UNIVERSITY OF TARTU
SCHOOL OF LAW
Department of Public Law

Meike Olszak

THE PROBLEM OF AN INTERNATIONAL CRIMINAL LAW OF THE ENVIRONMENT: UNDERSTANDING THE ONGOING FAILURE OF MAKING ECOCIDE A CRIME UNDER INTERNATIONAL LAW

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Supervisor
MA Andres Parmas

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Table of Contents

Introduction

Within the last century the world has witnessed numerous disastrous events caused by human agency resulting in severe harm to our natural environment and extending beyond national borders. Recognizing the detrimental impact human misconduct, such as the destruction of the rain forest, the dumping of toxic waste or unsustainable fishing practices[1] can have on the world's ecosystems, the international community reacted with the establishment of a novel sub-discipline of international law, the doctrine of international environmental law (IEL).[2] However, its state-centred and consent-based nature diminishes its potential to prevent future environmental damage. Hence, the large-scale and irreversible harm of major environmental disasters such as the 1980 toxic contamination of the Love Canal in the State of New York[3], the 1986 nuclear pollution of Chernobyl[4] or the 2010 Deepwater Horizon oil spill in the Gulf of Mexico[5] reinforced the call for preventive actions on the international level. In the light of prevailing impunity for perpetrators and partly based on the idea that individual criminal responsibility could entail a preventive effect by means of deterrence,[6] the issue further invoked the doctrine of international criminal law (ICL). In order to address the persisting inability to hold accountable those responsible for severe environmental harm, several legal scholars, working professionals and members of the civil society demanded the recognition of environmental offences as a separate crime, the international crime of ecocide.[7]

In fact, certain developments on the international, regional and national level seemed to be in favour of the emergence of such a novel crime. Since the early 1990s the United Nations (UN) discussed the role of criminal law in the protection of the environment. In that context an ad hoc working group brought forward a number of recommendations suggesting the formulation of certain core criminal environmental offences while taking into account basic

[1] M. A. Gray. The International Crime of Ecocide. – 26 California Western International Law Journal 1996 (2), p. 217.
[2] Throughout this thesis the term international law refers to public international law; private international law will not be considered.
[3] C. C. Boyd. Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work. – 32 William & Mary Environmental Law and Policy Review 2008 (2), p. 483.
[4] L. A. Teclaff. Beyond Restoration - The Case of Ecocide. – 34 Natural Resources Journal 1994 (4), p. 937.
[5] P. Higgins. Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet, London: Shepheard- Valwyn Ltd 2010, p. 256.
[6] K. Ambos. Treatise on International Criminal Law, Oxford: Oxford University Press 2013, p. 72.
[7] Inter alia, the following research papers are the outcome of such joined initiatives: S. Meheta, P. Merz. Ecocide - A New Crime against Peace. – 17 Environmental Law Review 2015 (1), pp. 3-7 and B. Lay *et al*. Timely and Necessary: Ecocide Law as Urgent and Emerging. – 28 Journal Jurisprudence 2015, pp. 431-452.

principles of IEL.[8] However, their draft resolution developed to be considered by the UN's Economic and Social Council (ECOSOC) has never been adopted. Meanwhile, in the course of the UN efforts to codify international crimes in general and to establish a permanent international criminal court, the UN General Assembly (UNGA) mandated its subsidiary body, the International Law Commission (ILC), to prepare a Draft Code of Crimes Against the Peace and Security of Mankind (Draft Code). At that time the ILC considered the inclusion of a separate environmental crime into the Draft Code that should later become the underlying document of today's International Criminal Court (ICC).[9] With such an initiative the ILC contemplated the possibility of widening already existing prohibitions under the Geneva Conventions[10] to situations of peacetime. However, the respective article was eventually removed completely from the Draft Code[11] and its only remainder in the final Rome Statute is confined to criminalizing certain environmental misconduct in situations of armed conflict that can be prosecuted as a war crime.[12] Despite the inability of the respective provision to address environmental damage caused outside of the context of armed conflict, it has further been criticized by several legal scholars for its weakness and ambiguity rendering its actual invocation unlikely in practice.[13]

Nonetheless, some scholars claim that the critical importance of the preservation of the world's ecosystems has increasingly gained international acceptance up to the consideration of a protection through criminal sanctions.[14] Such a belief could be supported with a view to the ILC's initial Draft Code on State Responsibility. Albeit envisaging state liability rather than individual criminal liability, it has been suggested that "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

[8] Draft Resolution and Report on the Meeting of the Ad Hoc Group on More Effective Forms of International Cooperation Against Transnational Crime, Including Environmental Crime, UN Doc. E/CN. 15/1994/4/Add.2. Vienna: United Nations Publications 1993.
[9] Yearbook of the International Law Commission: Report of the Commission to the General Assembly on the work of its forty-third session, UN Doc. A/CN.4/SER.A/1991/Add.l (Part 2). New York: United Nations Publications 1991, p. 107.
[10] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva 08.06.1977, e.i.f. 07.12.1978, Art. 35 (3) and Art. 55 (1).
[11] C. Stahn. A Critical Introduction to International Criminal Law, Cambridge: Cambridge University Press 2019, p. 109.
[12] Rome Statute of the International Criminal Court. Rome 17.07.1998, e.i.f. 01.07.2002, Art. 8(2)(b)(iv).
[13] S. Meheta, *op. cit.*, p. 4 and T. Weinstein. Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities. – 17 Georgetown International Environmental Law Review 2005 (4), p. 721. Furthermore, a subsequent attempt of including a crime of ecocide into the extension of the Convention on Genocide equally failed, see: S. Meheta, *op. cit.*, p. 4.
[14] M. A. Gray*, op. cit.*, p. 268.

seas"[15] could amount to an international crime. At least, it is notable that the ILC in the respective article equates environmental degradation amongst others with those crimes that are nowadays considered as accepted crimes under international law, such as genocide and aggression.[16] However, the ILC's approach has been severely criticized[17] and can at most be understood as a slight trend of the international community to consider environmental harm in the context of international criminalization processes.

Furthermore, regional endeavours such as a Council of Europe resolution recommending member states to examine "criminal penalties for damage to the environment […] in the most serious cases"[18] and its later Convention on the Protection of the Environment through Criminal Law[19] contain strong language clearly supporting the international criminalisation of severe environmental damage. Though, similarly to the developments on an international level, until today these promising initiatives lack implementation and acceptance.

Nevertheless, despite the lack of agreement on the international level, in the 1990s a number of national jurisdictions revived the ILC's efforts of criminalizing environmental harm and included the crime of ecocide into their national criminal codes.[20] In general, it can be observed that the criminalization of environmental misconduct is increasingly well-established on a national level.[21] Moreover, the recognition of an international crime of ecocide recently evolved into one of the central demands generated by environmental activists. Such a movement was triggered by the 'Eradicating Ecocide'[22] campaign initiated by the British lawyer P. Higgins who submitted a proposal of an ecocide definition to the ILC

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[15] Yearbook of the International Law Commission: Report of the Commission to the General Assembly on the work of its twenty-eighth session, UN Doc. A/CN.4/SER.4/1976/Add. 1 (Part 2). New York: United Nations Publications 1976, pp. 95-96.
[16] L. Berat. Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law. – 11 Boston University International Law Journal 1993 (2), p. 344.
[17] Amongst others in: J. H. H. Weiler *et al*. (eds.) International Crimes of State – A Critical Analysis of the ILC's Draft Article 19 on State Responsibility, Berlin: Walter de Gruyter 1989.
[18] Council of Europe, Committee of Ministers, Resolution (77) 28 on the Contribution of the Criminal Law to the Protection of the Environment, 28.09.1977, para 1.
[19] Convention on the Protection of the Environment through Criminal Law. Strasbourg: 04.11.1998. Note: The Convention has not yet entered into force.
[20] See (not exclusively): Penal Code of Viet Nam. Adopted 21.12.1999, e.i.f. 10.07.2000, Art. 342 and Criminal Code of The Russian Federation. Adopted 24.05.1996, e.i.f. 13.06.1996, Art. 358 and Criminal Code of the Republic of Moldova. Adopted 18.04.2002, e.i.f. 12.06.2003, Art. 136.
[21] See: A. S. Hogeland. Criminal Enforcement of Environmental Laws. – 75 Massachusetts Law Review 1990 (3), pp. 112-121 and S. F. Mandiberg, M. G Faure. Graduated Punishment Approach to Environmental Crimes: Beyond Vindication of Administrative Authority in the United States and Europe. – 34 Columbia Journal of Environmental Law 2009 (2), p. 448 and M. G. Faure. The Revolution in Environmental Criminal Law in Europe. – 35 Virginia Environmental Law Journal 2017 (2), pp. 321-323 and L. Berat, *op. cit.*, p. 341.
[22] See: P. Higgins, *op. cit.* and further promoted online: Ecocide Law. – One Law to Protect the Earth. Accessible at: https://ecocidelaw.com (07.04.20).

to be considered as an amendment to the current text of the Rome Statute.[23] Numerous initiatives supported her push for a crime of ecocide, including 'The Ecocide Project' of the University of London[24], the UK movement 'Stop Ecocide'[25] and the international movement 'Extinction Rebellion'[26] which in particular attracted international attention through its "well-organized civil disobedience campaign"[27] in 2019. Meanwhile, the debate increasingly entered the legal academic discourse, to a great extent led by experts of IEL rather than ICL who aimed at advancing the case of ecocide by contributing to a further clarification of its meaning and its substantive elements.[28]

Notwithstanding considerable efforts on the national, regional and international level promoted by civil society, state representatives and academia, until today ecocide has not been recognized as an international crime.[29] Neither has an international environmental criminal law legally binding on all states regardless of the technical term 'ecocide' developed.[30] As there exists a growing consensus that serious environmental harm poses a significant threat that cannot be ignored,[31] the continuing absence of concrete international regulation leaves three options: firstly, criminalisation and prosecution on the national level[32], secondly, the indirect prosecution of environmental harm under the core crimes of the ICC[33] and thirdly, the predominance of impunity and a lack of deterrence.[34] In fact, the former two options have been criticised for their inability of sufficiently addressing serious environmental harm with cross-border effects by a number of legal scholars.[35] Hence, it is currently unlikely that legal provisions can prevent any future harmful incidences similar to those mentioned above while it is rather expected that impunity for those responsible for environmental harm will prevail. This raises the question why an issue discussed by a multitude of different actors

[23] P. Higgins, 2010, *op. cit.*, p. 257.
[24] A. Gauger *et al*. The Ecocide Project: Ecocide is the missing 5th Crime Against Peace. London: Human Rights Consortium 2012.
[25] Become an Earth Protector. – Stop Ecocide. Accessible at: https://www.stopecocide.earth (07.04.20).
[26] International Rebellion. – Extinction Rebellion. Accessible at: https://rebellion.earth (07.04.20).
[27] A 'Climate Spring': UK protests embolden global climate movement. – Reuters. Accessible at: https://uk.reuters.com/article/us-environment-extinction-global/a-climate-spring-uk-protests-embolden-global-climate-movement-idUKKCN1S91FI (07.04.20).
[28] C. Stahn, *op. cit.*, p. 109. See: S. Meheta, *op. cit.*, pp. 3-7.
[29] C. Stahn, *op. cit.*, p. 265.
[30] C. C. Boyd, *op. cit.*, p. 488 and C. Byung-Sun. Emergence of an International Environmental Criminal Law? – 19 UCLA Journal of Environmental Law and Policy 2000 (1), p. 12.
[31] L. A. Teclaff, *op. cit.*, p. 939.
[32] C. Byung-Sun, *op. cit.*, p. 12 and C. Stahn, *op. cit.*, p. 108.
[33] C. Stahn, *op. cit.*, pp. 108, 109 and T. Weinstein, *op. cit.*, p. 713.
[34] B. Lay *et al*., *op. cit.*, p. 432
[35] This issue will be further discussed throughout the thesis. See: M. A. Orellana. Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad. – 17 Georgetown International Environmental Law Review 2005 (4), pp. 673-696 and A. Greene. The Campaign to Make Ecocide an International Crime: Quixotic Quest Or Moral Imperative. – 30 Fordham Environmental Law Review 2019 (3), pp. 19-22.

over such a long period of time has not yet led to any relevant changes with regard to the respective legal framework but rather been "sidelined in the criminalization process"[36]. More precisely, it seems reasonable and even necessary to uncover the reasons for the ongoing failure of the international community to incorporate an international crime of ecocide into the current legal system. Thus, the thesis at hand aims to provide a better understanding of the existing obstacles in the path of making ecocide a crime under international law. To that effect, this thesis is based on a critical evaluation of the various difficulties impeding the ecocide project. Thereby, it adopts elements of applied research as it partly refers to potential practical solutions to the current lack of accountability. However, the main goal of this research is not to suggest solutions but rather to reveal the actual reasons for the ongoing failure of closing the respective legal gap. Accordingly, mainly, a fundamental research approach has been adopted in order to add additional information to the existing body of scientific knowledge. Therefore, the research at hand is based on the analysis of several primary and secondary sources directly or indirectly dealing with the potential emergence of an international crime of ecocide. Those primary sources used include pertinent legal instruments in the fields of ICL and IEL, a few national criminal codes, the work of the ILC, UN documents as well as relevant ICJ jurisprudence. Secondary sources involve numerous IEL journal articles directly dealing with ecocide but also the work of eminent ICL scholars such as K. Ambos, G. Werle and C. Bassiouni. It should be noted that the existing research explicitly dealing with ecocide is extensively limited to framing the recognition of an international crime of ecocide as a matter of urgency while an explanatory approach regarding the current failure of such aspirations has hitherto been neglected. While most evidently pertinent research has been conducted by scholars of IEL, this thesis equally consults the work of ICL scholars as well as national and international legislation and jurisprudence to reveal the existing hurdles for the endeavour in question. Although the focus lies on the current legal status, a limited historical approach is used for the purpose of contextualization.

The underlying assumption of this thesis is that ecocide as a crime at the intersection of IEL and ICL entails significant challenges.[37] The establishment of criminal sanctions for environmental misconduct depends on four central elements, firstly, the global environment as the protected interest, secondly, the regime of international law in general, thirdly, the preferred regulatory framework, IEL as a branch of international law and fourthly, the regime

[36] C. Stahn, *op. cit.*, p. 105.
[37] M. A. Orellana, *op. cit.*, p. 674.

of ICL by the nature of the project.[38] Against that background, this thesis suggests that the four above-mentioned elements, each relevant for making ecocide a crime under international law, involve major obstacles which fundamentally impede the emergence of such a crime in the international context. Four main hypotheses serve to substantiate this argument.

The first hypothesis is that by nature of the project the international crime of ecocide substantially differs from conventional crimes under international law. Thus, the first chapter serves to contextualize ecocide, illustrate different approaches of defining the crime and discuss its potential elements, since currently no agreed definition of ecocide exists. As a basis for later discussions the respective chapter lastly sets forth the purposes of making ecocide a crime under international law.

The second hypothesis is that the underlying concept of state sovereignty and the radically anthropocentric approach of international law are obstacles in the path of the emergence of an ICL for the environment, including the criminalization of ecocide. On the one hand, it is alleged that states fear to relinquish sovereignty to the international system which hinders the expansion of the current doctrine of ICL. On the other hand, this thesis asserts that the sanguine idea of environmental scholars that the recognition of ecocide would require an 'ecocentric' mindset is incompatible with the anthropocentrism underlying the current system of international law[39] as well as with international human rights law (IHRL) as the potential basis for an emerging international crime.

Subsequently, the third hypothesis refers to the doctrine of IEL as the preferred regulatory framework for environmental protection. It is alleged that two main characteristics of IEL challenge the efforts of making ecocide a crime under international law: the doctrine's general lack of interest in criminalization due to its preference for soft law approaches and the vagueness of the principles of IEL, in particular the precautionary principle.

Furthermore, the fourth chapter deals with the major obstacles in the paths of the emergence of an international crime of ecocide deriving from the doctrine of ICL. In this context, it firstly hypothesizes that the current doctrinal basis for the process of international criminalization does not favour the criminalization of ecocide.[40] Secondly, the last chapter suggests that an international crime of ecocide would be difficult to reconcile with fundamental conceptions and principles of ICL. Special attention is paid to the conception of

[38] This underlying structure is to a great extent based on: F. Mégret. The Problem of an International Criminal Law of the Environment. – 36 Columbia Journal of Environmental Law 2011 (2), p. 204.
[39] Ecocentric describes a perspective that includes the non-human in its conceptualisations, as determined in: R. White. Ecocide and the Carbon Crimes of the Powerful. – 37 University of Tasmania Law Review 2018 (2), p. 103.
[40] M. C. Bassiouni. Introduction to International Criminal Law, vol. 1. Leiden: Martinus Nijhoff Publishers 2013, p. 142.

victimhood, the potential prosecution before the ICC, the mental element of such a crime and the tensions between its special characteristics and specificity and predictability requirements of the legality principle.

Having demonstrated the existence of a number of fundamental hurdles posed by the nature of international law in general as well as IEL and ICL in particular for the aspiration of making ecocide an international crime, the thesis finally draws the conclusion that all underlying hypotheses can be confirmed. The current legal system clearly poses various obstacles to a future recognition of ecocide as a crime under international law. Furthermore, it is important to note that the current ecocide discourse suffers from serious shortcomings based on the entanglement of IEL and ICL on the one hand and an overly emotional approach taken by environmental activists on the other.

Keywords: ecocides, environmental damage, environmental crimes, international crimes

I. The Crime of Ecocide

The first chapter of this thesis aims to provide a basic understanding of the research's main subject, the crime of ecocide. This is not only necessary to establish a clear point of reference for the following discussions but also to support the hypothesis that by the nature of the project, the international crime of ecocide substantially differs from conventional crimes under international law. One fundamental difference is that those crimes explicitly recognized under current ICL are predominately rooted in IHRL and humanitarian law[41] while ecocide is closely related to a rather novel branch of international law dealing with environmental protection: IEL. In order to underline this statement, the subsequent section firstly serves to contextualize the crime of ecocide with regard to the increasing attention that international law has paid to environmental issues. Secondly, it gives a short overview of the development of the terminology and thereafter discusses the difficulty of reaching an agreement on a definition of ecocide. Thirdly, this chapter sets forth the potential elements of an international crime of ecocide with a focus on its special features compared to yet internationally criminalized conduct. Lastly, the chapter shortly explains the actual purpose of criminalizing ecocide in order to demonstrate what is being expected from the endeavour in question. It should be noted that in this process no sole means of making ecocide a crime under international law will be assessed but different practical alternatives are taken into consideration.[42]

1. Contextualizing Ecocide

"No area of law is an island and ecocide is a vital part of an emergent jurisprudence that clarifies the duty of care towards the environment"[43]. This statement perfectly describes what constitutes a basic premise of this thesis: in order to discuss the ongoing failure of making ecocide an international crime, attention has to be paid not only to ICL but to all relevant disciplines of international, to some extent, even national law. This approach is amongst others justified by the complex entanglement of recent developments in international law

[41] M. C. Bassiouni, 2013, *op. cit.*, p. 47.
[42] Suggested options include the emergence of ecocide by means of 1) an amendment of the current text of the Rome Statute as suggested in: P. Higgins, 2010, *op. cit.*, 2) an international convention, suggested amongst others in: R. A. Falk. Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals. – 4 Bulletin of Peace Proposals 1973 (1), pp. 80-96 and L. Berat, *op. cit.*, pp. 327-348 and 3) the establishment of an international environmental body, discussed amongst others in: A. Greene, *op. cit.*, pp. 1-48.
[43] B. Lay *et al*., *op. cit.*, p. 433.

intending to increasingly protect the world's ecosystems. The UN Conference on the Human Environment in Stockholm in 1972 is today considered to be a landmark event in the evolution of the rather young discipline of IEL. It was the first international conference to officially acknowledge that "[t]hrough ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well being depend"[44]. With such an awareness having emerged and been reaffirmed on subsequent occasions such as the Rio Conference in 1992[45], the seed was planted for the criminalization of environmental harm. Meanwhile, similar developments accrued in the field of IHRL with *inter alia* regional courts acknowledging that the enjoyment of fundamental rights depends on the existence of a healthy environment.[46] Moreover, during the 1990s the International Court of Justice (ICJ) with the "great significance that it attaches to respect for the environment"[47] articulated a "legal reasoning that elucidates ecocide as the prohibitive point of the international norms in human rights, sustainable development and other international treaties"[48]. In addition to those developments mentioned in the introduction of this thesis,[49] miscellaneous international initiatives favouring the adoption of an international crime of ecocide include a UNGA resolution encouraging member states to "prevent, combat and eradicate international illicit trafficking in wildlife […] through […] the use of international legal instruments"[50]. Moreover, the same year the Oslo Principles on Global Climate Change Obligations were adopted by a group of international law experts stating that "avoiding severe global catastrophe is both a moral and legal imperative"[51]. Thus, this shows that the process of criminalizing serious environmental misconduct on the international level has not been exclusively discussed as a matter of ICL. Although yet without success, the call for an international crime of ecocide has been the most drastic move in this context and hence deserves to be further examined in the following section.

[44] Report of the United Nations Conference on the Human Environment in Stockholm, UN Doc. A/CONF.48/14, New York: United Nations Publication 1973, p. 3.
[45] Report of the United Nations Conference on Environment and Development in Rio de Janeiro, UN Doc. A/CONF.151/26 (Vol. I). New York: United Nations Publication 1992, pp. 3 *ff*.
[46] B. Lay *et al*., *op. cit.*, p. 442.
[47] *Gabcikovo Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25.09.1997, ICJ Reports (1997), p. 41.
[48] B. Lay *et al*., *op. cit.*, p. 442.
[49] See *supra*, p. 3-7.
[50] GA Res. 69/314, Tackling Illicit Trafficking in Wildlife (19.08.2015).
[51] Oslo Principles on Global Climate Change Obligations. 01.03.15. Accessible at: https://law.yale.edu/sites/default/files/area/center/schell/oslo_principles.pdf (22.09.19).

2. Legal Definition of Ecocide

The neologism 'ecocide' consists of the prefix 'eco' deriving from the Greek word 'oikos' meaning 'house' supplemented with the suffix 'cide' stemming from the Latin word 'caedere' meaning 'to kill'[52] and hence in a very broad sense refers to the destruction of the natural environment.[53] It clearly draws a parallel to the generally accepted international crime of genocide[54] and has alternatively been referred to as 'geocide'.[55] The term started to gain prominence during the 1970s after having been publicly referred to for the first time by the scientist A. Galston in the context of the use of herbicidal warfare during the Vietnam war.[56] Ever since, various definitions have emerged and been refined[57] but until today no generally accepted definition of the crime of ecocide exists.[58] The use of the term in different contexts without entailing a clear and unambiguous meaning has resulted in confusion and ineffectiveness.[59] Ecocide is broadly understood as a "multifaceted socio-ecological phenomenon enabled both by substantive limitations of criminal liability rules and by limitations attributable to the values and assumptions that undergird international law"[60]. However, ICL requires that a definition of a crime clearly determines what conduct is criminalized,[61] and therefore, a definitional *lacuna* constitutes an obstruction to the exercise of jurisdiction.[62] At least, legal scholars agree that while there exist a wide range of environmental offences that have been criminalized by means of national legislation or multilateral treaties,[63] ecocide as a crime under ICL should be limited to the most serious abuses of the environment.[64] In that sense, one has to distinguish between transnational and

[52] P. Higgins, 2010, *op. cit.*, p. 11.
[53] S. Meheta, *op. cit.*, p. 4.
[54] C. Stahn, *op. cit.*, p. 109 and V. Schwegler. The Disposable Nature: The Case of Ecocide and Corporate Accountability. – 9 Amsterdam Law Forum 2017 (3), p. 73.
[55] See: Berat, L, *op. cit.*, pp. 327-348.
[56] D. Zierler. The Invention of Ecocide: Agent Orange, Vietnam, And the Scientists Who Changed the Way We Think About the Environment, Athens: University of Georgia Press 2011, p. 4.
[57] B. Lay *et al*., *op. cit.*, p. 435.
[58] V. Schwegler, *op. cit.*, p. 73.
[59] A. Greene, *op. cit.*, p. 31.
[60] R. Mwanza. Enhancing Accountability for Environmental Damage under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity. – 19 Melbourne Journal of International Law 2018 (2), p. 588.
[61] G. Werle, F. Jessberger. Principles of International Criminal Law, vol. 3. Berlin: T.M.C. Asser Press 2014, p. 39.
[62] C. Kreß. The International Criminal Court as a Turning Point in the History of International Criminal Justice. – A. Cassese (ed). The Oxford Companion to International Criminal Justice. Oxford: Oxford University Press 2009, p. 153.
[63] M. A. Orellana, *op. cit.*, p. 673 and C. Stahn, *op. cit.*, p. 108 and L. A. Teclaff, *op. cit.*, pp. 939-943.
[64] C. Stahn, *op. cit.*, p. 110 and L. Berat, *op. cit.*, p. 344 and L. Berat, *op. cit.*, p. 344 and B. Lay *et al*., *op. cit.*, p. 450.

international crimes.[65] Less consensus exists with regard to the elements of crime as will be discussed in the subsequent section. Certainly, it should be kept in mind that a complicated and lengthy process of clarifying definitional issues under ICL is no exception.[66] Undoubtedly, in case of a future recognition of ecocide as an international crime, the ultimate responsibility of defining the crime would lay with the member states involved in such a process.

3. Elements of the Crime

The subsequent section provides an overview of the elements of an international crime of ecocide while demonstrating the variety of different approaches characterized by an entanglement of IEL and ICL. In the course of this presentation, the so-called 'core crimes' of ICL, namely genocide, crimes against humanity and war crimes[67] serve as a point of reference in order to demonstrate the novelties which an international crime of ecocide entails for the current ICL system. Yet, due to the limited scope of this thesis, certain issues such as those of participation, defences excluding criminal liability and inchoate crimes remain unaddressed.

1) Individual Responsibility

While historically only states were considered to be subjects of international law, with the emergence of individual criminal responsibility after World War II individuals were partly added to this category.[68] In order to justify the need for jurisdiction over individuals under the Nuremberg Charter[69], the judgement of the military trial states: "Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced"[70]. In line with these developments, conventional international crimes recognized by international courts and tribunals entail international criminal responsibility[71] which in a narrow sense is decisive for

[65] C. Kreß, *op. cit.*, p. 147.
[66] K. Ambos, *op. cit.*, p. 35 and C. Kreß, *op. cit.*, p. 153.
[67] M. C. Bassiouni, 2013, *op. cit.*, p. 147.
[68] *Ibid.*, p. 59.
[69] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London 08.08.1945, e.i.f. 08.08.1945, Art. 6.
[70] *France et al. v. Goering et al.*, Judgment, 01.10.1946, 22 International Military Tribunal 411 (1946), p. 55.
[71] Relevant provisions: Rome Statute of the International Criminal Court, 2002, *op. cit.*, Art.11, SC Res. 955 (08.11.1994), Statute of the International Criminal Tribunal for Rwanda (as last amended on 13.10.2006), Art. 6

rendering a certain conduct a crime under international law.[72] In the context of criminalizing environmental misconduct, so-called non-ascertainable crimes caused by external factors such as *force majeure* are being distinguished from so-called ascertainable crimes caused by human activity which can create individual criminal liability.[73] Accordingly, ecocide can only constitute a certain form of criminality when human activity is involved.[74] However, the nature of severe environmental crimes goes beyond individual criminal responsibility and raises the question of corporate responsibility. While the involvement of non-state actors in terms of groups of several individuals is not new to ICL but rather required in the context of the crime against humanity,[75] an international crime which entails corporate responsibility does indeed constitute a novelty. The subsequent section discusses how this issue can be addressed.

2) Corporate and Superior Responsibility

In principle, severe environmental damage can be inflicted by individuals, governments, corporations or other entities. However, in a majority of cases potentially amounting to a crime of ecocide, the harmful conduct is intertwined with corporate activities.[76] Air pollution caused by large factories burning their waste, deforestation linked to agriculture or to the paper and pulp industries or water pollution by large industrial farms and the timber and oil industries are only a few out of "uncountable ways in which corporations are involved in different types of ecocide"[77]. Often, such conduct is simply considered to be a by-product of the corporations' fulfilment of its legal duty to act in the interests of profit. Moreover, even if the wrongfulness of the conduct is recognized, generally speaking financial penalties outside of the scope of ICL are likely to be imposed in order to evade personal liability.[78] Thus far, it was a common practice to use international conventions such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora to oblige states to "take

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and SC Res. 827 (25.05.1993), Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17.05.2002), Art. 7.
[72] C. Stahn, *op. cit.*, p. 21.
[73] P. Higgins, 2010, *op. cit.*, p. 103.
[74] R. White, *op. cit.*, pp. 102-103.
[75] M. C. Bassiouni, 2013, *op. cit.*, p. 70.
[76] L. A. Mowery. Earth rights, human rights: Can international environmental human rights affect corporate accountability. – 13 Fordham Environmental Law Journal 2002 (2), p. 373.
[77] V. Schwegler, *op. cit.*, p. 84.
[78] P. Higgins, 2010, *op. cit.*, p. 8, p. 164.

all appropriate measure to enforce the provisions"[79] of the relevant text and hence to put contracting states in charge of dealing with the question of how to prevent and penalize corporate conduct.[80] However, with the increasingly important role legal entities play on the international plane, issues of corporate responsibility are being widely discussed, amongst others in the context of the core crimes of international law.[81] Still, the ICC's jurisdiction is limited to natural persons.[82] Although international law has not yet extensively dealt with the principle of corporate liability, holding judicial persons accountable for international crimes is technically conceivable.[83] Some scholars suggest informal social control instead of sanctioning in order to change the corporate mind-sets[84] while others refer to the possibility of setting up symbolic tribunals such as the International Monsanto Tribunal in 2016.[85] It has further been argued that in some cases the criminality of certain conduct is inseparable from the institutional culture and corporate criminal responsibility should be established.[86] Nonetheless, such an approach lacks sufficient support on the international level.[87]

On the contrary, others believe that "legal entities as abstractions can neither think nor act as human beings"[88] but in fact, it is the actions of individuals in the relevant positions which cause the harmful conduct. In order to circumvent the disputed matter of corporate liability, it has been suggested to use the well-known principle of superior responsibility to hold the corporate leadership accountable for severe environmental misconduct.[89] The implied principle allows for a punishment of such behaviour which does not amount to direct participation and constitutes a mode of liability *sui generis*.[90] The doctrine has developed after World War II in order to take into account the hierarchical organizational structures relevant in situations of conflict in which the failure of superiors to take action has a decisive influence on the behaviour of their subordinates. Thus, superiors can be held responsible for criminal acts committed by their inferiors on condition that they knew or should have known about a

[79] Convention on International Trade in Endangered Species of Wild Fauna and Flora. Washington 03.03.1973, e.i.f. 01.07.1975.
[80] V. Schwegler, *op. cit.*, p. 95.
[81] See: A. Garcia. Corporate Liability for International Crimes: A Matter of Legal Policy since Nuremberg. – 24 Tulane Journal of International and Comparative Law 2015 (1), pp. 97-130 and in: J. G. Stewart. The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute. – 47 New York University Journal of International Law and Politics 2014 (1), pp. 121-206.
[82] Rome Statute of the International Criminal Court, 2002, *op. cit.*, Art. 25 (1).
[83] C. Stahn, *op. cit.*, pp. 120, 212.
[84] V. Schwegler, *op. cit.*, p. 89.
[85] G. MacCarrick, J. Maogoto. The Significance of the International Monsanto Tribunal's Findings with Respect to the Nascent Crime of Ecocide. – 48 Texas Environmental Law Journal 2018 (2), p. 236.
[86] C. Stahn, *op. cit.*, p. 419.
[87] K. Ambos, *op. cit.*, p. 83, p. 144 and G. Werle, *op. cit.*, p. 43.
[88] M. C. Bassiouni, 2013, *op. cit.*, p. 62.
[89] M. A. Gray, *op. cit.*, p. 221 and P. Higgins, 2010, *op. cit.*, p. 303.
[90] G. Werle, *op. cit.*, p. 223.

crime but failed to prevent their subordinates from committing it or failed to punish them where offences occurred.[91] Even though the criteria for such an assignment of criminal liability slightly differed between the ad hoc international tribunals and the ICC,[92] today the concept is considered to be customary international law. Superior responsibility is applicable to military commanders as well as to civilian superiors in a non-military context.[93] The idea of resorting to the concept of superior responsibility in order to bring those hiding under the corporate veil to justice, has already been discussed by a number of scholars outside of the environmental context during the 1990s.[94] Moreover, such an approach is well-established in various national legislations.[95] For example, the responsible corporate officer doctrine is widely accepted in the US[96] and entails a preventive effect for environmental misconduct through increased efforts of supervisory officials to exercise their control function.[97] Furthermore, on the European level, efforts have been made to advocate for applying the principle of superior responsibility to economic and environmental crimes beyond national jurisdictions.[98] After all, "[c]riminal law imposes additional duties which override any obligations a CEO has to the company's shareholders to ensure it makes a good profit"[99]. Against the background of the entanglement of IEL and ICL present in the legal discourse on ecocide, it should further be mentioned that ecocide proponents widen the discussion on corporate liability to issues of corporate social responsibility and socially responsible investments.[100] Whereas such alternative approaches are not unknown to the criminal justice debate from a comparative criminal law perspectives,[101] they are rather unlikely to be included into the current framework of ICL.

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[91] C. Bishai. Superior Responsibility, Inferior Sentencing: Sentencing Practice at the International Criminal Tribunals. – 11 Northwestern University Journal of International Human Rights 2013 (3), p. 84. It should be noted that the threshold for superior responsibility in a non-military context required by Art. 28 of the Rome Statute is higher than what is suggested by customary ICL: G. Werle, *op. cit.*, p. 223.
[92] A. Cassese *et al*. International Criminal Law, vol. 3. Oxford: Oxford University Press 2013, p. 88.
[93] However, proving the existence of a superior-subordinate relationship is considered to be much more difficult than in the military context. See: B. I. Bonafe. Finding a Proper Role for Command Responsibility. – 5 Journal of International Criminal Justice 2007 (3), pp. 609, 616.
[94] S. Walt, W. S. Laufer. Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions. – 18 American Journal of Criminal Law 1991 (3), p. 265. l
[95] B. Lay *et al*., *op. cit.*, pp. 435-436 and M. A. Gray, *op. cit.*,p. 265.
[96] T. M. Downs. Recent Developments in Environmental Crime. – 17 William and Mary Journal of Environmental Law 1992 (1), pp. 26-35 and R. Deeb. Environmental Criminal Liability. – 2 South Carolina Environmental Law Journal 1993 (2), pp. 171-176.
[97] A. S. Hogeland, *op. cit.*, p. 120.
[98] Spain's campaigning judge seeks change in law to prosecute global corporations. – The Guardian. Accessible at: https://www.theguardian.com/world/2015/aug/20/spain-judge-baltasar-garzon-prosecute-global-corporations (07.04.20).
[99] P. Higgins, 2010, *op. cit.*, p. 165.
[100] *Ibid.*, pp. 177, 180.
[101] F. Pakes. Comparative Criminal Justice, vol. 4. Devon: Willian Publishing 2019, pp. 79-85.

While the preceding section served to explain issues of criminal responsibility, with special regards to the principle of superior responsibility, the following section focuses on the requirements for establishing such individual criminal liability under international law. Although hitherto only a bare outline of a tangible doctrine of international crimes has emerged, jurisprudence agrees that the test of liability under ICL, as a rule, includes at least the assessment of the material and the mental element.[102] These elements are also those mostly discussed in the ongoing legal discourse on the criminalization of serious environmental misconduct. Thus, the following section discusses the potential threshold of the material and mental element of an international crime of ecocide.

3) Material Elements

The material element, the *actus reus*, of international crimes describes the external appearance of an individual act determined by objective conditions. Usually, these elements are provided by the definition of the crime which describes a certain conduct, requires specific consequences of this behaviour and the presence of additional circumstances. Such conduct can consist of either an act or an omission.[103] In respect of conduct constituting the material element of ecocide, a variety of proposals have been put forth. All of the considered definitions clearly focus on the specific consequences of an unspecified conduct. Therefore, in line with most other international crimes, a crime of ecocide would most probably be a crime of result rather than a crime of conduct.[104] Nevertheless, it should be noted that core crimes often require a conduct that is already criminalised by national laws but can amount to an international crime under certain circumstances, for example, murder possibly amounting to a crime against humanity under Art. 7 (1) (a) ICC Statute. In contrast, in the ecocide context, in practice, it is more likely that the conduct in question is not criminalized on a national level. However, this does not preclude liability under ICL[105] as supported by similar approaches on a regional level.[106] Having said that, the subsequent section takes a look at the concrete formulation of the material element of an international crime of ecocide.

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[102] G. Werle, *op. cit.*, pp. 168-170
[103] *Ibid.*, pp. 172-173.
[104] A. Cassese *et al*., *op. cit.*, pp. 38-39.
[105] R. McLaughlin. Improving Compliance: Making Non-State International Actors Responsible for Environmental Crimes. – 11 Colorado Journal of International Environmental Law and Policy 2000 (2), pp. 393-394.
[106] M. G. Faure, *op. cit.*, p. 336.

The ILC's proposal for the international criminalisation of environmental misconduct originally included the wording "widespread, long-term and severe environmental damage"[107]. This wording resembles the environmental war crime provision under the Rome Statute.[108] Hence, the respective consequences of conduct have to reach a certain threshold of gravity; not every environmental damage qualifies.[109] A requirement of seriousness equally applies to those core crimes accepted under international law[110] and is justified by the notion that ICL is an apparatus of exception.[111] Although by virtue of a different wording, most of the proposed ecocide definitions likewise require certain territorial ('widespread', "extensive"[112] or ''massive scale"[113]) and temporal ('long-term' or "lasting"[114]) dimensions as well as a particular intensity of harm (using the wording 'severe' or "serious"[115]). Moreover, inspired by the efforts of the ILC, in the 1990s a number of states included ecocide into their domestic penal codes.[116] On the national level, the focus of the definition clearly lays on the gravity in a narrow sense, elucidated by the requirement of destruction to be "en-mass"[117], "massive"[118] or "mass"[119]. However, it would be feasible to interpret these terms with a view to the territorial and temporal dimensions of the respective destruction in order to be able to determine the required intensity. Thus, it is likely that an internationally accepted definition of ecocide would consist of a similar wording as brought forward by the ILC. In that case it has been suggested that the 1977 UN Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD) can provide guidance for the interpretation of the above-mentioned terms.[120] More accurately, it clarifies that the term 'widespread' can be understood as "encompassing an area on the scale of several hundred square kilometres"[121], 'long-lasting' means "lasting for a period of months, or approximately

[107] Yearbook of the International Law Commission, 1991, *op. cit.*, p. 107.
[108] Rome Statute of the International Criminal Court, 2002, *op. cit.*, Art. 8(2)(b)(iv).
[109] Yearbook of the International Law Commission, 1991, *op. cit.*, p. 107.
[110] Rome Statute of the International Criminal Court, 2002, *op. cit.*, Art. 17 (1)(d) and Art. 53 (1)(b),(c),(2)(b),(c), Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993, *op. cit.*, Art. 1 and Statute of the International Criminal Tribunal for Rwanda, 1994, *op. cit.*, Art. 1.
[111] C. Stahn, *op. cit.*, p. 110.
[112] P. Higgins, 2010, *op. cit.*, p. 103.
[113] L. A. Teclaff, *op. cit.*, p. 934.
[114] M. A. Gray, *op. cit.*, p. 216.
[115] L. Berat, *op. cit.*, p. 343 and M. A. Gray, *op. cit.*, p. 216.
[116] A. Greene, *op. cit.*, p. 19. See in more detail *supra,* footnote 20.
[117] Penal Code of Viet Nam, 2000, *op. cit.*, Art. 347.
[118] The Criminal Code of The Russian Federation, 1996, *op. cit.*, Art. 358.
[119] Criminal Code of Ukraine. Adopted 05.04.2001, e.i.f. 01.09.2001, Art. 441.
[120] Neither the ICC Statute nor Elements of Crime provide for interpretative tools.
[121] United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques. Geneva 18.05.1977, e.i.f. 05.10.1978, Annex to the Convention.

a season"[122] and 'severe' stands for the involvement of "serious or significant disruption or harm to human life, natural and economic resources or other assets"[123]. However, a mechanical transfer of the ENMOD wording to a potential ecocide definition should be refrained from as the provisions' threshold might be lower than that required for a crime under international law.[124] In order to avoid the need for such an interpretative tool, it has been put forward to directly include the required consequences into the definition.[125] Moreover, a few proposed ecocide definitions rather resemble the ICC's genocide provision,[126] hence requiring an environmental destruction "in whole or in part"[127]. Furthermore, if provided for by the definition,[128] the *actus reus* of an international crime can also consist of an omission, meaning a "non-action, absence of action, failure to act"[129]. In fact, only one of the proposed ecocide definitions explicitly states that the material element can consist in omission.[130] Nevertheless, as serious environmental harm can result from the failure to take precautionary measures, it can be anticipated that a future ecocide definition would involve omission liability. In addition, it should be noted that under customary law, a causal link between the perpetrator's conduct and the specific consequences required by the international crime represents a prerequisite for criminality.[131] This has been equally taken into account by the initial Art. 26 of the ILC[132] and could not be ignored in the context of a future ecocide definition. Having said that, it should be added that apart from the occurrence of a certain conduct and specific consequences resulting from such conduct, the material elements of crimes under international law normally require the existence of additional circumstances.[133] These so-called contextual elements of international crimes can take different forms such as the occurrence of an armed conflict as required by war crimes.[134] However, the crime of ecocide, such as the crime of genocide[135] does not require the objective presence of any similar circumstances. In fact, in light of the heavily criticised Art. 8

[122] United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1978, *op. cit*., Annex to the Convention.
[123] *Ibid.*
[124] G. Werle, *op. cit.*, p. 493.
[125] P. Higgins, 2010, *op. cit.*, p. 103.
[126] Rome Statute of the International Criminal Court, 2002, *op. cit.*, Art. 6.
[127] L. Berat, *op. cit.*, p. 343 and R. A. Falk, *op. cit.*, p. 93.
[128] G. Werle, *op. cit.*, p. 173.
[129] K. Ambos, *op. cit.*, p. 180.
[130] M. A. Gray, *op. cit.*, p. 216.
[131] G. Werle, *op. cit.*, pp. 173-174.
[132] Yearbook of the International Law Commission: Report of the Commission to the General Assembly on the work of its forty-eighth session, UN Doc. A/CN.4/SER.A/1996/Add.l (Part 2). New York: United Nations Publications 1991, p. 56.
[133] G. Werle, *op. cit.*, p. 174.
[134] Assembly of States Parties to the Rome Statute of the International Criminal Court, ICC-ASP/1/3. New York: United Nations Publication 2002, p. 125.
[135] G. Werle, *op. cit.*, p. 175.

(2)(b)(iv) ICC Statute, the detachment of an international crime of ecocide from a situation of armed conflict has been identified as fundamental for its efficiency.[136]

While the precluding section focused on discussing the so-called material elements of an international crime of ecocide, the subsequent section sheds light on a much more disputed issue; the mental element.

4) Mental Elements

In almost every legal system worldwide criminal liability requires the person engaged in the prohibited conduct to have a certain 'state of mind' which is commonly referred to as the mental or subjective element of a crime, the *mens rea*.[137] Nevertheless, there exists no rule in customary international law that provides for a general definition of the different categories of *mens rea*, such as intent, knowledge, recklessness or negligence. This can *inter alia* be traced back to a lack of consensus on the national level: different legal traditions and national legislations are the source of a diversity of definitions and concepts of *mens rea* as a precondition for criminal responsibility. Such a lack of unanimity equally exists on the international level as international criminal tribunals and courts either lack specified regulations, consistency in those regulations enshrined in their statutes or provide diverse interpretations of the various notions of the subjective element.[138] Art. 30 of the Rome Statute constitutes an exception by providing a general definition of the mental element of international crimes. However, it is not considered to be customary international law but merely applies to the crimes under the authority of the ICC.[139] A comprehensive examination of the *mens rea* threshold required by the existing core crimes under the Rome Statute is a complex undertaking considering the cumbersome differentiation between the mental elements regarding the criminal conduct, the consequences of the conduct and the circumstances of the crime respectively.[140] Moreover, it must not only be distinguished between the individual acts of each crime but also between different forms of participation. Nonetheless, roughly summarized it can be said that genocide apart from a lowered threshold for some individual acts[141] requires intent and knowledge regarding the material elements of the committed crime and a specific intent with respect to the whole or partly destruction of

[136] S. Meheta, *op. cit.*, p. 4.
[137] M. C. Bassiouni, 2013, *op. cit.*, p. 304 and A. Cassese *et al*., *op. cit.*, p. 39.
[138] A. Cassese *et al*., *op. cit.*, pp. 39-41.
[139] G. Werle, *op. cit.*, p. 178.
[140] K. Ambos, *op. cit.*, p. 271 and G. Werle, *op. cit.*, pp. 197-183.
[141] Assembly of States Parties to the Rome Statute of the International Criminal Court, 2002, *op. cit.*, p. 115.

one of the protected groups.[142] With a view to crimes against humanity, the perpetrator must in general know about the attack on a civilian population and intent the commission of the respective individual act.[143] Similarly, a war crime requires the perpetrator to know about the general existence of an armed conflict.[144] Not all individual acts require direct intent, however, recklessness is mostly insufficient.[145] Accordingly, generally speaking, the core crimes under international law show a rather high *mens rea* threshold. In fact, in the context of the international criminalisation of severe environmental damage, the disagreement about the *mens rea* threshold was one of the main reasons for the ultimate failure of including the ILC's Art. 26 into the Draft Code.[146] Its text required "wilful causing"[147] of environmental damage referring to "the express aim or specific intention of causing damage"[148]. This approach has been subject to great criticism[149] although it is in line with the *mens rea* requirement of today's Art. 8 (2)(b)(iv) ICC Statute and has been supported by few scholars in the context of ecocide.[150] The problem of an ecocide definition that requires intent is that it fails to accommodate reckless and negligent behaviour likely to cause severe environmental damage[151] and hence "create[s] a large legal loophole"[152]. Taking into consideration that most corporate acts which could amount to ecocide are not intended, but are rather framed as accidents, collateral damage or side-effects of pursuing other goals,[153] numerous legal scholars have suggested to lower the *mens rea* threshold to guarantee the efficiency of an international crime of ecocide. It has been argued that an ecocide definition should therefore involve elements of recklessness and negligence.[154] Similar approaches can be found on a regional level[155] as well as in national legislations.[156] None of the national ecocide definitions previously consulted to discuss the material elements is limited to the intentional causation of damage. Rather, it has been observed that in the US "[t]he traditional principle that there is no

[142] K. Ambos, *op. cit.*, p. 279 and G. Werle, *op. cit.*, p. 312.
[143] K. Ambos, *op. cit.*, pp. 280-283 and G. Werle, *op. cit.*, pp. 347-348 and Assembly of States Parties to the Rome Statute of the International Criminal Court, 2002, *op. cit.*, p. 116.
[144] G. Werle, *op. cit.*, p. 425 and Assembly of States Parties to the Rome Statute of the International Criminal Court, 2002, *op. cit.*, p. 125.
[145] G. Werle, *op. cit.*, p. 426.
[146] A. Greene, *op. cit.*, pp. 15-19.
[147] Yearbook of the International Law Commission, 1991, *op. cit.*, p. 107.
[148] *Ibid.*
[149] *Ibid.*
[150] R. A. Falk, *op. cit.*, p. 93 and L. Berat, *op. cit.*, p. 343.
[151] M. A. Gray, *op. cit.*, p. 218 and Yearbook of the International Law Commission, 1991, *op. cit.*, p. 107.
[152] A. Greene, *op. cit.*, p. 33.
[153] *Ibid.* and V. Schwegler, *op. cit.*, p. 85.
[154] R. McLaughlin, *op. cit.*, pp. 395-396 and M. A. Gray, *op. cit.*, p. 267 and L. Berat, *op. cit.*, p. 343.
[155] Council of Europe, Committee of Ministers, Resolution (77) 28, 1977, *op. cit.*
[156] T. M. Downs, *op. cit.*, pp. 11-12.

crime without a criminal mind has eroded"[157]. In light of the emergence of regulatory crimes imposing strict liability on environmental misconduct, various legal scholars equally demand that an international crime of ecocide shall be based upon strict liability.[158] Dramatically lowering the standard of proving culpability, an ecocide crime of strict liability would break out of the conventional understanding of international crimes. Proponents of such a novel approach justify their reasoning with recourse to the above-mentioned efficiency argument on the one hand[159] and with a gravity argument on the other hand.[160] The latter refers to the utmost importance of preventing future harm in the face of its level of seriousness[161] which can only be guaranteed by means of a stronger deterrent effect.[162] The critical entanglement of IEL and ICL clearly and explicitly comes to light where those scholars advancing the idea of making ecocide a crime of strict liability introduce environmental principles into a definitional discussion based on ICL. Correspondingly, issues of strict liability are being debated in connection with environmental guidelines such as the polluter pays and the precautionary principle which will be further explained in subsequent chapters.[163] Hence, the threshold of the mental element of a future ecocide definition could range from requiring intent through to leaving room for recklessness and negligence or even allowing for criminal liability in the absence of a criminal mind.

5) Non-Human Life as a Victim

While victims have played a fundamental role in human rights law from the very beginning,[164] ICL has for a long time rather focused on the notion of punishment.[165] However, over time the role of victims became increasingly significant to the ICL discourse. Legal scholars and practitioners continue to discuss the rights and interests of victims in international criminal proceedings.[166] In the context of environmental crimes, victimhood differs from the construct known to conventional international crimes. In fact, all proposed

[157] T. M. Downs, *op. cit.*, pp. 22-26.
[158] A. Greene, *op. cit.*, p. 27 and P. Higgins, 2010, *op. cit.*, p. 112 and M. A. Gray, *op. cit.*, p. 218.
[159] P. Higgins, 2010, *op. cit.*, p. 112.
[160] R. White, *op. cit.*, p. 105.
[161] L. A. Teclaff, *op. cit.*, p. 943 and P. Higgins, 2010, *op. cit.*, p. 102.
[162] R. Mwanza, *op. cit.*, p. 600.
[163] M. A. Gray, *op. cit.*, pp. 218-219 and P. Higgins, 2010, *op. cit.*, p. 248. See *infra* Chapter III.
[164] As can be shown by the inclusion of the right to an effective remedy in the Universal Declaration of Human Rights: GA Res. 217 a (III) (10.12.1948), Universal Declaration of Human Rights, Art. 8.
[165] A. Cassese *et al*., *op. cit.*, p. 3.
[166] V. Spiga. No Redress without Justice: Victims and International Criminal Law – 10 Journal of International Criminal Justice 2012 (5), p. 1377.

definitions determine that the caused harm must be directed against a certain subject, here the environment.[167] Against that background, the ILC's Art. 26 merely uses the term 'environmental' in order to refer to the subject of the occurred damage or destruction. Alternatively, the Rome Statute refers to the "natural environment"[168] while other definitional proposals make use of the terms "ecological"[169] and global or human "ecosystem"[170]. In order to clarify the meaning of these terms, the commentary to the ILC's initial Art. 26 further explains that the respective wording covers "the seas, the atmosphere, climate, forests and other plant cover, fauna, flora and other biological elements"[171]. Domestic ecocide definitions use a similar wording, amongst others referring to the destruction or contamination of "land and water resources"[172], "flora and fauna"[173], "atmosphere"[174] or "animal or plant kingdoms"[175]. Hence, although indirect suffering of humans is to be expected,[176] first and foremost victims of ecocide are of a non-human nature that equally involves living organisms as well as non-living components of the environment.[177]

However, a few definitions require the environmental harm to entail particular consequences for the "species"[178], "inhabitants"[179] or "society"[180] living on a certain territory. While the first two allow for an inclusion of non-human life, the latter is in general rather used in the context of human life. Thus, the question of whether a future ecocide definition would allow for the prosecution of severe environmental damage beyond any humanitarian consequences remains to be seen.[181]

Before drawing a conclusion concerning the first hypothesis addressed by the thesis at hand,[182] the subsequent section briefly draws attention to the actual purpose of making ecocide a crime under international law.

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[167] Yearbook of the International Law Commission, 1991, *op. cit.*, p. 107.
[168] Rome Statute of the International Criminal Court, 2002, *op. cit.*, Art. 8(2)(b)(iv).
[169] M. A. Gray, *op. cit.*, p. 216.
[170] L. A. Teclaff, *op. cit.*, p. 934 and L. Berat, *op. cit.*, p. 343 and R. A. Falk, *op. cit.*, p. 93 and P. Higgins, 2010, *op. cit.*, p. 103.
[171] Yearbook of the International Law Commission, 1991, *op. cit.*, p. 107.
[172] Criminal Code of Georgia. Adopted 22.07.1999, e.i.f. 15.02.2000, Art. 409.
[173] Criminal Code of Armenia. Adopted 18.04.2003, e.i.f. 12.09.2005, Art. 394.
[174] Criminal Code of the Republic of Moldova, 2003, *op. cit.*, Art. 136.
[175] The Criminal Code of The Russian Federation, 1996, *op. cit.*, Article 358.
[176] P. Higgins, 2010, *op. cit.*, p. 107.
[177] R. Mwanza, *op. cit.*, p. 607.
[178] L. Berat, *op. cit.*, p. 343.
[179] V. Schwegler, *op. cit.*, p. 73.
[180] Penal Code of Viet Nam, 2000, *op. cit.*, Art. 342.
[181] T. Weinstein, *op. cit.*, p. 721.
[182] *Infra*, p. 26.

4. Purpose of the Crime of Ecocide

It is this thesis' underlying premise based on the reasoning of a number of legal scholars that there exists a necessity to close the current legal gap allowing perpetrators to inflict severe environmental harm with impunity through criminal enforcement of environmental offences.[183] The subsequent section shortly explains how making ecocide a crime under international law is supposed to serve this purpose.

To begin with, based on the fundamental principle *nulla poena sine lege* the possibility for criminal punishment generally requires the existence of a legal provision.[184] Making ecocide a conduct *malum prohibitum* would establish a basis for a future differentiation between legal and illegal environmental harm and clearly go beyond the approach of current environmental regulations which merely criticize socially unexcepted behaviour.[185]

Moreover, an international crime of ecocide is supposed to entail a preventive function in order to deter potential perpetrators from future damage of the worlds' ecosystems.[186] In general, the prevention of harm is one of the overall functions of ICL.[187] This objective is absolutely crucial when considering the irreversibility of environmental damage and its dramatic and far-reaching consequences for human and non-human life.[188] Prevention by means of deterrence in line with the idea "*punitur, ne peccetur*"[189] can be identified as the outcome of an "economic analysis of crime and punishment"[190]. Especially in the corporate context, the raising costs, more precisely the risk of punishment of a certain conduct, potentially generate future compliance with laws that would otherwise be disregarded.[191]

Furthermore, the qualification of a certain conduct as a crime under international law entails a number of advantages in contrast to ordinary crimes, including the possibility of universal jurisdiction as well as the inapplicability of immunities and statutes of limitations.[192]

In addition, the ecocide discourse is characterized by the rationale that "society prefers to call certain actions 'criminal' in order to express its moral outrage and to prohibit the

[183] Amongst others: B. Lay *et al*., *op. cit.*, p. 432, R. Mwanza, *op. cit.*, p. 587, P. Higgins, 2010, *op. cit.*, p. 20 and C. Stahn, *op. cit.*, p. 105.
[184] V. Schwegler, *op. cit.*, p. 86.
[185] R. White, *op. cit.*, p. 97.
[186] C. Stahn, *op. cit.*, p. 110.
[187] K. Ambos, *op. cit.*, pp. 60-67.
[188] V. Schwegler, *op. cit.*, p. 72, p. 85.
[189] K. Ambos, *op. cit.*, p. 67.
[190] C. Byung-Sun, *op. cit.*, pp. 13-14.
[191] *Ibid.*, pp. 13-14 and S. Meheta, *op. cit.*, p. 4.
[192] C. Stahn, *op. cit.*, pp. 17-18.

activity unconditionally"[193]. In that sense, making ecocide a crime under international law should equally promote the moral recognition of the wrongfulness of environmental misconduct[194] and hence counteract the ongoing marginalization of environmental protection.[195]

All in all, the hypothesis that by the nature of the project the crime of ecocide fundamentally differs from conventional crimes recognized under international law can be confirmed. Firstly, as demonstrated by contextualizing ecocide, the whole discourse is closely related to IEL which entails certain novel legal issues being addressed later on.[196] Secondly, while an international crime of ecocide in line with the existing international crimes would entail individual criminal liability, it would furthermore, unlike the known core crimes, particularly strive to hold corporate leaderships accountable with recourse to the concept of superior responsibility. Thirdly, unlike crimes against humanity and war crimes, ecocide would not necessitate the existence of any additional circumstances. Fourthly, although at present no agreement concerning the mental element of an international crime of ecocide exists, based on the nature of severe environmental harm, only a *mens rea* threshold lower than that of the core crimes under the Rome Statute would pave the way for an efficient prosecution of the crime. Fifthly, the crimes intention to protect non-human life stands out from what is hitherto prominent in ICL theory and practice. Moreover, it has been argued that compared to conventional crimes, long-term consequences and negative impacts of ecocide are more likely to be temporally and geographically indefinite. The implications of these said determinations for the accommodation of an international crime of ecocide in the current system of ICL will be further assessed in the last chapter.[197]

[193] C. Byung-Sun, *op. cit.*, pp. 13-14.
[194] B. Lay *et al*., *op. cit.*, p. 437 and R. White, *op. cit.*, p. 97 and similarly: V. Schwegler, *op. cit.*, p. 92.
[195] C. Stahn, *op. cit.*, p. 417.
[196] See *infra*, pp. 43 *ff*.
[197] See *infra*, pp. 57 *ff*.

II. Obstacles Based on the Nature of the System: International Law

The second chapter of this thesis aims at revealing the main obstacles posed by the current international law system impeding the process to make ecocide an international crime. While many issues could be discussed in this context, the scope of the thesis at hand only allows for a limited discussion. Hence, two outstanding problems most central to the research objective will be discussed. Firstly, it is alleged that the concept of state sovereignty underpinning the modern system of international law presents an obstacle in the path of making ecocide an international crime. In order to prove this hypothesis, the chapter at hand draws special attention to the state's reluctance regarding an expanding scope of international environmental legislations as well as to the impact of the said concept on the pertinent branches of public international law, namely ICL and IEL. Secondly, this chapter hypothesizes that taking into consideration the anthropocentric nature of the current international legal system the idea of an ecocide law detached from human rights considerations as suggested by a number of scholars seems unrealistic and impracticable. In the context of testing this assumption, the chapter takes a look at the role of IHRL as a foundation of international crimes and the existing matter of course to treat nature as a commodity under international law.

1. Lacking Scope: Restrictions posed by the Concept of State Sovereignty

The subsequent section serves to test the hypothesis that the concept of state sovereignty is an obstacle in the path of making ecocide an international crime with special regard to the states' warranty of leeway towards international law. In this light, it is alleged that the said concept limits the scope of international law as it entails a heavy dependence on the willingness and agreement of sovereign states concerning any expansion of international regulations. The discussion firstly elucidates the states' problematic preference for domestic legislation in the ecocide context and secondly illustrates the far-reaching consequences which such an approach has on the scope of the doctrines of ICL and IEL, both highly relevant for the underlying project of the research at hand. To begin with, the following section shortly introduces the concept of state sovereignty from an international law perspective.

1) The Concept of State Sovereignty

State sovereignty, equally referred to as Westphalian sovereignty, is one of the underlying principles of modern international law.[198] It emerged from the Peace of Westphalia in 1648 and is closely related to political theories of sovereignty established by famous political philosophers such as J. Bodin and T. Hobbes.[199] The complexity of the concept and the absence of an internationally agreed definition makes it difficult to provide a short and universal explanation. However, many scholars agree that state sovereignty can be understood with a view to its three notions: national independence, international autonomy and territorial integrity.[200] The common understanding that each sovereign state shall independently determine its relation with other states, has the right to freely choose its internal system and the authority over its territory and citizens is amongst others enshrined in the UN Charter.[201] As the concept in question gives states the right to exercise "ultimate and independent authority to govern themselves and those within their territory"[202], the initial scrutiny of its compatibility with those rules emerging from international law even predates the existence of the UN. The preceding observations illustrate that the concept of state sovereignty provides states with a certain prerogative of legislative and judicial powers compared to those powers delegated to the international legal system. In that respect the discrepancy between state sovereignty and the project of making ecocide a crime under international law arises. Many scholars have underlined the significant advantages of criminalizing severe environmental misconduct on an international level.[203] Nonetheless, this project would entail considerable sovereignty costs for contracting states in the context of making law (*jus dare*) and enforcing law.[204]

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[198] K. Ambos, *op. cit.*, p. 334.
[199] M. N. Shaw. International Law, vol. 6. Cambridge: Cambridge University Press 2008, p. 26.
[200] J. D. Van Der Vyver. State Sovereignty and the Environment in International Law. – 109 South African Law Journal 1992 (3), p. 475.
[201] Charter of the United Nations. San Francisco 26.06.1945, e.i.f. 24.10.1945, Art 2 (1), (4), (7).
[202] O. A. Hathaway. International Delegation and State Sovereignty. – 71 Law and Contemporary Problems 2008 (1), p. 115.
[203] See: A. Greene, *op. cit.*, pp. 19-22 and C. Byung-Sun, *op. cit.*, pp. 13-14.
[204] J. Bouvier. A law dictionary adapted to the Constitution and laws of the United States of America, and of the several states of the American union; with references to the civil and other systems of foreign law, vol 2. Pennsylvania: Childs & Peterson 1856, p. 772.

2) States' Preference for Domestic Legislation

As mentioned before,[205] based on the fundamental principle of ICL *nulla poena sine lege* ecocide cannot become a punishable crime without the existence of a law criminalizing the respective behaviour.[206] Hence, it has to be taken into account that the adoption of international laws highly depends on the willingness of states. Such an assumption has been confirmed by the Permanent Court of Justice with its application of the so-called Lotus principle in the 1930s. In its judgement the court states the following: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions […]. Restrictions upon the independence of States cannot therefore be presumed"[207]. This goes in line with the common understanding of state sovereignty assigning each state an "unfettered authority to make the laws that govern its own citizens"[208]. Thus , states are generally rather reluctant to voluntarily give away authority and independence by allowing new international laws to emerge which then create legally binding obligations and restrict the national scope of action.[209] Yet, within the last decade in a number of fields delegation of authority to international institutions has increasingly occurred. Based on this development, more recently legal scholars have argued that "[t]he concept of state sovereignty has been gradually eroded by treaties and the practice of states that have voluntarily accepted limitations to their hitherto jealously-guarded sovereignty in ways that only decades ago would have been deemed unacceptable"[210]. Correspondingly, academic scholars and public leaders who worry that international delegation comes at high costs have stated that the expanding scope of international law "lie[s] in direct conflict with this conception of sovereignty"[211]. As a consequence, despite negligible concessions by heads of states on international conferences that do not involve any sovereignty costs due to their non-binding character, little has been done to push for the international criminalization of environmental misconduct.[212] UN efforts remain occasional and produce limited outcomes, leaving most serious environmental threats unaddressed.[213]

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[205] *Supra*, p. 25.
[206] V. Schwegler, *op. cit.*, p. 86. *Supra*, p. 25.
[207] *S.S. Lotus (France v. Turkey)*, Judgment, 07.09.1927, PCIJ (ser. A) No. 10 (1927), § 44.
[208] O. A. Hathaway, *op. cit.*, p. 118.
[209] *Ibid.*, p. 118, 121.
[210] M. C. Bassiouni, 2013, *op. cit.*, p. 46.
[211] O. A. Hathaway, *op. cit.*, p. 115.
[212] C. C. Boyd, *op. cit.*, p. 488 and M. A. Gray, *op. cit.*, p. 237.
[213] F. Mégret, *op. cit.*, pp. 199-200.

Assuming that this stagnation *inter alia* results from the states' reluctance to hand over more sovereignty to international institutions, it should be examined whether domestic legislation leaving states' sovereignty untouched could be an alternative to the adoption of an ecocide law on the international level. As stated before, in the aftermath of the failure of the ILC to include its Art. 26 into the Draft Code, more than ten states adopted ecocide laws on a national level. Vietnam was the first state to realise such an inclusion most likely as a consequence of the severe environmental destruction during the war.[214] After the collapse of the Soviet Union, Russia[215] and several new states, including Armenia,[216] Moldova[217] and Georgia[218] integrated similar provisions into their new penal codes. However, it is striking to see that the majority of these states is characterized by a "low level of respect for the rule of law and a high level of corruption"[219]. Correspondingly, recent case law has demonstrated the limits of domestic laws in prosecuting environmental crimes.[220] Moreover, the general risk that domestic courts are affected by corruption and political interests[221] above all poses an obstacle to the successful prosecution of environmental crimes in two cases: firstly, when the state itself is involved in environmentally harmful activities[222] and secondly, when the perpetrator is a powerful corporation.[223] It is self-explanatory that the former on the one hand reduces the motivation of sovereign states to criminalize environmental misconduct at all and on the other hand, increases the risk that proceedings are not being conducted independently and impartially in case legal provisions exist.[224] Furthermore, where "corporate power and sovereign power are ontologically linked"[225] it might be in the interest of states to shield powerful corporations whose activities are beneficial to the state's economy.[226] In contrast to illegal conduct criminalized under the core crimes of ICL, states might be less motivated to criminalize ecocide taking into consideration that unlike murder or torture, polluting activities are often side-effects of activities that are in principle beneficial for the society.[227]

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[214] Penal Code of Viet Nam, 2000, *op. cit.*, Art. 342.
[215] The Criminal Code of The Russian Federation, 1996, *op. cit.*, Art. 358.
[216] Criminal Code of Armenia, 2005, *op. cit.*, Art. 394.
[217] Criminal Code of the Republic of Moldova, 2003, *op. cit.*, Art. 136.
[218] Criminal Code of Georgia, 2000, *op. cit.*, Art. 409.
[219] V. Schwegler, *op. cit.*, p. 94.
[220] A. Greene, *op. cit.*, pp. 19-22.
[221] *Ibid.*, p. 45.
[222] F. Mégret, *op. cit.*, p. 197 and M. A. Gray, *op. cit.*,p. 221.
[223] S. Hall. Entanglements Between Finance, Corporate Power and State Sovereignty. – 19 Geopolitics 2014 (3), p. 743.
[224] R. White, *op. cit.*, p. 100.
[225] J. Barkan. Corporate Sovereignty: Law and Government under Capitalism. London: University of Minnesita Press 2013, p. 4.
[226] L. A. Teclaff, *op. cit.*, p. 951.
[227] S. F. Mandiberg, M. G Faure, *op. cit.*, p. 448.

Nevertheless, even where a genuine interest to prosecute perpetrators of ecocide exists, it has been argued that due to the very nature of environmental damage domestic laws tend to be inefficient.[228] Individual states may not only lack investigative means but also jurisdictional competence.[229] Such argumentation is generally based on the assumptions that environmental harm amounting to ecocide tends to geographically spread beyond national borders and commonly involves a number of multinational actors.[230] While a state has the legislative jurisdiction to prescribe rules for its citizens that apply even outside of its territory, this is not the case with respect to enforcement jurisdiction.[231] Accordingly, a state cannot exercise criminal jurisdiction on the territory of a foreign state "except by virtue of a permissive rule derived from international custom or from a convention"[232]. Therefore, where transboundary harm occurs, jurisdictional reach for the crime of ecocide at least requires international cooperation. However, after all, "unprecedented problems of extraterritoriality and suspicions of interference in the internal affairs of other states"[233] could be prevented by means of an international law voluntarily and mutually agreed upon by all contracting states. Furthermore, an international approach would facilitate dealing with the multitude of trans- or multinational actors and stakeholders involved in harmful conduct.[234] Beyond that, in the event that effective regulations exist only in a few states, they "may end up bearing a disproportionate share of the burden of prosecuting those who commit international environmental offenses"[235] while, in fact, the international community as a whole should take responsibility for crimes with such global consequences.

Having considered these difficulties, it can be concluded, that national legislation does not present an equivalent alternative to the project of making ecocide a crime under international law. Reducing state autonomy by widening the scope of IEL and ICL might be necessary in order to efficiently prosecute severe environmental misconduct.[236] However, it should be noted that an international ecocide law depending on the indirect enforcement system integral to ICL would equally suffer from the above-mentioned risks and difficulties.[237] Rather, to

[228] C. C. Boyd, *op. cit.*, p. 488.
[229] A. Greene, *op. cit.*, p. 45.
[230] B. Lay *et al*., *op. cit.*, p. 445.
[231] C. Staker. Jurisdiction. – M. Evans (ed). International Law. Oxford: Oxford University Press 2014, p. 3.
[232] *S.S. Lotus (France v. Turkey)*, 1927, *op. cit.*, § 45.
[233] F. Mégret, *op. cit.*, p. 214.
[234] G. MacCarrick, *op. cit.*, p. 235 and F. Mégret, *op. cit.*, p. 213.
[235] F. Mégret, *op. cit.*, p. 215.
[236] G. MacCarrick, *op. cit.*, p. 235.
[237] R. McLaughlin, *op. cit.*, p. 409 and M. C. Bassiouni, 2013, *op. cit.*, p. 23.

overcome the obstacles of political arbitrariness and insufficient equipment, proceedings would have to take place under the jurisdiction of an international institution.[238]

Based on the fact that the emergence of an international crime of ecocide has been primarily discussed in the context of an expansion of IEL and ICL, the subsequent sections discuss the role that state sovereignty plays accordingly.

3) State Sovereignty and ICL

In order to further support the hypothesis that the concept of state sovereignty impedes the process of making ecocide a crime under international law, this section takes a closer look at the concepts' impact on the field of ICL in general. To begin with, legal scholars have been criticizing the concept of state sovereignty as an obstacle to the efficiency of the ICL system ever since the sub-doctrine has emerged.[239] In particular, some of the most renowned figures in the field, namely A. Cassese, T. Meron and C. Bassiouni equally claim that the concept of state sovereignty is in principle incompatible with the aspirations of ICL.[240] This opinion represents the view of a considerable number of ICL scholars who identify sovereignty as "the enemy, […] the sibling of realpolitik, thwarting international criminal justice at every turn"[241]. Although some scholars do not support such a radical judgement,[242] the concept's debilitating effect on initiatives aiming to expand the scope of ICL cannot be denied. To that effect, states have been reluctant to give authority to the ICC and occasionally misused the concept of state sovereignty in order to assert national interests *inter alia* during the drafting process of the Rome Statute.[243] After all, expressions of the concept in question such as the principles of territorial integrity and political independence of states have been anchored in the document's preamble.[244] Hence, while on the one hand, the emergence of individual criminal responsibility under ICL has lifted "the veil of state sovereignty"[245], on the other hand the tendency of states to assert sovereignty has established a system of ICL which highly

[238] C. Byung-Sun, *op. cit.*, p. 47 and A. Greene, *op. cit.*, pp. 19-22.
[239] G. Werle, *op. cit.*, p. 1.
[240] R. C. Jennings. Cosmopolitan subjects: Critical reflections on dualism, ICL and sovereignty. – 7 African Journal of Legal Studies 2014 (3), p. 323 and R. Cryer. International Criminal Law vs State Sovereignty: Another Round? – 16 The European Journal of International Law 2006 (5), p. 981.
[241] R. Cryer, *op. cit.*, p. 980.
[242] C. Stahn, *op. cit.*, pp. 414-416 and R. Cryer, *op. cit.*, p. 985.
[243] G. Werle, *op. cit.*, pp. 19-20, C. Stahn, *op. cit.*, p. 414 and R. Cryer, *op. cit.*, p. 981, 985.
[244] Rome Statute of the International Criminal Court, 2002, *op. cit.*, Preamble.
[245] P. Gaeta. International Criminalization of Prohibited Conduct. – A. Cassese (ed). The Oxford Companion to International Criminal Justice. Oxford: Oxford University Press 2009, p. 68, similarly expressed in: G. Werle, *op. cit.*, pp. 43-44 and K. Ambos, *op. cit.*, pp. 59-60.

depends on state cooperation.[246] In that sense, the ICC's execution of fundamental functions such as arrests, witness relocation or the enforcement of sentences requires voluntary support of states.[247] Consequently, it should be kept in mind that the efficiency of prosecuting severe environmental harm even provided that the project of making ecocide an international crime succeeds would still be dependent on the political will of individual states.[248] Moreover, the prominent principle of complementarity deriving from the concept of state sovereignty establishes jurisdictional precedence in favour of sovereign states.[249] Taking into consideration the above-mentioned concern that national prosecution might protect political actors and corporate leadership, a certain risk of lower severity of penalties outside of the international framework exists.[250] Accordingly, the preceding examination clearly illustrates that the concept of state sovereignty has inhibited the development of an ICL independent of the voluntary cooperation and continuing support of states from the very beginning. Instead, the said concept has entered into the realm of ICL and led to the doctrine's subordination to the willingness of sovereign states. Moreover, it is fundamental to understand that the agreement of states to accept an international adjudication of core crimes and hence giving up their legal monopoly can be traced back to the fundamental values protected by an international criminalisation of the respective conduct.[251] However, until today environmental protection has not been accredited a status of such an undisputed and fundamental value.

4) States Sovereignty and IEL

Moreover, it is relevant to mention that a similar tension exists between the concept of state sovereignty and the doctrine of IEL.[252] To begin with, international regulations entailing a certain standard of treatment for the environment potentially affect the territorial integrity of states by restricting national decision-making processes concerning the use of resources and the treatment of ecological systems.[253] IEL scholars justify the incurred sovereignty costs with recourse to the basic premise that the natural environment is "made up of assets common to

[246] A. Cassese *et al*., *op. cit.*, p. 298.
[247] Joining the International Criminal Court: Why does it matter? – International Criminal Court. Accessible at: https://www.icc-cpi.int/iccdocs/PIDS/publications/Universality_Eng.pdf (07.04.20) and C. Stahn, *op. cit.*, pp. 230-231.
[248] F. Mégret, *op. cit.*, p. 204 and R. Mwanza, *op. cit.*, p. 606.
[249] M. C. Bassiouni, 2013, *op. cit.*, p. 21 and A. Cassese *et al*., *op. cit.*, p. 298.
[250] G. MacCarrick, *op. cit.*, p. 235 and V. Schwegler, *op. cit.*, p. 88.
[251] P. Gaeta, *op. cit.*, p. 66.
[252] J. D. van der Vyver. The Environment: State Sovereignty, Human Rights, and Armed Conflict. – 23 Emory International Law Review 2009 (1), p. 88.
[253] *Ibid.*, p. 476.

all humanity that move beyond state territorial boundaries"[254]. However, the implementation of most environmental conventions highly depends on the willingness of its contracting states.[255] By contrast, the powers and discretion of international organisations, including pertinent sub-organs of the UN, are narrowly confined. As a matter of fact, even the most fundamental documents of IEL such as the 1992 Stockholm Declaration include notions of "traditional territorial state responsibility"[256] and require national implementation instead of integrating directly applicable provisions. Such a sovereignty-based and state-centred approach of IEL has been heavily criticised and identified as "an obstacle to the type of cooperation that is necessitated"[257]. To that effect, although the protection of the environment constitutes the very core of IEL, the doctrine's scope with regard to the prohibition of certain environmentally harmful conduct remains limited until individual states decide otherwise. Such high dependence on the political will of states is problematic once a state is not interested in criminalizing environmental degradation due to its own involvement in harmful processes or the prioritization of economic interests over environmental protection.

All in all, the preceding section confirmed the existence of an impeding effect of the concept of state sovereignty on the project to make ecocide a crime under international law. Clearly, states have a preference for maintaining their law-making and jurisdictional authority while being reluctant to expand the scope of international law at the costs of their sovereignty. Nonetheless, domestic ecocide legislations tend to be insufficient due to the nature of severe environmental crimes and the risk of political arbitrariness. Concerning ICL, it can be concluded that the development and expansion of the doctrine highly depends on the willingness of states. Hence, an international ecocide law will not emerge without the conscious decision of states to support such an endeavour. The fact that it might be in the state's interest to protect corporate activity or to ensure that their own behaviour remains unpunishable further reduces the likelihood that the international criminalization of ecocide would succeed. Moreover, due to the notions of state sovereignty that penetrated the young doctrine of ICL it can be questioned whether a crime of ecocide could at all efficiently fulfil its purpose under the current system. Furthermore, the existing tension between the concept of state sovereignty and the natural progression of IEL additionally complicates the occurrence of the desirable event.

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[254] G. MacCarrick, *op. cit.*, p. 235.
[255] J. D. van der Vyver, *op. cit.*, p. 85.
[256] *Ibid.*, p. 92.
[257] A. Murphy. The United Nations Security Council and Climate Change: Mapping a Pragmatic Pathway to Intervention. – 1 Carbon & Climate Law Review 2019, p. 52. See also: R. McLaughlin, *op. cit.*, p. 381.

2. Lacking an 'Ecocentric' Mindset: The Anthropocentrism of International Law

The first chapter clearly demonstrated that suggested definitions for an international ecocide crime entail a novel development: the recognition of non-human life as a victim of international crimes.[258] In line with this idea many environmentalists have argued that the emergence of an efficient ecocide crime requires a fundamental change in mindsets, more precisely it has been demanded that the anthropocentric approach of international law should be replaced by an 'ecocentric' one.[259] After clarifying the terminology and the underlying idea of an 'ecocentric' mindset, the following section points out the difficulties of such a radical claim. The practicability of non-human life as a victim under current ICL will be further discussed in the last chapter.[260] The term 'anthropocentrism' derives from the Greek words 'anthropos' meaning 'human being' and 'kentron' meaning 'centre'. It refers to the belief that human beings are the most important and central entity in the universe. By contrast, critical legal theory argues that in the context of law dealing with non-human life it can be seen as "intensely problematic that the human subject stands at the centre of the juridical order as its only true agent and beneficiary"[261]. Instead, a number of environmental scholars made use of the ecocide discourse in order to introduce the idea of ecocentrism as a counterpart of anthropocentrism. The term 'ecocentric'[262] describes a perspective that includes the non-human in its conceptualisations.[263] Hence, in the ecocide context, it raises the question of whether the nature itself can be identified as a protected good or whether a linkage to human harm is strictly required.[264] In that sense, it has been argued that "every element of nature is unique and has inherent dignity, and therefore warrants respect regardless of its value to man"[265]. While such a statement is mainly based on moral considerations, other proponents of an 'ecocentric' approach to the crime of ecocide base their argumentation on practical considerations. Although harm to the environment entering the threshold of ecocide is likely to affect humans,[266] the fundamental issue is that "at the outset this harm may be remote, widespread, and difficult to prove, especially in instances where the adverse impact is not

[258] See *supra*, pp. 22 *ff.*
[259] P. Higgins, 2010, *op. cit.*, pp. 9-10.
[260] See *infra*, pp. 65 *ff.*
[261] A. Grear. Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene 'Humanity'. – 26 Law Critique 2015, p. 225.
[262] Some scholars synonymously use the term 'biocentric', as in: M. A. Orellana, *op. cit.*, p. 695.
[263] R. White, *op. cit.*, p. 103.
[264] T. Weinstein, *op. cit.*, p. 721, D. Shelton. Human Rights, Environmental Rights, and the Right to Environment. – 28 Stanford Journal of International Law 1991 (1), p. 104 and R. White, *op. cit.*, p. 103.
[265] M. A. Gray, *op. cit.*, pp. 224-225.
[266] M. A. Orellana, *op. cit.*, p. 695.

manifest for a generation or more"[267]. The establishment of a causal link between the prohibited conduct and human suffering necessary for the prosecution of potential perpetrators in court becomes a nearly insurmountable obstacle[268] and a subject of complex scientific considerations.[269] Accordingly, some scholars have concluded that "attempts to bring actions to remedy environmental damage and destruction based solely on adverse human impact rarely succeed"[270]. The introduction of non-human rights for its part helps to establish direct causal links between the criminalized conduct and its harmful consequences through a holistic approach allowing to take into consideration "soil and water damage as well as animal and human harm"[271]. Such an idea is closely linked to a general movement of environmentalists claiming that the environment itself possesses certain rights that are meant to be protected.[272] However, although "[t]he ascribing of rights to non-human species is on the increase"[273], until today, very few legal systems have adopted an 'ecocentric' mindset.[274] In fact, most national systems are mainly focused on the protection of human interests.[275] Nonetheless, numerous scholars of IEL believe that the moral imperative underlying the idea of an 'ecocentric' approach of international law will further develop and potentially entail legal effects in the future.[276] Others argue that even though the adoption of an ecological approach is possible in theory, current political, social and economic obstacles place it "beyond likelihood of succeeding"[277]. In fact, the current system of international law suggests that the adoption of an 'ecocentric' approach is unlikely to be implemented but rather remains a moral claim of environmentalists. This statement is based on two main observations being further addressed in the following: Firstly, if an international crime of ecocide should emerge it is likely to be based on human rights law rather than on purely 'ecocentric' considerations.

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[267] F. Mégret, *op. cit.*, p. 209.
[268] P. Higgins, 2010, *op. cit.*, p. 228. Equally confirmed by jurisprudence albeit in the rather particular context of climate change: *Lliuya v. RWE AG*, Decision, 15.12.2016, District Court Essen 14/0354Z/R/RV (2016).
[269] D. Shelton, 1991, *op. cit.*, p. 136.
[270] P. Higgins, 2010, *op. cit.*, p. 228.
[271] *Ibid*, p. 228.
[272] B. Lay *et al*., *op. cit.*, p. 440 and M. A. Gray, *op. cit.*, pp. 224-225.
[273] P. Higgins, 2010, *op. cit.*, p. 230.
[274] One of very few existing examples can be found in Ecuador: Art. 10 of its constitution states recognizes nature as a legal entity. It should be noted though that in Ecuador corporate activity has damaged the countries ecosystems to an extent that makes it one of the well-known cases of potential ecocide. Further discussed in: L. A. Mowery, *op. cit.*, p. 344. Moreover, on the World People's Conference on Climate Change, held in 2010, Bolivia introduced a Universal Declaration of Mother Earth Rights as a significant step towards a general recognition of non-human rights. However, it remained unsuccessful. See: P. Higgins, 2010, *op. cit.*, p. 235.
[275] C. Byung-Sun, *op. cit.*, pp. 23, 27.
[276] M. A. Gray, *op. cit.*, pp. 224-225 and T. Weinstein, *op. cit.*, p. 721.
[277] L. A. Mowery, *op. cit.*, p. 348. See also: J. J. Bruckerhoff. Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights. – 86 Texas Law Review 2008 (3), p. 645.
The right of economic self-determination can be identified as one of the major hurdles in particular in developing countries where economic development prevails over environmental sustainability. This is not expected to change in near future, see: D. Shelton, 1991, *op. cit.*, p. 109.

Secondly, the idea of non-human life as a victim can be framed as environmental idealism that seems impractical against the backdrop of a predominantly anthropocentric approach of international law which mainly treats nature as a commodity.

1) Human Rights Law as a Foundation for Ecocide

As *prima facie* the project of making ecocide a crime under international law is not instantly linked to IHRL, a short explanation of the doctrine's relevance in the context of ecocide is required.

An interrelation between the recognition of fundamental rights and the establishment of penal sanctions for certain misconduct has already been observed in ancient laws.[278] Regardless, the existence of a clear linkage between IHRL and the emergence of international crimes was firstly articulated in the end of the 20th century when ICL was classified as an enforcement measure of human rights.[279] Bassiouni examined a systematized process of five stages through "which internationally protected human rights principles, norms, and standards evolve from the stages of enunciation to criminalization"[280]. Hence, provided that the international community would consider a certain human right to be highly significant and in need of adequate protection, any violation of such a right would sooner or later be criminalized in order to ensure its enforcement by means of criminal proceedings.[281] It is important to note that *vice versa*, not every crime recognized under ICL is based on the protection of human rights.[282] However, the process of international criminalization will be examined closely in a subsequent chapter.[283] Based on Bassiouni's reasoning, IHRL is the 'shield' relying on civil and administrative law, while ICL primarily penal in nature constitutes the 'sword' used as an *ultima ratio* of enforcement.[284] Undoubtedly, in the absence of penal sanctions the "assumptions of voluntary compliance and deterrence"[285] are insufficient to guarantee that fundamental rights are protected. Nevertheless, it should be kept in mind that until today a number of novel regional and international human rights

[278] L. C. Green. Intersection of Human Rights and International Criminal Law. – 2 The Finnish Yearbook of International Law 1991, pp. 156-158.
[279] G. Werle, *op. cit.*, p. 53.
[280] M. C. Bassiouni. Enforcing Human Rights through ICL and through an International Criminal Tribunal. – 26 Studies in Transnational Legal Policy 1994, p. 348.
[281] *Ibid.*, pp. 348-349.
[282] G. Werle, *op. cit.*, p. 53.
[283] See *infra,* p. 57 *ff*.
[284] M. C. Bassiouni,1994, *op. cit.*, pp. 350-351.
[285] *Ibid.*, p. 355.

enforcement mechanisms outside of the scope of ICL have emerged. However, as IHRL mainly creates liability for states[286] such an approach would be insufficient to adequately address ecocide which in fact requires criminalization under ICL in order to prosecute the CEOs and managers of transnational corporations.[287] On the contrary, what is most relevant is that in line with the understanding of the evolutionary process of human rights, the reasoning of many ecocide proponents rests upon the indispensable necessity of protecting fundamental human rights by criminalizing their violation. The idea of justifying the emergence of a crime of ecocide based on the protection of human rights has further been supported by ICJ jurisprudence[288] and the early initiatives promoting its inclusion into the Rome Statute.[289]

Currently, there exist two different approaches relying on the human rights doctrine in order to provide remedy for those suffering environmental degradation.[290] Legal scholars discussing the crime of ecocide have made use of both ideas in order to justify the necessity of and provide for a foundation for an international ecocide law.[291] On the one hand, human rights scholars have tried to link environmental damage to already existing and fundamental, so-called first generation human rights,[292] such as the right to life or the right to health, the right to personal security or the right to food.[293] However, criticism of this approach puts forth that such a connection has not yet been universally acknowledged by jurisprudence, states and international organizations. The second approach referred to by a number of ecocide proponents[294] proposes an extension of the current substantive human rights catalogue by including the right to a safe and healthy environment.[295] The inclusion of a new third-generation right[296] as a specific environmental human right would resolve any conflict based on the assumption that human rights and environmental protection stand for distinct social values.[297] Moreover, it can be easily justified based on the understanding that there exists a

[286] Al. Zysset. The Common Core between Human Rights Law and International Criminal Law: A Structural Account. – 32 Ratio Juris 2019 (3), p. 291.
[287] However, human rights law can play a significant role when obliging states to exercise due diligence to ensure that human rights are not violated by non-state actors. In the absence of an international crime of ecocide, human rights law remains the only legal field which provides options for victims to seek redress for environmental harm during peace time. See: D. Shelton. Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized. – 35 Denver Journal of International Law and Policy 2006 (1), pp. 129-172.
[288] B. Lay *et al*., *op. cit.*, p. 442.
[289] F. Mégret, *op. cit.*, p. 208.
[290] D. Shelton, 1991, *op. cit.*, p. 104.
[291] See: B. Lay *et al*., *op. cit.*, p. 437.
[292] *Ibid.*, p. 440.
[293] L. A. Mowery, *op. cit.*, pp. 353-354, D. Shelton, 1991, *op. cit.*, p. 105 and M. A. Gray, *op. cit.*, p. 222.
[294] See: R. Mwanza, *op. cit.*, pp. 586 – 613 and B. Lay *et al*., *op. cit.*, pp. 431-452.
[295] L. A. Mowery, *op. cit.*, p. 353 and L. Berat, *op. cit.*, p. 348.
[296] B. Lay *et al*., *op. cit.*, p. 440.
[297] D. Shelton, 1991, *op. cit.*, p. 106.

"duty to protect the environment as a pre-condition of the realisation of human rights"[298]. Regional jurisprudence[299] and national constitutions[300] have already recognized the existence of such a right, which at first glance once it has reached a stage of criminalization, could serve as a solid basis for an international crime of ecocide.[301] Nonetheless, regardless of the criticism that hitherto IHRL lacks an accepted definition[302] and general recognition[303] of such a right, the main problem is that both above-mentioned approaches are anthropocentric in their nature and therefore incompatible with an ecological approach of IEL. Similar concerns exist about the frequently mentioned option of basing the crime of ecocide on the rights of future generations which will not be discussed any further due to the limited scope of this thesis.[304]

In fact, the ascertained anthropocentrism of IHRL can be traced back to the very nature of the doctrine. More precisely, in the 1970s the anthropocentric theory of international law was used in order to adequately justify the existence of human rights.[305] At that time the idea of humans at the centre of international law was a novel approach serving a necessary expansion of the doctrines' scope from the sole regulation of relations between states to the protection of individuals.[306] Hence, an anthropocentric perspective of international law was seen as crucial in order "to maximize its relevance to human affairs or […] to play its role in the twin goals of law-providing order and achieving values in the universe in which it operates"[307].

Taking into account the "prevailing anthropocentric orientation of international law"[308], the reasoning of ICL scholars[309] as well as the argumentation of many ecocide proponents as outlined above, it is to be expected that a further development of human rights norms such as the right to a healthy environment will be linked to the emergence of an international ecocide crime. The adoption of such a crime completely detached from human rights considerations and purely based on an 'ecocentric' mindset seems unrealistic. In order to underline the preceding assumption, that the current system of international law, beyond the sub-discipline

[298] B. Lay *et al*., *op. cit.*, p. 442.
[299] *Ibid.*, p. 441.
[300] L. A. Mowery, *op. cit.*, p. 349.
[301] B. Lay *et al*., *op. cit.*, p. 442.
[302] L. A. Mowery, *op. cit.*, p. 355.
[303] D. Shelton, 2006, *op. cit.*, p. 170.
[304] See: P. Higgins, 2010, *op. cit.*, p. 232 and J. J. Bruckerhoff, *op. cit.*, p. 633.
[305] S. P. Sinha. The Anthropocentric Theory of International Law as Basis for Human Rights. – 10 Case Western Reserve Journal of International Law 1978 (2), p. 475.
[306] S. P. Sinha, *op. cit.*, p. 497.
[307] *Ibid.*, p. 475.
[308] R. Mwanza, *op. cit.*, p. 588.
[309] See: M. C. Bassiouni,1994, *op. cit.*, pp. 348-355 and G. Werle, *op. cit.*, pp. 50-53.

of human rights, adopted a mainly anthropocentric approach, the following section demonstrates that the environment has mainly been dealt with as a commodity.

2) Nature as a Commodity under International Law

Supporting the hypothesis that taking into consideration the anthropocentric nature of the current international legal system, the idea of an 'ecocentric' ecocide law seems unrealistic and impracticable, the subsequent section examines the prevailing approach of dealing with the natural environment based on respective international legislation and jurisprudence. As mentioned above,[310] two main approaches of dealing with the natural environment can be distinguished: an 'ecocentric' approach on the one hand, treating earth as a living being, a subject entailing its own rights and an 'anthropocentric' approach on the other hand, identifying nature as an inactive object exploited for the benefit of humanity.[311] Accordingly, it has been criticized that the majority of national and international laws dealing with environmental protection, in fact, treat nature as a commodity[312] and by implication create legal systems which "legitimise and encourage the abuse of the earth by humans"[313]. Early environmental conventions such as the 1902 Convention for the Protection of Birds Useful to Agriculture confirm the idea that environmental protection is meant to serve human interests instead of guaranteeing a respectful treatment of non-human life based on ecological considerations.[314] However, one may expect that with the emergence of the new discipline of IEL reflecting the increasing attention the international community attributes to environmental protection, such an anthropocentric approach has changed. Nevertheless, contrary to this assumption, it has been argued that, in fact, since the 1970s environmental legislation worldwide has treated nature as a resource that entails a monetary value and is subject to trade, property and trusteeship laws.[315] To that effect, fundamental documents such as the 1972 Stockholm Declaration on the Human Environment[316] and the 1992 Rio

[310] *Supra*, p. 35.
[311] A. Grear, *op. cit.*, p. 230.
[312] See: M. A. Drumbl. International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps. – 6 ILSA Journal of International & Comparative Law 2000 (2), p. 324.
[313] P. Higgins, 2010, *op. cit.*, p. 230.
[314] D. Shelton, 1991, *op. cit.*, p. 108. Referring to: Convention for the Protection of Birds Useful to Agriculture. Paris 19.03.1902, e.i.f. 06.12.1905.
[315] P. Higgins, 2010, *op. cit.*, p. 23 and P. Higgins. Earth Is Our Business: Changing the Rules of the Game, London: Shepheard- Valwyn Ltd 2012, pp. 36-37.
[316] The declaration considered to be one of the most relevant documents with a view to the emergence of an IEL. It states in its second principle that "[t]he natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present

Declaration on Environment and Development[317] adopted an anthropocentric approach by clearly focusing on the human benefits of environmental protection. Moreover, pollution prevention regulations are a prime example of centring human self-interest.[318] Correspondingly, the 1992 UN Framework Convention on Climate Change (UNFCCC)[319] and the 1997 Kyoto Protocol[320] to a great extent justify the urgent need to deal with climate change based on anthropocentric reasoning. Albeit the 2016 Paris Agreement includes an 'ecocentric' conception of nature,[321] the majority of its text underlines the threats that climate change poses to humanity. To that effect, it reproduces the understanding that environmental degradation has to be addressed only in those cases where it is necessary in order to protect mankind. Against this background, it can be concluded that the agreement is still dominated by an overall anthropocentric approach. Notwithstanding a slow emergence of biodiversity laws which attempt to shift the current focus of international law,[322] changes of a far-reaching scope have not yet been introduced.

In addition, the jurisprudence of the ICJ dealing with environmental protection has likewise reproduced the predominant anthropocentric attitude of international law.[323] In its 1996 Nuclear Weapons advisory opinion the court bases its reasoning on the anthropocentric view that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn"[324]. While the court's judgement in the 1997 Gabikovo case at least recognizes the harmful effects of past human interference with nature based on economic profits, it still considers the need for enhanced environmental protection with a view to "a growing awareness of the risks for mankind - for

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and future generations […]", can be found in: Report of the United Nations Conference on the Human Environment in Stockholm, 1973, *op. cit.*, p. 4.

[317] Reaffirming human benefits as the primary driving force for protecting the environment it emphasizes in its first principle that "[h]uman beings are at the centre of concerns for sustainable development"[317] and in the following acknowledges the right of sovereign states to exploit the resources found on their territory. Can be found in: Report of the United Nations Conference on Environment and Development in Rio de Janeiro, 1992, *op. cit.*, p. 3.

[318] J. J. Bruckerhoff, *op. cit.*, p. 618.

[319] The UNFCCC states that the climate system has to be protected "for present and future generations": United Nations Framework Convention on Climate Change. Rio de Janeiro 09.05.1992, e.i.f. 21.03.94, preamble.

[320] The Kyoto Protocol reaffirms the provisions of the UNFCCC emphasizing the right of sovereign states to exploit natural resources and the right to development: Kyoto Protocol to the United Nations Framework Convention on Climate Change. Kyoto 11.12.1997, e.i.f. 16.02.2005.

[321] The Paris Agreement emphasizes the "importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth": Paris Agreement. Paris 12.12.2015, e.i.f. 04.11.16, preamble.

[322] See: P. Higgins, 2012, *op. cit.*, pp. 36-37 and J. J. Bruckerhoff, *op. cit.*, p. 618.

[323] See: Y. Shigeta. Obligations to Protect the Environment in the ICJ's Practice: To What Extent Erga Omnes. – 55 Japanese Yearbook of International Law 2012, pp. 176-207.

[324] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 08.07.1996, ICJ Reports (1996), pp. 241-242, § 29.

present and future generations"[325]. However, in more recent cases the court has considered "risks to the ecology and water quality of the river, as well as morphological changes"[326] as relevant without making a direct reference to any resulting harm for humanity. Nevertheless, until today no clear shift to an 'ecocentric' conception can be ascertained.

Taking into consideration that "[l]aw shapes our societies, our way of thinking, our behaviour"[327] it has been suggested that the current approach of international law even promotes harmful business activity as the current mindset supports the idea that "[t]he value of life is of no consequence but value of profit is"[328]. Correspondingly, some argue that the adequate conditions for making ecocide a crime under international law remain absent.

Yet, the anthropocentric nature of international law does not generally exclude the adoption of an international crime of ecocide. Rather, as outlined above, it should be taken into consideration that such a crime is likely to be based on human rights considerations requiring a link to the occurrence of human harm. Hence, the idea of the sole protection of non-human victims, though possible in theory, does not seem realistic. Having demonstrated the general approach of the international legal system of treating nature as a resource rather than granting it its own rights, the demand for fundamental changes towards an 'ecocentric' system of international law appears to be naïve. Nonetheless, the conclusion of some scholars that the anthropocentric nature of the international legal system poses a general obstacle to the emergence of an international crime of ecocide loses its consistency once it is considered that serious cases of environmental destruction are likely to be inseparable from human suffering.[329]

In conclusion, the hypothesis that the ambitious project of making ecocide a crime under international law is hampered by the concept of state sovereignty underpinning the modern system of international law as well as by the anthropocentric nature of the current international legal system can be confirmed partly. In fact, the expansion of the regime of ICL highly depends on the willingness of states which have not yet generated the necessary enthusiasm for the adoption of an international crime of ecocide. Moreover, if such a process should be initiated in the future, it will most likely fail to meet the over-optimistic expectations of environmentalists demanding a shift from an anthropocentric to an

[325] *Gabcikovo Nagymaros Project (Hungary v. Slovakia)*, 1997, *op. cit.*, p. 78, § 140.
[326] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment, 16.12.2015, ICJ Reports (2015), p. 721, § 155.
[327] P. Higgins, 2010, *op. cit.*, p. 230.
[328] *Ibid.*, p. 24.
[329] M. A. Orellana, *op. cit.*, p. 695.

‘ecocentric’ approach. Notwithstanding, a less ‘ecocentric’ approach based on the protection of the human right to a safe and healthy environment could be successful under the current system of international law.

III. Obstacles Based on the Preferred Regulatory Framework: IEL

Due to the emergence of an IEL concerned with environmental protection, "law is now perceived as ordering the relationships between human endeavors and the environment which sustains them"[330]. As human behaviour resulting in environmental harm can be seen as part of that relation, an international ecocide law falls into the ambit of IEL. More precisely, such a law could be identified as "a reasonable and vital part of this growing legal culture"[331]. Even though as explained before, making ecocide an international crime requires recourse to a number of fields of law *inter alia* IHRL and ICL,[332] it would be obvious that IEL as a doctrine primarily charged with "formulating new roles for international law in protecting the Earth's environment"[333] would present the international community's traditional response to deal with the occurrence of severe environmental harm. Thus far, the emergent doctrine has provoked an expansion of laws for environmental protection and developed relevant tools in order to prevent and reduce environmental harm as a result of human activity.[334] However, the subsequent section hypothesizes that two main characteristics of IEL challenge the efforts of making ecocide a crime under international law. It is alleged that, firstly, IEL presently lacks a "strong prohibition point or capacity to hold individual perpetrators accountable"[335] and that such a "reluctance […] in moving toward criminal-oriented solutions"[336] is obstructive to the project in question. Secondly, the subsequent section serves to test the hypothesis that the vague nature of the principles of IEL, in particular the precautionary principle, is incompatible with the aspirations of imposing criminal sanctions for individual behaviour severely harming the environment.

1. Lacking Interest in Criminalization: Focus on Administrative Regulations

The claim of making ecocide a crime under international law is based on the assumption that albeit civil enforcement has punitive dimensions, criminal enforcement is unique in its long-term effects as its sanctions include "the loss of liberty that results from incarceration, […]

[330] N. A. Robinson. Introduction: Emerging International Environmental Law. – 17 Stanford Journal of International Law 1981 (2), p. 229.
[331] B. Lay *et al*., *op. cit.*, p. 443.
[332] *Ibid.*, p. 437.
[333] N. A. Robinson, *op. cit.*, p. 229.
[334] *Ibid.*, pp. 229, 260.
[335] B. Lay *et al*., *op. cit.*, p. 447.
[336] F. Mégret, *op. cit.*, p. 217.

and the moral stigma associated with a criminal conviction"[337]. However, the following section suggests that there exists a tension between the general approach of IEL as the primary legal discipline dealing with environmental protection on the one hand and criminal enforcement as a necessity in the context of ecocide on the other hand. In order to prove this hypothesis, it is first necessary to explain the doctrines' preference for soft law approaches before secondly pointing out respective shortcomings. Thirdly, the issue will be contextualized with a view to the allegation of a general incompatibility of the doctrines of IEL and ICL in order to assess the theoretical possibility of including criminal sanctions into the toolkit of IEL. Lastly, the necessity for the imposition of criminal sanctions for committing severe environmental crimes will be reaffirmed in order to prove that the traditional approach of IEL remains insufficient.

1) Understanding the Soft Law Approach of IEL

In general, it has been argued that IEL is "less well-suited to enforcement than other areas of international law"[338]. In practice, the doctrine "has developed its own peculiar identity and priorities"[339] with a clear preference for soft law approaches.[340] It can be observed that "anticipated solutions in this realm are typically administrative, preventive, voluntary, consensual, forward-looking, and regulatory in nature"[341] as they include the use of guidelines and codes of conduct instead of binding law. Hence, national and international legislation in the field of environmental law relies on "confidence building, compliance, self- reporting, transparency, negotiation, persuasion, and peer review"[342] while to a great extent rejecting the imposition of criminal sanctions for environmental misconduct. Such a reluctance to resort to criminal enforcement results from a few basic assumptions of the emergent doctrine of IEL which are further assessed in the following.

Firstly, IEL originally focuses on states as subjects of international law and "is therefore not naturally suited to criminal law forms"[343].

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[337] R. J. Lazarus. Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law. – 83 Georgetown Law Journal 1995 (7), p. 2442.
[338] M. E. O'Connell. Enforcement and the Success of IEL. – 47 Global Legal Studies Journal 1995 (3), p. 48.
[339] F. Mégret, *op. cit.*, p. 218.
[340] A. Greene, *op. cit.*, p. 30 and A. Murphy, *op. cit.*, p. 52 and C. Stahn, *op. cit.*, p. 109.
[341] F. Mégret, *op. cit.*, p. 219.
[342] *Ibid.*, p. 219.
[343] F. Mégret, *op. cit.*, p. 218.

Secondly, the preference for a soft law approach can be traced back to the particular design of environmental regimes built on the basic assumption that weak rules, inclusive regimes and consensual decision-making lead to a higher level of cooperation and greater effectiveness while on the contrary it has been suggested that "[c]oercive enforcement mechanisms operate to sabotage the evolution of effective regimes"[344]. In fact, non-binding guidelines are seen as a compromise between no law at all and "too rigidly defined obligations [which] would only lead to inefficiency by deterring a significant number of States from undertaking any commitment"[345]. Moreover, due to the nature of environmental harm, it is alleged that "[d]eveloping a supranational mechanism to criminalize gross harm to the environment would require unprecedented levels of global solidarity"[346]. Thus, different regions and societies are affected in unequal ways and therefore, IEL prefers to give states room for manoeuvre when implementing environmental regulations instead of equally subjecting them to the same legally binding provisions.

Thirdly, environmental lawyers claim that in general "criminal law fails to take into account the unique characteristics of environmental law as an aspirational, dynamic, and complex project ill-suited to harsh stigmatization and black-or-white categorization"[347]. Accordingly, it should be taken into account that IEL deals with often-irreversible effects of environmental harm which can geographically cover large-scale areas and be of continuing character even across generations.[348] Such "spatial and temporal dimensions"[349] of environmental harm underpin the doctrines' preventive approach based on the "incentives to increase countries' compliance with goals"[350]. Contrary to those who emphasize the strong preventive effect of criminal law which will be discussed later on,[351] it has been suggested that criminal enforcement focusing on the punishment of noncompliance is incompatible with such a risk-reduction approach of IEL.[352] Furthermore, IEL takes into consideration that environmental pollution is generally inevitable and pervasive resulting from economic activity in nearly all sectors and other socially beneficial activities. Hence, criminalizing environmental law bears the potential of having "far-reaching implications for our entire

[344] G. W. Downs. Constructing Effective Environmental Regimes. – 25 Annual Review of Political Sciences 2000 (3), pp. 28-29.
[345] L. Paradell-Trius. Principles of IEL: an Overview. – 9 Review of European, Comparative & IEL 2000 (2), p. 99.
[346] F. Mégret, *op. cit.*, p. 217.
[347] *Ibid.*, p. 218.
[348] See *supra*, p. 31.
[349] R. J. Lazarus, *op. cit.*, p. 2421.
[350] A. Greene, *op. cit.*, p. 30.
[351] *Infra*, p. 49 *ff.*
[352] A. Greene, *op. cit.*, p. 30.

society"[353]. A general reluctance towards the criminalization of environmental laws based on the fear of an extensive restriction of economic and human behaviour is in line with the limited scope of a potential ecocide crime that exclusively addresses the most serious dimensions of environmental harm. Moreover, against the backdrop of the special characteristics of environmental degradation, environmental laws demonstrate an aspirational quality as they do not intent "to codify existing norms of behavior, but to force dramatic changes in existing behavior"[354]. This feature of IEL potentially leads to "overly ambitious goals, unrealistic deadlines, and uncompromising and unduly rigid standards-doubtless"[355] and has therefore been identified as being incompatible with criminal enforcement. Furthermore, the doctrines' aversion towards criminalization is based on its "dynamic and evolutionary tendency"[356] which would otherwise result in a constant "pressure for legal redefinition"[357]. Thus, it becomes obvious that "[a] law that is constantly changing and fiercely contested cannot be used to impose criminal liability in the same way that traditional criminal law is used"[358]. Apart from that, the complexity of environmental law, arising from political and scientific factors but above all reflecting the complexities of our ecosystems,[359] has equally been identified as unprecedented and hardly compatible with criminal enforcement.[360] Assigning criminal responsibility is further complicated due to scientific uncertainties amongst others with regard to the causes of environmental harm and a lack of clear hierarchical structures in decision-making in many institutions involved in environmental misconduct.[361] Accordingly, it has been concluded that criminal sanctions as an enforcement measure of IEL are "incapable of addressing the vast diversity of behavior involved or the need for carefully calibrated incentives"[362]. Such a statement is closely connected to the presumed inability of current criminal justice institutions, such as the ICC, to adequately address environmental crimes due to a lack of knowledge and proficiency in the field of environmental law and sciences as outlined in the previous chapter.[363]

[353] R. J. Lazarus, *op. cit.*, p. 2423.
[354] *Ibid*., p. 2424.
[355] *Ibid.*, p. 2426.
[356] *Ibid.*, p. 2424.
[357] *Ibid.*, p. 2427.
[358] C. Motupalli. International Justice, Environmental Law, and Restorative Justice. – 8 Washington Journal of Environmental Law and Policy 2018 (2), p. 340.
[359] *Ibid.*, p. 340.
[360] R. J. Lazarus, *op. cit.*, pp. 2427-2429.
[361] *Ibid.*, p. 2422.
[362] F. Mégret, *op. cit.*, p. 221.
[363] See *infra*, pp. 66 *ff*.

Fourthly, "[w]ith fault de-emphasized, environmental issues have often been thought to be better treated under an administrative regulatory framework"[364] than by the imposition of penal sanctions. The fact that ecocide proponents underline the insignificance of fault by demanding that the crime shall entail strict liability demonstrates that ecocide falls into the category of such issues that environmental lawyers prefer to address by means of soft law approaches. Such an attitude is partly based on the difficulties arising from strict liability under ICL which will be addressed in the subsequent chapter.[365]

All in all, this section served to confirm the hypothesis that IEL generally lacks an interest in criminalization as, due to the nature of its subject, soft law approaches are overall thought to be more efficient in order to reduce the risk of future environmental degradation as well as more suitable for dealing with the state-centred and aspirational character, the evolutionary trend and the general complexity of the doctrine.

2) Shortcomings of the Soft Law Approach

Although the previous assessment served to give reasons for the reluctance of IEL to make use of criminal enforcement measures, the current soft approach of the doctrine entails certain problems with regard to the effectiveness of existing civil environmental protection laws. This has amongst many other cases been witnessed in the context of the pollution of the Love Canal in 1978 where "civil and administrative remedies were failing to deter environmental crime"[366]. One of the main reasons for such a failure of administrative penalties, as discussed in the first chapter,[367] is the inability of financial sanctions to cause a change in mind-set, especially when the misconduct results from corporate activities.[368] More precisely, it has been observed that "fines are merely factored in by the company as an externality, to be paid if and when caught"[369]. An expedient outcome requires perpetrators to be aware of the underlying norms and values whereas "making something legally punishable is not enough; society as a whole must disapprove of the acts and the potential risk of being caught must be high enough"[370]. Therefore, legal scholars have repeatedly scrutinized the effectiveness of financial sanctions. As long as sufficient understanding and discernment are missing,

[364] F. Mégret, *op. cit.*, p. 218.
[365] See *infra*, pp. 69 *ff*.
[366] C. C. Boyd, *op. cit.*, p. 483.
[367] See *supra*, p. 25.
[368] V. Schwegler, *op. cit.*, p. 87.
[369] P. Higgins, 2010, *op. cit.*, p. 113.
[370] V. Schwegler, *op. cit.*, p. 88.

financial punishment will not have any preventive or long-lasting effect. This is closely intertwined with the criticism that "statutory sanctions are not properly handling the root causes of why corporations and individuals violate environmental laws"[371]. Given these shortcomings of civil sanctions in the field of environmental protection, the following section examines the theoretical possibility of an integration of criminal sanctions into the field of environmental law.

3) ICL for the Environment: The Incompatibility of the Doctrines

A number of scholars have suggested the replacement of administrative penalties for environmental misconduct with criminal sanctions. In fact, the question of an ICL for the environment has been increasingly addressed by criminological scholarship since the 1990s.[372] Nonetheless, it has been noted that the horizontal approach of IEL "focused […] on tinkering with the economic determinants of behavior affecting the environment and the broad responsibility of states"[373] fundamentally differs from the top-down approach of ICL which emphasises "individual guilt, immorality, and gross wrongdoing"[374]. While a conviction under criminal law requires clear evidence and is based on determined, unambiguous norms, environmental law deals with scientific uncertainties[375] and is subject to constant changes and vague technical standards.[376] Hence, "[t]he reliance on administrative models […] makes it difficult to introduce a criminal dimension to the extent that such models are subtly premised against a significant and autonomous role for criminal sanction"[377]. This obvious segmentation of the two legal regimes impedes the emergence of an environmental criminal law, although IEL intersected many other disciplines of international law.[378] Therefore, it has been concluded that at this time neither "a regime of international environmental criminal law"[379], nor a commonly accepted "criminological theory of the uses of criminal law to better protect the environment"[380] exist. This is the case notwithstanding the agreement of many

[371] C. C. Boyd, *op. cit.*, p. 512.
[372] B. Lay *et al*., *op. cit.*, p. 432.
[373] F. Mégret, *op. cit.*, pp. 219-220.
[374] *Ibid.*
[375] R. McLaughlin, *op. cit.*, p. 396.
[376] R. J. Lazarus, *op. cit.*, p. 2445.
[377] F. Mégret, *op. cit.*, p. 221.
[378] R. J. Lazarus, *op. cit.*, p. 2415, p. 2419.
[379] A. Greene, *op. cit.*, p. 1.
[380] F. Mégret, *op. cit.*, p. 201.

scholars that the emergence of such a regime would be of utmost importance.[381] However, a general assessment of the need for an environmental criminal law would go beyond the scope of this thesis. Nevertheless, the following section serves to highlight the importance of criminalizing ecocide and further underlines the need for going beyond the usual toolkit of IEL by making use of criminal sanctions.

4) The Necessity of Criminalizing Ecocide

First of all, based on the fundamental concept of *nulla poena sine lege* environmental misconduct can only enter the ambit of ICL once it has been made legally punishable.[382] Hence, this justifies the need for the adoption of an international ecocide law in order to make use of criminal sanctions when determining the occurrence of severe environmental harm caused by human or corporate activity. However, it shall further be explained why criminal sanctions are needed in order to adequately and effectively address such environmental misconduct. With regard to corporate liability, it has been argued that "[l]aw can […] have the ability to establish social change"[383]. Nonetheless, no change in mindsets will occur given that corporations accept financial penalties as mere side effects of economic activities harming the environment.[384] By implication, it has been maintained that "[b]y treating ecocide as a regulatory issue instead of a genuine crime, the legal system reinforces the ideology that dealing with issues such as corporate environmental damage is something autonomous which corporations can resolve privately, outside of the context of criminal law"[385]. By contrast, criminalizing ecocide "should show that corporate wrongdoings are socially intolerable"[386] and consequently lead to a sustainable change in corporate mindsets. Furthermore, similar considerations are relevant in a non-corporate context. In order to prevent future ecocides, the general public has to be convinced that activities amounting to ecocide are morally wrong, illegal and criminal.[387] Thus, the integration of severe environmental harm into the doctrine of criminal law would make ecocide "a crime against society; […] not just a private wrong"[388].

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[381] R. J. Lazarus, *op. cit.*, p. 2419.
[382] V. Schwegler, *op. cit.*, p. 86. Partly addressed in the context of explaining the purpose of making ecocide a crime under international law, *supra* p. 25.
[383] *Ibid.*, p. 91.
[384] S. Hedman. Expressive Functions of Criminal Sanctions in Environmental Law. – 59 George Washington Law Review 1990 (4), p. 894.
[385] V. Schwegler, *op. cit.*, p. 91.
[386] *Ibid.*, p. 87.
[387] R. White, *op. cit.*, p. 97.
[388] R. J. Lazarus, *op. cit.*, p. 2444.

Apart from the ability of criminal sanctions to change corporate and community mindsets, another rather obvious purpose of criminalizing ecocide is the deterrent effect of an imprisonable offence. As the consequences and the severity of imprisonment are clearly greater than those of civil sanctions, criminal sanctions entail a strong preventive effect.[389] Therefore, an international ecocide law would primarily serve as a tool to prevent future harm instead of punishing misconduct which has occurred in the past.[390] Furthermore, it has been claimed that the remedies for ecocide shall be based on restorative justice,[391] going beyond the pecuniary justice envisaged by the imposition of civil sanctions.[392] Resulting from the existence of unsatisfying and non-expedient justice systems the concept of restorative justice has evolved as an alternative to traditional justice practices[393] and usually functions as a complement to the existing criminal justice system.[394] The UN Office on Drug and Crime has defined a restorative process as "any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator"[395]. Amongst others, the emergent concept aims at giving victims a voice and is meant to create change by identifying certain behaviour as unacceptable and thus reaffirms certain values within society.[396] It has been argued that restorative justice is a useful tool even when the victims of a crime are voiceless, as it is the case for non-human victims suffering from ecocide. Consequently, legal scholars have underlined that with regard to adequately addressing environmental misconduct, "restorative justice will not face the same limitations as environmental law"[397]. In fact, restorative justice is seen as a meaningful and necessary complement to existing environmental law remedies which highly depend on implementation.[398] Although it has been claimed that pecuniary remedies can be used directly as a means of serving retributive justice,[399] restorative justice at any stage of a criminal process goes beyond the aims of retribution by focusing on restoring and healing and is therefore capable of adequately addressing environmental crime.[400] Hence, criminal law does

[389] P. Higgins, 2010, *op. cit.*, p. 113.
[390] *Ibid.*, p. 112.
[391] P. Higgins, 2010, *op. cit.*, p. 114.
[392] B. Lay *et al*., *op. cit.*, p. 451.
[393] United Nations Office on Drugs and Crime. Handbook on Restorative Justice Programmes, New York: United Nations Publication 2006, p. 5.
[394] C. C. Boyd, *op. cit.*, p. 510.
[395] United Nations Office on Drugs and Crime, 2006, *op. cit.*, p. 6.
[396] *Ibid.*, p. 9-11.
[397] C. Motupalli, *op. cit.*, p. 343.
[398] *Ibid.*, pp. 346-348.
[399] N. Sachs. Beyond the Liability Wall: Strengthening Tort Remedies in IEL. – 55 UCLA Law Review 2008 (4), p. 845.
[400] C. C. Boyd, *op. cit.*, p. 508 and C. Motupalli, *op. cit.*, p. 334.

not only include sanctions of a greater deterrent effect but when making use of restorative processes further offers a complex and sustainable victim-oriented justice system. In addition to restorative justice practices, "therapeutic jurisprudence -specifically, problem-solving courts"[401] are considered to be alternative "unique and unconsidered strategies"[402] in order to effectively sanction severe environmental harm and only available in the context of ICL.[403]

5) Criminal Sanctions for the most Serious Offences

The fact that IEL predominantly makes use of non-criminal sanctions[404] results from the doctrines unique characteristics but is further strongly supported by a general incompatibility of the disciplines of environmental and criminal law.[405] However, such an assessment does not mean to undermine the functioning of IEL in general, as the novel doctrine has meaningfully developed a sanction system based on the special characteristics of environmental offences. Nevertheless, while in some cases "civil and administrative penalties serve appropriate and important roles in dealing with violations of environmental laws"[406], the previous section served to explain that with regard to severe environmental crimes, more precisely, in the case of ecocide, recourse to criminal sanctions remains indispensable.[407] Thus, it becomes clear that it is the gravity of the crime which renders civil sanctions insufficient. This goes in line with the general idea of using criminal punishment as a mean of last resort for sanctioning those having committed the most serious and grave offences.[408] The fact that until today an integration of the most serious environmental offences into criminal law is lacking is not exclusively based on the reluctance of IEL to impose criminal sanctions but can also be traced back to "a lack of enthusiasm, particularly from states"[409]. Moreover, with a view to national and regional levels, the preference for administrative regulations is connected to the higher costs of criminal investigations as it has been suggested with regard to a criminal environmental law on the European level.[410]

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[401] C. C. Boyd, *op. cit.*, p. 484.
[402] *Ibid.*
[403] See: Byung-Sun, C, *op. cit.*, pp. 11-47 and M. A. Orellana, *op. cit.*, pp. 673-696.
[404] F. Mégret, *op. cit.*, p. 196.
[405] C. Motupalli, *op. cit.*, p. 338.
[406] C. C. Boyd, *op. cit.*, p. 483.
[407] See *supra*, pp. 49-50.
[408] B. Lay *et al*., *op. cit.*, p. 451 and V. Schwegler, *op. cit.*, p. 92.
[409] F. Mégret, *op. cit.*, p. 201.
[410] G. Heine, C. Ringelmann. Towards an European Environmental Criminal Law - Problems and Recommendations. – 138 Studia Iuridica Auctoritate Universitatis Pecs Publicata 2005, p. 53.

All in all, it becomes rather obvious that making ecocide a crime under international law faces deep-rooted challenges and requires considerable efforts as it would constitute a deviation from procedure as usual with respect to the enforcement mechanisms of IEL.

2. Lacking Clarity: Vagueness of Principles of Environmental Law

As mentioned above, the doctrines of IEL and ICL have adopted fundamentally different approaches. With regard to the soft law approach of IEL, it has been stated that "[t]he vagueness, flexibility and imprecision of IEL can be difficult to reconcile with the specificity and rigidity required of ICL provisions"[411]. However, the legal ecocide discourse frequently mentions a number of principles of environmental law considered to be relevant for making ecocide a crime under international law. The precautionary principle stands out most as it has been referred to by a majority of ecocide proponents. Moreover, it has been recommended that in order to make ecocide a crime states shall adopt guidelines based on the precautionary principle.[412] Thus, to test the hypothesis that the incompatibility of environmental principles with the requirements of criminal liability under ICL presents an obstacle in the path of making ecocide a crime under international law, the following section focuses on the precautionary principle.

1) The Precautionary Principle: Emergence and Meaning

While it is difficult to provide a definitive list of principles of environmental law due to the heterogenic, complex and advancing character of the doctrine,[413] it has been generally agreed that the precautionary principle constitutes a rather popular environmental principle which emerged from the Rio Declaration in 1992 and has gained wide acceptance to date.[414] Principle 15 of the declaration states: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[415] Ever since, it has repeatedly

[411] A. Greene, *op. cit.*, p. 30.
[412] P. Higgins, 2010, *op. cit.*, p. 248 and M. A. Gray, *op. cit.*, p. 219.
[413] L. Paradell-Trius, *op. cit.*, p. 98.
[414] *Ibid.*, p. 99, A. Gray, *op. cit.*, p. 245 and E. Deloso. The Precautionary Principle: Relevance in International Law and Climate Change. – 80 Philippine Law Journal 2006 (4), p. 659 and J. R. Nash. Standing and the Precautionary Principle. – 108 Columbia Law Review 2008 (2), p. 499.
[415] Report of the United Nations Conference on Environment and Development in Rio de Janeiro, 1992, *op. cit.*, p. 6.

been referred to in national and regional jurisprudence[416] and appeared in various international instruments, such as in Art. 3 of the Climate Change Convention.[417] Furthermore, it has been suggested that the principle constitutes customary international law.[418] Although it can generally speaking be applied in any context involving risks and uncertainties, it is predominately associated with environmental protection.[419] As a "modern soft law instrument"[420] the principle differs from traditional regulatory practices of environmental law due to its preventive and pre-emptive rather than reactive approach.[421] More precisely, the principle ensures that "if there is a risk of severe damage to humans and/or the environment, the absence of incontrovertible, conclusive, or definite scientific proof is not a reason for inaction"[422]. In the context of ecocide, the principle complements the obligation of due diligence underlying the crime, as both aim at reducing the risk of harm.[423] The added value of the principle in the context of ecocide derives from shifting the burden of proof as the principle "places a duty on a decision-maker to anticipate harm before it occurs and make sure all steps have been taken to prevent any significant harm occurring"[424]. Consequently, it "encourages use of the best available technology in advance of conclusive scientific determination of a causal link"[425]. Moreover, the "better-safe-than-sorry approach"[426] additionally obliges the respondent to take preventive measures in order to minimize possibly resulting harm which could have severe consequences for the environment even in the absence of scientific certainty.[427]

2) Incompatibility with Criminal Liability

The previous section outlined the precautionary principle's underlying idea as well as its potential to address environmental degradation in a preventive manner. Utilizing the environmental principle as a basis for an international crime of ecocide goes in line with its integration into the doctrine of ICL. Nonetheless, based on the principle's vague nature, such

[416] B. Lay *et al*., *op. cit.*, p. 446.
[417] L. Paradell-Trius, *op. cit.*, p. 99.
[418] J. R. Nash, *op. cit.*, p. 499.
[419] *Ibid*., p. 498.
[420] M. A. Gray, *op. cit.*, p. 250.
[421] E. Deloso, *op. cit.*, p. 659.
[422] *Ibid.*, p. 659.
[423] M. A. Gray, *op. cit.*, p. 245.
[424] P. Higgins, 2010, *op. cit.*, p. 192.
[425] M. A. Gray, *op. cit.*, p. 218.
[426] E. Deloso, *op. cit.*, p. 659.
[427] P. Higgins, 2010, *op. cit.*, p. 192.

a process is problematic. Against this background, the subsequent section demonstrates the incompatibility of environmental principles with the requirements for the establishment of criminal liability.

The precautionary principle has been described as "vague and broad"[428], "ill-defined […] and a value-judgment"[429], "inherently contradictory"[430], likely to be misunderstood or misleading,[431] "unclear"[432] and in a lack of an "univocal meaning"[433] by its critics. Concurrently, the fact that the principle to some extent lacks clarity has been identified as its actual strength for two reasons. Firstly, in line with the reasoning in the first part of this chapter, a clear definition of the principle would most likely fail to take into account the special characteristics of IEL.[434] Secondly, the "compromise formulations leave some space for flexibility on the part of national enforcers"[435] and hence render the principle politically efficient. Nevertheless, with a view to the potential integration of such a principle into the ambit of criminal law, it has to be taken into consideration that the precautionary principle is "designed for broad domestic regulation or inter-state relations rather than the exacting standards of criminal justice"[436]. According to the principle, a degree of evidence below absolute proof or scientifically based evidence is sufficient in order to take action. Applied under ICL this would allow for the prosecution of an individual with recourse to an assessment primarily based on an uncertain value judgement. Therefore, albeit appropriately located in civil law, the principle's application to criminal law "creates the potential for criminal punishment in the absence of culpability"[437]. As a consequence, it can be concluded that the principle is inherently inappropriate for being used in the context of ICL as it bears a great potential of endangering the rights of the accused.[438] However, the fundamental principles of legality underpinning ICL which are likely to be violated by the vagueness of environmental principles will be further discussed in the subsequent chapter.[439]

Furthermore, it has been suggested that the principle requires a high standard of knowledge about the general scientific consensus predicting the consequences of certain acts

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[428] F. Mégret, *op. cit.*, p. 224.
[429] E. Deloso, *op. cit.*, p. 667.
[430] J. R. Nash, *op. cit.*, p. 501.
[431] *Ibid.*, p. 500, p. 502.
[432] R. McLaughlin, *op. cit.*, p. 396.
[433] L. Paradell-Trius, *op. cit.*, p. 99.
[434] *Ibid*., p. 99.
[435] E. Deloso, *op. cit.*, p. 668.
[436] F. Mégret, *op. cit.*, p. 224.
[437] B. Pardy. Applying the Precautionary Principle to Private Persons: Should it Affect Civil and Criminal Liability. – 43 Cahiers de Droit 2002 (1), p. 78.
[438] F. Mégret, *op. cit.*, p. 224.
[439] See *infra*, pp. 73 *ff*.

or omissions while such an "absolute foreseeability requirement has important implications for the identification of perpetrators, as few actors other than states possess the requisite knowledge"[440]. Accordingly, the principle is not anticipated to be used in the field of ICL with individuals as legal subjects. An attempt to further clarify the scope and meaning of the principle[441] is unlikely to solve its incompatibility with the requirements of ICL and at the same time potentially impedes the dynamic development of the doctrine of IEL which intentionally prefers to adopt indefinite and adaptable rules.[442]

All in all, the precautionary principle may be accepted as a "form of broad policy guidance"[443] but states will be unwilling to approve its role as a component of creating criminal liability. In fact, the ILC in its report outlining the difficulties arising from the ongoing fragmentation of international law exemplified the collision of IEL and international trade law (ITL) with reference to the precautionary principle. The World Trade Organisation- despite the principles' status under IEL- declared it non-binding under ITL.[444] Correspondingly, the ILC concluded that two separate regimes of international law may be guided by different principles which may leave a state being bound by conflicting obligations. Determining the prevailing obligation merely depends on "which one chooses as the relevant frame of legal interpretation"[445]. Similarly, conflicts between IEL and ICL arise in the context of an international crime of ecocide. Nonetheless, the prosecution of an international crime despite its thematic focus is rather dealt with under the regime of ICL than of IEL. Hence, the importance of environmental principles is likely to be marginal in the actual context of criminal proceedings. Indeed, similar environmental principles have been suggested to be implemented by environmental scholars, some of them in a non-criminal context in order to address ecological destruction on different levels.[446] Other scholars have mixed up these approaches and consequently *inter alia* consider ecocide to be a "breach of a legal duty of care"[447]. However, as demonstrated by the example of the precautionary principle, it is dangerous to assume that environmental principles can be used as a basis for the creation of criminal liability. It should be noted that the whole ecocide discourse is to some extent emotionalized and thereby coined by rather activist and revolutionary statements which entail

[440] M. A. Gray, *op. cit.*, p. 216, p. 218, p. 225, p. 270.
[441] E. Deloso, *op. cit.*, p. 667.
[442] F. Mégret, *op. cit.*, p. 220.
[443] *Ibid.*, p. 220.
[444] GA, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 13.04.2006, para 55, 136.
[445] Fragmentation of International Law, 2006, *op. cit.*, para 55.
[446] A. Greene, *op. cit.*, p. 47.
[447] M. A. Gray, *op. cit.*, p. 234.

a certain danger of rendering arguments legally implausible.[448] *Summa summarum*, the hypothesis that vague environmental principles such as the precautionary principle are rather idealistic but form an unsuitable and inadequate basis for an international crime of ecocide can be confirmed.

Overall, the preceding examinations demonstrate that even though IEL is the preferred regulatory framework for any international legislation aiming at environmental protection, in the context of the fight against impunity for those having caused severe environmental harm amounting to ecocide, the doctrines conventional tools are ineffective. It is further problematic for the project of making ecocide a crime under international law that some of the principles of IEL are unhelpful or even incompatible with the idea of criminalizing certain environmental misconduct.

[448] However, such a deviation from reality is not only integral to the regime of IEL but has also found its way into ICL which is equally coined by unmanageable expectations build up by civil society and international organizations. This issue is further addressed in: C. Stahn, *op. cit.*, pp. 113, 412-417.

IV. Obstacles Based on the Nature of the Project: ICL

By nature, the endeavour of internationally criminalising ecocide depends on the young doctrine of ICL. Yet, with regard to the legal integration of environmental and criminal issues it has been stated that "[s]everal characteristics of criminal law as a social, intellectual, and legal project could also impose limitations on the development of a strong international criminal law regime for the environment"[449]. As making ecocide a crime under international law implies the criminalization of certain environmental conduct which to date can only be sanctioned by civil measures, the preceding statement clearly suggests that such an undertaking entails certain challenges based on the special features of ICL. Correspondingly, the subsequent sections hypothesize that the current system of ICL exhibits two main obstacles in the path of the project in question. Firstly, it is alleged that the current doctrinal bases for the process of international criminalization impede the project of making ecocide a crime under international law notwithstanding any well-founded arguments substantiating it. Secondly, as touched upon in previous chapters,[450] it will be argued that the emergence of an international ecocide law is hampered by the incompatibility of certain aspects of a potential ecocide definition with fundamental principles underpinning the doctrine of ICL.

1. Lacking Control: The Process of International Criminalization

In the context of shedding light on the anthropocentric nature of international law it has been mentioned that international crimes frequently emerge through the enforcement process of internationally recognized human rights.[451] However, not all existing international crimes have primarily been developed for the purpose of protecting such fundamental rights. With that in mind, understanding the current failure of making ecocide a crime under international law inevitably involves the question whether a doctrinal basis for the process of international criminalization exists. As a matter of fact, the legal discourse concerning international criminalization processes is fairly limited. Many legal scholars rather address the question of what constitutes an international crime. Different theories conclude that such crimes are those which give rise to individual criminal responsibility,[452] those involving an international

[449] F. Mégret, *op. cit.*, p. 221.
[450] See *supra*, p. 54.
[451] See *supra*, pp. 37 *ff.*
[452] R. O'Keefe. International Criminal Law, Oxford: Oxford University Press 2015, p. 56.

element,[453] those crimes of the evillest nature or simply those crimes that have been prohibited on an international level.[454] Accordingly, it becomes apparent that ICL lacks a specific definition of an international crime.[455] This results in an uncertainty concerning the existence of any definite criteria decisive for the establishment of crimes under international law.[456] In fact, the "lack cohesion and uniformity"[457] of ICL has been identified as a logical consequence of the accommodation of fundamentally differing crimes into one single system.

Nevertheless, in order to avoid the criminalization of conduct "in an ad hoc manner with no underlying philosophy directing the criminalization process"[458], the identification of certain criteria guiding the international criminalization process would be reasonable. In that sense, the subsequent section introduces the two predominant guiding interests of international criminalization which have been identified with a view to different common elements of currently existing international crimes. These implied guiding interests can be framed as 'principle' and 'policy'.[459] Furthermore, the following discussion reflects on the consequences that these doctrinal bases for the process of international criminalization have on the potential emergence of an international crime of ecocide. In that context, it hypothesises that the identified doctrinal bases pose an obstacle in the path of making ecocide a crime under international law.

1) 'Principle' as the Guiding Interest of Criminalization

The criminalization of prohibited behaviour based on principle involves moral considerations and usually originates from natural law serving "a higher form of justice and harmony"[460]. It is well known that the criminalisation of certain misconduct on the national level aims to protect fundamental values in order to "secure the peaceful coexistence of human beings in a community"[461]. Similarly, conduct that violates those shared values identified as extremely important by the international community has to be prevented and punished through

[453] G. Werle, *op. cit.*, p. 170.
[454] In this context, Stahn differentiates between the theories of *malum in se* and *malum prohibitum*, in: C. Stahn, *op. cit.*, pp. 18-22. O'Keefe agrees that international crimes are those which have their source in international customary law or treaty, in: R. O'Keefe, *op. cit.*, p. 56.
[455] C. Stahn, *op. cit.*, p. 16.
[456] *Ibid*. 15-16.
[457] B. M.Yarnold. Doctrinal Basis for the International Criminalization Process. – 8 Temple International and Comparative Law Journal 1994 (1), p. 85.
[458] B. M. Yarnold, *op. cit.*, p. 113.
[459] *Ibid.*
[460] B. M. Yarnold, *op. cit.*, p. 108.
[461] K. Ambos, *op. cit.*, p. 62.

criminalization.[462] In line with this, the preamble of the Rome Statute refers to "atrocities that deeply shock the conscience of humanity"[463]. Accordingly, certain international crimes historically evolved based on philosophical or faith-oriented assumptions.[464] Ecocide proponents have tried to justify the criminalisation of severe environmental harm with recourse to such an approach. It has been argued that environmental destruction is "immoral, an affront to humanity, nature and God"[465] and a "sin which generations will not forgive"[466]. The implications of this observation for the project of making ecocide a crime under international law will be discussed after having addressed the second predominant interest of criminalisation.[467]

2) 'Policy' as the Guiding Interest of Criminalization

Even though many ICL scholars confirm that moral considerations have played a role in the development process of international crimes, more recently, a clear tendency towards a policy-based criminalization process has been observed.[468] Crimes internationalized based on policy considerations are identified as a "product of the collective self-interest of each unit in the world community"[469]. Such crimes *inter alia* include on the one hand conduct that has been criminalized on the international level because it constitutes a threat to international peace and security and on the other hand prohibited conduct that entails transnational implications.[470] In this context, pragmatic considerations prevail moral considerations that focus on the specific nature of a crime.[471] In fact, it can be argued that ecocide would potentially fall into the above-mentioned categories. Framing the legal gap in ICL leaving ecocide unpunished as a potential threat to international peace and security is not a novelty.[472] Predictions of "[f]uture global conflicts […] caused by competing needs for dwindling supplies of natural resources"[473] can be found in legal literature dating back to the 1990s. Moreover, even though the Security Council is not seen as the most appropriate forum to

[462] P. Gaeta, *op. cit.*, p. 66 and C. Stahn, *op. cit.*, p. 19 and Byung-Sun, *op. cit.*, pp. 14-15.
[463] Rome Statute of the International Criminal Court, 2002, *op. cit.*, Preamble.
[464] B. M. Yarnold, *op. cit.*, pp. 108-110.
[465] M. A. Gray, *op. cit.*, p. 216.
[466] L. Berat, *op. cit.*, p. 340.
[467] See *infra*, pp. 61 *ff.*
[468] B. M. Yarnold, *op. cit.*, pp. 108-110.
[469] *Ibid.*, p. 107.
[470] M. C. Bassiouni, 2013, *op. cit.*, p. 142.
[471] C. Stahn, *op. cit.*, p. 22, p. 416.
[472] P. Higgins, 2010, *op. cit.*, p. 102.
[473] C. Tinker. Environmental Security in the United Nations: Not a Matter for the Security Council. – 59 Tennessee Law Review 1992 (4), p. 801.

address harmful conduct to the environment, early texts of its resolutions demonstrate the existence of "a willingness to recognize harm to the environment in the context of a Chapter VII action"[474]. However, this assessment was based on environmental degradation during armed conflict, more precisely the use of environmental damage as a weapon of war.[475] Nevertheless, as environmental issues have increasingly received attention within the last decades, since the early 2000s it is considered that "Security Council action is both necessary and appropriate as a last resort to counter environmental threats"[476]. Hence, the existence of a linkage between severe environmental degradation and peace and security has been recognized by legal scholars,[477] recent Security Council resolutions[478] as well as by UN officials[479]. Therefore, it could be argued that the crime of ecocide criminalizes conduct which constitutes a threat to international peace and security in line with several existing crimes under international law.

Moreover, if it was true that the adoption of the international conventions criminalizing certain prohibited conduct is "purely the result of contingent or opportunistic factors"[480], the criminalization of ecocide would indeed be in line with such pragmatic considerations. Various crimes have emerged on an international level in order to deal with their transnational implications.[481] In that sense, existing international crimes are commonly involve perpetrators and victims of different nationalities or involve means and methods which transcend national boundaries.[482] As discussed in the previous chapter, this is usually the case for misconduct reaching the threshold of ecocide.[483] By nature, severe environmental harm tends to have transboundary consequences affecting citizens of several states[484] and is often caused by transnational corporations involving actors of different nationalities.[485] Thus, international cooperation is needed in order to combat severe environmental destruction. Yet, although ecocide shares certain common elements with already existing international crimes, policy as a doctrinal basis for the process of international criminalisation does not necessarily support

[474] C. Tinker, *op. cit.*, p. 789. Referring to: SC Res. 687, Iraq-Kuwait (03.04.1991), p. 116.
[475] *Ibid*., p. 788.
[476] A. Knight. Global Environmental Threats: Can the Security Council Protect Our Earth. – 80 New York University Law Review 2005 (5), pp. 1549-1550.
[477] See: R. Mwanza, *op. cit.*, pp. 586-587.
[478] Albeit in the particular context of climate change, see: SC Res. 2349, Peace and Security in Africa (31.03.2017) and SC Res. 2408, The Situation in Somalia (27.03.2018).
[479] GA, Follow-up to the outcome of the Millennium Summit: Note by the Secretary-General, UN Doc. A /59/565, 02.12.2004, p. 12.
[480] M. C. Bassiouni, 2013, *op. cit.*, pp. 218-219.
[481] P. Gaeta, *op. cit.*, p. 63.
[482] M. C. Bassiouni, 2013, *op. cit.*, p. 142.
[483] See *supra*, pp. 30-31.
[484] B. Lay *et al*., *op. cit.*, p. 445.
[485] R. White, *op. cit.*, p. 96.

the project of making ecocide a crime under international law. This will be further elaborated on in the following section.

3) Consequences for a Crime of Ecocide

It cannot be denied that each existing international crime "has its own rationale and has followed its own path"[486]. Hence, the retrospective identification of a doctrinal basis underlying the process of international criminalization is rather difficult. However, as outlined above, it has been assumed that either moral or pragmatic considerations (principle or policy) have played a predominant role in the decision-making process leading to the criminalization of a certain misconduct on the international level. Thus, the following section puts forward implications for making ecocide a crime under international law provided that such a process would eventually depend on the identified doctrinal bases.

Firstly, as mentioned above, it is theoretically possible to base the international criminalization of severe environmental crimes on moral considerations. However, the general problem with the involvement of principled dimensions into the process of international criminalisation is that they are "subjective and subject to abuse"[487] as well as "imprecise, arbitrary, and inconsistent in its variations"[488]. The terms used in this context, such as "conscience of humanity"[489] or "world peace and harmony"[490], are vague and open to contrasting interpretations.

After all, the question of whether the international community is under a moral duty to prevent devastating environmental degradation is highly subjective and leaves room for a wide range of potential answers based on personal opinions or even promoting opposed political agendas. Therefore, such a doctrinal basis could be equally used to promote or to impede the process of making ecocide a crime under international law. Having said that, in fact, it has been suspected that in future, policy-motivated crimes will eventually replace those based on principle.[491]

Accordingly, the following discussion considers the implications for the project of making ecocide a crime provided that the second identified doctrinal basis would underlie its process of international criminalisation. A number of observations mentioned within the

[486] P. Gaeta, *op. cit.*, p. 66.
[487] C. Stahn, *op. cit.*, p. 20.
[488] K. Ambos, *op. cit.*, pp. 62-63.
[489] Rome Statute of the International Criminal Court, 2002, *op. cit.*, Preamble.
[490] B. M. Yarnold, *op. cit.*, p. 110.
[491] *Ibid.*, p. 110.

preceding section have been made based on an empirical study which identified international crimes prohibited in international conventions.[492] To that effect, it should firstly be mentioned that the idea that pragmatism and political motives underlie the process of international criminalization more than any other expected legal method or system is closely connected to "an inherent defect in the present international law system"[493]. Namely, the reality that international conventions are to a great extent drafted by diplomats or political actors representing the respective governments. Hence, criminal law experts, and therewith legal considerations, play an underwhelmingly minor role in the drafting processes decisive for the process of international criminalization.[494] Attempts to counteract such a "highly politicized"[495] process by adopting a comprehensive and generally accepted international criminal code have failed and left behind a fragmented doctrine in lack of a global vision.[496] Assuming that an international crime of ecocide would emerge through the adoption of international conventions and at the same time considering the observations made in the third chapter,[497] it is to be expected that the language used in environmental instruments does not entail criminal sanctions for environmental misconduct. The use of environmental terminology paired with the assumption that such conventions are drafted by political actors interested in including rather implicit and vague provisions[498] is likely to fail in meeting the "specificity required by principles of legality that most legal systems follow"[499]. Whereas some legal scholars differentiate between international treaty-based crimes and proper international crimes,[500] concluding that generally speaking treaties do not give rise to individual criminal responsibility by themselves,[501] as mentioned above, a "unified theory on what ought to be protected by international criminal law, and what constitutes an 'international crime'"[502] does not exist.

In general, the fundamental role of political interests in the process of international criminalization poses a challenge to the endeavour of making ecocide a crime under international law. In principle, "[t]he international community's concern for the environment faces a variety of economic, practical, and political hurdles"[503]. The current reality that

[492] M. C. Bassiouni, 2013, *op. cit.*, pp. 143-144.
[493] B. M. Yarnold, *op. cit.*, p. 110.
[494] M. C. Bassiouni, 2013, *op. cit.*, p. 219.
[495] B. M. Yarnold, *op. cit.*, p. 110.
[496] M. C. Bassiouni, 2013, *op. cit.*, p. 227.
[497] See *supra*, pp. 51 *ff.*
[498] *Ibid.*, p. 224.
[499] *Ibid.*, p. 253.
[500] K. Ambos, *op. cit.*, p. 54 and P. Gaeta, *op. cit.*, p. 70.
[501] G. Werle, *op. cit.*, p. 46.
[502] C. Stahn, *op. cit.*, p. 16.
[503] M. C. Bassiouni, 2013, *op. cit.*, p. 150.

several relevant political players deny the importance and urgency of imminent and efficient actions in the field of environmental protection[504] can easily result in the absence of political consensus hindering the adoption of international conventions establishing criminal sanctions for severe environmental harm amounting to ecocide. Moreover, as discussed in previous chapters,[505] states generally prefer to deal with environmental issues on the domestic level in order to maintain their full sovereign rights. Accordingly, it is likely that states will lack interest in internationally criminalizing environmental harm but rather continue to deal with incidences of ecocide on a local or regional level.[506]

The most significant obstacle in the path of making ecocide a crime under international law that becomes apparent in the context of the preceding discussion lies in the complex entanglement of environmental degradation and economic benefits. Identifying the self-interest of states to be a decisive component for international criminalization of certain prohibited conduct means that economic interests have the potential to impede the criminalization of such harmful behaviour merely thought of as a side-effect of economically beneficial corporate activity.[507] A reluctance of states to support an international criminalization of ecocide could hence be traced back to the fact that economic interests of states and corporate actors are likely to correspond. This way, the expectable lack of penal sanctions capable of hindering political objectives in international conventions entails an impeding effect for the project of making ecocide a crime under international law.[508] An obvious example of how political prioritization of economic success over environmental protection can result in irreversible and serious harm can currently be found in Brazil. Against the backdrop of furthering the country's economic interest, the Bolsonaro government has weakened environmental regulations which amongst others contributed to the protracted and catastrophic fires of the Amazon rainforest.[509] Consequently, "[i]n a world where much of the economy is based on the destruction of natural resources"[510] the assessment that economic interests have a great potential to prevail over environmental interests of states obviously reduces the likelihood of the adoption of an international convention criminalizing ecocide.

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[504] See *inter alia* the president of the United States: A running list of how President Trump is changing environmental policy. – National Geographic. Accessible at: https://www.nationalgeographic.com/news/2017/03/how-trump-is-changing-science-environment/ (07.04.20).
[505] See *supra*, pp. 29 *ff.*
[506] M. C. Bassiouni, 2013, *op. cit.*, p. 150.
[507] V. Schwegler, *op. cit.*, pp. 84-85.
[508] M. C. Bassiouni, 2013, *op. cit.*, p. 222.
[509] The Amazon Is Burining. Bolsonaro Fanned the Flames. – Peterson Institute for International Economics. Accessible at: https://www.piie.com/blogs/realtime-economic-issues-watch/amazon-burning-bolsonaro-fanned-flames (07.04.20).
[510] F. Mégret, *op. cit.*, p. 221.

However, in "periods of international fecundity stimulated by political circumstances"[511] the respective public and political sentiment has led to the criminalization of certain prohibited conduct. Therefore, the ongoing failure of making ecocide a crime under international law could be traced back to the absence of a respective political momentum which nonetheless might change in future. In fact, mass media and activism can play a significant role in promoting the initial drafting and the final adoption of legal instruments resulting in the international criminalization of a certain conduct.[512] Thus, considering the continuing efforts of civil society in the process of making ecocide a crime under international law, states might at least consider potential solutions. It should be mentioned that indeed, "[u]nlawful acts against certain internationally protected elements of the environment"[513] have already been framed as a new category of international crimes during the 1990s.[514] While criminalizing ecocide would clearly go beyond isolated international instruments, at any rate an expanding tendency of the list of crimes under international law can be ascertained as the "codification of international crimes by the world community is continuing at a healthy pace"[515]. Accordingly, some suggest that ICL "is likely to embrace new types of environmental offences in the future"[516].

After all, on the one hand, the search for a doctrinal basis of the process of international criminalisation demonstrated that some scholars believe that environmental crimes either already do or at least prospectively will play a significant role in ICL. On the other hand, and above all, it has been observed that the moral and political considerations and therewith political interests present the very core of decision-making processes decisive for the adoption of those documents ultimately serving as a tool of international criminalization. This confirms the hypothesis that the doctrinal basis of the process in question impedes the project of making ecocide an international crime as long as political will is missing, notwithstanding any well-founded reasoning for its urgency put forth by environmentalists and legal experts.

[511] M. C. Bassiouni, 2013, *op. cit.*, p. 221.
[512] *Ibid.*, p. 225.
[513] *Ibid.*, p. 145.
[514] B. M. Yarnold, *op. cit.*, p. 111.
[515] *Ibid.*
[516] C. Stahn, *op. cit.*, p. 110.

2. Lacking Compatibility: Interference with Conceptions and Principles of ICL

In fact, "[t]here are several plausible hypotheses as to why international criminal law has lagged behind the emergence of major transnational pollution events"[517]. The subsequent section focuses on four fundamental problems deriving from an entanglement of IEL and ICL in the context of an international crime of ecocide. Firstly, it draws attention to the conception of victimhood under ICL taking into consideration that a crime of ecocide, according to a majority of currently existing definitions, aims at protecting non-human life. Secondly, it briefly considers the possibility of prosecuting severe environmental crimes before the ICC. The third part of the chapter takes a look at the general principles of ICL. It should be mentioned that in the early stages of the development of an ICL the doctrines' codification process primarily focused on the definition of crimes while the establishment of general principles remained of secondary importance. While general principles were of a subordinate relevance in the Nuremberg Charter and the international criminal tribunals, they were finally codified in a separate and comprehensive provision of the Rome Statute.[518] Correspondingly, the thesis at hand hypothesizes that an international crime of ecocide depending on its exact definition bears the potential of being incompatible with two fundamental principles of ICL. The first part questions the compliance of a low *mens rea* threshold with the principle of criminal liability while the second part assesses the compatibility of the crime of ecocide with the principle of legality against the backdrop of issues of deficient specificity and predictability arising in the environmental context.

1) ICL's Conception of Victimhood

Some legal scholars maintain that one of the reasons for ICL's minor role in the protection of the environment rests on its conception of victimhood.[519] Even though no generally accepted understanding of the term 'victim' exists, the definition provided in the Rules of Procedure and Evidence of the ICC can serve as guidance in order to grasp the understanding of victimhood under current ICL. Rule 85 clearly states that victims are natural persons or organizations and institutions.[520] In contrast, as mentioned in the context of discussing

[517] F. Mégret, *op. cit.*, p. 221.
[518] G. Werle, *op. cit.*, p. 165.
[519] C. Stahn, *op. cit.*, p. 110.
[520] Assembly of States Parties to the Rome Statute of the International Criminal Court, 2002, *op. cit.*, p. 52.

emerging ecocide definitions, an international crime of ecocide would potentially aim at protecting non-human victims such as flora and fauna regardless of the occurrence of any human harm.[521] Generally speaking, the idea of protecting non-human life is not fundamentally new to international law as it can be found in several international conventions on the protection of endangered species.[522] Nevertheless, it raises a number of challenging questions in the context of justice and ICL.[523] Relying on such an unconventional approach, environmental activists and ecocide proponents continuously claim that so-called Earth rights and natural rights shall be enforced by means of ICL.[524] However, their international recognition remains fairly limited. Rather, environmental crimes not entailing any human harm have often been perceived "as 'victimless' crimes"[525]. Accordingly, scholars of IEL criticize that "non-human animals and ecosystems will be systemically (and unevenly) disadvantaged […] by law's disembodied schematic"[526]. Whether current ICL might expand its current conception of victimhood enabling an inclusion of non-human life or at least increasingly consider indirect human harm resulting from the destruction of the world's ecosystems remains to be seen. Taking into consideration the most important permanently existing institution of ICL, the following section takes a look at the potential prosecution of ecocide under the ICC's jurisdiction.

2) Prosecuting Ecocide before the ICC

An amendment to the current text of the Rome Statute would be one possible way of integrating the crime of ecocide into the current system of ICL. Yet, in line with the conclusions made in the second chapter, the ICC's anthropocentric nature and structure clearly impede the inclusion of a crime of ecocide based on an 'ecocentric' definition.[527] The Rome Statute is based on the ILCs Draft Code of Crimes Against the Peace and Security of Mankind frequently described as human rights-oriented and anthropocentric.[528] Even though in the 1980s, the ILC considered including a separate article for environmental crimes into its document, such an attempt failed in the 1990s due to the fundamental rejection of such an

[521] See *supra*, p. 24.
[522] R. Mwanza, *op. cit.*, p. 607.
[523] L. Bertolesi. Victims and Responsibility: Restorative Justice: New Path for Justice towards Non-Human Animals. – 5 Relations: Beyond Anthropocentrism 2017 (2), p. 123.
[524] Earth Law. – Ecocide Law. Accessible at: https://ecocidelaw.com/the-law/earth-law/ (07.04.20).
[525] C. Stahn, *op. cit.*, p. 108.
[526] A. Grear, *op. cit.*, p. 246.
[527] See *supra*, pp. 35 *ff.*
[528] S. Meheta, *op. cit.*, p. 4.

inclusion by a few governments.[529] Nevertheless, within the last decades, a legal discourse focussing on the idea of 'greening' the ICC has emerged. This novel approach evolved around the question of whether a 'green' interpretation of the statute's substantive provisions allows for the prosecution of perpetrators having caused severe environmental harm.[530] Though, the current text of the Rome Statute only allows for the prosecution of conduct harmful to the environment "as a byproduct of another crime that the perpetrators have committed"[531]. All the respective crimes are considering harm to humans rather than harm to the nature itself. Such an anthropocentric approach "deemphasizes the impacts of environmental attacks that do not immediately adversely affect the human population"[532]. Hence, it has been concluded that "by focusing mainly the humanitarian consequences of environmental damage, 'green' interpretation fails to address the ecological dimension of environmental damage"[533].

Until today Art. 8 (2)(b)(iv) ICC Statute presents the only 'ecocentric' provision of the Rome Statute as it considers the environment "for its intrinsic value, regardless of any relevance that it may have in connection with human interests and activities"[534]. But this article suffers from shortcomings and is consequently rendered irrelevant in practice.[535] Nevertheless, as the establishment of the ICC has been a reaction to new developments in the world, there exists a potential for reactionary amendments.[536] This raises the question whether the proposal to broaden the court's jurisdiction constitutes a reasonable alternative to a 'green interpretation' of the current text of the Rome Statute. Including ecocide into the Rome Statute in order to make the ICC "a suitable forum for environmental adjudication"[537] during peacetime would require fundamental substantive changes.[538] Having said that, the recognition of non-human life as a victim discussed above serves as an example for demonstrating the obstacles in the path of including an international crime of ecocide into the

[529] See: A. Gauger *et al.*, *op. cit.*
[530] See: R. Mwanza, *op. cit.*, pp. 586 – 613 and in M. A. Drumbl, *op. cit.*, pp. 305-342.
This was increasingly discussed when the court published a Policy Paper in 2016 which dealt with the status of environmental crimes. See: A. Mistura. Is There Space for Environmental Crimes under International Criminal Law: The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework. – 43 Columbia Journal of Environmental Law 2018 (1), pp. 181-226.
[531] P. Patel. Expanding Past Genocide, Crimes against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court's Mandate to Prosecuting Environmental Crimes. – 14 Loyola University Chicago International Law Review 2016 (2), p. 182.
[532] *Ibid.*
[533] R. Mwanza, *op. cit.*, p. 599.
[534] A. Mistura, *op. cit.*, p. 211.
[535] *Ibid.*
[536] P. Sharp. Prospects for Environmental Liability in the International Criminal Court. – 18 Virginia Environmental Law Journal 1999 (2), p. 242.
[537] R. Mwanza, *op. cit.*, p. 606.
[538] *Ibid.*, p. 612.

Rome Statute.[539] Even though the inclusion of a new category of victims would be "an acknowledgement of the importance of treating the ecological dimension of environmental damage with the seriousness it deserves"[540], such a development seems quite unlikely. The ICC's "ability to provide adequate corrective and reparative justice in a timely fashion is hampered by several factors"[541] already. Certainly, a new category of victims would only add new challenges which leads to the conclusion that the "Court's provisions on victims do not leave space for the environment to qualify as a victim in its own right"[542]. Indeed, the ICC's system of victim participation and reparations in line with the court's anthropocentric orientation is designed for human victims who can participate in proceedings and receive reparations.[543] Suggestions for reforming the court's system, for instance by creating an Ecosystem Trust Fund in order to rehabilitate affected ecosystems, have been made but require such fundamental changes depending on the agreement of the state parties that they appear highly unlikely to be introduced.[544] Apart from any substantive changes required by an efficient inclusion of ecocide into the Rome Statute, there are certain procedural challenges which potentially hinder the actual enforcement of an expanded jurisdiction of the ICC.[545] On account of the distinctive nature of ecocide and due to the fact that conducting investigations and presenting evidence require technical and scientific knowledge and resources,[546] "there are several respects in which the Court's procedures will make prosecuting environmental harm highly challenging"[547]. Yet, the establishment of a special environmental chamber might be one possibility in order to address issues of capacity and competence.[548]

All in all, "it will […] be difficult to amend the Rome Statute to accommodate prohibitions of environmental harm without unbalancing or fundamentally altering the nature

[539] *Supra*, p. 23 *ff*.
[540] R. Mwanza, *op. cit.*, p. 609.
[541] *Ibid.*, p. 608.
[542] Prosecuting Environmental Harm Before the International Criminal Court. – Leiden University Repository. Accessible at: https://openaccess.leidenuniv.nl/handle/1887/62738?_ga=2.118767114.2097678770.1563972821-434863976.1563972821 (07.04.20).
[543] M. A. Orellana, *op. cit.*, p. 695.
[544] R. Mwanza, *op. cit.*, p. 608.
[545] M. A. Drumbl, *op. cit.*, p. 326.
[546] The knowledge and resources required are not comparable to what is needed to investigate the current crimes under the court's authority. See: P. Patel, *op. cit.*, p. 184 and M. A. Drumbl, *op. cit.*, p. 326.
[547] Prosecuting Environmental Harm Before the International Criminal Court. – Leiden University Repository. Accessible at: https://openaccess.leidenuniv.nl/handle/1887/62738?_ga=2.118767114.2097678770.1563972821-434863976.1563972821 (07.04.20).
[548] R. Mwanza, *op. cit.*, p. 606.

of the Court"[549]. Hence, initiatives aiming at an amendment of the Rome Statute are unlikely to reach a status of further negotiation or even implementation.[550]

The suggestion by many legal scholars to lower the *mens rea* threshold for an international crime of ecocide presents another obstacle for the prosecution of severe environmental misconduct before the ICC. Regardless of the provisions under the Rome Statute this issue might be incompatible with the fundamental principle of criminal liability under ICL as will be discussed in the following.

3) The Principle of Criminal Liability

ICL recognizes two main forms of criminal responsibility: individual criminal responsibility and command responsibility.[551] As it has been outlined in the first chapter,[552] individuals can be held criminally liable under ICL for offences which consist of a material (*actus reus*) and a mental element (*mens rea*).[553] The mental element has been identified as the "essential basis for the determination of criminal responsibility or culpability"[554]. Having said that, the following section examines whether the mentioned definitional ecocide approaches,[555] more precisely, on the one hand the idea of making ecocide a crime of strict liability and on the other hand requiring a low *mens rea* threshold for holding the perpetrator criminally responsible, are compatible with the principle of criminal liability under the current ICL doctrine. Thereafter, it takes a look at the required mental element for the establishment of command responsibility which plays an equally relevant role in the context of an international crime of ecocide.

According to ecocide proponents, the crime could only be prosecuted efficiently if adopted as a crime of strict liability with no *mens rea* requirement.[556] Based on the seriousness of the harmful consequences of environmental crimes,[557] it would hence be possible to punish the perpetrators of such crimes "in the absence of specifically proven

[549] Prosecuting Environmental Harm Before the International Criminal Court. – Leiden University Repository. Accessible at: https://openaccess.leidenuniv.nl/handle/1887/62738?_ga=2.118767114.2097678770.1563972821-434863976.1563972821 (07.04.20).
[550] M. A. Drumbl, *op. cit.*, p. 325 and A. Mistura, *op. cit.*, p. 224.
[551] General Principles of International Criminal Law – Factsheet. – International Committee of the Red Cross. Accessible at: https://www.icrc.org/en/document/general-principles-international-criminal-law-factsheet (07.04.20).
[552] See *supra*, pp. 17 *ff.*
[553] G. Werle, *op. cit.*, p. 168
[554] M. C. Bassiouni, 2013, *op. cit.*, p. 304.
[555] See *supra* pp. 21 *ff.*
[556] P. Higgins, 2010, *op. cit.*, p. 112. See also: B. Lay *et al*., *op. cit.*, p. 433 and R. Mwanza, *op. cit.*, p. 600.
[557] R. White, *op. cit.*, p. 105 and P. Higgins, 2010, *op. cit.*, p. 145.

culpability"[558]. As discussed previously,[559] such a narrowing of criminal liability could *inter alia* find its practical justification in the acknowledgement that ecocide is predominantly a crime of consequences.[560] Based on these considerations, a strict liability approach in the context of environmental crimes has long found recognition in the jurisprudence of the United Kingdom and few other national jurisdictions.[561] In principle, such a national backup complemented with the assumption that "[t]his trend is certain to continue in light of the growing public concern for our environment"[562] gives ground for making ecocide an international crime of strict liability. However, these recent developments have at the same time been described as an "erosion of *mens rea* in environmental criminal prosecutions"[563] and hence obtained a negative connotation based on the judgement of ICL scholars. While many raise the question whether ICL provides the necessary scope for a strict liability crime[564] some even claim that "strict liability is generally disfavored in criminal law"[565] as it "violates the principle of individual guilt"[566]. In order to test such an assertion, the compatibility of the concept of criminal liability under ICL and the idea of strict liability crimes needs to be examined. Determining general rules for criminal liability under ICL is difficult as each statute provides its own regulations in the general parts[567] and the required form of liability usually depends on the offence in question.[568] Moreover, little text can be found in the underlying documents of the international tribunals[569] while they have been equally reluctant to develop clear rules through their jurisprudence.[570] Nevertheless, it has been argued that although no uniform meaning of culpability exists- in principle since the Nuremberg trials- the jurisprudence of international criminal tribunals demonstrates that "criminal responsibility presupposes personal guilt or culpability"[571]. Furthermore, Art. 30 ICC Statute explicitly provides a high threshold to prove culpability.[572] Even though the

[558] G. P. Fletcher. Theory of Criminal Negligence: A Comparative Analysis. – 119 University of Pennsylvania Law Review, 1971 (3), p. 403.
[559] See *supra*, p. 18.
[560] V. Schwegler, *op. cit.*, p. 73 and B. Lay *et al*., *op. cit.*, p. 450.
[561] J. Keiler. Actus Reus and Mens Rea, The Elements of Crime and the Framework of Criminal Liability. – J. Keiler and D. Roef (eds). Comparative Concepts of Criminal Law. Cambridge: Intersentia 2016, p. 61 and B. Lay *et al*., *op. cit.*, p. 450.
[562] R. A. Weidel *et al*. Erosion of Mens Rea in Environmental Criminal Prosecutions. – 21 Seton Hall Law Review 1991 (4), p. 1124.
[563] R. A. Weidel, *op. cit.*, p. 1100.
[564] R. Mwanza, *op. cit.*, p. 600.
[565] A. Greene, *op. cit.*, p. 32.
[566] G. Werle, *op. cit.*, p. 204.
[567] *Ibid.*, p. 168.
[568] R. Cryer *et al*. An Introduction to ICL and Procedure, Cambridge: Cambridge University Press 2014, p. 384.
[569] *Ibid.*
[570] M. C. Bassiouni, 2013, *op. cit.*, p. 304.
[571] K. Ambos, *op. cit.*, p. 93.
[572] R. Mwanza, *op. cit.*, p. 609.

wording of the article gives room for narrowing criminal liability if "otherwise provided"[573], it has been ascertained that "[n]one of the sources referred to by the court support strict liability as a basis for conviction"[574]. Rather, the basic idea that the accused cannot be held liable under ICL without proving his culpability is an indispensable and fundamental principle of the legal doctrine.[575] Therefore, making ecocide a crime of strict liability would "entail a departure from what has long been considered a cornerstone principle of criminal law"[576]. The tendency to require a certain *mens rea* threshold as a prerequisite for criminal liability equally prevails on the national level, as criminal conviction is subject to the condition of proving the existence of some form of mental element in a clear majority of legal systems worldwide.[577] In addition, some national jurisdictions even show a clear reluctance to accept negligence as a legitimate ground for criminal liability and, to that effect, apparently reject strict liability.[578] Such considerations are based on the maxim "*actus not facit reum nisi mens sit rea*"[579] which requires an unlawful act to be complemented with a guilty mind in order to determine criminal responsibility. Hence, the main concern underlying the reluctance to implement strict liability crimes into national jurisdictions in based on the right to a fair trial deriving from human rights law.[580] Accordingly, the above-mentioned trend of an erosion of the *mens rea* requirement in the context of environmental offences present in a number of national jurisdictions has internationally faced preoccupation and resistance.[581] It is further problematic that some scholars in favour of making ecocide a crime of strict liability fail to draw a clear line between strict liability in the context of the establishment of individual criminal liability on the one hand and state liability on the other hand.[582] Such confusion is often accompanied by an overemotional discussion rather aiming at the promotion of social goals than a profound legal analysis.[583] Consequently, regardless of any moral considerations that have been brought forward in favour of the approach in question, the current ICL system lacks support for the establishment of an international crime in the absence of any *mens rea*

[573] Rome Statute of the International Criminal Court, 2002, *op. cit.*, Art. 30.
[574] R. Mwanza, *op. cit.*, p. 610. See also: R. Cryer *et al*., *op. cit.*, p. 384.
[575] See: G. Werle, *op. cit.*, p. 168 and B. Lay *et al*., *op. cit.*, p. 450 and R. Cryer *et al*., *op. cit.*, p. 384 and R. Mwanza, *op. cit.*, p. 609.
[576] R. Mwanza, *op. cit.*, p. 610.
[577] M. C. Bassiouni, 2013, *op. cit.*, p. 304.
[578] G. P. Fletcher, *op. cit.*, pp. 402-403. Germany for example adopts a rather strict interpretation of the principle of guilt and hence leaves no room for crimes of strict lability, see: J. Keiler, *op. cit.*, p. 61.
[579] R. A. Weidel *et al*., *op. cit.*, p. 1100.
[580] F. Mégret, *op. cit.*, p. 223. See also: International Covenant on Civil and Political Rights. New York 16.12.1966, e.i.f. 23.03.1976, Art. 14 (1). European Convention on Human Rights. Rome 04.11.1950, e.i.f. 03.09.1953, Art. 6 (1). American Convention on Human Rights. San José 22.11.1969, e.i.f. 18.07.1978, Art. 8 (1).
[581] F. Mégret, *op. cit.*, pp. 223-224.
[582] M. A. Gray, *op. cit.*, p. 221 and L. A. Teclaff, *op. cit.*, p. 951.
[583] M. A. Gray, *op. cit.*, p. 270 and P. Higgins, 2010, *op. cit.*, pp. 112-113.

requirement. Such an idea conflicts with the subordinated endeavour of ICL to precautionarily protect the fairness of the accused. Against this background, it can be assumed that a definition of ecocide disregarding the concept of culpability is unlikely to find acceptance on the international plane in future.

In addition, as mentioned above, ecocide proponents have similarly argued that an international ecocide definition should in general entail a low *mens rea* threshold. In the absence of a necessity to prove intent or knowledge and given that a causative link exists,[584] perpetrators can be held accountable given that their misconduct was caused by "negligence, reasonable foreseeability, wilful blindness [or] carelessness"[585]. This is especially relevant in cases of corporate activity where environmental degradation is frequently considered to be a mere side-effect of economically beneficial projects and hence not necessarily caused intentionally or consciously.[586] At first sight, such an approach seems to fall out of the "high mens rea threshold for conviction"[587] of Art. 30 ICC Statute requiring intent and knowledge. Such formulation results from an inability of the treaty parties with different legal traditions to agree on a uniform language during the drafting process of the Rome Statute.[588] Accordingly, firstly, the above-mentioned "unless otherwise provided"[589]- notation allows for a lower standard than the explicit wording of Art. 30 suggests, amongst others in the context of a number of war crimes enlisted under the Statute.[590] Secondly, in line with customary international law and the jurisprudence of the ad hoc tribunals, recent ICC case law demonstrates that a *mens rea* not amounting to intent or knowledge suffices in order to establish individual criminal liability.[591] A *mens rea* requirement ranging "from recklessness and dolus eventualis to negligence […] frequently involves cases in which it seems likely that the perpetrator could argue ignorance or error"[592]. Hence, a lower *mens rea* threshold of an international crime of ecocide would, in fact, be in line with current ICL.

Furthermore, as outlined in the first chapter,[593] an international crime of ecocide with recourse to the principle of superior responsibility should allow for holding chief executives, directors and senior managers accountable in cases where they knew or should have known that environmental harm could be an incidental consequence of business activity, even if it

[584] P. Higgins, 2010, *op. cit.*, p. 145. See *infra*, Chapter I.
[585] B. Lay *et al*., *op. cit.*, p. 450.
[586] V. Schwegler, *op. cit.*, p. 85.
[587] R. Mwanza, *op. cit.*, p. 609.
[588] G. Werle, *op. cit.*, p. 182.
[589] Rome Statute of the International Criminal Court, 2002, *op. cit.*, Art. 30.
[590] K. Ambos, *op. cit.*, p. 276.
[591] G. Werle, *op. cit.*, p. 182.
[592] *Ibid.*, 187-188.
[593] See *supra*, pp. 15 *ff.*

was not envisaged but rather an outcome of the attempt to maximize profit.[594] Indeed, the Rome Statute only requires a rather low *mens rea* standard in the context of command responsibility.[595] However, the jurisprudence of international criminal tribunals suggests that "[t]he mens rea of the commander must always be established beyond reasonable doubt, even if by way of circumstantial evidence"[596]. Therefore, while trends on the national level give the impression that criminal responsibility of superiors can be established in the absence of any *mens rea* requirement,[597] strict liability is not accepted as a sufficient basis on the international level.

All in all, the approach of making ecocide a crime of strict liability although partly supported by national legislation is not compatible with the ICL principle of criminal liability and hence highly unlikely to be part of an accepted definition of ecocide in future. In contrast, the lowering of the *mens rea* threshold in comparison to the rather high requirements explicitly laid down in Art. 30 ICC Statute is in principle compatible with current ICL. Especially in the context of command responsibility, such an approach finds support in the current practice of the ICC.

4) The Principle of Legality

Any crime recognized under ICL must comply with the requirements of the principle of legality.[598] The purpose of such a principle is on the one hand to reduce the likelihood of law to be judicially abused or applied arbitrarily[599] and on the other hand to guarantee a certain specificity and predictability of any legislation in order to allow individuals to predict the legal consequences of their conduct.[600] Hence, the principle in question, more precisely its requirement of a *lex certa*,[601] requires a crime to be clearly defined as to enable an unambiguous identification of the prohibited conduct.[602] Considering the possibility that an international crime of ecocide may arise through the adoption of international conventions in the field of IEL, the non-compliance with the principle of legality can be expected. Due to the vague and broad nature of environmental principles discussed in the previous chapter it is

[594] P. Higgins, 2010, *op. cit.*, p. 169. See *supra*, Chapter I.
[595] G. Werle, *op. cit.*, p. 187.
[596] B. I. Bonafe, *op. cit.*, p. 606.
[597] C. Byung-Sun, *op. cit.*, p. 28, M. A. Gray, *op. cit.*, p. 265 and A. S. Hogeland, *op. cit.*, p. 119.
[598] M. C. Bassiouni, 2013, *op. cit.*, p. 246.
[599] *Ibid.*, p. 247.
[600] General Principles of International Criminal Law – Factsheet, opt. cit.
[601] F. Mégret, *op. cit.*, p. 224.
[602] M. C. Bassiouni, 2013, *op. cit.*, p. 247.

unlikely that a crime of ecocide evolving from environmental conventions using IEL terminology would meet the ICL requirement of specificity.[603] On the contrary, a rather direct emergence of the crime of ecocide in the field of ICL by amending the Rome Statute or by drafting a statute for an international environmental court could rely on a definition of ecocide fulfilling the specificity criterion. Nevertheless, the nature of environmental crimes entails scientific uncertainties that bear a potential to impede the principle of legality. This is especially problematic with a view to the requirement of predictability. Making ecocide a crime under international law would amongst others aim at encouraging corporations to take preventive measures. However, due to a lack of scientific knowledge or certainty, an act can possibly result in severe environmental harm despite caution and diligence.[604] Moreover, it has been argued that regardless of states, few actors can be expected to know that certain acts or omissions according to the current state of scientific research cause severe environmental harm.[605] Under those circumstances, the occurrence of such an event would have been unpredictable for the perpetrator. In the context of discussing environmental war crimes under the ICC Statute it has further been mentioned that "[g]iven the complex and fragmented regimes of criminal law which exist in today's world, nobody can be expected to know all offences and defences"[606]. If this is a concern with respect to IHL despite the obligation of states to disseminate the rules of the respective legal doctrine,[607] it would similarly be alarming in the context of environmental crimes.

Beyond that, two more characteristics of environmental harm potentially impeding the predictability of the crime of ecocide and therewith its compliance with the principle of legality should be mentioned. Firstly, while ICL usually considers one single act, the *actus reus*, "environmental crime often lacks the single-event character typical of ordinary localized crime, and consequently may be much more about process than a one-time occurrence"[608]. Thus, prosecutors dealing with ecocide would face a number of uncertainties such as the question of whether the respective misconduct may harm future generations. Secondly, ecocide is likely to involve a "chain of causation in which one actor's harm is indistinguishable from another's"[609]. In a logical conclusion, this means that the single act of a person may trigger environmental harm amounting to the crime of ecocide although such an event was clearly not foreseeable for the accused. In addition, such characteristics of

[603] See *supra*, pp. 51 *ff.*
[604] R. McLaughlin, *op. cit.*, p. 396.
[605] M. A. Gray, *op. cit.*, p. 219.
[606] K. Ambos, *op. cit.*, p. 375.
[607] Protocol Additional to the Geneva Conventions, 1978, *op. cit.*, Art. 83 (1).
[608] F. Mégret, *op. cit.*, p. 222.
[609] *Ibid.*, p. 223.

environmental harm clearly involve practical challenges with regard to proofing causality since "[t]he environment is so vast, with so many different interacting elements, that causation can be impossible to discern or prove in court"[610]. Similar observations have been made with a view to the wording of the often-criticised environmental war crime under Art. 8 (2)(b)(iv) ICC Statute. In fact, it has been argued that this particular provision does not comply with the principle of legality.[611] Given that an international ecocide crime would include a similar wording, namely terms such as 'widespread', 'long-term' and 'severe', into its definition, as suggested in the first chapter,[612] its threshold would presumably be criticised as "extraordinarily ambiguous"[613] or "difficult to forecast or measure"[614]. Despite limited interpretative guidance offered by the ENMOD, the remaining uncertainty concerning interpretation, causation and measurement do not only affect the perpetrators ability to foresee that his action could amount to a crime but is further likely to inevitably result in an extensive judicial interpretation, hence, violating the requirement of *lex stricta*[615] deriving from the principle of legality.[616]

Taking into consideration these aspects, it can be concluded that an international ecocide law based on a definition including a similar wording as initially suggested by the ILC would be incompatible with the principle of legality under current ICL. However, it should be kept in mind that to date legal scholars claim a more detailed definition of the general principles of ICL.[617] Therefore, considering that the young doctrine steadily develops, options of reconciliation of the ecocide project and the principles in question could potentially be developed in future.

Overall, as hypothesized above, it can be confirmed that the current doctrine of ICL impedes the project of making ecocide a crime under international law in two different ways. Firstly, while ecocide proponents strive to push through their claims by means of well-founded reasoning, in fact, the process of international criminalization primarily depends on the interests of states which at times are immune to substantive argumentation. While such an impediment could be removed in the event that the right political momentum builds up, the

[610] A. Greene, *op. cit.*, p. 34. See also: C. Byung-Sun, *op. cit.*, p. 22.
[611] K. Ambos, *op. cit.*, p. 91.
[612] *Supra*, p. 19.
[613] T. Weinstein, *op. cit.*, p. 722.
[614] M. A. Orellana, *op. cit.*, p. 683.
[615] C. Peristeridou. The Principle of Legality. – J. Keiler and D. Roef (eds). Comparative Concepts of Criminal Law. Cambridge: Intersentia 2016, p. 37-38. It should be noted, that this is only the case if the principle is understood in a broad sense, according to: K. Ambos, *op. cit.*, p. 88.
[616] Inter alia, it has been argued, that the measurement of harm usually requires the involvement of victims which might be absent in the case of an international crime of ecocide. See: R. McLaughlin, *op. cit.*, p. 398.
[617] G. Werle, *op. cit.*, p. 169.

second obstacle in the path of the project in question is rather difficult to overcome. Currently, the concept of victimhood under ICL does not include non-human life and the ICC is by nature inadequate to accommodate severe environmental crimes into its jurisdiction. Lastly, the principle of criminal liability does not allow for an international crime of strict liability and the characteristics of environmental harm pose fundamental challenges to the principle of legality.

Conclusion

All in all, making ecocide an international crime, whether through an international convention, an amendment to the Rome Statute or the creation of an international environment court "is universally considered difficult at the present time"[618]. To begin with, the first chapter illustrated that the crime of ecocide in the light of its specific features clearly differs from conventional crimes recognized under international law. Hence, it stands to reason that the recognition of a novel crime would face a number of challenges and like all new laws be exposed to a tedious and arduous journey.[619] More precisely, the second chapter demonstrated that two of the main obstacles in the path of recognizing ecocide as a crime under international law are based on the state-centred and anthropocentric nature of the current system. These fundamental approaches counteract the emergence of an international crime of ecocide. Such a project would, on the one hand, entail a certain loss of sovereignty for states and on the other hand ideally require an 'ecocentric' mindset allowing for the recognition of non-human life as a victim under ICL. However, the argument that an international crime of ecocide is in principle incompatible with the current anthropocentric system could not be sustained. Furthermore, the third chapter occupied with those obstacles posed by IEL as the preferred regulatory framework for environmental protection, confirmed the previously constructed hypothesis that the doctrine generally lacks an interest in criminalization while at the same time soft law approaches remain insufficient to adequately address ecocide. Moreover, it has been concluded that fundamental principles of IEL such as the precautionary principle are incompatible with the idea of criminalizing certain conduct causing severe environmental harm. Thus, the very nature of the character of ecocide entails inherent discrepancies embodied in the segregation of the emergent doctrines of IEL and ICL. The fourth chapter illustrated that the discipline of ICL impedes the project in question, on the one hand, by means of resting the process of international criminalization on political interests. On the other hand, it demonstrated that the ICC is an inadequate forum for the prosecution of severe environmental harm. In addition, a definition of ecocide tends to involve a concept of victimhood yet unknown to ICL and is likely to fail meeting the requirements of the fundamental principles of criminal liability and legality under ICL.

By confirming all the initially constructed hypotheses, several serious obstacles have been revealed and left behind little optimism with a view to an imminent success of making ecocide a crime under international law notwithstanding an urgent need for addressing the

[618] B. Lay *et al*., *op. cit.*, p. 452.
[619] *Ibid.*, p. 437.

issue. Clearly, the whole ecocide debate is "marked by a lack of ambition and vision on the one hand, combined with occasional outbursts of utopianism on the other"[620]. Yet, legal scholars in the 1990s were similarly pessimistic about an actual emergence of a permanent international criminal court including widespread scepticism based on the observation that "states are protective of their sovereignty"[621]. Nevertheless, the Rome Statute was finally adopted in 1998 and the ICC began functioning in 2002.[622] Hence, once the appropriate political momentum appears, states might be willing to relinquish sovereignty for the sake of environmental protection.[623] Beyond any doubt, political will and the interests of states play a major role for the recognition of international crimes. It seems that today's political climate is rather favourable of finding solutions for the sustainable protection of the world's ecosystems. Environmental issues increasingly receive public attention, *inter alia* due to the 'Fridays For Future'[624] movement led by the Swedish activist Greta Thunberg.[625] With 2019 having been officially titled the 'Year of the Environment'[626] , the proposal for the 'Green New Deal'[627] in the United States and the EU's expanding environmental policy,[628] the respective political momentum for making ecocide a crime under international law might not be long in coming. In the face of these developments and a generally increasing environmental awareness[629] it has been suggested that ICL "is likely to embrace new types of environmental offences in the future"[630].

However, it is questionable whether such an endeavour is possible without reforming "international environmental norms and institutions from a perspective informed by foundational values other than those that undergird international law currently"[631]. Such a process would in fact -if ever realistic- remain tendinous and challenging.[632] It should be noted that at least the hope of amending the Rome Statute in order to expand the ICC's

[620] F. Mégret, *op. cit.*, p. 254.
[621] L. C. Green, *op. cit.*, p. 195.
[622] C. Kreß, *op. cit.*, p. 143.
[623] A. Greene, *op. cit.*, p. 48.
[624] About #FridaysForFuture. – Fridays For Future. Accessible at: https://www.fridaysforfuture.org (07.04.20).
[625] Although the focus of this movement lays on Climate Change, it has influenced the current zeitgeist in terms of a shift of public attention to environmental issues.
[626] 2019: The Year of the Environment. – Ashford Borough Council. Accessible at: https://news.ashford.gov.uk/news/2019-the-year-of-the-environment/ (07.04.20).
[627] What Is the Green New Deal? – The New York Times. Accessible at: https://www.nytimes.com/2019/02/21/climate/green-new-deal-questions-answers.html (07.04.20).
[628] Environment: Towards a greener and more sustainable Europe. – European Union. Accessible at: https://europa.eu/european-union/topics/environment_en (07.04.20).
[629] M. A. Gray, *op. cit.*, p. 216.
[630] C. Stahn, *op. cit.*, p. 110.
[631] R. Mwanza, *op. cit.*, p. 588.
[632] However, it has been concluded that the costs of modifying the current legal system are expected to be much lower than those resulting from ongoing inaction. Stated in: B. Saul. Climate Change, Conflict and Security: International Law Challenges. – 9 New Zealand Armed Forces Law Review 2009, p. 20.

jurisdiction over the crime of ecocide is highly unrealistic.[633] An alternative and potentially more realistic approach, although highly dependent on a genuine willingness of states, would be the creation of an international criminal court for the environment.[634] In this case, 'ecocentric' concepts could be used as a guiding framework in the process of the development of the underlying document of such a novel institution[635] and ensure that the courts ability to appropriately address environmental degradation "as a multifaceted socio-ecological phenomenon"[636]. Under the requirement of a carefully drafting of the founding text, such a court could further overcome the obstacle of vague provisions based on the nature of IEL. Non-criminal enforcement measures should still be used on the national level and especially for those harmful acts not amounting to ecocide. The observation, that generally speaking international crimes evolve due to political policy, served to reveal one of the reasons for the ongoing failure of the ecocide project. However, while no legal aspirations will be able to change this, the careful drafting of the statute of an international criminal court for the environment could address the tensions between ecocide as an international crime and the basic principles of ICL. Especially concerning the legality principle, compromises have been proposed by a number of scholars in order to fulfil the *mens rea* requirement while safeguarding the efficiency of an international ecocide law. Accordingly, international lawyers involved in a drafting process should have a closer look at proposals of this kind.

To conclude, it should be mentioned that idealism, moral ambition, overenthusiasm and high expectations can result in harming the current system of ICL which is rather "in need of modesty and greater recognition of its own limitations"[637]. Thus, the future ecocide debate should focus on identifying a realistic definition for an international crime of ecocide leaving aside environmental principles and ideals. Undoubtedly, further research is needed to find adequate solutions overcoming the persisting challenges outlined in this work. As long as the international community is not ready to adopt an international crime of ecocide, perpetrators of severe environmental harm should be prosecuted under the already existing international crimes. While such proceedings are unlikely to entail satisfying results, they would at least "establish precedent in which environmental damage would be measured and considered such

[633] A. Greene, *op. cit.*, p. 42.
[634] Prosecuting Environmental Harm Before the International Criminal Court. – Leiden University Repository. Accessible at: https://openaccess.leidenuniv.nl/handle/1887/62738?_ga=2.118767114.2097678770.1563972821-434863976.1563972821 (07.04.20).
[635] R. Mwanza, *op. cit.*, p. 594.
[636] *Ibid.*, p. 588.
[637] C. Stahn, *op. cit.*, p. 413.

that it can give meaning to the ambiguities of the terms 'widespread, long-term and severe'"[638].

[638] T. Weinstein, *op. cit.*, p. 713.

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