of War Criminals vol. XI: United States v. Wilhelm List et al*. The United Nations War Crimes Commission. p. 1241.

[38] Special Tribunal for Lebanon. (2011, February 16). Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/1). para. 134.

[39] District Court of Jerusalem (Israel). (1961). *Attorney General v. Adolf Eichmann* (Criminal Case No. 40/61)., para. 11.

[40] House of Lords (UK). (1998). Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3) [2000] (1 A. C. 147)., p. 100.

[41] Thiam. (1984). Second Report on the Draft Code of Offences against the Peace and Security of Mankind, Special Rapporteur, Vol. II. In *Yearbook of the International Law Commission* (A/CN.4/377 and Corr.1). para. 8.

[42] Higgins et al., 2013.

Nevertheless, despite its intrinsic pertinence and practical value, the term has yet to achieve the expected level of impact within the context of its applicability and usefulness. The ongoing discourse surrounding the issue of Ecocide remains a focal point within current academic and legal scholarship. Some scholars and experts are actively engaged in advocating for the recognition of Ecocide as an encompassing category of international crimes within the framework of the Rome Statute.

In 2010, Polly Higgins, an UK lawyer, submitted a proposal to the United Nations Law Commission that would amend the Rome Statute to incorporate Ecocide.[43] She proposed the definition of Ecocide as follows:

> "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."[44]

She further expanded the definition into Model law that states:

> "Ecocide crime is: (1) acts or omissions committed in times of peace or conflict by any senior person within the course of State, corporate or any other entity's activity which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystem(s) of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely diminished. (2) To establish seriousness, impact(s) must be widespread, long-term or severe."[45]

In June 2021, the Independent Expert Panel, convened by the Stop Ecocide Foundation, concluded the development of a proposed draft amendment to the Rome Statute aimed at incorporating the crime of Ecocide. The Independent Expert

[43] *Id*.
[44] Higgins, 2010.
[45] *Id*.

Panel seeks to establish a comprehensive legal definition of Ecocide, which finally concluded as follows: “unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.”[46]

Though the discussions and debates surrounding Ecocide remains relevant today, the term Ecocide is not a new concept in international law. The term was first introduce in 1970s in reference to Vietnam War.[47] The US military used chemical substances as a means of warfare in Vietnam thus creating severe environmental destruction.[48] This incident is also known as Agent Orange case. Agent Orange refers to a chemical compound created through the collaboration of Monsanto and Dow Chemical, is a combination of two commonly used herbicides, namely 2,4-D and 2,4,5-T, which had been separately employed in the United States since the late 1940s.[49] The name "Agent Orange" originated from the orange-striped barrels in which it was transported. [50] Dioxin, an exceedingly toxic substance, represents the lethal constituent of Agent Orange and is responsible for a range of health complications.[51]

In 1970, Professor Arthur W. Galston, coined “Ecocide” for the first time at the Conference on War and National Responsibility in Washington and proposed a

[46] Stop Ecocide Foundation, 2021.

[47] Greene. (2019). The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative? *Fordham Environmental Law Review*, *30*(3). (***Greene, 2019***), p. 7.

[48] Zierler. (2011). The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment. University of Georgia Press., p.17.

[49] Institute of Medicine (US) Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides, 1994.

[50] *Id*.

[51] *Id*.

new international agreement to ban Ecocide.[52] Galston, a US biologist, had earlier identified the defoliant properties of a chemical compound that would eventually evolve into Agent Orange.[53] Later as a bioethicist, he pioneered characterizing the extensive devastation and destruction of ecosystems as Ecocide.[54]

Following Professor Galston milestone, the term "Ecocide" become frequently used and its criminalization become heavily discussed. In 1973, the Revue Belge de Droit International featured an article by Professor Richard Falk, wherein he presented his proposition for an International Convention on the Crime of Ecocide.[55] Professor Falk's work stands as one of the pioneering efforts to establish a legal definition of Ecocide. In 1978, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities put forth a proposal to augment the Genocide Convention by incorporating the concept of "Ecocide".[56] As part of this initiative, the Sub-Commission conducted a comprehensive study for the UN Human Rights Commission, appraising the effectiveness of the Genocide Convention and advocating for the inclusion of Ecocide, also the reintroduction of cultural genocide, within the catalog of proscribed acts.[57] Regrettably, the proposal to integrate Ecocide into the Genocide Convention faced rejection in 1985.[58]

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[52] *History – Ecocide Law*. (n.d.). Ecocide Law. https://ecocidelaw.com/history/ (***History – Ecocide Law, n.d.***)

[53] Zierler, 2011, p.17

[54] (History – Ecocide Law, n.d.)

[55] Falk, R. A. (1973, March). Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals. *Bulletin of Peace Proposals*, *4*(1), 80–96. https://doi.org/10.1177/096701067300400105. (***Falk, 1973***)

[56] History – Ecocide Law, n.d.

[57] UN Human Rights Commission. (1978, July 4). Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Question of the Prevention and Punishment of the Crime of Genocide (U.N. Doc. E/CN.4/Sub.2/416)., pp. 128-134

[58] History – Ecocide Law, n.d.

Nevertheless, there appears to be a more optimistic outlook for incorporating Ecocide within the jurisdiction of the ICC. Despite its previous rejection, indications of Ecocide's development within the ICC can be found in the *Travaux préparatoires* of the Rome Statute dating back to 1991. In these preparatory documents, the drafter included Article 26, encompassing the notion of "willful and severe damage to the environment" within the Draft Code of Crimes Against the Peace and Security of Mankind (the draft of Rome Statute). Moreover, in both 2013 and 2016, the ICC's Prosecutor issued policy papers that underscored the significance of prosecuting crimes involving the destruction of the environment and environmental damage when assessing the gravity of offenses falling under the purview of the Rome Statute.[59] These developments hint at a more promising future for the recognition and prosecution of Ecocide within the framework of the ICC.

1.6.2. International Crimes based on the Rome Statute

The realm of international criminal law lacks a universally accepted theory regarding the proper scope of protection under international criminal law and the specific characteristics that define an act as an "international crime".[60] The development and definition of international crimes have been subject to ongoing debates among scholars, legal experts, and policymakers.

[59] Office of the Prosecutor. (2013). *Policy Paper On Preliminary Examinations*. International Criminal Court. (***OTP Policy Paper, 2013***), para. 65; (OTP Policy Paper, 2016)., para. 41.

[60] Stahn. (2019, December 6). *A Critical Introduction to International Criminal Law*. Cambridge University Press. (***Stahn, 2019***), para. 16.

Professor Stahn is of the opinion that the contemporary understanding of international crimes is divided into three different approaches.[61] The first approach focuses on safeguarding specific public goods or interests as a basis for defining international criminal law.[62] This approach seeks to protect both individual and collective interests, including but not limited to peace and security, the rights of individuals and groups, as well as the preservation of human dignity.[63] The second approach centers around defining international crimes based on their inherent criminal nature.[64] Criminologists have proposed various conceptual frameworks to clarify the fundamental characteristics of international crimes. The third approach involves defining international crimes by considering the community whose interests have been violated.[65] According to this perspective, a crime is viewed as an assault on the normative order and collective conscience of a society.

Article 5 of the Rome Statute governs four actions that are considered international crimes: genocide, crimes against humanity, war crimes, and crimes of aggression.[66] However, there are ongoing discussions about expanding the scope of international criminal law to include other offenses such as environmental crimes, cybercrimes, and transnational organized crimes. The definition and inclusion of these offenses are subject to international consensus, treaty negotiations, and the development of customary international law.

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[61] *Id.*, para. 15.
[62] *Id.*, para.16.
[63] *Id*.
[64] *Id*.
[65] *Id.*, para. 17.
[66] Rome Statute, Article 5.

It is important to note that the evolution of international criminal law is a complex and dynamic process influenced by legal, political, and societal factors. Consequently, determining what should be protected by international criminal law and recognized as an international crime requires ongoing dialogue and consensus-building among the international community.

Nevertheless, the existing discussions and limitations should not rule out the potential inclusion of additional offenses as international crimes, particularly in relation to environmental crimes.[67] Given the significant and harmful consequences these crimes have on both the environment and humanity, there is a compelling rationale for their integration into the domain of international criminal law.

1.6.3. The Method of Treaty Interpretation based on the VCLT

Every legal document will inevitably raise questions from future experts and scholars. This is especially true since the treaties and conventions were not formalized through unanimous agreement of all the drafters. The questions and debates continue even after the establishment of the treaties or conventions. Consequently, the method of treaty interpretation becomes the most important rule to analyze and study the treaty in order to provide answers to those questions.

The rules of treaty interpretation have been established a long time ago. In the 17th and 18th centuries, legal scholars such as *Grotius, Pufendorf,* and *Vattel* made

[67] Mégret. (2011). The Problem of an International Criminal Law of the Environment. *Columbia Journal of Environmental Law*, *195*(218). (***Mégret, 2011***); Weinstein. (2005). Prosecuting attacks that destroy the environment: Environmental crimes or humanitarian atrocities? *Georgetown International Environmental Law Review*, *17*(4), 697–722. (***Weinstein, 2005***); Berat. (1993). Defending the Right to a Healthy Environment: Toward a Crime of Genocide in International Law. *Boston University International Law Journal*, *11*(2), 327–348. (***Berat, 1993***)

significant contributions by initiating the early attempts to identify precise rules for treaty interpretation and to formulate them into codified sets of rules.[68] The rise in the utilization of arbitration from the late 19th century onwards led to the expansion of a significant collection of decisions that provided interpretations of treaties. Concurrently, the development of interpretative practice at the universal level gained momentum through the establishment of precedents by the Permanent Court of International Justice [*PCIJ*].[69] In 1969, a written convention was established to codify the–one of which is–rules of treaty interpretation namely the 1969 Vienna Convention on the Law of Treaties [*VCLT*]. Section 3 of the VCLT entitled "Interpretation of Treaties" consists of 3 articles namely Articles 31–33. However, since the thesis would discuss treaty interpretation based on *Travaux préparatoires* and commentaries, the focus is on Articles 31–32 concerning *General rule of interpretation* and *Supplementary means of interpretation.*

The term "interpretation" is defined as the process of establishing the true meaning of a treaty.[70] The function of such interpretation is to give "effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances."[71] Article 31 of the

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[68] Gardiner. (2017). *Treaty Interpretation* (2nd ed.). Oxford International Law Library., p. 52. (***Gardiner, 2017***)

[69] Permanent Court of International Justice. (1925). *Exchange of Greek and Turkish Populations* (PCIJ Ser. B No. 10, 20).; Permanent Court of International Justice. (1925). *Polish Postal Service in Danzig* (PCIJ Ser. B No. 11, 37); Permanent Court of International Justice. (1933). *Legal Status of Eastern Greenland* (PCIJ Ser. A/B No. 53, 49).

[70] Dörr, & Schmalenbach (Eds.). (n.d.). *Vienna Convention on the Law of Treaties: A Commentary*. Springer Heidelberg Dordrecht London. (***Dörr & Schmalenbach, n.d.***), p. 522, para.2.

[71] International Court of Justice. (1994). Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgement. In *ICJ Reports*., p. 6, para 41; International Court of Justice. (2004). Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment. In *ICJ Reports*., p. 279, para 100.

Vienna Convention on the Law of Treaties (VCLT) establishes the fundamental principle of treaty interpretation, which involves three distinct methods: textual interpretation, contextual interpretation, and teleological interpretation.[72] These approaches should be employed simultaneously, in accordance with the principle of good faith, which directly derives from the maxim "*pacta sunt servanda.*"[73]

Article 32 of the VCLT introduces supplementary means of treaty interpretation, which complement the general rule of interpretation specified in Article 31. Essentially, this article outlines the conditions under which these supplementary measures can be employed for treaty interpretation, their importance in the interpretive process, and their relationship with other principles of interpretation.[74] The primary objective is to incorporate external information and material beyond the treaty text, which aids in the interpretation process.[75]

Articles 31 and 32 of the VCLT have been widely recognized as customary international law. The ICJ Judgement 1991 on the Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal) became the first explicit judgment that endorsed the customary character of the provision stating that the pre-existing principles of treaty interpretation "are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point."[76] This view is widely

[72] Dörr & Schmalenbach, n.d., p. 523, para. 5.
[73] *Id*.
[74] *Id*, p. 571, para. 1.
[75] Gardiner, 2017., p. 302.
[76] International Court of Justice. (1989). Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal). In *ICJ Reports*. (***Arbitral Award, 1989***), p. 53, para 48.

recognized by the following international courts and tribunals such as International Tribunal for the Law of the Sea [*ITLOS*],[77] the European Court of Human Rights [*ECtHR*],[78] the European Court of Justice [*ECJ*],[79] as well as the dispute settlement bodies of the World Trade Organization [*WTO*].[80] Furthermore, numerous arbitral institutions also share this viewpoint.[81]

In the absence of an authoritative definition of international crime, it is imperative to consider the *Travaux préparatoires* and commentaries of the Rome Statute in order to comprehensively interpret the term. Moreover, this approach aligns with the principles established in Articles 31 and 32 of the VCLT and has consistently been employed by the courts and tribunals. By consulting the *Travaux préparatoires* and commentaries, we adhere to the prescribed methodology of interpretation as outlined in Article 31 and 32.

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[77] ITLOS. (2011, February 1). *(Seabed Disputes Chamber) Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in Area, Advisory Opinion.*, para 57.

[78] ECtHR. (1975). *Golder v United Kingdom* (App No 4451/70, Ser A 18)., para. 29; ECtHR. (1996). *Loizidou v Turkey (GC) (Merits)* (App No 15318/89, ECHR1996-VI)., para 43.

[79] ECJ. (1991, December 14). *Opinion Pursuant to Article 228 Of The EEC Treaty Vol 61991CV0001*., para 14; ECJ. (1993, July 1). *Metalsa Judgment* ((C-312/91, ECR 1993 p. I-3751) ECLI:EU:C:1993:279)., para 12; ECJ. (2010, February 25). *Brita Judgment* ((C-386/08, ECR 2010 p. I-1289) ECLI:EU:C:2010:91)., paras 41–42; ECJ. (2010, May 6). *Walz Judgment* ((C-63/09, ECR 2010 p. I-4239) ECLI:EU:C:2010:251)., para 23.

[80] WTO. (1996). *Japan–Taxes On Alcoholic Beverages II* (WT/DS 8, 10–11/ AB/R, Part D)., paras. 10–12.; WTO. (2001). *United States–Hot-Rolled Steel Products from Japan* (WT/DS184/ AB/R)., para 57.; WTO. (2005). *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/AB/R)., para. 159.

[81] Reports of International Arbitral Awards (RIAA). (2005). *The Iron Rhine Railway Arbitration (Belgium v. Netherlands)* (27 RIAA 35)., para. 45; RIAA. (2004). *The Audit of Accounts Between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976 (Netherlands v. France)* (25 RIAA 267)., paras. 58-62.

1.7. Research Method

1.7.1. Type of Research

Normative legal research involves identifying legal rules, principles, and doctrines to address specific legal issues to resolve the problem.[82] This method is carried out by researching library materials or secondary data.[83] This research based on this method since it is mainly based on the studies of experts, which focuses on the result of the experts" thoughts on international criminal law and international environmental law.

1.7.2. Method of Approach

In this research, the author will use several approach methods in this type of normative research, such as:

1.7.2.1. Statutory Approach

Statutory approach involves analyzing all applicable laws and regulations related to the discussed legal issue.[84] This approach is utilized to analyze the definition of international crimes and the criminalization of environmental offenses based on applicable statutes and conventions.

1.7.2.2. Conceptual Approach

The conceptual approach combines the analysis of statutes or regulations with their practical application while also delving into the concepts and ideas that have

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[82] Mahmud. (2005). *Penelitian Hukum*. Prenada Media.

[83] Soekanto, & Mamudji. (2003). *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Raja Grafindo Persada. p.13.

[84] Muhaimin. (2012). *Metode Penelitian Hukum*. Mataram University Press., pp. 67-68.

emerged within the legal field.[85] This approach is employed to investigate the regulations concerning the criminalization of Ecocide, particularly in countries that have acknowledged it as a crime.

1.7.2.3. Historical Approach

The historical approach entails examining legal cases associated with the relevant issues, which have led to court decisions that hold significant legal significance.[86] Considering that the term "Ecocide" is derived from "Genocide," it is essential to explore the etymology and origins of the term.

1.7.3. Sources of Research Data

The present study employs the methodology of normative legal research, which relies on secondary data sources to collect, review, and track relevant documents and libraries. The legal materials used in this research comprise authoritative sources, including legal codes, regulations, and case law. The legal materials employed in this research include:

1.7.3.1. Primary Legal Material

The thesis relies on primary legal materials, which include legislative documents, official records, and judicial decisions. [87] The primary legal material employed in this research are the Rome Statute and the 1969 Vienna Convention on the Law of Treaties. The study aims to draw upon the Rome Statute as a

[85] Ibrahim. (2007). *Teori dan Metodologi Penelitian Hukum Normatif* (3rd ed.). Bayumedia Publishing, p. 300.
[86] *Id*.
[87] *Id.,* p. 68.

foundational source of legal authority which interpreted through the 1969 Vienna Convention, to provide a comprehensive and rigorous analysis of the research topic.

1.7.3.2. Secondary Legal Materials

The thesis utilizes secondary legal material, which encompasses all publications related to law that are not official documents.[88] This includes a wide range of sources such as textbooks, legal dictionaries, legal journals, and commentaries on court decisions. By incorporating secondary legal material, this study aims to provide a comprehensive analysis of the research topic, drawing upon diverse perspectives and insights from various sources within the legal community.

1.7.3.3. Tertiary Legal Materials

The thesis utilizes tertiary legal materials, which are sources that provide guidance and clarification on primary and secondary legal materials.[89] Examples of tertiary legal materials include legal dictionaries, encyclopedias, cumulative indexes, and other reference works that help to explain and contextualize legal concepts and terminology. By incorporating tertiary legal materials, this study aims to provide a comprehensive and in-depth analysis of the topic, drawing upon a range of sources to develop a nuanced understanding of the legal issues at hand.

1.7.4. Method of Data Collecting

The thesis utilizes a literature study approach as its primary data collection method. This approach involves activities such as collecting data from library sources, reading and taking notes, and managing research materials. By employing

[88] *Id.*
[89] *Id.*

this method, the study aims to provide a comprehensive and systematic review of the existing literature on the research topic, serving as a foundation for further analysis and interpretation.

1.8. Writing Framework

1.8.1. Chapter I

This chapter presents an overview of the research and is structured as follows: background of the study, problem formulation, research objectives, literature review, research methodology, and writing structure.

1.8.2. Chapter II

In this chapter, a general overview of the conventions and documents supporting this research will be provided, including the Vienna Convention on the Law of Treaties (VCLT), Rome Statute, *Travaux préparatoires*, and commentaries. Additionally, the chapter will discuss the method of treaty interpretation based on the VCLT and provide a historical account of Ecocide.

1.8.3. Chapter III

This chapter analyzes the inclusion of Ecocide as the fifth international crime under the Rome Statute, based on definitions provided by scholars. It will also examine the challenges and opportunities associated with incorporating Ecocide as an international crime under the Rome Statute.

1.8.4. Chapter IV

This final chapter presents the conclusion and recommendations based on the previous research.

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CHAPTER II

LITERATURE REVIEW

2.1. Defining Ecocide and the Perspective of National Crimes

A. Understanding the Roadmap: The History of Ecocide

The concept of Ecocide is not novel; it has undergone substantial development, yet the light at the end of the tunnel remains elusive. The term "Ecocide" was initially coined by Professor Arthur W. Galston during a conference addressing war and national responsibility.[90] Galston also introduced a novel proposition for an international agreement to proscribe Ecocide within this context.[91] Galston, a US biologist, was the individual who identified the defoliant properties of a chemical substance that eventually evolved into Agent Orange.[92] His active opposition to the US military's utilization of the toxic defoliant Agent Orange during the Vietnam War underscores why the history of Ecocide is inseparably linked to the tragic events involving Agent Orange in the Vietnam War.

In June 1972, representatives from 113 nations gathered at the United Nations Conference on the Human Environment in Stockholm, Sweden—also known as the Stockholm Conference.[93] This marked the UN's inaugural major conference addressing international environmental issues.[94] In his opening speech, Olaf Palme,

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[90] (History – Ecocide Law, n.d.)
[91] *Id*.
[92] (Greene, 2019), p. 8.
[93] Björk. (1996). *The Emergence of Popular Participation in World Politics: United Nations Conference on Human Environment 1972*. http://folkrorelser.org/johannesburg/stockholm72.pdf
[94] *Id.,* p. 5.

the Prime Minister of Sweden, referred to the Vietnam War as “Ecocide,” highlighting that “the immense destruction brought about by indiscriminate bombing, large-scale use of bulldozers, and herbicides is an outrage sometimes described as Ecocide, demanding international attention.”[95]

In 1973, Professor Falk published the proposed International Convention on the Crime of Ecocide, which included a comprehensive analysis, definition, and framework for the proposed Ecocide law.[96] The Draft Convention asserted, "The Contracting Parties confirm that Ecocide, whether committed in times of peace or war, is a crime under international law which they undertake to prevent and punish."[97] This Proposed Convention required criminal intent "to disrupt or destroy, either wholly or partially, a human ecosystem."[98] Instead of offering a general definition of Ecocide, it presented a list of acts that could constitute Ecocide.[99]

Falk's article was subsequently incorporated into a UN study concerning the issue of Ecocide.[100] The UN Sub-Commission was tasked with assessing the effectiveness of the Genocide Convention and potential modifications to it.[101] In 1978, the Commission issued a "Study of the Question of the Prevention and Punishment of the Crime of Genocide."[102] This study examined the feasibility of

[95] *Id*., p. 19.
[96] (History – Ecocide Law, n.d.)
[97] (Falk, 1973), p. 21.
[98] *Id*.
[99] *Id*.
[100] (Greene, 2019), p. 13.
[101] *Id*.
[102] UN Human Rights Commission. (1978, July 4). *Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Question of the Prevention and Punishment of the Crime of Genocide* (U.N. Doc. E/CN.4/Sub.2/416)., pp. 128-134

developing additional conventions to address acts of genocide not covered by the original 1948 Convention.[103] The study explored proposals to include Ecocide and cultural genocide within the Convention.

Regarding Ecocide, three distinct concepts were considered: treating Ecocide as an international crime similar to genocide, viewing Ecocide as a war crime, and addressing Ecocide as actions intended to manipulate the environment for military purposes.[104] However, the recommendations of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities were not pursued further.[105] Moving ahead to 1985, UN Special Rapporteur on genocide, Benjamin Whitaker, proposed a definition of "Ecocide" for inclusion in the Genocide Convention.[106] Unfortunately, this proposition was not adopted.

In 1991, the ILC formulated the Draft Code of Crimes Against the Peace and Security of Mankind, which initially included 12 crimes.[107] Among these was an environmental crime designated as Article 26: "Willful and Severe Damage to the Environment."[108] This article stated that an individual who willfully causes or orders significant harm to the environment can be held accountable.

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[103] *Id*.
[104] (Greene, 2019), p. 13.
[105] (History – Ecocide Law, n.d.)
[106] *Id*.
[107] ILC. (1991). Draft Code of Crimes Against the Peace and Security of Mankind, Text of Draft Articles Provisionally Adopted by the Commission on First Reading. In *Report of the International Law Commission on the Work of Its Forty-Third Session* (UN Doc. A/CN.4/L.459 [and corr.1] and Add.1).
[108] *Id*.

However, when the Assembly voted on the final version of the Code in 1996, Article 26 vanished from the text entirely.[109] Instead of addressing the issue of intent for environmental crimes, the International Law Commission opted to completely eliminate Article 26 from the Draft Code.[110] As a result, any provisions safeguarding the environment beyond acts classified as war crimes were absent from the Rome Statute.

In the final version of the Code, environmental damage is only mentioned in the context of war crimes. The only provision under international criminal law that holds a perpetrator responsible for environmental damage is Article 8(b)(iv) on War Crimes.[111] This article encompasses the following war crime: "Intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life, injury to civilians, damage to civilian objects, or widespread, long-term, and severe damage to the natural environment, which would be clearly excessive concerning the concrete and direct overall military advantage anticipated."[112]

Between 1990 and 2003, several countries, including Russia, Kazakhstan, the Kyrgyz Republic, Tajikistan, Georgia, Belarus, Ukraine, Moldova, and Armenia, incorporated the crime of Ecocide into their domestic laws.[113] These countries prescribed imprisonment for actions leading to ecological disasters.[114]

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[109] (Greene, 2019), p. 18.
[110] *Id*.
[111] Rome Statute
[112] Article 8(2)(b)(iv), Rome Statute
[113] (History – Ecocide Law, n.d.)
[114] *Id*.

In 2013, the ICC Prosecutor released a Policy Paper on Preliminary Examinations. This paper highlighted that the impact of a crime plays a crucial role in assessing its gravity. It stated:

> "The impact of crimes may be evaluated considering factors such as the suffering endured by victims, their increased vulnerability, the subsequent instillation of terror, and the social, economic, and environmental damage inflicted upon affected communities."[115]

In 2016, the Prosecutor of the ICC issued a Policy Paper on Case Selection and Prioritization. This paper reiterated the significance of the impact of a crime in determining its gravity. It stated:

> "The impact of crimes may be assessed by taking into account aspects like the heightened vulnerability of victims, the subsequent instillation of terror, and the social, economic, and environmental damage inflicted on affected communities. In this context, the Office will especially prioritize the prosecution of Rome Statute crimes involving, among other things, environmental destruction, illegal exploitation of natural resources, or unlawful land dispossession."[116]

During 2019-2020, during ICC Assembly of States Parties meetings, Vanuatu, the Maldives, and Belgium advocated for the inclusion of Ecocide as a crime within the Rome Statute.[117] In 2021, an Independent Expert Panel convened by the Stop Ecocide Foundation finalized a draft amendment to the Rome Statute, proposing the addition of an "Ecocide" crime.[118]

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[115] (OTP Policy Paper, 2013), para. 65.
[116] (OTP Policy Paper, 2016), para. 41.
[117] (History – Ecocide Law, n.d.)
[118] (Stop Ecocide Foundation, 2021)

B. Defining Ecocide through Expert Perspectives

Ecocide remains a subject of ongoing deliberation, lacking a universally accepted and definitive definition. Notably, scholars have been actively engaging in proposing diverse interpretations of Ecocide. Among these proposals, the most recent one put forth by an Independent Legal Expert aims to amend the Rome Statute. In the following sections, the writer will present the various definitions that these scholars have suggested in their pursuit of establishing a comprehensive understanding of Ecocide.

1) Professor Richard A. Falk

Professor Falk, deeply moved by the tragic consequences of Agent Orange during the Vietnam War, fervently advocates for the criminalization of Ecocide.[119] He views the areas affected by Agent Orange as catastrophic sites, comparable to environmental Auschwitz, emphasizing the urgent need for addressing this distinct environmental crime.[120]

The impact of Agent Orange on Vietnam has been devastating, with approximately 400,000 people reported to have suffered death or permanent injury, and an estimated 2,000,000 people afflicted with illnesses resulting from exposure.[121] Moreover, exposure to Agent Orange led to around half a million babies being born with birth defects.[122]

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[119] (Falk, 1973), p. 80.
[120] *Id*, p. 84.
[121] *Defoliant | Herbicides, Pesticides, Agriculture*. (n.d.). Encyclopedia Britannica. https://www.britannica.com/science/defoliant.
[122] *Id.*

The ecological ramifications of Agent Orange on Vietnam's plant life were profound, contributing to the displacement of refugees during the war. The lingering ecological effects have continued to affect the lives of Vietnamese citizens. Studies indicate that dioxin contamination in soil and sediment has caused a process of biological magnification, leading to contamination in fish, ducks, and, ultimately, humans through consumption.[123] The International Union for Conservation of Nature has expressed concerns that much of the environmental damage may be irreparable.[124]

Professor Falk believes that an Ecocide Convention could play a pivotal role in condemning environmental warfare and providing a legal framework for addressing ecocidal acts, similar to how the Genocide Convention formalized condemnation and punishment for acts of genocide after Nuremberg.[125] In his article published by the Revue Belge de Droit International, he proposes an International Convention on the Crime of Ecocide and takes the initiative to define the term "Ecocide," making a significant contribution to the development of this emerging field of law.[126]

Thus, Professor Falk proposing the definition of Ecocide as follow:

> Article II.
> In the present Convention, Ecocide means any of the following acts committed with intent to disrupt or destroy, in whole or in part, a human ecosystem:

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[123] Schecter, A., Cao Dai, L., Päpke, O., Prange, J., Constable, J. D., Matsuda, M., Duc Thao, V., & Piskac, A. L. (2001, May). Recent Dioxin Contamination from Agent Orange in Residents of a Southern Vietnam City. *Journal of Occupational and Environmental Medicine*, *43*(5), 435–443. https://doi.org/10.1097/00043764-200105000-00002

[124] Kemf, E. (1990, April 1). *Month of Pure Light: The Regreening of Vietnam*. https://doi.org/10.1604/9780704350502.

[125] (Falk, 1973), p. 84.

[126] Ecocide Law. "History – Ecocide Law," n.d. https://ecocidelaw.com/history/.

(a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
(b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
(c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of the soil or to enhance the prospect of diseases dangerous to human beings, animals, or crops;
(d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;
(e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
(f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.

Professor Falk's article was included in a UN study on Ecocide, which tasked the UN Sub-Commission with evaluating the effectiveness of the Genocide Convention and potential amendments.[127] In 1978, the Commission released the "Study of the Question of the Prevention and Punishment of the Crime of Genocide," examining the feasibility of additional conventions to address acts of genocide not covered by the original 1948 Convention.[128] This study also explored the inclusion of Ecocide and cultural genocide in the Convention.

The concept of Ecocide proposed expanding its scope from acts of war to encompass industrial and commercial actions, such as nuclear explosions, acid rain, severe pollution, and rainforest destruction. The intent behind Ecocide would cover both deliberate actions and criminal negligence.[129] Despite these proposals, the idea

[127] (Greene, 2019), p. 13.
[128] UN Human Rights Commission. (1978, July 4). Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Question of the Prevention and Punishment of the Crime of Genocide (U.N. Doc. E/CN.4/Sub.2/416)., pp. 128-134
[129] *Id.*, p. 14.

of incorporating "Ecocide" into the Genocide Convention did not gain momentum, and the 1985 report did not draw any definitive conclusions on the matter.

Following the 38th session of the Sub-Commission, the final report recommended that Special Rapporteur Whitaker conduct further investigation into the expansion of the Genocide Convention to include cultural and ecocidal methods of genocide.[130] However, this recommendation remained unaddressed during the 40th session.[131]

2) Polly Higgins

Pauline Helène "Polly" Higgins, a Scottish barrister, author, and environmental lobbyist, was acclaimed as one of the most influential figures in the green movement, according to Jonathan Watts" obituary in The Guardian.[132] During her final years, Higgins dedicated herself to promoting the global understanding of "Ecocide" through public speaking, documentary work, and advisory roles with governments.[133] In 2010, she presented a definition of Ecocide to the UN Law Commission, stating that:[134]

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

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[130] Short, D. (2016, June 15). *Redefining Genocide: Settler Colonialism, Social Death and Ecocide*. (***Short, 2016***), p. 68.

[131] *Id.*

[132] Watts, J. (2019, April 22). *Polly Higgins, lawyer who fought for recognition of "ecocide", dies aged 50*. The Guardian. http://www.theguardian.com/environment/2019/apr/22/polly-higgins-environmentalist-eradicating-ecocide-dies.

[133] *Polly Higgins; Stop Ecocide International*. (n.d.). Stop Ecocide International. Retrieved July 29, 2023, from https://www.stopecocide.earth/polly-higgins.

[134] *Polly Higgins Ecocide Crime – Ecocide Law*. (n.d.). Ecocide Law. https://ecocidelaw.com/polly-higgins-ecocide-crime/

Higgins later expanded this definition into a model law, which states:

Ecocide crime is:

1. acts or omissions committed in times of peace or conflict by any senior person within the course of State, corporate or any other entity's activity which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystem(s) of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely diminished.
2. To establish seriousness, impact(s) must be widespread, long-term or severe.
3. For the purposes of paragraph 1:
   (a) "climate loss or damage to or destruction of" means impact(s) of one or more of the following occurrences, unrestricted by State or jurisdictional boundaries: (i) rising sea-levels, (ii) hurricanes, typhoons or cyclones, (iii) earthquakes, (iv) other climate occurrences;
   (b) "ecosystems" means means a biological community of interdependent inhabitants and their physical environment;
   (c) "territory(ies)" means one or more of the following habitats, unrestricted by State or jurisdictional boundaries: (i) terrestrial, (ii) fresh-water, marine or high seas, (iii) atmosphere, (iv) other natural habitats;
   (d) "peaceful enjoyment" means peace, health and cultural integrity;
   (e) "inhabitants" means indigenous occupants and/or settled communities of a territory consisting of one or more of the following: (i) humans, (ii) animals, fish, birds or insects, (iii) plant species, (iv) other living organisms

3) Independent Panel Expert

The Independent Expert Panel for the Legal Definition of Ecocide is a diverse group of twelve global lawyers with criminal, environmental, and climate law expertise.[135] From January to June 2021, they collaborated on crafting a practical and effective definition of the crime of "Ecocide." Throughout their work, the Panel

[135] (Stop Ecocide Foundation, 2021)

sought external expertise and engaged in a public consultation, gathering insights from various perspectives, including legal, economic, political, youth, faith, and indigenous viewpoints from around the world.[136] Five remote sessions were held during this period, with sub-groups assigned to specific research and drafting responsibilities.[137] In June 2021, a consensus on the core text of the international crime definition for Ecocide was achieved.[138]

The Panel aspires for the proposed definition to serve as the groundwork for amending the Rome Statute of the International Criminal Court (ICC) to include Ecocide as a new crime. To achieve this, they put forth the following recommended amendments.[139]

Article 8 *ter*
Ecocide

1. For the purpose of this Statute, "Ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.
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;

[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*

e. “Environment” means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.

C. Ecocide on a National Scale

Despite the International Law Commission (ILC) removing Article 26 from the conclusive Rome Statute, certain nations have drawn upon the initial draft articles as a foundation to develop their legislation on the subject of Ecocide.[140] Notably, ten countries have established laws criminalizing "Ecocide" during peacetime.[141] These laws closely resemble the language of the ILC”s draft Article 26, which entails that any individual who deliberately instigates or commands extensive, enduring, and severe harm to the natural environment shall face appropriate legal consequences upon conviction.

In 1990, Vietnam took a significant step by becoming the first country to criminalize "Ecocide," likely motivated by the environmental devastation it experienced during the Vietnam War. The Ecocide provision is incorporated within Chapter 5 of their legal framework, titled "Crimes of Undermining Peace, Against Humanity, and War Crimes,"[142] specifically under Article 342, "Crimes Against Mankind." This statute defines Ecocide as

> “Those who, in peace time or war time, commit acts of annihilating en-mass population in an area, destroying the source of their livelihood, undermining the cultural and spiritual life of a country, upsetting the foundation of a society with a view to undermining such society, as well as other acts of genocide or acts of Ecocide or destroying the natural environment, shall be sentenced to between ten years and twenty years of imprisonment, life imprisonment or capital punishment…”[143]

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[140] *See* Chapter II, 2.2.1.

[141] These countries include: Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Republic of Moldova, Russian Federation, Tajikistan, Ukraine, Uzbekistan, and Vietnam.

[142] *Penal Code Vietnam*. (1990)., Ch. 5, Art. 342.

[143] *Id.*

Following the dissolution of the Soviet Union ("USSR") in 1990, the Russian Federation and several former USSR Republics took steps to incorporate the offense of "Ecocide" into their respective Criminal Codes, a process that occurred between 1994 and 2001.[144] As an illustration, Kyrgyzstan's definition of Ecocide is expressed in Article 374, which entails

> "Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe, shall be punishable by deprivation of liberty for a term of 12 to 20 years."[145]

It is noteworthy that Kyrgyzstan's Criminal Code explicitly highlights environmental protection as one of its primary objectives, and a dedicated chapter, Chapter 26, is exclusively devoted to addressing Environmental Crimes.

Numerous nations have integrated environmental safeguards into their respective national Constitutions. As an illustration, Ecuador's Constitution establishes legally binding rights for Nature, accompanied by an obligation to implement measures to prevent ecosystem degradation and species extinction.[146] Similarly, certain countries have established domestic environmental courts exclusively designated to adjudicate cases related to environmental harm. Guatemala serves as an example, as it recently enacted legislation criminalizing Ecocide and established a specialized environmental court to address such claims.[147]

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[144] (Short, 2016), p. 48.

[145] *Criminal Code Kyrgyzstan*. (1997)., Ch. 34, Art. 374.

[146] Higgins. (2012, August 1). *Earth Is Our Business: Changing the Rules of the Game*. Shepheard-Walwyn., p. 153.

[147] Marsili. (2015, December 1). *A New Court in Guatemala Tackles Ecocide*. FrontLines November/December 2015 | Archive - U.S. Agency for International Development. Retrieved May

Under the jurisdiction of these Ecocide laws, national courts have handled various cases. One notable instance involves a Guatemalan village that filed an Ecocide claim against a palm oil company responsible for contaminating a major river and causing the death of all its fish.[148] This landmark case received widespread international attention, particularly from environmental activists. Additionally, in 2012, Kyrgyzstan's prosecutors pursued criminal charges of Ecocide when a substantial quantity of radioactive coal, amounting to 9000 tons, was imported into the country and distributed to schools, orphanages, and nursing homes.[149] In response, the prosecutor's office not only brought Ecocide charges against the head of the Kyrgyz company responsible for shipping the hazardous material but also initiated criminal investigations against government officials who had authorized the perilous shipment.[150]

Nevertheless, there have been scarce instances of successful prosecutions in the limited number of countries that have implemented domestic laws against Ecocide. For instance, in the Kyrgyzstan case, the charges against the company

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29, 2023, from https://2017-2020.usaid.gov/news-information/frontlines/resilience-2015/new-court-guatemala-tackles-ecocide.

[148] *Guatemala's Environmental Crimes Court Hears First Case - Sustainable Business*. (2016, January 19). Sustainable Business. Retrieved May 29, 2023, from https://www.sustainablebusiness.com/2016/01/guatemalas-environmental-crimes-court-hears-first-case-55448/.

[149] Gutteridge, B. N., View, T., Garry, B. T., Foreign Staff, B. O., & Macpherson, B. W. (2012, February 10). *Radioactive coal sent to schools in Kyrgyzstan*. Radioactive Coal Sent to Schools in Kyrgyzstan. https://www.telegraph.co.uk/news/worldnews/asia/kyrgyzstan/9071329/Radioactive-coal-sent-to-schools-in-Kyrgyzstan.html; *Kyrgyz Officials Face Charges over Radioactive Coal*. (2012, March 13). Sputnik International. Retrieved May 29, 2023, from https://sputnikglobe.com/20120313/172130276.html

[150] Sanya Khetani, OOPS: *Kazakhstan (Accidentally) Sent Radioactive Coal To Kyrgyzstan Orphans*, BUSINESS INSIDER (Feb. 10, 2012), https://www. businessinsider.com/oops-kazakhstan-accidentally-sent-radioactive-coal-tokyrgyzstan-orphans-2012-2 [https://perma.cc/WBJ9-2QWF].

head were ultimately dismissed due to insufficient evidence, and the government officials involved were exonerated of any wrongdoing, although one of them later resigned amid embezzlement allegations.[151] Similarly, progress came to a standstill in the Guatemala case after the matter was brought before the Environmental Court. Tragically, an environmental activist was murdered on the court's steps, while others faced threats and harassment from the palm oil company.[152] Despite a brief closure of the palm oil plant, it resumed its operations, continuing to pollute the river unabated. These cases serve as a cautionary reminder of the limitations inherent in domestic laws addressing environmental crimes and underscore the potential necessity of an international entity to adjudicate such cases effectively.

2.2. Method of Treaty Interpretation: Utilizing *Travaux préparatoires* and Commentaries in Accordance with VCLT

A. Customary Nature of the Rules of Treaty Interpretation Under The VCLT

The inherent imperfection of all human-crafted legal documents necessitates their interpretation by individuals with relevant expertise at both the international and national levels. The critical process of treaty interpretation is indispensable not only for comprehending the laws and regulations but also for their effective

[151] The deputy Prime Minister, who was exonerated of any misconduct in 2012, ultimately stepped down in 2018 following embezzlement accusations. A thorough investigation exposed substantial undisclosed assets, leading to his resignation. *Kyrgyzstan: Probe into ex-deputy PM reveals unexplained riches | Eurasianet*. (2018, May 8). Eurasianet. Retrieved May 29, 2023, from https://perma.cc/M4DY-VVNN.

[152] Chávez. (2016, February 16). *Guatemala's La Pasión River is still poisoned, nine months after an ecological disaster*. Mongabay. Retrieved May 29, 2023, from https://perma.cc/4PZA-3V7Q.

application. Consequently, the significance of treaty interpretation has greatly amplified within the realm of international law practice.[153]

Interpretation" is defined as "the process of establishing the true meaning of a treaty."[154] According to *McNair*, the task of interpretation is to give "effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them, in the light of the surrounding circumstances."[155] The rules governing treaty interpretation are regulated under the 1969 Vienna Convention on the Law of Treaties, commonly referred to as the VCLT, specifically in Article 31-33.

Article 31 of the VCLT establishes the fundamental principle of treaty interpretation, which involves three distinct methods: textual interpretation, contextual interpretation, and teleological interpretation.[156] These approaches should be employed simultaneously, in accordance with the principle of good faith, which directly derives from the maxim "*pacta sunt servanda.*"[157] Article 32 of the VCLT introduces supplementary means of treaty interpretation, which complement the general rule of interpretation specified in Article 31.[158]

Interpretation using *Travaux préparatoires* and commentaries is deemed a supplementary rule of interpretation under Article 32 of the VCLT. Scholars are of the opinion that Articles 31 and 32 reflect customary international law. This view is also supported by past practices and judgments.

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[153] (Dörr & Schmalenbach, n.d.), p. 522.
[154] *Id.*
[155] Baron McNair. (2003). *The Law of Treaties*. Oxford University Press., p. 365.
[156] Dörr & Schmalenbach, n.d., p. 523, para. 5.
[157] *Id.*
[158] Article 32, VCLT.

Before the ICJ, the customary nature of these articles was endorsed in the 1991 judgment on the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal). In this judgment, the Court stated that the pre-existing principles of treaty interpretation supported the customary status of these articles.

> "Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point."[159]

The view of the ICJ, which holds that the VCLT Rules of Interpretation are universally binding as customary international law, is widely shared by other international courts, including ITLOS,[160] the ECtHR,[161] the ECJ,[162] and the dispute settlement bodies of the WTO,[163] also numerous arbitral institutions.[164]

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[159] International Court of Justice. (1989). Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal). In *ICJ Reports*., para. 48.

[160] ITLOS. (2011, February 1). *(Seabed Disputes Chamber) Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in Area, Advisory Opinion.*, para. 57.

[161] ECtHR. (1975). *Golder v United Kingdom* (App. No. 4451/70, Ser. A 18)., para. 29.; ECtHR. (1996). *Loizidou v Turkey (GC) (Merits)* (App. No. 15318/89, ECHR 1996-VI)., para. 43; ECtHR. (2000). *Litwa v Poland* (App. No. 26629/95, ECHR 2000-III)., para. 57; ECtHR. (2001). *Al-Adsani v United Kingdom (GC)* (App. No. 35763/97, ECHR 2001-XI)., para. 55; ECtHR. (2003, February 6). *Mamatkulov and Askarov v Turkey (GC)* (App. No. 46827/99 and 46951/99)., para. 99; ECtHR. (2008, January 29). *Saadi v United Kingdom (GC)* (App. No. 13229/03)., paras. 61–62; ECtHR. (2008, November 12). *Demir and Baykara v Turkey (GC)* (App. No. 34503/97)., para. 65; ECtHR. (2010, March 2). *Al-Saadoon and Mufhdhi v United Kingdom* (App. No. 61498/08)., para. 126.

[162] ECJ. (1991, December 14). *Opinion Pursuant to Article 228 Of The EEC Treaty Vol 61991CV0001*., para 14; ECJ. (1993, July 1). *Metalsa Judgment* ((C-312/91, ECR 1993 p. I-3751) ECLI:EU:C:1993:279)., para 12; ECJ. (2010, February 25). *Brita Judgment* ((C-386/08, ECR 2010 p. I-1289) ECLI:EU:C:2010:91)., paras 41–42; ECJ. (2010, May 6). *Walz Judgment* ((C-63/09, ECR 2010 p. I-4239) ECLI:EU:C:2010:251)., para 23.

[163] WTO. (1996). *Japan–Taxes On Alcoholic Beverages II* (WT/DS 8, 10–11/ AB/R, Part D)., paras. 10–12.; WTO. (2001). *United States–Hot-Rolled Steel Products from Japan* (WT/DS184/ AB/R)., para 57.; WTO. (2005). *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/AB/R)., para. 159.

[164] Reports of International Arbitral Awards (RIAA). (2005). *The Iron Rhine Railway Arbitration (Belgium v. Netherlands)* (27 RIAA 35)., para. 45; RIAA. (2004). *The Audit of Accounts Between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976 (Netherlands v. France)* (25 RIAA 267)., paras. 58-62.

Thus, the rules of treaty interpretation stipulated in Articles 31 and 32 of the VCLT reflect customary rules of international law. As such, these articles apply to all treaties beyond the scope of the Convention, encompassing agreements concluded before the VCLT entered into force in 1980[165] and treaties between States where not all parties are bound by the VCLT.[166]

B. General Rule of Treaty Interpretation

The process of interpreting treaties is structured by Article 31, which houses the 'general rule' for interpretation.[167] This singular rule, governed in paragraph 1, underscores three key elements: (1) comprehending the ordinary meaning of treaty terms, (2) considering their context, and (3) bearing in mind the treaty's objectives and purpose, along with the principle of good faith.[168] These components are integral to the rule and should be applied cohesively.[169] Subsequent to Article 31, paragraphs 2 and 3 explain the concept of "context" and are closely linked to paragraph 1.[170] They appear to distinguish between interpreting elements intrinsic and extrinsic to the text: paragraph 2 identifies vital context elements, while

[165] International Court of Justice. (1999). Kasikili/Sedudu Island (Botswana/Namibia). In *ICJ Reports*., para. 20 (interpretation of treaty of 1890); International Court of Justice. (2001). LaGrand (Germany v. United States of America). In *ICJ Reports*., para. 99 (ICJ Statute); International Court of Justice. (2004, July 9). Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. In *ICJ Reports*., para. 47 (treaty of 1885); ITLOS. (2011, February 1). *(Seabed Disputes Chamber) Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in Area, Advisory Opinion*. (UNCLOS)

[166] International Court of Justice. (1999). Kasikili/Sedudu Island (Botswana/Namibia). In *ICJ Reports*., para. 18; International Court of Justice. (2001). Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia). In *ICJ Reports*., para. 37.

[167] Article 31, VCLT.

[168] *Id*.

[169] (Gardiner, 2017), p. 161.

[170] (Dörr & Schmalenbach, n.d.), p. 523, para. 5.

paragraph 3 outlines interpretive methods to be employed alongside context.[171] Despite their distinct wording, both paragraphs strive to integrate the interpretation elements they describe into the overarching rule outlined in paragraph 1.[172] Deviating from the general rule in paragraph 1, Article 31, paragraph 4, introduces an exception for situations where parties have implicitly or explicitly agreed to ascribe a specific meaning to a term within a treaty provision.[173]

a. Ordinary Meaning

The initial aspect of the general interpretation rule involves attributing a common significance to the "terms of the treaty." Given the foundational textual approach that underpins the entire process, it is entirely logical that the "terms" being referred to are those explicitly recorded by the parties – in other words, the words and expressions used in the treaty – rather than the agreements reached between the parties.[174] This notion is supported by Article 31, paragraph 4, and Article 33, paragraph 3, where "term(s)" is clearly employed in relation to interpreting written language.[175] Therefore, as emphasized by the ICJ in its legal pronouncements, the foundation of interpretation must primarily be anchored in the text of the treaty.[176] To establish such an interpretation, international judicial bodies often turn to dictionaries, whether general or specialized in nature, even though

[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] (Gardiner, 2017), p. 163-164.
[175] (Dörr & Schmalenbach, n.d.), p. 542, para. 40.
[176] International Court of Justice. (1994). Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgement. In *ICJ Reports*., p. 6, para 41; International Court of Justice. (2004). Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment. In *ICJ Reports*., p. 279, para 100.

these resources generally aim to encompass all meanings of words, not exclusively the ordinary ones.[177]

When determining the ordinary sense of terms, two interconnected aspects should be taken into account: the temporal aspect of the ordinary meaning assessment pertains to the decision between a static or dynamic interpretation; unless the parties have used a general term, interpretation must seek the ordinary sense as it existed when the treaty was concluded.[178] The linguistic aspect is derived from Article 33: each authentic language of a treaty must be consulted to determine the ordinary meaning of the term in question, and each language carries equal weight; in every authentic language, the term is generally presumed to possess the same meaning.[179]

b. Context

The interpretation principle outlined in Article 31, paragraph 1, of the general rule does not permit deriving a separate, abstract ordinary meaning of a term.[180] Instead, it requires that the terms of a treaty be understood "in their context," indicating that when interpreting any term in a treaty, the interpreter must consider the entire treaty.[181] This perspective extends beyond the treaty, as in Article 31, paragraphs 2 and 3.[182] The systematic arrangement of a treaty holds the same

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[177] International Court of Justice. (1996). *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection.*, para. 45.; International Court of Justice. (1999). Kasikili/Sedudu Island (Botswana/Namibia). In *ICJ Reports*., para. 30.

[178] (Dörr & Schmalenbach, n.d.), p. 543, para. 43.

[179] *Id*.

[180] *Id*., para. 44.

[181] *Id*.

[182] *Id*.

significance as the conventional linguistic interpretation of the words used.[183] This is crucial for grasping the true intention, as previously emphasized by the Permanent Court of International Justice (PCIJ), where words derive meaning from their context.[184] The complete text of the treaty constitutes the "context," including the title, preamble, annexes (as detailed in the introduction of paragraph 2), any attached protocols, and the deliberate placement of the phrase under scrutiny within that overarching framework.[185] The positioning of a specific word within a group of words, a sentence within a paragraph, a paragraph within an article, or a comprehensive set of provisions, as well as the relationship of an article to the overall structure or scheme of the treaty, all carry interpretative significance.[186]

The interpretation process considers the treaty title, along with factors like punctuation, syntax, and sentence structure.[187] When interpreting, the entire treaty is considered.[188] The interpreter compares the usage of the same term elsewhere in the treaty or different phrases in the same treaty that addresses the same issue but with different wording.[189] Furthermore, the treaty as a whole is also considered when it is established that other provisions of the same treaty imply a particular understanding of the disputed term as an inevitable consequence.[190] The preamble

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[183] *Id*.

[184] Permanent Court of International Justice (PCIJ). (1922). The Competence of the ILO Regarding the International Regulation of the Conditions of Persons Employed in Agriculture. In *PCIJ* (PCIJ Ser B No 2), p. 158.

[185] (Dörr & Schmalenbach, n.d.), p. 543, para. 45.

[186] *Id*.

[187] *Id.*, p. 543-544.

[188] *Id*.

[189] International Court of Justice. (2009, July 13). Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua). In *ICJ Reports*., pp. 77-79 and 89.

[190] *Id*.

of a treaty, usually comprising a series of recitals, can aid in determining the treaty's purpose and intent, often explicitly stated by the parties.[191] By outlining the goals and objectives of a treaty, a preamble holds both contextual and teleological significance.[192] In international jurisprudence, there are numerous instances where reference is made to a treaty's preamble to clarify the meaning of a specific provision.[193]

c. Object and Purpose

The closing statement of Article 31, paragraph 1, introduces the teleological or functional aspect of the general interpretation rule. In doing so, it incorporates the principle of effectiveness into this rule: the terms of a treaty should be comprehended in a manner that propels the achievement of the treaty's objectives.[194] Any interpretation rendering specific portions of the treaty redundant or diminishing their practical impact should be avoided.[195]

Determining the intention and purpose of a treaty can be approached through various avenues.[196] Some treaties include expansive clauses that expressly articulate their intentions, as exemplified by Article 1 of the UN Charter.[197] The title of the treaty can also offer insights.[198] Furthermore, a treaty's preamble often

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[191] (Dörr & Schmalenbach, n.d.), p. 544, para. 50.
[192] *Id*.
[193] International Court of Justice. (2001). Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia). In *ICJ Reports*., para. 51.; ECtHR. (1975). *Golder v United Kingdom* (App No 4451/70, Ser A 18)., para. 34.
[194] (Dörr & Schmalenbach, n.d.), p. 544, para. 53.
[195] International Court of Justice. (1960). Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion). In *ICJ Reports* (ICJ Rep 150)., para. 374.
[196] (Dörr & Schmalenbach, n.d.), p. 545, para. 55.
[197] *Id*.
[198] *Id*.

serves as a platform where the parties outline the objectives they intend to fulfill through their agreement.[199]

In particular instances, the nature of the treaty itself may imply a distinct objective and purpose. For example, boundary treaties frequently indicate a final and stable establishment of borders, which becomes an implied objective.[200] Generally, however, a comprehensive examination of the entire treaty – encompassing all its substantive provisions – is essential to establish the intention and purpose with reasonable certainty.[201] Comparing the treaty in question with relevant treaties of a similar nature can also aid in determining the intended purpose of the former.[202]

In essence, intuition and common sense can serve as valuable tools in discerning the intention and purpose of a treaty.[203] Nevertheless, the principle of good faith safeguards prevents the introduction of aims and objectives through indirect means.[204] This ensures that intentions and objectives are not injected into the treaty's terms after they have been formulated, aligning with the intentions of the treaty drafters.[205]

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[199] *Id*.
[200] (Gardiner, 2017), p. 192.
[201] (Dörr & Schmalenbach, n.d.), p. 546, para. 56.
[202] *Id*.
[203] International Court of Justice. (1996). Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection., para. 27.
[204] (Dörr & Schmalenbach, n.d.), p. 546, para. 56.
[205] *Id*.

d. Good Faith

Article 31, paragraph 1, mandates that all treaties be interpreted in "good faith," establishing this universally recognized principle as a "general rule" for the entire interpretation process.[206] This notion is rooted in the opening words of the general interpretation rule, providing the framework and direction for the entire endeavor. As stipulated by the core rule of the law of treaties, every treaty must be executed "in good faith."[207] Considering that treaty interpretation is a vital component of its execution, it logically extends that the principle of good faith applies to the interpretation of treaties.[208] Good faith must be consistently applied throughout the interpretation process, covering the analysis of the text's ordinary meaning, its context, objectives and purpose, along with subsequent party practices and more. Additionally, the outcome of the interpretative process should also be evaluated in good faith.[209]

While the concept of "good faith" lacks a precise definition, its underlying principle appears to be a fundamental requirement of reasonableness.[210] This safeguards against potential dogmatism arising from purely verbal or excessive teleological analysis.[211] This concept is also implied in the rules of interpretation, albeit as an obligation for a reasonable outcome. Specifically, Article 32,

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[206] *Id*., p. 548, para. 60.
[207] *Id*.
[208] *Id*.
[209] Macleod, C. B. S. I. (2020, November 4). Ian Sinclair, The Vienna Convention on the Law of Treaties, 1984. *British Contributions to International Law, 1915-2015 (Set)*, p. 120. https://doi.org/10.1163/9789004386242_027
[210] (Gardiner, 2017), p. 155, 157.
[211] *Id.*

subparagraph (b), asserts that interpretation should not yield a result that is clearly absurd or unreasonable.[212] Thus, when considered within its context, the ordinary meaning must always be subjected to the test of reasonableness.[213] If utilizing the words of a treaty in their ordinary sense would produce a result that is unmistakably absurd or unreasonable, an alternative interpretation must be pursued.[214]

Interpreting in good faith directly stems from the pacta sunt servanda principle.[215] The connection between this proposition and the initial statement of the Vienna rules ("A treaty shall be interpreted in good faith") is both conceptual and textual.[216] This relationship is conceptual due to the understanding that interpretation is an integral facet of a treaty's proper and honest fulfillment.[217] It is also textual because the initial elaboration of *pacta sunt servanda* by the International Law Commission links interpretation to it: A treaty is binding on the parties and must be executed by them in good faith in accordance with its terms and guided by the general principles of international law that govern the interpretation of treaties.[218]

C. Travaux préparatoires

"Travaux préparatoires" or preparatory works are deemed supplementary means of interpretation that complement Article 31 of the VCLT regarding the

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[212] (Dörr & Schmalenbach, n.d.), p. 548, para. 61.
[213] *Id*.
[214] *Id*.
[215] (Gardiner, 2017), p. 169.
[216] *Id*.
[217] *Id*.
[218] Waldock. (1964). Third Report draft article 55(1). In *Yearbook of the ILC*., p. 7.

general rule of treaty interpretation. In this regard, Art. 32 corresponds to Art. 31, paras. 2 and 3, as it also considers extrinsic material to interpret the treaty in context.

In the realm of international law, *travaux préparatoires* lacks a universally recognized definition.[219] Additionally, there is no definitive guideline regarding which materials are admissible for consideration or the extent to which historical treaty documents can be utilized to provide interpretive insights.[220] As aptly pointed out by Gardiner, courts and tribunals often eagerly grasp any potentially beneficial source.[221] The fundamental purpose behind employing preparatory work in this context is to discern the genuine intent underlying the parties" treaty agreements. Nonetheless, several conditions must be met before the material under scrutiny can be deemed *travaux préparatoires*.

First, preparatory works exclusively cover material and processes that interpreters can objectively assess.[222] They must be accessible so that people can take cognizance of them. Preparatory work encompasses all pertinent documents generated by negotiating states during the lead-up to and conclusion of a treaty.[223] These documents include drafts, memoranda, commentaries, statements, and observations exchanged between governments or drafting bodies.[224] Additionally, diplomatic exchanges, negotiation records, and minutes of commission and plenary proceedings are considered part of the preparatory work. Moreover, the processes

[219] (Dörr & Schmalenbach, n.d.), p. 574.
[220] *Id.*
[221] (Gardiner, 2017), p. 99–100.
[222] (Dörr & Schmalenbach, n.d.), p. 574.
[223] *Id.*, p. 575.
[224] *Id.*

involved in the negotiations, such as textual changes or refusals to amend the text, along with the course of discussions and diplomatic exchanges, hold significance.[225] The contributions of individual negotiators or delegations are also taken into account.

Secondly, the material must shed light on the mutual understanding of the treaty provisions among the negotiating parties to be considered relevant preparatory work.[226] Therefore, the material can only qualify as authentic preparatory work if it was accessible and present during the negotiation process, available collectively to all negotiators at some point.[227] This requirement is particularly crucial for materials originating from a single source, such as statements from individual governments or State representatives outside the treaty negotiations, national legislative documents, or explanations given during a national ratification process.[228] To be admissible, such materials must have been introduced into the negotiation process, made known to other participants, and not merely remained as unilateral aspirations, inclinations, or opinions.[229]

[225] The ICJ examined the UN Preparatory Commission's debate in the case of International Court of Justice. (1970). *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion.*, para. 69. In the case of International Court of Justice. (1995). *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain).*, para. 41, the bilateral exchange between the parties was deemed inconclusive.

[226] Reports of International Arbitral Awards (RIAA). (2005). *The Iron Rhine Railway Arbitration (Belgium v. Netherlands)* (27 RIAA 35)., para. 45

[227] (Dörr & Schmalenbach, n.d.), p. 575.

[228] *Id.*

[229] International Court of Justice. (1996). *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection.*, para. 29.; (Gardiner, 2017), p. 107.

D. Commentaries

In the context of drafting treaties, various documents such as commentaries and explanatory reports can be produced concurrently.[230] These materials may either be acknowledged during the adoption or conclusion of the treaty or prepared at a later stage. While there isn't a consistent nomenclature for these materials, they can be broadly categorized into two types: those closely associated with the treaty's preparation, conclusion, or implementation, and those prepared independently.[231]

The former could be covered under Article 31(2)(a) or considered part of the preparatory work, while the latter (independent materials) might be admissible under Article 31(3)(c) to the extent that they align with international law as recognized in Article 38 of the Statute of the ICJ.[232] However, due to the subordinate status of such materials in the Statute, they may not fit seamlessly into the notion of "rules of international law applicable in the relations between the parties." Consequently, these materials are perhaps best seen as falling under the category of supplementary means of interpretation, contingent on their content.[233]

Numerous sets of commentaries, including those by the ILC and other treaty preparatory bodies, form part of the preparatory work unless granted elevated status upon a treaty's conclusion. Some specific commentaries, like the explanatory reports accompanying conventions within the Council of Europe and those related to Conventions by the Hague Conference on Private International Law, are

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[230] (Gardiner, 2017), p. 107.
[231] *Id*.
[232] *Id*.
[233] International Court of Justice. (1996). *Legality of the Threat or Use of Nuclear Weapons*., para 27.

officially endorsed at the time of treaty conclusion.[234] Other examples include the "Handbook" issued by the UN High Commissioner for Refugees (UNHCR) in connection with the UN Convention on Refugees, which saw successive editions after the treaty's adoption.[235]

The precise basis for utilizing such materials is not always explicitly stated, leading to potential confusion between general rule interpretation and supplementary means.[236] Commentaries and guides typically contain a combination of text analysis, references to preparatory work, and compilations of practice. The interpretative role of these materials hinges on which elements are employed, rather than their overall character as learning sources. The underlying assumption is that when a commentary or explanatory report clearly reflects the collective intent of treaty drafters, it will be considered helpful in achieving correct interpretation.[237] This is especially applicable when treaties are based on model provisions, such as

[234] *Home - Treaty Office - www.coe.int*. (n.d.). Treaty Office. https://www.coe.int/en/web/conventions

[235] UNHCR. (2019). *Handbook On Procedures and Criteria for Determining Refugee Status and Guidelines On International Protection Under The 1951 Convention and The 1967 Protocol Relating to The Status of Refugees*.

[236] In the case House of Lords (UK). (1989). *R v Secretary of State for the Home Department, Ex parte Read* (AC 1014)., P. 1052; the UK House of Lords acknowledged the Explanatory Report on the Convention on the Transfer of Sentenced Persons as a non-binding but helpful resource for interpreting the Convention. According to the House of Lords, the explanatory report carries persuasive value and is considered part of the "*travaux preparatoires*," as stated under Article 31 of the Vienna Convention. Similarly, in another case, House of Lords (UK). (2004). *Regina v. Secretary of State for the Home Department (Appellant) ex parte Mullen (Respondent)* (UKHL 18). p. 44–45, para 48, Lord Steyn emphasized the significant persuasive influence of the explanatory report in the interpretative process. State practice, influenced by the explanatory report, is seen as directly relevant to interpreting Article 14(6) under Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

[237] Lord Stanley, House of Lords (UK). (2004). *Regina v. Secretary of State for the Home Department (Appellant) ex parte Mullen (Respondent)* (UKHL 18).

double taxation treaties.[238] In cases where a treaty concerns an evolving subject matter, provisions may be made for ongoing production of explanatory and interpretative material.[239]

Commentaries authored by independent experts may hold nearly equivalent significance to those officially endorsed by the parties involved in treaty agreements.[240] This equivalence can lead to uncertainties in their status, as illustrated in the case of the "Explanatory Report on the 1980 Hague Child Abduction Convention", written by Elisa Pérez-Vera and published by The Hague Conference on Private International Law (HCCH) in 1982.[241] While Professor Pérez-Vera had served as the Rapporteur for the Commission responsible for preparing the Convention, her report was compiled after the conclusion of the Convention and candidly acknowledges the possibility of reflecting subjective viewpoints despite efforts to maintain objectivity.[242] Nonetheless, this commentary has had a considerable impact on cases involving child abduction.

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[238] European Court Reports. (2010, October 28). *Staatssecretaris van Financiën v X BV, Judgment of the Court (Fifth Chamber)* (C-423/09). Hoge Raad der Nederlanden - Netherlands., paras 3.6 and 3.7 referring to explanatory notes and commentary to tax treaties, and US Court of Federal Claims. (n.d.). *National Westminster Bank plc v. United States of America*., p. 304.

[239] In the International Convention on the Harmonized Commodity Description and Coding System (Vol. 1503), it is stipulated in Articles 6-7 that a committee will be established to carry out various functions, including the preparation of "Explanatory Notes, Classification Opinions, or other advice" to assist in interpreting the Harmonized System. This provision was referenced in the ECJ case Turbon International GmbH v Oberfinanzdirektion Koblenz (Case C-250/05) on page 384.

[240] Madsen. (1997, October). *Commentary on the Refugee Convention, Articles 2–11, 13–37*. UNHCR Department of International Protection and references to that work in *A and Others v Secretary of State for the Home Department* (UKHL 56). (2004)., para. 69; *R v Immigration Officer at Prague Airport Ex parte European Roma Rights Centre* (UKHL 55). (2004)., paras. 13, 14, 17, and 70; *R v Special Adjudicator ex parte Hoxha* (UKHL 19). (2005)., paras. 15 and 68.

[241] *Actes et documents de la Quatorzième session 1980*. (1982). HCCH Publications.

[242] *Id.*, p. 428.

The scope of context utilized in commentaries varies, leading to either a more restrictive or extensive interpretation of the law.[243] While primarily centered on the text, commentaries may encompass broader contextual elements, particularly the practical application of the relevant provision.[244] These reviewed commentaries consider *travaux préparatoires*, state practices, and rulings of international courts and tribunals. Additionally, they may incorporate social, cultural, and economic factors as supplementary layers of context.[245]

A crucial aspect of commentaries is their role in structuring legal discourse.[246] They aim to encompass comprehensive interpretations of the legal provisions they address, contributed by all relevant actors. As central points of reference, they possess the authority to elevate certain viewpoints while disregarding and excluding others, significantly influencing legal discussions.[247]

Although it is sometimes suggested that commentaries should not be overly innovative, the authors often take stances on critical matters, granting them a unique position in legal discourse akin to courts giving advisory opinions. By advocating specific solutions to legal problems, commentaries establish hierarchical patterns in

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[243] Djeffal, C. (2013, November 1). Commentaries on the Law of Treaties: A Review Essay Reflecting on the Genre of Commentaries. *European Journal of International Law*, *24*(4), 1223–1238. https://doi.org/10.1093/ejil/cht071., (***Djeffal, 2013***) p. 1234.

[244] Henne. (2008). Kommentar. In Cordes, *Handwörterbuch zur deutschen Rechtsgeschichte: HRG* (2nd ed.)., (***Henne, 2008***) p. 4-5.

[245] Schmoeckel, Rückert, & Zimmermann. (2003). *Historisch-kritischer Kommentar zum BGB*.

[246] A. (n.d.). *Publikationen - Prospects of legal scholarship in Germany | Current situation, analyses, recommendations (Drs. 2558-12), November 2012*. Wissenschaftsrat - Publikationen - Prospects of Legal Scholarship in Germany | Current Situation, Analyses, Recommendations (Drs. 2558-12), November 2012. https://www.wissenschaftsrat.de/download/archiv/2558-12_engl.html, at 69.

[247] (Djeffal, 2013), p. 1235.

discourse.[248] The authority of commentaries is further reinforced by the reputable status of their authors, who are often distinguished scholars with prior publications on related subjects, elevating the significance of commentaries in the realm of legal discourse. Additionally, courts and tribunals frequently rely on academic guides and studies to aid their analysis of text, preparatory work, comparative case law, and arguments on contentious matters.[249]

2.3. Defining International Crimes: A Comprehensive Endeavor

The absence of a universally agreed-upon list of international crimes reflects the complexity and ever-evolving nature of international law. While certain offenses, such as genocide, crimes against humanity, war crimes, and crimes of aggression, enjoy broad recognition, reaching a consensus on a comprehensive catalog remains a persistent challenge. The diverse array of legal systems and cultural perspectives, coupled with intricate political dynamics, contribute to the lack of a definitive list. Nevertheless, international efforts through treaties, conventions, and the establishment of tribunals are underway to address and prosecute the most heinous violations of international law.

A. International Crimes Through the Lens of the Drafters: *Travaux préparatoires*

Since 1946, the United Nations has made efforts to codify international crimes and establish an international criminal court, but both endeavors have yielded

[248] (Henne, 2008), p. 1972.
[249] (Gardiner, 2017), p. 398.

limited results.[250] During its first session, the Assembly initiated the process of codifying international crimes by sponsoring resolution 95 (I) on December 11, 1946, which affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and its judgment.[251] Additionally, the Assembly tasked the Committee on the Codification of International Law, the predecessor of the International Law Commission (ILC), with formulating a comprehensive codification of offenses against the peace and security of mankind.[252] Subsequently, in 1947, the United Nations officially established the ILC.[253]

In 1949, the ILC began working on the "Formulation of the Nuremberg Principles and Preparation of a Draft Code of Offenses Against the Peace and Security of Mankind" (Draft Code), which specifically addressed crimes that impact global peace and security.[254] Later, this Draft Code evolved into the Rome Statute.

Throughout its sessions, the ILC has introduced various actions that potentially classify as international crimes, resulting in a list of twenty-four (24) universally recognized international crime categories.[255] From its thirty-fourth session in 1982 to its forty-third session in 1991, the ILC received nine reports from the Special

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[250] Bassiouni, M. C. (1993). The History of the Draft Code of Crimes Against the Peace and Security of Mankind. *Israel Law Review*, *27*(1–2), 247–267. https://doi.org/10.1017/s0021223700016939, (***Bassiouni, 1993***) p. 244.

[251] UNGA. (1946). *U.N.GA Res. 96(1): Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal* (U.N. Doc. A/64/Add.l).

[252] Gross. (1985). Some Observations on the Draft Code of Offenses Against the Peace and Security of Mankind. In *Israel Yearbook on Human Rights* (Vol. 15).

[253] UNGA. (1947). *U.N.G.A. Res. 174 (II)* (U.N. Doc. A/519)., p. 105-10.

[254] International Law Commission. (1949). *Yearbook of the International Law Commission*.

[255] Bassiouni, M. C. (1986, January 1). *International Crimes: Digest/Index of International Instruments*, 1815-1985.

Rapporteur, Mr. Doudou Thiam.[256] As a result of these sessions and Mr. Thiam's reports, the Commission provisionally adopted several articles of the Draft Code. Notable examples include Article 19 (Genocide), Article 20 (Apartheid), Article 21 (Systematic and mass violations of human rights), Article 22 (Exceptionally serious war crimes), Article 23 (Recruitment, use, financing, and training of mercenaries), Article 24 (International terrorism), Article 25 (Illicit traffic in narcotic drugs), and Article 26 (Willful and severe damage to the environment), along with their respective commentaries.[257]

The discussion on crimes against the environment began during the ILC's 43rd session when they added "willful and severe damage to the environment" as Article 26 of the 1991 Draft Code, which prescribes: "An individual who willfully causes or orders the causing of widespread, long-term, and severe damage to the natural environment shall, on conviction thereof, be sentenced [to...]."[258] The ILC deemed the protection of the environment essential and classified the destruction of the environment as a "fundamental interest of mankind." Concerning this proposed crime, the ILC established a working group to discuss the feasibility of including Article 26 in the final Draft Code. The report curated by Christian Tomuschat presents three options for this proposed crime against the environment: a war crime, a crime against humanity, or a standalone crime against the peace and security of

[256] (Bassiouni, 1993), p. 260.

[257] *Id.; Report of the International Law Commission, 43rd Sess., U.N. GAOR Supp. No. 10* (U.N. Doc. A/46/10). (1991). P. 235-36. (***Report of the International Law Commission, 43rd Sess., U.N. GAOR Supp. No. 10, 1991***)

[258] (Report of the International Law Commission, 43rd Sess., U.N. GAOR Supp. No. 10, 1991), p. 97.

mankind. The ILC voted to classify the proposed crime of willful and severe damage to the environment from the 1991 Draft Code as a war crime.[259]

However, during the second reading, the ILC's Chairman unilaterally decided to remove mass environmental degradation as a separate provision without any recorded justification.[260] This decision was most likely influenced by pressure from the nuclear lobby and a few states.[261] As a result, environmental protections final and current position remains a "far cry" from the other provisions included in the Statute.[262]

B. International Crimes According to Commentaries

a. Theories of International Crimes: *Malum in se* v. *Malum Prohibita*

1) *Malum in se* (Evil Nature of the Offence)

Malum in se is derived from the Latin term that means wrong or evil in itself.[263] According to this theory, a crime is inherently evil or wrong, regardless of the existence of regulations prohibiting such conduct.[264] Factors taken into account include its evil intent, such as an attack on humankind or fundamental human values (e.g., human dignity and humaneness); its gravity and scale (a "grave matter of international concern"); its international or cross-jurisdictional dimension,

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[259] Tomuschat. (1996). *Report of The International Law Commission On the Work of Its Forty-Eighth Session* (By International Law Commission; A/51/10)., para. 44.

[260] Tomuschat. (1996). Crimes against the environment. *Environmental Policy and Law, 26(6)*, 242–243.

[261] *Id.*

[262] Gerard Kemp, "Climate Change, Global Governance, and International Criminal Justice" in Oliver C. Ruppel, Christian Roschmann, and Katharina Ruppel-Schlichting, Climate Change: International Law and Global Governance: Volume I: Legal Responses and Global Responsibility (Nomos Verlagsgesellschaft mbH, 2013)., p. 730.

[263] (Stahn, 2019), p. 19.

[264] *Id.*

including the need for international enforcement; and/or its perception as “shocking the conscience of humanity.”[265]

A wide range of conducts are included as international crimes under this theory. The classic example of international crimes is piracy; the international society called Pirates on the high seas were called enemies of humankind (*hostes humani generis*).[266] In the 18th century, war crimes emerged, and post-World War II discussions labeled them crimes against peace, as they attacked the "society of states."[267] Subsequently, crimes against humanity emerged, encompassing the violation of a state against its own population, which was seen as an "attack on humanity and humanness."[268] In 1996, the International Law Commission (ILC) compiled a list of “crimes against the peace and security of mankind,” drawing from the Nuremberg and Tokyo tribunals. These crimes include (i) aggression, (ii) genocide, (iii) crimes against humanity, (iv) crimes against United Nations and associated personnel, and (v) war crimes.[269] The main reason for this classification is that these crimes can be internationally investigated and prosecuted, irrespective of whether or not they are enshrined in a universally applicable treaty.

An increasingly cited example in doctrine is crimes against the environment, which are considered serious offenses due to their wide-ranging impacts on present

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[265] *Id*.
[266] Routledge Handbook, pp. 1, 342.
[267] (Stahn, A Critical Introduction to International Criminal Law), p. 19
[268] *Id*.
[269] ILC. “Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May - 26 July 1996, Official Records of the General Assembly, Fifty-First Session, Supplement No.10.” *Yearbook of the International Law Commission, Vol. II (2)*, 1996.

and future generations.[270] With growing awareness of environmental issues, crimes against the environment are receiving greater attention in legal and policy discussions. Recognizing the shared interest in preserving the environment, international efforts have been made to address these crimes.

2) *Malum prohibitum* (Prohibited Evil)

As the name suggests, *malum prohibitum* refers to an action being deemed evil or wrong solely because it is prohibited by law.[271] The prohibition of such actions is typically reflected in international treaties or customary international law.[272] A clear example of this is seen in the criminalization of genocide and war crimes.[273] Prior to their codification in the Rome Statute or the statutes of previous international tribunals, the prohibition of genocide and war crimes was established under the United Nations Convention on the Prevention and Punishment of the Crime of Genocide[274] and the Four Geneva Conventions.[275] Many international

[270] (Mégret, 2011); (Weinstein, 2005); (Berat, 1993).

[271] Werle, G. (2005, April 28). *Principles of International Criminal Law*. https://doi.org/10.1604/9789067041966.

[272] *Id.*

[273] (Stahn, 2019), p. 20.

[274] *Convention on the Prevention and Punishment of the Crime of Genocide: Paris, 9 December 1948*. (1970, January 1). In GA Res. 180(II) dated 21 December 1947, the United Nations General Assembly acknowledged that genocide constitutes an international crime, carrying individual and state responsibility both at the national and international levels.

[275] International Committee of the Red Cross (ICRC). (1949, August 12). *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*., Arts. 49 and 50; ICRC. (1949, August 12). *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*., Arts. 50 and 51; ICRC. (1949, August 12). *Geneva Convention (III) relative to the Treatment of Prisoners of War*., Arts. 129 and 130; ICRC. (1949, August 12). *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*., Arts. 146 and 147.; Ferdinandusse, W. (2009, September 1). The Prosecution of Grave Breaches in National Courts. *Journal of International Criminal Justice*, *7*(4), 723–741. https://doi.org/10.1093/jicj/mqp053., p. 723.

conventions impose a direct obligation on states to investigate and prosecute the offenses in question or to extradite individuals to a willing state for prosecution.[276]

Practically, there are certain crimes that are classified as international crimes without explicit prohibition in any international treaty. A common example includes acts of aggression or crimes against humanity, both of which are outlined in the statutes of the Nuremberg and Tokyo Tribunals without a specific treaty basis or prohibition.[277] However, the presence of an inherently evil act does not necessarily serve as the sole decisive criterion for determining international crimes. In some cases, other international crimes are prosecuted due to the lack of capacity or failure of states to take action, rather than solely relying on the nature of the crime.[278]

b. Universal Criminality

According to Heller, most international scholars believe that international crimes involve acts that are universally considered criminal under international law.[279] The universality of these crimes does not stem from international law itself but rather from the independent decision of states to criminalize them.[280]

The universality of crimes finds support not only in state practices but also in the actions of international criminal tribunals and the perspectives of scholars. States demonstrate their affirmation of the universality of international crimes

[276] Bassiouni, & Wise. (1995, January 1). *Aut dedere aut judicare: The Duty to Extradite or Prosecute in International Law*. Brill. https://doi.org/10.1163/9789004642676.
[277] (Stahn, 2019), p. 21.
[278] *Id.*
[279] (Heller, 2016), p. 354.
[280] *Id.*

through consistent actions. Notably, nearly 150 states have enacted legislation that empowers their courts to exercise universal jurisdiction over war crimes, crimes against humanity, genocide, and aggression.[281] This legislative commitment showcases their recognition of these crimes as universally criminal.[282]

Moreover, domestic courts applying international law routinely confirm the universal nature of international crimes. An iconic example is the *Eichmann* case, where the District Court of Jerusalem justified its authority to punish *Eichmann* for crimes against humanity committed prior to the establishment of the State of Israel by invoking the "universal character of the crimes in question."[283]

Similarly, in the Pinochet No. 3 case, Lord Browne-Wilkinson, speaking for the majority, asserted that crimes against humanity transcend national boundaries as they target individuals, making them subject to trial anywhere.[284] Supporting this perspective, Lord Phillips emphasized that certain categories of crimes carry such gravity that they offend the conscience of humanity and are deemed intolerable by the international community, thus constituting violations of international law.[285]

International criminal tribunals uphold the concept of universality. For example, the Nuremberg Military Tribunal famously stated in the Hostage case that

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[281] *Universal jurisdiction: A preliminary survey of legislation around the world - 2012 update - Amnesty International*. (2012, October 9). Amnesty International. https://www.amnesty.org/en/documents/ior53/019/2012/en/

[282] Macedo, S. (Ed.). (2003, December 1). *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*. https://doi.org/10.1604/9780812237368., p. 21.

[283] District Court of Jerusalem (Israel). (1961). *Attorney General v. Adolf Eichmann* (Criminal Case No. 40/61)., p. 11.

[284] House of Lords (UK). (1998). *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3) [2000]* (1 A. C. 147).

[285] Id. at 243 (Opinion of Lord Phillips).

an international crime is universally recognized as criminal.[286] Similarly, the Special Tribunal for Lebanon (STL) connects international criminality to customary international law, defining international crimes as heinous offenses contrary to universal values, condemned by the entire community through customary rules.[287] The International Criminal Tribunal for the Former Yugoslavia (ICTY) takes it a step further, asserting that international crimes are universally condemned due to their status as peremptory norms or *jus cogens* in international law.[288]

Although the Rome Statute does not explicitly declare international crimes as criminal irrespective of their location, universality is implied in the Preamble. The Preamble emphasizes that international crimes deeply shock the conscience of mankind and pose threats to global peace, security, and well-being.[289] It also underscores the necessity of not allowing the most serious crimes, such as war crimes, crimes against humanity, and genocide, to go unpunished, reinforcing the idea of their universal criminality.[290] Consequently, if international crimes are not universally criminal, they cannot be subject to universal punishment.

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[286] United States Military Tribunal at Nuremberg. (1949). *Law Reports of Trials of War Criminals vol. XI: United States v. Wilhelm List et al*. The United Nations War Crimes Commission., p. 1241.

[287] Special Tribunal for Lebanon. (2011, February 16). *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (STL-11-01/I)., para. 134.

[288] International Criminal Tribunal for the former Yugoslavia (ICTY). (1998, December 10). *Prosecutor v. Furundzija, Judgement* (IT-95-17/1)., p. 156.; ICTY. (2000, June 14). *Prosecutor v. Kupreškić, Judgement* (IT-95-16-T)., para. 520. "*Jus cogens*" refers to a small class of fundamental norms of international law that are non-derogable—that prohibit states from assuming treaty obligations inconsistent with the norm.

[289] Rome Statute.

[290] Id., Preamble, para. 4; Schabas, W. A. (2012, June 5). *An Introduction to the International Criminal Court*. https://doi.org/10.1017/CBO9781139164818https://doi.org/10.1017/CBO9781139164818. (Schabas, 2012), p. 83.

The ICJ has rarely addressed international crimes, except for its notable 1951 Genocide Advisory Opinion.[291] In this opinion, the Court adopted a universalizing perspective, asserting the United Nations" intention to condemn and punish genocide as an international crime.[292] Genocide involves denying the right to exist for entire human groups, causing profound shock to humanity, significant losses, and conflicting with moral law, as well as the spirit and objectives of the United Nations.[293] This understanding indicates that the principles underlying the Convention are acknowledged by civilized nations as binding on all States, irrespective of specific treaty obligations.[294] The statement firmly establishes the notion of genocide as universally criminal, violating both moral law and the core principles of the United Nations.[295] It would be peculiar for moral law to prohibit genocide in certain states but not in others. Moreover, akin to the STL and the ICTY, the ICJ emphasizes that the obligation to criminalize genocide applies equally to all states, regardless of their ratification of the Genocide Convention, as a fundamental aspect of general international law, even for states without any specific treaty obligation.[296]

Heller put forward two theses, namely the "Direct Criminalization Thesis" [DCT] and the "National Criminalization Thesis" [NCT], to classify whether a crime is universally criminal under international law.

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[291] International Court of Justice. (1951, May 28). Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion. In *ICJ Reports*.
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *Id.*

1) Direct Criminalization Thesis (DCT)

According to this theory, an action is universally deemed criminal because it is directly criminalized by international law, irrespective of whether states choose to criminalize it domestically.[297] This perspective is widely supported by modern scholars of International Criminal Law (ICL). For instance, Cassese emphasizes that international crimes are rooted in the principle that international legal norms can directly impose obligations on individuals, bypassing the state's authority over them.[298] Similarly, Cryer highlights that under exceptional circumstances, states have opted to criminalize certain behaviors, directly bypassing the domestic legal order.[299] Triffterer further notes that the distinctiveness of international criminality lies in its capacity to punish individuals even in the absence of corresponding criminal liability under their domestic jurisdiction or any other national legal system.[300] Numerous examples from scholars further reinforce this viewpoint.

The DCT asserts that international criminalization and domestic criminalization are not interconnected; an act can be considered criminal under international law even if it is lawful under domestic law.[301] This theory was initially introduced in the judgment of the International Military Tribunal at Nuremberg (IMT), which emphasized that individuals have "international duties which

[297] (Heller, 2016), p. 362.

[298] Cassese, & Gaeta. (2003, April 5). *Cassese"s International Criminal Law* (3rd ed.). Oxford University Press., p. 9.

[299] Cryer. (2008, January 1). The Doctrinal Foundations of International Criminalization. In Bassiouni, *International Criminal Law Volume 1: Crimes* (Vol. 1). Martinus Nijhoff., p. 108.

[300] Triffterer. (2008). Commentary on the Rome Statute of the International Criminal Court: Observers" notes, article by article. München., p. 25.

[301] (Heller, 2016), p. 363.

transcend... national obligations."[302] Subsequently, the International Law Commission (ILC) consistently underscored the lack of significance of domestic criminalization in relation to international criminalization. The renowned Nuremberg Principles of 1950 state that the absence of a penalty under internal law for an act constituting an international crime does not exempt the individual from responsibility under international law.[303] The 1991 Draft Code of Crimes against the Peace and Security of Mankind affirms the independent characterization of an act as a crime against the peace and security of mankind, regardless of its punishability under national law.[304] In explicit terms, the 1996 Draft Code unambiguously declares that crimes against the peace and security of mankind are crimes under international law and subject to punishment as such, irrespective of their punishability under national law.[305]

Indeed, the act would be deemed criminal regardless of its legality under the domestic laws of every state in the world. This is because international law operates on the principle of equal application to all states.[306] The concept of international

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[302] International Military Tribunal (Nuremberg). (1946, October 1). *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*., p. 447.

[303] ILC, UN. (1950, July 29). Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle 2. In *Yearbook of the International Law Commission 1950 Volume II Summary Records of the Second Session 5 June - 29 July 1950*.

[304] ILC. (1991). Draft Code of Crimes Against the Peace and Security of Mankind, Text of Draft Articles Provisionally Adopted by the Commission on First Reading. In *Report of the International Law Commission on the Work of Its Forty-Third Session* (UN Doc. A/CN.4/L.459 [and corr.1] and Add.1)., p. 187.

[305] ILC. (1996). Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No.10. In *Yearbook of the International Law Commission, Vol. II (2)* (A/51/10)., para. 10

[306] Lauterpacht. (1970). *International Law: Being the Collected Papers of Hersch Lauterpacht* (Lauterpacht, Ed.; Vol. 1). Cambridge University Press., P.113.

law and the establishment of an international community governed by the rule of law are based on the factual assertion that universally applicable rules and principles of international law bind all subjects of international law, irrespective of their classification as states or non-state entities. Furthermore, these rules and principles are not contingent upon factors such as race, religion, geographical location, political ideology, or level of civilization.[307]

2) National Criminalization Thesis (NCT)

NCT refutes the notion that international law bypasses domestic law by directly criminalizing specific acts.[308] According to the NCT, certain acts are universally deemed criminal under international law, qualifying them as true international crimes.[309] This is because international law mandates every state worldwide to criminalize and prosecute such acts.[310] In simple terms, an international crime refers to an act that international law requires all states to criminalize.

Although only a few contemporary scholars of ICL have embraced this approach, its origins can be traced back to the works of Grotius.[311] Grotius argued that international law prohibits states from granting refuge to individuals who have committed crimes against humanity in foreign territories.[312] According to Grotius, in such cases, the "State where the convicted Offender lives or has taken Shelter" should either punish the accused individual in accordance with their crimes or hand

[307] *Id.*
[308] (Heller, 2016), p. 391.
[309] *Id.*
[310] *Id.*
[311] *Id.*, p. 355.
[312] *Id.*, p. 391.

them over to the injured party, subject to the injured party's discretion.[313] This obligation, known as "*aut dedere aut judicare*," hinges on the condition that the offense has been criminalized domestically.[314]

The national-criminalization thesis encompasses two core aspects. Firstly, international law should impose an obligation on states to criminalize a specific act, rather than merely granting permission.[315] Merely authorizing the act's criminalization is insufficient as it allows the possibility of states refusing to comply, which contradicts the universality requirement for an act to be recognized as an international crime. Secondly, international law must mandate all states, without exceptions, to criminalize the specified act. If even a single state retains the freedom to permit the act's commission within its jurisdiction, it cannot be considered universally criminal.[316]

c. Bassiouni's Theory

Scholars face uncertainty when it comes to justifying the criteria for defining crimes under international law.[317] This lack of consensus among scholars has given rise to a range of undefined terms used to label "international crimes," including crimes under international law, international crimes, international crimes *largo sensu*, international crimes *stricto sensu*, transnational crimes, international delicts,

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[313] Grotius. (2005). *De Jure Belli ac Pacis* (Tuck, Ed.)., ch. XXI, p. 1062.
[314] *Id.*
[315] (Heller, 2016), p. 391.
[316] *Id.*
[317] Bassiouni, M. C. (2012, November 9). *Introduction to International Criminal Law, 2nd Revised Edition*. Martinus Nijhoff Publishing. https://doi.org/10.1163/9789004231696. (***Bassiouni, 2012***), p. 142.

jus cogens crimes, *jus cogens* international crimes, and even a further subdivision of international crimes known as "core crimes" encompassing genocide, crimes against humanity, and war crimes.[318]

Bassiouni asserts that there are five criteria applicable to the policy of international criminalization, which are as follows:[319]

(a) The prohibited conduct affects a significant international interest, particularly if it poses a threat to international peace and security.

(b) The prohibited conduct constitutes egregious conduct that is offensive to the shared values of the international community, including acts historically regarded as shocking to the conscience of humanity.

(c) The prohibited conduct has transnational implications, involving or impacting multiple states in its planning, preparation, or commission, either through the diverse nationalities of its perpetrators or victims, or due to the utilization of means that transcend national boundaries.

(d) The conduct causes harm to an internationally protected person or interest.

(e) The conduct violates an internationally protected interest, which may not meet the requirements of (a) or (b) but can be most effectively prevented and suppressed through international criminalization due to its nature.

In an effort to provide clearer guidance on international crimes, Bassiouni examines the "Penal Characteristics of ICL Conventions." These characteristics are derived from 281 conventions, including the IMT Charter, the IMTFE Charter,

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[318] *Id.*
[319] *Id.*, pp. 142-143.

Control Council Law No. 10, the ICTY Statute, the ICTR Statute, and the Rome Statute of the ICC.[320]

An analysis of the 281 conventions reveals ten penal characteristics. Ideally, each international criminal law convention should include all or most of these characteristics. The aforementioned penal characteristics are as follows:[321]

(1) Explicit or implicit recognition of the proscribed conduct as constituting an international crime, a crime under international law, or simply a crime.
(2) Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or similar measures.
(3) Criminalization of the proscribed conduct.
(4) Duty or right to prosecute.
(5) Duty or right to punish the proscribed conduct.
(6) Duty or right to extradite.
(7) Duty or right to cooperate in prosecution and punishment, including judicial assistance.
(8) Establishment of a criminal jurisdictional basis.
(9) Reference to the establishment of an international criminal court or tribunal with penal characteristics.
(10) Absence of a defense of superior orders.

[320] *Id.*, p. 144.
[321] *Id.*, p. 143.

The ten penal characteristics can be utilized to classify 27 international crimes. These crimes are as follows:[322]

1. Aggression
2. Genocide
3. Crimes against humanity
4. War crimes
5. Unlawful possession, use, emplacement, stockpiling, and trade of weapons, including nuclear weapons
6. Nuclear terrorism
7. Apartheid
8. Slavery, slave-related practices, and trafficking in human beings
9. Torture and other forms of cruel, inhuman or degrading treatment
10. Unlawful human experimentation
11. Enforced disappearances and extrajudicial executions
12. Mercenarism
13. Piracy and unlawful acts against the safety of maritime navigation and platforms on the high seas
14. Aircraft hijacking and unlawful acts against international air safety
15. Threat and use of force against internationally protected persons and United Nations personnel
16. Taking of civilian hostages

[322] *Id.*, pp.144-145.

17. Use of explosives
18. Unlawful use of the mail
19. Financing of terrorism
20. Unlawful traffic in drugs and related drug offenses
21. Organized crime and related specific crimes
22. Destruction and/or theft of national treasures
23. Unlawful acts against certain internationally protected elements of the environment
24. International traffic in obscene materials
25. Falsification and counterfeiting
26. Unlawful interference with international submarine cables
27. Corruption and bribery of foreign public officials.

Out of the 27 international crimes listed, only 4 crimes are included in the Rome Statute. However, this does not necessarily mean that the doors for new international crimes under the Rome Statute are closed. The numbers have been obtained through a thorough and comprehensive study conducted by scholars and experts. Some of these crimes may be added to the Rome Statute in the future if deemed necessary.

2.4. Corporate Liability Challenges under the Rome Statute

In today's highly interconnected global economies, mounting concern revolves around the increasing allegations implicating corporations in heinous atrocity

crimes.[323] Human rights violations committed by powerful economic actors have garnered significant public attention. This heightened awareness led the United Nations to appoint John Ruggie as the Special Representative on Business and Human Rights, acknowledging the pressing need to establish accountability mechanisms for these influential entities.[324]

Despite the international legal community's recognition of this issue, unresolved and fundamental questions persist within the legal framework. The extent of corporate accountability for international crimes has become a fiercely debated subject. Case law has shown that individuals within a corporation, and in certain jurisdictions, even the corporation itself as a legal entity, can be held criminally liable for their involvement in international human rights crimes that occur during the course of their business operations.[325]

Moreover, pursuing justice through civil litigation has seen notable successes in the United States and the United Kingdom.[326] Tort law has played a crucial role in holding corporations accountable in civil courts for the human rights violations caused by their business activities.[327] The urgent need to address corporate involvement in atrocities demands continuous examination and improvement of the

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[323] *IBA War Crimes Committee shines a light on corporate liability cases*. (2022, November 25). International Bar Association. Retrieved May 29, 2023, from https://www.ibanet.org/IBA-War-Crimes-Committee-shines-a-light-on-corporate-liability-cases.

[324] Kaleck, W., & Saage-Maass, M. (2010, July 1). Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges. *Journal of International Criminal Justice*, *8*(3), 699–724. https://doi.org/10.1093/jicj/mqq043. (***Kaleck & Saage-Maass, 2010***), p. 699.

[325] *Id.*, p. 700.

[326] *Id.*

[327] *Id.*

legal framework. Public discourse and legal proceedings have shed light on this critical issue, but a comprehensive and universally accepted approach to holding corporations accountable for human rights violations on an international scale is yet to be established. As society continues to grapple with this complex challenge, the quest for greater corporate responsibility in safeguarding human rights remains at the forefront of global discussions.

A. Corporate Liability at the International Criminal Court

The Rome Statute grants the International Criminal Court (ICC) the authority to investigate and prosecute individuals, including corporate officers, who are nationals of a "State Party." Among those prosecuted was Joshua Arap Sang, a former corporate executive and radio personality, charged by the ICC with three counts of crimes against humanity.[328] These charges stem from his alleged involvement in using coded messages during radio broadcasts to commit murder, forcible transfer, and persecution, all of which occurred during the post-election violence in Kenya between June 1, 2005, and November 26, 2009. However, on April 5, 2016, the Trial Chamber dismissed the charges against Sang due to insufficient evidence.[329] One judge, with the support of a third judge, reasoned that witness interference and political interference likely intimidated the witnesses.[330]

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[328] International Criminal Court. (2012, January 23). *Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute* (ICC-01/09-01/11). (***The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, 2012***)

[329] International Criminal Court. (2016, April 5). *Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Public redacted version of Decision on Defence Applications for Judgments of Acquittal* (ICC-01/09-01/11).

[330] International Criminal Court. (2016, April 5). *Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Dissenting Opinion of Judge Herrera Carbuccia* (ICC-01/09-01/11).

The ICC holds corporate officers accountable for their actions under individual criminal responsibility[331] or superior responsibility[332] if they are involved in atrocity crimes investigated by the ICC either through a referral[333] from a State Party or the Security Council or initiated by the Prosecutor.[334] Corporate officers may be subject to ICC scrutiny if their actions are linked to Rome Statute's crimes,[335] and part of a situation under official investigation or preliminary examination by the Prosecutor. As of early 2016, this accountability applies to corporate activities within the following situations: Democratic Republic of the Congo, Uganda, Central African Republic (two situations), Darfur (Sudan), Kenya, Libya, Côte d'Ivoire, Mali, Georgia, Afghanistan, Burundi, Colombia, Nigeria, Guinea, Iraq, Ukraine, and Palestine.[336]

In the context of corporate operations or government complicity in atrocity crimes to support corporate investments, the International Criminal Court (ICC) may have jurisdiction. However, specific criteria relating to personal, territorial, temporal, and subject-matter jurisdiction must still be satisfied. Additionally, the gravity threshold required for ICC's attention must be met. It is conceivable that a single atrocity crime, even if of limited magnitude and caused by corporate criminal conduct, could warrant ICC investigation in the future. For example, the Pre-Trial Chamber's decision on July 16, 2015, recognized sufficient gravity in the Israeli

[331] Rome Statute, art. 25.
[332] *Id.*, art. 28.
[333] *Id.*, art. 13.
[334] *Id.*, art. 15.
[335] *Id.*, art. 5.
[336] *Situations under investigation*. (n.d.). International Criminal Court. https://www.icc-cpi.int/situations-under-investigations

Defense Forces" singular attack on the Mavi Marmara, a Comoros-registered vessel en route to the Gaza Strip on May 31, 2010.[337] As a result, the ICC Prosecutor was requested to reconsider her initial decision not to investigate.[338]

The potential impact of corporate officers" exposure to ICC jurisdiction in cases of atrocity crimes could notably shape multinational corporations" behavior. However, the pressing question remains: why not grant the ICC the authority to directly prosecute corporations as juridical persons? This possibility was deliberated and dismissed during the U.N. negotiations leading to the July 1998 Rome Statute.[339] The original focus of the court was to hold individuals accountable for atrocity crimes, leaving inadequate time to assess the proposal thoroughly.[340] Additionally, few national jurisdictions at that time held corporations liable under criminal law, as civil tort liability was more universally established.[341] Embracing corporate liability before the ICC could have compromised the principle of complementarity under the Rome Statute, which relies on compatible criminal law

[337] International Criminal Court. (2015, July 16). *Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation* (ICC-01/13).

[338] International Criminal Court. (2014, November 6). *Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, Article 53(1) Report* (ICC-01/13-6-AnxA).

[339] Saland. (1999). International Criminal Law Principles. In Lee (Ed.), *The International Criminal Court: The Making of the Rome Statute--Issues, Negotiations, Results*. Kluwer Law International., p. 189.

[340] Scheffer, & Kaeb. (2011, July). The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory. *Berkeley Journal of International Law*. https://doi.org/10.15779/Z38T65N., p. 334.; U.S. Supreme Court. (2013). *Kiobel v. Royal Dutch Petroleum Co.: Supplemental Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as Amicus Curiae in Support of the Petitioners* (133 S. Ct. 1659 (No. 10-1491).). (***U.S. Supreme Court, 2013***)

[341] *Id.*

in state-party jurisdictions and could have jeopardized the treaty's ratification by many governments due to the novelty of corporate criminal liability.[342]

Nonetheless, the landscape concerning corporate criminal liability in national jurisdictions has evolved since then, including in numerous States Parties to the Rome Statute.[343] The potential exercise of complementarity, although still challenging in some jurisdictions, could become more feasible if the Rome Statute were amended to include corporate liability and a substantial number of States Parties adopt changes to their national criminal codes to address the involvement of juridical persons in atrocity crimes.

Gaining approval for amendments to the Rome Statute to extend the ICC's jurisdiction over juridical persons would pose significant diplomatic challenges. Nations heavily reliant on multinational corporations, both as home and host states, are likely to resist subjecting these companies to ICC's criminal liability. The potential economic ramifications of corporate criminal liability or the prospect of an ICC investigation could severely impact a nation's economy. Nonetheless, considering a potential amendment to the Rome Statute that expands the Court's personal jurisdiction over juridical persons is valuable. One possible revision could be to amend Article 25(1) to state: "The Court shall have jurisdiction over natural *and juridical persons* pursuant to this Statute." Additionally, the second sentence of Article 1 could be amended to read: "It shall be a permanent institution and shall have the power to exercise its jurisdiction over *natural and juridical persons* for the

[342] (Schabas, 2012), p. 190-199.
[343] (U.S. Supreme Court, 2013), p. 13-26.

most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. *Any use of "person" or "persons" or the "accused" in this Statute shall mean a natural or juridical person unless the text connotes an exclusive usage.*"[344]

The achievement of corporate accountability for atrocity crimes can be pragmatically pursued through two approaches.[345] Firstly, by investigating corporate officers within the existing scope of Rome Statute powers, particularly when the ICC has jurisdiction over relevant situations.[346] Secondly, by augmenting national criminal codes to encompass corporate involvement in or complicity with atrocity crimes.[347] Governments that have already modernized their criminal codes in this context might consider establishing a treaty-based multilateral tribunal exclusively focused on atrocity crimes. Such a tribunal would possess clear jurisdiction to address criminal complaints and, potentially, civil claims against juridical persons. Nevertheless, if the choice is made to rely on the ICC as the international forum to prosecute corporate crimes, the construction of the necessary framework to indict corporations could pose significant challenges.

[344] *Corporate Liability under the Rome Statute*. (n.d.). Corporate Liability Under the Rome Statute. https://harvardilj.org/2016/07/corporate-liability-under-the-rome-statute/
[345] *Id.*
[346] *Id.*
[347] *Id.*

B. Corporate Criminal Liability: Analyzing States Approaches and Practices

Since the Nuremberg Trials, the core international crimes - genocide, crimes against humanity, and war crimes - have been firmly established, with most of their elements unquestioned.[348] While some aspects of secondary liability remain unresolved, the fundamental principles of individual responsibility for international crimes are well-defined and applied by international and national courts.[349] Decisions by various international and national courts since the late 1940s have shown that individuals acting on behalf of corporations can be held liable under international criminal law.

Although some national jurisdictions have introduced criminal liability for corporations, no known criminal law cases specifically pertain to international crimes committed by corporations themselves. However, civil lawsuits in the United States, the United Kingdom, and the Netherlands seek damages from corporations involved in international crimes or other human rights violations. Nevertheless, the number of cases holding business actors - individuals and legal entities - legally accountable for their role in international crimes remains minimal compared to the considerable number of reported corporate human rights abuses by victims, civil society organizations, and state or UN agencies.

Corporate actors may be held accountable for their involvement in international crimes at the national level through criminal proceedings or civil lawsuits. These

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[348] (Kaleck & Saage-Maass, 2010), p. 699.
[349] *Id.*, p. 700.

legal actions can target either the company itself or individual corporate officers. The choice of forum for such proceedings can be the state where the violations occurred (the "host state") or the state where the company is headquartered (the "home state").[350]

International criminal law has been widely integrated into the national legislation of European countries, providing a legal basis for criminal proceedings involving corporate involvement in international crimes.[351] Nevertheless, several problematic issues persist, especially concerning corporate criminal liability, the extraterritorial application of law, the attribution of criminal actions to specific agents, the *mens rea* requirements, and the challenges of extraterritorial investigations and obtaining sufficient evidence.

Europe lacks a uniform regulation on corporate criminal liability, with some countries, like Germany, not providing for it at all, while others, like Switzerland, rarely enforce this provision. Most European jurisdictions apply their laws to international crimes committed abroad based on the active and passive personality principle or the principle of universal jurisdiction. However, the capacity and willingness of law enforcement agencies to investigate extraterritorial cases remain significant obstacles.[352]

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[350] *Id.*, p. 714-15.

[351] Thompson, Ramasastry, & Taylor. (2009). Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes. *George Washington International Law Review*, *40*(4)., p. 310-374; Mattioli-Zeltner, G. (2006, June 28). *Universal Jurisdiction in Europe*. Universal Jurisdiction in Europe: The State of the Art | HRW. https://www.hrw.org/report/2006/06/27/universal-jurisdiction-europe/state-art

[352] (Kaleck & Saage-Maass, 2010), p. 961-964.

The complex structures and distant relations of corporations often make it challenging to establish individual responsibility and link specific actors to crimes committed within an opaque business framework. Proving the alleged perpetrator's or accessory's knowledge of the crime becomes difficult when they are far removed from the scene. In situations where crimes occur in distant and politically unstable regions, such as during armed conflicts or internal repression, demonstrating that the alleged perpetrator had knowledge of specific incidents becomes nearly impossible.

However, there are two landmark cases of national mechanism:[353]

a. Sweden: The *Lundin* Case

Lundin Petroleum AB, now known as Lundin Energy, participated in a consortium with Petronas from Malaysia and OMV Exploration from Austria that exploited oil in Sudan's Block 5A between 1997 and 2003. This period coincided with Sudan's armed conflict, where the consortium's operations took place amidst brutal clashes between government forces and opposition groups, including the Sudan People's Liberation Movement and Army (SPLM/A), vying for control over the territory's oil resources.

A report by the European Coalition on Oil in Sudan (ECOS) detailed numerous international crimes committed during this time, such as attacks on civilians,

[353] Larissa Furtwengler, V. R., Riello, V., Furtwengler, L., Dannenbaum, T., Bisset, A., Goitein, E., Giorgetti, C., Pearsall, P., Croner, G., Petrila, J., Patel, F., Dyson, I., Nevitt, M., Jamshidi, M., Rosensaft, M. Z., Widdersheim, N., Sharma, C., Meyers, J. S., Durbin, D., . . . Lefas, M. (2021, September 6). *Corporate Criminal Liability for International Crimes: France and Sweden Are Poised to Take Historic Steps Forward - Just Security*. Just Security - a Forum on Law, Rights, and U.S. National Security. https://www.justsecurity.org/78097/corporate-criminal-liability-for-human-rights-violations-france-and-sweden-are-poised-to-take-historic-steps-forward/.

destruction of shelters, pillaging, unlawful killings, rape, abduction of children, torture, and forced displacement.[354] Although the direct perpetrators were the armed parties, the report implicated the Lundin consortium in complicity with these crimes.[355] The allegations suggest that the consortium provided infrastructure to support the Sudan Armed Forces (SAF), including a refurbished airstrip used for bombings, and that the oil exploitation served as the motive behind the Sudanese government's campaign in the region.[356] Notably, providing support to government security agencies or militias was not uncommon for oil companies operating in Sudan.

In response to the ECOS report, the Swedish Prosecution Authority initiated a preliminary investigation into violations of international humanitarian law in Sudan between 1997 and 2003 in June 2010.[357] As a result, the prosecution of two Lundin executives, Alex Schneiter, and Ian Lundin, for their alleged involvement in international crimes was authorized.[358] The company itself also faced potential penalties. However, all parties involved vehemently deny any wrongdoing.

The Lundin case raises significant legal issues, not only within Swedish law but also in the realm of international criminal law.[359] Swedish law's concept of

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[354] European Coalition on Oil in Sudan (ECOS). (2010, June). *Unpaid Debt*.

[355] *Id.*

[356] *Documentation – Unpaid Debt*. (n.d.). Documentation – Unpaid Debt. https://unpaiddebt.org/resources/documentation/

[357] (European Coalition on Oil in Sudan (ECOS), 2010).

[358] AFP. (2018, October 18). *Sweden OKs trial of Lundin Oil execs for Sudan war crimes*. JusticeInfo.net. Retrieved May 29, 2023, from https://www.justiceinfo.net/en/39274-sweden-oks-trial-of-lundin-oil-execs-for-sudan-war-crimes.html.

[359] Ingeson, M., & Kather, A. L. (2018, November 13). The Road Less Traveled: How Corporate Directors Could be Held Individually Liable in Sweden for Corporate Atrocity Crimes Abroad. EJIL: Talk! https://www.ejiltalk.org/the-road-less-traveled-how-corporate-directors-could-be-held-individually-liable-in-sweden-for-corporate-atrocity-crimes-abroad/

individual liability for corporate crimes remains relatively undeveloped.[360] Nevertheless, the possibility of corporate liability for international crimes has emerged with the notification that Lundin Energy may face fines and forfeiture of economic benefits. The prosecutor in charge of the case announced that the suspects would be indicted soon, although a specific date was not provided.[361] The outcome of this trial could have far-reaching implications as it pertains to the company and its executives" potential involvement in war crimes during their operations in Sudan.

b. France: The *Lafarge* Case

The French Supreme Court is expected to make a historic decision on September 7 in the Lafarge case, where a French parent company faces charges for alleged crimes committed by its Syrian subsidiary, including terrorism financing and complicity in crimes against humanity.[362] This marks the first time such charges have been brought against a corporate entity.[363]

The actions in question occurred during the Syrian armed conflict and the rise of the Islamic State (IS) between 2012 and 2014. Lafarge, owning 98.7% of Lafarge Cement Syria (LCS), is accused of collaborating with IS and other armed groups to

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[360] *Id.*

[361] *Prosecutor is ready & the Court rejects a last request from Lundin – Unpaid Debt*. (n.d.). Prosecutor Is Ready & the Court Rejects a Last Request from Lundin – Unpaid Debt. https://unpaiddebt.org/prosecutor-is-ready-the-court-rejects-a-last-request-from-lundin/

[362] *Lafarge/Syria: French Supreme Court decision postponed to 7 September*. (2021, July 15). ECCHR. Retrieved May 29, 2023, from https://www.ecchr.eu/pressemitteilung/milestone-decision-in-lafarge-case/

[363] Tixeire, Lavite, & Guislain. (2020, July 27). Holding Transnational Corporations Accountable for International Crimes in Syria: Update on the Developments in the Lafarge Case (Part I). Opinio Juris. Retrieved May 29, 2023, from https://opiniojuris.org/2020/07/27/holding-transnational-corporations-accountable-for-international-crimes-in-syria-update-on-the-developments-in-the-lafarge-case-part-i/. (***Tixeire et al., 2020***)

continue operations amidst the conflict, passing through checkpoints and sourcing raw materials from areas under IS control. While non-Syrian staff were evacuated in 2012, Syrian employees were pressured to work under dangerous conditions. When IS violently seized the facility in 2014, the Syrian workers were left abandoned.[364]

In 2016, Sherpa and the European Center for Constitutional and Human Rights (ECCHR) filed a complaint with the Paris Court against Lafarge, LCS, and three individuals, resulting in Lafarge's indictment on charges of financing terrorism, complicity in crimes against humanity, violating an embargo, and endangering lives.[365] Former CEOs and directors of Lafarge had already been indicted in 2017.[366]

In November 2019, the Paris Court of Appeals overturned the charge of complicity in crimes against humanity and limited Sherpa's and ECCHR"s standing in the criminal case, which is now under appeal.[367] Notably, the court upheld the

[364] Larissa Furtwengler, V. R., Riello, V., Furtwengler, L., Dannenbaum, T., Bisset, A., Goitein, E., Giorgetti, C., Pearsall, P., Croner, G., Petrila, J., Patel, F., Dyson, I., Nevitt, M., Jamshidi, M., Rosensaft, M. Z., Widdersheim, N., Sharma, C., Meyers, J. S., Durbin, D., . . . Lefas, M. (2021, September 6). *Corporate Criminal Liability for International Crimes: France and Sweden Are Poised to Take Historic Steps Forward - Just Security*. Just Security - a Forum on Law, Rights, and U.S. National Security. https://www.justsecurity.org/78097/corporate-criminal-liability-for-human-rights-violations-france-and-sweden-are-poised-to-take-historic-steps-forward/

[365] Id.

[366] *Lafarge SA, Eric Olsen and others*. (2023, April 17). TRIAL International. Retrieved May 30, 2023, from https://trialinternational.org/latest-post/lafarge-eric-olsen-and-others/

[367] *Sherpa and ECCHR to appeal decision in Lafarge/Syria case at French Supreme Court - Business & Human Rights Resource Centre*. (2019, November 7). Business & Human Rights Resource Centre. Retrieved May 30, 2023, from https://www.business-humanrights.org/en/latest-news/sherpa-and-ecchr-to-appeal-decision-in-lafargesyria-case-at-french-supreme-court/; (***Tixeire et al., 2020***)

charge of financing terrorism against Lafarge, citing the company's significant operational and financial control over LCS.

The Court of Appeals became the first domestic court to find evidence of IS committing crimes against humanity between 2013 and 2014. It also concluded that Lafarge's financing of IS, totaling 500,000 euros, could have contributed to the commission of these crimes. However, the court rejected the charge of complicity in crimes against humanity, interpreting Article 121-7 of the French Criminal Code strictly, demanding that the accomplice share the intent of the main perpetrator. The current appeal challenges this narrow understanding, arguing that knowledge of the direct perpetrators" intent should suffice to establish complicity, in line with established jurisprudence.

2.5. Islamic Perspective

The Holy Quran contains verses emphasizing the concept of stewardship and responsibility bestowed upon humans by Allah. Muslims are considered viceroys or trustees on Earth, entrusted with its care and accountable for using its resources. This divine responsibility serves as a test from Allah, making it essential for Muslims to demonstrate good stewardship in their actions.

The Islamic approach to preserving the environment is firmly grounded in rational consumption, moderation, and sustainability values. The Quran contains verses that explicitly discourage wastefulness and extravagance, emphasizing the need to appreciate and utilize resources responsibly. For instance, Muslims are urged not to waste food and to use resources wisely, as Allah dislikes wastefulness. This principle of responsible resource utilization promotes a balanced and mindful

approach to consumption, preventing unnecessary depletion and environmental harm.

وَهُوَ ٱلَّذِى جَعَلَكُمْ خَلَٰٓئِفَ ٱلْأَرْضِ وَرَفَعَ بَعْضَكُمْ فَوْقَ بَعْضٍ
دَرَجَٰتٍ لِّيَبْلُوَكُمْ فِى مَآ ءَاتَىٰكُمْ ۗ إِنَّ رَبَّكَ سَرِيعُ ٱلْعِقَابِ وَإِنَّهُۥ لَغَفُورٌ
رَّحِيمٌ ﴿١٦٥﴾

> And it is He who has made you successors upon the earth and has raised some of you above others in degrees [of rank] that He may try you through what He has given you. Indeed, your Lord is swift in penalty; but indeed, He is Forgiving and Merciful. (QS. Al-An'am: 165)

۞ يَٰبَنِىٓ ءَادَمَ خُذُوا۟ زِينَتَكُمْ عِندَ كُلِّ مَسْجِدٍ وَكُلُوا۟ وَٱشْرَبُوا۟ وَلَا
تُسْرِفُوٓا۟ ۚ إِنَّهُۥ لَا يُحِبُّ ٱلْمُسْرِفِينَ ﴿٣١﴾

> O Children of Adam! Dress properly whenever you are at worship. Eat and drink, but do not waste. Surely He does not like the wasteful. (QS. Al-Al'Raaf: 31)

Prophet Muhammad (SAW) provided practical guidance on environmental conservation, encouraging acts that promote environmental well-being, such as planting trees and engaging in agriculture.[368] In Islam, planting a tree or sowing seeds is considered a charitable deed, benefiting various living beings. This hadith reinforces the notion that Allah rewards every positive action for the environment.

Islam places great importance on the preservation and protection of plants and trees. Cutting or destroying them without justification is condemned, as illustrated in a hadith that mentions severe consequences for needlessly cutting a lote-tree

[368] Hadith Bukhari, Narrated by Anas bin Malik (RA). "There is none amongst the Muslims who plants a tree or sows seeds, and then a bird, or a person or an animal eats from it, but is regarded as a charitable gift for him"

(without justification).[369] This approach aligns with the imperative to preserve biodiversity and prevent deforestation, which can lead to adverse environmental impacts, such as soil erosion and loss of wildlife habitat.

The teachings of Islam extend to the proper use of natural resources. Hazrat Ali ibn Abi-Talib (RA) eloquently captures this principle, urging people to utilize resources responsibly and refrain from being wasteful or destructive. This highlights Islam's emphasis on equitable resource distribution among all living beings and the prohibition of abuse or misuse.

> "Partake of it gladly so long as you are the benefactor, not a despoiler; a cultivator, not a destroyer. All human beings as well as animals and wildlife enjoy the right to share Earth's resources. Man's abuse of any resource is prohibited as the juristic principle says "What leads to the prohibited is itself prohibited"

Historically, when Abu Musa (RA) was appointed governor, he prioritized educating the people about the Quran and the Sunnah (the teachings and practices of the Prophet). Additionally, he emphasized the importance of cleanliness and preserving the environment by forbidding actions such as relieving oneself in water sources, on paths, or in the habitats of animals. These values underscore Islam's focus on maintaining the purity of essential resources and respecting the habitats of other creatures.

Moreover, Islam greatly emphasizes the significance of water as a source of life and purification. The Quran acknowledges water's vital role in sustaining all

[369] Abu Dawud, Reported by Abdullah ibn Habashi. "He who cuts a lote-tree [without justification], Allah will send him to Hellfire."

living creatures and underscores the importance of maintaining its purity.[370] Pollution, a form of impurity, is regarded as detrimental to human well-being and one's faith in Islam.[371] Therefore, Muslims are encouraged to engage in acts of repentance and purification, actively abstaining from harmful activities that lead to pollution and ecological damage.

Prophet Muhammad's teachings and actions serve as a role model for environmental sustainability.[372] He emphasized the value of sustainable agriculture, proper treatment of animals, and the preservation of natural resources.[373] For instance, planting trees and engaging in beneficial works were considered charitable acts and exemplified the Prophet's deep-rooted concern for environmental well-being. His approach demonstrates Islam's commitment to nurturing and safeguarding the natural world.

Another significant contribution of Prophet Muhammad to environmental conservation was the introduction of "protected areas."[374] These designated zones were established to ensure the preservation of land, forests, and wildlife by restricting their use during specific periods.[375] The concept of environmental protection, embedded in Islamic teachings, reflects the religion's concern for

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[370] Surah Al-An"am. (n.d.). In *Al-Qur"an*., ayat 48.

[371] Surah Al-Baqarah. (n.d.). In *Al-Qur"an*., 222.

[372] Musa. (2002). *Ahadith fi al-Din wa-l-Thaqafah wa-l-Ijtima" (Conversations on Religions, Culture and Sociology)*. Beirut: Mu"asasat al-BalÉgh., pp. 210–12

[373] *Id.*

[374] Bab al-Mazru"ah (The Book of Farming). (2018). In *Al- "Ayni* (Vol. 9)., pp. 4–24).

[375] Safa. (2010). *Himayat al-Bi"ah al-Tabi"iyya fÊ al-Shari"ah al-Islamiyya: Dirasah Muqaranah (Protection of the Natural Environment in Islamic Law: A Comparative Jurisprudence Study)*.; Shihadah, & Amman. (2005). Safahat min Tarikh al-Turath al-Tibb al-Isami. In *History of the Arab-Islamic Medical Heritage*.

maintaining ecological balance and preserving the environment for the benefit of future generations.

Specific legislation and policies promoting rational resource use and moderation are essential to ensure effective environmental protection.[376] Islamic principles, which advocate justice, equality, and popular participation in decision-making, form the bedrock of sustainable development.[377] The guidance provided by the Prophet encourages consultation and responsible resource management, ensuring that the needs of the present and future generations are met without compromising the environment's well-being.

While development projects may vary in their objectives, their ultimate aim should always be to sustain human well-being and benefit society as a whole.[378] Islam emphasizes that development should not be pursued solely for its sake but with a focus on improving the lives of individuals and communities. This inclusive approach promotes the harmonious coexistence of human society with the natural world, leading to a balanced and prosperous future for all.

[376] Al-Siryani. (2006). *Al-Manzour al-Islami l-Qadaya al-Bi''ah: Dirasah Muqaranah (The Islamic Perspective on Environmental Issues, a Comparative Study)*. Riyadh: Jami"ah Nayif., p. 146.

[377] Al-Jayyousi. (2012). *Islam and Sustainable Development New Worldviews*. Routledge.

[378] Abu Zant, & Othman. (2006). *Al-Tanmiyya al-MustadÊmah: Dirasah Nazariyyah fi al-Mafhum wa-l-Muhtawa (Sustainable Development: A Theoretical Study of Concept and Content)* (Vol. 12). Al-Manara., pp. 154–55.

CHAPTER III

RESULT AND DISCUSSION

3.1. Ecocide as International Crimes According to The *Travaux préparatoires* and Commentary of the Rome Statute

The absence of a universally agreed-upon definition of international crimes poses a significant challenge when attempting to determine whether other actions can indeed be classified as international crimes. The following theories regarding international crimes do not function as cumulative prerequisites; rather, they form a framework of interconnected theories that mutually reinforce each other, aiming to substantiate the incorporation of Ecocide as part of the ICC's *ratione materiae*. In addition to considering *travaux préparatoires*, the fundamental essence of the discussions revolves around the concepts of universal criminality theory and *malum in se* theory.

To begin with, the theory of universal criminality posits that international crimes possess inherent universality, rendering them criminal and subject to punitive measures irrespective of their occurrence anywhere in the world.[379] Within this theory, Heller introduces two approaches for determining the status of an action as universally criminal and, consequently, an international crime: The Direct Criminalization Thesis (DCT) and the National Criminalization Thesis (NCT).[380] While contemporary international law scholars are not widely supportive of DCT, it played a foundational role in establishing *ratione materiae* in earlier tribunals and

[379] (Heller, 2016), p. 357.
[380] *Id*., pp. 354-355.

garnered support from the drafters of the Rome Statute. Given these considerations, the thesis adopts DCT as its analytical cornerstone.

DCT defines an international crime as an act directly criminalized by international law, regardless of domestic criminalization.[381] This concept emerged from the International Military Tribunal at Nuremberg (IMT) judgment, which emphasized that

> "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[382]

The term "international duties…transcend the national obligations" underscores the detachment between international and domestic criminalization.[383] The International Law Commission (ILC) has consistently upheld this theory since the Nuremberg trials. Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal (1950) and subsequent drafts affirm that an act's characterization as an international crime remains independent of internal law.[384]

In the establishment of the IMT, the crimes listed in the Nuremberg Charter were not exclusively prohibited in domestic law; however, these crimes retained their status as international crimes under the jurisdiction of the IMT. Furthermore,

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[381] *Id*., p. 362.

[382] International Military Tribunal (Nuremberg). (1946, October 1). *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*., p. 447.

[383] (Heller, 2016), p. 363.

[384] ILC, UN. (1950, July 29). Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle 2. In *Yearbook of the International Law Commission 1950 Volume II Summary Records of the Second Session 5 June - 29 July 1950*.

during the drafting of the Code of Crimes Against the Peace and Security of Mankind, while the ILC omitted certain crimes, the drafters unanimously recognized crimes against the environment as universally acknowledged international crimes.[385]

The rationale behind the inclusion of IMT's crimes was closely tied to whether the crime possesses customary nature or is classified as *jus cogens*[386] or *erga omnes*[387] offenses.[388] War crimes, crimes against humanity, and genocide maintain their status as customary or *jus cogens* crimes, a fact reaffirmed by numerous judgments and expert opinions. Some scholars argue that specific environmental crimes, such as severe marine environment pollution or Ecocide, could ascend to the same level of *jus cogens* norms as the prohibitions against crimes against humanity, war crimes, acts of aggression, and genocide.[389] Environmental responsibilities characterized by an *erga omnes* nature find expression in various

[385] (Bassiouni, 1993), p. 248.

[386] A rule or principle in international law that is so fundamental that it binds all states and does not allow any exceptions. Such rules (sometimes called peremptory norms) will only amount to *jus cogens* rules if they are recognized as such by the international community as a whole.

[387] Obligations in whose fulfilment all states have a legal interest because their subject matter is of importance to the international community as a whole.

[388] Danilenko. (2000). The Statute of the International Criminal Court and Third States. *Michigan Journal of International Law*, *21*(3). https://repository.law.umich.edu/mjil/vol21/iss3/3., pp. 482-490.

[389] Gillett, M. (2013, June 24). Environmental Damage and International Criminal Law. *Sustainable Development, International Criminal Justice, and Treaty Implementation*, 73–99. https://doi.org/10.1017/cbo9781139507561.008; Carpenter. (2021, July 13). *How the Inclusion of Ecocide among the Rome Statute's Crimes Could Counter Neo-Colonial Criticisms*? *Jus cogens*: The International Law Podcast & Blog. https://juscogens.law.blog/2021/07/13/how-the-inclusion-of-ecocide-among-the-rome-statutes-crimes-could-counter-neo-colonial-criticisms; Kułaga, U. (2022, October). Prohibition of massive and serious pollution of marine environment as a *jus cogens*. Identification, legal bases and consequences in view of the recent work of the International Law Commission. *Marine Policy*, *144*, 105217. https://doi.org/10.1016/j.marpol.2022.105217

treaties, soft law instruments, and legal cases, underscoring the collective duty to preserve the environment.[390]

The rationales of *erga omnes* or *jus cogens* opinion are as follows:

a. Common Property: The concept of obligations *erga omnes* is particularly relevant in environmental law, especially concerning areas beyond national jurisdiction that are considered 'common property.'[391] These areas, such as the high seas or the atmosphere, represent shared resources requiring collective responsibility for preservation.
b. Mitigating Climate Change: Scholars further contend that states have an *erga omnes* obligation to mitigate climate change based on human rights protection.[392] In essence, states are responsible for reducing greenhouse gas emissions and addressing climate change's impacts on present and future generations.
c. Emerging Jurisprudence: The jurisprudence of international courts and tribunals has also recognized *erga omnes* obligations in environmental

[390] UN General Assembly. (1988, December 6). Protection of Global Climate for Present and Future Generations of Mankind. In *United Nations* (UN GA 43/53); ILC, UN. (2001). *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries.*, Article 19(3).; ILC, UN. (1996). *Draft Code of Crimes against the Peace and Security of Mankind*., Article 20(g).

[391] Jørgensen, N. H. B. (2000, November 9). Obligations *Erga omnes*. *The Responsibility of States for International Crimes*, 93–99. https://doi.org/10.1093/acprof:oso/9780198298618.003.0008

[392] Tsang. (2021). Establishing State Responsibility in Mitigating Climate Change under Customary International Law. *Essays & Theses*. https://scholarship.law.columbia.edu/llm_essays_theses/1

law[393]—for instance, an advisory opinion defined sponsoring state obligations for environmental damage as *erga omnes*.

The umbrella reason is that scholars argue that environmental destruction holds *erga omnes* characteristics due to its impact on the global community, necessitating collective action and responsibility to address it.

These arguments have given rise to the theory that environmental crime constitutes a *malum in se* crime. According to this concept, an act is deemed criminal due to its inherent evil nature, regardless of the presence of legal prohibitions.[394] Stahn outlines several factors considered in identifying actions as *malum in se* crimes: the presence of evil intent, such as an attack on humankind or fundamental human values (e.g., human dignity and humanity); its gravity and scale ('grave matter of international concern'); its international or cross-jurisdictional dimension, including the necessity for international enforcement; and/or its perception, for instance, as 'shock[ing] the conscience of humanity'.[395] The acceptance of the *malum in se* theory is gaining traction within the realm of international criminal law.[396] For instance, Cécile Fabre asserts that, in the context of prospective legal reform, all acts that dehumanize and infringe upon fundamental human rights should be classified as international crimes.[397]

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[393] Fitzmaurice, M. (2021, December 31). Multilateralism, Environmental Law, and the Jurisprudence of International Courts and Tribunals. *The Global Community Yearbook of International Law and Jurisprudence 2020*, 375–402. https://doi.org/10.1093/oso/9780197618721.003.0017

[394] (Stahn, 2019), p. 19.

[395] Id.

[396] Id., p. 20.

[397] Fabre, C. (2016, September 1). *Cosmopolitan Peace*. Oxford University Press., p. 181.

As an illustration, acts such as (i) aggression, (ii) genocide, (iii) crimes against humanity, (iv) crimes targeting the United Nations and its affiliates, and (v) war crimes that are subject to international investigation and prosecution, even without universal treaty-based codification, can be considered.[398]

In regard to gravity and scale ('grave matter of international concern'), the ICC demonstrated its consideration of environmental destruction when assessing the scale and gravity in its Policy Paper. In 2016, the Office of the ICC Prosecutor stated its intention to prioritize crimes for prosecution that had led to environmental destruction, exploitation of natural resources, or illegal dispossession of land.[399] What was once excluded from the ambit of the Rome Statute now appeared to be a focus of the ICC.

On September 15, 2016, the Office of the Prosecutor for the ICC published a Policy Paper on Case Selection and Prioritization.[400] This policy paper outlined the priorities in the cases the Prosecutor would investigate and bring before the Court. Environmental destruction was mentioned as a consideration in several provisions. Notably, the Prosecutor's Office would now factor in environmental damage when assessing the gravity of crimes. The paper stated,

> "The impact of the crimes may be assessed in light of ... the social, economic, and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the

[398] IMT Charter.
[399] (OTP Policy Paper, 2016).
[400] *Id*.

environment, the illegal exploitation of natural resources, or the illegal dispossession of land."[401]

Furthermore, the Prosecutor committed to cooperating with States prosecuting individuals for crimes under the Rome Statute and expressed willingness to provide assistance related to conduct constituting serious crimes under national law, including the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing, or environmental destruction.[402]

According to the ICC Regulations, when evaluating the gravity of a crime, the Prosecutor must consider factors such as the scale, nature, manner of commission, and impact of the potential crime.[403] With the Policy Paper, the ICC prosecutor can now factor in environmental damage when assessing the gravity of a crime. The Paper introduced the environmental effect as a factor for both evaluating the manner of commission and the impact of the potential crime. The Paper stipulated, "The manner of commission of the crimes may be assessed in light of ... crimes committed by means of, or resulting in, the destruction of the environment or of protected objects."[404] This implies that crimes involving environmental destruction, or resulting in such destruction, will be considered more serious.

Moreover, when considering the impact of a crime, the policy now takes into account environmental consequences.

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[401] *Id.*

[402] *Id.*

[403] International Criminal Court. (2009, April 23). *Regulations of the Office of the Prosecutor,*. https://www.icc-cpi.int/nr/rdonlyres/fff97111-ecd6-40b5-9cda792bcbe1e695/280253/iccbd050109eng.pdf., Reg. 29.

[404] (OTP Policy Paper, 2016), para. 40.

> "The impact of the crimes may be assessed in light of ... the social, economic, and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources, or the illegal dispossession of land."[405]

ICC Prosecutors can now assess three types of environmental impacts: environmental destruction, illegal exploitation of natural resources, or the illegal dispossession of land.[406] This provision significantly broadens the range of cases that ICC prosecutors can investigate, encompassing situations like 'land grabs' and forced evictions of indigenous populations, illegal mining and fishing, or ecosystem destruction. All these environmental impacts are commonly categorized as 'Ecocide' according to most definitions of the term.[407]

Furthermore, environmental destruction constitutes an infringement of fundamental rights, such as the right to life. According to General Comment 36, the right to life is supreme, allowing no derogation, and serves as a fundamental right.[408] This right should not be narrowly interpreted. The obligation to protect life also entails that State parties must take appropriate measures to address societal conditions that could lead to direct threats to life or hinder individuals from experiencing their right to life with dignity. These conditions encompass factors like environmental degradation, among others.[409] Environmental degradation,

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[405] *Id*., para. 41.
[406] *Id*.
[407] (Greene, 2019), p. 24.
[408] UN Human Rights Committee. (2019, September 3). *General comment No. 36: Article 6: Right to Life of International Covenant on Civil and Political Rights* (CCPR/C/GC/36). (***General Comment 36, 2019***), para. 2.
[409] Id., para. 26.

climate change, and unsustainable development pose some of the most pressing and serious threats to the ability of both present and future generations to enjoy the right to life.[410] Implementing the duty to uphold and ensure the right to life, particularly a life with dignity, relies, among other factors, on actions taken by State parties to preserve the environment and safeguard it from harm, pollution, and climate change caused by both public and private entities.[411] Therefore, State parties must ensure the sustainable use of natural resources, establish and enforce substantial environmental standards, conduct environmental impact assessments, and engage in consultations with relevant States regarding activities likely to significantly impact the environment.[412]

Finally, it's important to mention Bassiouni's theory, closely linked to the *Travaux préparatoires* of the Rome Statute. The International Law Commission (ILC) held sessions for developing the code between 1946 and 1998, culminating in the completion of the Rome Statute.[413] Throughout this process, the ILC extensively examined and evaluated potential international crimes. Among the 12 listed crimes, environmental crimes retained their place. Specifically, Article 26

[410] United Nations Conference on the Human Environment in Stockholm. (1972, June 16). *Declaration of the United Nations Conference on the Human Environment*., para. 1.; United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro. (1992, June 14). *Rio Declaration on Environment and Development*., principle 1.; United Nations. (1992). *United Nations Framework Convention On Climate Change* (FCCC/INFORMAL/84 GE.05-62220 (E) 200705), preamble.

[411] (General Comment 36, 2019), para. 62.

[412] *Id*.

[413] (Bassiouni, 1993), p. 244.

addressed "Willful and severe damage to the environment," designating it as a "universally recognized international crime."[414]

The drafter of the Rome Statute, Bassiouni, introduced a theory derived from his prior writings.[415] This theory pertains to the classification and categorization of international crimes.[416] He conducted an empirical study of 271 conventions spanning the period from 1815 to 2007, encompassing documents such as the IMT Charter, IMTFE Charter, Control Council Law No. 10, ICTY statute, ICTR statute, and the Rome Statute of the ICC. [417] These conventions were categorized into 27 crime groups based on ten core penal characteristics. [418] While some penalists might critique this theory, it portrays reality rather than an ideal scenario. [419] The central challenge arises from the lack of a consistent international legislative policy and coherence in shaping international crimes. [420] The mere presence of any of these ten penal characteristics within a convention suffices to classify the proscribed behavior as an international crime.[421] Ideally, each international criminal law convention should encompass most, if not all, of these ten penal characteristics. This theory also extends to environmental crimes. [422]

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[414] (Report of the International Law Commission, 43rd Sess., U.N. GAOR Supp. No. 10, 1991)

[415] (Bassiouni, 2012), pp. cxxvii – cxxviii.

[416] *Id*.

[417] (Bassiouni, 2012), pp. 143-144.

[418] *Id*., pp. 144-145.

[419] (Bassiouni, 2012), pp. cxxvii – cxxviii.

[420] (Bassiouni, 2012), pp. cxxvii – cxxviii.

[421] *Id*.

[422] *Id*.

The aforementioned theories, indeed, do not necessitate state practices or domestic criminalization. However, to further support this notion, the criminalization of Ecocide is regulated in several states, including Vietnam, Russia, Kazakhstan, and the Kyrgyz Republic, among others.[423] This speaks volumes, indicating that not only the principles of Direct Criminalization Theory (DCT) or *malum in se*[424] are fulfilled but also those of National Criminalization Theory (NCT) and *malum prohibitum*.[425]

In conclusion, these arguments underscore that Ecocide can be classified as an international crime under the International Criminal Court's (ICC) jurisdiction.

3.2. The Challenges and Opportunities to Include Ecocide as International Crimes Under Rome Statute

Over the past few decades, the development of a robust framework for international criminal law has made significant strides. However, this progress has not been mirrored in the area of environmental law, leaving the establishment of an international environmental criminal law regime unresolved. Although specific treaties address certain environmental offenses,[426] none comprehensively encompass the entirety of environmental law or criminalize environmental damage.

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[423] Other countries include Tajikistan, Georgia, Belarus, Ukraine, Moldova, and Armenia. *See* (History – Ecocide Law, n.d.)

[424] Malum in se means a crime is inherently evil or wrong, regardless of the existence of regulations prohibiting such conduct. *See* Chapter II point 2.3 (B).

[425] *Malum prohibitum* refers to an action being deemed evil or wrong solely because it is prohibited by law. *See* Chapter II point 2.3 (B).

[426] *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, 1973. https://cites.org/sites/default/files/eng/disc/CITES-Convention-EN.pdf.; *BASEL Convention On The Control Of Transboundary Movements Of Hazardous Wastes And Their Disposal*, 1989. https://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf.

Recognizing this gap, many lawyers and organizations advocate for change and seek to establish environmental destruction as an international crime.[427]

One specific proposal gaining momentum is the recognition of "Ecocide" as a fifth crime against peace. The term "fifth crime against peace" refers to expanding the existing crimes against peace, which fall under the jurisdiction of the International Criminal Court. This expansion would involve adding Ecocide, or the large-scale destruction of the environment, to the list of international crimes. The hope is that by doing so, Ecocide would be considered a crime of international concern, subject to prosecution at the international level. However, the journey to criminalize Ecocide faces inevitable advantages and disadvantages, and this pursuit presents both opportunities and challenges that must be carefully considered.

A. The Challenges

a. The Proposal of Ecocide and its Unrealistically High Threshold of Proportionality Test

Environmental crime is recognized only once in the Rome Statute, specifically under article 8(2)(b)(iv) for war crimes, which requires the action to occur in the context of an armed conflict.[428] This crime violates international humanitarian law, along with its relevant conventions.[429] The threshold used in 8(2)(b)(iv) indeed reflects the standards of IHL Conventions, namely Art. 35(3) and Art. 55 of

[427] (Greene, 2019), p. 7.
[428] Article 8(2)(b)(iv), Rome Statute.
[429] *Id*.

Additional Protocol I (AP I),[430] which require the attack to cause "widespread, long-term, and severe damage to the natural environment." Mr. Heller argues that the cumulative requirements of "widespread, long-term, and severe damage to the natural environment" do hold a certain degree of rationale, as engaging in armed conflict inevitably leads to some level of environmental damage.[431]

The reason behind incorporating Ecocide into the Rome Statute is to address environmental offenses even in times of peace, expanding its application beyond the limitations of armed conflict or international law. [432] However, it is noteworthy that the phrasing employed in the Independent Expert Panel's proposal for Ecocide seems to draw direct inspiration from Art. 35(3) and Art. 55 of Additional Protocol I (AP I), [433] which are integral components of the International Humanitarian Law (IHL) conventions. Specifically, the proposed definition of Ecocide reads as follows: "severe and either widespread or long-term damage to the environment.

The Proposal explains the definition of the term as follows:

> 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;

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[430] ICRC. (1977, June 8). *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*. https://ihl-databases.icrc.org/assets/treaties/470-AP-I-EN.pdf

[431] Heller. (2021, June 23). *Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn"t)*. Opinio Juris. Retrieved May 29, 2023, from https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/

[432] Palarczyk, D. (2023, February 20). Ecocide Before the International Criminal Court: Simplicity is Better Than an Elaborate Embellishment. *Criminal Law Forum*, *34*(2). https://doi.org/10.1007/s10609-023-09453-z. (***Palarczyk, 2023***), p. 149–150.

[433] (Stop Ecocide Foundation, 2021)

d. “Long-term” means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;[434]

Furthermore, the definition of Ecocide includes a “proportionality test,” requiring the inflicted damage to be considered “clearly excessive in relation to the social and economic benefits anticipated.” This test bears a strong resemblance to a similar criterion found in Art. 8(2)(a)(iv) of the ICC Statute, which pertains to war crimes, where damage must be “clearly excessive in relation to the concrete and direct overall military advantage.”[435] Despite this similarity, certain scholars have already highlighted the impracticality of such a comparison and its potentially detrimental impact on environmental protection.[436]

Within the context of the 1949 Geneva Conventions, a critical aspect to consider is the drawbacks associated with Additional Protocol I. This protocol sets forth the criteria for identifying impermissible environmental damage, necessitating that such damage must meet the stringent conditions of being “widespread, long-term, and severe.”[437] However, this definition has been scrutinized due to its overly restrictive nature, inhibiting a comprehensive assessment of environmental impacts during armed conflicts. Furthermore, the phrasing of the threshold remains ambiguous, giving rise to interpretational challenges and potential disputes in its application.

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[434] *Id*.

[435] Article 8(2)(a)(iv), Rome Statute.

[436] Heller. (2021, June 28). *The Crime of Ecocide in Action*. Opinio Juris. Retrieved May 29, 2023, from http://opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action/

[437] Bothe, Bruch, Diamond, & Jensen. (2010, September). International law protecting the environment during armed conflict: gaps and opportunities. *International Review of the Red Cross*, *92*(879). (***Bothe et al., 2010***)., p. 2.

Another area of concern, as this proposal seemingly borrow the "collateral damage" concept of Article 8(2)(a)(iv), lies in the concept of "collateral damage" and its proportional relationship to harm inflicted on the environment.[438] Determining the appropriate extent of harm deemed acceptable as a consequence of military operations poses a daunting challenge. In the application of this concern to the standard of Ecocide, ascertaining the degree to which environmental degradation can be classified as an unavoidable side effect of "social and economic benefits anticipated" is complex, often leading to contentious debates and differing perspectives on the overall ecological impact.[439]

b. Accountability Gap: The Question of Corporate Criminal Liability and Strict Liability for Prosecuting a Company

The International Criminal Court (ICC) holds the jurisdiction to initiate legal action against individuals, including corporate officers.[440] This authority is exemplified in the case of Joshua Arap Sang, a former radio personality and corporate leader from Kenya.[441] He faced ICC prosecution as an indirect collaborator in crimes against humanity.[442] Nevertheless, attributing entire companies accountable for their actions remains a significant challenge.

In the realm of international criminal law, establishing corporate liability has struggled to keep pace with the rapid expansion of multinational corporations,

[438] *See* page 87.
[439] (Bothe et al., 2010)., p. 2.
[440] Article 25 and 28, Rome Statute.
[441] (The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, 2012)
[442] *Id*.

leading to several inadequacies in regulating their conduct.[443] The complexity arises from the complex network of subsidiary companies, often distancing parent companies from daily operations.[444] Determining liability is further complicated by the substantial revenues generated by large corporations, affording them influence over regulatory processes.[445] As it stands, the Rome Statute confines criminal accountability to "natural persons," lacking a framework for holding "legal persons" like corporations accountable under international criminal law. Consequently, a considerable "accountability gap" emerges for corporations.

Industries involving resource extraction, chemicals, arms, or surveillance are more prone to indirect involvement in human rights violations compared to other sectors.[446] These violations often qualify as international crimes, facilitated and exacerbated by corporations providing resources, services, or illicit funds.[447] The ICC operates based on two forms of responsibility: individual criminal responsibility (Article 25) and superior responsibility (Article 28).[448] Although many contributors during the drafting of the Rome Statute recognized the potential of including "legal persons" (corporations or organizations) under Article 25(1), the ICC's jurisdiction explicitly excludes them due to disagreements, a consensus on

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[443] Bordeleau-Cass. (in press). The 'Accountability Gap': Holding Corporations Liable for International Crimes. *Global Justice Journal Queen's Law*. https://globaljustice.queenslaw.ca/news/the-accountability-gap-holding-corporations-liable-for-international-crimes. (***Bordeleau-Cass, in press***)

[444] *Id*.

[445] Weikinnis. (2018, August 13). Analysis: Towards Greater Accountability for Corporate Involvement in International Crimes. *Global Justice Journal Queen's Law*. In press. https://globaljustice.queenslaw.ca/news/analysis-towards-greater-accountability-for-corporate-involvement-in-international-crimes.

[446] *Id*.

[447] *Id*.

[448] Rome Statute.

the scope of Article 25(1) was not reached, leaving the ICC only capable of assigning criminal liability to "natural persons."[449]

Environmental destruction often involves a complex web of individuals spread across different locations and nationalities, including government officials, criminals, and corporate entities.[450] This intricate scenario makes attributing environmental harm across multiple sovereign territories to a single individual exceedingly challenging.[451] Consequently, multinational corporations frequently evade direct consequences and responsibility for the environmental harm they contribute to. This lack of direct accountability hampers efforts to address environmental crimes and raises questions about the role of corporations in environmental degradation.

Notably, unlike other major crimes falling under the jurisdiction of the ICC, the proposed Ecocide legislation does not necessitate criminal intent. This establishes it as a crime of strict liability.[452] Higgins clarifies that Ecocide stands as a consequence-based offense rather than one requiring specific intention.[453] Often, Ecocides stem from industrial accidents without explicit intent, and the severity of the harm justifies prosecution even in the absence of criminal intent. Historically, courts have found attributing criminal intent to corporations impractical, making it

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[449] United Nations. (1998, June). *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*. (A/CONF.183/13 (Vol. II)).

[450] Aparac, J. (2021, September 7). *A Missed Opportunity for Accountability?* A Missed Opportunity for Accountability? - Völkerrechtsblog. https://doi.org/10.17176/20210709-135824-0

[451] *Id*.

[452] (Higgins, 2010), p. 68.

[453] *Id*.

challenging to convict them for offenses requiring a mental element.[454] The concept of strict liability ensures corporations can be held accountable. Additionally, strict liability places the onus on individuals to prevent harm, shifting the focus from assigning blame alone.[455]

Proponents argue that Ecocide should indeed be categorized as a crime of strict liability, although this approach presents procedural challenges. Gray suggests that a strict liability standard would best incentivize preventive measures, align with the "polluter pays" and "precautionary" principles, and compel companies to address hazardous practices proactively.[456] However, strict liability is generally discouraged in criminal law. Advocates emphasize that none of the existing Ecocide laws include an intent requirement.[457] Introducing intent as a prerequisite would create a legal loophole, enabling perpetrators to claim a lack of intent for extensive damage. Many instances of corporate Ecocide are not intentional but occur accidentally or as collateral damage in pursuit of other objectives.[458] According to White, for crimes like Ecocide, the magnitude of harm overrides the question of intent, allowing for higher penalties even within a strict liability framework.[459]

Nevertheless, under a strict liability standard, a certain threshold must be established for pollution to warrant criminalization and for determining who within

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[454] *Id*.
[455] *Id*.
[456] Gray. (2017, October 24). International Crimes. In N. Passas (Ed.), *The International Crime of Ecocide* (1st ed.). Routledge. https://doi.org/10.1604/9780754622406. (***Gray, 2017***), p. 218.
[457] (Higgins et al., 2013)
[458] *Id*.
[459] White. (2017). Carbon Criminals, Ecocide and Climate Justice. In *Criminology and the Anthropocene* (1st ed.). Routledge., p. 68.

the company should be held accountable.[460] Defining these specifics is crucial for effective prosecutions, but achieving such precision without clear guidelines is challenging. This strict liability standard contradicts the existing intent requirements outlined in the Rome Statute.[461]

Article 30 (Mental Element) mandates criminal responsibility only if the material elements are committed with intent and knowledge.[462] This requirement breaks intent down into conduct and consequence.[463] However, many Ecocide instances, such as industrial accidents like Chernobyl and the BP Deepwater Horizon oil spill, lack deliberate intent for catastrophic outcomes.[464] Therefore, even with the potential inclusion of the Ecocide crime under the ICC, it might still be constrained by the intent requirements established by the Rome Statute. This, as Higgins points out, could hinder the prosecution of numerous ecological disasters that the Ecocide crime aims to address.

c. *Dolus eventualis*: Its Lack of Recognition in the Practice of the ICC

In the realm of criminal law, a profound comprehension requires the fulfillment of *actus reus* (material elements) and *mens rea* (mental elements) to classify an action as a crime. Article 30 of the Rome Statute emphasizes the significance of "intent and knowledge" in the *actus reus* of an offense.[465] The *mens rea* aspect encompasses two essential components: intent, which relates to the volitional

[460] *Id*.
[461] *Id*., p. 69.
[462] Article 30, Rome Statute.
[463] *Id*.
[464] (Greene. 2019), pp. 33-34.
[465] Article 30, Rome Statute.

dimension, and knowledge, which pertains to the cognitive aspect.[466] Notably, the judges presiding over the ICC have adopted nomenclature from continental legal doctrine, referring to these volitional and cognitive elements as *"dolus*."[467] Consequently, three pertinent forms of *dolus* arise: *Dolus directus* in the first degree or direct intent, *Dolus directus* in the second degree or oblique intention, and *dolus eventualis* or subjective recklessness.[468]

Dolus directus in the first degree, or direct intent, pertains to the offender's knowledge that their actions or omissions will bring about the material elements of the crime. They purposefully and intentionally carry out these acts or omissions with the specific desire to achieve the forbidden outcome. In simpler terms, "the suspect purposefully wills or desires to attain the prohibited result".[469]

In *Dolus directus* of the second degree, the offender need not possess the actual intent or will to bring about the material elements of the crime, but they must be aware that these elements will almost inevitably result from their acts or omissions.[470] Simply put, the offender must be "aware that [… the consequence] will occur in the ordinary course of events."[471]

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[466] Schabas. (2016, September 22). Part 3 General Principles of Criminal Law: Principes Généraux Du Droit Pénal, Art.30 Mental element/Elément psychologique. In *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed.). Oxford University Press. http://opil.ouplaw.com. (***Schabas, 2016***), p. 629.

[467] *Id*.

[468] *Id*.

[469] International Criminal Court. (2009, June 15). *The Prosecutor v Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo* (ICC-01/05-01/08). (***Bemba Case, 2009***), para. 358.

[470] *Id*., para. 359.

[471] International Criminal Court. (2007, January 29). *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Confirmation of the Charges* (ICC-01/04-01/06)., para. 351.

Regarding the third form, *dolus eventualis*, which shares similarities with the common law concept of recklessness, the Chamber in Bemba Case has asserted that "such concepts are not encompassed by article 30 of the Statute."[472] The precise language of the phrase supports the Chamber's conclusion "will occur in the ordinary course of events," which allows no room for a lower standard than *Dolus directus* in the second degree.[473] This stance finds additional reinforcement from the *travaux préparatoires* of the Statute.

According to Roger S. Clark, the Statute's drafters harbored general unease with establishing liability based on recklessness or its civil law (near) equivalent, *dolus eventualis*.[474] At the Rome Conference, both *dolus eventualis* and its common law counterpart, recklessness, faced unanimous exclusion. Any attempt to introduce them into the Statute would defy the clear language and historical context.[475] After thoroughly analyzing the *travaux*, the Chamber in Bemba Case conclusively determined that "the idea of including *dolus eventualis* was abandoned at an early stage of the negotiations."[476]

In the Proposal of Ecocide drafted by the Independent Expert Panel, the *mens rea* standard employed is *dolus eventualis*.[477] This standard is evident in two key aspects of the proposed Ecocide crime: firstly, when the perpetrator acts with

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[472] (Bemba Case, 2009), para. 360.
[473] *Id.*
[474] Clark, R. S. (2008, September 11). Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court"s First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings. *Criminal Law Forum*, *19*(3–4), 519–552. https://doi.org/10.1007/s10609-008-9074-9., p. 525.
[475] *Id.*, p. 529.
[476] (Bemba Case, 2009), p. 366.
[477] (Stop Ecocide Foundation, 2021)

knowledge of a substantial likelihood of causing environmental damage, and secondly, when the perpetrator acts wantonly, displaying reckless disregard for the resulting harm.[478] Therefore, the perpetrator does not need a specific intent to harm the environment; it is sufficient that they acted with awareness of a "substantial likelihood" of Ecocide.[479] This *mens rea*, centered around the notion of "acting with substantial likelihood" of harm, closely aligns with the principles of *dolus eventualis* or recklessness.[480]

The term "wanton acts committed with knowledge" raises further concerns. As explained in paragraph 2, wanton" implies a "reckless disregard for damage that would be clearly excessive in relation to the social and economic benefits anticipated."[481] This introduces an additional mental state requirement—recklessness—into the definition of Ecocide, particularly concerning the magnitude of the inflicted damage.[482] Consequently, it is insufficient for a perpetrator to simply "know" that their actions will lead to "severe and either widespread or long-term damage to the environment."[483] They must also be aware that the ensuing damage will be "clearly excessive in relation to the social and economic benefits anticipated."[484]

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[478] *Id*.

[479] Greene, A. (2021, July 7). *Mens Rea and the Proposed Legal Definition of Ecocide*. Mens Rea and the Proposed Legal Definition of Ecocide - Völkerrechtsblog. https://doi.org/10.17176/20210707-135726-0

[480] (Schabas, 2016), p. 632.

[481] (Stop Ecocide Foundation, 2021)

[482] Heller. (2021, June 23). *Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)*. Opinio Juris. Retrieved May 29, 2023, from https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/. (***Heller, 2021***)

[483] *Id*.

[484] (Stop Ecocide Foundation, 2021)

Establishing that the perpetrator was aware of a substantial likelihood of causing the required environmental damage already poses significant challenges. However, proving that they were also aware that the anticipated environmental harm would be clearly excessive compared to the expected social and economic benefits becomes a nearly insurmountable task.[485] This requirement seemingly demands that the perpetrator make a value judgment—deciding that the act would not yield sufficient benefits—similar to the approach in Art. 8(2)(b)(iv). In that case, the perpetrator must subjectively acknowledge that an attack will lead to excessive collateral damage, rather than evaluating the relationship between military advantage and civilian harm from the perspective of a reasonable military commander.[486]

B. The Opportunities

a. Addressing the Void in International Law: Proposing the Criminalization of Ecocide to Combat Environmental Destruction

The current framework of international law concerning environmental degradation exhibits significant deficiencies, as evidenced by the lack of criminal convictions following major environmental catastrophes.[487] The prevailing legal structure comprises fragmented environmental treaties and soft law instruments that often narrowly focus on specific issues, such as whaling.[488] As a result, the scope

[485] (Heller, 2021)
[486] Art. 8(2)(b)(iv), Rome Statute.
[487] Megret, F. (2010). The Case for a General International Crime Against the Environment. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.1583968. (***Megret, 2010***)
[488] (Greene, 2019), p. 29.

of action is both limited and fragmented, placing the responsibility on individual nations to establish domestic laws and mechanisms for ensuring compliance.

While a few environmental treaties do require countries to enact domestic criminal legislation, these efforts remain sporadic and constrained in their scope.[489] This observation closely aligns with the principles of green criminology, which argue that civil and administrative measures lack the necessary deterrence and stigmatization to effectively combat environmental offenses due to a lack of political determination to address these issues directly.[490]

Consequently, companies frequently disregard environmental regulations, viewing civil fines merely as an acceptable "cost of doing business."[491] An urgent need arises for a clearly defined international offense against environmental damage – one that consolidates and categorizes offenses recognized as the gravest environmental threats. Given that a significant portion of environmental crimes are committed by individual non-state actors, such as corporate CEOs, international criminal law presents itself as the most appropriate legal framework for addressing these transgressions.[492] Hence, there is a growing chorus of calls for a well-defined "international offense against the environment" that consolidates and addresses the most serious offenses acknowledged by the international community. As of now, no such international crime related to the environment exists.

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[489] (Megret, 2010), p. 11.
[490] White, R., & Heckenberg, D. (2014, January 23). *Green Criminology: An Introduction to the Study of Environmental Harm* (1st ed.).
[491] (Greene, 2019), p. 31.
[492] (Megret, 2010), p. 9.

Within the realm of international criminal law, one court stands out—the ICC. However, addressing environmental damage remains insufficient even within the ICC's jurisdiction. The current Rome Statute's Article 8(b)(iv) tangentially references the environment in the context of war crimes, yet no defendant has faced charges under this subsection for environmental harm.[493] Consequently, the international legal landscape lacks criminal accountability for environmental destruction, underscoring the need for new legislation. Surprisingly, limited interaction exists between "international environmental law" and "international criminal law" despite the growing nature of both disciplines. These fields embrace distinct approaches: international environmental law leans towards soft law instruments and adaptability.[494] In contrast, international criminal law adheres to established legal principles, utilizing enforcement and imprisonment to penalize non-compliance.[495]

The divergence between these approaches presents challenges in reconciling the flexibility of environmental law with the precision required by international criminal law.[496] Nonetheless, activists argue that enforcing international environmental treaties should incorporate criminal mechanisms to deter violations and ensure compliance.[497] Without such mechanisms, companies could continue

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[493] Article 8(2)(b)(iv), Rome Statute; International Criminal Court. (2010, February 3). *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09). https://www.icc-cpi.int/darfur/albashir.

[494] Mégret. (2011). The Problem of an International Criminal Law of the Environment. *Columbia Journal of Environmental Law, 36*(195)., p. 201.

[495] *Id*.

[496] (Megret, 2010), p. 5.

[497] Mastny, & French. (2002, September). Crimes of (a) global nature. *Research Gate*. https://www.researchgate.net/publication/297115519_Crimes_of_a_global_nature

disregarding provisions and treating civil liabilities as a cost of doing business.[498] Criminal sanctions could potentially hold greater deterrence value for environmental crimes compared to other areas of international criminal law, given that environmental harm often results from calculated cost-benefit analyses.[499] The international criminalization of environmental devastation holds the potential to discourage such actions, contributing to a healthier global environment.

b. Revamping Corporate Responsibilities: The Potential of Ecocide's Addition to the Rome Statute in Redefining Corporate Criminal Liability

The integration of Ecocide into the Rome Statute holds the potential to reshape the corporate legal landscape significantly.[500] This would be achieved by instilling a newfound environmental duty, marking a profound departure from the current singular emphasis on profit maximization.[501] Currently, corporate entities, often regarded as "fictional persons," is capable of litigating and influencing yet immune to criminal proceedings for the harm they cause, creates an encouragement to prioritize financial gain without regard for environmental consequences.[502]

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[498] Qudah. (2014, May). Towards International Criminalization of Transboundary Environmental Crimes. *SJD Dissertation*. http://digitalcommons.pace.edu/lawdissertations/16/

[499] (Greene, 2019), p. 31.

[500] *Id*., p. 27.

[501] *Id*.

[502] Higgins. (2010, December 1). *Eradicating Ecocide: Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws Needed to Eradicate Ecocide*. Shepheard Walwyn. (***Higgins, 2010***), p. 26.

The proposed incorporation of Ecocide as an international crime would compel corporations to consider the ecological consequences of their actions.[503] This reassessment of approach would leverage deterrence as a tool to prompt companies to exercise caution when deliberating activities that could inflict harm upon the environment. The underlying objective is to prevent reckless, profit-driven conduct that has historically been the catalyst for significant ecological disasters.[504]

The doctrine of strict liability, integral to Ecocide law, emphasizes that corporations cannot utilize lack of intent or knowledge as a valid defense.[505] Unlike criminal intent, Ecocide shifts the focus from intent to the actual effect of the action, encouraging companies to adopt preventive measures to avoid ecological harm,[506] prioritizing the prevention of ecological damage before it occurs.[507] This separates it from post-event efforts to impose fines and restitution after the destruction.[508]

The inclusion of liability for corporations regarding corporate criminal acts or strict liability remains a highly disputed topic, given that the ICC primarily focuses on prosecuting individuals.[509] Nevertheless, the possibility of prosecuting corporations persists.

Two distinct viewpoints to hold corporations criminally accountable. The first perspective advocates for a novel corporate criminal liability model, emphasizing corporations' autonomy and the limitations of attributing criminal responsibility

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[503] *Id.*
[504] *Id*.
[505] (Greene, 2019), p. 27.
[506] *Id*.
[507] (Greene, 2019), p. 27.
[508] *Id*.
[509] Article 25 and 28, Rome Statute; *See* Chapter III point 3.2(A)(b).

solely to individuals for corporate offenses.[510] This viewpoint introduces the concept of "juridical entity participation," which pertains to the potential imposition of criminal liability on corporations and organizations.[511] This approach to criminal liability is often deemed more effective than targeting individuals acting on behalf of corporations. Challenges in implementing this approach, however, stem from resistance by corporations and vested interests against such legal advancements.

Conversely, the second perspective leans toward expanding and refining the existing framework of 'individual criminal liability' at the ICC to bolster corporate accountability rather than creating an entirely new model.[512] Since its beginning, international criminal law has centered on individual actions.[513] Traditionally, corporate criminal behavior has been prosecuted by indicting corporate officers who committed crimes in their personal capacity during business activities.[514] Nevertheless, the complexities of corporate structures, particularly multinational companies with numerous subsidiaries, complicate holding individual corporate actors accountable for serious international offenses.

[510] (Bordeleau-Cass, in press)

[511] Einarsen, & Rikhof. (2018, December 7). *A Theory of Punishable Participation in Universal Crimes*. Torkel Opsahl Academic EPublisher (TOAEP). (***Einarsen & Rikhof, 2018***), p. 110.

[512] Stahn. (2018). Liberals vs Romantics: Challenges of an Emerging Corporate International Criminal Law. *Case Western Reserve Journal of International Law*, *50*(1). (***Stahn, 2018***), p. 102.

[513] Article 25 and 28, Rome Statute; *See* Chapter III point 3.2(A)(b).

[514] Stewart, G. (2011). *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*. Open Society Institute. (***Stewart, 2011***), p. 75.

Furthermore, several countries have integrated various forms of corporate liability into their domestic legal systems after the drafting of the Rome Statute. Over 40 nations have enacted legislation to regulate corporate accountability.[515] Corporate criminal liability is more well-developed at the domestic level compared to the international level.[516]

Nevertheless, different legal systems have approached corporate liability differently. While common law system mostly accepts corporate criminal liability, civil law system has adopted diverse approaches. For instance, Italy, Ukraine, and Germany skeptical about criminal liability and lean toward addressing corporate wrongdoing through administrative law.[517] In their criminal codes, many jurisdictions have also codified corporate liability.[518] For example, France's states that: "the criminal responsibility of the corporate entity does not exclude that of natural persons who are perpetrators or accomplices to the same act."[519]

Some countries have interpretation acts that enable charging corporations with war crimes as defined in domestic laws. For instance, section 35 of Canada's Interpretation Act specifies that "in every enactment… 'person'' or any word or expression descriptive of a person, includes a corporation."[520] Some cases preferred civil proceedings and tort claims strategy, such as the Nevsun Resources Ltd. case

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[515] (Einarsen & Rikhof , 2018), p. 600.
[516] (Stahn, 2018), p. 96.
[517] *Id*., p. 95.
[518] (Stewart, 2011), p. 75.
[519] *French Penal Code, Code pénal, Title II: Criminal liability (Articles 121-1 to 122-9), Chapter I: General provisions (Articles 121-1 to 121-7).* (2005, December 31). https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI00000641720., Art 121-2.
[520] *Canada Interpretation Act*. (1985). https://laws-lois.justice.gc.ca/eng/acts/i-21/

heard by the Supreme Court of Canada in January 2019, which highlighted corporate liability for international human rights violations in Canada.[521] Regardless of the approach taken, changes in domestic legal frameworks reflect a broader international trend toward increased accountability for international crimes committed by corporate entities.

A notable example of corporate crimes is evident in the Appeals Chamber's decision in the 2014 case of Prosecutor v. Al Khayat (the Al-Jadeed case) before the STL.[522] This ruling represents the first instance where a hybrid criminal tribunal held a corporation criminally responsible for contempt of court.[523] This case holds promise in setting a jurisprudence that broadens the interpretation of 'person' in the context of corporate liability. In the Al-Jadeed case, both a corporation and an individual faced charges of contempt and obstruction of justice before the STL. In a symbolic decision, the Appeals Chamber overturned the Contempt Judge's ruling that the STL lacked jurisdiction over legal entities, concluding that corporations can indeed be held liable for contempt charges under the STL.

Before arriving at this decision, the Appeals Chamber conducted a comprehensive review of relevant laws, including recognition of the "emerging shared international understanding on the need to address corporate responsibility."[524] This understanding encompassed a thorough examination of

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[521] Supreme Court of Canada. (2019, January). *Nevsun Resources Ltd. v. Gize Yebeyo Araya, et al.* (No. 37919). https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=37919

[522] Special Tribunal for Lebanon (STL). (2015, September 18). *The Case Against Al Jadeed [CO.] S.A.L./ New T.V. S.A.L. (N.T.V.) Karma Mohamed Tahsin Al Khayat* (STL-14-05/T/CJ). https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05. (***Al-Jadeed Case, 2015***)

[523] (Stahn, 2018), p. 98.

[524] (Al-Jadeed Case, 2015), para. 46.

global trends in corporate liability and Lebanon's domestic laws.[525] The Appeals Chamber's decision in the Al-Jadeed case holds significance, mainly due to its implications extending beyond the STL's specific mandate, establishing a vital jurisprudence for international criminal law. Additionally, it provides an informative overview of the current status of both domestic and international laws concerning the criminal liability of corporations.

The Al Jadeed case represents an increasingly recognized global imperative for mechanisms addressing corporate accountability. This trend is mirrored by the emergence of soft law frameworks that emphasize corporate responsibility for human rights violations and international offenses. The international structure for human rights accountability has notably expanded, and the acceptance of corporate criminal liability has grown through various multinational treaties.[526]

By 2018, 17 multinational mechanisms had incorporated provisions dealing with corporate criminal liability.[527] These mechanisms encompass examples like the United Nations Convention against Transnational Organized Crime (Article 10),[528] the United Nations Convention against Corruption (Article 26),[529] and the International Convention for the Suppression of the Financing of Terrorism (Article

[525] *Id*., paras. 68-71
[526] (Stahn, 2018), p. 93.
[527] *Id*., p. 95.
[528] United Nations Office On Drugs and Crime. (2000, November 15). *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*. https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html
[529] United Nations Office On Drugs and Crime. (2004). *United Nations Convention Against Corruption*. https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

5).[530] Corporate criminal liability also finds recognition in international human rights law, particularly within the United Nations Human Rights Council's Guiding Principles on Business and Human Rights.[531] Nevertheless, while encouraging ethical practices and human rights adherence, these instruments remain non-binding, leaving states accountable for addressing corporate misconduct. Shareholders and consumers exert pressure, compelling companies to align with human rights standards.

The Malabo Protocol, adopted by the African Union to operationalize the African Court of Justice and Human Rights, introduces a groundbreaking expansion of criminal liability to corporations. This would mark the inaugural inclusion of corporate criminal liability in an international criminal court upon ratification.[532] The protocol designates the African Court of Justice and Human Rights as the primary judicial body of the African Union, entrusted with prosecuting crimes like genocide, crimes against humanity, piracy, terrorism, corruption, and more.[533] Article 46C of the protocol introduces a distinct expansion of criminal liability to corporations, asserting jurisdiction over legal entities, excluding states. Corporate

[530] United Nations. (1999). *International Convention for The Suppression of the Financing of Terrorism*. https://treaties.un.org/doc/db/Terrorism/english-18-11.pdf

[531] UN Human Rights. (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (HR/PUB/11/04).

[532] Open Society Justice Initiative. (2018). *OPTIONS FOR JUSTICE: A Handbook for Designing Accountability Mechanisms for Grave Crimes*. Open Society Foundations. https://www.justiceinitiative.org/uploads/89c53e2e-1454-45ef-b4dc-3ed668cdc188/options-for-justice-20180918.pdf. (***Open Society Justice Initiative, 2018***), p. 137.

[533] *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights "Malabo Protocol."* (2014, June 27). https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights. (***Malabo Protocol, 2014***)

intent to commit an offense can be established through policies enabling unlawful acts or possessing "actual or constructive knowledge" of pertinent information.[534]

Although the Malabo Protocol's jurisdiction is confined to crimes within state parties' territories, its significance is noteworthy, especially regarding Africa's conflicts involving international corporations and natural resources.[535] However, critics doubt its extensive jurisdiction and the court's capacity. The practical implementation and potential influence on the ICC's culture of corporate accountability will be pivotal.

The endorsement of the Ecocide amendment within the Rome Statute is likely to catalyze corresponding national legislation in signatory states, intensifying pressure for the swift global implementation of this crime.[536] Embracing an Ecocide law aims to protect indigenous communities vulnerable to the ravages of environmental destruction while prioritizing the well-being of ecosystems over business interests. Advocates of Ecocide legislation underscore the urgency for decisive actions, highlighting the inadequacy of current environmental regulations in averting an impending ecological crisis. Humanity is at a crucial crossroads, necessitating unwavering measures to prevent an impending catastrophe.[537]

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[534] *Id*.
[535] (Open Society Justice Initiative, 2018), p. 137.
[536] (Higgins, 2010), p. 70.
[537] Mehta, & Merz. (2015). Ecocide – a new crime against peace? *Sage Journals, Environmental Law Review*, *17*(1). https://doi.org/10.1177/1461452914564730

c. The inextricable link between environment and human rights and value

The interconnection between the global climate crisis and human rights holds immense significance. The United Nations has recognized the environment as a 'common concern of mankind,' underscoring the interdependence of environmental issues and human values.[538] Despite the anthropocentric nature of the ICC, it should not hinder the inclusion of Ecocide as a fifth crime under its jurisdiction.[539] The importance of safeguarding the environment takes center stage in both the ICC's Draft Code and the Draft Articles on State Responsibility.[540] These documents emphasize that violations of international environmental obligations are profoundly grave and can be categorized as international crimes.[541] This perspective also finds resonance in other international legal frameworks, including the UN Convention against Transnational Organized Crime and Interpol.[542]

Moreover, the argument favoring the criminalization and global integration of environmental harm is compelling and warrants joint examination. This approach signifies a worldwide elevation of the values an international environmental offense seeks to protect.[543] Various sources provide legal substantiation supporting the role

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[538] UN General Assembly. (1988, December 6). *Protection of a global climate for present and future generations of mankind: resolution* (A/RES/43/53). https://www.refworld.org/docid/3b00eff430.html

[539] Heller. (2021, June 26). *Ecocide and Anthropocentric Cost-Benefit Analysis*. Opinio Juris. http://opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/

[540] ILC, UN. (2001). *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*., Article 19(3).

[541] *Id*.; "international crimes" of the state covers"a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."

[542] (Megret, 2010), p. 3.

[543] Frank, D. J., Hironaka, A., & Schofer, E. (2000, February). The Nation-State and the Natural Environment over the Twentieth Century. *American Sociological Review*, *65*(1), 96. https://doi.org/10.2307/2657291., pp. 96-161.

of international criminal law in addressing significant environmental detriments.[544] A multitude of states now criminalize domestic environmental harm, reflecting a global institutional acceptance of environmental regulation.[545] This convergence of criminal and global environmental regulatory models fortifies the credibility of international criminalization. Additionally, the correlation between the global environment and both domestic and international public order is growing stronger.[546] Several factors underscore this correlation:

a. The acknowledgment by entities like the UN Security Council that environmental assaults impact international peace and security.[547]
b. The interrelation between environmental protection and fundamental human rights.[548]
c. The recognition that a healthy environment is pivotal for development and poverty alleviation.[549]

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[544] McCaffrey. (1986). Crimes against the Environment. In Bassiouni (Ed.), *International Criminal Law*. https://doi.org/10.1604/9780941320283., pp. 556-560.

[545] *Id*.

[546] Boutelet, & Fritz. (2005). *L'ordre public écologique = Towards an ecological public order / sous la direction de Marguerite Boutelet et Jean-Claude Fritz; ouvrage honoré d'une subvention du Conseil régional de Bourgogne; avec le concours du Ministère de la recherche . . . [and others]*. Bruxelles: Bruylant.

[547] Malone. (1996). "Green Helmets": A Conceptual Framework for Security Council Authority in Environmental Emergencies. *Michigan Journal of International Law*, *17*(2). https://repository.law.umich.edu/mjil/vol17/iss2/10.

[548] Aminzadeh. (2007). A Moral Imperative: The Human Rights Implications of Climate Change. *Hastings International Comparative Law Review*, *30*(2). https://repository.uclawsf.edu/hastings_international_comparative_law_review/vol30/iss2/4

[549] UN General Assembly. (1992, August 12). Rio Declaration: Report of The United Nations Conference On Environment and Development. In *United Nations* (A/CONF.151/26 (Vol. I)). https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf

The evolving *erga omnes* nature of environmental responsibilities further bolsters the notion of international criminalization; this principle signifies obligations owed to the global community at large.[550] Environmental responsibilities characterized by an *erga omnes* nature are embedded in various treaties, soft law instruments, and legal cases, emphasizing the collective duty to safeguard the environment. For example, the global climate crisis has been acknowledged as a "the common concern of mankind."[551] Recognizing the environment as a value whose violation constitutes an international criminal act is exemplified in legal documents like the Draft Articles on State Responsibility and the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind.[552] Incorporating provisions addressing severe environmental damage in these documents signifies an increasing acknowledgment of a shared interest in environmental preservation. In this context, the push for criminalization

[550] (Megret, 2010), p. 12.

[551] The term "common concern of humankind" refers to matters that inevitably transcend the boundaries of a single state and necessitate collective action in response. This concept is connected to, yet separate from, the principle of the common heritage of mankind. The common heritage of mankind typically pertains to geographic areas or resources, whereas the concept of the common concern of humankind was originally and primarily addressed in the context of international environmental law. *See* Cottier, T. (2021, May 13). The Principle of Common Concern of Humankind. *The Prospects of Common Concern of Humankind in International Law*, 3–92. https://doi.org/10.1017/9781108878739.003; Bowling, Pierson, & Ratté. (n.d.). The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas. *United Nations*. https://www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf; UN General Assembly. (1988, December 6). Protection of Global Climate for Present and Future Generations of Mankind. In *United Nations* (UN GA 43/53).

[552] ILC, UN. (2001). *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries.*, Article 19(3).; ILC, UN. (1996). *Draft Code of Crimes against the Peace and Security of Mankind.*, Article 20(g).

aligns with the perception of a progressively unified global interest, even if the precise formulations of such recognition have evolved over time.

CHAPTER IV

CLOSING

4.1. Conclusion

1. The absence of a universally agreed-upon definition for international crimes poses a challenge when determining whether certain actions qualify as such. Nevertheless, the Vienna Convention on the Law of Treaties (VCLT) permits the interpretation of treaties through Travaux Preparatoires and commentaries. Travaux Preparatoires and commentaries extend beyond documents produced during the treaty drafting process and also encompass documents generated after the statute's entry into force, which significantly contribute to the interpretation process. These documents include those authored by the drafters or experts relevant to the interpretation. The documents utilized in this thesis draw upon evolving theories rooted in the Travaux Preparatoires and commentaries created during the drafting process of the statute, specifically focusing on universal criminality, malum in se, and the ten penal characteristics theory. This interconnected framework of theories serves as a foundation to substantiate the inclusion of Ecocide as an international crime under the jurisdiction of the International Criminal Court (ICC). The theory of universal criminality posits that international crimes encompass actions universally recognized as criminal under international law. This assertion finds support in the Direct Criminalization Thesis (DCT) and the National Criminalization Thesis (NCT). The former characterizes international crimes as actions deemed universally criminal due to direct criminalization by international law,

regardless of whether states opt to criminalize these acts domestically. The latter emphasizes that certain acts are universally considered criminal under international law, thus qualifying as genuine international crimes. This thesis challenges the notion that international law bypasses domestic law by directly criminalizing specific acts. Furthermore, the malum in se theory argues that actions can be criminal due to their inherently evil nature, irrespective of legal proscriptions. This theory takes into account various factors such as intent, gravity, cross-jurisdictionality, and societal perception as criteria. The ICC's evolving consideration of environmental impact when assessing crime gravity further strengthens the case for classifying Ecocide as an international crime. This analysis, coupled with the recognition of Ecocide in the criminal laws of various states, underscores the argument that Ecocide can indeed be categorized as an international crime within the ICC's purview. This categorization is grounded in principles of universal criminality and the malum in se theory, while also acknowledging the growing recognition of environmental concerns within the international criminal justice framework.

2. Contemplating the integration of Ecocide into the Rome Statute of the ICC gives rise to a complex tapestry of challenges and opportunities. The proposal aims to expand the scope of accountability for environmental offenses beyond armed conflicts and international legal constraints. However, concerns arise due to the inclusion of a proportionality test, reminiscent of war crimes, which raises questions about practicality and potential drawbacks in terms of environmental protection. Furthermore, the issue of corporate criminal liability

comes to the fore, exposing an existing accountability gap for companies under international criminal law. While suggesting strict liability as the foundation for Ecocide acknowledges the challenges of attributing intent to corporate actions, it clashes with the intent requirements established in the Rome Statute. The reliance on "*dolus eventualis*" as the *mens rea* standard in the Ecocide definition introduces complexities in proving awareness of the likelihood of harm and excessiveness. Nevertheless, these challenges are accompanied by promising prospects. The proposal addresses a void in international law by criminalizing environmental destruction, providing a consolidated framework to combat the most severe environmental threats. By incorporating Ecocide, corporate priorities might undergo transformation, as a new environmental duty could reshape profit-centered decision-making, giving precedence to preventive measures against ecological harm. Additionally, recognizing the inherent connection between the environment and human rights supports the argument for international criminalization, echoing shared values and obligations. Ecocide proposal navigates intricate terrain, presenting both obstacles and avenues to enhance global environmental protection through international criminal law.

4.2. Suggestion

1. Recognizing a promising avenue for establishing Ecocide as an actionable offense within the jurisdiction of the ICC, it is regrettable to note that the preliminary draft of the Ecocide proposal contains notable gaps and inadequacies. Given this, it is advisable for the individual responsible for

drafting the proposal to seek the involvement of a more extensive cohort of experts and scholars. This expanded group should not only encompass legal specialists but also include environmentalists, corporate representatives, and other professionals with relevant expertise. By adopting this collaborative approach, the goal is to comprehensively revise the proposal, making it both all-encompassing and receptive to a diverse array of viewpoints.

2. Incorporating corporate criminal liability to address Ecocide is challenging yet feasible, as shown by nations penalizing corporations. Rome Statute's State Parties, especially criminalizing domestic Ecocide, must be the frontier in advocating this. Corporate criminal liability holds corporations accountable for their actions, aligning with global efforts against environmental degradation. Though complex due to corporate activities, it ensures fair consequences for ecologically damaging actions. The Rome Statute created ICC for grave international crimes, reflecting recognition of human-induced environmental harm. State Parties promoting corporate liability set precedents, strengthening the legal response to environmental devastation. This fosters comprehensive accountability for actions causing global ecological harm. Introducing corporate criminal liability complements discussions on ICC's jurisdiction over Ecocide, a significant stride towards holistic environmental protection.

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