THE CRIME OF ECOCIDE: THE ANSWER TO OUR ENVIRONMENTAL EMERGENCY?

Zahra McDonnell-Elmetri

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
MEA	Multilateral Environmental Agreement
TEEB	The Economics of Ecosystems and Biodiversity
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

INTRODUCTION

"We have a choice: make the leap to the new and leave the old ways behind as distant memories, or follow the current route into the ecocide of our earth." [1]

On 20 September 2020, a new clock was unveiled in Manhattan's Union Square. It promises to tell the exact amount of time the world has left before irreversible climate change alters human existence. Upon its unveiling, it read seven years, 101 days, 17 hours, 29 minutes and 22 seconds.[2] This is the estimated time we have left until the Earth's carbon budget is depleted, based on current emission rates.[3] Once this carbon budget is exhausted, the world will suffer even more flooding, increased wildfires, worsening famine and extensive human displacement.[4] Our environment is now at a tipping point. Something has to change, or we face the complete annihilation of the Earth and the species that call it home.

In an attempt to protect our planet, environmental movements are sweeping the world at a faster pace than ever before, with a significant impetus for the criminalisation of ecological harm. This mounting pressure is in response to substantial threats from land degradation, biodiversity loss, air, land and water pollution, and the effects of climate change. These harms are compromising the ability of the planet to meet human needs for both present and future generations.[5] We must acknowledge that the wellbeing and prosperity of humanity are entwined with the state of our environment. If we continue down this path of ignorance, we are paving the way for an incredibly bleak future.[6] However, the looming question remains – what can we do to prevent environmental destruction?

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[1] Polly Higgins *Earth is our business: changing the rules of the game* (Shepheard-Walwyn, London, 2012) at XIV.

[2] Jennifer Hassan "How long until it's too late to save Earth from climate disaster? This clock is counting down." (22 September 2020) The Washington Post <https://www.washingtonpost.com/climate-environment/2020/09/21/climate-change-metronome-clock-nyc/>.

[3] Above n 2.

[4] Above n 2.

[5] Laura Parker "UN: Environmental threats are jeopardizing human health" (13 March 2019) National Geographic <https://www.nationalgeographic.com/environment/2019/03/un-healthy-planet-report-environment/>.

[6] Joyce Msuya, the acting executive direction of UN Environment was quoted as saying "The science is clear. The health and prosperity of humanity is directly tied with the state of our environment…This report is an outlook for humanity. We are at a crossroads. Do we continue on our current path, which will lead to a bleak future for humankind, or do we pivot to a more sustainable development pathway? That is the choice our political leaders must make, now."

One of the leading proposals is to amend the Rome Statute of the International Criminal Court (the Rome Statute) to include a fifth Crime Against Peace under the jurisdiction of the International Criminal Court (ICC):[7] the crime of ecocide. This was the basis of the late Polly Higgins' submission to the United Nations (UN) mandated International Law Commission (ILC) in 2010. Higgins, a lawyer and author, founded the Eradicating Ecocide movement, which intends to implement a bold new law to derail the unstoppable train of destruction we have created.[8] Labelled radical in thought, the Eradicating Ecocide movement seeks to pull up the status quo from the roots, to eradicate the culture that has allowed for the destruction of our environment, and in turn to eradicate ecocide.[9]

The justification for a new ecocide law is clear and does not need to be assessed in this paper. Instead, the purpose of this paper is to explore the interplay between Higgins' proposed ecocide law and our existing legal framework, and the feasibility of its adoption. This paper evaluates the operation of our current environmental law framework and contrasts this to Higgins' submission. Further, it enquires into the substantive content of ecocide law and how it will function in the international environmental arena. This inquiry indicates that although at a surface level Higgins' submission echoes past attempts to criminalise environmental harm at both international and domestic levels, critical analysis suggests weaknesses that require a remedy to give ecocide its intended effect. These weaknesses not only permeate at a superficial level, within Higgins' formulation of ecocide and international law more generally but also at a deeper fundamental level of society, within our communities' attitudes and values. Without first addressing the systems that allow environmental harm to go unpunished, any attempts to criminalise this harm are likely to be unsuccessful.

The first part of this paper will outline our current environmental law response to harm, which is dominated by multilateral environmental agreements (MEAs). It will analyse their ability to

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UNFCC "UN: Ecological Damage Putting Millions of Lives at Risk" (15 March 2019) United Nations Climate Change <https://unfccc.int/news/un-ecological-damage-putting-millions-of-lives-at-risk>.

[7] There are currently four Crimes Against Peace referred to in Article 5 of the Rome Statute as under the jurisdiction of the ICC. These are the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002), art 5.

[8] Polly Higgins *Eradicating Ecocide: Laws and governance to prevent the destruction of the planet* (Shepheard-Walwyn, London, 2010) at XI.

[9] At XI.

protect the environment by looking at indicators of change and concludes that generally, MEAs fail to prevent environmental degradation and meet their intended purpose of protection. It then goes on to assess the emergence and development of the concept of ecocide in international law and what it could theoretically offer to our current systems. The paper then turns to Higgins' proposal of the crime of ecocide, discussing the content and formulation of the definition. As part of the ecocide movement, Higgins drafted a hypothetical Ecocide Act, which was used as the basis for a mock trial in the United Kingdom Supreme Court in 2011.[10] This Act provides the in-depth detail of the proposed content and interpretation of ecocide upon which I have based my analysis. The fourth chapter evaluates the crime of ecocide's theoretical operation, by exploring the potential issues that may arise and that in turn arguably limit its application. If ecocide cannot be effectively prosecuted, it will be unable to create the deterrent effect necessary to protect the environment, making it another redundant piece of international environmental law. The final chapter turns to how the law may respond to these issues. The paper concludes that although an alternative definition and forum could rectify the problems of Higgins' ecocide submission, these are only superficial changes. Fundamental concerns remain that require a change at every level of society. Any revisions to the crime of ecocide are unlikely to have any substantial effect without first challenging the culture that allows for the corporate and political practices that destroy our environment.

[10] Higgins includes an Ecocide Act in her book *Earth is our Business*. This Act expands on the amendment to be included within the Rome Statute by providing a sample of ecocide being integrated into domestic legislation (in the United Kingdom) once it is included as the Fifth Crime Against Peace. Although this is a United Kingdom example, by using the Ecocide Act, the content of ecocide and its feasibility in international law can be more accurately evaluated. Higgins *Earth is our business: changing the rules of the game*, above n 1, at 157.

CHAPTER 1 – LOVING OUR PLANET TO DEATH

I. Current International Environmental Law Landscape

International environmental law has responded to environmental degradation predominately through MEAs such as the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol.[11] MEAs allow for the establishment of long-term regimes and are defined by the institutionalisation of networks and decision-making and the development of treaty-based transparency and accountability mechanisms.[12] However, as the sense of urgency grows, so does the contention surrounding MEAs' ability to prevent environmental harm.[13]

MEAs work to complement existing national legislation, along with regional and bilateral agreements, in creating an overarching international legal backbone for global efforts to address specific environmental issues. In doing so, they provide an opportunity for international cooperation with significant autonomy.[14] Back in the early 1970s, there were only a handful of such agreements, mainly focused on pollution, and the majority of countries lacked any environmental legislation on a domestic level.[15] Since then, the landscape has dramatically changed. During the 1980s and 1990s, the environmental law scene exploded with MEAs covering an extensive range of issues.[16] The majority of initial MEAs were aimed at protecting particular species, creating a sectoral approach that looked only at environmental protection or conservation.[17] However, with increasing access to information and awareness of the interlinking nature of ecological processes, a quest for more integrated mechanisms and

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[11] United Nations Framework Convention on Climate Change (opened for signature 4 June 1992, entered into force 21 March 1994); and Kyoto Protocol to the United Nations Framework Convention on Climate Change (signed 11 December 1997, entered into force 16 February 2005).
[12] Jutta Brunnée "The Sources of International Environmental Law: Interactional Law" in Samantha Besson and Jean d'Aspremont (eds),*Oxford Handbook on the Sources of International Law* (Oxford University Press, Oxford 2017) 1 at 6.
[13] Jutta Brunnée "COPing with Consent: Law-Making Under Multilateral Environmental Agreements" (2002) 15 LJIL 1 at 1.
[14] Romain Boulet, Ana Flavia Barros-Platiau and Pierrer Mazzega "35 years of multilateral environmental agreements ratifications: a network analysis" (2016) 24 Artificial Intelligence and Law 133 at 134.
[15] Edith Brown Weiss "The Evolution of International Environmental Law" (2011) 54 Japanese Yearbook International Law 1 at 1.
[16] Geoffrey Palmer *Environment: The international challenge* (Victoria University Press, Wellington, 1995) at 120.
[17] Belinda Bowling "Multilateral Environmental Agreements: A Handbook for Afghan Officials" (March 2008) United Nations Environment Programme <https://postconflict.unep.ch/publications/afg_tech/theme_02/afg_mea_handbook.pdf> at 8.

solutions began.[18] As a result, the MEAs that have been developed in recent years look increasingly at sustainable development and the use of natural resources, acknowledging the entwined nature of our environment.[19] According to the International Environmental Agreement Database Project, currently over 1,300 MEAs exist, covering a variety of issues such as the atmosphere, marine environment, noise pollution, and nuclear safety.[20] New Zealand has various obligations under these agreements, and a number of them are incorporated into our domestic laws as required. MEAs can provide more general principles about a particular environmental issue, such as the Convention on Biological Diversity;[21] through to specific international ecological obligations and objectives to be met by the parties in agreement, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[22]

II. Indicators of MEAs' Success – or Lack Thereof

Although MEAs are the dominant mechanism in international environmental law, their effectiveness has become a subject of much contention in the escalating climate crisis.[23] Despite there being more MEAs than ever before, we are witnessing the daily destruction of ecosystems and facing the extinction of an estimated one million plant and animal species.[24] Yet, 60 billion tons of natural resources continue to be extracted by humankind each year, raising questions about the continuing role of MEAs in our international environmental law regime.[25] We are now at a breaking point; we must move away from these instruments premised on compromise or face the consequences.[26]

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[18] At 8.
[19] At 8.
[20] Ronald B Mitchell "International Environmental Agreements (IEA) Database Project (Version 2020.1)" University of Oregon <https://iea.uoregon.edu>.
[21] Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993).
[22] Convention on the International Trade of Endangered Species of Wild Fauna and Flora (opened for signature 3 March 1973, entered into force 1 July 1975).
[23] Tim Stephens "Reimagining International Environmental Law in the Anthropocene" in Louis J Kotze (ed) *Environmental Law and Governance for the Anthropocene* (Hart, Oxford & Portland, 2017) at 34.
[24] S Díaz and others (eds) IPBES (2019): *Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, Summary Report for Policymakers, 2019) at 12.
[25] At 28.
[26] Higgins *Eradicating Ecocide: Laws and governance to prevent the destruction of the planet*, above n 8, at XXIII.

The idea that the majority of MEAs tend to be ineffective is not new in literature. Empirical evidence on the subject is sparse, and we will never be able to truly measure the effect that they have had on the environment or where we would be without MEAs. However, it is clear from the increasingly urgent environmental emergency that MEAs may not provide the most effective legal solution.[27] Higgins in *Eradicating Ecocide* states: [28]

> History demonstrates that laws dealing directly or indirectly with the environment, for example, pollution reduction measures, have comprehensively failed when reliance is placed on incremental mechanisms, limitations, efficiency measures and permit allocations. In reality, corporations simply deal with these measures by making any breach and the consequence thereof, part of the profit and loss account of its operations. Modern-day climate negotiations are a further example; it has spawned a rash of laws premised on compromise which serve only to advance the interests of industry, not the people and planet.

To understand the impact of MEAs, we can use indicators to assess the extent to which these environmental regimes have been successful in internalising goals set for the planetary boundaries. [29] Stephens uses the nine planetary boundaries identified by the Stockholm Resilience Centre to measure the extent MEAs have internalised goals consistent with planetary survival.[30] Despite some successes, such as the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol), the overwhelming picture indicates that MEAs have had neither the desired nor necessary effect in the majority of situations.[31]

A. Climate change

Climate change is considered a 'core' boundary because of its central importance to the safety of all species. However, human-induced climate change is already well beyond the level of

[27] Stephens, above n 23.
[28] Higgins *Eradicating Ecocide: Laws and governance to prevent the destruction of our planet*, above n 8, at XIV-XV.
[29] Stephens, above n 23, at 34.
[30] The Stockholm Resilience centre is an independent, non-profit research institute specialising in sustainable development and environmental issues. They work on a number of environmental issues, such as climate change, to generate insights and knowledge with the aim of shifting governance and management towards sustainability; see 35.
[31] At 34.

what can be considered safe.[32] The climate regime is tied to a clearly defined objective, yet the UNFCCC does not define what 'dangerous climate change' is or include any targets or timeframes to meet its objectives. In an attempt to remedy this deficiency, the Kyoto Protocol and the following 2012 Doha Amendment were introduced.[33] However, the commitments set out within the Amendment are considered insufficient by scientists and scholars to curb dangerous climate change and were never even entered into force.[34]

The Paris Agreement on Climate Change (the Paris Agreement) aimed to address both the 'objective gap' of the UNFCC and the 'emissions gap' in the Kyoto Protocol.[35] Yet on the current estimated emissions trajectory, scientists place us at an almost certain 4°C or more increase in temperature by 2100.[36] This is well above the 1.5°C to 2°C increase in temperature limit imposed by the Agreement.[37] Additionally, the Agreement is silent on policy approaches for cutting emissions and includes no systematic distribution of the carbon budget among individual states.[38]

B. Novel entities

Novel entities and modified life forms have the capacity to create severe and persistent effects, and thus must be closely monitored. To prevent chemical pollution, there has been recent global regulatory efforts to control the production, use and transboundary trade in chemicals, including novel entities. The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Stockholm Persistent Organic Pollutants Convention have successfully restricted the production and

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[32] At 35.
[33] Doha Amendment to the Kyoto Protocol (opened for signature 8 December 2012, not yet entered into force).
[34] The Doha Amendment refers to the changes made to the Kyoto Protocol in 2012, after the First Commitment Period of the Kyoto Protocol concluded. Despite multiple attempts to encourage Parties to accept the Amendment as soon as possible, as of 16 June 2020 only 140 parties have deposited their instrument of acceptance, and a total of 144 instruments of acceptance are required for the entry into force of the amendment. UNFCC "The Doha Agreement" (16 June 2020) United Nations Climate Change < https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment>.
[35]Aims to strengthen the global response to the threat of climate change by: "Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change". Paris Agreement to the United Nations Framework Convention on Climate Change (opened for signature 12 December 2015, entered into force 4 November 2016), art 2(1)(a).
[36] R Guarnaut "Compounding Social and Economic Impacts: The Limits to Adaptation" in P Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Milton Park, Routledge, 2014) 141.
[37] Paris Agreement to the United Nations Framework Convention on Climate Change (opened for signature 12 December 2015, entered into force 4 November 2016).
[38] Stephens, above n 23, at 37.

movement of some hazardous chemicals.[39] However, they are only applicable to a limited number of the most dangerous substances, and neither regime has fully taken into account the global impacts of the chemicals. Additionally, both regimes operate awkwardly, creating significant delays. As a result, the extent MEAs have been effective in controlling the development of novel substances has been drastically limited.

C. Stratospheric ozone depletion

The Vienna Convention for the Protection of the Ozone Layer,[40] and the Montreal Protocol are considered the most successful MEAs created, as the only MEAs with universal ratification.[41] They were effective in taking steps to reduce the production and consumption of many ozone-depleting substances, and their success is evident in the recovering health of the ozone layer.[42]

D. Atmospheric aerosol loading

Aerosols have contributed to 'global dimming', which partially masks the effects of climate change and affects regional ocean-atmosphere circulation such as the South Asian monsoon season.[43] There is currently no global treaty regime regulating atmospheric aerosol loading, and although there are various regional regimes, these have arguably failed to be effective.[44] The Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone to the Air Pollution Convention was amended in 2012 to include binding emissions targets for aerosols.[45] However, this revised version was only entered into force in 2019 and is yet to show any impactful changes.

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[39] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (opened for signature 10 September 1998, entered into force 24 February 2004); and Stockholm Persistent Organic Pollutants Convention (opened for signature 22 May 2001, entered into force 17 May 2004).
[40] Vienna Convention for the Protection of the Ozone Layer (opened for signature 22 March 1985, entered into force 22 September 1988).
[41] Montreal Protocol on Substances that Deplete the Ozone Layer (opened for signature 16 September 1987, entered into force 1 January 1989).
[42] Stephens, above n 23, at 40.
[43] At 41.
[44] At 41.
[45] *Decision 2012/2 Amendment of the text of and annexes II to IX to the 1999 Protocol to Abate Acidification, Eutrophication and Ground-level Ozone and the addition of new annexes X and XI* UN Doc ECE/EB.AIR/111/Add.1.; and Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone to the Air Pollution Convention, as amended on 2 May 2012 (opened for signature 20 November 1999, entered into force 17 May 2005).

E. Ocean acidification

Ocean acidification regimes have failed to respond to changing environmental conditions. Although potentially governable by multiple regimes, to date no MEAs address it. The UNFCCC is arguably the most appropriate vehicle for governance in this area given the ocean climate nexus, however, is yet to introduce any metrics for healthy ocean chemistry despite clear goals in terms of temperature objectives. The Paris Agreement provides only a brief reference to oceans and does not include a pH equivalent to respond to the 1.5°C to 2°C temperature increase limits.[46] As a result, ocean acidification concentrations currently sit at an estimated 84 per cent, close to transgressing the planetary boundary.[47] The lack of MEAs shows states have entirely failed even to attempt to address this pressing harm.

F. Biogeochemical flow

Appallingly, biogeochemical flows are almost entirely unregulated by MEAs. There is no regulation on a global scale via legally binding instruments for land-based pollution.[48] Currently, the closest thing to a regime is the non-binding Washington Declaration on the Protection of the Marine Environment from Land-Based Activities.[49] The Declaration has such general targets it can be considered to have no meaningful content and falls significantly short of creating targets for reducing the input and impact of major pollutants.[50]

G. Freshwater use

At present no global treaty exists to address access to, and conservation of freshwater. Rather freshwater resources are considered a matter for individual states to address as they see as appropriate. The exception to this regards shared bodies of waters for which there is the United Nations Convention on the Law of the Non-Navigational Use of International Watercourses.[51]

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[46] Paris Agreement to the United Nations Framework Convention on Climate Change (opened for signature 12 December 2015, entered into force 4 November 2016).
[47] Stephens, above n 23, at 43.
[48] Stephens, above n 23, at 43.
[49] Washington Declaration on Protection of the Marine Environment from Land-Based Activities UN Doc UNEP(OCA)/LBNIG.2/L.4 (2 November 1995).
[50] For example, states declare their intention to protect and preserve the marine environment from the impacts of land-based activities by: "Developing or reviewing national action programmes within a few years on the basis of national priorities and strategies". At declaration 2.
[51] United Nations Convention on the Law of the Non-Navigational Use of International Watercourses (opened for signature 21 May 1997, entered into force 17 August 2014).

However, it fails to protect world freshwater resources as a global commons resource.[52] Scientists estimate that freshwater use will soon overwhelm the resources available as the population explodes, and by 2025, an estimated 1.8 billion people will live in areas plagued by water scarcity.[53] This shows freshwater is a pressing, if not essential, matter that must be more adequately responded to by international environmental law.

H. Land-use change

Given the importance of forests to the climate system, forest protection has emerged as a critical issue in regimes such as the Paris Agreement, which employs 'REDD+' – a scheme where forests are conserved in exchange for payment.[54] But, there have been serious questions about the effectiveness of REDD+ and if it can deliver the results necessary in a timely and permeant fashion.[55] Additionally, the Non-Legally Binding Instrument on All Types of Forest is also applicable to forest protection yet contains such overly general provisions that it is considered meaningless.[56] The global planetary boundary for forest cover is 75 per cent of the original cover, yet current estimates place current forest cover at 62 per cent of the original cover.[57] Therefore, it is clear that the MEAs in place at present are failing to deliver what is necessary to protect the environment.

I. Biosphere integrity

Despite acute awareness of the biodiversity data and various efforts to adopt and implement targets to reduce the range and rate of species extinction, the overall picture indicates these have not been successful. The Earth is now experiencing its sixth extinction event.[58] The lack of impact from regimes such as the Convention on Biological Diversity;[59] CITES;[60] and the Ramsar Convention on Wetlands of International Importance;[61] indicate how target-setting

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[52] Stephens, above n 23, 44.
[53] National Geographic "Fresh Water Crisis" National Geographic <https://www.nationalgeographic.com/environment/freshwater/freshwater-crisis/>.
[54] Paris Agreement to the United Nations Framework Convention on Climate Change, art 5.
[55] Stephens, above n 23, at 46.
[56] *Non-Legally Binding Instrument on All Types of Forest* GA Res 62/98 (2007).
[57] Stephens, above n 23, at 46.
[58] G Ceballos and others "Accelerated Modern Human-Induced Species Losses: Entering the Sixth Mass Extinction" (2015) 1 Science Advances; and Stephens, above n 23, at 46.
[59] Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993).
[60] Convention on the International Trade of Endangered Species (opened for signature 3 March 1973, entered into force 1 July 1975).
[61] Ramsar Convention on Wetlands of International Importance (opened for signature 2 February 1971, entered into force 21 December 1975).

exercises alone are not sufficient and must be supported through effective policies and governance strategies.[62] Currently an estimated one million animal and plant species are threatened with extinction, and this number is only set to increase within decades.[63] This highlights how despite good intentions, the MEAs aimed to protect biosphere integrity are dramatically failing to respond effectively.

Although there have been some successes, such as the Montreal Protocol, overall indicators paint a picture of MEAs failing to stop and reverse the environmental degradation they were implemented to prevent. Instead, the environment continues to decline, and MEAs are doing little to prevent it.

III. Difficulties Faced by MEAs in International Environmental Law

The world today looks very different than how it did when international environmental law was initially emerging. However, the way we make international environmental law has remained the same. States are continuously engaging in crafting the same type of MEAs, dramatically limiting what can be achieved. The sovereign equality of states has led to significant difficulties in the negotiation and ratification process. Decision-makers have made MEAs either increasingly vague or overly specific to combat these issues, which itself creates its own set of problems such as treaty congestion and conflict. As a result, we now have a congested scene of MEAs all facing the same issues we are trying to circumvent - indicating it may be time to form a new type of international environmental law.

A. Treaty negotiation and compliance

State sovereignty makes up the foundations of international law. However, it has caused difficulties in the negotiation and ratification process. These difficulties are mainly as a result of a lack of an overarching organisation to coordinate the process, meaning each negotiation proceeds differently regardless of common elements. This approach comes with the risk that

[62] Stephens, above n 23, at 47.
[63] S Díaz and others (eds), above n 24, at 24.

during each negotiation "the wheel must be reinvented"[64] – a dangerous game considering the critical input that scientific data provides in environmental issues. As a result, we are unable to evaluate the gaps that may exist in MEAs or devise a means of prioritising competing claims.

Furthermore, such negotiations are often incredibly time-consuming, to the point where the MEA being negotiated can become redundant, as was the fate with the Convention on the Regulation of Antarctic Mineral Resource Activities.[65] Before the Convention could be entered into force, a new legally binding agreement was finalised by the parties - the Protocol on Environmental Protection to the Antarctic Treaty.[66] The negotiation involved the Antarctic Treaty partners only– representing a mere segment of the international community, yet even they could not reach a consensus. This example indicates how the issues exhibited by the Convention will only be multiplied when virtually every country in the world is involved.

A significant part of the difficulty in negotiating comes down to the rule of unanimous consent that is a corollary of the sovereignty and the equality of the states. This intensifies the negotiation difficulties, as a single nation can hold a negotiation process hostage, demanding concessions as a price of unanimous consent.[67] Additionally, the principle of state consent, means that treaty norms can be characterised as 'commitments' as opposed to 'obligations' to emphasise the self-binding quality of treaty law. This feature of MEAs means that treaty norms are not imposed on states, but rather are commitments that the state voluntarily undertakes. As a result, MEAs are much more enticing to states to be a part of, as it means there are no formal obligations, but it also creates a complete lack of liability.

As these commitments are not formal, ensuring treaty compliance has proven to be incredibly difficult. Many MEAs are equipped with procedures for 'compliance monitoring' to ensure the actual implementation of an agreement by member states.[68] Deliberate non-compliance with

[64] Palmer, above n 16, at 52.
[65] Convention on the Regulation of Antarctic Mineral Resource Activities (opened for signature 2 June 1988, not yet entered into force).
[66] The Convention was signed by 19 states but no states have ratified it. Therefore the Convention was never entered into force and was instead replaced in time by the Protocol on Environmental Protection to the Antarctic Treaty. Protocol on Environmental Protection to the Antarctic Treaty (signed 4 October 1991, entered into force 14 January 1998).
[67] Palmer, above n 16, at 54
[68] Nils Goeteyn and Frank Maes "Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?" (2011) 10 Chinese Journal of International Law 791 at 791.

obligations is considered 'free-riding.'[69] Both non-participation through failure to ratify and failure to apply, can provide competitive advantages to nations or industries over foreign competitors.[70] In an effort to deter, and ultimately sanction states for free-riding, non-compliance procedures have been built around the periodic reporting obligations of member states under most MEAs.[71] The majority of MEAs require each signatory nation to submit regular progress reports, however, treaty secretariats rarely, if ever, have sufficient technical staff to review the accuracy of the information submitted or assist countries that need technical support. Furthermore, the progress reports that are presented by some countries often contain unreliable information.[72]

B. Reservations

State sovereignty has meant past MEAs have been subject to countless reservations that have dramatically limited their potency. A state's ability to enter reservations against articles in international treaties has evolved since the 19th Century and has been codified under the Vienna Convention on the Law of Treaties (VCLT).[73] Despite Article 19 of VCLT constraining reservations which run contrary to the 'object and purpose' of the treaty, the reality is the majority of reservations adopted dramatically affect the formulation and fulfilment of treaties. Many modern MEAs prohibit reservations in the body of the treaty in an attempt to preserve the integrity of the agreement undertaken. However, reservations are permitted concerning obligations related to individual species, substances, or measures listed in the appendices or annexes of many important MEAs.[74] For example, upon the submission of a reservation against a species listed in CITES, the state shall be treated as a non-party to the Convention in regards to that species, and so the trade restrictions embodied in the Convention will not apply.[75] This is dangerous for two reasons; firstly, any dealings between a reserving state and a non-member

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[69] Ana Espínola Arredondo and Félix Muñoz-García "Free-riding in international environmental agreements: A signalling approach to non-enforceable treaties" (2008) 23 Journal of Theoretical Politics 111 at 112.
[70] In an attempt to prevent this type of free-riding through non-compliance, some MEAs include provisions for the application of 'comparable' rules to trade relations with non-member states; for example, Article 10 of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora.
[71] Daniel Bodansky *The Art and Craft of International Environmental Law* (Harvard University Press, Cambridge, 2010) at 239.
[72] Lawrence Susskind "Strengthening the Global Environmental Treaty System" (October 2008) Issues in Science and Technology <https://issues.org/susskind/>.
[73] Iain J MacLeod "Incompatibility of Multilateral Treaty Reservations with International Environmental Law" (Harvard School of Public Health, nd) at 3.
[74] Karen N Scott "The Dynamic Evolution of International Environmental Law" (2018) 49 VUWLR 607 at 612.
[75] MacLeod, above n 73, at 3.

would not fall under the control of CITES; and secondly trade between contracting parties that have entered into identical reservations creates the same obligations as though the trade were between two non-parties.[76] Reservations to CITES have overall dramatically weakened the first international protections for iconic species such as giraffes, by entering into reservations nations will not have to take the vital and necessary steps to ensure the protection of these species.[77] This shows that despite the efforts of the VCLT, reservations dramatically limit the effectiveness of MEAs because they undermine the very objectives of them, regardless of attempts to prevent this.

C. Increasingly vague

The conflicting interests of states during complex negotiations means that compromise is necessary – often resulting in weak documents that operate at the level of the lowest common denominator.[78] As a result of the principle of state consent, no state can be forced to do something against their will. Each state will instead seek to formulate an agreement that will maximise the responsibility of other states while minimising their own responsibility. Each nation wants to protect its sovereignty, meaning that these MEAs are more often than not political declarations of intent. In the cases where commitments are made, they rarely go far enough and instead cover what is often already covered under domestic law.[79] The Convention on Biological Diversity is a prime example of a much-hyped convention that in reality failed to have the desired effect as a result of flawed foundations through questionable organisation strategies, ineffective implementation and identity problems.[80] The majority of obligations in

[76] At 3.
[77] Botswana, the Democratic Republic of Congo, Eswatini, South Africa, Tanzania, Zambia and Zimbabwe all refused to enact provisions for giraffe by entering into reservations to the listing in Appendix II of CITES. South Africa, Zimbabwe and Namibia are top exporters of giraffe parts and products to the United States, the African Nations decision has raised significant concerns, as by entering into a reservation these nations can export the species (in any form), without determining that the items were acquired legally and verifying that the export will not harm the survival of the species in the wild, nor will they need to report export data for the species to CITES.
Convention on International Trade in Endangered Species of Wild Flora and Fauna (opened for signature 3 March 1973, entered into force 1 July 1975), Appendix II.
[78] David Krott ""Guilty or not Guilty" The call for International Environmental Criminal Court" (LLM thesis, University of Otago 2017) at 40.
[79] At 40.
[80] Lakshman D Guruswamy "The Convention on Biological Diversity: exposing the flawed foundations" (1999) 26 Environmental Conservation 79 at 79.

Articles 1-14 regarding conservation and sustainable use of biodiversity, are rendered completely weak, by only imposing obligations "as far as possible and as appropriate."[81]

As a result, there is a real potential for overlap – either in the form of a doubling of efforts concerning a specific issue, or the more dangerous form, as a complete contradiction or conflict between objectives, programs or measures.[82] This phenomenon of a multitude of parallel, overlapping and conflicting agreements, only exasperated by the negotiation of even more MEAs, has been labelled as "treaty congestion".[83] Creating a congested scene of MEAs is arguably worst then no MEAs, as we have created the illusion of progress, giving a false sense of security in an increasingly urgent situation.[84]

This "doubling of efforts" diminishes the potency of international environmental law because already limited financial, administrative or technical resources may be wasted.[85] If there is a conflict between MEAs, this limits the effectiveness of the agreements itself, as it creates uncertainty in regards to interpretation, and as a result, application and implementation in the global arena. If two MEAs offer a colliding perspective, the primary consideration is if either agreement has priority over the other. This question has so far not been dealt with extensively in international law – even the international convention adopted to regulate questions regarding the law of treaties, the VCLT, provides limited insight into the answer.[86] Article 30 of the VCLT sets out only limited instances of conflict, ignoring the problem of treaty conflict and congestion, and fails to provide any mechanisms for institutional cooperation to avoid such conflict.[87]

In the effort to facilitate cooperation amongst states, we have caused congestion and conflict, affecting all levels of law-making – national, regional and domestic.[88] Conflicting regulations in any sector of a legal system are worrying because of the threat posed to the overall coherence

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[81] Dr S Blay, Kwaw Nyamekeh and Dr Ryszard W Piotrowicz "Biodiversity and Conservation in the Twenty-first Century: A Critique of the Earth Summit 1992" (1993) 10 EPLJ 461.
[82] Rüdiger Wolfrum and Nele Matz *Conflicts in International Environmental Law* (Springer, Germany, 2003) at 2.
[83] At 3.
[84] Adalheidur Johannsdottir, Ian Cresswell and Peter Bridgewater "The Current Framework for International Governance of Biodiversity: Is it doing more harm than good?" (2010) 19 Rev European Community Inter'l Enva'l Law 139.
[85] Wolfrum and Matz, n 82, at 3.
[86] At 3.
[87] At 3.
[88] At 5; and Vienna Convention on the Law of Treaties, art 30.

and effectiveness of that area of law specifically, but also the law more generally. In international law, these conflicts are more common to occur because of the principle of state sovereignty.

IV. Reimagining International Environmental Law

We are now at a tipping point.[89] Our law works in a mirage of ways, it can be used to directly or indirectly cause damage and destruction, but it can also be used to prevent such damage and destruction from occurring. Currently, the operation of our law is indirectly allowing harm to the environment. As a result, we must change the current course of our trajectory of destruction. These concerns with MEAs have led legal scholars to speculate how international law could be better imagined to more appropriately respond to environmental destruction and prevent it from occurring in the first place.

Target setting through reference to state boundaries is not sufficient to make the necessary impact. Preferably such targets must be coupled with a new set of environmental norms. To achieve this, we must meet a new balance, taking a pragmatic approach that is more orientated towards protecting globally integrated environmental systems to not only protect and sustain human civilisation, but all species. It is no longer possible to be concerned with the precautionary approach of preserving an external order in the environment. Rather it may instead become a purely utilitarian normative order concerned only with protecting species from an increasingly hostile and hazardous environment.[90] A new radical approach is necessary, and the crime of ecocide has been touted as one answer to our environmental emergency.

[89] Higgins, above n 8, at XIV.
[90] Stephens, above n 23, at 54.

CHAPTER 2 – THE HISTORY OF ECOCIDE

Our experiences have shown us that international environmental laws have failed to be effective because of the reliance on a systematic formula focusing on incremental mechanisms, limitations, efficiency measures and permit allocations.[91] The reality is that modern-day environmental negotiations are a prime example of laws of compromise that serve only to advance the interests of the industry by allowing corporations to deal with such weak measures by electively choosing to breach them and deal with the consequences later. A new type of approach is necessary, and for many, the concept of ecocide may provide at least part of the answer.

I. Ecocide Defined

There is no one fixed definition of ecocide, which brings with it a number of its own issues. However, for the purpose of this paper ecocide in general terms can be defined as meaning the "total destruction of an area of the natural environment, especially by human agency."[92]

II. History of Ecocide

Ecocide as a concept has existed for decades in international law and as a result, may not be as radical as it is made out to be. By reviewing the history of ecocide, we can establish the validity of an international crime of ecocide in a contemporary setting.

The term ecocide initially came into international focus to describe the atrocities witnessed in the Vietnam War as a result of the use of chemical warfare by the United States of America (the United States). The first recorded use of "ecocide" was Professor Arthur W Galston's description of the United States warfare tactics in Vietnam, beginning his campaign for "a new international agreement to ban ecocide".[93] In his speech at the 1970 Conference on War and National Responsibility, Galston drew comparisons between the crime of genocide being enacted following the end of World War II, to the need for a crime of ecocide following the

[91] Higgins, above n 8, at XIV-XV.
[92] Collins Online English Dictionary <https://www.collinsdictionary.com/dictionary/english/ecocide>.
[93] A Gauger and others *The Ecocide Project: Ecocide is the missing 5th Crime Against Peace* (Human Rights Consortium, London, 2012) at 5.

Vietnam War. He referred to the UN as the "appropriate body for the formulation of a proposal against ecocide."[94] Galtson, a biologist, actually helped develop Agent Orange.[95] However, he contended that its use violated the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.[96] He strongly opposed the use of herbicides in warfare, yet he did not believe that the extraction of natural resources to constitute ecocide.[97] Once engaged, the term ecocide quickly spread and began to appear in literature in regards to Agent Orange, however, most authors referred to it as an act of war, supporting Galston's interpretation.[98]

Since its initial mention, ecocide continued to evolve in meaning. In the 1971 article "A Constitutional Right of Freedom from Ecocide" by Professor Pettigrew of Ohio University, ecocide is defined as "the substantial destruction of an integral part of a particular ecosystem or the unreasonable degradation of the environment in general."[99] This period during the 1970s and 1980s marked a time of extensive study and debate within the international community regarding ecocide and the possible inclusion of ecocide into the Convention on the Prevention and Punishment of Genocide (the Genocide Convention).

In June 1972, 113 nations' representatives gathered in Stockholm for the United Nations Conference on the Human Environment (the Stockholm Conference). The Stockholm Conference marked the first-ever major conference by the UN on international environmental issues and included several references to ecocide. The Conference's opening speech by Swedish Prime Minister Olof Palme was a particular historical moment in which he described the United States' use of defoliants and herbicides in Vietnam as ecocide.[100] More than focusing solely on war, the Conference also looked to other issues related to transboundary pollution and environmental pollution. From the Conference came the formation of the first declarations of principles of international environmental law under the 1972 United Nation Conference on

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[94] David Zierler *The Invention Of Ecocide: Agent Orange, Vietnam, and the Scientists who changed the way we think about the Environment* (University of Georgia Press, Georgia, 2011) at 102.
[95] Anastacia Greene "The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?" (2019) 30 Fordham Environmental Law Review 1 at 8.
[96] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (opened for signature 17 June 1952, entered into force 8 February 1928); and at 8.
[97] Articles referring to ecocide mainly focused on the ecological effects of the Vietnam War, chemically poisonous products' effect on agriculture, and the bombing of Vietnam. Greene, above n 98, at 8.
[98] At 8.
[99] At 9.
[100] A Gauger and others, above n 93, at 5.

the Human Environment (Stockholm Declaration).[101] The Stockholm Declaration comprised of 26 principles and submissions of recommendations, including Principle 1, which set out:[102]

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being

Furthermore, Principle 6 states: [103]

> The discharge of toxic substances … in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted to ensure that serious or irreversible damage is not inflicted upon ecosystems.

Additional unofficial parallel events were held during the Conference including the 'Peoples Summit' that discussed the creation of a crime of ecocide and formulated a Working Group to draft an 'Ecocide Convention', which was eventually submitted to the UN in 1973.[104] Ecocide was also a reoccurring topic in the Environmental Forum, a side event for non-government organisations who could not participate in the conference itself. Discussion at the Forum indicated confusion on whether ecocide constituted an environmental issue or a war issue, as early discussion of ecocide was often in the context of a general condemnation and withdrawal of the United States from Vietnam.[105]

In 1973 Professor Falk published a proposed "International Convention on the Crime of Ecocide" containing analysis, definition and a framework.[106] In this proposal, ecocide was extended to both times of peace and warfare and included an element of criminal intent.[107] The article was then later included in a UN study evaluating the effectiveness of the Genocide Convention, which in turn raised the question of a proposal incorporating ecocide and cultural genocide into the Convention – extending its scope.[108] The study considered three different

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[101] *Declaration of the United Nations Conference on the Human Environment* GA Res 48/14 (1972).
[102] At Principle 1.
[103] At Principle 6.
[104] Greene, above n 95, at 11.
[105] Greene, above n 95, at 11.
[106] Richard A Falk "Environmental Warfare and Ecocide: Facts, Appraisal and Proposals" (1973) 9 Belgian Review International Law 1 at 11.
[107] At 11.
[108] Nicodème Ruhashyankiko *Report of the Special Rapporteur on the Study of the Question of the Prevention and Punishment of the Crime of Genocide* UN Doc E/CN4/Sub 2/416 (4 July 1978).

conceptualisations of ecocide: "Ecocide as an international crime similar to genocide, ecocide as a war crime and ecocide as actions to influence the environment for military purposes."[109] Although there was some support from countries for its incorporation into the Convention, the lack of a legal definition raised opposition, and ultimately the Study found that extending the context of genocide to include ecocide would compromise the effectiveness of the Convention itself.[110]

A. The Rome Statute of the International Criminal Court

The question of ecocide's role in international law continued following the creation of the UN, itself sparked by the humanitarian crises from the scourge of war. The Charter of the United Nations was adopted in 1945 and stated a proclamation of human rights as a global goal.[111] In 1947 the ILC was tasked by the UN General Assembly to formulate "the principles of international law recognised in the Charter of the Nuremberg Tribunal" and to "prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the [aforementioned] principles."[112] During this drafting process, an extensive debate arose regarding the inclusion of a law prohibiting extensive environmental damage.

The ILC included within this Draft Code Against Peace and Security of Mankind, Article 26 which stated: "an individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced […]."[113] The Article raised criticism because of the inclusion of "wilfully", as it presupposes a clear intent is necessary to constitute ecocide, and because the environmental crime did not refer to ecocide by name directly.[114] In response, the ILC removed Article 26 in its entirety instead of simply amending it. It is unclear exactly why the Chairman of the ILC choose to remove the Article without first subjecting it to a vote, but the outcome was that the only crimes

[109] Greene, above n 95, at 13.
[110] Ruhashyankiko, above n 108, at 108.
[111] Charter of the United Nations, art 1.3. "…To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all with- out distinction as to race, sex, language, or religion…"
[112] Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal GA Res 177(II) (1947).
[113] A Gauger and others, above n 93, at 9.
[114] At 9.

against the environment included within the current Rome Statute are war crimes, specifically Article 8(2)(b)(iv), which prohibits: [115]

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Christian Tomuschat was a member of the Working Group established to examine the possibility of covering the issue of wilful and severe damage to the environment in the Draft Code Against Peace and Security of Mankind.[116] He published an article in 1996 regarding the development of a provision for environmental crimes in the Draft Code saying: [117]

> One cannot escape the impression that nuclear arms played a decisive role in the minds of many of those who opted for the final text which now has been emasculated to such an extent that its conditions of applicability will almost never be met even after humankind would have gone through disasters of the most atrocious kind as a consequence of conscious action by persons who were completely aware of the fatal consequences their decisions would entail.

The Rome Statute was eventually negotiated into its final form at a UN conference in Rome in 1998, aiming to create the necessary tools to finally make a shared international commitment to peace a reality, by creating the International Criminal Court (ICC). Overall the Statute represented the culmination of the long and frustrating struggle that arose following the aftermath of the World Wars.[118] The purpose of the ICC is to investigate and prosecute the four Crimes Against Peace; namely genocide, crimes against humanity, war crimes and the crime of aggression.[119] The ICC is set up as an independent body to be financed by state parties.[120]

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[115] Rome Statute of the International Criminal Court, art 8 (2)(b)(4).
[116] Document on draft crimes against the environment, prepared by Mr. Christian Tomuschat, member of *the Commission* [1996] vol 2, pt 1 YILC.
[117] Greene, above n 95, at 17.
[118] Andrew Novak "The Rome Statute of the International Criminal Court" in *The International Criminal Court* (Springer, Cham, 2015) at 23.
[119] Rome Statute of the International Criminal Court, art 5.
[120] Higgins *Earth is our business: changing the rules of the game*, above n 1, at 28.

At present, 123 countries are listed as state parties to the Rome Statute.[121] The ICC is intended to have universal jurisdiction, stepping in to prosecute when states fail to take action. Currently, there are 13 situations under investigation by the Office of the Prosecutor for the ICC following referral by State Parties or the United Nations Security Council (UNSC), or its own initiative with the judge's authorisation.[122] Under the complementarity principle of the Rome Statute, the ICC is designed to complement existing national judicial systems. As a result, states have generally implemented domestic legislation to allow for the investigation and prosecution of crimes that may fall under the jurisdiction of the ICC. Therefore, by implementing ecocide as a crime at an international level, the potential exists for it to filter down rapidly to the domestic consciousness and legislation of State Parties.

To some degree, this is already happening. Although the Draft Code Against Peace and Security of Mankind morphed into the 'lesser' Rome Statute, some states adopted to transfer elements of it into their national penal codes, including ecocide. Vietnam understandably was the first country to include a crime of ecocide into its domestic law.[123] Russia followed in 1996 after the fall of the Soviet Union;[124] along with many newly independent ex-Soviet states.[125] More recently, states such as France have floated the idea of a referendum regarding the introduction of a national crime of ecocide.[126] From this, it can be concluded that portions of the international community approve of the legal concept of ecocide and as a result have deliberately chosen to incorporate it into their national penal codes.

Despite the number of domestic ecocide laws in place already, the effectiveness of them still must be ascertained. The capacity to effectively prosecute ecocide domestically depends on several factors including the ability of the state to enforce the law, an independent judiciary

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[121] "The States Parties to the Rome Statute" International Criminal Court <https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>.
[122] Democratic Republic of Congo, Uganda, Darfur (Sudan), Central African Republic (referred twice, in 2014 and 2004), Kenya, Libya, Côte d'Ivoire, Mali, Georgia, Burundi, Bangladesh/Myanmar and Afghanistan. Upon referral the Office of the Prosecutor investigates, requesting cooperation and assistance from States and international organisations to gather evidence.
[123] Penal Code 1990 (Vietnam), art 278. 'Ecocide, destroying the natural environment', whether committed in time of peace or war, constitutes a crime against humanity.
[124] Criminal Code 1996 (Russian Federation), art 358.
[125] Criminal Code of the Republic of Armenia 2003 (Armenia), art 394; Criminal Code of the Republic of Belarus 1999 (Belarus), art 131; Criminal Code of Ukraine 2001 (Ukraine), art 441; and Criminal Code of Georgia 1999 (Georgia), art 409.
[126] Rosie Frost "France wants to make hurting the planet illegal, but what is Ecocide?" (25 June 2020) Euro News <https://www.euronews.com/living/2020/06/25/france-wants-to-make-hurting-the-planet-illegal-but-what-is-ecocide>.

and respect for the rule of law.[127] The reality is the countries with national ecocide laws rank very low in terms of respect for the rule of law and high in terms of corruption, for example, Vietnam.[128] This indicates that although international support may arguably already exist for ecocide in the form of domestic law, these same domestic laws in place are primarily rendered ineffective by a lack of enforcement and respect.

III. Ecocide's Role in International Environmental Law

Despite being radical in approach, ecocide is not a radical extension on the pre-existing foundations of Western law.[129] Instead, ecocide represents a natural evolution in the progression of our law and offers a new dimension to international environmental law that would otherwise not be possible.

A. Builds on existing legal principles

The concept of a prohibition against ecocide fits within pre-existing legal principles such as international environmental law, human rights, public interest, the duty of care, fiduciary relationships and the global commons.[130] By building on these principles in a natural evolutionary progression, the concept of ecocide already has pre-existing support from within the legal framework.

Recent UN General Assembly resolutions indicate an evolution towards support for the criminalisation of ecocide. For example, the 2015 Resolution of the General Assembly of the United Nations on Tackling Illicit Trafficking in Wildlife encouraged member states to adopt

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[127] "Ecocide crime in domestic legislation" (2012) <https://ecocidelaw.com/wp-content/uploads/2012/06/Existing-Ecocide-Laws.pdf> at 1.
[128] Vietnam is a highly corrupt country, 65 percent of citizens said they had paid a bribe in the last six months when accessing public services. "Vietnam Global Corruption Barometer 2017: views and experiences from Vietnamese citizens" Towards Transparency (December 2017) <https://towardstransparency.vn/wp-content/uploads/2019/10/Vietnam-Global-Corruption-Barometer-2017_Views-and-experiences-from-Vietnamese-citizens.pdf> at 2.
[129] Bronwyn Lay and others "Timely and Necessary: Ecocide Law as Urgent and Emerging" (2015) 28 J Juris 431 at 437.
[130] At 438.

effective measures to counter crime that would impact on the environment.[131] This suggests a progression towards states taking responsibility in international environmental law for transboundary harm as "environmental stewardship" has taken on an increasing role in the international arena.[132]

Human rights law further supports ecocide, as many elements of ecocide law are based upon human rights law. The rise of the indivisibility doctrine in human rights law has reinforced the idea of ecocide, by making the necessary connection between those human rights traditionally seen as absolute, such as civil and political rights, and the inherent dependence on environmental rights.[133] Although the right to a healthy environment is not a *jus cogens* norm yet, recent dissents at the International Court of Justice (ICJ) have indicated a shift in jurisprudence which supports the emergence of ecocide and a link between human rights and the environment.[134] Furthermore, the values of public interest, the duty of care, fiduciary relationships and the global commons all support placing prohibitive parameters on the environmental harm that can be permitted by regulatory state bodies and confirms a responsibility to protect.[135]

B. Responsibility is a mantle to be worn by all

Our current international environmental law speaks only to states, not individuals. But ecocide supporters believe that responsibility is a mantle to be worn by all, and thus our law must represent this. The ICC has supported this tenet, as can be shown in Article 4 of the Genocide Convention, which provides that genocide is a punishable crime irrespective of whether those committing it are "constitutionally responsible rulers, public officials or private individuals."[136]

Going after individuals is also crucial to prevent and remedy environmental harm. The Economics of Ecosystems and Biodiversity (TEEB) report found in 2008 that the top 3,000 corporations in the world caused USD 2.2 trillion worth of damage and destruction to the

[131] *Resolution adopted by the General Assembly on Tackling Illicit Trafficking in Wildlife* GA 69/314 (2015).
[132] Saloni Malhotra "The International Crime that could have been but never was: an English school perspective on the Ecocide Law" (2017) 9 Amsterdam L Forum 49 at 57.
[133] Bronwyn Lay and others, above n 129, at 440.
[134] Separate Opinion of Vice-President Weeramentry in *Gabeikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 at 429-555.
[135] Bronwyn Lay and others, above n 129, at 443.
[136] Convention on the Prevention and Punishment of the Crime of Genocide (open for signature 9 December 1948, entered into force 12 January 1951), art 4.

environment.[137] One of the largest instances of ecocide we have seen in recent times was the BP Deepwater Horizon Spill, which endangered the lives of countless species and was directly attributable to the decisions of individuals.[138] The findings of the TEEB report highlight the weakness of the current environmental regime. MEAs only speak to states, yet it is individuals from large multinational corporations who are making the decisions that cause the most harm. Ecocide demands an international commitment and unified action to save the environment that will not be possible unless individuals are held responsible for environmental degradation. This may increase the strength of our environmental law artillery in general by speaking directly to individuals and imposing the environmental protection mantle of responsibility on all.

C. Will not build on treaty congestion and conflict

A crime of ecocide will not introduce a new MEA but rather make an amendment to already existing law, so will not increase treaty congestion. Furthermore, it may be successful in preventing forum shopping by providing a compulsory form of participation. The ICC will become the only global forum where ecocide can be directly outlawed by those suffering it, creating an even more powerful marginalisation of those who continue to pollute. Forum shopping can be considered an undesirable and abusive tactic. Therefore, the application of a uniform law convention that will be possibly able to remove forum shopping opportunities entirely is highly appropriate.[139]

As with Article I of the Genocide Convention, all contracting parties would be in agreement that ecocide, whether committed in time of peace or war, is a crime under international law which they undertake to prevent and to punish.[140] Countries who have already ratified the Rome Statute would be bound by ecocide as an amendment and would need to pass it into their domestic law.[141]

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[137] Malhotra, above n 132, at 50.
[138] At 50.
[139] Markus Petsche "What's wrong with forum shopping? An attempt to Identify and Assess the Real Issues of a Controversial Practice" 45 The Inter'l Lawyer 1005 at 1006.
[140] "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."
Convention on the Prevention and Punishment of the Crime of Genocide, art I.
[141] Higgins, above n 1, at 195.

Introducing a crime of ecocide would not only give international environmental law another legal tool but can also be strongly justified on economic[142] and moral levels.[143] However, despite all the justifications and support for ecocide, it would also face a number of issues.

IV. Conceptual Issues with of Ecocide as a "Crime"

A. Lack of a clear definition

As the ecocide movement has gathered momentum, various definitions of 'ecocide' have emerged. Glaston's original definition was used to refer to herbicides, and academics have since created more substantial legal definitions of the term that have come to encompass several other elements such as indigenous rights, corporate profits and women's rights.[144] The use of the same term to describe vastly different damage and action has led to a lack of certainty and impact. Higgins sets out that the term itself has origins in both Greek and Latin:[145]

> The word ecocide is prefixed with 'eco'; it derives from the 16th century Greek word *oikos* meaning 'house, dwelling place, habitation, family.' The suffix 'cide' means 'killer,' from the use of the French *-cide*, from Latin *caedere* 'to strike down, chop, beat, hew, fell slay.' To eradicate ecocide means to forcibly remove the systems that are killing and destroying our habitat.

The UN Sub-Commission evaluation of 'Ecocide as an International Crime' stated the term is not legally defined, although its "essential meaning can be understood."[146] Definitions proposed by academics acknowledge that there is no consensus on the exact interpretation of

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[142] TEEB study placed the conservative estimated cost of global ecocide by the world's top firms at USD 2.2 billion for the year of 2008. This figure is even larger than the national economies of the majority of the globe's nations, except for seven of them. A year later, in 2009, TEEB placed the cost at USD 4 trillion. Prepared by Pavan Sukhdev and others *The Economics of Ecosystems and Biodiversity: Climate Issues Update* (The Economics of Ecosystems and Biodiversity, 2009).

[143] Similar to how abolition in the 19th century radically changed public opinion, so will an international prohibition of ecocide in realigning our systems, and coming more into line with changing international values – placing the preservation of our planets ecological integrity above profits. The moral justifications are clear – not only because of the obvious horrific environmental harm a crime of ecocide would prevent and punish, but on a deeper level that would update our international environmental laws to align with the moral values of our global community. Malhotra, above n 132, at 57.

[144] Greene, above n 95, at 32.

[145] Higgins, above n 8, at XI.

[146] Ruhashyankiko, above n 108, at 128.

ecocide and rather 'ecocide' can mean what the user wants it to mean.[147] This lack of clarity regarding a clear and accepted definition makes its integration as an international crime inappropriate, as under the criminal principle *nullum crimen sine lege* of the ICC there can be no crime without a law.[148]

B. Causation.

For a crime of ecocide to be established, there must be causation from the perpetrator. However, establishing one action has caused environmental damage could be very difficult for the purpose of criminal liability.[149] Causation can sometimes be evident in the situation of a dramatic event, for example, an oil spill or explosion. However, it often occurs as a result of a series of small, subtle actions by multiple individuals over several years. For example, it is impossible to point to an individual for destroying our planet's coral reefs, and it is this very vast nature of the environment and these intertwined ecological processes that make causation near impossible to prove in court.

Climate change is one such "crime without a criminal."[150] In a sense, everyone has been a perpetrator of climate change, but at the same time, we are all a victim of climate change. Some supporters have argued that an international crime of ecocide could prosecute the largest contributors and generators of carbon emissions.[151] However, on the other side of the argument, one could contend climate change is a result of the normal operations of the current capitalist system.[152] If it is the system that should bear the blame, how can we hold one individual criminally responsible? It could be more productive to hold state leaders and corporate heads responsible, as the decision-makers behind controlling the system. However, if we were to employ this method we would end up with almost every corporate head and state leader imprisoned.

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[147] Greene, above n 95, at 32.
[148] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002), art 22.
[149] Greene, above n 95, at 34.
[150] At 34.
[151] "How one law can disrupt climate change" (2018) Eradicating Ecocide <https://eradicatingecocide.com/our-earth/earth-justice/>.
[152] Greene, above n 95, at 34.

Therefore, it seems more appropriate to use ecocide to hold individuals accountable for specific ecological disasters, but completely inappropriate to address the broader environmental destruction caused by humanity as a whole.

C. Lack of an appropriate prosecution forum

There is a concern, even among supporters of ecocide, that the ICC may not be the most appropriate forum for hearing prosecutions.[153] Firstly, the ICC was formed via the Rome Statute, which did not create new crimes but incorporated pre-existing codified crimes into a permanent court with international jurisdiction. Ecocide lies entirely outside of this context. There is no pre-existing convention that has prohibited, or even recognised ecocide, nor has it been applied in any past war tribunals or international court proceedings. This weak legal context and the lack of a clear definition raises doubts that ecocide can be successfully included as a crime under the jurisdiction of the ICC.

Secondly, the ICC was established with the intent of addressing human rights abuses, with the horrors of World War II as a driving force behind the need to create an international criminal court for the protection of humankind's peace and security. As a result, the Rome Statute is directly anthropocentric. This may mean it would be less favourable to ecocentric claims that do not have the same anthropocentric focus as the other crimes contained within the Rome Statute.[154] This anthropocentric focus of the Rome Statute would mean it would be unlikely that ecocide would be prosecuted and successfully convicted unless there had also been harm to human interest, yet often harm to the environment occurs as a result of human interests.[155]

Thirdly, there have been concerns that including a crime of ecocide in the Rome Statute could trivialise the crime of genocide because of the different levels of intent required for each crime. Although sympathetic to the need to address environmental destruction, international lawyers feel that the specific and deliberate criminal intent necessary for genocide, compared to ecocide which is often as a result of negligence or mistake, could create a comparison between the two

[153] Mark Drumbl "International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?" (1999) 6 ILSA J Inter'l and Comparative L 305 at 327.
[154] At 306.
[155] Kevin Jon Heller and Jessica Lawrence "The limits of Article 8(2)(b((iv) of the Rome Statute, the First Ecocentric Environmental War Crime" (2007) 20 Geo Int'l Envtl Law Review 61 at 67.

that would be seen as to dishonour the victims of genocides.[156] Additionally, such critics voice concerns over the similarity between the two terms and suggest the term 'transnational environmental crime' instead of 'ecocide'.[157] Similar concerns were discussed during the ILC's 1978 review, highlighting the apprehension that broadening the scope of international crimes to include ecocide may trivialise or diminish the gravity of the original Crimes Against Peace.[158]

Furthermore, there are questions regarding the ICC's capacity, both in terms of knowledge and resources, to prosecute environmental crimes. The composition of the ICC is a reflection of the focus of the court – the 18 judges that make up the court are experts in criminal law or humanitarian law, not environmental law.[159] As a result, the current formulation of the ICC would require considerable outside input and time to adequately address environmental issues to ensure that these specialised areas of law are considered appropriately. Although ICC judges and prosecutors undoubtedly have extensive experience in human rights law and criminal law, asking them to consider the case of ecocide could negatively impact on their credibility, leaving them open to criticism. This could weaken the credibility of environmental crimes in general. Therefore, many academics believe that environmental crimes should be prosecuted in a separate environmental court, as opposed to the ICC, where judges and prosecutors would have the necessary specialised knowledge and could present more appropriate remedies.[160] Although the Rome Statute allows for victims to receive funds relinquished from the perpetrator, there is no provision for the remediation of the harm, or recovery.[161] Nor does the ICC have injunctive powers to stop violations from continuing to occur.[162] Without these powers, the ICC's ability to prevent harm to the environment is limited at best.

The jurisdiction of the Rome Statute also raises questions. Currently, it only has jurisdiction over signatory countries which means that some of the most influential countries on the planet, and significant contributors to environmental damage, have not signed onto the Rome Statute such as the United States, Russia, India and China. Without jurisdiction over major polluters,

[156] Frederic Mégret "The Problem of an International Criminal Law of the Environment" (2011) 36 Colum J Envtl L 195 at 201.
[157] Greene, above n 95, at 38.
[158] Ruhashyankiko, above n 108, at 128.
[159] Drumbl, above n 153, at 326.
[160] Greene, above n 95, at 39.
[161] Rome Statute of the International Criminal Court, art 77.
[162] Drumbl, above n 153, at 328.

any ecocide provision in the ICC is going to have a limited impact. Additionally, the ICC only has jurisdiction to bring cases against "natural persons" not against states or fictional persons such as corporations.[163] This may present a flawed gap in the crime of ecocide as states and corporations are often involved in instances of ecocide. As we have seen in the prosecution of the core crimes, individual heads of states could be prosecuted in the ICC. Furthermore, the Rome Statute, in theory, could allow for directors or superiors to be criminally charged for corporate activities under Article 28(b).[164] However, to apply this provision to corporate chief executive officers seems beyond the scope of the Article, which is intended to focus on holding military and state superiors responsible for war crimes.[165] Article 28(b), along with various others, including the procedural rules, have been tailored specifically to the core crimes currently included in the Rome Statute, so their application, without multiple amendments, would likely be awkward and complicated in the context of ecocide.

Finally, there are concerns about the feasibility of ecocide in the Rome Statute, with commentators labelling its proposal as "utopian."[166] Even supporters agree that although it is a valid principle, the reality of seeking the necessary agreement from two-thirds of countries is improbable.[167] To amend the Rome Statute to include ecocide, the international community would first have to reach an explicit agreement on the existence and definition of the crime itself. This is likely to be a slow process given the previously discussed lack of clear definition and framework of ecocide. The Rome Statute itself took over 50 years to reach the final version we have today despite being formulated off already well-established crimes.[168] The amendment would require approval from 82 countries – a difficult task given the various geopolitical interests of each nation. The crime of aggression is a prime example of the slow and challenging process the amendment would have to go through. Although 'aggression' was one of the four core crimes in the original Draft Code of Crimes Against Peace and Security of Mankind, states could not agree on the definition of the crime.[169] It was not until 2010 when states finally

[163] Rome Statute of the International Criminal Court, art 25.
[164] Article 28. "Superiors can be criminally responsible for crimes committed by subordinates under his or her effective authority and control, where the superior knew or had information about the crime, and the superior failed to take necessary steps to prevent the crime from occurring"
[165] *Yamashita v Styer* 327 U.S. 1 (1946) at 15. The United States Supreme Court decided whether a General can be held criminally responsible for war crimes committed by his subordinates. The majority held that an army commander had a duty to take appropriate measures in his power to control his subordinate troops and prevent them from committing war crimes.
[166] Mégret, above n 156, at 254.
[167] Greene, above n 95, at 42.
[168] At 43.
[169] At 43.

decided on a definition, and it took another seven years for them to vote to activate the crime, and another year before it was finally entered into force on 13 July 2018.[170] This indicates that the crime of ecocide will face a similarly time-consuming process, despite its time-sensitive nature.

Although ecocide could fill many of the gaps in international environmental law and build on our current artillery, it would also bring with it its own issues that would need to be resolved before its inception into international law. The debate regarding its role has particularly reignited following Higgins' 2010 submission to the ILC, where she sought to address many of the issues of ecocide by providing a formal definition and proposal of function. Given the centrality of Higgins' work to current pressure for ecocide to be a recognised international crime, Chapter 3 focuses on Higgins and her proposal.

[170] At 43.

CHAPTER 3 – THE PROPOSED CRIME OF ECOCIDE

Despite the issues that ecocide may have conceptually, it has faced a revival in recent decades, as a result of the movement founded by Higgins which aims to include ecocide as an international crime into the Rome Statute.

I. A Contemporary Definition of Ecocide in International Law

> "*Until we have a law to prosecute those who destroy the planet, corporations will never be called to account for their crimes.*"[171]

Higgins built on this rich history and support of ecocide to begin a movement to amend the Rome Statute to include a crime of ecocide. Her work was founded on the idea that there is a missing responsibility to protect the natural living world and all life.[172] Higgins' hope was that the UN would introduce an international law that would hold business executives and governments to account by holding them criminally liable for the environmental harm that they cause. Despite a resilient movement, Higgins' submission to the ILC was rejected. Tragically, she was diagnosed with late-stage lung cancer in March 2019 and passed away just a month later. Although ecocide is still unrecognised in international criminal law, it is clear that the momentum Higgins created is growing as a result of the escalating climate crisis and the overwhelming evidence that a relatively modest number of large corporations are indeed responsible for most greenhouse gas emissions.

A crucial part of Higgins' legacy was her proposed legal definition of ecocide. Although she was unsuccessful in her lobbying of the ILC, the impact that it had is still evident today, as it remains the dominant definition campaigned for by international law. Higgins felt this new language would create the revolution needed to change how environmental law operates to increase the protection of the environment in international law. Her definition of ecocide is set out as:[173]

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[171] Polly Higgins "Why we need a law on ecocide" The Guardian (5 January 2011) https://www.theguardian.com/environment/cif-green/2011/jan/05/ecocide-law-ratcliffe.
[172] Above n 171.
[173] Higgins *Eradicating Ecocide: Laws and governance to prevent the destruction of our planet*, above n 8, at 63.

> The extensive damage to, destruction of or loss of ecosystems of a given territory, whether by human agency or by any other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.

II. The Subject of Prosecution

Higgins' proposed crime of ecocide would impose a superior obligation and pre-emptive legal duty on individuals in positions of superior responsibility within corporations, banks and governments.[174] Higgins used the Nuremberg Principles of individual responsibility to support this individual duty. As held by the International Tribunal at Nuremberg: [175]

> 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.

Additionally, unlike the pre-existing 'core crimes', Higgins' proposed crime of ecocide would be of strict liability, without the requirement of criminal intent.[176] Higgins set out some reasons for this: ecocide is typically a crime of consequence rather than conduct itself; the gravity of the harm justifies conviction without proof of *mens rea*; without absolute liability the legislation would be wholly ineffective; and finally because the rationale of strict liability places a focus on preventing the harm, from the beginning, as opposed to ascertaining the blame of the accused perpetrator.[177] The focus of a crime of ecocide, as with international war crimes, is ultimately by preventing the harm from occurring in the first place and creating a pre-emptive binding obligation, the crime would act as a preventative measure from its inception. [178]

A. Who is protected?

The crime of ecocide criminalises actions that severely diminish the peaceful enjoyment of the inhabitants of the territory in question. As stated in her proposed United Kingdom Ecocide Act

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[174] Higgins *Earth is our business: changing the rules of the game*, above n 1, at 4.
[175] Higgins *Eradicating Ecocide: Laws and governance to prevent the destruction of our planet*, above n 8, at 68.
[176] "It is proposed that the ecocide be a crime of strict liability, one without the requirement of a *mens rea*." At 68.
[177] At 68.
[178] At 69.

"inhabitants" means "any living species dwelling in a particular place."[179] As a result, the international crime of ecocide is a crime against all life forms, not just human life, giving it extensive application.

B. What type of environmental damage is considered ecocide?

1. "Damage to, destruction of, or loss of ecosystems"

Higgins asserts that "destruction" and "loss" can be easily ascertained through the use of data.[180] However, "damage" is more complex as the size, duration or significance of impact may be relevant in assessing if the crime has been made out or not. Section 10 of the Ecocide Act states:[181]

> 10. Size, Duration, Impact of Ecocide:
> The test for determining whether Ecocide is established is determined on either one or more of the following factors, which have impact on the severity of diminution of peaceful enjoyment by the inhabitants, namely: -
>
> (a) Size of the extensive damage to, destruction or loss of ecosystem(s):
> (b) Duration of the extensive damage to, destruction of or loss of ecosystem(s):
> (c) Impact of the extensive damage to, destruction of or loss of ecosystem(s).

In interpreting these terms, Higgins intended the United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques be used, which specifies the terms as: [182]

> Widespread: encompassing an area on the scale of several hundred square kilometres;
> Long-lasting: lasting for a period of months, or approximately a season;
> Severe: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

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[179] Higgins *Earth is our business: changing the rules of the game*, above n 1, at 170. Although the Ecocide Act is a proposed law for the UK, it provides insight as to how a crime of ecocide in the Rome Statute is intended to be interpreted.
[180] At 161.
[181] At 161.
[182] Higgins *Eradicating Ecocide: Laws and governance to prevent the destruction of our planet*, above n 8, at 64; and United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (opened for signature 10 December 1976, entered into force 5 October 1978).

This interpretation deliberately draws on Article 8(2)(b)(iv) of the Rome Statute to support the argument that these definitions are already entrenched in international law, and thus provide ecocide with the necessary footing. Despite these definitions traditionally being used in the context of war, the same framework can be used to ascertain the extent of damage in the context of ecocide during times of peace as well.[183]

2. *"By human agency or by other causes"*

This creates two categories of ecocide: ascertainable ecocides and non-ascertainable ecocides. In ascertainable cases of ecocide "by human agency", the liability of a legal person can be ascertained.[184] Non-ascertainable ecocides are referred to as ecocides "by other causes" and can include catastrophic natural disasters such as tsunamis and earthquakes. These types of ecocides constitute an 'act of God' and cannot be wholly nor directly prevented. However, the aim is that by avoiding human-induced ecocides that destroy carbon sinks and create escalating emissions, it may be possible to reduce the frequency of climatic extremes and mitigate the negative impacts caused by them.[185]

III. Operation in International Environmental Law

Higgins, along with other ecocide supporters, took part in a mock trial to assess how ecocide would operate in the international law environment. Although the outcome of this was labelled a success, and in theory there is support for the introduction of a law of ecocide, Higgins' particular formulation may potentially create several difficulties. These are discussed in the next chapter.

[183] At 64.
[184] At 63.
[185]Martin Crook, Damien Short and Nigel South "Ecocide, genocide, capitalism and colonialism: Consequences for indigenous peoples and global ecosystems environments" (2018) 22 Theoretical Criminology 298 at 304.

CHAPTER 4 – FUNCTIONALITY OF HIGGINS' ECOCIDE LAW

I. Critique of Higgins' Formulation of Ecocide

On the surface, Higgins' proposed crime of ecocide could offer a bold move to improve our international environmental law. However, her formulation carries with it several problems that will drastically limit its impact. The crime of ecocide will likely face political and resource constraints in the prosecution process; difficulties establishing causation; and an overall limited deterrence effect under the ICC. The Rome Statute's crime of genocide acts as a helpful comparison as the similarities between the two may mean that the crime of ecocide also reflects many of the same issues experienced by the crime of genocide.

II. Comparisons to Genocide

Higgins used the crime of genocide as an example of how the law was used to create a new radical prohibition based on the advancement of a higher morality.[186] However, in this analysis, she fails to acknowledge the flaws of the international law of genocide and the limits of the operation of the ICC.

Genocide acts as a useful and helpful comparative as both ecocide and genocide have similar origins, as both were drafted in response to widespread harm which left society calling for change and both were initially included in the original Draft Code Against Peace and Security of Mankind. Additionally, genocide and ecocide can be both considered as universally acknowledged evils that are continuing to occur despite this acknowledgement. The structures of both crimes are also similar as they each emphasise the widespread magnitude of the harm caused by individual perpetrators without regard for humanity and complete disrespect of specific victims. These similarities may go as far as to mean that the crime of ecocide will reflect many of the same problems faced by the crime of genocide.

[186] Higgins *Eradicating Ecocide: Laws and governance to prevent the destruction of our planet*, above n 8, at XV.

III. Restraints on the Prosecution Process

Effectively prosecuting ecocide will be crucial to the success of the crime and resulting protection of the environment. Higgins proposed the state as the starting point in the initiation of legal proceedings for ecocide.[187] However, genocide has proven that it is challenging for a state to initiate the prosecution process, despite the global recognition of genocide as a crime. This difficulty often comes down to the politicisation of the prosecution process and the associated costs. If the state does not initiate proceedings than Higgins proposes the ICC should have jurisdiction to step in. The issues with the ICC as an inappropriate forum for ecocide as set out in Chapter 2 remain relevant factors to take into account here. There are also additional factors that indicate the prosecution process could be complicated and thus may limit how effective ecocide would be as a crime in international law.

A. Political and structural constraints

The prosecution of international crimes, such as genocide, is an incredibly political process. For example, the United States invasion of Iraq is considered a direct violation of international law, yet as a result of the dangerous self-interest of states, it has been largely ignored in terms of international repercussions.[188] Instead, it appears that compliance with and participation in the international law regime is limited to international politics and relations, rather than being an external pressure on state actions.[189] Political influences mean it is unlikely a state will go after a powerful nation for the violation of international law because of the political repercussions. Therefore, it is easy for the other interests of states to take priority, and this is particularly likely if less affluent nations are suffering harm. Tragically this is too often the situation for transboundary harms, where less affluent countries bear the brunt of the consequences from environmental degradation despite being minor contributors. For example, Africa produces less than three per cent of the world's global carbon emissions, yet its 840 million people are at the most risk of disrupted water supplies and droughts.[190] Smaller states are also often disproportionately affected by environmental degradation, such as Pacific nations vulnerability from rising sea levels, and it is these same countries that are ignored in favour of

[187] Higgins *Earth is our business: changing the rules of the game*, above n 1, at 192.
[188] Meghana V Nayak "International Law as a Tool of Power Politics" (2005) 7 International Studies Review 469 at 469.
[189] At 469.
[190] Andrew C Revkin "Poor Nations to Bear Brunt as World Warms" (1 April 2007) NY Times <https://www.nytimes.com/2007/04/01/science/earth/01climate.html>.

more dominant nations interests. Human rights abuses have shown us it is too easy for a state to avoid what may be going on in a smaller developing country and fail to initiate prosecution for it, raising important questions as to how feasible this prosecution process is.

Furthermore, in practise the jurisdiction of the ICC is limited. Not every state is a party to the Rome Statute. Although the ICC can theoretically start an investigation into crimes committed by outside member states if the situation is referred by the UNSC, the reality is tricky as would require the support of permanent council members such as Russia and China.[191] As a result of the complex interplay between the UNSC and ICC, the validity of its referrals has been widely debated among Council members, with historical failures to refer alleged mass crimes and a relative indifference from the UNSC regarding states' non-cooperation with the ICC on existing referrals. Other fundamental issues include a lack of international police to arrest suspects, which would face problems with sovereignty even if formulated. Therefore, although the ICC theoretically has universal jurisdiction, the reality is much different because of the political interests at play which limit the ICC.

B. Resource constraints

Prosecuting international crimes under the Rome Statute has proven to be costly in both time and money. The International Criminal Tribunal for Rwanda (ICTR) lasted 20 years and cost between USD 1-2 billion,[192] while the International Criminal Tribunal for the former Yugoslavia (ICTY) took 23 years and cost more than USD 2 billion.[193] Over the first thirteen years, the ICTY alone was allocated over USD 1.2 billion.[194] The ICTR produced 61 sentences, and 14 acquittals, while the ICTY resulted in a "record" 83 convictions and 19 acquittals.[195] As stated by one ICC judge "if only for reasons of cost and capacity, the Court will never be able to do more than conduct a few, exemplary trials."[196] Prosecuting ecocide is likely to result in

[191] This is difficult. For example, China and Russia vetoed a resolution referring the situation in Syria to the ICC on 22 May 2014.
[192] Statute of the International Criminal Tribunal for Rwanda 1994; and Rupert Skilbeck "Funding Justice: The Price of War Crimes Trials" (2008) 15 Human Rights Brief 1 at 1.
[193] Statute of the International Criminal Tribunal for Yugoslavia 1993; Seth Mydans "11 Years, $300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?" (10 April 2017) New York Times <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html> ; and above n 192, at 1.
[194] David Wippman "The Costs of International Justice" (2006) 100 The American Journal of International Law 861 at 861.
[195] Mydans, above n 193.
[196]John Dietrich "The Limited Prospects of Deterrence by International Criminal Court: Lessons from Domestic Experience" (2014) 88 International Social Science Review 1 at 17.

similar costs that may limit how effective it could be. It seems redundant to have a costly ecocide trial lasting over two decades while during this time, the harm is still occurring, degrading our environment further.

This also raises important questions of how these trials would be funded. Given the cost of international criminal trials, it seems unlikely that the ICC will be able to sustain the funding of multiple ecocide trials continuously, along with trials for the pre-existing Crimes Against Peace. As an independent body, the ICC is primarily funded by its member states.[197] The contributions of each state roughly correspond to the country's income, employing the same method used by the UN.[198] Further funding is provided by voluntary government contributions, individuals, corporations and other entities, and the UN may also offer support if approved by the General Assembly and is related to a referral by the Security Council.[199] However, this is unlikely to be sufficient.

To prosecute crimes of ecocide, the ICC will need a significant financial boost to ensure that enough trials can proceed to create a deterrent effect. Additionally, a more effective system is necessary to ensure that these trials can proceed in a timely fashion that would not make their impact redundant. Hybrid trials, like the ones put in place for genocide, are likely also to be employed for ecocide. However, they are incredibly complex to create. Once a tribunal is created, the trial will most certainly be the most complicated trial that has ever occurred in that country, using techniques and concepts unknown to domestic judges, prosecutors and lawyers.[200] If new legislation is required, it must be passed through national assembly in a way acceptable to the international community.[201] These prosecution issues raise serious questions of how the crime of ecocide will be able to act as a deterrent if it cannot be prosecuted effectively.

[197] Clair Calzonetti "Frequently asked questions about the International Criminal Court" (23 July 2012) Council on Foreign Relations <https://www.cfr.org/backgrounder/frequently-asked-questions-about-international-criminal-court>.
[198] Above n 197.
[199] Above n 197.
[200] Skilbeck, above n 192, at 3.
[201] At 3.

IV. Strict Liability

Supporters of Higgins contend ecocide should be a crime of strict liability to ensure maximum impact. It can be agreed from a theoretical standpoint, that a strict liability standard would best encourage a preventative approach and implement the polluter pays and precautionary principles by forcing companies to act pre-emptively in addressing dangerous practises.[202] However, this raises problems from a procedural and practical perspective.

As a general principle in criminal law strict liability is not a common approach, rather "strict liability, where the defendant need have no particularly blameworthy mental state, is rare and disfavoured in criminal law." [203] Supporters of the ecocide movement argue that no existing ecocide laws have an intent requirement. [204] They contend if intention were a necessary element, then a clear loophole would be created, where perpetrators could simply argue that they had not intended to cause the environmental harm.[205] This argument is valid considering the majority of ecocides we have seen, such as the BP Deepwater Horizon Spill, which could be considered an 'accident' as the parties in charge did not intend it.[206]

Yet even if the liability standard proposed by Higgins is accepted, strict liability conflicts with the existing intent requirements that are set out in Article 30 of the Rome Statute. Article 30 states "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."[207] Intent is then further broken down into conduct and consequence: "that person means to engage in the conduct;"[208] and "in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."[209] Thus,

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[202] Mark Allan Gray "The International Crime Of Ecocide" (1996) 26 Cal W. INT'L LJ 215 at 218.
[203] Allison Marston Danner and Jenny S. Martinez "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" (2005) 93 Cal L Rev 75 at 147. *("Strict liability, where the defendant need have no particularly blameworthy mental state, is rare and disfavoured in criminal law.")*.
[204] Polly Higgins, Damien Short and Nigel South "Protecting the planet: a proposal for a law of ecocide" (2013) 59 Crime, Law and Social Change 251 at 251.
[205] At 251.
[206] Associated Press in Washington "Investigation into 2010 BP oil spill finds failures, poor testing and ongoing risks" (5 June 2014) < https://www.theguardian.com/environment/2014/jun/05/bp-deepwater-horizon-spill-report-failures-risks>.
[207] Rome Statute of the International Criminal Court, art 30.
[208] Article 30(2)(a).
[209] Article 30(2)(b).

even if ecocide is crafted as a strict liability crime, under Higgins' definition, a lack of clarity and the pre-existing intent requirements of the Rome Statute could limit its application.[210]

As Higgins provides for no defence to ecocide, this could further conflict with pre-established provisions and conventions in international law. The current Rome Statute permits the operation of some defences, as set out in Articles 31-33.[211] This is further illustrative of the previously discussed difficulties with combining ecocide into the Rome Statute. Moreover, it highlights how even at an international criminal level, there are defences that would not be available under Higgins' formulation of ecocide, raising concerns about the practicality of its application.

Higgins' definition extends to naturally occurring environmental degradation, through reference to ecocides "by other causes". The intention was to prevent human-induced ecocides that in turn, affect naturally occurring ecocides.[212] Higgins' definition would also impose an international duty of care upon governments to provide emergency relief and assistance to other territories at risk or adversely affected by naturally occurring ecocide, by utilising the UN Trusteeship Council.[213] There is a crucial question of how this would be funded as it would be difficult to enforce a legally binding obligation of assistance and relief upon a country which may already be receiving aid itself, such as Syria. Furthermore, we may be penalising a lot of developing nations under this provision for their inability to have the appropriate environmental infrastructure, for example, failing to ensure methods of clean energy. If we want the cooperation of all countries in addressing global problems, it must also be acknowledged that assistance will be necessary for developing countries to help address those environmental problems which impact heavily on the health and livelihoods of its more impoverished citizens. The parameters of this obligation are unclear and raise questions about how the crime of ecocide would function fairly in practise.

As a result of these concerns, ecocide may never be prosecuted over fears of its inappropriate and unfair application. Without first clarifying how the crime of ecocide is to function as a

[210] Greene, above n 95, at 34.
[211] Rome Statute of the International Criminal Court, art 31-33.
[212] Polly Higgins "Closing the door to dangerous industrial activity: A concept paper for governments to implement emergency measures" (2012) <http://www.eradicatingecocide.com/the-law-of-ecocide/attachment/ecocide-concept-paper/>paper, at 9.
[213] At 9.

strict liability provision without a defence, it is unlikely the provision will be applied in international law.

V. The Crime of Ecocide as a Deterrent

If these structural issues mean that ecocide is never prosecuted, it will be unable to act as an effective deterrent to protect the environment. With international crimes such as genocide, rather than punishment being at the heart of the purpose of the crime, the ICC seeks to prevent such atrocities from occurring in the first place through deterrence. The same is true for ecocide. Punishment, deterrence and reparation are all referred to as fundamental purposes of sentencing by Higgins.[214]

Evidently, this approach is failing. We are continuously witnessing atrocious instances of genocide, raising the question of how effective individual responsibility and punishment is as a deterrent to international criminal behaviour. General criminal theory is complex, but research suggests that overall, severe penalties rarely, if ever, have a deterrent effect.[215] This indicates that by imposing severe punishment of perpetrators of ecocide is unlikely to have the deterrent effect intended because of the various other factors that come into play. Instead, studies have shown that for crimes such as rape, assault, robbery, burglary and auto-theft, the severity of punishment had the opposite deterring effect.[216] In regards to the ICC, this focus on deterrence through punishment is indicated in the first *Report of the International Criminal Court to the United Nations* which sets out, "by punishing individuals who commit these crimes, the Court is intended to contribute to the deterrence of such crimes."[217] While no institution can deter all international players, it is hoped that the ICC will have a degree of influence over at least deterring some governments and rebel groups who seek legitimacy, and a more significant deterrent effect than previous ad hoc tribunals.

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[214] Higgins *Earth is our business: changing the rules of the game,* above n 1, at 173.
[215] Ben Johnson "Do Criminal Laws Deter Crime? Deterrence Theory in Criminal Justice Policy: A Primer" (paper presented to the Minnesota House Research Department, St Paul, January 2019) at 5.
[216] At 5.
[217] John Dietrich "The Limited Prospects of Deterrence by the International Criminal Court: Lessons from Domestic Experience" (2014) 88 International Social Science Review 1 at 1.

Overall the facts demonstrate that these hopes for deterrence have not translated into reality. Instead, we have borne witness to continuous large-scale human rights violations, for example, the ongoing abuses in Syria and Libya, despite ICC investigations. This limited influence is what many academics predicted; they argue that the deterrent impact of international courts has been dramatically and optimistically exaggerated by politicians and ICC supporters.[218] Although it is possible that the influence of the ICC could increase in the future as it matures or implements specific reforms, it is also highly probable that the realities of the court and the international system will mean the ICC will never have a significant deterring effect.[219] Without a deterring impact to prevent the harm from its initial occurrence, the crime of ecocide will be redundant.

A. Why is there no deterrent value of ecocide under the jurisdiction of the ICC?

Studies suggest that deterrence will only work if potential criminals make rational calculations before their actions, know the laws and accept them as limits on their behaviour, feel the benefits of a given crime are relatively low and finally believe the costs of the crime are high as influenced by the certainty, swiftness and severity of punishment.[220] Meeting all four of these criteria is already difficult in a domestic setting, and is amplified in the international arena.

The ICC usually focuses on general deterrence, using the prosecution of someone from one state to deter criminal behaviour in other states.[221] Additionally, as observed by David Bosco, the ICC may also seek targeted deterrence at times, when investigating a particular individual or group that has already committed instances of abuses in a given state, and thus seeks to deter future abuse in that specific state generally.[222]

Overall there is a limited practical deterrent impact to the ICC because of its limited capacity to prosecute and punish.[223] In theory, there are multiple ways in which the ICC could prevent crimes, such as imprisonment. The principle of deterrence centres on the idea that no rational actor will commit an abuse if the perceived costs exceed the perceived gains from the action.

[218] At 1.
[219] At 2.
[220] At 3.
[221] At 4.
[222] David Bosco "The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?" (2011) 19 Michigan State Journal of International Law 163 at 170.
[223] Johnson, above n 215, at 4.

As the likelihood of punishment decreases, so does the deterring effect. The ICC faces the aforementioned structural and political limits that decrease the chance of arrest, prosecution and conviction, which make its role as an effective international deterrent even less likely.

Ecocide will likely suffer the effects of the ICC's inherent inability to carry out punishment because of political and structural limits and therefore fail to act as an effective deterrent. If ecocide as an international crime is not an effective deterrent then arguably there is no point, because the fundamental purpose of it is to prevent environmental harm from occurring in the first place. Without the appropriate mechanisms and systems in place, criminalising ecocide will be redundant because there will be no ability to punish current perpetrators or prevent future harm to the environment. Therefore, the next chapter will outline the potential solutions that may be available in response to the flaws of ecocides.

CHAPTER 5 – TOWARDS A NEW WORLD: WHAT CHANGES ARE NECESSARY

I. Resolving the Flaws of Ecocide Law

The issues associated with Higgins' proposed formula and forum of ecocide mean that it is unlikely to be a feasible and effective piece of international environmental law. These issues could be remedied by adjusting the current definition of ecocide or using an alternative forum that may provide a more straightforward solution to an increasingly complicated situation.

However, despite any superficial changes that are made, the problems of criminalising ecocide stem not only from its formula and application but from fundamental factors that mean it is unlikely to be an appropriate and adequate piece of international environmental law. Instead, sweeping changes will be necessary that challenge the core values and attitudes that currently allow for ecological harm to go on unquestioned.

II. Expanding on the Current Definition of Ecocide

A significant issue with the original conception of ecocide is the lack of a clear definition. Although Higgins responded to this with a dominant definition that has become widely accepted in international environmental law, this very definition may itself present several issues in practice. A number of these issues boil down to strict liability, as set out in Chapter 4. If ecocide is adopted on the basis of strict liability, it may still be a compelling piece of international environmental law. However, additional mechanisms and definitions are likely necessary to ensure that ecocide can be prosecuted appropriately and effectively.

If the ILC did adopt Higgins' strict liability definition of ecocide, the ICC would be imposing absolute liability without the availability of a defence and with the possibility of imprisonment if convicted. The sentences of imprisonment proposed by Higgins are severe with at least four years if held as ecocide by dangerous industrial activity; ten years for ecocide by reckless knowledge; and 12 years for ecocide by intent.[224] These severe penal punishments present one

[224] Higgins *Earth is our business: changing the rules of the game*, above n 1, at 175.

of the foremost dangers of strict liability. Therefore, it may be appropriate to provide alternative remedies to imprisonment if a strict liability approach to ecocide is adopted. This would be consistent with the liberal notion that criminal punishment should be a last resort and therefore could incorporate alternate non-penal means.[225] This has been supported by ecocide law commentators such as Higgins, who agrees that the remedies should also be based on restorative justice and remediation.[226]

Non-penal punishments may mean that strict liability is, in fact, the more appropriate mechanism, and could therefore ensure the resolution of the harm, instead of simply punishment. This could be enacted within the criminal arena to reflect the principles of common but differentiated responsibilities between states, which has significant traction within the international arena.[227] However, if the ICC remains as the forum for ecocide, it currently does not have the capacity for restitution, injunctive powers or the ability to remedy the harm thus supporting the argument for a separate international convention for ecocide enforced by its own court.[228]

Alternatively, a defence could be offered. The existing Rome Statute permits the operation of some defences, as set out in Articles 31-33.[229] These provide grounds for excluding criminal responsibility, a mistake of fact or mistake of law and superior orders and prescription of law.[230] However, a new defence could be provided for, which would be more ecocentric and fit with the pre-existing defence of due diligence that exists for a strict liability offence in the common law. This would ensure that a defence is available for unjust situations that would not have been intended by Higgins, this is especially important given the lack of clarity surrounding ecocides "by other causes".

Without providing for a defence or non-penal remedies, Higgins is proposing a very strict standard of liability with no clear guideline of causation. Even if these alternative safeguard

[225] Bronwyn Lay and others "Timely and Necessary: Ecocide Law as Urgent and Emerging" (2015) 28 J Juris 431 at 450.
[226] Higgins *Eradicating Ecocide: Laws and governance to prevent the destruction of our planet*, above n 5, at 141.
[227] Bronwyn Lay and others, above n 225, at 450.
[228] At 450.
[229] Rome Statute of the International Criminal Court, art 31-33.
[230] Article 31-33.

measures are adopted, a more extensive definition of what constitutes causation for ecocide may be necessary. It may be more appropriate to prosecute specific disasters as ecocide, where causation is clear, as opposed to humanity's damage to the environment more generally. Similarly, the Court must establish the extent of "by other causes" and how far this can be extended to hold countries accountable for non-ascertainable ecocides. Perhaps removing this element of the definition all together would be more appropriate given the lack of clarity about its application and the extent to which it could hold countries, especially developing countries, to account for failing to provide emergency relief and assistance?

Alternatively, if ecocide was implemented with a *mens rea* element, an alternative definition of 'intention' could be developed, specific to eco-crime and different to crimes against humanity.[231] Environmental criminality is distinctive and differs vastly from crimes against human dignity and thus should be acknowledged as such.[232] This could potentially address the fears of intent being used as a loophole to escape liability for ecocide.

These potential adjustments to the definition of the crime of ecocide would ensure that it upholds its foundational values while making it more applicable to international environmental law.

III. Exploring Alternative Forums

In addition to the definition of ecocide, a number of structural issues stem from the appropriateness of the ICC as the forum for ecocide. The ICC was principally designed as an anthropocentric court to punish and deter Crimes Against Peace, thus making it an inappropriate forum for an ecocentric crime. Therefore, instead of making ecocide an international crime under the Rome Statute, and giving the ICC prosecution jurisdiction, there may be alternate institutions that could provide a more effective forum and thus create a more impactful deterrent to environmental harm.

[231] Bronwyn Lay and others, above n 225, at 450.
[232] At 450.

A. International Environmental Court

A repeatedly discussed alternative is that rather than amending the Rome Statute, a new 'Ecocide Convention' could be negotiated.[233] Along with this, would come the establishment of an 'International Environmental Court', to hear cases on transnational environmental crime. Under this proposed alternative, the new convention could include ecocentric provisions relating to mechanisms such as restitution and recovery for the impacted territory, or injunctions to prevent further ecological damage.[234] Additionally, the convention would not be bound by the prior entrenched restrictions of the Rome Statute and could offer a fresh perspective on how we negotiate and apply international law. A new specifically ecocentric court could be composed of environmental law experts who are capable of evaluating ecological harm and remedies, much more so than the current formulation of the ICC.[235] An 'International Environmental Court' could also adjudicate less severely damaging environmental acts as tort or civil claims, which may offer a more resource-effective alternative for cases that still need to be adjudicated but in a less resource-intensive nature. This theoretical court could then have the ability to resolve both civil and criminal matters in a manner the ICC is not able to, giving it greater jurisdiction. There has been a great deal of support in this area, with activists already creating model codes for such a court and non-governmental organisations committed to the creation of an international environmental court.[236]

B. International Court of Justice

The ICJ could offer an alternative forum to the ICC to help resolve despites of ecocide between states. This came close to occurring in 2005 when Tuvalu issued a legal threat to sue the United States in the ICJ over its contribution to climate change.[237] However, the ICJ has its own pitfalls that would limit the functionality and effectiveness of ecocide. Currently, the ICJ does not have a criminal jurisdiction and thus would need a newly-appointed criminal division. If setting up an entirely new court is a cumbersome, expensive and timely task, the ICJ could use pre-established mechanisms to create a criminal division that would have the ability to impose

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[233] Greene, above n 95, at 44.
[234] At 44.
[235] At 44.
[236] For example, the International Court for the Environment Foundation was established in 1988, by Amedeo Postiglione, Judge of the Italian Supreme Court, with a commitment to the creation of an International Court of the Environment. International Court of the Environment Foundation <https://www.icefcourtpress.org>.
[237] Rebecca Elizabeth Jacobs "Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice" (2005) 14 PAC RIM Law & Policy J 103 at 103.

sentences as well as making decisions and giving opinions. However, as the ICJ can only hear claims between states, this is in direct contrast to what the intended purpose of the law of ecocide to speak to individuals. Additionally, both states must submit to the ICJ's jurisdiction, which is generally unlikely to occur given the 'polluting' state has a good reason to avoid the Court's jurisdiction.[238]

All these changes are necessary to ensure that ecocide meets its intended purposes. However, these are only superficial functionality changes. More profound fundamental changes will be essential to the crime of ecocide's success. We must reassess the corporate culture that permeates into the attitudes and values of our society and allows ecocide to go unquestioned. It is these changes to our core values that are almost favoured by environmental activists.[239] They recognise that if we do not first address the broader social and cultural issues that have allowed ecocide to go unpenalised, we will be unsuccessful in introducing a law to punish and prevent instances of ecocide.

Together our global community must first understand and establish an international duty of care towards the community and the planet as a whole. Without an agreed set of core values and respect for the Earth, no international criminal law, no matter how clear, will be successful at preventing environmental harm and preserving our planet for generations to come.

[238] Greene, above n 95, at 45.
[239] For example, partial changes could take the form of non-criminal methods such as: adopting commercial banking rules that prevent the most environmentally dangerous projects from being funding, adopting a precautionary principles, establishing a trust that would work to protect the global commons, and enacting laws that would protect environmental whistle-blowers from repercussions. These would expose the corporate and political practises that allow for environmental harm to go unchallenged. Higgins *Eradicating Ecocide: Laws and governance to prevent the destruction of our planet,* above n 8, at 167.

CONCLUSION

The purpose of this paper was to explore the interplay between ecocide and our existing international environmental legal system, to discern the role that ecocide could have in preventing environmental harm and protecting our planet for generations to come. Ecocide has been just one of the proposals put forth in recent years to remedy the gaps in the international response to global environmental degradation.

As it stands, the current international environmental legal scheme does not adequately or appropriately address the issue of environmental harm. International law criminalising this harm has been touted as a potential tool to bridge this gap. This paper agrees that ecocide, as a concept, can offer some beneficial features to build on existing international environmental law. However, the campaign of ecocide fails to acknowledge conceptual and practical issues that may hinder an international crime such as ecocide from being successful. Higgins' proposed law of ecocide seems at times over the top, imposing too great an obligation on less affluent nations to prevent and provide relief for unascertainable ecocides, within a context of strict liability. Yet, at the same time, it appears wholly insufficient to address the massive scale of environmental harm the crime of ecocide must address. Restraints to the prosecution process and an overwhelming lack of deterring effect imputes the conclusion that the crime of ecocide as it is currently formulated is insufficient to respond to the growing distress of our planet. Although there are possible remedies to these weaknesses, these are only superficial responses. As the debate around the adoption of ecocide continues, it is likely a new formulation will emerge that may be better suited. However, what is necessary is a fundamental change to the culture and values that have allowed for environmental harm to be accepted and, in a sense, encouraged in our global community. Without this, the criminalisation of any form of environmental harm will have minimal impact at eradicating ecocide.

The additional Crime against Peace within the Rome Statute of ecocide is initially an appealing and hopeful idea. MEAs currently act as the dominant mechanisms for environmental protection, and indicators signalling that these are neither sufficient nor appropriate at protecting our environment and all the species within it. This is mainly as a result of the negotiation and compliance process, reservations and the vague and conflicting content of MEAs generally. Introducing a law to criminalise ecocide provides hope as it would not suffer many of the same faults of MEAS and could offer an additional tool to be used to combat harm

to the environment. As a concept, ecocide has a strong history in international law, and also plays a role in many states' national laws. Higgins built on this history to craft her proposal of ecocide. At a surface level, Higgins' criminalisation of ecocide appears to respond to many of the initial concerns of commentators, by providing a clear and accepted definition. However, as set out in this paper, a more in-depth evaluation of her submission reveals several issues related to strict liability, prosecution restraints and an overall lack of a deterring effect. These issues could be partially addressed by expanding on the definition of ecocide and the creation of an alternative forum. As part of providing alternative forums, it may be more effective if non-criminal means were employed to deter environmental harm. This further highlights how even if we make amendments to the international criminal law of ecocide, we may need to go beyond its superficial elements and look at the fundamental values that allow for the destruction of our environment.

It appears that what is necessary, and long overdue, is a change to these values and attitudes, and our culture in general. Consumerist and capitalist values dominate much of the West, and similarly, the West causes much of the environmental degradation we are facing. By letting these attitudes permeate our values, attitudes and beliefs, our planet is unable to sustainably manage human life. We risk the complete annihilation of life on Earth as we know it. Therefore, law and policy changes are unlikely to be either feasible or have a substantial impact without first creating a fundamental change to address the culture that accepts Governments, business and financial institutions turning a blind eye to environmental destruction. This change in culture, values and attitudes is likely to be a gradual process within society, but one that must start immediately. We cannot wait for tomorrow, or from changes to come from the top, but rather begin to make the changes within ourselves at an individual level with the hope that we will be able to eradicate ecocide and provide a healthy planet for all species to thrive.

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