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CRIMINALIZING ENVIRONMENTAL DEGRADATION AND DEVASTATION: NEW PROSPECTS FOR THE ICC ROME STATUTE?

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INTRODUCTION

Over the last decade, steadily increasing voices are ringing the tocsin to the international community for the impact of human activities on climate and their potential consequences on human life and dignity.[1] The Intergovernmental Panel on Climate Change (IPCC), in its recent (6th) Assessment Report, confirmed this assertion.[2] Greenhouse gas concentrations and emissions (particularly CO_2), as well as the retreat of arctic glaciers and the subsequent sea-level rise[3] causing—among other issues—the acidification of the oceanic waters,[4] are some of the most evident human-induced implications on climate and the environment.[5]

As a result, States—quite early and on various occasions—expressed their desire to establish new rules, frameworks, and patterns

1. On the human vulnerability in the context of climate change or natural disasters, see Stelios Perrakis, *La Protection Internationale au Profit Des Personnes Vulnérables en Droit International des Droits de L'Homme* [*International Protection for Vulnerable Persons in International Human Rights Law*], 420 RECUEIL DES COURS [COLLECTED COURSES] 363–73 (2021). Also see the extensive work of the Organization for Economic Co-operation and Development (OECD) at *Tackling the Climate Crisis Together*, ORG. FOR ECON. COOP. & DEV., https://www.oecd.org/climate-change (last visited Oct. 21, 2022).

2. HANS-O. PÖRTNER ET AL., IPCC, SUMMARY FOR POLICYMAKERS ¶¶ B.2.1, B.3–3.1 (2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf (explaining findings regarding climate change and its impact on people and the planet).

3. Anastasia Strati, *Klimatike Allagi: I Synepies tis Anodou tis Stathmis tis Thalassas epi ton Thalassion Orion* [*Climate change: The Consequences of the Sea Level Rise on the Delimitation of Maritime Boundaries*], 2 CAHIERS DE DROIT INTERNATIONALE & DE POLITIQUE INTERNATIONALE [JOURNAL OF INTERNATIONAL LAW & INTERNATIONAL POLITICS] 224, 224 (2021); *see* Géraldine Giraudeau, *Is the Pacific Shaping the Future of Maritime Limits and Boundaries?*, 25 AM. SOC'Y INT'L L. 1, 1–2 (2021) (discussing the effect of sea level rise on maritime zones and Pacific island states); *see also* PACIFIC ISLANDS FORUM, DECLARATION ON PRESERVING MARITIME ZONES IN THE FACE OF CLIMATE CHANGE-RELATED SEA-LEVEL RISE 2 (2021) (providing a declaration regarding maritime zones and the lack of a current framework covering the issue and establishing their view that those zones should continue to exist irrespective of sea-level rise).

4. *See* PÖRTNER ET AL., *supra* note 2, ¶ B1.1 (finding that "ocean acidification . . . ha[s] also been attributed to human induced climate change").

5. The IPCC is a UN body created and mandated to provide policymakers—on a regular basis—with scientific-based assessments on climate change, its consequences, and eventual risks, and to propose/promote various mitigation options. *See id.*, ¶¶ A.1.1, A.1.5–1.7.

to better regulate and curtail man-made activities that could damage or degrade the natural environment.[6] The most notable initiative is the adoption by the UN General Assembly (GA) of the *2030 Agenda for Sustainable Development*[7]—a call for universal action to reverse, or at least slow down, climate degradation.[8] Subsequently, the signing of the 2016 Paris Climate Accords, in which the signatory States recognized that "climate change represents an urgent and potentially irreversible threat to human societies and the planet and . . . requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response" and that any initiative or action taken should "respect, promote and consider their respective obligations on human rights . . . ."[9] The Paris Agreement, along with preceding instruments,[10] sets States' responsibility to reduce the global average temperature levels below 2°C or at least to commit to limit any increase up to 1.5°C compared to pre-industrial levels, as well as to intensify individual initiatives set out in respective National Action Plans to maintain a balance between emissions and removals.[11] This novelty was buttressed not only by States, but also by the EU as a collective intrastate political entity,[12] thus expanding the

6. G.A. Res. 70/1, at 2–5 (Oct. 21, 2015).

7. *Id.* at 1–2, 5, 8–9, 14–15, 22–23.

8. *Id.* at 4.

9. U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris*, 2, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

10. Grigoris Tsaltas, PERIVALLON: DIETHNIS PROSTASIA, POLITIKI, DIKAIO, THESMI [ENVIRONMENT: INTERNATIONAL PROTECTION, LAW, INSTITUTIONS], 650 (2017); Ilias Plakokefalos, *I Diethnis Prostasia Tou Perivallontos* [*The International Protection of the Environment*], *in* TO DIKAIO TIS DIETHNOUS KOINONIAS [THE LAW OF INTERNATIONAL SOCIETY] 699, 699–704 (Konstantinos Antonopoulos & Konstantinos Magkliveras eds., 3d ed. 2017); *see, e.g.*, MALCOLM N. SHAW, INTERNATIONAL LAW 640, 640 (8th ed. 2017) (reviewing previous UN resolutions and actions concerning climate change).

11. Council Decision (EU) 2016/1841 of 5 Oct. 2016, on the Conclusion, on Behalf of the European Union, of the Paris Agreement Adopted under the United Nations Framework Convention on Climate Change, 2016 O.J. (L 282) 1, ¶ 5.

12. The EU adhered to the Paris Agreement on 5 October 2016 pursuant to Decision 2016/1841, *id.* ¶ 13. See also the separate E.U. environmental and climate initiatives, such as the adoption of the European Green Deal by the European Commission, aiming at turning the community "into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gas[s]es in 2050 and where economic growth is decoupled

initial concept of State responsibility.[13]

This paper presents the gradual upgrade of environmental protection to a universal human right (as depicted in national and international jurisprudence), as well as its inclusion in the work and practice of various international organizations, institutions, mechanisms and organs, along with the recent international and regional efforts to criminalize potential environmentally hazardous acts. Yet, as this paper thoroughly examines, the framework of international criminal law may not be the most adequate to deal with such issues while, conversely, the eventual introduction of a fifth international crime could hamper the contribution of the international criminal justice system. The final Part proposes a set of alternative solutions to balance, or even counter, the lack of a separate international crime of "ecocide."

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from resource use." Communication From the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal, at 2, COM (2019) 640 final (Dec. 11, 2019).

13. Since the presentation of the EU Green Deal by the EU Commission, a set of initiatives have been promoted towards the harmonization of the EU legislation, which is quite fragmented. *See* Directive 2004/35/CE, of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, 2004 O.J. (L 143) 56, 56; Commission Regulation (EC) No. 1213/2008 of 5 December 2008, Concerning a Coordinated Multiannual Community Control Programme for 2009, 2010, and 2011 to Ensure Compliance with Maximum Levels of and to Assess the Consumer Exposure to Pesticide Residues in and on Food of Plant and Animal Origin, 2008O.J. (L 328) 9, 9–10. See also more specific ones, such as Council Directive 92/43/EEC, of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, 1992 O.J. (L 206) 7, 7–8; Directive 2009/147/EC, of the European Parliament and of the Council of 30 November 2009 on the Conservation of Wild Birds, 22/12/2000 O.J. (L 20) 7, 7–8; Directive 2000/60/EC, of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy, 21/12/2000 O.J. (L 327) 1, 1–3; Regulation (EC) No. 1367/2006, of the European Parliament and of the Council of 6 Sept. 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies, O.J. 2006 (L 264) 13, 13, 17–18; Consolidated Version of the Treaty on the Functioning of the European Union art. 191, May 9, 2008, 2008 O.J. (C 115) 1, 132–33 [hereinafter TFEU]; Eur. Parliament, Comm. on Legal Affs., Report on the Liability of Companies for Environmental Damage, at 29, 31–32, A-9-0112/2021 (Apr. 6, 2021).

I. FROM AN ECO-CENTRIC TO A HUMAN RIGHTS-BASED APPROACH

All of the aforementioned initiatives culminated in the upgrade of the protection of the environment to a fundamental human right, as enshrined in the provisions of several international instruments or the resolutions of various international organizations.[14] One highlight is the latest UN Human Rights Council Resolutions 48/13 on "The human right to a clean, healthy and sustainable environment"[15] and 48/14, the latter establishing a new mandate—the Special Rapporteur on the promotion and protection of human rights in the context of climate change—for an initial 3-year term.[16] The Council of Europe (CoE) has also recently integrated climate change in its thematic agenda.[17] In fact, on 29 September 2021, the Parliamentary Assembly of the Council of Europe (PACE) adopted a series of resolutions on various aspects of climate change, beginning with more generic acts,[18]

14. The core Human Rights Conventions contain very few relevant provisions. *See, e.g.*, G.A. Res. 44/25, Convention on the Rights of the Child, art. 24.2 (Sept. 2, 1989); Charter of Fundamental Rights of the European Union art. 37, Dec. 18, 2000, 2000 O.J. (C 364) 1. In some cases, their monitoring mechanisms seem to adapt to the contemporary challenges. *See, e.g.*, Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, U.N. Doc. CEDAW/C/GC/37, at 22 (2018); Hum. Rts. Comm., General Comment No. 36: Article 6: Rights to Life, ¶ 65, U.N. Doc. CCPR/C/GC/36 (2019); Hum. Rts. Comm., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016, U.N. Doc. CCPR/C/127/D/2728/2016, ¶¶ 4.2, 7.1 (Sept. 23, 2020).

15. *See* Human Rights Council Res. 48/13, U.N. Doc. A/HRC/RES/48/13, at 3 (Oct. 18, 2021); Human Rights Council Res. 48/14, U.N. Doc. A/HRC/RES/48/14, at 1–2 (Oct. 13, 2021); Human Rights Council Res. 47/24, U.N. Doc. A/HR/RES/47/24, at 5, ¶¶ 1–3 (July 26, 2021). See also the significant work of the Special Rapporteur on Human Rights and the Environment.

16. H.R.C. Res. 48/14, *supra* note 15, ¶ 2.

17. The CoE had already been a pioneer in the field of environmental protection. *See, e.g.*, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, E.T.S. No. 150 (1993); Convention on the Protection of the Environment through Criminal Law, E.T.S. No. 172 (1998). Although these two instruments offer a considerable legal basis for environmental protection at a regional (and probably more effective) level, unfortunately, none of them has— to date—entered into force. Of course, other CoE organs, institutions, and mechanisms have also addressed such issues as well.

18. *See, e.g.*, Eur. Parl. Ass. Res. 2397 (2021), *More Participatory Democracy*

such as the one on "Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe,"[19] and proceeding to more specific ones.[20]

The increasing importance that States attribute to environmental protection and the respect of any international commitment assumed[21] is highlighted by national and international jurisprudence.[22] In fact, in 2020-2021, various national instances have ruled on the need to implement international law and policies adopted in respect, mostly through a human rights lens.[23] This is the case of the *Urgenda Climate*

to Tackle Climate Change, ¶¶ 1–2, 12–15 (Sept. 29, 2021), https://pace.coe.int/en/files/29516/html (focusing on the importance of participatory democracy and citizen engagement to combat climate change); Eur. Parl. Ass. Res. 2399 (2021), *The Climate Crisis and the Rule of Law*, ¶¶ 1, 5–5.2 (Sept. 29, 2021), https://pace.coe.int/en/files/29518/html (reiterating the importance of respecting the rule of law in the response to climate change).

19. Eur. Parl. Ass. Res. 2396 (2021), *Anchoring the Right to a Healthy Environment: Need for Enhanced Action by the Council of Europe*, (Sept. 29, 2021), https://pace.coe.int/en/files/29499/html.

20. *See, e.g.*, Eur. Parl. Ass. Res. 2400 (2021), *Combating Inequalities in the Right to a Safe, Healthy and Clean Environment*, ¶¶ 1, 3–4, 6 (Sept. 29, 2021), https://pace.coe.int/en/files/29523/html (focusing on the importance of respecting human rights and procedural safeguards such as principles of non-discrimination in efforts to combat climate change); Eur. Parl. Ass. Res. 2401 (2021), *Climate and Migration*, ¶¶ 1, 4-6 (Sept. 29, 2021), https://pace.coe.int/en/files/29524/html (laying out the challenges of human migration resulting from climate change and sea-level rise and pointing to steps the Council and Member States should take).

21. It is to be noted that a considerable number of States have adopted environmental legislation at a national level, many of which have already introduced environmental protection and/or the right to a healthy environment to their Constitutions. *See* Malayna Raftopoulos & Joanna Morley, *Ecocide in the Amazon: The Contested Politics of Environmental Rights in Brazil*, 24 INT'L J. HUM. RTS. 1616, 1620 (2020); U.N. ENV'T PROGRAMME, ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT 2 (2019), https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf (reviewing environmental protection laws and institutions at the national level).

22. *See, e.g.*, *id.* at 1620–21 (considering the surge of legislation and offices related to environmental protections, as well as mentions of new enforcement mechanisms).

23. *See, e.g.*, Eur. Parl. Ass. Res. 2396 (2021), *supra* note 19, ¶¶ 1–2 (laying out the situation in the Council of Europe Member States); *see also*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands] 20 december 2019, ECLI:NL:HR:2019:2007 (Netherlands/Urgenda Found.) at 2–3 (Neth.) (enforcement of emission reduction).

Case before the Dutch Supreme Court.[24] The Urgenda Foundation, a non-profit sustainability organization, lodged an application against the State, claiming that it should maintain the existing rate of reduction of hazardous emissions, 30%, because any change would be less effective in the long run and the postponement of the necessary measures would increase the cost.[25] The State opted for the reduction of this pace from 30% to 20%, complying with the EU standards and its National Climate Plan.[26] The appellant highlighted that, in any case, the State could not justify a change of policy, as such an obligation derived from international instruments, which mandated a reduction of at least 25% of the emissions.[27] The District Court acknowledged such a responsibility, and the Court of Appeal later confirmed it.[28] The State appealed against the second decision, raising a series of objections.[29] The Supreme Court rejected the appeal and affirmed the first judgment, recalling that, although the Government and the Parliament have the primary power to consider any political dimensions of decisions regarding the reduction of emissions, the national courts are responsible for ensuring that the political and executive powers follow the international minimum standards and limits set by the European Convention on Human Rights (ECHR) and the Court's (ECtHR) jurisprudence.[30] As a result, the Dutch Supreme Court reiterated the State's obligations pursuant to both the UN Framework Convention on Climate Change and the ECHR, claiming that it bears the responsibility to adopt suitable measures to reduce its greenhouse gas emissions "in proportion to its share of the responsibility," especially in the light of Articles 2 and 8 of the ECHR, when there is high risk of endangering people's lives due to severe climate change.[31]

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24. HR 20 december 2019, ECLI:NL:HR:2019:2007 (Netherlands/Urgenda Found.).

25. *Id.* at 2, 5, 11.

26. *Id.* at 4–5.

27. *Id.* at 5.

28. *Id.* at 11–12, 16.

29. *Id.* at 2, 16–17 ("This ground for cassation also asserts that the Court of Appeal failed to recognize that it is not for the courts to make the political considerations necessary for a decision on the reduction of greenhouse gas emissions.").

30. *Id.* at 33–35.

31. The Court reiterated the previous ECtHR judgment in Brincat v. Malta, App.

In July 2021, the French Council of State published its judgment on an application lodged by several NGOs, asking the Government to furnish further information on the reduction plan of greenhouse gasses emissions following the commitments of the Paris Agreement.[32] The Court observed that there was a considerable backdrop with regards to the objective of the National Plan.[33] The (surprising) high degree of greenhouse gas emissions reduction in 2020 was justified mostly by the confinement measures against the COVID-19 pandemic.[34] Yet it was not considered a capable means of reaching the 2030 objective.[35] The Court insisted on applying all measures prescribed in the national legislation[36] and dictated that the Government should adopt additional measures to obtain the aforementioned objectives on a strict deadline.[37]

Other national courts and tribunals have also dealt with environmental cases, unveiling various aspects of the phenomenon,[38]

Nos. 60908/11, 62110/11, 62129/11, 62312/11, & 62338/11, ¶¶ 51, 79, 85, 91, 100–02 (July 24, 2014), https://hudoc.echr.coe.int/fre?i=001-145790, and highlighted that the positive obligations under Articles 2 and 8 of the ECHR overlap and shall be jointly examined. HR 20 december 2019, ECLI:NL:HR:2019:2007 (Netherlands/Urgenda Found.), at 23.

32. Conseil d'État [CE] [Council of State], 6e-5e chs., July 1, 2021, 427301, Rec. Lebon, ECLI:FR:CECHR:2021:427301.20210701 (Fr.).

33. *Id.* ¶ 2.

34. *Id.* ¶ 4

35. *Id.*

36. Loi no 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets [Law No. 2021-1104 of August 22, 2021 on the Fight Against Climate Change and Strengthening Resilience to Its Effects], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], August 24, 2021.

37. CE, 427301, Rec. Lebon, ECLI:FR:CECHR:2021:427301.20210701.

38. For example, the settlement achieved between the Shell oil company and environmental and indigenous peoples' rights NGOs before the Abuja High Court for indemnification to communities in southeastern Nigeria (an Ogoni region), close to the Niger Delta, who lost their lands after the 1970s oil spills in the region. Michael Oduor, *Justice at Last: Shell Agrees to Pay $110M over Oil Spills in Nigeria*, AFRICANEWS (Aug. 12, 2021), https://www.africanews.com/2021/08/12/justice-at-last-shell-agrees-to-pay-110m-over-oil-spills-in-nigeria. See a similar case before the Irish Supreme Court challenging the suitability of governmental measures in order to tackle climate change, and claiming that such policies violated both national laws and the ECHR. Lauren Boland, *Supreme Court Finds Government Climate Plan Falls "Well Short,"* JOURNAL (July 31, 2020), https://www.thejournal.ie/supreme-court-climate-case-ireland-5164687-Jul2020.

although not always in the same way.[39] It is equally interesting, though, that there is a significant (and increasing) number of cases before international human rights bodies, such as two cases pending before the ECtHR.[40] *Agostinho v. Portugal*[41] concerns serious claims of children and youths from Portugal, challenging the national policies of thirty-three ECHR States Parties on the greenhouse gas emissions, claiming that such practices exacerbate the already worrying environmental degradation.[42] The Court subsequently gave notice to the defendants and posed specific questions to find out whether there had been violations of ECHR provisions, such as Articles 1 (jurisdiction), 2 (right to life), 3 (prohibition of torture), 8 (private/family life), 14 (prohibition of discriminations), 34 (individual applications' admissibility criteria), and Article 1 of Protocol No 1 (property rights).[43] While the Court has not yet examined the case, it is very interesting that, at a first glance, it seems to overcome the rule of the prior exhaustion of domestic remedies pursuant Article 41 Rules of the Court, as there are no indications that

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See also the very recent lawsuit against Guyana's government, Anastasia Moloney, *Analysis—Climate Lawsuits Snowball as South Americans Seek a Healthy Environment*, REUTERS (May 31, 2021), https://www.reuters.com/article/climate-change-litigation-latam-idUSL5N2NE6RQ, and the claims against the Italian government for incapacity to adopt national climate policies, Angela Giuffrida, *Italian Climate Activists Sue Government Over Inaction*, GUARDIAN (June 5, 2021), https://www.theguardian.com/world/2021/jun/05/italian-climate-activists-sue-government-over-inaction.

39. In 2018, the Swiss Federal Administrative Court ruled against the complaint of a human rights NGO and some citizens, who claimed that older women are more vulnerable due to climate change. The Supreme Court rejected the appeal, as the protection requested could not be fulfilled through the Paris Agreement. The applicants could use the ECHR alternative, as expressed by the NGO. *See, e.g.*, Greenpeace Int'l, *Swiss Federal Court Puts Human Rights Last in the Climate Crisis*, GREENPEACE (May 20, 2020), https://www.greenpeace.org/international/press-release/43390/swiss-federal-court-human-rights-climate-crisis-health.

40. For the interrelation of international human rights law and environmental issues, see also Linos-Alexander Sicilianos, J. & President, Eur. Ct. H.R., Opening Remarks at the Conference on Human Rights for the Planet in Strasbourg (Oct. 5, 2020), https://www.echr.coe.int/Documents/Speech_20201005_Sicilianos_Conference_Planet_ENG.pdf.

41. App. No. 39371/20 (Dec. 2020), https://hudoc.echr.coe.int/eng?i=002-13055.

42. *Id.* at 2

43. Agostinho v. Portugal, App. No. 39371/20, at 2 (June 2020), https://hudoc.echr.coe.int/eng?i=002-13724.

national procedures have been used.[44] This might be a sign of how the Court perceives this type of claim.

Verein KlimaSeniorinnen Schweiz v. Switzerland[45] will give the Court the chance to address potential ECHR violations when climate change provokes health problems and deteriorates living conditions.[46] In this case, a group of senior women filed an application against Switzerland for not fulfilling its obligation—under its Constitution and the ECHR—to maintain the emissions reduction plan in accordance with international standards, and highlighting their vulnerability, especially in relation to the heatwaves resulting from ongoing severe climate change.[47] The national remedies failed because the applicants did not prove a concrete and specific violation of their individual rights, but rather supported their legal arguments with more generic regulations.[48] The Supreme Court rejected their appeal, concluding that the women's rights were not severely violated in a way that would justify legal recourse[49]. However, they could seek protection through political means. The Strasbourg Court gave notice to the Government and set a series of questions regarding the potential violation of ECHR provisions (Articles 2, 8, 6, and 13).[50]

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44. *See* Daria Stanculescu, *The Requirement to Exhaust Domestic Remedies and the Future of Climate Change Litigation Before the ECtHR*, PUB. INT'L L. & POL'Y GRP., (Apr. 26, 2021), https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2021/4/26/the-requirement-to-exhaust-domestic-remedies-and-the-future-of-climate-change-litigation-before-the-ecthr (commenting on the case, specifically on the reasons why exhaustion of domestic remedies may not be feasible in a case brought against multiple Member States).

45. App. No. 53600/20 (Apr. 2020), https://hudoc.echr.coe.int/eng?i=002-13212.

46. *Id.* at 1–2.

47. *Id.*

48. Bundesgericht [BGer] [Federal Supreme Court] May 5, 2020, 1C_37/2019 (Switz.), *translated in* FEDERAL SUPREME COURT [OF SWITZERLAND], PUBLIC LAW DIVISION I JUDGMENT 1C_37/2019 OF 5 MAY 2020, 12, 20, 24–27, *in* CLIMATE CHANGE LITIG. DATABASES (last visited Oct. 22, 2022), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200505_No.-A-29922017_judgment.pdf [hereinafter JUDGMENT 1C_37/2019].

49. BGer Jan. 21, 2019, 1C_37/2019, *translated in* APPEAL IN MATTERS OF PUBLIC LAW SUBMITTED ON 21 JANUARY 2019 TO THE FEDERAL SUPREME COURT [OF SWITZERLAND] 19–20, *in* CLIMATE CHANGE LITIG. DATABASES (last visited Oct. 22, 2022), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2019/20190121_No.-A-29922017_appeal-1.pdf.

50. BGer May 5, 2020, 1C_37/2019, *translated in* JUDGMENT 1C_37/2019,

The Court of Justice of the EU (CJEU) has also dealt with environmental cases,[51] albeit through a different lens, with the last case being published on 25 March 2021. In *Armando Carvalho v. European Parliament and Council of the European Union* (*People's Climate Case*),[52] families from five EU member-States, Kenya, Fiji, and a Swedish youth association representing the indigenous Sami populations (Sáminuorra) brought a case before the EU General Court seeking damages and the annulment of a set of EU legislative measures for the reduction of greenhouse gasses emissions that were promoting EU organs and institutions.[53] The applicants claimed that the reduction pace of 40% was not sufficient and that they were all victims of the ongoing climate change, proposing an intensified rate of almost 50–60%.[54] However, the General Court rejected their application as inadmissible for not proving the existence of individual concern (and thus *locus standi* before the Court).[55] They subsequently filed an appeal[56] before the CJEU, which ultimately confirmed the General Court's Order.[57]

Other regional human rights *fora* have also extensively treated human rights aspects of environmental degradation and devastation as well, such as the Inter-American Commission of Human Rights

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supra note 48, at 12–13, 21–22, 27.

51. On 16 July 2021, the EU Commission submitted a case against Greece to the Court for not adopting all necessary and feasible measures and for infringing Council Directive 2008/50, 2008 O.J. (L 152) 1. Case C-633/21, Comm'n v. Greece, 2021 O.J. (C 513) 24.

52. Case T-330/18, Carvalho v. Parliament [*People's Climate Case*], ECLI:EU:T:2019:324 (May 8, 2019).

53. *Id.* ¶ 1.

54. *Id.* ¶¶ 1, 18, 29–31.

55. *Id.* ¶¶ 45, 54, 70.

56. Case C-565/19 P, Carvalho v. Parliament, ECLI:EU:C:2021:252 (Mar. 25, 2021).

57. *See id.* ¶¶ 41, 50, 75–78; *see also*, Lena Hornkohl, *The CJEU Dismissed the* People's Climate Case *as Inadmissible: The Limit of Plaumann is Plaumann*, EUR. L. BLOG, (Apr. 6, 2021), https://europeanlawblog.eu/2021/04/06/the-cjeu-dismissed-the-peoples-climate-case-as-inadmissible-the-limit-of-plaumann-is-plaumann (reviewing the dismissal of an action for annulment of various EU acts concerning emissions).

(IACHR)[58] and Court of Human Rights (IACtHR),[59] usually in relation to indigenous peoples' rights. One example was the case before the IACHR in which a group of Inuit persons filed a petition against the United States for human rights violations related to global warming, exacerbated by the greenhouse gasses emissions.[60] The petitioners claimed that climate change hampered their traditional hunting and challenged a series of provisions in the American Convention of Human Rights, including rights to life, the preservation of health, physical integrity and security, residence, movement, and property rights.[61] However, the petition was dismissed due to insufficiency of the information furnished to the IACHR, in order to establish a concrete nexus between the acts of the Government and their impact on the indigenous community.[62]

58. See, for example, the pending petition before the IACHR filed by a number of NGOs to promote climate policies that protect human rights, Solicitud de audiencia temática sobre los impactos del cambio climático en los derechos en las Américas [Petition for a Hearing on the Topic on the Impacts of Climate Change on Rights in the Americas] (July 11, 2019), *in* CLIMATE CHANGE LITIG. DATABASES, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200711_11476_petition.pdf, and another seeking redress of human rights violations, Petition to the Inter-American Commission on Human Rights Concerning Violations of the American Convention on Human Rights (Feb. 4, 2021), *in* CLIMATE CHANGE LITIG. DATABASES, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210204_13174_petition.pdf.

59. *See, e.g.*, The Environment and Human Rights (State Obligations to the. Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 48, 67, 113, 156 (Nov. 15, 2017) (offering commentary on specific human rights that can be threatened as a result of climate change, such as indigenous rights, development, and disability rights, as well as what obligations states have in relation to those).

60. See the unaccepted petition by members of the Inuit Circumpolar Conference to the Commission arguing that their human rights as indigenous people have been violated as a result of the United States' policies regarding climate change. Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, 5–6 (Dec. 7, 2005), *in* CLIMATE CHANGE LITIG. DATABASES, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf.

61. *See generally id.*

62. *See* Lara Diaconu, *The Time Is Now for the IACHR to Address Climate Action as a Human Right: Indigenous Communities Can Lead (Again)*, 9 AM.

All of the aforementioned challenges, along with the gradual, universal acceptance of the individual human right to a healthy, clean, and safe environment and the national and international jurisprudence confirming potential criminal liability for non-green practices, has led some legal experts to introduce the term "ecocide" and to propose amending the Rome Statute[63] to include it as a new international crime.[64] This initiative has also been promoted at a political level.[65] On the European continent, for instance, the PACE adopted Resolution 2398(2021) on "Addressing issues of criminal and civil liability in the context of climate change," calling all Member States to "consider recognizing universal jurisdiction for ecocide and the most serious environmental crimes, including in the 1998 Rome Statute of the International Criminal Court,"[66] and reiterating the need to commit to the existing international and regional legal framework. Meanwhile, the EU Parliament, in a Report of the Legal Affairs Committee, observed the increasing willingness and commitment of EU Member States to promote at all levels the so-called crime of "ecocide."[67] For this reason, the Parliament asked the Commission to examine the potential compatibility of such a crime to the EU legislation.[68]

INDIAN L.J. 213, 225–26 (2021) (offering a commentary on the Inuit petition to the IACtHR and its dismissal by the Court). For an overview of the work of the IACtHR, see generally JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1–4, 8, 10–12 (2d ed. 2013).

63. Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

64. *See* STOP ECOCIDE FOUND., STATEMENT TO THE 20TH ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2021) (urging the Assembly to include the crime of "ecocide" in the Rome Statute).

65. *See* Eur. Parl. Res. 2398 (2021), *Addressing Issues of Criminal and Civil Liability in the Context of Climate Change*, at 2 (Sept. 29, 2021), https://pace.coe.int/pdf/d267ce9b45e2010542623e352d362bc7733875c6bf1c94dfc1e7a659a478f68f/res.%202398.pdf ("The Assembly calls on member States of the Council of Europe to . . . consider introducing the crime of ecocide into their national criminal legislation.").

66. *Id.* at 3.

67. Eur. Parl. Comm. on Legal Affs., Report on the Liability of Companies for Environmental Damage, ¶ 9, No. A9-0112 (Apr. 4, 2021).

68. *See id.* ¶ 10 (recommending that the EU Environmental Liability Directive be "revised as soon as possible and . . . transformed into a fully harmonized regulation").

The same voices, mostly of small island States, are echoing within the International Criminal Court (ICC) structures. During the 18th Session of the Assembly of States Parties, Vanuatu and Maldives highlighted the impact of climate change and the calamities suffered by their populations.[69] In 2021, Samoa insisted on the "international demand for ecocidal and gross environmental acts to be carefully examined in terms of the structure and principles of the Rome Statute,"[70] while States not directly affected by climate change (for example, Belgium and Finland) sympathize with this initiative.[71] What is the (or would be a) proposed international crime of "ecocide"?

II. IN SEARCH OF A DEFINITION: THE (RE)APPEARANCE OF "ECOCIDE" IN INTERNATIONAL LAW[72]

Since the 1960-1970s, because of the serious environmental

69. Vanuatu, Statement, 18th Sess. of the Assembly of State Parties, 2-7 Dec. 2019; Maldives, Statement, 18th Sess. of the Assembly of State Parties, 3 Dec. 2019; Anastacia Greene, *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?*, 30 FORDHAM ENV'T L. REV. 1, 7 (2019) (presenting the statement made by Vanuatu's ambassador to the EU expressing his support for ecocide to be "made into a crime of atrocity under international law").

70. I.C.C. Gen. Deb. 20th Sess. (Dec. 6–11, 2021) (remarks of Prime Minister Hon Fiame Naomi Mataafa).

71. C.P.I. Deb. Gen., 20th Sess. (Dec. 6, 2021) (remarks of Belgian member) (noting the importance of spreading awareness of the crime of ecocide amongst the international community and highlighting Belgium's efforts to incorporate the concept into its penal code); I.C.C. Gen. Deb. 20th Sess. (Dec. 6, 2021) (remarks of Mr. Pekka Haavisto) (presenting the statements made by the Minister for Foreign Affairs of the Republic of Finland regarding the importance of a united front against taking measures to address climate change).

72. For an overall assessment on the history of "ecocide" and its theoretical roots, see Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L. L.J. 215, 215–71 (1996) (providing a background of ecocide, its international consequences, and the regulations and law surrounding it); Polly Higgins et al., *Protecting the Planet After Rio—The Need for a Crime of Ecocide*, 90 CRIM. JUST. MATTERS 1, 4–5 (2012) (proposing a potential avenue to address climate change including the criminalization of ecocide); Polly Higgins et al., *Protecting the Planet: a Proposal for a Law of Ecocide*, 59 CRIME L. SOC. CHANGE 251, 251–66 (2013) (discussing examples of crimes to the environment and proposing a law of ecocide); Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (Shepheard-Walwyn Publishers Ltd., 2015); Kübra Kalkandelen & Darren O'Byrne; *On Ecocide: Toward a Conceptual Framework*, 18

questions posed by the Vietnam War,[73] the international community perceived human-induced environmental degradation as a threat that should be extensively treated and/or criminalized. The term was first used by the American Biologist A. Galston during the Conference on War and National Responsibility in Washington DC in 1970, and two years later was reiterated by the Swedish Prime Minister O. Palme in his speech at the Conference on the Human Environment, held in Stockholm, under the auspices of the UN:[74]

> The immense destruction brought about by indiscriminate bombing, by large-scale use of bulldozers and herbicides is an outrage sometimes described as ecocide, which requires urgent international attention. . . . It is of paramount importance . . . that ecological warfare cease immediately.[75]

In 1973, R. Falk recalled the basic humanitarian principles that govern the widely known methods of warfare in his contribution *Environmental Warfare and Ecocide: Facts, Appraisal and Proposals* and vividly described attacks on the environment as a "desecration of the land" and the use of Agent Orange in the forests of Indochina as an "Auschwitz for environmental values."[76] He proposed, by analogy, the drafting of a Convention to clearly condemn the "environmental warfare" that took place there, just like the 1948 Genocide Convention

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DISTINKTION: J. SOC. THEORY 333, 333–49 (2017) ("presenting a conceptual framework for ecocide"); Olivia Hasler, *Green Criminology and an International Law Against Ecocide: Using Strict Liability and Command Responsibility to Prevent State and Corporate Denial of Environmental Harms*, *in* GREEN CRIMINOLOGY AND THE LAW 387–408 (James Gacek & Richard Jochelson eds., 2022) (exploring the use of "strict liability and superior responsibility to prevent state and corporate denial of environmental harms").

73. *See* Richard A. Falk, *Environmental Warfare and Ecocide—Facts, Appraisal and Proposals*, 9 BELG. REV. INT'L L. 1, 21–24 (1973) (analyzing the environmental damage resulting from various weapons and tactics used during the Vietnam Wars).

74. Although the Stockholm Conference did not conclude in the criminalization of ecocide, it led to the establishment of the UN Environment Program (UNEP). Olivia Hasler, *Mining as Ecocide: The Case of Adani and the Carmichael Mine in Australia*, *in* ILLEGAL MINING: ORGANIZED CRIME, CORRUPTION AND ECOCIDE IN A RESOURCE-SCARCE WORLD 497, 501–02 (Yuliya Zabyelina & Daan van Uhm eds., 2020).

75. Olof Palme, Prime Minister of Sweden, Address at the U.N. Conference on the Human Environment at Stockholm, Sweden (June 1972), *in A Special Report—What Happened at Stockholm*, 28 BULL. ATOMIC SCIENTISTS 16, 44–45 (1972).

76. Falk, *supra* note 73, at 84.

condemns and punishes acts and omissions similar to those clearly described in the Nuremberg jurisprudence.[77] Surprisingly, his "Proposed International Convention on the Crime of Ecocide" set a clear definition of the term in Articles I–III, while Article IV proclaimed the international criminal responsibility of persons who should be tried either by the competent national instruments of the State in which the criminalized acts were committed or by an international criminal tribunal, which would be mandated to try persons having committed such acts under Article VII.[78] As there was no such competent international forum, Falk also proposed a GA Resolution calling the International Law Commission (ILC) to study issues regarding the potential international criminal jurisdiction, proposing the creation of an individual Criminal Chamber within the International Court of Justice (ICJ).[79] However, such a proposal was not accepted.

Yet the Indochina precedent kept inspiring the work of international institutions and mandate-holders to engage the international community in an enhanced dialogue within all available frameworks. During the 1970s, the UN extensively considered the idea of expanding the *ratione materiae* scope of application of the Genocide Convention.[80] It had Raphael Lemkin's proposals on genocide as a theoretical starting point—as expressed during the International Conference for Unification of Criminal Law (League of Nations,

77. *Id.*

78. Echoing what in contemporary International Criminal Law is characterized as the complementarity principle. *Id.* at 93–94.

79. *Id.* at 95. Such a proposal (although very innovative and inspirational, taking into consideration that there were no international criminal instances, whether ad hoc or permanent ones) would pose a number of serious questions that could possibly endanger the whole UN system. Proposing the establishment of a Criminal Chamber within the ICJ would alter its interstate nature. *See* U.N. Charter art. 93; Statute of the International Court of Justice art 34, ¶ 1, June 26, 1945, T.S. No. 993. In any case, such an addition could only be inserted after a lawful amendment of the Court's Statute pursuant Article 69, which adopts the same procedure with Article 108 UN Charter. *Id.*

80. *See* ANJA GAUGER ET AL., THE ECOCIDE PROJECT: 'ECOCIDE IS THE MISSING 5TH CRIME AGAINST PEACE' 6–7 (2012), https://sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf (reiterating the growing number of academics from the 1970s onward who called for the criminalization of ecocide).

Madrid, 1933) and set in his oeuvre *Axis Rule in Occupied Europe*[81]—the term addresses "the deliberate destruction of a nation or ethnic group" either through the means of "physical genocide" (killing individual members) or "cultural genocide" (using practices that could undermine the group's way of life and individual identity).[82] In this generic term, some researchers see the roots of ecocide, in the sense that "[it] can and often does lead to cultural damage and destruction; and the direct destruction of a territory can lead to cultural genocide."[83]

The very first proposal was brought before the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, whose Special Rapporteur N. Ruhashyankiko observed the potential inclusion of ecocide either as an "international crime similar to genocide" or as a war crime.[84] Ecocide as an international crime similar to genocide would recall previous academic debates and proposals and the Sub-Commission's stance that "interference with the natural surroundings or the environment in which ethnic groups lived was . . . a kind of ethnic genocide because . . . [it] could prevent the people involved from following their own traditional way of life."[85] Ecocide as a war crime would reflect State and diplomatic international practice that opted for the criminalization of acts against the natural environment during armed conflicts.[86] In the same vein, the

81. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (2005).

82. Damien Short, *Cultural Genocide and Indigenous People: A Sociological Approach*, 14 INT'L J. HUM. RTS. 831, 835 (2012).

83. *See* GAUGER ET AL., *supra* note 80, at 6; *see also* Martin Crook & Damien Short, *Marx, Lemkin and the Genocide-Ecocide Nexus*, 18 INT'L J. HUM. RTS. 298, 299 (2014) (evaluating ecocide as a method of genocide); Martin Crook et al., *Ecocide, Genocide, Capitalism and Colonialism: Consequences for Indigenous Peoples and Local Ecosystems Environments*, 22 THEORETICAL CRIMINOLOGY 298, 300 (2018) (expanding the understanding of genocide to include ecocide and its resulting genocide). For other UN Actions, see G.A. Res. A/RES/3264 (XXIX) (Dec. 9, 1974) in which the Disarmament Committee was informed of a Soviet proposal for a draft Convention on the prohibition of action to influence the environment and climate for military and other purposes incompatible with the maintenance of international peace, human well-being and health.

84. GIOVANNI CHIARINI, ECOCIDE AND INTERNATIONAL CRIMINAL COURT PROCEDURAL ISSUES: ADDITIONAL AMENDMENTS TO THE 'STOP ECOCIDE FOUNDATION' PROPOSAL 5 (2021).

85. *Id.* at 6.

86. At that time, the Diplomatic Conference on the reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts had

work of Ruhashyankiko's successor, B. Whitaker, who proposed in a follow-up Report to include ecocide—along with the crime of genocide—covering:

> [A]dverse alterations, often irreparable, to the environment—for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest—which threaten the existence of entire populations, whether deliberately or with criminal negligence.[87]

The potential existence of such a *nexus* has been concurrently treated more recently by the ICC Prosecutor in the situation in Darfur.[88] In 2008, the Prosecutor acknowledged that there was a link between the acts of Al Bashir's forces and the poor living conditions of victims of the attacks after they had been displaced from their hometowns, providing that "[a]fter the attack, the attackers went through the town systematically destroying properties, vegetation and water sources."[89] Yet, the specific genocidal intent[90] required in

already included Article 55 in the 1977 Additional Protocol I, dealing with the protection of the natural environment during international armed conflicts. *See generally* COMMENTARY ON THE FIRST GENEVA CONVENTION (Knut Dörmann et al. eds., 2016), https://www.icrc.org/en/document/updated-commentaries-first-geneva-convention. It is to be noted that, although an eventual violation of Article 55 does not amount to a grave breach pursuant Article 85 Protocol I, thus being excluded, in 1998, from the grave breaches of humanitarian norms as war crimes in the Rome Statute, it fell under the spectrum of Article 8 para 2(b)(iv). *See* Nicodème Ruhashyanlcik (Special Rapporteur) Study of the Question of the Prevention and Punishment of the Crime of Genocide Before the U.N. Econ. & Soc. Council Subcomm. on Prevention of Discrimination and Protection of Minorities on its Thirty-Fifth Session, ¶¶ 462–78, U.N. Doc. E/CN 4/Sub.2/416 (1978) (supplying statements from the leaders of nations on the legal complications of criminalizing ecocide and an examination of a draft protocol from the United States Senate).

87. Benjamin Whitaker (Special Rapporteur), Comm'n on Hum. Rts., Review of Further Development in Field with Which the Sub-Commission Has Been Concerned: Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide on its Thirty-Eighth Session, ¶ 33, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985).

88. Situation in Darfur, The Sudan, Case No. ICC-02/05, Public Redacted Version of Prosecution's Application Under Article 58, ¶ 200 (July 14, 2008), https://www.icc-cpi.int/RelatedRecords/CR2008_04753.PDF (describing violent acts and the resulting displacement by Al Bashir's forces in Darfur, the Sudan).

89. *Id.*

90. Michalis Retalis, *Ermineftikí proséngisi tou enklímatos tis genoktonías me vási ti nomología ton Diethnón Dikastirían* [*An Interpretative Approach of the Crime of Genocide on the Basis of the Jurisprudence of International Courts*], 6

Article 6 of the Rome Statute is quite difficult to prove, which, in turn, makes it difficult to prosecute environmental harms under the crime of genocide.[91]

Much work has been done in other UN fora too. In 1976,[92] the GA adopted the ENMOD Convention,[93] recalling in its Preamble that:

> [T]he use of environmental modification techniques for peaceful purposes could improve the interrelationship of man and nature and contribute to . . . the benefit of present and future generations . . . [while] military or any other hostile use . . . could have effects extremely harmful to human welfare . . . .[94]

It also covered both military and hostile (Article I) and peaceful (Article III) uses.[95]

Subsequently, during the codification process of a *Code of Crimes*

POINIKÍS DIKAIOSÝNIS [CRIMINAL JUSTICE] 8–9 (2007).

91. *See* Rachel Killean, *From Ecocide to Eco-Sensitivity: 'Greening' Reparations at the International Criminal Court*, INT'L J. HUM. RTS. 1, 5–8 (2014) (discussing the "numerous jurisdictional barriers" contained in Article 8 of the Rome Statute of the ICC); Ammar Bustami & Marie-Christine Hecken, *Perspectives for a New International Crime Against the Environment: International Criminal Responsibility for Environmental Degradation Under the Rome Statute*, 11 GOETTINGEN J. INT'L L. 145, 160–61 (2021) (emphasizing the high mens rea threshold for "attributing environmental crimes to the crime of genocide").

92. Until then, one of the fundamental applicable instruments was the 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare , recalling -among others- the previously proclaimed Hague Declaration concerning asphyxiating gasses (29 July 1899), and Article 171 of the Treaty of Versailles of 28 June 1919. *See* Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571. Later on, the G.A. adopted a series of Resolutions, calling States to fully comply with the principles and objectives enshrined in the 1925 Protocol, recalling a series of previous Resolutions. In 1996, ICRC also adopted a set of Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict as a follow-up process to the 1993 International Conference for the Protection of War Victims. *See* Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, 311 INT'L REV. RED CROSS (1996) ("[A] summary of the existing applicable international rules which must be known and respected by members of the armed forces.").

93. Convention on the Prohibition of Military Or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 1108 U.N.T.S. 151.

94. *Id.* pmbl.

95. *Id.* arts. I, III.

Against the Peace and Security of Mankind (1981), there was an extensive multilevel and multilateral discourse within the UN ILC on whether a relevant provision should be included[96]. Following its previous work on the *Articles on State Responsibility*,[97] the ILC included, at first, Article 26 on intentional damages on the natural environment, which was met with the solid disagreement of some countries claiming that there is no intent in potential environmentally hazardous activities when committed in peacetime as it is a "by-product of industrial and other activity."[98] However, instead of working on how to overcome the challenging criterion, the ILC opted for the total exclusion of Article 26 without any official procedure to be followed and with only a few reactions in respect.[99] The following step forward was made in 1995 when a more flexible Working Group was created[100] that conducted a special report (by C. Tomuschat)[101]

96. *See Summaries of the Work of the International Law Commission: Draft Code of Crimes Against the Peace and Security of Mankind (Part II)—Including the Draft Statute for an International Criminal Court*, INT'L L. COMM'N (last updated Dec. 4, 2017), https://legal.un.org/ilc/summaries/7_4.shtml#a15 (recalling the Commission's process of recommending that "the General Assembly select the most appropriate form which would ensure the widest possible acceptance of the draft Code").

97. For the 1996 proposed Draft Articles on State Responsibility, see U.N. Int'l L. Comm'n, Report of the International Law Commission on the Work of its Forty-Eighth Session art. 19, [1996] Y.B. Int'l L. Comm'n, U.N. Doc. A/51/10 (July 26, 1996) ("3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from: . . . (d) 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."). *See also* U.N. Int'l L. Comm'n, Report of the International Law Commission to the General Assembly on the Work of its Forty-Eighth Session, at 60, [1996] Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2). However, this proposal was not included in the Articles on State Responsibility for Internationally Wrongful Acts.

98. In other words, the sole fact that environmentally hazardous activities take place in peacetime and somehow serve humanity, lifts (or at least justifies) any potential long-term environmental impact. GAUGER ET AL., *supra* note 80, at 9.

99. Gaetano Arangio-Ruiz (Special Rapporteur), U.N. Int'l L. Comm'n, Seventh Report on State Responsibility on its Forty-Seventh Session, ¶¶ 31–40, [1995] Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/469/Add.1 (May 29, 1995).

100. *See generally id.* (providing background on the working group and the Draft Code of Crimes Against the Peace and Security of Mankind discussed by Tomuschat in the report).

101. Christian Tomuschat (Comm'n Member), U.N. Int'l Law Comm'n, Draft

proposing three alternatives.[102] However, the option of a separate provision was disqualified[103] and in the final draft—of what would become the Rome Statute—damages to the natural environment fell solely under war crimes,[104] thus limiting the scope of application. However, the ILC kept working on this issue.[105] Since 2013, the protection of the environment in relation to armed conflicts has already been introduced in its thematic agenda.[106] In 2019, the ILC Drafting Committee provisionally adopted a set of draft principles on the topic, while the Special Rapporteur, Ms. Marja Lehto, had already submitted her report addressing a series of questions regarding the environmental protection during non-international armed conflicts, as well as the potential responsibility and/or liability of States and non-State actors.[107] The UN Secretary General transmitted the draft

Code of Crimes Against the Peace and Security of Mankind, at 16, [1996] Y.B. Int'l L. Comm'n, U.N. Doc. ILC(XLVIII)/DC/CRD.3 (Mar. 27, 1996).

102. Environmental damages could be included in the Code either as separate provisions, as part of crimes against humanity or war crimes. *Id.* at 17, 24 (examining crimes against the environment, the constituent elements of a crime against the environment, and work done by international bodies to address environmental crimes and damage).

103. *Summary Records of the Meetings of the 48th Session*, [1996] Y.B. Int'l L. Comm'n 60, U.N. Doc. A/CN.4/SER.A/1996.

104. *See* Rome Statute, *supra* note 63 (including specifically that "damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" falls under Article 8: War Crimes); *see also* Int'l Conf. of the Red Cross, Together for Humanity, annex, Res. 1 (Nov. 26–30, 2007), https://www.icrc.org/en/doc/resources/documents/resolution/30-international-conference-resolution-1-2007.htm (asserting that the focus of the Conference Members centered on addressing "the humanitarian consequences of four great challenges" among which was environmental degradation); Int'l Conf. of the Red Cross, Disaster Law and Policies that Leave No One Behind, Res. 33IC/19/R7 (Dec. 9–12, 2019) (emphasizing the importance of including environmental degradation under disaster laws and subsequently addressing the humanitarian consequences effectively).

105. *See* Killean, *supra* note 91, at 5 (providing examples of continued efforts to address environmental destruction in connection with mass violence, such as the ILC's 2019 draft legal principles).

106. *See generally* Marja Lehto (Special Rapporteur), U.N. Int'l L. Comm'n, First Report on Protection of the Environment in Relation to Armed Conflicts on its 70th Session, U.N. Doc. A/CN.4/270 (Apr. 30, 2018) (reporting on the protection of the environment during armed conflicts and the role of international law therein).

107. *See Summaries of the Work of the International Law Commission: Protection of the Environment in Relation to Armed Conflicts,* INT'L L. COMM'N 2 (last updated Jan. 23, 2023), https://legal.un.org/ilc/summaries/8_7.shtml#a9 (summarizing the

principles to all stakeholders (Governments and International Organizations), to formally submit their observations, comments, and proposals.[108]

Upon this precedent, the Independent Expert Panel of the Stop Ecocide Foundation proposed some amendments of the Rome Statute, introducing a fifth international crime, defined as:

> 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.[109]

III. THE CHALLENGES LURKING THE PROPOSED INTERNATIONAL CRIME OF "ECOCIDE"

No matter the motives and the ideological starting point for the criminalization of acts against the natural environment, from a strictly legal standpoint the inclusion of a new, "hybrid" international crime sets some serious challenges regarding both the *actus reus* and the *mens rea* of the crime itself, as well as with respect to the nature of and the principles governing the ICC. Such questions and challenges should be thoroughly studied and dealt with.

The Independent Expert Panel proposed specific amendments to the Rome Statute[110] so that an eventual inclusion of such an international crime would take place more smoothly. Apart from the addition of an

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provisional adoption of the draft principles 19, 20, and 21 and the Report of the Special Rapporteur to which they had access at the time).

108. *See id.* (detailing how the U.N. Secretary General transmitted the principles to various parties and requested feedback therefrom).

109. STOP ECOCIDE FOUND., INDEPENDENT EXPERT PANEL FOR THE LEGAL DEFINITION OF ECOCIDE: COMMENTARY AND CORE TEXT 5 (2012), https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf.

110. Reserving the potential need for further amendments to the ICC Rules of Procedures and Evidence, and to the Elements of Crimes, both of them forming part of the applicable law pursuant Article 21, ¶ 1(a) of the Rome Statute. *See* STOP ECOCIDE FOUND., *supra* note 109, at 5.

Article 8ter setting the specific circumstances of the new crime, the Panel also proposed the inclusion of an additional preambular paragraph to broaden the ideological foundation of the Rome Statute, as well as the amendment of Article 5, to broaden the jurisdiction of the Court.[111] Yet these proposals raise serious problems and considerations with regards to the international criminal justice system.

A. A "HYBRID" INTERNATIONAL CRIME: STUDYING ITS *ACTUS REUS*

The aforementioned definition of ecocide in the proposed Article 8 ter, provides interesting issues for consideration, the first of them being merely linguistic. "Ecocide" as proposed could be characterized as a "hybrid" international crime, in the sense that it follows the structure of crimes against humanity,[112] with an obvious linguistic similarity to genocide.[113] However, attacks that may cause "widespread, long-term and severe damage" to the natural environment managed to fit into the Rome Statute as a subcategory of war crimes.[114]

Taking into consideration that "ecocide" is described as an endangerment crime ("substantial likelihood"),[115] the Panel opted for the inclusion of two thresholds. On the one hand, it sets a quite ambiguous semi-conjunctive and semi-disjunctive criterion: that the criminal conduct would cause "[a] severe and either widespread or

111. *See id.* (listing the Proposed Amendments to the Rome Statute to preambular paragraph 2, Article 5(1), and Article 8).

112. The crime itself is described in paragraph 1 of proposed Article 8 ter, while paragraph 2 further defines the terminology used and clarifies its exact scope of application. *See id.*

113. Although nobody can deny the long history of "ecocide," there are serious concerns with regards to its suitability for the situation described. According to some researchers, genocide and ecocide, despite their prima facie linguistic similarity, do not have the same magnitude, while others seem to be more reluctant with the motives of such a choice, believing it probably is "eye-catching." *See* Kai Ambos, *Protecting the Environment Through International Criminal Law?*, EJIL: TALK! (June 29, 2021), https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law (referencing the original definition of 'genocide' and its connection to the definition and use of 'ecocide').

114. STOP ECOCIDE FOUND., *supra* note 109.

115. Ambos, *supra* note 113.

long-term damage" that balances the totally disjunctive criterion of the ENMOD Convention—which, being too low, could not guarantee a significant level of protection—and the conjunctive criterion enshrined in the 1977 Additional Protocol I and the Rome Statute.[116] On the other hand, the latter being unjustifiably high, resulting in the exclusion of certain acts from the *ratione materiae* scope of application of the crime.[117] Inspired by these instruments and the interpretation of the GA Disarmament Committee[118] of the ENMOD Convention, the Panel perceives the term "severe" as encompassing any damage to "any element of the environment,[119] including grave impacts on human life or natural, cultural or economic resources."[120] Similarly, the term "widespread" seems to be a mid-point solution, balancing among the alternatives offered by the ENMOD Convention, the Additional Protocol I, and Rome Statute. The two former instruments, by contrast, set a mere geographical and numerical prerequisite—which might be excessive—and uses "widespread" in cases of crimes against humanity when there is a "widespread (or systematic) attack . . . against any civilian population."[121] The Panel

116. STOP ECOCIDE FOUND., *supra* note 109.

117. *Id.*; *see also* Kevin Jon Heller, *Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)*, OPINIOJURIS (June 23, 2021), http://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt (arguing that the use of a conjunctive/disjunctive test can be justified, as it is almost inevitable that environmental damage happens during an ongoing armed conflict, while this criterion should be stricter in peacetime).

118. *See generally* U.N. Gen. Assembly, Report of the Conference of the Committee on Disarmament on its Thirty-First Session, at 91, U.N. Doc. A/31/27 (1976) (describing the purpose of the Consultative Committee of Experts as seeking to "make appropriate findings of fact and provide expert views relevant to any problem raised pursuant to article V, paragraph 1, of this Convention "by the State Party requesting the convening of the Committee").

119. Apart from some scattered references, as for instance in the legality of the threat or use of nuclear weapons, there is no definition of the environment in other primary sources of international law. *See* Case Concerning Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment 1997 I.C.J. Rep. 92 (Sept. 1997). For the inclusion of the provision Article 8 ¶ 2(e), enumerating the elements composing the "environment" is quite innovative. *See* Christina Voigt, *Ecocide as an International Crime: Personal Reflections on Options and Choices*, EJIL: TALK! (July 3, 2021), https://www.ejiltalk.org/ecocide-as-an-international-crime-personal-reflections-on-options-and-choices.

120. STOP ECOCIDE FOUND., *supra* note 109.

121. *See* Rome Statute, *supra* note 63 (determining that the subsequent listed acts

opted to limit the numerical precondition to cover hazardous acts whose environmental impact causes harm to a considerable number of people, and expanding the geographical one, so as to treat damages caused to climate systems in areas that are not strictly definable and transboundary harms.[122] An anthropocentric element was also included, as "widespread" was attributed to a harm "suffered by an entire ecosystem or species or a large number of human beings," reiterating the long-standing ICC jurisprudence.[123] The final, "long-term" criterion introduces a temporal dimension, as it requires that the environmental damage should either be irreversible or not recoverable through natural means, or "*within a reasonable period of time*."[124] The Panel opted for a more flexible solution, clarifying that there is no need for the time frame to elapse before the prosecution of the committed acts, and imposing no specific conditions besides defining it "on the particular circumstances of any situation."[125] But, it is rather questionable whether such a vague wording complies with the *nullum*

"when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" fall under Crimes Against Humanity).

122. G.A. Res. 62/68, at 3 (Jan. 8, 2008) (describing what is encompassed under "risk of causing significant transboundary harm," "harm," and "transboundary harm" and echoing both human rights approaches and the prior ILC work in its Articles on Prevention of transboundary harm from hazardous activities).

123. VICTOR TSILONIS, THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 176–82 (Angeliki Tsanta trans., 2017); AGGELOS GIOKARIS & PHOTINI PAZARTZIS, ETHNIKI KAI DIETHNIS POINIKI KATASTOLI TON DIETHNON ENKLIMATON [NATIONAL AND INTERNATIONAL CRIMINAL PROSECUTION OF INTERNATIONAL CRIMES] 193 (2012); *see, e.g.*, Prosecutor v. Bashir, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 81 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF (contrasting the accepted definition of "widespread" compared to "systematic"); Prosecutor v. Bemba, ICC-01/05-01/08, Decision on the Prosecution's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ¶ 33 (June 10, 2008) (comparing the use of the term "widespread" and "systematic" and delineating an avenue through which "systematic" can be inferred); Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 248 (July 15, 1999), https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (assessing that Article 5 requires the knowledge of the accused that their actions fit into "a pattern of widespread or systematic crimes").

124. The initial interpretations of similar wordings both in the ENMOD Convention and Additional Protocol I by the GA Disarmament Committee were disqualified by the Panel. *See* STOP ECOCIDE FOUND., *supra* note 109.

125. *Id.*

crimen sine lege principle of Article 22 of the Rome Statute.[126]

There are strong concerns and opposition regarding the anthropocentric element. Some academics have accepted such a compromise in light of the unsuitability of crimes against humanity to fully cover environmental degradation and devastation and the need to individually criminalize offenses against the natural environment.[127] The same critique also applies to the second threshold ("unlawful or wanton")[128] which aims at balancing socio-economic profits and environmental harms, introducing a sort of proportionality test and claiming that it is a widely accepted mechanism and falls under the principle of sustainable development.[129] In this case, some academics identify a sign of inconsistency between the desired eco-centric or eco-sensitive proclamations of the proposed preambular clause, and the anthropocentric view reinserted by introducing a cost-benefit approach in this threshold, especially when it comes to lawful acts with significant environmental impact that are excluded from the definition.[130]

No matter how noble, sensitive, and necessary (in view of the severe consequences of climate change) the proposal of a fifth international crime might be, there are some serious concerns with regards to its compatibility with the *nullum crimen sine lege* principle, as enshrined

126. *See* Rome Statute, *supra* note 63 ("[T]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted").

127. *See* Heller, *supra* note 117 (discussing both structural and conceptual reasons for ecocide to be included as an international crime and not included under a crime against humanity).

128. The second element ("wanton") will be further analyzed in Title 3b and associated with the *mens rea* of the crime, as it sets a more subjective criterion in the equation. *See* STOP ECOCIDE FOUND., *supra* note 109.

129. *See id.* (including in the proposed definition for ecocide a proportionality test and as part of the goal of balancing the prohibited consequence with the social and economic benefits). In order to support its views, the Panel reiterates other war crime provisions, which include a kind of proportionality test between the prohibited consequences and the military advantage or necessity. However, one may observe that in the cases in question, the elements counterbalancing the prohibited consequences are quite different (socio-economic benefits v. military advantage and necessity), mutating the anthropocentric approach of the Rome Statute and degrading to a materialistic one. *See id.*

130. Ambos, *supra* note 113.

in Article 22 of the Rome Statute.[131] Such concern arises especially in the following two instances.

First, as the proposal does not specify the timeframe of the proposed crime, when does "ecocide" take place—in peacetime or in wartime? Apparently, the aim was to introduce a provision that could cover any environmentally hazardous acts that would take place in peacetime, as there is already a provision related to armed conflicts (no matter their exact nature), without exploiting the mere anthropocentric nature of crimes against humanity,[132] rather than adapting the Rome Statute to the necessity of an eco-sensitive approach. Yet, crimes against humanity and war crimes may sometimes overlap, as the former may also be committed during an ongoing armed conflict, if the individual acts or charges form part of a "widespread or systematic attack against civilian population."[133] Then, what would be their exact relation? German judge and scholar Kai Ambos reasonably posed the question if, and how, could "ecocide" be conceived as a posterior *lex specialis* when the *ratione materiae* scope of application of the respective war crime is perceived by the Panel as narrower.[134]

131. Rome Statute, *supra* note 63, art. 22.

132. It has been argued that—under certain circumstances—environmental harms and destruction could also fall under four specific counts of crimes against humanity: (i) extermination (in the sense of Article 7, paragraphs 1b and 2b of the Rome Statute); (ii) deportation or forcible transfer (paragraphs 1d and 2d); (iii) persecution (paragraphs 1h and 2g); and (iv) other inhumane acts (paragraph 1k). *See id.* art. 7, ¶¶ 1–2; Donald K. Anton, *Adding a Green Focus: The Office of the Prosecutor of the International Criminal Court Highlights the 'Environment' in Case Selection and Prioritization*, 1, 4–8 (Griffith L. Sch. Rsch. Paper No. 17–03, 2016); Killean, *supra* note 91; Bustami & Hecken, *supra* note 91, at 160–61; STELIOS PERRAKIS & MARIA DANIELLA MAROUDA, DIETHNÍS DIKAIOSÝNI [INTERNATIONAL JUSTICE] 297–98 (2d ed. 2018).

133. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 233–34 (2d ed. 2010); *see generally* Payam Akhavan, *Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence*, 6 J. INT'L CRIM. JUST. 21 (2008).

134. Ambos, *supra* note 113. The question of criminalizing environmental damages has also been raised with regard to the crime of aggression. Indeed, acts committed by a State's military forces could amount to a sort of "use of force against the territorial integrity or political independence of [another] state." U.N. Charter art. 2, ¶ 4; G.A. Res. 3314 (XXIX), at 4 (Dec. 14, 1974). Although, the alleged violations should be attributed to the persons in charge. Such questions arose during the investigation of potential "aggression-related environmental harms" during the

Second is determining what kind of activities fall under "acts" as proposed in the definition. According to the Panel, in its explanatory note, the term "acts" necessarily encompasses omissions as well.[135] Yet such an option manifestly defies the *nullum crimen sine lege* principle, as it lacks the clarity required in international criminal law. More specifically, as mandated in Article 22 of the Rome Statute, for a person to be held criminally responsible under International Criminal Law, the conduct in question shall conjunctively be internationally criminalized and fall under the jurisdiction of the Court (paragraph 1), and the definition of the allegedly committed crime shall be clearly and strictly construed, without being extended by analogy (paragraph 2).[136] Besides, in cases of ambiguity, the definition shall be interpreted *in bonam partem*, that is, in favor of the alleged perpetrator (para 2 in fine).[137]

B. *MENS REA* AND THE CHALLENGE OF ATTRIBUTING INDIVIDUAL CRIMINAL RESPONSIBILITY FOR "ECOCIDE": RESHUFFLING THE ICC STANDARDS?

The second threshold ("unlawful or wanton") of the proposed crime also includes a mental element. According to the Panel, "wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated."[138] The term is well-known in international law and has its roots in Article 8 para 2(a)(iv) of the Rome Statute.[139] The Experts,

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1999 NATO operations in the former Yugoslavia. However, no criminal responsibilities were attributed. *See* U.N. Int'l Crim. Trib. of the Former Yugoslovia , *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, ¶¶ 14–25, (June 13, 2000), https://www.icty.org/x/file/Press/nato061300.pdf; Vojin Joksimovich, *Militarism and Ecology: NATO Ecocide in Serbia*, 11 MEDITERRANEAN Q. 140, 140–60 (2000); Killean, *supra* note 91.

135. STOP ECOCIDE FOUND., *supra* note 64.

136. Rome Statute, *supra* note 63, art. 22.

137. Donna Minha, *The Proposed Definition of the Crime of Ecocide: An Important Step Forward, but Can Our Planet Wait?*, EJIL: TALK! (July 1, 2021), https://www.ejiltalk.org/the-proposed-definition-of-the-crime-of-ecocide-an-important-step-forward-but-can-our-planet-wait.

138. *See* STOP ECOCIDE FOUND., *supra* note 64.

139. Rome Statute, *supra* note 63, art. 8. Although Article 55, paragraph 1 of Additional Protocol I does not use the same wording, it sets the mental element as

reiterating jurisprudence of international criminal courts and tribunals, consider that "wanton" commonly encompasses intention or reckless disregard of the consequences.[140] Such an interpretation is in alignment with the Panel's approach on the way Article 30 of the Rome Statute should be interpreted in the case of "ecocide." While Article 30 sets the rule with regards to the default *mens rea* of all international crimes and requires the intent of the alleged perpetrator to cause the prohibited consequence or at least the perpetrator's awareness that this consequence will eventually occur "in the ordinary course of events," and thus requiring only *dolus directus* and *dolus indirectus.*[141] The Panel, in view of the high thresholds set for the crime of "ecocide," proposes that Article 30 should be interpreted as a sort of recklessness or *dolus eventualis* that would respond to the knowledge of the required "substantial likelihood of severe and either widespread or long-term damage."[142] This diverges from the long-standing jurisprudence and academic literature, both of which are in favor of awareness that approximates certainty that the consequences described will occur.[143]

Although not extensively treated in the literature, there is an

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follows: "This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 55 ¶ 1, June 8, 1977, 1125 U.N.T.S. 4, 28.

140. STOP ECOCIDE FOUND., *supra* note 64 (citing Prosecutor v. Kordi, Case No. IT-95-14/2-T, Judgement, ¶¶ 346–347 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), https://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf). However, the Panel did not take into consideration other interpretations of Article 30 requiring—first and foremost—*dolus directus*. *See id.*; Rome Statute, *supra* note 63, art. 8.

141. Rome Statute, *supra* note 63, art. 30; Anastacia Greene, *Mens Rea and the Proposed Legal Definition of Ecocide*, VOLKERRECHTSBLOG (July 7, 2021), https://voelkerrechtsblog.org/mens-rea-and-the-proposed-legal-definition-of-ecocide (analyzing the language of the legal definition of ecocide proposed by a panel of international experts).

142. STOP ECOCIDE FOUND., *supra* note 64. Lowering the required *mens rea* would probably cover examples of non-green acts/omissions, such as hazardous (mostly industrial) accidents. In such cases, the perpetrator(s) usually act recklessly or with *dolus eventualis*, yet they were capable of recognizing the substantial likelihood that harm to the environment could occur. *See* Greene, *supra* note 141.

143. STOP ECOCIDE FOUND., *supra* note 64.

additional issue that makes the adoption of an international crime of "ecocide" quite problematic: the attribution of international criminal responsibility to a single person. According to Article 25, paragraph 1 of the Rome Statute, "[t]he Court shall have jurisdiction over natural persons pursuant to this Statute."[144] But it is likely impossible that a single person could commit an act, as described above, that could have such an extensive environmental impact that the individual person would be held criminally responsible at the international level. Such hazardous consequences are usually caused by acts by corporations—and usually multinational ones, which have an expanded area of activities, a variety of expertise, and a wide network of transactions worldwide. Yet treating multinational corporations as legal personalities clearly falls outside the scope of the Rome Statute.[145] Even in the case that the Prosecutor or the Court overcome such an obstacle, which is highly impossible without an amendment of its Statute, there are still some serious legal concerns.

First, what if a considerable percentage of the corporation's assets belongs to one or more State(s)? If that would be the case, then the following alternatives would take place: (a) the ICC would have to deal with a mere interstate issue, challenging its own nature, as developed since its conception and creation; (b) the parties to the case—the corporation or the State(s)—would exempt the case from the ICC jurisdiction and would search for another more competent forum to resolve the dispute (an alternative with questionable results, as it would deviate from the context of international criminal justice); and (c) the investigation for the perpetrator would result in finding a person or persons in the corporation's hierarchy that could be held criminally responsible for the acts committed and for the consequent environmental damages. However, it would be quite difficult to identify a single person and to establish a concrete *nexus* between the decision, the act, and the consequences on the environment. In this vein, the following problems might also emerge:

(a) In the best-case scenario, a corporation deploys its activities in a single and specific geographic area and the consequences influence the people and the resources of this exact region. If that is the case,

144. Rome Statute, *supra* note 63, art. 25.
145. Bustami & Hecken, *supra* note 91, at 173–74.

then it would be easier to establish a sufficient *nexus* among the necessary elements (decision-act/omission-consequences.)[146]

(b) In the worst-case scenario, the affiliated corporation of a multinational one (seated, for example, in the United States) deploys its statutory activities in a single and specific geographic area (for example, India) and causes "severe and either widespread or long-term damage" to the environment and the natural resources of a third country (for example, the neighboring Indonesia). In such a hypothetical case, it would be highly impossible to identify a single person that would have decided and permitted the execution of an act, in order to hold that person internationally responsible, creating an insurmountable obstacle and, probably, leading to impunity.[147]

One way to treat such a problem is through the existing mechanism of command or superior responsibility pursuant to Article 28 of the Rome Statute.[148] While there is a slight terminological difference, as command responsibility is related to armed forces (Article 28a) and superior responsibility to civilians (Article 28b,)[149] the minimum prerequisites—as set out in the *Celebici*[150]—are almost the same.[151] As reiterated in the *Bagilishema*, the "effective control" criterion remains, yet it is adapted to the context of civilians and it may differ.[152] More specifically, there are three elements that need to be fulfilled: (1) a mental one, requiring that the person in charge knew or at least

146. *See* discussion *infra* pp. 452–53 on "causation."

147. *See* discussion *infra* pp. 452–53 on "causation."

148. Rome Statute, *supra* note 63, art. 28.

149. Although this is not explicitly mentioned. *Id.* ("With respect to superior and subordinate relationships not described in paragraph (a) . . . .").

150. Prosecutor v. Delalic [*Celebici Case*], Case No. IT-96-21-T, Judgement, ¶¶ 331–401 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), https://www.icty.org/x/cases/mucic/tjug/en (recalling the simultaneous customary and conventional nature of the principle in question (it is to be noted that it was first codified in the Additional Protocol I and with a slightly different wording in Article 7.3 of the ICTY Statute) and setting the basic necessary conditions, that is, the need to establish a superior-commander/subordinate relationship, the required mental element, as well as "a failure to take reasonable measures to prevent or punish violations of international criminal law").

151. Rome Statute, *supra* note 63, art. 28.

152. Prosecutor v. Bagilishema, Case No. ICTR-95-1A, Judgement, ¶ 52 (Int'l Crim. Trib. for Rwanda July 3, 2002), https://www.refworld.org/cases,ICTR,48abd5180.html.

consciously disregarded that his/her subordinates were committing crime; (2) the subordinates falling under the superior's "effective responsibility and control"; and (3) that the superior did not take the "necessary and reasonable measures" to prevent the crimes or to refer the case to the competent authorities (Article 28b(i)–(iii)).[153]

The mental element was further elaborated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Celebici* case, in which the court acknowledged that the person in charge may have "actual knowledge . . . that his subordinates were committing or about to commit crimes" or at least indications based on circumstantial information that there was the possibility of such offenses being committed and, thus, there was a need for further investigation.[154] However, in *Blaškic*, the ICTY opted for lifting commanders' or superiors' responsibility in cases where they fulfilled their duties diligently[155] but without knowing that crimes were to be committed or may have already been committed.[156] Yet this precedent was disqualified later on.[157] Especially for civilian superiors, the ICC adopted a stricter *mens rea* requirement,[158] and it is questionable whether it would apply in the case of "ecocide" as it does not correspond to the proposed *mens rea*.

Regarding the two objective criteria, the question of "effective control" has raised quite a debate in international criminal

153. Rome Statute, *supra* note 63, art. 28.

154. *Celebici Case*, Case No. IT-96-21-T, Judgement, ¶ 383.

155. Prosecutor v. Blaškic, Case No. IT-95-14-A, Judgement, ¶ 61 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004), https://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf (stating that potential negligent behavior shall not life the responsibility).

156. *Id.*

157. CRYER ET AL., *supra* note 133, at 392 (citing Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Appeal Judgement, ¶¶ 34–35 (Int'l Crim. Trib. for Rwanda July 3, 2002); *Blaškic*, Case No. IT-95-14-A, Judgement, ¶ 63; Prosecutor v. Halilovic, Case No. IT-01-48-A, Judgement, ¶ 71 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 16, 2007)).

158. CRYER ET AL., *supra* note 133, at 394.

jurisprudence.[159] For the failure to take measures[160] or to refer the case to the authorities, the international criminal jurisprudence introduces a dual, and separate, type of liability,[161] and further elaborates that there is neither a need for prior knowledge of the alleged offenses nor the subsequent punishment of the subordinate for committing a crime that the superior could have prevented, lifting the superior's liability.[162] The measures expected may vary according to the nature and the intensity of the superior's control, as stated in the *Blaškic* and implied in Article 28.[163] Regarding the superior's duty to punish, the ICTY statement in the *Oric* is quite enlightening on the specific circumstances that need to be fulfilled.[164] Yet none of these criteria fully corresponds to the nature of corporations. At first, in cases falling within the scope of the proposed crime, it would be difficult to prove the "effective control" of a higher administrative member on subordinates in an affiliation seated abroad, and almost impossible to adopt the necessary measures or to refer the case to any competent authorities. Besides, in similar cases, the persons involved usually avoid referring to such instances.[165]

159. *Id.* at 391–92.; Christopher Greenwood, *Command Responsibility and the* Hadžihasanovic *Decision*, 2 J. INT'L CRIM. JUST. 598 (2004).; Prosecutor v. Hadžihasanovic, Case No. IT-01-47-T, Judgement, ¶ 199 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006), https://www.icty.org/x/cases/hadzihasanovic_kubura/tjug/en/had-judg060315e.pdf; Prosecutor v. Hadžihasanovic, Case No. IT-01-47-A, Appeal Judgement, ¶¶ 37–56 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 22, 2008), https://www.icty.org/x/cases/hadzihasanovic_kubura/acjug/en/had-judg080422.pdf.

160. This might also be considered as acceptance of the crime(s) committed, as in *Halilovic*. *Halilovic*, Case No. IT-01-48-A, Judgement, ¶ 95.

161. CRYER ET AL., *supra* note 133, at 394–95; *see Blaškic*, Case No. IT-95-14-A, Judgement, ¶¶ 78–85; *Halilovic*, Case No. IT-01-48-A, Judgement, ¶ 94.

162. Prosecutor v. Oric, Case No. IT-03-68-T, Judgement, ¶ 326 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006), https://www.icty.org/x/cases/oric/tjug/en/ori-jud060630e.pdf.

163. *Blaškic*, Case No. IT-95-14-A, Judgement, ¶ 72; *see* Rome Statute, *supra* note 63, art. 28. Both the ICTY and the ICC have occasionally drawn some examples on what measures could fall under the "failure [conversely, obligation] to prevent." CRYER ET AL., *supra* note 133, at 395–96.

164. *Oric*, Case No. IT-03-68-T, Judgement, ¶ 336; *see Hadžihasanovic*, Case No. IT-01-47-A, Appeal Judgement, ¶¶ 149–55 (explaining the duty to punish may also theoretically cover disciplinary measures/sanctions); CRYER ET AL., *supra* note 133, at 396.

165. Vanessa Schwegler, *The Disposable Nature: The Case of Ecocide and*

The last (implied) criterion of Article 28 is causation and has raised quite a debate, as the commander's or superior's potential failure to prevent or to punish requires a different handle.[166] As acknowledged in the *Celebici*:

> [R]ecognition of a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's failure to take the measures within his powers to prevent them. . . . [The latter] may be considered to be causally linked to the offen[s]es, . . . for his failure to fulfil[l] his duty to act, the acts of his subordinates would not have been committed.[167]

This argument was subsequently abandoned[168] and somehow infiltrated the Rome Statute. Requiring that the alleged crimes occur for the superior's failure to exercise control and authority over subordinates logically and conversely excludes liability, and causation, by omission.[169]

In this way, the mechanism of superior responsibility at first seems to be the most relevant means of international criminal justice; when it comes to attributing one's criminal responsibility in cases when a group of persons commit a set of acts, it does not fully correspond to the mandate and the collective or contextual nature of corporations, while the diffusion of the responsibility sets additional obstacles in front of any effort to identify a single (natural) person as the primarily responsible. As well-put by Schwegler:

> It is predominantly the organi[z]ational existence [of] the corporations that foster deviant [behavior], not natural persons. A corporate culture is

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Corporate Accountability, 9 AMSTERDAM L. F. 87, 90 (2017) (explaining the complications of establishing *mens rea* in corporate liability cases and affirming the "predominant intent of corporations . . . to minimize loss.").

166. Otto Triffterer, *Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 of the Rome Statute?*, 15 LEIDEN J. INT'L L. 179 (2002).

167. *Celebici Case*, Case No. IT-96-21-T, Judgement, ¶¶ 398–99 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), https://www.icty.org/x/cases/mucic/tjug/en.

168. *Oric*, Case No. IT-03-68-T, Judgement, ¶ 338; *Hadžihasanovic*, Case No. IT-01-47-A, Appeal Judgement, ¶ 39.

169. As stated in the recent *Bemba Gombo* case. Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Warrant of Arrest, ¶¶ 424–425 (June 15, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF.

> created, which can translate into criminal environments. When individuals are separated from the corporation they no longer have the same incentive to engage in destructive doings. Even if individuals would have the same incentives when separated from the corporation, they usually do not have the resources to commit the wrongdoing. By focusing on and indicting individuals within a corporation, the true nature of corporate participation in international criminalities, such as ecocide, is not effectively captured, nor is the organisational wrongdoing effectively addressed. It is also very difficult to point out which single person is to blame within a corporation.[170]

In any case, although it is a *prima facie* logical argument, superior responsibility was neither initially designed to cover environmental crimes, in the context of the long-existent conventional or customary core crimes, nor it was intended to serve such a purpose.[171]

IV. ALTERNATIVE MEANS FOR REDRESSING ENVIRONMENTAL HARMS AND DAMAGES?

For all the aforementioned reasons, the ICC does not seem to be the most convenient forum for dealing with environmental protection legal issues. Conversely, there are some more viable and realistic solutions to adjudicate such cases. Some academics and researchers have already proposed the establishment of an "International Environmental Court" that could possibly adapt to the needs and challenges of this legal branch, and whose judges would possess the necessary scientific and technical background.[172] However, none of the scholarship in this area has yet specified, for example, its potential applicable law, its exact nature (would it deal with civil or criminal claims?), or its *ratione personae* jurisdiction (would it try inter-State applications and communications, legal entities, or natural persons?).

For the criminal nature of "ecocide" to be maintained, the introduction of a new transnational crime has been sporadically proposed to at least criminalize environmentally hazardous acts and omissions at a domestic level, following the ratio of various

170. Schwegler, *supra* note 165, at 90.
171. Greene, *supra* note 141.
172. Stuart Bruce, *The Project for an International Environmental Court, in* CONCILIATION IN INTERNATIONAL LAW 2, 11 (Christopher Tomuschat et al. eds., 2016).

international conventions. In this way, the punishment of potential perpetrators and the reparation of victims would be achievable, as the domestic instances have already dealt with many of the obstacles raised before the ICC (that is, *locus standi* of legal persons or entities).[173] However, there is reasonable fear that corruption in government services would possibly impede any efforts.[174]

In addition, the ICJ could also be of use in such circumstances, whether under its competence in adjudicating inter-State disputes or its advisory function. With regard to the former, no such issues have yet been raised; the proclaimed application of Tuvalu against both the United States and Australia for damages suffered by its citizens due to excessive emissions of greenhouse gasses was not brought before the Court.[175] On the other hand, some researchers have proposed that the ICJ would issue an Advisory Opinion concerning States' international obligations towards populations that are most affected by the consequences of human-induced climate change.[176]

Another commonly used legal recourse would be the international or regional human rights mechanisms—judicial or quasi-judicial—that could examine potential State liability through the lens of international human rights law.[177] In the same vein, international procedures, such as the UN Universal Periodic Review, could prove quite useful, as States would be politically committed to respect their international environmental obligations.[178]

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173. *Id.* at 27–28.

174. Greene, *supra* note 69, at 44–45.

175. *See, e.g.*, Mariya Gromilova, *Rescuing the People of Tuvalu: Towards an I.C.J. Advisory Opinion on the International Legal Obligations to Protect the Environment and Human Rights of Populations Affected by Climate Change*, 10 INTERCULTURAL HUM. RTS. L. REV. 234, 237 (2015); Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL'Y J. 103, 115–28 (2005) (assessing the viability of Tuvalu's potential case against the United States before the ICJ).

176. Gromilova, *supra* note 175; Greene, *supra* note 69, at 46.

177. Gromilova, *supra* note 175.

178. *See* Valentina Carraro, *Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies*, 63 INT'L STUD. Q. 1, 5-13 (2019) (offering an analysis of the extent to which the Universal Periodic Review is effective in improving state compliance with human rights).

Lastly, although not specifically oriented to environmental protection, the World Trade Organization could be a useful forum to settle disputes with a considerable environmental impact that primarily fall under its mandate, as the agreements adopted in this framework usually guarantee the governments' right to protect the environment, and they may interact with international agreements adopted outside the WTO context that still affect trade.[179] In fact, the Trade and Environment Committee has said that when an action is taken on the basis of an international environmental agreement, the Parties concerned should settle the case under the terms prescribed in the said convention.[180] However, if one party to the dispute has not adhered to that agreement, the WTO could provide a possible forum for settling it.[181]

CONCLUSION

Having in mind the impact of human activities on climate, their consequences on human life and dignity,[182] and the steady upgrade of the protection of the environment to a universal human right, the potential criminalization of environmental degradation and devastation is still very appealing. However, one should bear in mind the aforementioned critical issues while examining the eventual adoption of a fifth international crime in the context of the ICC field of jurisdiction.

First, the ICC should give a more thorough and clear definition and explanation of the *actus reus* and *mens rea* of the crime, so as not to contradict other existing provisions of the Rome Statute and to comply with the basic principles of criminal law, especially the *nullum crimen sine lege* doctrine.[183] Fully defining which kind of acts should be internationally criminalized, whether omissions should also be included, the issue of (un)lawfulness of the committed acts, as well as

179. *The Environment: A Specific Concern*, WORLD TRADE ORG. (last visited Jan. 22, 2022), https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm.

180. *Id.*

181. *Id.*; Anastasios Gourgourinis, *Diethnés oikonomikó díkaio: Diethneís emporikés schéseis* [*International Economic Law: International Commercial Relations*], *in* THE LAW OF INTERNATIONAL SOCIETY, *supra* note 10, at 681–84.

182. *See generally*, Perrakis, *supra* note 1, at 363–73.

183. Greene, *supra* note 141, at 31–32.

the specific kind of the mental element required are some of the principal questions that need and shall be carefully and explicitly responded to.

But does the international community really need an international crime of "ecocide" to tackle the issue of legal environmental protection? Probably yes, in view of the high environmental impact of many acts and/or omissions. However, there are still some undeniable obstacles that will need to be overcome to introduce a new international crime; the already existing ones were not adopted with an environmental perspective in mind.[184] More specifically, genocide and the crime of aggression would make it difficult to establish either the necessary genocidal intent or the criminal liability of the persons in charge of aggressive acts against the sovereignty, territorial integrity and political independence of a State, while the human-centered character of crimes against humanity is not suitable for environmental crimes—even if environmentally hazardous acts could fall under some categories of Article 7 Rome Statute. However, what would the exact relation be to the already existing war crime provision on attacks against the natural environment, taking into consideration that crimes against humanity can be committed both in peacetime and in wartime?

For this reason, there is need for the ICC to receive more detailed proposals—rather than a seven-page explanatory note or comment—that would not include amendments solely to the Preamble and to a couple of provisions of the Rome Statute, but to any other provision, and the Rules of Procedures and Evidence and the Elements of Crimes as well, giving solutions to any potential legal questions of this kind. Any vague disclaimer falls far from the *nullum crimen sine lege*

184. One shall also bear in mind the recent practice of the Office of the Prosecutor in respect. In fact, the then ICC Prosecutor, Fatou Bensouda, in her 2013 and 2016 Policy Papers on case selection and prioritization, included an environmental perspective while exercising the prosecutorial discretion. *See* Killean, *supra* note 91 (explaining that the ICC in the 2013 and 2016 Policy Papers on case selection and prioritization, an environmental perspective was included); Greene, *supra* note 141, at 22–26. For a critical evaluation of how the crime of ecocide could be conceptualized under international law, and its possible limitations, see also Ricardo Pereira, *After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?*, 31 CRIM. L.F. 179 (2020).

principle. Besides, such a deficient proposal would probably discourage States from formally amending the statutory instruments of the ICC.

In the same vein, some researchers have proposed that the ICC reparative mechanisms (Article 75, the Court's independent, non-judicial Trust Fund for Victims)[185] should be reviewed accordingly to effectively respond to the conditions subsequent to the environmental damages or destruction, mainly because the necessary requirements set by the ICC jurisprudence aim at restoring any "personal" harm, following the explicit anthropocentric and human rights-related nature of the long-standing international crimes.

Furthermore, another crucial issue that the ICC needs to clearly set out is the attribution of international criminal responsibility, especially in view of the principal actors in the global economic and commercial arena. Indeed, such activities are usually undertaken by corporations with a wide network of transactions and affiliations. Yet they clearly fall outside the *ratione personae* scope of application of the ICC Statute. That means that the Panel should also consider the probability of amending Article 25 para 1. This process could prove very intriguing as it would even challenge the nature of the Court, as States usually possess a considerable percentage of the corporation's assets, likely upgrading the case into an interstate dispute. Even when the corporation's assets belong solely to individuals, it would be difficult to establish a concrete nexus between the person in charge and the prohibited consequence. Although some academics have proposed the use of superior responsibility enshrined in Article 28 of the Rome Statute, by analogy, such an alternative would be quite problematic, as it was meant to respond to military environments and it would be difficult to readapt this mechanism to a mere economic one, and prove effective control and authority over the acts or omissions of a "subordinate" working for a subsidiary. In any case, such a solution would violate the *nullum crimen sine lege* principle, as expanding by analogy the scope of application of the existing provisions is forbidden by international criminal law.

In addition, even though the recent proposal is quite interesting and

185. PERRAKIS & MAROUDA, *supra* note 132, at 301.

demonstrates the increasing concern on human-induced implications on the environment, it is dubious whether it serves its proclaimed purpose and aspiration. Although inspired by genocide (the "crime of crimes")[186] and the structure of the crimes against humanity, in the case of environmental protection an anthropocentric approach probably mutates any effort into a "hypocritical" political, economical, financial, trade or other compromise between the vital need to protect the environment and criminalize acts that severely damage it. This allows some *prima facie* lawful acts, despite their high potential environmental impact, to serve socio-economic benefits in the short or long run.

In any case, if the ICC Statute is eventually amended, following the necessary requirements of paragraph 3 of Article 121, "[t]he adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties,"[187] only States that accept the amendments, will be bound.[188] Without rejecting the moral and legal importance of such an effort, especially considering its long historic and theoretical background—the Vietnam Wars and the extensive work of international organizations and mechanisms like the UN International Law Commission—under a realistic approach, it is very questionable that industrially-developed States would adhere to such an instrument and risk their economic profits. Besides, as presented above, there are some significant alternatives to restoring harms of all kinds from environmental degradation or devastation that could prove more effective for reparations.

186. William A Schabas, Introductory Note, *Convention on the Prevention and Punishment of the Crime of Genocide*, at 4, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (last visited April 5, 2023), https://legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf.

187. Rome Statute, *supra* note 63, art. 121, ¶ 3.

188. Heller, *supra* note 117 ("[E]ven if 2/3 of states parties are willing to support an ecocide amendment, which is unlikely, an amendment to Art. 5 of the Rome Statute—which ecocide would be—would apply only to states that formally accepted it."); Minha, *supra* note 137 ("[E]ven if two thirds of States Parties were to agree to amend the Statute, as required by Article 121(3) of the Rome Statute, achieving this might take time.").