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Master's degree in

Human Rights and Multi-level Governance

Recognising the Crime of Ecocide:

Rights Protection and Reparations for Individuals

at Risk of Environmental Displacement

Supervisor: Mariavittoria CATANZARITI

Candidate: Vincent LEFEBVRE

Matriculation No. : 2046762

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no one leaves home until home is a sweaty voice in your ear
saying-
leave,
run away from me now
i don’t know what i’ve become
but i know that anywhere
is safer than here

Excerpt from *Home* by Warsan Shire, 2023

Abstract

In the past decades, environmental displacement has emerged as a pressing global challenge, driven by climate change, environmental degradation, and resource depletion. Studies estimate that up to 1.2 billion people could be displaced, internally or across international borders by 2050, due to climate change and natural disasters. In light of this displacement reality, largely resulting from human activity, the international community must ensure that these vulnerable populations are not left behind. While the consequences of this phenomenon are increasingly evident, the absence of adequate legal frameworks under international refugee law for individuals facing environmental displacement poses a significant threat to their most basic human rights. The inadequacy of international human rights law, humanitarian law and environmental law in addressing these gaps advocates for the identification of new ways to protect environmental refugees. While the best alternative still remains to establish international legal protection for persons internally displaced and displaced across international borders through a new instrument, this recourse seems a long way off given the timeframe required to negotiate and implement such an instrument.

The central research question revolves around the relevance of recognising ecocide in guaranteeing the rights of individuals at risk or victims of environmental displacement. Acknowledging environmental changes as a global crisis with profound societal implications to be urgently addressed, the study introduces the concept of ecocide as a potential legal remedy preventing the violation of the right to a safe, clean, healthy and sustainable environment. It establishes a foundation by tracing the historical development of ecocide and its emergence as a response to escalating environmental challenges. Drawing on the analysis of international law sources, the research identifies areas where ecocide law could create additional obligations on States and private actors, notably to tackle the root causes of environmental flight situations. Contributing to anchoring ecocide discourse in the human rights field, the study emphasises the relevance of ecocide in opening reparative avenues available to redress the harm suffered by victims of environmental flight. By recognising ecocide as a distinct crime, the legal framework can establish accountability for the perpetrators, who by their careless activities triggered environmental changes, fostering a more proactive approach to environmental protection and mitigating the impacts on vulnerable communities. Considering the transnational threat that environmental changes represent, the thesis underscores the need for a multi-jurisdictional approach, advocating for recognising ecocide at the national, regional, and international levels. This approach, while compensating for the inherent organisational and jurisdictional obstacles of the International Criminal Court, would ensure complementarity among different legal systems, enhancing efficiency and facilitating a more comprehensive response to ecocide cases. By calling for more political will and urgent actions to tackle environmental changes and their consequences on

human mobility, the thesis envisions a future where ecocide is universally acknowledged and combated as a means to safeguard our planet and its inhabitants on the lands they have chosen.

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As every new beginning comes from some other beginning's end, I look back at my experience as an international student in Padua. Italy was initially a choice motivated by financial consideration, but it blossomed into an incredible journey on all levels. Living far away from my family, I discovered facets of myself. The distance became a canvas upon which I painted my anxieties, dreams, and aspirations. It was a journey of self-discovery, a path carved through uncertainty and homesickness, yet illuminated by the warmth of newfound friendships.

To all my friends and in particular to Laura, Alex, Audrey, Demet, Irene and Mako. You have made my Italian experience sweeter, bringing me joy in the hardest moments. You inspire me in this life and you will forever be etched in the mosaic of my heart.

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Summary

Abbreviations

Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA)

Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques ('ENMOD')

Corporate Criminal Liability (CCL)

Environmentally-Displaced Persons (EDPs)

Executive Committee of the Warsaw International Mechanism (WIM)

Independent Expert Panel (IEP)

Intended Nationally Determined Contributions (INDCs)

Internal Displacement Monitoring Centre (IDMC)

Inter-American Commission on Human Rights (IACHR, The Commission)

Inter-American Court on Human Rights (IACtHR, The Court)

Inter-American System of Human Rights (IASHR)

Internally-Displaced Persons (IDPs)

International Court of Justice (ICJ)

International Criminal Court (ICC)

International Law Commission (ILC)

organisation of African Unity (OAU)

Responsibility to Protect (R2P)

Rules of Procedure and Evidence (RPE)

Trust Fund for Victims (TFV)

United Nations Environmental Programme (UNEP)

United Nations Framework Convention on Climate Change (UNFCCC)

United Nations High Commissioner for Refugees (UNHCR)

Introduction

"We believe the people of Tuvalu deserve the [right] to live, study and work elsewhere, as climate change impacts worsen"[1]. These words, jointly written by prime ministers of Australia and Tuvalu — Anthony Albanese and Kausea Natano — neatly encapsulate the human rights stakes involved in environmental displacement. On November 10, 2023, Australia and Tuvalu disclosed the terms of the Falepili Union treaty covering a diverse set of initiatives, including collaboration on security matters, managing human mobility, and addressing the growing threat of climate change to the small island state of Tuvalu. According to estimations, more than half the island will be underwater by 2050, putting its population at risk. Under the human mobility area of cooperation, the deal will gradually offer climate asylum under Australian jurisdiction to the 11,000 citizens of the South Pacific island. This historic agreement is the first of a kind to establish a direct link between human mobility and climate change, allowing migration in anticipation of climate-related disasters. It highlights how countries are having to find solutions to address the considerable effects of climate change on the rights of affected populations.[2] While this agreement is a positive development for the future of the citizens of Tuvalu — albeit by no means flawless — the international community must develop global systems of protection for people at risk or victims of environmental displacement. Tuvalu's situation is indeed only the 'tip of the iceberg'. Billions of people are at risk of environmental displacement by 2050, and neither the measures taken to safeguard the environment — that could prevent displacement — nor the frameworks guaranteeing the rights of displaced persons and reparations for the harm caused, provide sufficient and effective protection.

Over the last decades, there has been a notable and commendable surge in global awareness and commitment to addressing environmental change. The international community has increasingly recognised the urgency of mitigating climate change, protecting biodiversity, and promoting sustainable practices. Multilateral agreements such as the Paris Agreement have symbolized a collaborative effort to curb greenhouse gas emissions, while various international conferences and summits have provided platforms for world leaders to discuss and implement measures to tackle environmental challenges. From grassroots movements to governmental policies, the mounting concern for the planet has prompted nations to reevaluate their environmental impact and seek innovative solutions for a more sustainable future.

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[1] N.D. (2023). Australia announces plan to help Tuvalu residents escape rising seas and storms of climate change. *Le Monde.fr*. [online] 10 Nov. Available at: https://www.lemonde.fr/en/asia-and-pacific/article/2023/11/10/australia-announces-plan-to-help-tuvalu-residents-escape-rising-seas-and-storms-of-climate-change_6244494_153.html [Accessed 3 Jan. 2024].

[2] Reuter, F.G., Manisha (2023). *More than just a climate deal: The Australia-Tuvalu Falepili Union treaty and the EU's potential contribution to the Pacific*. [online] ECFR. Available at: https://ecfr.eu/article/more-than-just-a-climate-deal-the-australia-tuvalu-falepili-union-treaty-and-the-eus-potential-contribution-to-the-pacific/.

Despite the heightened attention to environmental issues on the global stage, the plight of environmental displacement remains a pressing concern that has yet to receive adequate international focus and resolution. As climate change accelerates, vulnerable communities are increasingly facing the harsh reality of rising sea levels, extreme weather events, and resource depletion, forcing them to migrate in search of safer and more sustainable living conditions. While there is a growing awareness of these threats, the absence of comprehensive international frameworks to address the complexities of environmental migration leaves displaced populations in a precarious position without clear protection or assistance. As environmentally-induced displacement continues to grow, bridging this gap in international policy and cooperation becomes imperative to ensure the rights and well-being of those most affected by environmental changes.

Since the adoption of the Geneva Convention Relating to the Status of Refugees in 1951, migratory paths have changed radically, going through a profound evolution and diversification[3]. In particular, the Anthropocene has propelled an unprecedented increase in human mobility as a result of natural disasters heightened by climate change. If more research is needed to understand the fundamental causes and mechanisms driving environmental displacements, the main problem probably remains that people facing displacement lack official and legal recognition. Indeed, existing legal frameworks protecting the environment and the rights of internally displaced persons (IDPs) and refugees strike as being inadequate to address the human consequences of *"the largest, most pervasive threat to the natural environment and societies the world has ever experienced"*, in the words of, Ian Fry, UN Special Rapporteur on the promotion and protection of human rights in the context of climate change. This legal gap hampers the formulation of more intensive policies to ensure that the human right to a safe, clean, healthy, and sustainable environment is safeguarded. This demonstrates the close connection between environmental displacements and the broader concept of environmental safety. It also indicates that there is a growing acknowledgment of the importance of granting special assistance to environmentally displaced individuals (EDPs) on an international level, recognising them as a vulnerable demographic.

Albeit internationally recognised, the human right to a clean, healthy, and sustainable environment is not considered today a customary rule in international law. This can be explained by the lack of established environmental degradation thresholds, affecting negatively the implementation of the right to a clean, healthy, and sustainable environment. Furthermore, the international community's failure to encompass the safety criteria within the definition of the human rights to a clean, healthy, and sustainable environment participates in the lack of attention and protection available to communities victims of environmental displacement, notably in areas where natural disasters repeatedly occur.

[3] Wihtol de Wenden, C. and Benoît-Guyod, M. (2016). *Atlas des migrations, un équilibre mondial à inventer*, Paris, Autrement, Atlas-monde.

While human rights law, humanitarian law, and international environmental law share the common goal of fostering a more habitable planet, they all fail to effectively address these issues. Yet, as stated by the United Nations Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry *"[t]here is an urgent need to provide a legal regime to protect the rights of persons displaced across international borders due to climate change"*[4]. In light of the acceleration of climate change and the lack of commitment to implement the Paris Agreement, Ian Fry urged the international community to elaborate protection mechanisms, both at the international and domestic levels, for individuals displaced as a result of environmental changes.

Nonetheless, while multilateral discussions on the need to develop international agreements, policies, and protections specifically targeted to the needs and rights of those displaced due to environmental factors have been taking place for years, the fruits of the labour are still extremely unripe. Facing inaction and an underlying absence of willingness by the international community, the need to develop alternative approaches to rethink the currently existing protection frameworks emerged as a prominent necessity. Against this backdrop, the recognition of ecocide as an international crime holds significant promise in addressing the challenges faced by people at risk or victims of environmental displacement. In recent years, ecocide law emerged as an instrument to protect the environment against the climate and ecological crisis. The term 'ecocide' encompasses various forms of mass damage to ecosystems that result in severe, widespread, and long-term harm to nature. By acknowledging ecocide as a criminal offence, the international community could establish a framework to not only bridge the existing legal gap surrounding States' obligations to address the root causes of environmental displacement but also hold individuals and entities accountable for actions that contribute to environmental degradation, leading to displacement.

This research intends to answer to what extent the recognition of ecocide could guarantee the rights and access to reparations to people at risk or victims of environmental displacement. Beforehand, the study establishes an extensive academic and legal literature review on environmental displacement and the existing protection — or lack thereof — under international refugee law and international environmental law. Based on this analysis of the main relevant international law instruments, the research identifies international states' obligations related to addressing the root causes of environmental displacement and its management, through the case study of the Inter-American System of Human Rights. Acknowledging the lack of clear and universal obligations, the study will argue for the relevance of recognising the crime of ecocide, as a way to clarify existing obligations as well as create new ones. At last, the thesis delves into the recognition of ecocide at the international

[4] United Nations Human Rights Council (2023). *Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate change, Ian Fry*. [online] *OHCHR.org*, Office of the High Commissioner for Human Rights of the United Nations, pp.17–18. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/073/25/PDF/G2307325.pdf?OpenElement [Accessed 13 Jan. 2024].

level, analysing potential reparations relevant for redressing the harm suffered by victims of environmental flight, while conceding the challenges related to the recognition of ecocide and its implementation under the International Criminal Court jurisdiction.

Literature Review and Methodology

1. Environmental displacement in the Anthropocene

Environmental change and disasters have always triggered migration. Yet, in a capitalist world further and further affected by the effects of climate change, environmental migration is becoming more prominent, requiring careful analysis and urgent responses. In the early 2000s, Nobel Laureate in chemistry Paul Crutzen coined the term *Anthropocene* to describe how human activity has so expansively transformed the Earth's system that we have entered a new geologic epoch in which humans are the primary drivers of global environmental change[5]. Although the term has been widely adopted in scholarly and popular circles, the Anthropocene is a controversial concept. Etymologically, Anthropocene derives from *Anthropos* (human) and *scene* (recent). As argued by Malm and Hornborg, changes brought by the Anthropocene have not been initiated by humanity as a whole, but rather by groups of individuals with particular interests — at the intersection of capitalism and colonialism[6] —, leaving those who have not contributed to or gained fair benefits from these changes to bearing their impacts, including being displaced[7]. In line with this perspective, scholars propose substituting the term Anthropocene with a more appropriate concept, such as *Capitalocene* or *Plantationocene*[8].

The Anthropocene coincides with an incomparable surge in human mobility, spanning from temporary to permanent, and encompassing both voluntary and forced displacement. This surge has been facilitated by advancements in energy and transportation technologies, intricately linked to the global expansion of capital, thereby forming an inseparable aspect of the Anthropocene. Today's human-dominated world is provoking new forms of mobility, such as labour migration tied to fossil fuel extraction[9] but also displacement; that is, mobility that falls closer to the non-voluntary end of the migration continuum.

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[5] Crutzen, P.J. (2002). Geology of mankind. *Nature*, 415(6867), p.23. doi:https://doi.org/10.1038/415023a.

[6] Davis, H., & Todd, Z. (2017). On the Importance of a Date, or, Decolonizing the Anthropocene. *ACME: An International Journal for Critical Geographies*, *16*(4), 761–780. Retrieved from https://acme-journal.org/index.php/acme/article/view/1539.

[7] Malm, A. and Hornborg, A. (2014). The Geology of mankind? a Critique of the Anthropocene Narrative. *The Anthropocene Review*, [online] 1(1), pp.62–69. doi:https://doi.org/10.1177/2053019613516291.

[8] Haraway, D. (2015). Anthropocene, Capitalocene, Plantationocene, Chthulucene: Making Kin. *Environmental Humanities*, 6(1), pp.159–165; Moore, J.W. (2017). The Capitalocene, Part I: on the nature and origins of our ecological crisis. *The Journal of Peasant Studies*, [online] 44(3), pp.594–630. doi:https://doi.org/10.1080/03066150.2016.1235036; Davis, J., Moulton, A.A., Van Sant, L. and Williams, B. (2019). Anthropocene, Capitalocene, … Plantationocene?: a Manifesto for Ecological Justice in an Age of Global Crises. *Geography Compass*, 13(5), pp.1–15. doi:https://doi.org/10.1111/gec3.12438.

[9] Baldwin, A., Fröhlich, C. and Rothe, D. (2019). From climate migration to anthropocene mobilities: shifting the debate. *Mobilities*, 14(3), pp.289–297. doi:https://doi.org/10.1080/17450101.2019.1620510.

The last twenty years have seen substantial scholarly interest in environmental displacement as the effects of anthropogenic change become more widely and deeply experienced, albeit acutely disproportionately by vulnerable populations from countries of the Global South. Whereas much of this earlier work aimed to quantify numbers of environmental displacees[10], more recent work explores the particular displacing impacts of climate change from rising seas to mounting extreme weather events.[11] In fact, the advent of climate change introduces new complexities to this relationship, heightening the urgency to address it. Both gradual environmental shifts and the occurrence of natural disasters, whether sudden or slow-onset, play a role in shaping population migration patterns in distinct ways. Natural disasters encompass geological events like earthquakes or volcanic eruptions, as well as atmospheric or hydrological occurrences such as tropical storms or floods, potentially exacerbated by climate change.[12] Although sudden-onset natural disasters are more likely to lead to mass displacement, a larger overall number of people is anticipated to migrate due to the gradual deterioration of environmental conditions. Slow-onset disasters, including processes like desertification, soil fertility reduction, coastal erosion, and sea-level rise associated with climate change, impact existing livelihoods and production systems, triggering various forms of migration schemes. As debates on the Anthropocene and environmental displacement converge, even exceptional interventions framed explicitly around the Anthropocene overly privilege climate change.[13]

Indeed, climate change has been a predominant focus in discussions about the Anthropocene, both in popular discourse and scholarly writings. Nevertheless, the Anthropocene involves a much broader range of indicators that, when considered alongside climate change, present existential threats to both human and nonhuman life and can trigger displacement[14]. Beyond climate change, there are additional, often interrelated, indicators of the Anthropocene, such as changes in land use and cover associated with urbanisation, deforestation, mining, and agriculture. Alterations in water resource cycling, including the damming and diversion of water systems, also contribute to the complex environmental changes.[15] The Anthropocene's massive land-use changes radically transformed

[10] Black, R. (2001). Environmental refugees: Myth or reality? UNHCR. Available at: https://www.unhcr.org/media/environmental-refugees-myth-or-reality-richard-black [Accessed 3 Jan. 2024].
[11] Wennersten, J. R., & Robbins, D. (2017). *Rising Tides: Climate Refugees in the Twenty-First Century*. Indiana University Press. https://doi.org/10.2307/j.ctt200617d
[12] IPCC (2011). *Report on managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation - Summary for Policymakers.* Cambridge, United Kingdom and New York, NY, USA: Cambridge University Press.
[13] Gemenne, F. (2017). "Chapter 18: The refugees of the Anthropocene". In *Research Handbook on Climate Change, Migration and the Law*. Cheltenham, UK: Edward Elgar Publishing. Retrieved Jan 12, 2024, from https://doi.org/10.4337/9781785366598.00025; Baldwin, A., Fröhlich, C. and Rothe, D. (2019). From climate migration to anthropocene mobilities: shifting the debate. *Mobilities*, 14(3), pp.289–297. doi:https://doi.org/10.1080/17450101.2019.1620510.
[14] World Wildlife Fund. (2020). Living planet report 2020: Bending the curve of biodiversity loss. Gland, Switzerland: World Wildlife Fund.
[15] Steffen, W., Grinevald, J., Crutzen, P. and McNeill, J. (2011). The Anthropocene: conceptual and historical perspectives. *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences*, 369(1938), pp.842–867.

territorial and aquatic systems to enable farms and ranches, urban areas, and mineral extraction. Such projects repeatedly displace communities, as detailed in the literature on land grabs and development- and environment-induced displacement.[16] Additionally, displacement occurs as a result of biodiversity and livelihood resources loss, a process exacerbated by climate change.[17]

Several scholars have documented how responses to climate change, such as climate mitigation and adaptation, have authorised evictions. Noteworthy works by researchers like Kansanga, Luginaah, and DeBoom highlight instances where these responses align with measures for biodiversity protection.[18] An example is the United Nations REDD+ (Reducing Emissions from Deforestation and Forest Degradation/Forest Conservation) initiatives, which often take the form of market-based projects. In these initiatives, polluters offset emissions by financially supporting efforts to protect or expand forests elsewhere, contributing to carbon capture and biodiversity conservation.[19] The pursuit of biodiversity protection itself has also led to a recurring history of evictions, encapsulated in the concept of the 'conservation refugee' as discussed by Dowie[20]. This phenomenon underscores the complex interplay between environmental conservation efforts and their unintended consequences in displacing populations.

Thus, displacement can be the result of anthropocentric environmental changes such as sea-level rise, extreme weather events, and biodiversity loss, which have greatly affected the safe, clean, healthy, and sustainable characteristics of the environment. More extensive practices like land use and water resource conversion induce displacement, but it is rather a precondition than a consequence of environmental change. At last, displacement can be triggered by responses aimed at addressing the biophysical changes of the Anthropocene, ranging from climate change adaptation and mitigation to biodiversity protection.

[16] Borras, S.M., Hall, R., Scoones, I., White, B. and Wolford, W. (2011). Towards a better understanding of global land grabbing: an editorial introduction. *Journal of Peasant Studies*, 38(2), pp.209–216. doi:https://doi.org/10.1080/03066150.2011.559005; Lunstrum, E., Bose, P. and Zalik, A. (2016). Environmental displacement: the common ground of climate change, extraction and conservation. *Area*, 48(2), pp.130–133. doi:https://doi.org/10.1111/area.12193.

[17] Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES). (2019). The global assessment report on biodiversity and ecosystem services. Bonn, Germany: IPBES.

[18] Kansanga, M.M. and Luginaah, I. (2019). Agrarian livelihoods under siege: Carbon forestry, tenure constraints and the rise of capitalist forest enclosures in Ghana. *World Development*, 113, pp.131–142. doi:https://doi.org/10.1016/j.worlddev.2018.09.002; DeBoom, M.J. (2021). Climate Necropolitics: Ecological Civilization and the Distributive Geographies of Extractive Violence in the Anthropocene. *Annals of the American Association of Geographers*, 111(3), pp.900–912. doi:https://doi.org/10.1080/24694452.2020.1843995.

[19] Beymer-Farris, B.A. and Bassett, T.J. (2012). The REDD menace: Resurgent protectionism in Tanzania's mangrove forests. *Global Environmental Change*, 22(2), pp.332–341. doi:https://doi.org/10.1016/j.gloenvcha.2011.11.006; Kansanga, M.M. and Luginaah, I. (2019). Agrarian livelihoods under siege: Carbon forestry, tenure constraints and the rise of capitalist forest enclosures in Ghana. *World Development*, 113, pp.131–142. doi:https://doi.org/10.1016/j.worlddev.2018.09.002

[20] Dowie, M. (2009). *Conservation Refugees*. The MIT Press. doi:https://doi.org/10.7551/mitpress/7532.001.0001.

2. Overview of environmental displacement: Global trends and statistics

According to the International Organisation for Migration, environmental migration is defined as the *"movement of persons or groups of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are forced to leave their places of habitual residence, or choose to do so, either temporarily or permanently, and who move within or outside their country of origin or habitual residence"*[21]. Following this definition, climate migration corresponds to a subcategory of environmental migration, defining a singular type of environmental migration, where the change in the environment is due to climate change. The term 'environmental displacement' — or 'environmental flight' — corresponds to a specific type of environmental migration, where people, stripped of all willpower, are forced to leave their place of origin. The connection between displacement and the environment has always been inherently interdependent. This relationship being intricate — often intertwined with other factors such as poverty, human security, conflict, population growth, and governance — isolating environmental change precisely as the single cause for displacement is most often not possible due to the multi-causality of 'environmental flight situations'[22]. The term 'environmental flight situation' encompasses instances of environmental change, which present a significant threat to life or livelihoods. This includes both gradual processes and sudden events, potentially leading to involuntary migration.

Environmental flight can take place both within the territory of a country or across international borders. Victims of such displacements are respectively described as 'internal environmental refugees' and 'international environmental refugees'[23]. It is recognised that the majority of environmentally displaced persons remain within the borders of their country of origin[24]. According to the 2021 report of the Internal Displacement Monitoring Centre (IDMC), conflict, violence, and disasters triggered 38 million internal displacements across 141 countries and territories in 2021, the second-highest annual figure in a decade after 2020's record-breaking year for disaster displacement. In 2021, disaster displacement accounts for 23.7 million people displaced, of which 22.3 million resulted from

[21] International organisation for Migration (2000). *ENVIRONMENTAL MIGRATION | Environmental Migration Portal*. [online] Iom.int. Available at: https://environmentalmigration.iom.int/environmental-migration [Accessed 13 Jan. 2024].
[22] Ammer, M. and Nowak, M. (2010). *Legal Status and Legal Treatment of Environmental Refugees*. [online] *Intergovernmental Panel on Climate Change*, Germany: Federal Environment Agency, pp.1–14. Available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6671 [Accessed 2 Jan. 2023]; Gemenne, F. (2017). "Chapter 18: The refugees of the Anthropocene". In *Research Handbook on Climate Change, Migration and the Law*. Cheltenham, UK: Edward Elgar Publishing. Retrieved Jan 12, 2024, from https://doi.org/10.4337/9781785366598.00025.
[23] Ammer, M. and Nowak, M. (2010). *Legal Status and Legal Treatment of Environmental Refugees*. [online] *Intergovernmental Panel on Climate Change*, Germany: Federal Environment Agency, pp.1–14. Available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6671 [Accessed 2 Jan. 2024].
[24] IASC. (2008). *Informal group on migration/displacement and climate change of the IASC. Climate Change, Migration and Displacement: Who will be affected?* UNFCCC. Available at: https://unfccc.int/resource/docs/2008/smsn/igo/022.pdf [Accessed 2 Jan. 2024]; Wahlström, M. (2011). Chairperson's summary: *The Nansen Conference on Climate Change and Displacement in the 21st Century.* Oslo, 6-7 June 2011. Available at: www.nansenconference.no [Accessed 2 Jan. 2024].

weather-induced disasters[25]. The number of internationally displaced persons, while accounting for a smaller share of EDPs, is on the rise and could represent 2.8 billion people displaced globally by 2050, according to The Ecosystem Threat Register released in 2023 by the Institute for Economics and Peace.[26] This figure only estimates displacements if natural disasters keep occurring at the same rate seen in the last few decades. However, this estimation will likely be overpassed given how rising temperatures caused by increasing man-powered greenhouse gas emissions are affecting weather, climate, and ecosystems faster than scientists expected.[27] Notably, experts and practitioners anticipate that, by 2050, over one billion individuals worldwide may confront climate hazards specific to coastal areas, potentially compelling tens to hundreds of millions to migrate in the coming decades.[28] Additionally, gradual processes like droughts or sea-level rise are increasingly influencing global mobility. The World Bank's Groundswell report estimates that, without urgent measures to curb global greenhouse gas emissions, climate change could prompt up to 216 million people in six world regions (Sub-Saharan Africa, South Asia, Latin America, East Asia and the Pacific, North Africa, Eastern Europe, and Central Asia) to relocate within their respective countries by 2050[29].

While internal and international EDPs are confronted with similar drivers for displacement, they do not experience the same obstacles in their migration path. The cross-border dimension of international environmental displacement produces additional obstacles that can only be mitigated through bilateral or international cooperation. This is particularly a pressing issue for poor developing countries and small island states, which are at greater risk of rising sea levels. For instance, Pacific islands such as Tuvalu and Vanuatu could even disappear in the next decades, leaving their populations without land.[30] This poses the question of the protection and reparations for stateless people, as well as the accountability for the perpetrators who are involved in aggravating environmental change. The Falepili Union treaty, while offering an alternative solution to the citizens of Tuvalu, is a compelling statement of the urgent necessity for the international community to strengthen the loopholes in international law, to provide effective protection for people at risk of environmental flight situations.

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[25] IDMC. (2021). *Global Report on Internal Displacement 2021*. [online] Available at: https://www.internal-displacement.org/global-report/grid2021/ [Accessed 11 Dec. 2023].

[26] Institute for Economics & Peace. (2023). *Ecological Threat Report 2023: Analysing Ecological Threats, Resilience & Peace*. Sydney. Available at: http://visionofhumanity.org/resources [Accessed 11 Dec. 2023].

[27] IPCC. (2022). *Climate Change 2022: Impacts*, *Adaptation and Vulnerability*. Contribution of the Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Geneva, Switzerland: World Meteorological organisation.

[28] International organisation for Migration (2022). *Climate Change and Future Human Mobility*. [online] IOM, pp.3–4. Available at: https://emergencymanual.iom.int/sites/g/files/tmzbdl1956/files/2023-03/iom_global_data_institute_thematic_brief_1_evidence_summary_on_climate_change_and_the_future_of_human_mobility.pdf [Accessed 13 Jan. 2024].

[29] Clement, V., Rigaud, K.K., de Sherbinin, A., Jones, B., Adamo, S., Schewe, J., Sadiq, N. and Elham S. (2021). Groundswell Part 2: Action on Internal Climate Migration. Washington, DC, USA: World Bank.

[30] See, Moore, M. (2002). Turning Up the Heat When an Island Disappears: The Threat of Global Warming Has Loomed at the Back of Insurers' Minds for a Very Long Time. LEXIS, Nexis Library, ALLNWS File. See also, Stop Ecocide International (2019). Vanuatu Calls for Internatioal Criminal Court to Seriously Consider Recognising Crime of Ecocide. [online] Stop Ecocide International. Available at: https://www.stopecocide.earth/press-releases-summary/vanuatu-calls-for-international-criminal-court-to-seriously-consider-recognising-crime-of-ecocide- [Accessed 9 Mar. 2024].

These gaps can be identified in both international frameworks for the protection of displaced persons and the protection of the environment.

3. Gaps in the international framework for the protection of refugees

International instruments to protect the rights and lives of refugees were established in a post-war context to provide political asylum to refugees facing persecution in their country of origin. Still today, the Geneva Convention, adopted in 1951, and its 1967 Additional Protocol, remain the main instruments founding the basis of international protection. Yet, these instruments are nowadays ill-adapted to address the multi-factors forcing individuals to flee[31]. Notably, in the face of the challenges posed by the Anthropocene, these instruments are completely devoid of substance.

During the formulation of the text, issues related to environmental factors affecting living conditions were not considered. This omission was due to the fact that in the early 1950s, the global community had not yet begun to recognise the degradation of the planet and its human repercussions, including environmental flight. The awareness of these issues started to emerge in the 1970s and gained momentum in the 1990s, propelled by the availability of progressively explicit information regarding the consequences of widespread environmental changes, such as climate change and biodiversity loss[32]. The inconsistency of these instruments in dealing with environmentally displaced persons is evident both in the individual bases of the protection of refugees and in the establishment of the persecution criteria. Consequently, existing international instruments do not address the complex situations of people at risk of statelessness (3.3), nor do they protect efficiently internal environmental refugees (3.4).

3.1. Obstacles resulting from the individual bases of the protection of refugees

The individual approach adopted by the 1951 Geneva Convention on the protection of refugees is unsuited to environmental displacements. Under the instruments, ‘any person’ may qualify for refugee protection if they are in the capacity to prove a personal threat affecting them in their individuality. From this perspective, it is often impossible for environmental refugees to justify such a criterion due to the widespread impact of disasters. The United Nations High Commissioner for Refugees (UNHCR) Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status confirms that situations of widespread environmental degradation do not fall within the ambit of the Convention, due to the limitations to demonstrate the existence of ‘a well-founded fear’ of persecution.[33] Certain academics attribute this challenge to the fact that environmental factors would lead to migration without necessarily ‘forcing’ it. The fundamental premise of international refugee

[31] Cournil, C. (2017). The inadequacy of international refugee law in response to environmental migration. *Research Handbook on Climate Change, Migration and the Law*, pp.85–107. doi:https://doi.org/10.4337/9781785366598.00011.
[32] Ibid.
[33] UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status’, (HCR/1P/4/eng/Rev. 3, 2011), para. 39.

law, which aims to safeguard individuals who have no alternative but to seek refuge elsewhere, does not extend to voluntary environmental migrants.[34] However, establishing the voluntary nature of the displacement may appear to be a matter of individual concern and justice for those whose human rights have been temporarily or long-term affected.

In contemporary application, the Geneva Convention ought to be viewed more as a foundation, with the status of refugees primarily contingent on domestic measures that implement international human rights law concerning refugee populations[35]. The determination of refugee status typically involves an individual examination based on the Geneva Convention. However, concerns arise regarding the adaptability of the Convention to situations of environmental displacement, especially when faced with large-scale migrations resulting from sudden environmental catastrophes. The current individual status determination process may be inadequate for such emergencies, prompting a suggestion for a group-based status determination approach, akin to the UNHCR's longstanding practice in situations involving large populations fleeing generalized violence.

Additionally, EU law also offers collective and temporary protection in the event of a mass influx of people. 'The mass influx of people' defined by this text could correspond to an emergency triggered by an environmental disaster, and the exceptional nature that determines this protection strengthens the potential of the directive for victims of environmental disasters. The definition of displaced persons in the directive is relatively broad and includes *"persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights"*[36], which could apply in the case of natural disasters.

Although environmental factors are not explicitly mentioned, the definition seems sufficiently inclusive to integrate these circumstances as well, either through a modification of the definition or by extensively interpreting the directive. Temporary protection is however not automatic and requires a decision of the EU Council, which is politically challenging. Political consensus is often missing when it comes to migration policies — which are harshening gradually both at the domestic and EU levels — and has only been successful in the case of Ukrainian refugees following the 2022 Russia full-scale invasion of Ukraine. Moreover, temporary protection within the EU is exclusively provided to displaced individuals from third-country.[37] Those displaced as a result of an environmental catastrophe within any of the 28 Member States, even in the event of a widespread migration prompted by a natural disaster, would be subject to a distinct set of legal frameworks.

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[34] McAdam, J. (2011). Climate change displacement and international law: complementary protection standards. Legal and Protection Policy Research Series. UNHCR.

[35] Cournil, C. (2017). The inadequacy of international refugee law in response to environmental migration. *Research Handbook on Climate Change, Migration and the Law*, pp.85–107. doi:https://doi.org/10.4337/9781785366598.00011.

[36] European Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

[37] Ibid.

3.2. The shortcomings of environmental flight situations in constituting 'persecution'

The second gap of international refugee law to address situations of environmental flight situations lies in the difficulty of defining the persecution itself. The exhaustive list of grounds of persecution enabling a person to seek protection abroad prevents refugee status from being assigned to environmental or climate migrants. It remains difficult to envisage how the definition of persecution could be extended to include environmental factors of migration. In this respect, despite multiple calls from scholars[38], practitioners, and human rights defenders to update the 1951 Geneva Convention and its additional protocol, current international discussions slowly orientate towards a standalone instrument addressing the specific situation of environmental refugees, to avoid putting at risk the already fragile balance of the current refugee protection framework by reopening negotiations[39].[40]

The refugee definition within the Geneva Convention does not explicitly encompass victims of natural disasters or any environmental motives.[41] To date, no state has officially conferred refugee status, as outlined in the Geneva Convention, solely on the grounds of environmental migration factors. Although courts have occasionally considered these factors as indicative of a persecution context, it is important to clarify that sudden disasters or gradual environmental changes cannot be automatically categorised as persecution, even if they impact the lives or livelihoods of displaced populations. Some justify this exclusion on the basis of the intensity of the damage assuming that the consequences of most environmental changes are not within the threshold needed to qualify as persecution[42]. Others think that the concept of persecution requires the existence of a direct 'agent of persecution', which is difficult to envisage when it is the 'environment' that is causing the displacement. One could argue that in the case of human-triggered environmental change, the agent of persecution could be identified. For instance, François Gemenne argues for the use of the term 'climate refugee' on the grounds that climate change is caused by human activities.[43] Some scholars in this regard have argued

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[38] Lazarus, D. (1990). Environmental refugees: New Strangers at the Door. *Our Planet*, 2(3); Cooper, J. (1998). Environmental refugees: Meeting the Requirements of the Refugee Definition. *New York University Environmental Law Journal*, 6(2); Kibreab, G. (2009). Climate Change and Human Migration: a Tenuous Relationship? *Fordham Environmental Law Review*, [online] 20. Available at: https://core.ac.uk/download/pdf/144232155.pdf [Accessed 13 Jan. 2024].

[39] Antonio Guterres, 'Climate Change, Natural Disasters and Human Displacement: a UNHCR perspective' (UNHCR, 23 October 2008), at 7.

[40] Keane, D. (2004). Graduate Note: The Environmental Causes and Consequences of Migration: a Search for the Meaning of 'Environmental Refugees'. *Georgetown International Environmental Law Review*, 16(209), p.215; Atapattu, S. (2009). Climate Change, Human Rights, and Forced Migration: Implications for International Law. *Wisconsin International Law Journal*, 27(607), p.622; McAdam, J. (2012). 'Protection' or 'Migration'? The 'Climate Refugee' Treaty Debate. *Oxford University Press eBooks*, pp.186–211. doi:https://doi.org/10.1093/acprof:oso/9780199587087.003.0008; Compton, B. (2014). The Rising Tide of Environmental Migrants: Our National Responsibilities. *Colorado Natural Resources, Energy and Environmental Law Review*, 25(358), pp.371–372.

[41] Geneva Convention relating to the Status of Refugees, adopted on 28 July 1051 by 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. Art. 1A(2).

[42] Cournil, C. (2017). The inadequacy of international refugee law in response to environmental migration. *Research Handbook on Climate Change, Migration and the Law*, pp.85–107. doi:https://doi.org/10.4337/9781785366598.00011.

[43] Gemenne, F. (2017). "Chapter 18: The refugees of the Anthropocene". In *Research Handbook on Climate Change, Migration and the Law*. Cheltenham, UK: Edward Elgar Publishing. Retrieved Jan 12, 2024, from https://doi.org/10.4337/9781785366598.00025.

that the consequences of climate change could be characterised as ‘environmental persecution’.[44] Persecution, however, requires more than a causal relation between wrongful conduct and harm. Persecution suggests a specific intention of an agent of persecution to harm another person or group of persons. In the context of climate change, it would be far-fetched to consider that greenhouse gas-emitted activities are being carried out with the specific intention of causing harm to other populations, even though we have now clear available information regarding their impact on specific territories and vulnerable populations.

Other authors have nevertheless argued for the recognition of an extensive interpretation of persecution to extend it to displacements triggered by environmental factors.[45] This notion is abstract and general, subject to many interpretations, and there is no universally accepted definition of persecution. The concept of a 'well-founded fear of persecution' referenced in the Geneva Convention incorporates a subjective evaluation, closely tied to an individual's psychological response to surrounding events, as people may react differently to external circumstances. However, the term 'well-founded' introduces an objective criterion. The Geneva Convention lacks clear guidelines on assessing whether an individual genuinely harbours a well-founded fear of persecution. While persecution can manifest in different degrees and forms, it is generally defined as the deliberate imposition of unjust and harsh treatment that impinges on the fundamental rights of an individual. Essentially, the lack of clear, direct, and voluntary persecution in the context of environmental migration has been considered as a ground to exclude the protection provided by the Geneva Convention by the State representatives, by the doctrine, and by the courts.[46]

Finally, some academics have attempted to argue for the possibility of identifying ‘environmental persecution’ through a progressive reading of the Geneva Convention, for example in the case of indigenous peoples and the violation of their vital natural resources.[47] The argument for reevaluating persecution is based on the assertion that ethnic or cultural groups, that have experienced significant discrimination and instances of 'environmental racism,' should be considered as victims. Laura Westra thus estimated that in cases of serious environmental damage, the fundamental rights of indigenous populations and communities are affected to a level that may fulfil the requirements of the concept of persecution.[48] Similarly, when multinational corporations deprive a village or thousands of people of a vital natural resource, such an action could be considered as persecution. An additional illustration

[44] Quilleré Majzoub, F. (2009). Le droit international des réfugiés et les changements climatiques: vers une acceptation de l’"ecoprofugus"? *Revue de droit international et de droit comparé*, 86(4), pp.602–640.
[45] Quilleré Majzoub, F. (2009). Le droit international des réfugiés et les changements climatiques: vers une acceptation de l’"ecoprofugus"? *Revue de droit international et de droit comparé*, 86(4), pp.602–640.
[46] Mayer, B. (2016). *The Concept of Climate Migration: Advocates and its Prospects*. Cheltenham, United Kingdom, Northampton, USA: Edward Elgar Studies in Climate Law.
[47] Kozoll, C. (2004). Poisoning the Well: Persecution, the Environment, Refugee Status. *Colorado Journal of Environmental International Law*, 15(2)(271); Westra, L. (2013). *Environmental Justice and the Rights of Ecological Refugees*. Routledge, pp.14, 178.
[48] Ibid.

might involve governments engaging in persecution by withholding aid from certain groups affected by environmental disasters. Nevertheless, despite these progressive interpretations of the concept of persecution, the universally accepted understanding of persecution remains narrow and therefore excludes environmental refugees from international protection under the Convention.

3.3. The risk of statelessness for sinking island states' populations

In particular, inhabitants of small island states face the potential of displacement as a consequence of environmental changes, particularly climate change. The impact of climate change and natural disasters is anticipated to render several islands uninhabitable, potentially causing their disappearance. Consequently, the inhabitants are likely to leave their territories, prompting concerns about statelessness. Some scholars argue that international law advocates for stability and the ongoing recognition of states, irrespective of crises.[49]

According to the 1954 Convention Relating to the Status of Stateless Persons, a stateless person is defined as *"a person who is not considered as a national by any state under the operation of its law."*[50] Based on this definition, the islanders would not be considered stateless because the concept of statelessness revolves around the denial of nationality through a state's legal operation, rather than the complete disappearance of a state.[51]

It is questionable whether the islanders would benefit from being labelled as stateless. In today's global context, being recognised as a citizen of a state holds significant importance, even for island states with limited territory. Despite their size, these states can advocate for their citizens in international forums such as the United Nations. Furthermore, existing statelessness instruments inadequately address the unique needs of islanders, particularly in the context of relocation.

Addressing the challenges faced by islanders through the lens of statelessness makes sense in some respects. Apart from the aforementioned convention, both the 1961 Convention on the Reduction of Statelessness, and the UNHCR aim at preventing and reducing statelessness while protecting stateless persons. Framing the discourse around statelessness allows UNHCR to justify engagement with small island states and recommend comprehensive multilateral agreements covering admission, status, and rights, including cultural rights.[52]

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[49] Crawford, 2006, as referred to in Kälin, W. and Schrepfer, N. (2012). Protecting People Crossing Borders in the Context of Climate Change - Normative Gaps and Possible Approaches. Legal and Protection Policy Research Series. UNHCR.

[50] Geneva Convention relating to the Status of Refugees, adopted on 28 July 1051 by 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. Introductory Note. p.3.

[51] Saul, B. and McAdam, J. (2008). *An Insecure Climate for Human Security? Climate-Induced Displacement and International Law*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292605 [Accessed 13 Jan. 2024].

[52] UNHCR France (2009). *Climate Change and Statelessness: An Overview*. [online] *UNHCR.org*, pp.1–4. Available at: https://www.unhcr.org/fr-fr/en/media/climate-change-and-statelessness-overview [Accessed 13 Jan. 2024].

However, the island states themselves vary in their approach to this issue. While some advocate for relocation to be included in international agreements, others oppose it.[53] Tuvalu, for instance, is concerned that industrialised countries might view relocation as a solution to rising sea levels instead of reducing greenhouse gas emissions. In this respect, some state representatives of Tuvalu advocate for re-opening the negotiations with Australia concerning the Falepili Union treaty. Kiribati seeks enhanced labor migration options and recognises the need for international humanitarian agreements.

Addressing the predicament of island states requires moving beyond existing laws. International law and human rights principles, such as participation and international cooperation, can guide efforts to do so. First, many islanders prefer to remain in their homes, emphasising the importance of increasing climate change mitigation and adaptation measures. Second, leveraging long-standing migration links with countries like Australia and New Zealand can be beneficial. Third, the development of regional rights-based instruments, as recommended by UNHCR, is crucial to ensure admission, status, and rights, including cultural rights.

3.4. The ill-protected internally displaced persons

As previously demonstrated, a significant share of environmental refugees are displaced within the borders of their country of origin.[54] Consequently, in most situations, international refugee law does not apply, depriving displaced persons of protection. In this respect, a number of experts, have rejected the term 'environmental refugees' as a legal concept, contending that it inadequately captures the intricacies of environmental migration and may lead to misconceptions.[55]

The 1998 Guiding Principles on Internal Displacement serves as the overarching framework for addressing all forms of displacement occurring within a state's territory. Functioning as a soft law instrument, this framework synthesises international refugee law, humanitarian law, and human rights law, specifically in the context of internal displacement. It presents an inclusive definition of internally displaced persons, encompassing those fleeing both human-made and natural disasters. Over recent years, this progressive definition of IDPs encompassing environmentally displaced

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[53] McAdam, J. and Loughry, M. (2009). *We Aren't Refugees*. [online] Inside Story. Available at: https://insidestory.org.au/we-arent-refugees/ [Accessed 13 Jan. 2024]; Ramesh, R. (2008). *Maldives Seek to Buy a New Homeland*. [online] The Guardian. Available at: https://www.theguardian.com/environment/2008/nov/10/maldives-climate-change [Accessed 13 Jan. 2024].

[54] Wahlström, M. (2011). Chairperson's summary: The Nansen Conference on Climate Change and Displacement in the 21st Century. Oslo, 6-7 June 2011. Available at: www.nansenconference.no [Accessed 2 Jan. 2024].

[55] Ionesco, D. (2019). *Let's Talk about Climate Migrants, Not Climate Refugees - United Nations Sustainable Development*. [online] United Nations Sustainable Development. Available at: https://www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees/ [Accessed 13 Jan. 2024]; International organisation for Migration (2022). *Climate Change and Future Human Mobility*. [online] IOM, pp.3–4. Available at: https://emergencymanual.iom.int/sites/g/files/tmzbdl1956/files/2023-03/iom_global_data_institute_thematic_brief_1_evidence_summary_on_climate_change_and_the_future_of_human_mobility.pdf [Accessed 13 Jan. 2024].

persons has been asserted by several United Nations agencies, the UN Special Rapporteur on the Human Rights of Internally Displaced Persons, humanitarian agencies, and other stakeholders[56].

Yet, the onset of climate change has sparked renewed discussions about the sufficiency of protection for internally displaced persons and the most effective strategies to improve it. In some countries, conventional concepts of state sovereignty, often viewed as 'hegemonic', enable state abuses and a general lack of protection for IDPs. To protect and uphold the rights of IDPs against such abuses, some scholars came up with a humanitarian-oriented interpretation of sovereignty, stressing the responsibility to protect of third states. In the context of environmental changes, notably climate change, the concept of responsibility to protect is all the more interesting to consider. The responsibility for a disaster occurring in a given country is usually shared between several countries at the international level, collectively creating the conditions for such an event to occur.

The lack of protection suffered by IDPs in the context of natural disaster response can also result from an overall inadequate understanding at the national level, particularly by state agencies, which bear the primary duty to protect. According to research carried out by Zetter, case studies reveal a lack of domestic normative frameworks and policy implementation[57]. The Guiding Principles, along with more detailed operational guidance could offer a practical approach to developing normative frameworks[58]. Challenges pertaining to evacuation, relocation, and return further complicate the situation[59]. While the Guiding Principles touch on participation and non-discrimination, calls from both scholars and international agencies advocate for specifying operational guidelines, notably in relation to community-based planned relocations in the context of climate change[60]. Additionally, the framework for durable solutions primarily addresses conflict displacement, leaving unresolved issues for people unable to return due to permanent destruction or heightened disaster risk[61].

While there have been calls for a convention, nothing can guarantee that such an agreement would more effectively address these operational and implementation challenges. Eventually, Koser suggests that conventions often exert limited real-world impact, contrasting with the increasing integration of the Guiding Principles into national laws, policies, and operational practices by humanitarian and

[56] IASC. (2008). Informal group on migration/displacement and climate change of the IASC. Climate Change, Migration and Displacement: Who will be affected? UNFCCC. Available at: https://unfccc.int/resource/docs/2008/smsn/igo/022.pdf [Accessed 2 Jan. 2024]; Wahlström, M. (2011). Chairperson's summary: The Nansen Conference on Climate Change and Displacement in the 21st Century. Oslo, 6-7 June 2011. Available at: www.nansenconference.no [Accessed 2 Jan. 2024].
[57] Zetter, R. (2011). *Protecting Environmentally Displaced People: Developing the Capacity of Legal and Normative Frameworks*. Refugee Studies Centre, Oxford, United Kingdom: Oxford University.
[58] Ibid.
[59] Kolmannskog, V. (2012). Climate Change, Environmental Displacement and International Law. *Journal of International Development*, 24(8), pp.1071–1081. doi:https://doi.org/10.1002/jid.2888.
[60] Bronen, R. (2008). Alaskan communities' rights and resilience. *Forced Migration Review* 31: 30–32; Türk, V. (2011). Can protection of environmentally displaced persons be found in existing protection regimes? What are the next steps, from a protection perspective? *The Nansen Conference on Climate Change and Displacement in the 21st Century.* Oslo, 6-7 June. Available at: www.nansenconference.no [Accessed 11 Nov. 2023].
[61] Kolmannskog, V. (2008). Climates of displacement. *Nordic Journal of Human Rights* 26(4): 302-320; Koser, K. (2008). Gaps in IDP protection. *Forced Migration Review* 31.

development agencies[62]. Nevertheless, the legal status of movement in slow-onset disasters like drought remains unclear. Individuals who move preemptively or during severe droughts are often regarded as 'distress migrants,' lacking the same level of attention and protection as those displaced by conflict or sudden-onset disasters[63]. Regardless of the voluntary nature of initial movements, individuals may be considered displaced if the land becomes too degraded for a feasible return[64], similar to the return-ability test in cross-border cases.

While international attention to this issue has grown, stronger collaboration among states, international governmental organisations, and non-governmental organisations, is necessary to explore the human rights implications of environmental displacement[65]. Key challenges include the lack of state capability and willingness to safeguard their rights. Addressing this necessitates international support and assistance. In particular, it underscores the necessity of supporting states in building local resilience and capacity for prevention and protection. In this sense, humanitarian and development agencies have a strong role to play in ensuring the inclusion of EDPs within the broader understanding of IDPs[66].

4. Inadequacy of international environmental law in responding to environmental displacement

International environmental law is one of the bodies of law that has developed the most in the past decades. From the end of the 1980s, with climate change gradually entering the policy arena, the international community started to pay more attention to the protection of the environment and the prevention of environmental change consequences, including displacement.

The adoption in 1992 of a framework Convention in the form of the United Nations Framework Convention on Climate Change (UNFCCC), showcased the international community's awareness of the necessity to collectively address climate change. Although the Convention resembles more a declaration of principles rather than a binding instrument, it still represents the first international

[62] Koser, K. (2008). Gaps in IDP protection. *Forced Migration Review* 31.
[63] Kolmannskog, V. (2010). Climate Change, Human Mobility, and Protection: Initial Evidence from Africa. *Refugee Survey Quarterly*, 29(3), pp.103–119. doi:https://doi.org/10.1093/rsq/hdq033; Koser, K. (2008). Gaps in IDP protection. *Forced Migration Review* 31.
[64] Kälin, W. (2008). Guiding principles on internal displacement: annotations. *Studies in Transnational Legal Policy* 38. The American Society of International Law and The Brookings Institution, University of Bern Project on Internal Displacement. Available at: http://www.asil.org/pdfs/stlp.pdf. [Accessed 11 Nov. 2023]; Kolmannskog, V. (2012). Climate Change, Environmental Displacement and International Law. *Journal of International Development*, 24(8), pp.1071–1081. doi:https://doi.org/10.1002/jid.2888.
[65] United Nations General Assembly (2011). *Protection of and Assistance to Internally Displaced Persons (A/C.3/66/L.45/Rev.1)*. [online] *United Nations*, pp.4–6. Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/N11/591/23/PDF/N1159123.pdf?OpenElement [Accessed 13 Jan. 2024].
[66] Kolmannskog, V. (2012). Climate Change, Environmental Displacement and International Law. *Journal of International Development*, 24(8), pp.1071–1081. doi:https://doi.org/10.1002/jid.2888; Kälin, W. and Schrepfer, N. (2012). *Protecting People Crossing Borders in the Context of Climate Change - Normative Gaps and Possible Approaches.* Legal and Protection Policy Research Series. UNHCR.

attempt to mitigate the effects of climate change[67]. The UNFCCC's main target area is the reduction of greenhouse gas emissions, responsible for anthropogenic climate change. While focusing on mitigation, the Convention also provides some language — albeit general — on adaptation, obliging state parties to cooperate in this matter. According to the IPCC, migration can itself be seen as an adaptation strategy to climate change. This perspective suggests that migration represents an opportunity to reduce the vulnerability of populations at risk of displacement[68]. As migration is recognised as an adaptive strategy, one approach to addressing climate displacement is to consider it within the framework of adaptation policy. In theory, the UNFCCC could thus contribute to reducing the vulnerabilities of populations against climate-induced displacement through this same adaptation lens, as argued by some scholars[69]. In practice, the lack of specific language on adaptation and the Convention's inherent lack of enforcement powers prescribe strong political will from parties to achieve effective and collective action on the matter. However, the recalcitrant stance of the international community has hindered efforts towards cooperation on environmental matters. Developed countries, historically responsible for climate change, invest more towards securing their external borders to prevent migrants from entering their territory, than in adopting mitigation and adaptation measures to address environmental flight situations[70].

To make up for its lack of enforcement powers, the UNFCCC was soon complemented by the Kyoto Protocol, which introduced legally binding quantitative restrictions on greenhouse gas emissions for developed nations from 2008 to 2012[71]. Officially established in 2005, the Protocol aimed at achieving an overall reduction of approximately 5.2% from the 1990 levels of these countries but, as the initial commitment period was set to conclude in 2012, concerns arose about the future of the climate change legal framework[72]. To address this, the COP 17 meeting in Durban in December 2011 decided to initiate a second commitment period, while the following COP 21, held in Paris, resulted in a groundbreaking legally binding agreement, marking a global effort to limit global warming to below 2°C[73]. In stark contrast to the prescriptive approach of the Kyoto Protocol, which mandated specific

[67] Oberthür, S. and Ott, H.E. (1999). *The Kyoto Protocol: International Climate Policy for the 21st Century*. Berlin, Heidelberg: Springer Berlin Heidelberg. doi:https://doi.org/10.1007/978-3-662-03925-0.
[68] IPCC (2014). *Climate Change 2014, Impacts, Adaptation and Vulnerability - Summary for Policymakers, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change.* Geneva, Switzerland: World Meteorological organisation.
[69] Jolly, S. and Ahmad, N. (2015). Climate Refugees under International Climate Law and International Refugee Law: Towards Addressing the Protection Gaps and Exploring the Legal Alternatives for Criminal Justice. *ISIL Year Book of International Humanitarian and Refugee Law*, [online] 14, pp.216–248. Available at: https://heinonline.org/HOL/Page?handle=hein.journals/isilyrbk13&div=12&id=&page=&collection=journals [Accessed 11 Nov. 2023].
[70] Transnational Institute (2021). *Global climate wall: how the world's wealthiest nations prioritise borders over climate action*. [online] *Transnational Institute*. Available at: https://www.tni.org/fr/node/17096 [Accessed 19 Dec. 2023].
[71] IPCC. (2014). *Climate Change 2014, Impacts, Adaptation, and Vulnerability***-** Summary for Policymakers, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. Geneva, Switzerland: World Meteorological organisation.
[72] Soltau, F. (2011). Fairness in International Climate Change Law and Policy. Cambridge, United Kingdom: Cambridge University Press.
[73] UNFCCC. (2015). *Adoption of the Paris Agreement,* Report No. FCCC/CP/2015/L.9/Rev.1. Available at: http://unfccc.int/resource/docs/2015/cop21/eng/109r01.pdf [Accessed 11 Nov. 2023].

obligations for countries to decrease their greenhouse gas emissions, the Paris Agreement adopted a more flexible strategy under which each nation has the freedom to declare its Intended Nationally Determined Contributions (INDCs) as a means to contribute to the reduction of climate change and its impacts. Nonetheless, although 153 nations have presently committed to emissions reduction targets through their respective INDCs, the repercussions of climate change are expected to persist — which eventually would lead to an upsurge in climate-related displacement — because of the time lag involved in achieving these goals and the prolonged presence of carbon dioxide in the atmosphere.

Both the UNFCCC and the Kyoto Protocol seem therefore to lack explicit provisions addressing the social and human rights implications of climate-induced displacement, and, although successive COPs have acknowledged such an issue, their focus remained still narrow. Indeed, the early COPs did not specifically broach the topic of climate displacement, integrating instead concerns about climate displacement through the examination of the measures related to climate adaptation and the exploration of the interconnectedness of adaptation and displacement.

Notably, the Bali Action Plan, introduced in COP13 in 2007, marked a significant step forward by highlighting the importance of adaptation in addressing the distinct and immediate vulnerabilities of developing countries[74]. In its closing remarks, the conference established the working mechanism of the Adaptation Fund Board under the guidance of the COP/MOP and formed the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA), to negotiate a successful climate agreement following the Kyoto Protocol's initial commitment period[75]. Following the steps of COP13, the Poznan-based COP 14 attempted to operationalise the Adaptation Fund and, while it still lingered on new negotiations on adaptation, it managed to introduce the terms ‘migration’ and ‘displacement’ into the landscape of climate law[76]. Such development was quickly echoed by COP 15 in Copenhagen and COP 16 in Cancún, where the issue of climate displacement was directly incorporated into the negotiation agendas. Spotlighting specifically the need for further research on the intersections between climate change, migration, and displacement, the report of the AWG-LCA at COP16 particularly underlined how the parties were to enhance adaptation taking into consideration their common responsibilities. It notably brought to the forefront the discussion on the need for measures to enhance *“understanding, coordination, and cooperation related to national, regional and*

[74] UNFCCC, Conference of the Parties: Bali Action Plan, FCCC/CP/2007, Bali, Indonesia, 14 March 2008, Available at: www.unfccc.int/resource/docs/2007/copl3/eng/06a01.pdf [Accessed 11 Dec. 2023]; Harmeling, S. and Bals, C. (2017). *Adaptation to Climate Change - Where do we go from Bali? An Analysis of The COP 13 and the Key Issues on the Road to a New Climate Treaty*. *German Watch Briefing Paper.* Available at: https://www.germanwatch.org/fr/2630 [Accessed 11 Dec. 2023].

[75] UNFCCC, Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWGLCA),UNFCCC 2007. FCCC/CP/2007/6/Add. 1, 14 March 2008, Decision 1/CP. 13, para. 2 and annex 1, Available at: http://unfccc.int/resource/docs/2007/copl3/eng/ 06a01.pdf#page=3 [Accessed 11 Dec. 2023].

[76] Khan, M.R. (2013). *Toward a Binding Climate Change Adaptation Regime: A Proposed Framework.* New York, USA: Routledge Routledge, p. 29.

international climate change induced displacement, migration, and planned relocation, where appropriate"[77].

Circling back to the need for multilevel action — and indirectly reinforcing the theoretical underpinnings of the UNFCCC's mandate — the terminology employed by the COP16 report, which highlighted the primary role of 'coordination' and 'cooperation', further stressed the expectations placed on states to design and implement cooperative approaches to climate change induced displacement. But it was only in 2010 with the Cancún Agreements that the UNFCCC addressed the issue of climate migration. Indeed, the Cancún agreement placed significant emphasis on the 'loss and damage' program, which focused on compensating individuals while also bolstering the adaptive capacity of vulnerable populations. Further amplifying the commitments of Cancún, COP 18 in Doha, placed particular emphasis on climate change-induced migration, displacement, and human mobility, attempting to foster cooperation and collaboration in linking patterns of migration and displacement to the implementation of the loss and damage program. Nonetheless, COP18 somewhat fell short of its commitments with the identification of climate change-induced displacement as a non-economic loss, fundamentally creating potential hindrances to the filing of compensation claims[78].

Representing a further step forward from the trend started in Cancún, the Paris Agreement acknowledged the multilevel aspects of human mobility by entrusting the Executive Committee of the Warsaw International Mechanism (WIM) with the establishment of a task force to develop recommendations to minimise and address climate change induced displacement[79]. However, the Agreement ended up lacking an explicit identification of legal protections for migrants in terms of prevention, support, and clarification of their rights and did not envision any institutional mechanism dedicated to addressing the rights of displaced people[80]. Yet, steps within the loss and damage mechanism, including emergency preparedness, comprehensive risk assessment and management, the establishment of risk insurance facilities, addressing non-economic losses, and strategies to enhance the resilience of human institutions were outlined to address the underlying causes of climate displacement. In 2018, the Task Force concluded its work by releasing a final report that acknowledged the pivotal role of climate change in jeopardising essential resources crucial for human survival. The report emphasises that the extent and nature of resultant human displacement and

[77] UNFCCC. (2010). *Work Undertaken by the COP at its Fifteenth Session on the Basis of the Report of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UN* Doc FCCC/CP/2010/2.
[78] Decision 3/CP. 18, Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity, FCCC/CP/2012/8/Add.1 (28 February 2013), para. 26; "Non-economic Losses in the Context of the Work Programme on Loss and Damage", Technical paper, FCCC/TP/2013/2 (2013).
[79] Decision 1/CP.21, Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/10/Add.1, para. 49
[80] Jolly, S. and Ahmad, N. (2015). Climate Refugees under International Climate Law and International Refugee Law: Towards Addressing the Protection Gaps and Exploring the Legal Alternatives for Criminal Justice. *ISIL Year Book of International Humanitarian and Refugee Law*, [online] 14, pp.216–248. Available at: https://heinonline.org/HOL/Page?handle=hein.journals/isilyrbk13&div=12&id=&page=&collection=journals [Accessed 11 Nov. 2022].

mobility *"will largely depend on the adaptation, disaster risk reduction, and development policies that are implemented not only to mitigate the impacts of slow-onset events but also to facilitate, initiate, and/or manage migration as a positive strategy and planned relocation as a last resort option"*[81]. These recommendations received approval at COP 24 in Poland, confirming that states are urged to address the issue of climate refugees while considering their human rights and international environmental law obligations.

As previously shown, international environmental law has started to direct its attention to the issue of displacement only in recent times, and mostly through the perspective of climate change law. Such an approach that tends to overly privilege climate change is symptomatic of the Anthropocene and negatively affects international efforts to address the situations of environmental refugees. Eventually, such an approach hides the protean nature of environmental displacement. Indeed, the absence of specific institutional and legal protective mechanisms outlining the rights of those displaced by climate-related events represents a notable gap, raising the question of whether international climate law, rooted in the UNFCCC framework, constitutes the appropriate forum to address the legal challenges arising from climate displacement[82]. While the UNFCCC, with its mitigation and adaptation-oriented perspective and wide support, might represent a suitable institutional mechanism for addressing climate change and its diverse consequences, it may not be the most suitable legal institution to tackle climate change-induced displacement due to its lack of enforcement powers. Because of its approach, primarily based on adaptation, the UNFCCC dangerously oversimplifies the issue of climate change-induced displacement, overlooking potentially complex human rights aspects of the matter. The same concept of human rights imposes obligations on states to protect the lives and properties of those within their territories, particularly in the face of environmental hazards and the consequences of climate change, requiring states to establish appropriate legal and institutional mechanisms to protect their populations[83]. If clear rights and legal avenues for displaced individuals are not properly defined under international refugee law and international environmental law, the development of novel approaches to safeguard their rights emerges as a prominent need for the international community.

5. Research design

Taking into consideration the gaps and limitations of current legal frameworks in addressing the root causes of environmental flight situations, and their human rights implications, this research develops a three-fold objective. Adopting a qualitative research methodology, it first intends to identify existing

[81] Report of the Task Force on Displacement (TFD Report), Advanced unedited version of 17 September 2018. Available at: https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf. [Accessed 11 Dec. 2023].
[82] Gibb, C. and Ford, J. (2012). Should the United Nations Framework Convention on Climate Change recognise climate migrants? *Environmental Research Letters*, 7(4), p.045601. doi:https://doi.org/10.1088/1748-9326/7/4/045601.
[83] Dinah Shelton, 'Human Rights and Climate Change' (2009) Buffett Center for International and Comparative Studies Working Paper Series, Working Paper No 09-002 1, 12.

States' international obligations, deriving from international law instruments, in addressing the root causes of environmental flight situations, and in providing adequate protection to displaced persons. Acknowledging the variety of interpretations of international law at the global level, the research will draw on the case study of a regional human rights system, to ensure a more cohesive and consistent subject for the study. For various reasons explained in Chapter 1, the analysis of the Inter-American System of Human Rights appears as the best fit for this research, being considered the most progressive in this respect by several scholars and practitioners. The focus on the Inter-American System will identify current States' obligations at the regional level and the gaps left by the existing frameworks and their implementation.

The research will then study the legal concept of 'ecocide' as a potential remedy to the gaps identified. In this regard, it is important to note that, as an ecocentric tool, ecocide law is not meant to directly address the situation of environmentally displaced persons. As such, ecocide is not designed to address environmental displacement, but rather the root causes of environmental flight situations. This research advances that given the internationally-recognised interdependence of human rights with the environment, an ecocentric tool applied to situations of human mobility could bear positive human rights implications. The study of the Inter-American System of Human Rights (IASHR) shows that even at the regional level, the interpretation of states' duties may differ, requiring further clarification or the creation of new and clear obligations. The research then aims to analyse the concept of ecocide and its potential role in ensuring legal protection of the environment, preventing displacement, and providing remedial avenues to victims of environmental flights. It finally explores the potential challenges for recognising ecocide.

The study covers both transboundary and internal 'environmental flight situations'. While the concept of 'environmental refugees' is heavily debated and still lacks up to today of a legally binding definition, this research adopts a 'maximalist approach', as defined by Suhrke[84]. Such an approach singles out the environmental factor from a complex set of causes and asserts that the ensuing out-migration is directly attributed to environmental degradation. This choice is justified not only by the appeal of the term 'environmental refugees' but also due to a lack of effective alternative existing legal system at the international level. Following the maximalist approach, the thesis will use a working definition of 'environmental refugees' understood as: *"Citizens and persons with permanent residence who had to leave their home either within their State of origin or across borders, temporarily or permanently; the decisive, immediate trigger for leaving is environmental change induced by human or natural causes which pose a serious threat to their lives or livelihoods"*[85].

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[84] Suhrke, A. (1994). Environmental Degradation and Population Flows. *Journal of International Affairs*, *47*(2), 473–496. http://www.jstor.org/stable/24357292

[85] Ammer, M. and Nowak, M. (2010). *Legal Status and Legal Treatment of Environmental Refugees*. [online] *Intergovernmental Panel on Climate Change*, Germany: Federal Environment Agency, pp.1–14. Available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6671 [Accessed 2 Jan. 2023].

While addressing the pressing issue of the rights of environmentally displaced persons, the thesis intends to contribute to the ongoing discussions on ecocide as a legal concept, adopting a human rights lens. The academic literature, as well as the policy and practitioner discourses surrounding ecocide, have indeed for a long time adopted an ecocentric approach. The purpose of the thesis is not to challenge the ecocentric approach — indeed, it adopts its features for part of the argument — but rather to broaden its scope, embracing a human rights perspective. The safeguarding of human rights and the preservation of the environment are internationally recognised as interdependent. Accordingly, the ecocide discourse has progressively gained relevance within the human rights field, as shown by the speech of the UN High Commissioner for Human Rights Volker Türk at the 54th Session of the Human Rights Council, who welcomed consideration of ecocide as an international crime[86].

Similarly, while the ecocide discourse has so far been mostly contained in the criminal law realm, focusing mainly on ensuring accountability for environmental damage, the thesis seeks to adopt a more victims-oriented standpoint. Finally, acknowledging the legitimacy and necessity of the accountability discourse, this thesis intends to contribute to the ongoing discourse on ecocide with a broader approach embracing the essential ecocentric approach and including a human rights and victims-oriented perspective, through the relevance of ecocide recognition to protect the rights of environmentally-affected/displaced persons.

[86] UNGA. (2023). Report of the Human Rights Council: Fifty-fourth session (11 September–13 October 2023) (A/78/53/Add.1). Available at: https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session54/regular-session [Accessed 11 Dec. 2023].

Chapter 1: Lack of clear international obligations to address environmental flight situations and human rights implications: Case study of the Inter-American Human Rights system

Studies related to states' obligations concerning environmental displacements and their human rights implications are limited in number and scope. In this respect, the research produced by Ammer et al. for the German Federal Environmental Agency proves to be an avant-garde and enlightening study on the subject. While shedding light on existing obligations under international law, the study highlights the difficulty of identifying clear international obligations to address environmental flight situations. This is due to differences in the interpretation of various rights from different legal sources and at different levels by different treaty bodies, which do not allow for making general comments regarding the exact scope and content of those obligations at the international level[87]. Although the study does not take into account some major recent international developments related to the protection of human rights and the environment — notably the recognition of the right to a healthy environment — the main observation still stands.

Against this backdrop, examining legal interpretation at the regional level offers the advantage of delving into nuances specific to shared legal frameworks among nations, providing insights into how international laws are contextualised and applied within similar national systems. This approach enables a more granular understanding of legal dynamics and facilitates tailored solutions to regional challenges, ultimately enhancing coherence and effectiveness in legal implementation. Concerning the subject matter at stake, the Inter-American system of human rights stands out as one of the most progressive international frameworks, particularly in its commitment to safeguarding human rights concerning the environment. Encompassing the American Convention on Human Rights and the jurisprudence of the Inter-American Court of Human Rights (IACtHR), this system has evolved to recognise the intrinsic link between environmental degradation and human rights violations. The Inter-American Commission on Human Rights (IACHR) and the IACtHR have consistently interpreted the rights enshrined in the American Convention in a manner that acknowledges the right to a healthy environment as integral to the full enjoyment of human rights. At the heart of the Inter-American system's approach is the understanding that environmental protection is essential for the realisation of other human rights, including the rights to life, health, and cultural identity. Through landmark decisions and advisory opinions, the IACtHR has affirmed the duty of states to prevent environmental harm, hold perpetrators accountable for environmental violations, and provide remedies to affected individuals and communities. This progressive stance underscores the Inter-American system's commitment to promoting environmental justice and ensuring that human

[87] Ammer, M. and Nowak, M. (2010). *Legal Status and Legal Treatment of Environmental Refugees*. [online] *Intergovernmental Panel on Climate Change*, Germany: Federal Environment Agency, pp.1–14. Available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6671 [Accessed 2 Jan. 2023].

rights are upheld in the face of environmental challenges, positioning it as a "forerunner" in ensuring the most robust protection of environmental rights[88].

Furthermore, alongside Asian countries, the Americas is one of the most vulnerable regions to environmental change. As a matter of fact, in 2021, natural disasters emerged as the primary cause of internal displacements within the region, with approximately 1.7 million people forced to relocate. Of these displacements, over half stemmed from the destructive forces of storms and floods. Additionally, wildfires and geophysical hazards further compounded the challenges faced by communities across the region[89]. The significance of this phenomenon in the region calls for an analysis of the IASHR member states' obligations to address environmental flight situations and displacements when they occur.

1. States' duty to prevent environmental flight situations

Debates surrounding the protection of environmentally displaced persons tend to revolve around addressing their specific situations once their displacement has occurred. The fact is that states' environmental inaction has over the years contributed to displacing the paradigm of people at risk of environmental flight to de facto refugees in need of protection. And, while it is crucial to identify such ways to protect the rights of persons forcibly displaced, it goes without saying that the best outcome to displacement is avoiding such displacement. In the context of environmental flights, avoiding displacement equals preventing situations of environmental flight and calls for addressing the root causes of such situations.

Obligations that require States to address the root causes of environmental flight situations correspond to every duty that positively impacts the preservation of the environment from damage and therefore prevent consequential displacement. As identified by Ammer et al., such prevention of environmental flight covers several situations ranging from (1) prevention of situations of environmental change, (2) reducing the vulnerability to environmental flight situations, (3) preventively minimising their negative consequences, to when such situations occur (4) mitigating their impact to prevent displacement.[90]

While international obligations related to these four objectives exist, they are limited in scope and are not universally accepted or implemented. Nevertheless, within the Inter-American system of human

[88] Giannino, D. (2018). The Ground-Breaking Advisory Opinion OC-2317 of the Inter-American Court of Human Rights Healthy Envi.pdf. *IConnect – Blog of the International Journal of Constitutional Law*. [online] Available at: https://www.academia.edu/37902386/The_Ground_Breaking_Advisory_Opinion_OC_2317_of_the_Inter_American_Court_of_Human_Rights_Healthy_Envi_pdf [Accessed 26 Feb. 2024].

[89] IDMC (2022). *2022 Global Report on Internal Displacement*. [online] www.internal-displacement.org. Available at: https://www.internal-displacement.org/global-report/grid2022/ [Accessed 26 Feb. 2024].

[90] Ammer, M. and Nowak, M. (2010). *Legal Status and Legal Treatment of Environmental Refugees*. [online] *Intergovernmental Panel on Climate Change*, Germany: Federal Environment Agency, pp.1–14. Available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6671 [Accessed 2 Jan. 2023].

rights, such obligations were clarified by the Inter-American Court of Human Rights' 2017 Advisory Opinion on State obligations concerning the environment in the context of the protection and guarantee of the rights to life and personal integrity.

1.1. Right-based protection of the environment in the American Convention

On February 7, 2018, the IACtHR released an Advisory Opinion underscoring the relevance of the occurrence to extensively address the obligations arising from the American Convention on the matter of environmental protection. This followed Colombia's 2016 request for an Advisory Opinion delving into the interpretation of Articles 1(1) (Obligation to Respect Rights), 4(1) (Right to Life), and 5(1) (Right to Humane Treatment/Personal Integrity) of the American Convention on Human Rights.

Requested based on Article 64 of the American Convention, the non-binding legal interpretation by the Court offers guidance on the application of human rights treaties and principles within the Inter-American system in relation to the protection of the environment. Notably, while it does not rule on the specific legal dispute from which Colombia's request emerged and does not have the force of law, it serves as an authoritative interpretation of international human rights standards. As such, State Parties are prompted to take the Court's Opinions into account as they adapt their laws, practices, and public policies to the standards outlined by the Inter-American Human Rights System, as per their duty to exert conventionality control.

In the case in question, Colombia's inquiry focused mainly on the right to life and personal integrity, but its inquiry also extended to examining the interplay between Articles 4(1) and 5(1) in connection to Article 1(1) within the context of international environmental law. Such an approach fundamentally emphasised a request to clarify the interpretation of the American Convention when confronted with the potential adverse effects of significant new infrastructure projects on the marine environment of the Wider Caribbean Region. These effects, in particular, took centre stage as they could jeopardise a fundamental element for the complete exercise of the rights of coastal and island inhabitants of a State Party to the Convention: the human habitat. Moreover, Colombia also underscored the global significance of this issue, stating that it extends beyond the states directly affected to encompass the broader international community.

Nonetheless, in answering the inquiry the Court exercised its discretion to reformulate the advisory requests and decided that the opinion would cover the *"general environmental obligations arising out of the obligations to respect and ensure human rights"*[91], and concerning the rights to life and personal

[91] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 35, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].

integrity in particular[92]. Further, even before tackling the specificities of Colombia's request, the Court addressed the interconnectedness of human rights and the environment and the human rights impacted by environmental degradation — notably the right to a healthy environment — to situate the opinion in a wider contextual framework based on a review of its jurisprudence as well as of decisions, statements, and reports of various human rights bodies such as the European Court of Human Rights, the African Commission on Human and Peoples' Rights, and experts like the UN Special Rapporteur on human rights and the environment.

The Opinion served as a unique opportunity for the Court to refer extensively to the State obligations deriving from the need to protect the environment under the American Convention[93]. While the object of Colombia's inquiry focused specifically on State obligations arising from their duty to ensure the right to life and personal integrity, the Court took advantage of this opportunity to address the interrelationship between human rights and the environment, as well as considering the human rights affected by environmental degradation, including the right to a healthy environment.

The Court notably reaffirmed the undeniable interconnection between environmental protection and the fulfilment of various human rights. It emphasised that environmental degradation and the impacts of climate change directly impede the full enjoyment of human rights, a principle previously underscored in the *Kawas Fernández v. Honduras* case[94]. In doing so, the Court reaffirms the principles of human rights interdependence, and indivisibility[95] as the very foundational aspects of the Inter-American environmental legal framework, and acknowledges the autonomous character of the right to a healthy environment.

Concerning the former, the Court identifies the right to a healthy environment as having both an individual and a collective dimension highlighting its universal value owed to present and future generations. While in its collective aspects, it puts forth shared responsibilities for the well-being of the environment, in its individual facets its infringement may impact individuals' rights. Notably, the Court stated that ensuring the right to a healthy environment is a precondition to the realisation of particularly vulnerable rights, including *"the rights to life, personal integrity, private life, health,*

[92] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 38, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].
[93] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 46, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].
[94] *Kawas Fernández v. Honduras. Merits, Reparations and Costs.* [2009] Series C No. 196. para. 148. (Inter-American Court of Human Rights).
[95] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 47, 54, 55, 57, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].

water, food, housing, participation in cultural life, property, and the right to not be forcibly displaced".[96]

Turning instead to the latter, the Court notably underscores the unique nature of the right to a healthy environment as an autonomous right. As such, unlike other rights, this right protects environmental components, such as forests, rivers, and seas, as legal interests in themselves, even in the absence of concrete evidence or certainty of harm to individuals. This means that the right to a healthy environment fundamentally safeguards nature and the environment not solely for the benefit — or against the detriment — of humanity, but also due to their intrinsic value to other living organisms on the planet, which are particularly crucial for the realisation of other human rights, such as the cultural rights of indigenous communities[97].

As a consequence, the Court establishes the right to a healthy environment as being directly "justiciable" and falling under the American Convention-based contentious jurisdiction of the San Jose tribunal. By recognising such justiciability before the Court, the Advisory Opinion represents an important step forward in the protection of human rights and the environment, as it expands the existing scope of the human right to a healthy environment under the American Convention. Indeed, before the Court's interpretation, neither the Convention nor the Declaration referred to a right to a healthy environment. This right was only illustrated in burgeoning case law and codified in Article 11 of the Protocol of San Salvador which states that *"[e]veryone shall have the right to live in a healthy environment and to have access to basic public services."*[98] Nevertheless, its effective implementation faced several obstacles ranging from the limited ratification of the Protocol — ratified by only sixteen of 25 countries —, the Inter-American Commission on Human Rights lacking the authority to address individual complaints alleging violations of the right enshrined in the Protocol, to the Protocol's requirement for the progressive, rather than immediate and comprehensive, realisation of rights[99].

Challenging the tepid implementation level, the Court acknowledges the right to a healthy environment as fundamental to human existence[100]. Such interpretation of both content and scope of

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[96] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 66, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].
[97] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 62, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].
[98] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 56, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].
[99] Tigre, M.A. and Urzola, N. (2021). The 2017 Inter-American Court's Advisory Opinion: changing the paradigm for international environmental law in the Anthropocene. *Journal of Human Rights and the Environment*, 12(1), pp.24–50. doi:https://doi.org/10.4337/jhre.2021.01.02.
[100] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 59, 62 Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].

the right to a healthy environment was further solidified by the IACtHR's groundbreaking decision in the *Lhaka Honhat v. Argentina* case. In this context, the IACtHR ordered reparative measures to Argentina — deemed liable for violations of the right to a healthy environment as well as other associated rights — for the effective restitution of the environment and, in particular, of forest resources[101].

In light of these human rights obligations, the Court sets out obligations of states concerning environmental protection to guarantee that their actions or those of entities under their effective control do not stand in the way of the realisation of these fundamental rights[102]. Although primarily addressing the duties of states concerning the prevention of potential environmental damages to uphold the rights to life and personal integrity, the essence of the Advisory Opinion holds significance for our study due to the evident connection between guaranteeing these rights and the right not to be forcibly displaced.

1.2. Obligations related to preventing situations of environmental change

The identification of obligations related to the prevention of environmental change is relevant not only because prevention of serious environmental degradation is the most obvious way to prevent environmental flight situations, and therefore environment flights themselves, but also because their violation gives rise to secondary obligations, notably obligations to cease the wrongful act and to provide compensation to the victims — EDPs in the case of environmental displacement.[103]

At the international level, obligations to prevent environmental change exist such as the reduction of greenhouse gas emissions within the UNFCCC. However, the scope of these treaty-based obligations is limited, as they are not absolute obligations to prevent damage, compelling states only to a certain standard of care. The specific extent of these obligations can therefore only be established on a case-by-case basis and largely hinges on the economic capabilities of each state. As a result, uncertainties persist regarding the precise delimitations of existing state obligations.[104]

In this respect, the 2017 Advisory Opinion is an innovative resource to clarify such obligations within the Inter-American system. The interpretation of the Court revolves around the principle of due diligence which has been instrumental in its approach to the right to a healthy environment[105].

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[101] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*. [2020] Series C No. 400 (Inter-American Court of Human Rights).

[102] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 69, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].

[103] Ammer, M. and Nowak, M. (2010). *Legal Status and Legal Treatment of Environmental Refugees*. [online] *Intergovernmental Panel on Climate Change*, Germany: Federal Environment Agency, pp.1–14. Available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6671 [Accessed 2 Jan. 2023].

[104] *Ibid.*

[105] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 123-125, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].

Following that principle, States must take all necessary measures to achieve the progressive realisation of rights. By extension, the obligations set out in the Advisory Opinion apply to the protection of the right not to be displaced, given that the violation of this right can lead to the violation of other fundamental human rights, such as the right to life, for which the Court has ruled that States must ensure in cases of potential negative impact of environmental harm[106].

The Court in its Advisory Opinion outlines that *"the obligations to ensure the rights recognised in the American Convention entail the duty of States to prevent violations of these rights"*.[107] Considering that prevention allows for avoiding the reason for flight at an early stage, states' respect of their obligations in this regard is fundamental to guarantee the right not to be forcibly displaced.

As put by the Court, obligations related to preventing situations of environmental change encompass any "*measures of a legal, political, administrative and cultural nature that promote the safeguard of human rights and ensure that eventual violations of those rights"* are taken into account and may *"result in punishment for those who commit them, together with the obligation to compensate the victims for the negative consequences"*.[108]

While the Court considers that *"the erga omnes nature of the treaty-based obligation for States to ensure rights does not entail unlimited State responsibility"*, it recognises their *"international responsibility to regulate, supervise or monitor the activities of third parties"* that may cause environmental damage.[109] Such positive obligation to prevent environmental harm applies when the authorities were aware of a situation of 'real and imminent danger' or should have and failed to take the necessary preventive measures to avoid such danger.[110]

Particularly noting that the regulation of potentially damaging activities should be done to reduce any threat to the rights to life and personal integrity[111], the conclusions of the Court undoubtedly underscore how the implementation of effective regulatory approaches plays a crucial role in ensuring that fundamental rights, such as that to not be forcibly displaced, are safeguarded. Further, through its Opinion, the Court acknowledges that States have a role in preventing violations of economic, social, and cultural rights in other countries, aligning the Court's perspective with the evolving international perspective, urging States to take regulatory measures to prevent transnational corporations' actions that negatively impact human rights beyond their territorial boundaries.

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[106] *Mapiripán Massacre v. Colombia*. [2005] Series C No. 122 (Inter-American Court of Human Rights); *Ituango Massacres v. Colombia.* [2006] Series C No. 148 (Inter-American Court of Human Rights).
[107] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 127, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].
[108] *Ibid. para. 118.*
[109] *Ibid. para. 119.*
[110] *Ibid. para. 120.*
[111] *Ibid. para. 149.*

Similarly, the Court elucidates the duty of States to establish suitable mechanisms for the supervision and monitoring of specific activities to protect human rights from adverse effects. In doing so the Court has further extended such duties also to environmental protection by placing particular emphasis on the obligation to monitor the preservation of the territories of indigenous communities[112]. Building upon the recognition of the International Court of Justice that States must ensure, as part of the duty of prevention, the compliance to and implementation of environmental protection mechanisms and the monitoring of public and private entities' activities, the Court posits that States bear the responsibility to supervise and monitor activities within their jurisdiction that could potentially cause significant environmental damage, including outside of their territority[113].

As such, States are fundamentally required to incorporate robust independent monitoring systems, encompassing both preventive and investigative measures, as well as measures to rectify potential abuses through punishment and redress[114]. Nonetheless, in the Court's perspective and in alignment with the "Guiding Principles on Business and Human Rights", although States have a duty to supervise and monitor activities entailing potential environmental harm, businesses should also preemptively respect and protect human rights, taking steps to prevent and mitigate the potentially adverse human rights impacts of their activities.[115]

These acknowledgments underscore the primary role of the precautionary principle in the definition of prevention policies. In environmental matters, this principle refers to the measures that must be taken in cases where there is no scientific certainty about the impact that an activity could have on the environment. While this principle is recognised in the domestic law of most of the region[116], the Court reaffirms the obligation of states to act with due diligence and to *"take effective measures to prevent severe or irreversible damage"*[117] to the environment and violations of human rights under the Convention.

1.3. Obligations related to preventively minimising the negative consequences of environmental flight situations

In the realm of disaster prevention, the principle of 'preparedness' assumes a pivotal role. This principle encompasses a spectrum of measures, spanning from comprehensive risk assessments and awareness campaigns to the concrete delineation of roles and responsibilities in anticipation of

[112] *Ibid. para. 152.*
[113] *Ibid. para. 153-154.*
[114] *Ibid. para. 154.*
[115] *Ibid. para. 155.*
[116] *Ibid. para. 178.*
[117] *Ibid. para. 180.*

potential disasters. States are obligated to proactively implement such measures to mitigate the potential adverse effects of environmental harm.[118]

Within this framework, the Inter-American Court of Human Rights has emphasised several duties aimed at minimising the negative consequences of potential environmental displacement situations. The duty to mandate and endorse environmental impact assessments stands out as a crucial step before initiating any activity. Emerging mainly in the Inter-American Court's case-law in relation to activities executed within the territories of indigenous communities, the obligation to conduct environmental impact assessments also applies to all those activities deemed as potentially damaging for the environment.

For what concerns impact assessments in indigenous lands, the Court has emphasised the protective nature of environmental impact assessment in ensuring that the survival of indigenous communities is not endangered by limitations placed on their land ownership rights. In cases specifically addressing the territorial rights of indigenous people, the Court has highlighted the intrinsic link between a healthy environment and the protection of human rights, recognising that the safeguarding of their resources and territories is essential for their survival. Yet, the purpose of these assessments fundamentally extends beyond the mere measurement of potential impacts, aiming also to ensure that members of these communities are afforded the opportunity to exercise their right to free, prior, and informed consent to avoid having their livelihoods jeopardised and potentially risk being displaced[119].

Moreover, in highlighting the importance of environmental impact assessments, the Court acknowledges the tight interconnection between the right to a dignified life and the protection of ancestral territory, underscoring the presence of positive obligations for States to ensure that indigenous people have access to a dignified life. As such, States are fundamentally obliged to protect the close relationship between indigenous communities and their lands, especially in light of the fact that the disruption of this equilibrium might expose them to precarious living conditions, and subhuman circumstances, and result in various violations of their human rights, including the right not to be displaced[120].

Nonetheless, the Court acknowledges that this obligation also applies to any activity with the potential for significant environmental damage. As such, the Court has consistently emphasised that these assessments should adhere to relevant international standards and best practices, stressing that for an assessment to be successful it would need to be (1) made before the activity is implemented, (2)

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[118] Ammer, M. and Nowak, M. (2010). *Legal Status and Legal Treatment of Environmental Refugees*. [online] *Intergovernmental Panel on Climate Change*, Germany: Federal Environment Agency, pp.1–14. Available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6671 [Accessed 2 Jan. 2023].

[119] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 48, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].

[120] *Ibid. para. 62-64.*

carried out by independent entities focusing on (3) evaluating the cumulative impact of interrelated projects, and guarantee the (4) participation of interested parties and the (5) respect for the traditions and cultures of indigenous peoples.

Additionally, the Opinion extends the scope of Article 26 of the Convention to the obligation of States to cooperate in order to protect economic, social, and cultural rights.[121] Building upon several provisions of the Protocol of San Salvador, the Court emphasises that concerning activities with potentially dangerous environmental consequences, cooperation between the State of origin and those who are potentially affected is essential to implement preventive and mitigative measures.[122] In order to minimise damages, the obligation to notify immediately about imminent disasters is of central importance[123]. This duty to inform involves the prior and timely notification and consultation of States that may potentially face significant environmental harm due to activities within another State's jurisdiction.[124]

While the Court does not settle on whether the obligation to inform also extends to the consequences of environmental damage, it is in the best interest of States to apply such extensive interpretation. In fact, in the case of environmental flight resulting from environmental harm - with or without transboundary damage - respecting the obligation to inform neighbouring States of a potential inflow of environmental refugees is beneficial to all parties. On the one hand, it benefits directly to the receiving States as it allows for its preparation to effectively welcome refugees on its territory and guarantee that their fundamental rights are being respected to the extent of the circumstances. On the other hand, in informing its neighbours, the State of origin avoids any type of diplomatic tension that might arise as a result of the inflow of refugees. In fact, as recognised by the Court, *"displacements caused by environmental deterioration frequently unleash violent conflicts between the displaced population and the population settled on the territory to which it is displaced"*[125]. Therefore, by exercising its obligation to inform, the State of origin is debunking the idea that the displacement is designed to destabilise its neighbour's territory. Eventually, the obligations to notify and cooperate are instrumental for States not only to respect their prevention duty but also to take the necessary mitigation measures.

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[121] *Ibid. para. 181.*
[122] *Ibid. para 182.*
[123] Ammer, M. and Nowak, M. (2010). *Legal Status and Legal Treatment of Environmental Refugees*. [online] *Intergovernmental Panel on Climate Change*, Germany: Federal Environment Agency, pp.1–14. Available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6671 [Accessed 2 Jan. 2023].
[124] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 187, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].
[125] *Ibid. para. 66.*

1.4. Obligations related to mitigating environmental flight situations' impact to prevent displacement

Mitigation of environmental disasters is paramount for minimising their impact, particularly concerning human rights. These disasters pose significant threats to human lives, livelihoods, health, and property, often disproportionately affecting vulnerable communities. By implementing mitigation measures, the severity of disasters can be reduced. This, in turn, helps protect the rights of individuals and communities, ensuring their right to life, health, food, water, housing, and a healthy environment. Under international environmental law, obligations with regard to the mitigation of environmental damages are limited. For example, general provisions regarding compensation do not exist and must be deduced from principles of state responsibility.[126] As outlined previously, the Advisory Opinion serves as a basis for understanding what such responsibilities are. While the Court refers to States' duty *"to compensate the victims for the negative consequences"*[127], it does not provide more details as to what this compensation should look like. Nevertheless, the Court establishes general mitigation obligations that States must abide by in order to contain damages.

According to the Court, the identification and implementation of mitigating measures[128] must be guided by the States' obligation to cooperate. By arguing in favour of this point, the Court's Advisory Opinion fundamentally identifies an obligation for States to promote proactive measures for the mitigation of significant environmental damage swiftly and effectively. Further, even in the case where environmental damage occurs despite the necessary preventive measures being implemented, such obligation requires States to promptly mitigate its impact through the appropriate mitigation strategies.[129] In this regard, the Court establishes a non-exhaustive list of the measures that States should adopt:

> *"(i) clean-up and restoration within the jurisdiction of the State of origin;*
>
> *(ii) containment of the geographical range of the damage to prevent it from affecting other States;*
>
> *(iii) collection of all necessary information about the incident and the existing risk of damage;*

[126] Ammer, M. and Nowak, M. (2010). *Legal Status and Legal Treatment of Environmental Refugees*. [online] *Intergovernmental Panel on Climate Change*, Germany: Federal Environment Agency, pp.1–14. Available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6671 [Accessed 2 Jan. 2023].
[127] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 118, Inter-American Court of Human Rights (IACtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].
[128] *Ibid. para. 187.*
[129] *Ibid. para. 172.*

(iv) in cases of emergency in relation to an activity that could produce significant damage to the environment of another State, the State of origin should, immediately and as rapidly as possible, notify the States that are likely to be affected by the damage".[130]

Having been notified, the "affected or potentially affected" States are required to implement measures to mitigate, and even eliminate, the consequences of the damage.[131] In this regard, in situations of environmental flight, it seems like notifying neighbour countries for which there is a possibility of an inflow of EDPs, should stand as an obligation in order to respect the principle of preparedness for these countries and guarantee the best possible conditions of reception for the victims of environmental damages. This proactive approach therefore not only safeguards the environment but also upholds the rights and well-being of individuals and communities vulnerable to displacement due to environmental change. States' obligations to receive victims of environmental change will be later analysed.

Furthermore, stressing the necessity for States to respond to environmental emergencies, the Court also deems it necessary for States of origin to implement contingency plans. Understood as comprehensive strategies designed to prepare for and respond to potential environmental emergencies, contingency plans are composed of activities and procedures geared to the mitigation of risks and the ensuring of safety. Not strictly concerning States of origin, contingency plans also find their strength in the cooperation with other potentially-affected States as well as international actors.[132] As such, these plans typically envisage measures for prevention, preparedness, response, and recovery viewed through the lenses of ad-hoc approaches tailored to diverse scenarios. Among these measures, those concerning the mitigation of human mobility for environmental damage are crucial to clarify the obligations of States of origin and affected states in the area of displacement. Notably, because of the capacity of environmental disasters to force people to migrate, the absence of proper planning and preparation for environment-related population movements can exacerbate vulnerabilities and create additional risks for affected communities. In the framework of contingency plans, measures geared at addressing human mobility — such as relocation assistance or cooperation among affected states and international organisations — can help minimise adverse effects of displacement, ensuring a more cohesive and effective response in promoting resilience in the face of environmental hazards and safeguarding of human rights.

2. States' duty to cope with environmental flight

Preventing or mitigating environmental damage is essential and can avoid larger and enduring consequences on both the environment and the human rights of affected communities. Particularly, in

[130] *Ibid.*
[131] *Ibid.*
[132] *Ibid. para. 171.*

the context of environmental flight situations, individuals possess the inherent right to remain in their countries. Numerous international legal instruments acknowledge and uphold the right of individuals to select their place of residence, implicitly affirming the existence of the right to avoid displacement[133]. In some cases, environmental disasters, whether sudden or slow-onset events, lead to the displacement of populations and therefore to the violations of their fundamental human rights. As previously identified, such environmental flight results from situations of environmental change that significantly impact individuals' lives, compelling them to leave their habitual places of residence, either moving within the territory of their State of origin or across international borders. As the securitarian migration discourse gains momentum, and in view of the shortcomings of international law in meeting the protection needs of environmentally displaced persons, the study of the Inter-American system provides a valuable perspective on States' obligations to protect these populations.

2.1. Duty to protect internal environmental refugees

According to the 2021 report of the Internal Displacement Monitoring Centre, disaster displacement accounts for 23.7 million people displaced, of which 22.3 million resulted from weather-induced disasters[134]. The number of internationally displaced persons, while accounting for a smaller share of EDPs, is on the rise and could represent 2.8 billion people displaced globally by 2050, according to The Ecosystem Threat Register released in 2023 by the Institute for Economics and Peace[135].

Frequently, internally displaced persons find themselves in precarious positions as they *"have had to weigh up the threats they face against limited resettlement options, in an ongoing context of marginalisation."*[136] These individuals frequently encounter challenges such as limited access to fundamental services, separation from family, incidents of sexual and gender-based violence, human trafficking, discrimination, and harassment.

Fundamentally forced to abandon their homes or usual places of residence, internally displaced individuals often experience a profound disruption of their life plans and loss of property, as well as pervasive impacts on various other rights.[137] Among these, the Commission has extensively

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[133] Stavropoulou, M. (1994). The Right Not to be Displaced. *American University of International Law Review*, 9(3); Morel, M., Stavropoulou, M., & Durieux, J.F. (2012). The history and status of the right not to be displaced. *Forced migration review*, 5-7.

[134] IDMC. (2021). *Global Report on Internal Displacement 2021*. [online] Available at: https://www.internal-displacement.org/global-report/grid2021/ [Accessed 11 Dec. 2023].

[135] Institute for Economics & Peace. (2023). *Ecological Threat Report 2023: Analysing Ecological Threats, Resilience & Peace*. Sydney. Available at: http://visionofhumanity.org/resources [Accessed 11 Dec. 2023].

[136] Few, R., Ramírez, V., Armijos, M.T., Hernández, L.A.Z. and Marsh, H. (2021). Moving with risk: Forced displacement and vulnerability to hazards in Colombia. *World Development*, 144. doi:https://doi.org/10.1016/j.worlddev.2021.105482.

[137] Inter-American Commission on Human Rights (1999). *Third Report on the Situation of Human Rights in Colombia*. Chapter VI, Internal Forced Displacement, Section C, para. 1.; Inter-American Commission on Human Rights (2006). *Violence and Discrimination against Women in the Armed Conflict in Colombia. OEA/Ser.L/V/II. Doc. 67*. para. 85.

emphasised that forced internal displacement may lead to multiple violations of human rights, among which:

> *"i) the right not to be internally displaced; ii) the right to move freely within the territory of the State; iii) the right to choose one's place of residence; iv) the right to personal integrity; v) the right to private and family life; vi) the right to property, and vii) the right to work."*[138]

While facing similar circumstances as refugees when forced to leave their homes, internally displaced persons still exist within the national territory and, as such, they are precluded from availing themselves of the international protections traditionally afforded to refugees under international refugee law.[139] Therefore, as internally displaced individuals are fundamentally precluded from seeking refugee status, in accordance with the American Convention, it is the responsibility of the State to uphold and ensure their human rights without any distinction.

In a maximalist understanding, environmental displacement is not only a manifestation that human rights, notably the right to a healthy environment, have been violated but also further violates the fundamental human rights of individuals. In fact, the right not to be displaced is inherently attached to the freedom of movement and residence. At the international level, while some legal experts interpret States' duty to respect the right not to be displaced as being recognised within the Guiding Principles on Internal Displacement, such obligation lacks implementation power, due to the non-binding character of the instrument[140].

Within the Inter-American System, Article 22(1) of the American Convention recognises the right to be protected against any form of internal displacement as part of the right to live in a place of one's choosing with the territory of a State. Freedom of movement and residence, enshrined within Article 22, were further interpreted in the Court's case law[141] and by the Commission[142]. Their interpretation has led to recognise that States under the Inter-American System are obliged not to undertake any measure that could potentially lead to internal displacement, as well as to guarantee that third parties do not cause such displacement in their territories. Although these interpretations have been developed in the context of forced displacement resulting from violence and conflict, the same

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[138] *Ibid.*

[139] Inter-American Commission on Human Rights (2013). *Truth, Justice and Reparation - Report on the Situation of Human Rights in Colombia. OEA/Ser.L/V/II. Doc.49/13*. [online] para. 539. Available at: https://www.refworld.org/reference/countryrep/iachr/2013/en/114041 [Accessed 27 Feb. 2024].

[140] Morel, M., Stavropoulou, M., & Durieux, J.F. (2012). The history and status of the right not to be displaced. *Forced migration review*, 5-7.

[141] *Santo Domingo Massacre v. Colombia*. *Preliminary Objections, Merits y Reparations*. [2012] Series C No. 259, para. 255. (Inter-American Court of Human Rights); *Vélez Restrepo and Family Members v. Colombia. Preliminary Objection, Merits, Reparations and Costs.* [2012] Series C No. 248, para. 220. (Inter-American Court of Human Rights); *Valle Jaramillo v. Colombia*. *Merits, Reparations and Costs*. [2008] Series C No. 192, para. 138. (Inter-American Court of Human Rights); *Ituango Massacres v. Colombia.* [2006] Series C No. 148 (Inter-American Court of Human Rights).

[142] Inter-American Commission on Human Rights (2019). *Principios Sobre Políticas Públicas De Memoria En Las Américas*. [online] Available at: https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-3-19-es.pdf [Accessed 27 Feb. 2024].

standards are applicable in the case of environmental flight. In particular, in *Massacre de Mapiripán v. Colombia*, the Court stressed that States, according to the American Convention, are obliged not just to prevent displacement but also to guarantee conditions conducive to the safe return of individuals to their homes.[143] This case highlighted that the right to remain encompasses more than merely safeguarding against forced displacement; it also entails the responsibility of States to create an environment where people can lead lives of dignity and security[144]. Furthermore, in the *Ituango vs. Colombia case*, the Court elaborated on these duties, noting that States must both abstain from directly infringing upon individuals' rights to remain and freedom of movement and take proactive measures to create an environment conducive to the full realisation of these rights. This ruling underscored the significance of implementing policy frameworks to aid internally displaced persons and ensure the secure return and resettlement of those experiencing internal displacement.[145]

In light of the principle of interdependence and indivisibility of human rights, such obligation has been reaffirmed by the Court in its 2017 Advisory Opinion on the environment and human rights, where the Court clarifies that States have the duty to prevent environmental damage and to provide "the necessary conditions for the full enjoyment and exercise of [rights]"[146] in relation to their obligation to ensure the right to life and personal integrity[147]. Therefore, States must take all measures available to minimise displacement in the first place and to protect the rights of people on the move in the context of environmental change, as highlighted in the Resolution 3/21 of the Inter-American Commission on Human Rights and the Special Rapporteur on Economic, Social, Cultural, and Environmental Rights.[148] Failure to do so may lead to violations of other fundamental rights, such as the right to life.[149] In line with the Court's interpretation of States' duty to protect the right to life with regard to environmental damage, States thus have the secondary obligation *"to compensate the victims for the negative consequences"*[150], including when such consequences take the form of forced displacement.

Historically, the Commission has voiced apprehension about the rights of internally displaced persons following environmental catastrophes, with a particular focus on communities grappling with racial

[143] *Mapiripán Massacre v. Colombia*. [2005] Series C No. 122 (Inter-American Court of Human Rights)
[144] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, Inter-American Court of Human Rights (IACrtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024]
[145] *Ituango Massacres v. Colombia.* [2006] Series C No. 148 (Inter-American Court of Human Rights).
[146] *Ibid. para. 108.*
[147] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, Inter-American Court of Human Rights (IACrtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].
[148] Inter-American Commission on Human Rights (2021). *Climate Emergency Scope of Inter-American Human Rights Obligations. RES 3/2021*. [online] Available at: https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf [Accessed 27 Feb. 2024].
[149] *Mapiripán Massacre v. Colombia*. [2005] Series C No. 122 (Inter-American Court of Human Rights); *Ituango Massacres v. Colombia.* [2006] Series C No. 148 (Inter-American Court of Human Rights).
[150] *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, para. 118. Inter-American Court of Human Rights (IACrtHR), 7 Feb. 2018, https://www.refworld.org/jurisprudence/caselaw/iacrthr/2017/en/123157 [Accessed 15 Feb. 2024].

discrimination and socioeconomic marginalisation.[151] In one particular instance, following a series of disasters in 2017, the Commission called upon the institution of shared responsibility and collective action mechanisms among States in the Americas to foster assistance to those affected by displacement.[152] In that context, the Commission established that such mechanisms should entail measures to provide humanitarian aid and facilitate the recovery of — or compensation for — lost property in alignment with the Guiding Principles on Internal Displacement. Furthermore, the Commission underscored that, given the escalating severity of the climate emergency, such measures should reinforce the long-term preparedness and resilience of both States and communities.[153] Nonetheless, while the obligations for States of origin are defined within the Inter-American system, two questions within the context of disaster mitigation measures remain unaddressed. Firstly, are third States obligated to provide humanitarian aid only upon the request of the concerned State, or do they possess the right to offer and deliver humanitarian aid without invitation, even against the will of the concerned State? Secondly, is the concerned State mandated under international law to request or accept humanitarian aid?

As a narrow focus on the Inter-American Human Rights System would not provide an answer to these questions, it is necessary to focus the analysis on the precepts of international law. In the wider framework of international law, the primary responsibility for providing humanitarian aid commonly rests on the concerned State — the State of origin. Although not featuring any established legal obligations, such a framework has recently started to suggest that third States should contribute, based on their capacities, for disaster mitigation. Nonetheless, the provision of aid by third States is still contingent on the approval of the concerned State which, at the time of writing, is not mandated by law to request humanitarian aid and the imposition of humanitarian aid currently requires action through the UN Security Council. Certain international instruments are however evolving to include an obligation for the country of origin to accept aid in the case in which it is unable to protect its population from the consequences of environmental harm.[154]

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[151] Kromm, C. and Sturgis, S. (2008). *Hurricane Katrina and the Guiding Principles on Internal Displacement a Global Perspective on a National Disaster, Institute for Southern Studies*. [online] p.13. Available at: https://www.brookings.edu/wp-content/uploads/2012/04/0114_ISSKatrina.pdf [Accessed 27 Feb. 2024].

[152] Inter-American Commission on Human Rights (2017). *Expresses Solidarity with People Affected by Earthquakes and Hurricanes in Countries of the Region and Urges States and the International Community to Take Steps to Address the Situation of Those Affected*. [online] Available at: https://www.oas.org/en/iachr/media_center/PReleases/2017/139.asp. [Accessed 27 Feb. 2024].

[153] *Ibid*.

[154] Ammer, M. and Nowak, M. (2010). *Legal Status and Legal Treatment of Environmental Refugees*. [online] *Intergovernmental Panel on Climate Change*, Germany: Federal Environment Agency, pp.1–14. Available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6671 [Accessed 2 Jan. 2023].

2.2. Duty to repair and protect international environmental refugees against future violations

Much like internally displaced individuals, internationally displaced peoples tend to face similar threats that eventually force them to abandon their habitual place of residence. As such, the following section will focus on identifying the specific challenges and rights related to international environmental refugees, as well as the obligations arising for States in this regard.

As identified in the literature review, international refugee law does not delineate binding and universally accepted obligations and principles for States to protect persons displaced across borders as a result of environmental change. Turning to the Inter-American System, the Court recognised the right of all persons to seek and be granted asylum[155] as an obligation rooted in customary international law[156] that is crystallised in both the American Convention and in the American Declaration of the Rights and Duties of Man. According to the Court's legal interpretation, this right is governed not only by the Refugee Convention and its 1967 Protocol but also by the Cartagena Declaration, which includes a more comprehensive definition of the term refugee.[157]

In particular, building upon the precedents set by the organisation of African Unity and the Inter-American Commission on Human Rights, the 1984 Cartagena Declaration deemed it necessary *"to consider enlarging the concept of a refugee […] hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts,* ***massive violation of human rights or other circumstances which have seriously disturbed public order****."*

Having played a pivotal role in shaping the national legislation of more than fifteen States in Central and South America, the Cartagena Declaration — and in particular its articulation of the right to seek and receive asylum — was further endorsed by the Court awarding the Declaration with authoritative power for all OAS members.[158] The Court notably went as far as acknowledging that the definition of

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[155] See Article 22.7 and 8 of the American Convention on Human Rights and Article 27 of the American Declaration of the Rights and Duties of Man.

[156] *Advisory Opinion OC-21/14 of August 19, 2014* : Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, para. 73-74. (IACrtHR). https://www.refworld.org/cases,IACRTHR,54129c854.html [Accessed 15 Feb. 2024]; *Pacheco Tineo Family v. Plurinational State of Bolivia*. [2013] Series C, para. 137. (Inter-American Court of Human Rights).

[157] *Advisory Opinion OC-25/18 of May 30, 2018* : The Institution of Asylum and its Recognition as a Human Right in the Inter-American Protection System, para. 131. (IACrtHR). https://www.corteidh.or.cr/docs/opiniones/seriea_25_ing.pdf [Accessed 15 Feb. 2024].

[158] *Advisory Opinion OC-21/14 of August 19, 2014* : Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, para. 77-79. (IACrtHR). https://www.refworld.org/cases,IACRTHR,54129c854.html [Accessed 15 Feb. 2024]; *Advisory Opinion OC-25/18 of May 30, 2018* : The Institution of Asylum and its Recognition as a Human Right in the Inter-American Protection System, para. 131-132. (IACrtHR). https://www.corteidh.or.cr/docs/opiniones/seriea_25_ing.pdf [Accessed 15 Feb. 2024].

‘refugee’ must address current challenges in protection deriving from other patterns of displacement, a recognition that led the UNHCR to applaud the crucial role of the Court in interpreting the Cartagena definition.[159]

In this context, several scholars and experts have argued that individuals displaced across borders because of environmental emergencies fall under the Cartagena definition. This inclusion could be justified under the auspice of “*massive violations of human rights or other circumstances which have seriously disturbed public order*”, as environmental disasters might have the potential to lead to or exacerbate significant human rights violations — notably the right to life — as well as to amplify disruptions to public order — such as the breakdown of basic safety and security functions by the State — fundamentally jeopardising the life, security, or freedom of individuals, and forcing them to seek refuge elsewhere.[160]

Concerning the former, and as outlined by the Court itself, the characterisation of ‘massive’ in *“massive violations of human rights”* pertains to the scale of the violation, irrespective of its duration and its interconnection with other events.[161] For instance, environmental emergencies introduce significant concerns for human rights as their impacts extend beyond the direct victims, influencing substantial portions of the population and qualifying as massive violations.

Concerning instead the latter, *“other circumstances which have seriously disturbed public order”* tend to encompass all those events associated with environmental emergencies that force people to flee their homes, and, although the Court has not yet provided definitive guidance on this aspect, other analyses have started emerging. Notably, recent examinations by the UNHCR have compared the language of the 1969 organisation of African Unity (OAU) Convention with the Cartagena definition since the Cartagena Declaration's *“serious disturbance to public order”* provision is derived from the OAU Convention's Article I(2) definition.[162] In the UNHCR’s view, as the concept of ‘public order’ should be construed as a state's responsibility to safeguard *“the rights to life, physical integrity, and liberty of people within the society”*, these rights are considered inherent to the public order itself.[163] As such, the UNHCR has clarified that *“whether a disturbance to public order stems from human or*

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[159] UNHCR (2023). *International Protection Considerations with Regard to People Fleeing Colombia*. [online] p.79. Available at: https://www.refworld.org/docid/64cb691c4.html [Accessed 27 Feb. 2024]; Centro por La Justicia y el Derecho Internacional (2022). *Input to UN Special Rapporteur on Climate Change*. [online] Available at: https://www.ohchr.org/sites/default/files/documents/issues/climatechange/cfi-hrc-53-%20session/submissions/2022-11-28/CEJIL.docx [Accessed 27 Feb. 2024].

[160] Inter-American Commission on Human Rights (2013). *Truth, Justice and Reparation - Report on the Situation of Human Rights in Colombia. OEA/Ser.L/V/II. Doc.49/13*. [online] para. 539. Available at: https://www.refworld.org/reference/countryrep/iachr/2013/en/114041 [Accessed 27 Feb. 2024].

[161] *"Las Dos Erres" Massacre v. Guatemala*. [2009] Series C, para. 73, 79, 152. (Inter-American Court of Human Rights).

[162] Hansen-Lohrey, C. (2023). *Assessing Serious Disturbances to Public Order under the 1969 OAU Convention, Including in the Context of disasters, Environmental Degradation and the Adverse Effects of Climate Change*. [online] UNHCR, p.1.n.11. Available at: https://www.refworld.org/docid/651422634.html [Accessed 27 Feb. 2024].

[163] *Ibid. at 46.*

other causes is not determinative for concluding a serious disturbance of public order; the central concern is the effect of a given situation."[164]

With the growing acknowledgment that the definition outlined in the Geneva Convention relating to the status of refugees applies to those displaced due to environmental threats[165], a State's response or lack thereof in addressing such effects, including displacement, becomes crucial in determining refugee status. Indeed, as further underlined by the UNHCR, a "serious disturbance to public order" does not rely on an official declaration of a public emergency and a refusal of protection to vulnerable communities in the absence of a State's acknowledgment of its incapacity would only worsen the precarious situation of those individuals in need of protection.[166]

In its Advisory Opinion on the Environment and Human Rights, the Court establishes States' secondary obligations to provide reparations to victims of environmental harm, as demonstrated previously. The Court recognises the extraterritoriality of this obligation. This means that States — when they are responsible for transboundary environmental harm arising from activities carried out on their territories — have the duty to repair the victims of such harm. While the Court does not specify what reparations should include, international law limits this secondary obligation to natural restitution or compensation.[167] Natural restitution is not always possible, depending on the extent of the damage to the environment, making it impossible for displaced populations to exercise their right to return. Therefore, one could argue that, in the context of environmental harm leading to environmental flight, third States could compensate for their act or omissions that lead to the harm, by receiving refugees and awarding them with temporary protection. However, it has so far not been determined whether States causing environmental flight by creating the conditions of such displacement would be considered as 'flight-causing' States, or what their obligations in this regard could be.[168] This is all the more complex that climate change is the result of several countries. In this respect, attributing a level of responsibility to each State contributing to slow-onset events resulting in environmental displacement could represent a burdensome task for a Court.

Consequently, while States' obligations with regard to receiving international environmental refugees can be interpreted under the Convention, they would benefit from further clarification from the Court

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[164] UNHCR (2020). *Legal Considerations regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters*. [online] Available at: https://www.refworld.org/docid/5f75f2734.html [Accessed 27 Feb. 2024].

[165] Hansen-Lohrey, C. (2023). *Assessing Serious Disturbances to Public Order under the 1969 OAU Convention, Including in the Context of disasters, Environmental Degradation and the Adverse Effects of Climate Change*. [online] UNHCR. Available at: https://www.refworld.org/docid/651422634.html [Accessed 27 Feb. 2024].

[166] Weerasinghe, S. (2018). *In Harm's Way: International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change*. [online] UNHCR, pp.81–82. Available at: https://www.refworld.org/docid/5c2f54fe4.html [Accessed 27 Feb. 2024].

[167] Ammer, M. and Nowak, M. (2010). *Legal Status and Legal Treatment of Environmental Refugees*. [online] *Intergovernmental Panel on Climate Change*, Germany: Federal Environment Agency, pp.1–14. Available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6671 [Accessed 2 Jan. 2023].

[168] *Ibid.*

to potentially further ensure that international EDPs' rights are protected. With this being said, the international refugee law principle of non-refoulement still stands as a bulwark against the violations of the rights of international EDPs, no matter if they meet the criteria of the refugee definition.

Both the American Convention and the American Declaration recognise the principle of non-refoulement respectively in Article 22(8) and XXVII. Additionally, the jurisprudence of the Court has further interpreted this principle, for example in the *Pacheco Timeo Family v. Bolivia* case and in the *Andrea Mortlock v. United States* case, wherein it ruled that *non-refoulement* does not exclusively apply to refugees and asylum seekers, but extends to all persons whose *"life, integrity and/or freedom are in danger of being violated"*[169], as well as to any individual who is in a state of human mobility, regardless of whether they are seeking asylum or not, and in any legal process that could lead to their return to their country of origin or a third country.[170] Such a human-rights-based interpretation of the prohibition of pushbacks provides a legal basis for international environmental refugees, who lack protection under the Refugee Convention and the Protocol. Certainly, if an environmental refugee is forcibly returned to their country of origin and their health deteriorates as a result, it could potentially be considered *refoulement*, which constitutes a breach of international human rights law.[171]

At the international level, the decision of the Human Rights Committee in the *Ioane Teitota vs. New Zealand case* established that *"The obligation not to extradite, deport or otherwise transfer, pursuant to article 6 of the Covenant, may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status. States parties must, however, allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against refoulement. Therefore, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin"*.[172] Although the claimant's application was rejected, the Human Rights Committee's decision is deemed groundbreaking as it provides — for the first time in an asylum case related to the environment — further interpretation of the non-refoulement principle, in line with the IACtHR jurisprudence. Nevertheless, such a broad interpretation of the non-refoulement principle applied in the context of environmental flight has yet to be universally accepted and currently remains confined to the jurisdiction of the Inter-American Court.

Eventually, although some States' obligations to cope with environmental flight may be interpreted, they require further clarification from the Court. In this respect, at the beginning of 2023, Chile and

[169] *Pacheco Tineo Family v. Plurinational State of Bolivia*. [2013] Series C, para. 135. (Inter-American Court of Human Rights).
[170] *Djamel Ameziane v. United States*. Report No. 29/20. Case 12.865. Merits. [2020] paras. 263-266. (Inter-American Court of Human Rights).
[171] *Andrea Mortlock v. United States. Admissibility and Merits.* Report No. 63/08, Case 12.534. [2008] para. 94. (Inter-American Court of Human Rights).
[172] *Ioane Teitiota vs. New Zealand*. [2020] para. 9.3. (Human Rights Committee).

Colombia submitted a joint advisory opinion to the Court, with the objective of clarifying the scope of state obligations in addressing the climate emergency within the framework of international human rights law.[173] In particular, they ask the Court regarding the collaboration between states in addressing climate change in the region. The emphasis is particularly on clarifying the shared and differentiated obligations among the States of the region, notably concerning their role in ensuring reparation measures and addressing migration exacerbated by climate effects in the area. The Court is thus presented with a distinctive opportunity to strengthen states' duties in safeguarding the rights of environmental refugees, both internally and across borders.[174]

In spite of a general lack of legal recognition of EDPs which undermines their protection, our analysis of the Inter-American System of Human Rights allowed for the identification of some State obligations — be it in terms of duty to prevent environmental flight situations or to cope with disaster flight resulting from environmental change. Besides their existence, these obligations are hardly sufficient to effectively protect the rights of environmentally displaced persons, notably because they were not originally coined to address phenomena of environmental displacement, but rather are part of a broader framework to address general human rights implications of environmental change. While recognition of the right to a healthy environment at the national and regional levels represents an important first step — from which positive enforcement duties of states can already be identified[175] — towards ensuring the protection of human rights, including in the context of environmental flight, ensuring its protection in practice remains paramount. In fact, although there have been advancements in legislation concerning both human rights and environmental protection, the pervasive social and economic obstacles prevalent in the region hinder full compliance. This is due to the prioritiseation of socioeconomic necessities over environmental protection.[176] The same goes for its implementation at the international level. Enhancing implementation necessitates refining and revising national legal frameworks, ensuring procedural safeguards for judicial accountability and efficient avenues for redress, as well as an active role of jurisdictions in progressively interpreting, clarifying, and enforcing the right, ensuring its continued relevance and effectiveness.[177] Such implementation efforts are not only necessary at the national and regional level but also at the international level to attain a

[173] Climate Change Litigation. (2023). *Request for an Advisory Opinion on the Scope of the State Obligations for Responding to the Climate Emergency*. [online] Available at: https://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-scope-of-the-state-obligations-for-responding-to-the-climate-emergency/ [Accessed 24 Aug. 2023].

[174] International organisation for Migration (2023). *Five Key Considerations to Address Environmental Mobility from a Human Rights Perspective*. [online] Available at: https://reliefweb.int/report/world/five-key-considerations-address-environmental-mobility-human-rights-perspective [Accessed 25 Feb. 2024].

[175] Tigre, M.A. (2024). *The Right to a Healthy Environment in Latin America and the Caribbean: Compliance through the Inter-American System and the Escazú Agreement*. [online] Cambridge University Press. Available at: https://www.cambridge.org/core/books/international-courts-versus-noncompliance-mechanisms/right-to-a-healthy-environment-in-latin-america-and-the-caribbean/BD7A878B25E63FD6720A9A157C9FA1C8 [Accessed 25 Feb. 2024].

[176] May, J. (2020). Environmental Rights: Recognition, Implementation and Outcomes. *SSRN Electronic Journal*. doi:https://doi.org/10.2139/ssrn.3687070.

[177] Tigre, M.A. (2023). International Recognition of the Right to a Healthy Environment: What Is the Added Value for Latin America and the Caribbean? *AJIL Unbound*, [online] 117, pp.184–188. doi:https://doi.org/10.1017/aju.2023.28.

healthy environment through policies that not only emphasise environmental justice and law enforcement but do not discriminate against perpetrators.[178]

In fact, whether we are talking about climate change — for which developed countries are historically responsible, whilst developing nations are grappling with its disproportionate consequences, despite bearing minimal culpability — or about corporate actors damaging natural habitats through their reckless activities, environmental changes are deeply anchored in the globalised dynamics of our capitalist economies, either by their origin or by the impact they have.

Consequently, ensuring the right to a healthy environment requires not only international cooperation but also international mechanisms of accountability to both prevent environmental change and mitigate their impacts with a view of protecting the environment and human rights.[179] In this regard, the recognition of ecocide as an international crime has been proposed to fill the voids of current international law in effectively protecting the environment from harm and in responding to such ecocidal acts when they occur. In fact, the nature of the proposed crime of ecocide has the potential to reinforce environmental law as a mechanism for safeguarding the entitlement to a healthy environment, by offering a legal avenue through which its violations may be criminalised, prosecuted, and punished. This duty to criminalise, prosecute, and penalise violations of human rights stems from the widely recognised principle of *ubi jus, ibi remedium*, indicating that where a legal framework establishes a right, there should be corresponding avenues for redress in case of infringement. With the inclusion of the right to a healthy environment in international soft law, there is an urgent need for the establishment of such legal mechanisms to uphold and give practical effect to this right.[180] The international recognition of the crime of ecocide would open these avenues and by the same occasion would grant the right to a healthy environment with the status of *jus cogens* that it deserves.[181]

[178] Aida, M., Abdul Muthalib Tahar and Davey, O. (2023). Ecocide in the International Law: Integration Between Environmental Rights and International Crime and Its Implementation in Indonesia. *Advances in social science, education and humanities research*, pp.572–584. doi:https://doi.org/10.2991/978-2-38476-046-6_57.
[179] UN General Assembly (1972). United Nations Conference on the Human Environment, A/RES/2994. [online] Principle 22. Available at: https://www.refworld.org/legal/resolution/unga/1972/en/9934 [Accessed 25 Feb. 2024].
[180] Mwanza, R. (2023). The Right to a Healthy Environment as a Catalyst for the Codification of the Crime of Ecocide. *Cambridge University Press*, [online] 117, pp.189–193. doi:https://doi.org/10.1017/aju.2023.29.
[181] Berat, L. (1993). Defending the Right to a Healthy environment: toward a Crime of Genocide in International Law. *Boston University International Law Journal*, 11, pp.327–348.

Chapter 2: The avenues opened by the legal recognition of ecocide

Criminology has often served a pivotal function in aligning the law with contemporary needs, striving for fairness and inclusivity in rights and justice. This field challenges conventional notions and categorisations of crime, deviance, and harm, advocating for alternative frameworks to redirect attention and regulation.[182] An emphasis on 'green criminology', focusing on establishing robust mechanisms for environmental justice, could endorse the implementation of novel international legal measures to counter present-day ecocidal patterns.[183]

In recent years, there have been proposals to add ecocide as a fifth crime against peace to address several challenges confronting international environmental law, as highlighted in the UN Report on Gaps in international environmental law. These challenges include, among others: (i) the absence of standardised international environmental law principles; (ii) inadequate enforcement and implementation procedures; (iii) insufficient political commitment and engagement from stakeholders and civil society; (iv) limited reporting, knowledge gaps, and data inadequacy exacerbated by the high costs of sampling and analysis and a scarcity of scientific experts, particularly in developing nations; (v) the lack of review mechanisms and global liability and compensation frameworks, such as the exclusion of liability and compensation for climate-related damages from the Paris Agreement.[184]

The existing legal framework falls significantly short of safeguarding the environment adequately to generate substantial change. The scarcity of nations with ecocide laws makes it unfeasible to adopt the coordinated, cohesive strategy needed to address the profound challenges posed by environmental degradation. Internationally, Article 8(2)(b)(iv) of the Rome Statute prohibits environmental harm that occurs 'more by accident than design'[185], yet this provision lacks clarity regarding the actus reus, imposes a high mens rea threshold, and is limited to instances of armed conflict.[186]

During peacetime, there exists an international legal framework for addressing environmental crimes. Nonetheless, its mandate is primarily confined to transboundary harm related to the movement of hazardous wastes, as well as illegal activities related to fishing, logging, and wildlife trade. While many domestic jurisdictions have adopted and expanded upon this aspect of international law, eco-crimes can still occur within jurisdictions with weak governance structures lacking the resources

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[182] Nikos, P. and Neva R., G. (2004). *It's Legal but It Ain't Right: Harmful Social Consequences of Legal Industries*. Nikos Passas & Neva R. Goodwin editors ed. doi:https://doi.org/10.3998/mpub.11472.

[183] South, N. (2010), 'The ecocidal tendencies of late-modernity: Transnational crime, social exclusion, victims and rights', in White, R. (ed), Global Environmental Harm: Criminological perspectives, Cullompton: Willan.

[184] Srivastava, M. (2022). Fortifying the Crime of Ecocide through Transitional Justice Mechanisms. Available at: https://voelkerrechtsblog.org/fortifying-the-crime-of-ecocide-through-transitional-justice-mechanisms/ [Accessed 26 Feb. 2024].

[185] Leibler, A. (1992). Deliberate Wartime Environmental Damage: New Challenges for International Law. *California Western International Law Journal*, 23(1).

[186] Kevin Jon Heller and Lawrence, J.C. (2007). The limits of article 8(2)(b)(iv) of the Rome Statute, the first ecocentric environmental war crime. *GIERL*, [online] 20(61). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=979460 [Accessed 27 Feb. 2024].

for prosecution. Moreover, the current scope of international eco-crimes often fails to encompass legalised crimes permitted by state regulations, frequently perpetrated by transnational corporations, leading to extensive destruction of ecosystems and territories.[187] It is evident that much of the environment, *inter alia* air, sea, and weather systems, transcends state borders, resulting in damage that is not contained to any particular jurisdiction. This underscores the crucial need for a unified approach across states, a dimension currently lacking in the existing legal framework.[188]

In light of the above, Mackintosh, Mehta, and Rogers argue that reliance solely on individual states for regulation is inadequate[189], necessitating the establishment of a distinct international provision on ecocide to enhance accountability for significant environmental destruction.[190] The acknowledgement of ecocide as a legal principle marks a significant stride toward confronting profound environmental damage and its resultant impacts. The association between ecocide and displacement traces back to the inception of the concept during the Vietnam War, wherein environmental destruction was employed as a tactic to displace populations and assert territorial control.[191] Nevertheless, it is imperative to acknowledge that ecocide represents one aspect of the multifaceted phenomenon of environmental flight. While ecocide specifically denotes the extensive and irreversible degradation of ecosystems, environmental displacement encompasses a broader array of variables and dynamics. Numerous instances of displacement arise from a convergence of socioeconomic, political, and environmental factors, encompassing ecologically catastrophic events among other triggers. Therefore, while ecocide may serve as a relevant framework for addressing certain cases of displacement directly linked to severe environmental harm, it is not inherently equipped to address the full spectrum of displacement drivers. Yet, it is worth noting that a significant share of environmental displacement does indeed stem from severe environmental harm, which could by definition qualify as ecocide.

1. Defining ecocide: a long-lasting and promising History

1.1. Historical evolution of the notion

The preceding examination of the Inter-American system has provided an in-depth comprehension of a regional standpoint in safeguarding the environment concerning its intrinsic interests and implications for human existence. However, on the global scale, the lack of a systematic approach to

[187] Bronwyn, L. (2015). Timely and Necessary: Ecocide Law as Urgent and Emerging. *The Journal Jurisprudence*, (431).
[188] Kennedy, C. (2023). *Why Is an International Crime of Ecocide necessary?* [online] International Law Blog. Available at: https://internationallaw.blog/2023/06/01/why-is-an-international-crime-of-ecocide-necessary/ [Accessed 26 Feb. 2024].
[189] Mackintosh, K., Mehta, J. and Rogers, R. (2021). Prosecuting Ecocide. [online] Available at: www.project-syndicate.org/commentary/the-icc-should-recognise-ecocide-as-an-international-crime-by-kate-mackintosh-et-al-2021-08 [Accessed 27 Feb. 2024].
[190] Robinson, D. (2022). Ecocide — Puzzles and Possibilities. *Journal of International Criminal Justice*, 20(2). doi:https://doi.org/10.1093/jicj/mqac021.
[191] Glassman, J. (2023). Counter-Insurgency, Ecocide and the Production of Refugees Warfare as a Tool of Modernization | Refuge: Canada's Journal on Refugees. *Canada's Periodical on Refugees*, [online] 12(1). Available at: https://refuge.journals.yorku.ca/index.php/refuge/article/view/21645 [Accessed 25 Feb. 2024].

shielding the environment from human-induced threats has spurred interest in the recognition of a novel perspective. For many, from academics and practitioners to civil society actors, the concept of ecocide emerges as a potential component of the solution.

Although somewhat lacking a universally fixed definition, for the purpose of the following analysis, 'ecocide' will be broadly defined as *"the complete destruction of an area of the natural environment, especially as a result of human activity."*[192] In a broader sense, the concept of ecocide has been present in international law for decades but, more recently, it has re-entered the public fora as a growing body of actors is advocating for its introduction as an international crime. Nonetheless, the concept of ecocide was first recorded by Professor Arthur W. Galston, American plant physiologist and bioethicist.[193] Through his 1970 speech to the Conference on War and National Responsibility, he described atrocities witnessed during the Vietnam War particularly due to the deployment of chemical warfare by the United States to advocate for an international agreement to prohibit ecocide.[194]Galston, who was initially involved in the development of Agent Orange, notably drew a parallel between World War II, which led to the formulation of the crime of genocide, and the Vietnam War, contending that the contrast between the use of Agent Orange and the principles of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare created an imperative for a similar designation concerning ecocide.[195] As such, Galston's contribution informed early advocacy efforts surrounding ecocide, associating it with Agent Orange and characterising it as an act of war.[196]

Nonetheless, since its initial introduction, the concept of ecocide has undergone a process of transformative evolution, with contributions like that of Pettigrew characterising it as the *"significant destruction of an integral part of a specific ecosystem or the unjustifiable degradation of the environment in general."*[197] Such recognition paved the way for further expansive interpretations of the term 'ecocide' that, between the 1970s and 1980s, saw advocates even contemplating its potential inclusion in the Convention on the Prevention and Punishment of Genocide. In a landmark occurrence for the time, in June 1972, representatives from 113 nations convened in Stockholm for the United Nations Conference on the Human Environment, marking the inaugural major UN gathering

[192] Collins Online English Dictionary <https://www.collinsdictionary.com/dictionary/english/ecocide>.
[193] Gauger, A., Pouye Rabatel-Fernel, M., Kulbicki, L., Short, D. and Higgins, P. (2013). *Ecocide Project the Ecocide Project 'Ecocide Is the Missing 5th Crime against Peace' a Report by*. [online] Available at: https://sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf [Accessed 27 Feb. 2024].
[194] Ibid.
[195] See, Zierler, D. (2011). *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think about the Environment*. [online] *JSTOR*. University of Georgia Press. Available at: https://www.jstor.org/stable/j.ctt46n5dg [Accessed 12 Nov. 2022]. See also, Greene, A. (2019b). *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?*[online] FLASH: The Fordham Law Archive of Scholarship and History. Available at: https://ir.lawnet.fordham.edu/elr/vol30/iss3/1/.
[196] Higgins, P. (2010). *Eradicating Ecocide*. Shepheard-Walwyn.
[197] Mcdonnell-Elmetri, Z. (2020). *THE CRIME OF ECOCIDE: THE ANSWER TO OUR ENVIRONMENTAL EMERGENCY?* [online] Available at: https://www.otago.ac.nz/__data/assets/pdf_file/0022/326731/the-crime-of-ecocide-the-answer-to-our-environmental-emergency-828558.pdf [Accessed 27 Feb. 2024].

dedicated to international environmental issues. Among the discussions, the opening speech of Swedish Prime Minister Olof Palme became particularly memorable as he denounced the use of defoliants and herbicides by the United States in Vietnam as ecocide.[198] Building upon such momentum, the Conference even went as far as establishing what became known as the 'Stockholm Declaration': a series of principles and recommendations among which according to which *"The release of toxic substances [...] in quantities or concentrations surpassing the environment's capacity to neutralise them must cease to prevent inflicting severe or irreversible damage upon ecosystems."*[199] Alongside the official negotiation, the 'Peoples Summit' deliberated on the establishment of an ecocide crime, leading to the formation of a Working Group tasked with drafting an 'Ecocide Convention' to address the issue of ecocide comprehensively.[200] Additionally, ecocide acquired a permanent spot in the Environmental Forum, a parallel event for non-governmental organisations, where a certain ambiguity regarding whether ecocide should be classified as an environmental concern or a matter of warfare emerged.[201]

In the same year Richard Falk, American professor emeritus of international law at Princeton University, presented a draft titled 'International Convention on the Crime of Ecocide' which fundamentally extended the scope of ecocide to both peacetime and wartime and incorporated a component related to criminal intent.[202] Exploring three conceptualisations of ecocide, notably as (1) an international crime akin to genocide, (2) a war crime, and (3) actions influencing the environment for military purposes, the study was subsequently included in a UN study evaluating the Genocide Convention's efficacy, stimulating discussion on a proposal to broaden the scope of the Convention by including ecocide and cultural genocide.[203]

Such a choice was driven by the tight interconnection between the historical narratives of ecocide and genocide, a term coined by the Polish jurist Raphael Lemkin who, in 1933, had addressed the

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[198] Gauger, A., Pouye Rabatel-Fernel, M., Kulbicki, L., Short, D. and Higgins, P. (2013). *Ecocide Project the Ecocide Project 'Ecocide Is the Missing 5th Crime against Peace' a Report by*. [online] Available at: https://sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf [Accessed 27 Feb. 2024].

[199] Declaration of the United Nations Conference on the Human Environment. (1972). Principle 6, GA RES 48/14.

[200] Greene, A. (2019). The Campaign to Make Ecocide an International Crime: Quixotic Quest Or Moral Imperative. *Fordham Environmental Law Review*, [online] 30(3), pp.1–48. Available at: https://heinonline.org/HOL/Page?handle=hein.journals/frdmev30&id=279&collection=journals&index= [Accessed 4 Nov. 2022].

[201] Ibid.

[202] See, Falk, R. (1973). Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals. *Bulletin of Peace Proposals*, [online] 4(1), pp.80–96. Available at: https://www.jstor.org/stable/44480206 [Accessed 27 Feb. 2024]. See also, Mcdonnell-Elmetri, Z. (2020). *THE CRIME OF ECOCIDE: THE ANSWER TO OUR ENVIRONMENTAL EMERGENCY?* [online] Available at: https://www.otago.ac.nz/__data/assets/pdf_file/0022/326731/the-crime-of-ecocide-the-answer-to-our-environmental-emergency-828558.pdf [Accessed 27 Feb. 2024].

[203] See, Ruhashyankiko, N. and Genocide, U.S.R. on P. and P. of the C. of (1978). Study of the Question of the Prevention and Punishment of the Crime of Genocide /. *digitallibrary.un.org*. [online] Available at: https://digitallibrary.un.org/record/663583. See also, Greene, A. (2019). The Campaign to Make Ecocide an International Crime: Quixotic Quest Or Moral Imperative. *Fordham Environmental Law Review*, [online] 30(3), pp.1–48. Available at: https://heinonline.org/HOL/Page?handle=hein.journals/frdmev30&id=279&collection=journals&index= [Accessed 4 Nov. 2022].

International Conference for Unification of Criminal Law in Madrid, urging global consensus on prohibiting the destruction - both physical and cultural - of human groups. Genocide, understood by Lemkin as the deliberate destruction of a nation or ethnic group, involving killing its members and undermining its way of life, recognises that destruction can happen because of factors not necessarily associated with direct killing. Similarly to genocide, ecocide can also lead to the destruction of a territory and the undermining of the ways of life of those inhabiting it. As such, Falk's proposal sought to evaluate the Genocide Convention with the objective of including a provision against ecocide. Nonetheless, the support for such a potential extension was constrained by the absence of a legal definition which was considered as an aspect potentially jeopardising the Convention's effectiveness.[204]

1.2. Failed attempts to recognise ecocide at the international level

In international law, the presence of ecocide was recorded since right after the formation of the United Nations and, more specifically, in 1947, when the UN General Assembly tasked the International Law Commission (ILC) with identifying which principles of international law would be recognised in the Charter of the Nuremberg Tribunal, as well as with drafting a code of offences against peace and security on their blueprint.[205] The introduction of Article 26 in the Draft Code Against Peace and Security of Mankind, which stipulated that those wilfully causing or ordering widespread, long-term, and severe damage to the natural environment should face conviction embodied the substantial debates that unfolded concerning the inclusion and scope of laws prohibiting environmental damage in the process.[206] Nonetheless, in response to the criticism received for omitting to include the term 'ecocide' in the text of Article 26, the ILC opted to entirely remove the article from the draft, fundamentally constraining environmental crimes within the Rome Statute to the wider framework of war crimes as outlined in Article 8(2) (b) (iv).[207] Specifically, Article 8(2) (b) (iv) prohibits:

> *"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."*[208]

[204] Ruhashyankiko, N. and Genocide, U.S.R. on P. and P. of the C. of (1978). Study of the Question of the Prevention and Punishment of the Crime of Genocide /. *digitallibrary.un.org*. [online] Available at: https://digitallibrary.un.org/record/663583.
[205] Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal GA Res 177(II) (1947)
[206] Gauger, A., Pouye Rabatel-Fernel, M., Kulbicki, L., Short, D. and Higgins, P. (2013). *Ecocide Project the Ecocide Project 'Ecocide Is the Missing 5th Crime against Peace' a Report by*. [online] Available at: https://sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf [Accessed 27 Feb. 2024].
[207] *Ibid*.
[208] Rome Statute of the International Criminal Court, art 8 (2)(b)(4).

The finalisation of the Rome Statute negotiated during a UN in Rome in 1998, marked a pivotal moment in the establishment of the International Criminal Court. This treaty sought to provide the necessary tools for a collective international commitment to peace following the tragic aftermath of the World Wars. Therefore, the ICC's mandate ended up encompassing the investigation and prosecution of crimes against peace like genocide, crimes against humanity, war crimes, and the crime of aggression. Comprising currently 124 countries, the ICC was empowered to intervene and prosecute when states fail to take necessary action through referrals from State Parties, the United Nations Security Council, or through its own authority with judicial authorisation.[209] Notably, the principle of complementarity positions the ICC as a complement to national judicial systems, which consequently implement domestic legislation to facilitate the action of the ICC.

As such, the perspective of implementing ecocide as an international crime was recognised as holding the potential to swiftly permeate the legislation of State Parties in alignment with the broader jurisdiction of the ICC. In this context, various states started to integrate elements deriving from the original Draft Code Against Peace and Security of Mankind in their national penal code, specifically for what concerns ecocide. Notably, Vietnam's incorporation of the crime of ecocide in its domestic law represented a historical moment in the narrative of ecocide which was followed by similar propositions by Russia and ex-soviet states, as well as by nations like France that have recently contemplated a referendum on introducing a national crime of ecocide.[210] Nonetheless, despite the existence of domestic ecocide laws, their effectiveness remains unverified as the prosecution hinges on various factors like the state's capacity to enforce the law, an impartial judiciary, and adherence to the rule of law underscoring that, while international support for ecocide may be present in the form of domestic laws, their efficacy is significantly compromised by insufficient enforcement and adherence.[211]

1.3. Contemporary Legal Definition of Ecocide

Building upon the momentum surrounding ecocide, in April 2010 Polly Higgins, Scottish barrister, and environmental advocate, submitted a proposition for an international law of ecocide to the United Nations Law Commission which entailed an amendment of the Rome Statute to include a definition of ecocide as *"the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the*

[209] "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>.
[210] See, Penal Code 1990 (Vietnam), art 278. 'Ecocide, destroying the natural environment', whether committed in time of peace or war, constitutes a crime against humanity. See also, Criminal Code 1996 (Russian Federation), art 358.
[211] Mcdonnell-Elmetri, Z. (2020). *THE CRIME OF ECOCIDE: THE ANSWER TO OUR ENVIRONMENTAL EMERGENCY?* [online] Available at: https://www.otago.ac.nz/__data/assets/pdf_file/0022/326731/the-crime-of-ecocide-the-answer-to-our-environmental-emergency-828558.pdf [Accessed 27 Feb. 2024].

inhabitants of that territory has been severely diminished".[212] Encompassing a twofold interpretation of ecocide — man-made and naturally occurring — the proposal established a legal framework for preventing and prohibiting ecocide, identifying a fundamental extension of the principle of superior responsibility not only to large corporations but also to nations.

As such, Higgins' law set the standard for States to be subjected to the obligation of anticipating widespread damage, destruction, or environmental collapse through a legal duty of care bounding them to assist countries at risk — or even directly experiencing — environmental harm due to environmental events like rising sea levels. In Higgins' perspective, States are those bearing the responsibility for naturally occurring ecocide while human-caused ecocide should be overseen by both governments and businesses that should both abstain from causing extensive damage, destruction, or loss of ecosystems.[213]

Such an amendment to the Rome Statute would build upon the previously-existing framework according to which, in times of war damage exceeding 200 km in length or impacting ecosystems for over 3 months is already considered a crime, resulting in severe consequences for human, natural, or economic resources. Higgins' law underscores that, since during peacetime these types of damage happen routinely and often because of human activities, the introduction of a crime of Ecocide would render it unlawful to cause damage, destruction, or loss of ecosystems, similar to the wartime framework.

Although the amendment proposed by Higgins has not yet been implemented, her visionary perspective, which was embodied by her life-long commitment to the criminalisation of ecocide and the tireless promotion of the concept through lectures, documentaries, and consultations with governments, resonated with a diverse audience, inspiring parliamentarians, ecologists, lawyers, artists, and advocates at large. To create a mechanism through which channelling the growing global interest in 2017 she founded Stop Ecocide International, a UK non-profit company serving as the central hub and driving force behind the burgeoning global movement to establish ecocide as a criminal offence.[214] Operating in almost fifty countries, Stop Ecocide International's primary focus lies in mobilising and fostering global and cross-sectoral support for this cause, namely through extensive cooperation with actors from very diverse levels of society ranging from diplomats, politicians, lawyers, and corporate leaders to NGOs, indigenous and faith groups, influencers, academic experts, grassroots campaigns, and individuals.[215] Since its foundation, Stop Ecocide International has employed its particular positioning at the intersection of the legal, political, and

[212] Higgins, P., Short, D. and South, N. (2013). Protecting the planet: a Proposal for a Law of Ecocide. *Crime, Law and Social Change*, 59(3), pp.251–266. doi:https://doi.org/10.1007/s10611-013-9413-6.
[213] Ibid.
[214] Stop Ecocide International (n.d.). *Who We Are*. [online] Stop Ecocide. Available at: https://www.stopecocide.earth/who-we-are- [Accessed 27 Feb. 2024].
[215] Ibid.

public spheres to establish itself as a driving force in the shared objective of making ecocide an international crime by facilitating and amplifying the ongoing global dialogue.

As the global campaign advocating for the criminalisation of ecocide at the International Criminal Court gained momentum, the traction of Stop Ecocide's demands grew and the movement needed to situate itself in the wider framework of cross-border advocacy. Consequently, in 2019, the Stop Ecocide Foundation was established to bolster the expanding movement, serving as the primary fundraising and commissioning entity for Stop Ecocide's efforts and playing a crucial role in supporting its work.[216] The two branches fundamentally operate in a closely intertwined partnership, allowing for the parallel development of activities that align with the shared objectives of both entities and ensuring that initiatives are tailored to the evolving needs of global advocacy work.[217]

Furthermore, as the Stop Ecocide machine grew in size, humanity was eventually forced to acknowledge how it is finding itself closer and closer to a critical juncture concerning the protection of the environment. Issues like the emission of greenhouse gases and the rampant destruction of ecosystems were progressively identified by experts as having potentially catastrophic effects on the shared environment and, despite notable advancements, global environmental governance proved to be characterised by grave shortcomings. Against this backdrop, in 2020, the Stop Ecocide Foundation took a significant step towards conscious environmental governance by constituting an Independent Expert Panel for the Legal Definition of Ecocide.[218] The panel, composed of twelve legal professionals from various areas of the world each bringing a diverse range of expertise to the table, collaborated for six months intending to formulate a practical and effective definition for the crime of ecocide. Receiving support from external specialists and drawing from extensive public consultations with legal, economic, political, youth, faith, and indigenous viewpoints from across the globe, the panel conducted five virtual sessions, through which, by June 2021, a consensus was achieved on the core text of a definition for ecocide as an international crime.[219]

The work of the panel fundamentally built upon Higgins' initial commitment to attempt to amend the Rome Statute of the International Criminal Court, and the discussions among the panellists highlighted the potential for the novel definition to become a core point of discussion in the work towards the broadening of the scope of international protections in light of the need to guarantee

[216] Stop Ecocide International (n.d.). *Stop Ecocide Foundation*. [online] Stop Ecocide International. Available at: https://www.stopecocide.earth/sef [Accessed 27 Feb. 2024].
[217] Ibid.
[218] Stop Ecocide Foundation (2021). *Independent Expert Panel for the Legal Definition of Ecocide COMMENTARY AND CORE TEXT*. [online] Available at: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/16243688 [Accessed 26 Feb. 2024].
[219] Stop Ecocide Foundation (n.d.). *Legal Definition of Ecocide Drafted by Independent Expert Panel*. [online] Stop Ecocide International. Available at: https://bell-harmonica-g83z.squarespace.com/legal-definition [Accessed 27 Feb. 2024].

protections against environmental harm.[220] As no other crime had been incorporated in the Statute since 1945, the panel viewed the addition of ecocide as a groundbreaking development seeking to expand upon the existing offence of severe environmental damage during armed conflict, but fundamentally recognising that in the current day and age, a good portion of damage to the environment occurs during peacetime - which falls beyond the jurisdiction of the ICC.[221] In the formulation of its recommendations, the panel notably leveraged existing practices deriving from other international courts and tribunals proposing three amendments to the original text of the Rome Statute - namely (1) the introduction of a new preambular paragraph, (2) the amendment to Article 5, and (3) the addition of Article 8 ter.[222]

Highlighting the inherent need for the international community to prevent unimaginable atrocities that threaten global peace, security, and well-being, the preamble to the Rome Statute underscored the duty to prosecute international crimes, aiming to end impunity and contribute to global justice. Nonetheless, the preamble somehow omitted any reference to the threats posed by environmental deterioration to those same values of peace, security and well-being that it committed itself to protecting. As such, when the panel of the Stop Ecocide Foundation first started searching for avenues to advocate for the introduction of the crime of ecocide in the Rome Statute, its preamble quickly transformed into the breeding ground for change. In proposing the inclusion of a new preambular paragraph in the Rome Statute to pinpoint the global concern for environmental harm and its severe consequences on human systems, the panel brought forth Higgins' vision, outlining a novel preambular paragraph according to which:

> *"Recognising the imminent threat of severe destruction and deterioration to the environment, jeopardising natural and human systems on a global scale."*[223]

As previously mentioned, the panel extensively drew upon the practice of other international bodies and, in the case of the novel formulation of the preamble, the panel notably drew inspiration from the terminology used by the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons from July 8th, 1996. Much like in the panel's paragraph, in its Advisory Opinion the Court acknowledged the environment to be under a daily threat and reiterated how it constituted not some sort of intangible abstraction but the context in which human beings —

[220] Stop Ecocide Foundation (2021). *Independent Expert Panel for the Legal Definition of Ecocide COMMENTARY AND CORE TEXT*. [online] Available at: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/16243688 [Accessed 26 Feb. 2024].
[221] Ibid.
[222] Ibid.
[223] Stop Ecocide Foundation (n.d.). *Legal Definition of Ecocide Drafted by Independent Expert Panel*. [online] Stop Ecocide International. Available at: https://bell-harmonica-g83z.squarespace.com/legal-definition [Accessed 27 Feb. 2024].

including future generations — live and from which they derive their quality of life.[224] At the time such acknowledgement was further developed by the Court that confirmed the existence of obligations for states to ensure the protection of the environment under international law.

Such an amendment to the preamble would represent a significant enlargement in the scope of action of the ICC and therefore would inevitably require an equally significant expansion of Article 5. As currently formulated, Article 5 outlines the jurisdiction of the Court, limiting it to the *"most serious crimes of concern to the international community as a whole"*, namely the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. As such, in its proposal, the panel suggested an amendment of Article 5 by introducing a novel subparagraph to acknowledge the incorporation of the innovative crime of ecocide.[225] Stemming from the fusion of the Greek 'oikos', signifying house/home (later interpreted as habitat/environment), with 'cide', denoting to kill, the concept of ecocide would not only align with the approach implemented by Lemkin in the original definition of genocide but allow a somewhat smooth introduction of ecocide in the ICC framework.[226]

Nonetheless, in the panellists' perspective, the introduction of ecocide as an international crime would fall under the scope of Article 8 of the Rome Statute, the article concerning war crimes and the crime of aggression, extending the scope of the article by addressing the concept of ecocide.[227] Situating the crime of ecocide in peacetime, the proposed Article 8 ter would mirror the formulation of Article 7 of the Rome Statute, which specifically identifies crimes against humanity as *"acts […] committed as part of a widespread or systematic attack directed against any civilian population"*. As such, Article 8 ter, features an initial paragraph outlining the crime, while the second fundamentally elucidates its core elements. In particular, Article 8 ter reads as follows:

> *"Article 8 ter Ecocide*
>
> *1. For the purposes of this Statute, 'ecocide' denotes unlawful or wanton acts committed with the awareness that there is a substantial likelihood of causing severe and either widespread or long-term damage to the environment through those acts."*[228]

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[224] International Court of Justice (1994). *Legality of the Threat or Use of Nuclear Weapons*. [online] www.icj-cij.org. Available at: https://www.icj-cij.org/case/95#:~:text=The%20Court%20was%20led%20to [Accessed 27 Feb. 2024].
[225] Stop Ecocide Foundation (2021). *Independent Expert Panel for the Legal Definition of Ecocide COMMENTARY AND CORE TEXT*. [online] Available at: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/16243688 [Accessed 26 Feb. 2024].
[226] Higgins, P., Short, D. and South, N. (2013). Protecting the planet: a Proposal for a Law of Ecocide. *Crime, Law and Social Change*, 59(3), pp.251–266. doi:https://doi.org/10.1007/s10611-013-9413-6.
[227] Stop Ecocide Foundation (2021). *Independent Expert Panel for the Legal Definition of Ecocide COMMENTARY AND CORE TEXT*. [online] Available at: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/16243688 [Accessed 26 Feb. 2024].
[228] Ibid.

Undoubtedly influenced by the Rome Statute's existing provisions on damage to the natural environment — notably Article 8(2)(b)(iv) which outlaws *"Intentionally launching an attack in the knowledge that such attack will cause […] widespread, long-term and severe damage to the natural environment"* — the definition expands the scope *ratione materiae* of ecocide to all the acts — or omissions — falling under the aforementioned definition. As such, the definition attempts to advance existing law by encompassing protection beyond times of armed conflict to times of peace—a development reminiscent of legal expansions in 1945 when certain war crime prohibitions were extended to become prohibitions at all times for genocide and crimes against humanity.[229]

To further clarify the definition, Article 8(2) ter establishes that:

> *"For the purpose of paragraph 1:*
>
> *1. 'Wanton' signifies actions with reckless disregard for damage that would be clearly excessive in relation to the anticipated social and economic benefits;*
>
> *2. 'Severe' implies damage involving very serious adverse changes, disruption, or harm to any environmental element, encompassing grave impacts on human life or natural, cultural, or economic resources;*
>
> *3. 'Widespread' signifies damage extending beyond a confined geographic area, crossing state boundaries, or affecting an entire ecosystem, species, or a large number of human beings;*
>
> *4. 'Long-term' characterises damage that is irreversible or cannot be rectified through natural recovery within a reasonable period;*
>
> *5. 'Environment' encompasses the earth, its biosphere, cryosphere, lithosphere, hydrosphere, and atmosphere, as well as outer space."* [230]

As previously mentioned, the panellists made extensive use of established judicial practices in crafting the definition outlined in Article 8 ter. Notably, the concept of *"severe and either widespread or long-term damage"* echoes across various legal instruments, from the 1977 First Additional Protocol to the Geneva Conventions to Article 8(2)(b)(iv) of the Rome Statute, passing through the 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques ('ENMOD').[231]

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[229] Ibid.
[230] Ibid.
[231] International Commission of the Red Cross (1976). *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) – UNODA*. [online] Available at: https://disarmament.unoda.org/enmod/.

In this particular regard, the term ‘severe’ fundamentally encapsulates all those forms of damage creating profound harm or disruption to the environment in all its different facets, including human life and cultural, natural, or economic resources. Proposing a novel form of middle ground between ENMOD’s disjunctive approach — encompassing ‘widespread, long-lasting or severe’ damage — and the more conjunctive approach employed by the Rome Statute — focusing on ‘widespread, long-term and severe’ damage — Article 8 ter encompasses an acknowledgement of the need for a definition capable of encompassing only relevant factors but without excluding others a priori.[232]

In defining the temporal and spatial scope of ecocide, the ‘widespread' criterion qualifies the damage as extending beyond a strictly confined geographical area, fundamentally encompassing environmental damage and its capacity to cross state boundaries or affect entire ecosystems.[233] This notion is of particular importance because it underscores the necessity to recognise the importance of considering transboundary harm in our interconnected world, whether through the prevention of transboundary harm or the effective and inclusive response to its effects. On the other hand, the concept of ‘long-term’ fundamentally introduces a nuanced formulation based on the identification of ecocide-related damage as either irreversible or cannot be rectified through natural recovery within a reasonable period.

Further, in recognising that not all acts resulting in severe environmental damage are necessarily illegitimate, the panel deemed it necessary to include the criteria of 'unlawful or wanton acts' to discriminate between which activities constitute ecocide and which ones do not.[234] As such, the term 'unlawful' in this context encompasses acts already prohibited by law, be it international obligations or national laws. The employment of such a wide scope in the definition of unlawful acts notably derived from the fact that the panel recognised the importance of local practices and legislations in the identification of which acts could fall under the umbrella of ecocide, fundamentally ensuring a holistic approach that incorporates both regional and global perspectives.

For what concerns ‘wanton’, the term was chosen by the panel as it was previously employed in the Rome Statute’s Article 8(2)(a)(iv), where it signified either intending or acting in reckless disregard of prohibited consequences.[235] As such, in the panel’s interpretation, wanton acts indicate the reckless disregard for damage exceeding anticipated social and economic benefits. The prohibited consequence is damage to the environment, which would be excessive in relation to the anticipated benefits. Fundamentally reflecting commonly accepted environmental law principles, which at the national and

[232] Stop Ecocide Foundation (2021). *Independent Expert Panel for the Legal Definition of Ecocide COMMENTARY AND CORE TEXT*. [online] Available at: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/16243688 [Accessed 26 Feb. 2024].
[233] Ibid.
[234] Ibid.
[235] Rome Statute of the International Criminal Court, art 8 (2)(a)(iv).

international level often involve the balancing of environmental harms against economic benefits, the definition of the panel introduced a proportionality test in the definition.

Nonetheless, the previous categorisation fundamentally revolves around a concept whose definition presented numerous challenges for international law throughout the decades — the notion of environment. Harshly debated and lacking a universally agreed-upon definition, the identification of environment as *"the earth, its biosphere, cryosphere, lithosphere, hydrosphere, and atmosphere, as well as outer space"* by the panel underscores the relevance of the interconnectedness of the components of the environment.[236] This particular understanding underscores how the original interconnectedness of rights needs to be preserved through a comprehensive and interconnected interpretation of the environment in which these rights come to life.

Nonetheless, the totality of these acts is often linked to perpetrators, which, according to Article 30 of the Rome Statute often exhibit mens rea, or consciousness, of the illicit act they commit. Indeed, the established interpretation of the mens rea stipulates that *"A person has intent where […] that person means to cause that consequence or is aware that it will occur in the ordinary course of events."*[237] However, when applied to the severe and far-reaching consequences identified in the definition of ecocide, the Panel found the default mens rea under Article 30 to be overly restrictive. Such interpretation of mens rea was deemed insufficient to capture the various forms taken on by illicit activities with a substantial likelihood of leading to severe and either widespread or long-term damage to the environment. As such, the panel advocated for a revolutionised mens rea, grounded in the concept of *dolus eventualis* or 'recklessness', demanding an awareness of a significant likelihood of causing severe and either widespread or long-term damage to the environment.[238] As the responsibility for the crime of ecocide derives from the creation of a dangerous situation, rather than the outcome itself, this proposed mens rea introduces a more stringent criterion according to which it is the commission of an act — or the omission of an act — with the knowledge of the likelihood that they will cause harm to the environment that is criminalised and therefore ensures that only individuals with significant culpability for profound environmental damage bear responsibility.[239] Situating the crime of ecocide as a crime of endangerment rather than of result, this novel formulation emphasised the need for a robust legal framework that holds individuals accountable for actions with severe and far-reaching ecological consequences.

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[236] Stop Ecocide Foundation (2021). *Independent Expert Panel for the Legal Definition of Ecocide COMMENTARY AND CORE TEXT*. [online] Available at: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/16243688 [Accessed 26 Feb. 2024].

[237] Rome Statute of the International Criminal Court, art 30.

[238] Stop Ecocide Foundation (2021). *Independent Expert Panel for the Legal Definition of Ecocide COMMENTARY AND CORE TEXT*. [online] Available at: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/16243688 [Accessed 26 Feb. 2024].

[239] Ibid.

2. Examining the potential of ecocide as a legal concept

While no empirical research has yet examined the potential benefits of recognising ecocide in protecting the rights of environmentally displaced persons, the ensuing advancements aim to offer non-exhaustive insights into four key areas of importance, for the protection of the rights of people affected by environmental flight situations, where such benefits might materialise: (1) addressing the root causes of environmental flight situations, (2) shaping international refugee law, (3) the conceptual framework of Responsibility to protect (R2P) of States and (4) ensuring justice and accountability.

2.1. Addressing the root causes of environmental flight situations

In light of the ever-increasing instances of the triple planetary crisis and the pressing urgency to safeguard the planet, the following section will delve into the multifaceted avenues that could potentially open to safeguard the rights of environmentally displaced persons if ecocide were to be recognised, with a particular focus on its capacity to address the root causes of environmental flight situations. As the gravity of environmental harm unfolds, requiring proactive approaches to the prevention of violations, the ensuing discussion firstly encapsulates the symbolic influence of ecocide and its potential interactions with the ICC-instated deterrence regime for international crimes.

Indeed, extending the scope of the framework of deterrence to ecocide, the following analysis underscores its potential in fortifying the ICC's deterrence capacity against international crimes. Nonetheless, scrutinising the challenges faced by the ICC in ensuring the efficacy of its traditional deterrence framework, it further will highlight the crucial role member states play in translating international legal standards into enforceable domestic laws and policies. Examining the evolving landscape, it notably advances the argument that, while the ICC establishes a framework for international deterrence, the effectiveness of these efforts relies heavily on the active participation of member states in implementing ecocide laws domestically.

The comprehensive exploration will underscore how the effective integration of ecocide in international and national law mechanisms would align with the precepts of the well-established 'do no harm' principle in customary international law.

2.1.1. Exploring the symbolic influence of ecocide: the efficacy of deterrence

In the realm of international crimes, such as genocide, the emphasis is not solely on punishment; rather, the International Criminal Court seeks to prevent such atrocities from occurring through deterrence. Among the various mechanisms employed by the Court in preventing crimes, the principle of deterrence revolves around the notion that rational actors will refrain from committing violations only if the perceived costs outweigh the perceived benefits. As such the effectiveness of deterrence hinges on factors like the capacity of potential perpetrators to make rational calculations prior to

acting, their knowledge of the law, and their perception of the benefits of a given crime as relatively low compared to its benefits.[240] This preventive approach is equally applicable to ecocide that, if introduced as an international crime, carries the potential of averting and addressing severe transgressions before they materialise, enhancing the deterrence capacity of the ICC against CEOs and companies engaged in environmentally hazardous activities. Indeed, as underlined by Higgins, punishment, deterrence, and reparation emerge as fundamental purposes of sentencing and the prospect of potential criminal liability could dissuade polluters from such actions.

According to Higgins:

> *"The purpose of deterrence includes:*
> *(1) making clear that the overall penalty for a breach of the law is always*
>
> *likely to be much more costly than any expense that should have been incurred in avoiding the breach in the first place or that can be passed on to customers as cost outlay;*
>
> *(2) the need for the overall penalty to be such as to bring the necessary message home to the particular defendant (whether individual and/or corporate) before the Court, in order to deter future breaches – whether by that defendant, or by other potential offenders; and*
>
> *(3) the need for equal deterrence of all potential offenders, whether wealthy or of limited means – not least because the wealthiest potential offenders are likely, via the scale of their operations, to have the greatest potential to cause the most serious damage."*[241]

Outlining a holistic strategy to tackle environmental offences like ecocide, Higgins supported the integration of punishment, deterrence, and reparation to actively thwart the emergence of environmental damage by laying out penalties that exceed the potential gains of unlawful activities and fostering a global discourse that places paramount importance on the conservation and safeguarding of the planet. Within such a framework, deterrence operates on the idea that the fear of the consequences can dissuade rational actors from engaging in them and, for what concerns ecocide, potential perpetrators are expected to rationally evaluate their perspectives on a loss-and-benefit scale. Deterrence, therefore, hinges on the clear communication that the penalties for breaching environmental laws are not only inevitable but also substantially more burdensome than any gains obtained through violating these laws.

Nonetheless, guaranteeing the presence of the core criteria for effective deterrence is undoubtedly challenging, even in a domestic context, and the challenges arising from the concretisation of these aspects are exacerbated by the complexities of the international arena. Indeed, the diminishing

[240] Dietrich, J. (2014). The Limited Prospects of Deterrence by the International Criminal Court: Lessons from Domestic Experience. *International Social Science Review*, *88*(3), 1–29. https://www.jstor.org/stable/intesociscierevi.88.3.03
[241] Higgins, P. (2012). *Earth Is Our Business*. Shepheard-Walwyn, pp.167–168.

likelihood of punishment because of the ICC's inherent structural and political constraints eventually led to a diminishing of its effectiveness as an international deterrent.[242] Because of its constraints in the prosecution of perpetrators and the administration of punishment, the ICC has progressively demonstrated somewhat limited deterrent capacities. For what concerns ecocide as an international crime, its effectiveness as a deterrent is contingent upon overcoming structural challenges that, if left unaddressed, may impede the prosecution of ecocide and compromise its role as an effective deterrent to protect the environment.

With instances of genocide continuing to unfold, such a paradigm applied to the wider framework of international crimes is proving ineffective. Indeed, the general criminal theory suggests that severe penalties rarely, if ever, achieve the intended deterrent effect, implying that imposing stringent punishment on ecocide perpetrators may not yield the desired deterrence due to many other influencing factors like motivations, socio-political dynamics, and situational factors.[243] For what concerns the ICC; the emphasis on deterrence through punishment was defined in the first Report of the International Criminal Court to the United Nations which states that: *"by punishing individuals who commit these crimes, the Court is intended to contribute to the deterrence of such crimes."*[244] Nonetheless, despite such commitment, the aforementioned limitations underscore the complexity of achieving a comprehensive deterrent effect.

Acknowledging the multifaceted nature of international criminal behaviour, the intricate interplay of political, economic, and social factors underscores the need for a nuanced and comprehensive approach beyond punitive deterrence. While punishment remains a crucial element, complementing it with other strategies, such as preventive measures, becomes imperative. However, despite the recognised limitation of deterrence as outlined by the Rome Statute and Higgins' perspective, alternative perspectives argue that the efficacy of deterrence could be strengthened through the ICC-bound process of implementation of its international criminal law assumptions at the domestic level. In its preamble, the Rome Statues recalls that *"it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"*, a perspective that was recently underlined by the Fifth Judicial Seminar of the International Criminal Court which underlined how *"the central idea of complementarity is that the courts of each State Party to the Rome Statute have the primary responsibility to prosecute and try the major crimes defined in the Statute."*[245] As such the

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[242] Johnson, B. (2019). *Do Criminal Laws Deter Crime? Deterrence Theory in Criminal Justice Policy: A Primer*. [online] *MN House Research*. Available at: https://www.house.mn.gov/hrd/pubs/deterrence.pdf [Accessed 27 Feb. 2024].
[243] *Ibid*.
[244] Dietrich, J. (2014). The Limited Prospects of Deterrence by the International Criminal Court: Lessons from Domestic Experience. *International Social Science Review*, *88*(3), 1–29. https://www.jstor.org/stable/intesociscierevi.88.3.03
[245] See, UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), ISBN No. 92-9227-227-6, UN General Assembly, 17 July 1998, https://www.refworld.org/legal/constinstr/unga/1998/en/64553 [accessed 27 February 2024]. See also, International Criminal Court (2023). *Fifth Judicial Seminar of the International Criminal Court*. [online] ICC. Available at: https://www.icc-cpi.int/sites/default/files/2023-03/2023-ICC-5th-Judicial-Seminar-report.pdf [Accessed 27 Feb. 2024].

acknowledgement of deterrence as a passive mechanism designed to dissuade potential perpetrators from committing crimes implies that, once a crime is enshrined in the Rome Statute, member states assume the responsibility of actively translating this commitment into action at the national level.

For what concerns ecocide, the institutional limitations to the powers of deterrence might be compensated by the proactive efforts of member states to draft policies and legislation to translate ecocide laws into their legal frameworks. Such a proactive approach proves to be fundamental to the effective incorporation of measures designed to implement ecocide since, while the ICC operates at the international level for crimes of global concern, its capacity to do so is inevitably linked to the commitment of national authorities in translating international legal standards into enforceable domestic laws and policies. As such, the complementarity between international and domestic legal frameworks would mutually reinforce the deterrence against ecocide.

2.1.2. The national implementation of international law

While Article 1 of the Rome Statute may not explicitly mandate member states to implement laws for the prosecution of international crimes, its articulation of complementarity nonetheless underscores the fact that primary jurisdiction over the crimes outlined in the Statute pertains to member states.[246] Such an implicit recognition derives from the fact that states are tasked with ensuring not only the theoretical capacity to prosecute the crimes enumerated in the Statute — notably through the creation of judicial mechanisms capable of exercising jurisdiction — but also the concrete capacity to do so, which inevitably passes through the incorporation of the crimes listed in the Statute in their national law.[247] Effective prosecution at the national level became a topic of discussion in the international sphere as it constitutes a fundamental step in one of the main objectives behind the foundation of the ICC — ending impunity for perpetrators and preventing international crimes. However, the effectiveness of this system is compromised when states lack implementing legislation and the objective of prosecution, as well as its capacity to constitute a deterrent, faces significant challenges in the absence of national laws that give practical effect to the Rome Statute.

Further building upon this viewpoint, former Registrar of the ICC Silvana Arbia underscored how without legislation capable of translating the Rome Statute into national systems, the entire framework becomes inefficient as the cooperation between states and the ICC hinges on the presence of implementing legislation at the national level.[248] As such, states are often pushed to undertake legislative amendments, whose scope and form can vary from one state to another but always reflect

[246] Imoedemhe, O. C. (2014). National Implementation of the Complementarity Regime of the Rome Statute of the International Criminal Court: Obligations and Challenges for Domestic Legislation with Nigeria as a Case Study (Version 1). University of Leicester. https://hdl.handle.net/2381/36077
[247] Ibid.
[248] Remarks by Silvana Arbia, 'No Peace without Justice: Roundtable on Implementing Legislation' 17 July 2009 Rome Italy. Available at <http://www.icc-cpi.int/NR/rdonlyres/9EA855BC-A495-40AA-B5F8-92F44E08D695/280578/Statement_Registar2.pdf> (Accessed February 27, 2024)

the principles enshrined in the Statute.[249] This perspective was also reiterated during the Eighth High-Level Regional Cooperation Seminar of the ICC, where it was discussed how Article 88 of the Rome Statute fundamentally outlines the obligation for States Parties to ensure the availability of requisite national procedures for cooperation, specifically under Part 9 of the Statute.[250] Stating that *"States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part"*, Article 88 highlights the inherent obligation for state parties to review their national laws and procedures, as well as to introduce new ones through legislation or administrative practices, to fulfil their obligations in the area of cooperation.[251] Further, in the same context, another critical dimension in the implementation of the Rome Statute in national settings referred to the need for states to take measures to incorporate the crimes enumerated in the Statute into their national criminal codes.[252] Such integration is essential for guaranteeing the capacity of national jurisdictions to effectively investigate and prosecute these crimes, aligning with the fundamental principle of complementarity enshrined in the Rome Statute.

Essentially, the distinctive regime of the Rome Statute stands on two interconnected pillars: cooperation and complementarity.[253] The coherence of these pillars necessitates the presence of legislation that addresses both aspects, strengthening the capacity of States Parties to fulfil their cooperation obligations with the ICC but also ensuring the seamless integration of international crimes into their national legal systems.

For what concerns ecocide, although still lacking proper recognition in international criminal law, certain states have started integrating the concept of ecocide in their national penal codes. One notable example is that of Vietnam which notably became the first country to incorporate the crime of ecocide in its domestic legal framework.[254] Following in Vietnam's footsteps, Russia and many ex-soviet states also adopted ecocide in their national legislations while, most recently, Belgium became the first country in Europe to criminalise ecocide on a national and international level, laying out

[249] Imoedemhe, O. C. (2014). National Implementation of the Complementarity Regime of the Rome Statute of the International Criminal Court: Obligations and Challenges for Domestic Legislation with Nigeria as a Case Study (Version 1). University of Leicester. https://hdl.handle.net/2381/36077

[250] International Criminal Court. (2017). Concept note for break out session 1: Promoting Universality of the Rome Statute and the adoption of National Implementing Legislation. https://www.icc-cpi.int/sites/default/files/2022-04/HLS%20Korea%20-%20Concept%20Note_ENG.pdf (Accessed February 24, 2024)

[251] Ibid.

[252] Ibid.

[253] Ibid.

[254] Mcdonnell-Elmetri, Z. (2020). *THE CRIME OF ECOCIDE: THE ANSWER TO OUR ENVIRONMENTAL EMERGENCY?* [online] Available at: https://www.otago.ac.nz/__data/assets/pdf_file/0022/326731/the-crime-of-ecocide-the-answer-to-our-environmental-emergency-828558.pdf [Accessed 27 Feb. 2024].

imprisonment of up to 20 years for individuals guilty of ecocide, and fines of up to €1.6 million for corporations.[255]

Suggesting that more and more actors in the international community are progressively endorsing the legal concept of ecocide. Nonetheless, the capacity of national courts to prosecute ecocide still widely varies among different states, underscoring how, despite the potential international support for ecocide in the form of domestic laws, these frameworks are still frequently hampered by inadequate enforcement and a lack of respect for the rule of law.

Furthermore, even considering the fact that legally speaking member states do not have an obligation to incorporate the perspective of the Court into their domestic law, the mere acknowledgement of ecocide as an international crime could play a pivotal role in transforming international jurisdiction.[256] Indeed State parties might build upon the ICC's stance and extend their jurisdictional reach to ecocide-related matters, undeniably fostering the evolution of more robust environmental policies aimed at preventing the perpetration of ecocide through inaction.[257] A precedent for such procedures was set in 2019 when France came under public scrutiny as the French municipality of Grand-Synth, feeling particularly vulnerable to the repercussions of climate disruption, approached the Conseil d'État to challenge what it deemed France's 'climate inaction'.[258] In response, the court, after an initial decision in November 2020, imposed a deadline on the government until July 2021 to *"bend the curve of greenhouse gas emissions"* by March 31, 2022.[259] Upon ratification, the need for implementing the Rome Statute and complying with the principle of complementarity through the drafting of legislation and the enhancement of procedural capacities would strengthen even more the states' environmental protection systems. Furthermore, the recognition of ecocide as an international crime would also push states to not only evaluate their very own activities but also those of foreign companies operating within their borders or registered in their territory but operating abroad, defining a regime of vigilance that is crucial to avert ecocide.

As underlined by Knox, even going beyond its recognition as an international crime, the proposed crime of ecocide aligns appropriately with the domain of international environmental law.[260]

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[255] Scottish Legal News (2024). *Belgium becomes European trailblazer on ecocide law*. [online] Scottish Legal News. Available at: https://www.scottishlegal.com/articles/belgium-becomes-european-trailblazer-on-ecocide#:~:text=Belgium%20has%20become%20the%20first [Accessed 27 Feb. 2024].

[256] Palarczyk, D. (2023). Ecocide Before the International Criminal Court: Simplicity is Better Than an Elaborate Embellishment. *Criminal Law Forum*. doi:https://doi.org/10.1007/s10609-023-09453-z.

[257] Ibid.

[258] Garric , A. and Mandard, S. (2023). Top Court Keeps Pressure on French Government over 'climate inaction'. *Le Monde.fr*. [online] 10 May. Available at: https://www.google.com/url?q=https://www.lemonde.fr/en/france/article/2023/05/10/top-court-keeps-pressure-on-french-government-over-climate-inaction_6026192_7.html&sa=D&source=docs&ust=1709035232227129&usg=AOvVaw2BonnmNVf7LXvhb192TYP9 [Accessed 27 Feb. 2024].

[259] Ibid.

[260] Knox, J.H. (2023). Introduction to Symposium on UN Recognition of the Human Right to a Healthy Environment. *AJIL unbound*, 117, pp.162–166. doi:https://doi.org/10.1017/aju.2023.25.

Conceived as a response to profound environmental harm, international environmental law would undoubtedly be fortified by the codification of ecocide, as it could provide avenues for safeguarding the elements like the right to a healthy environment.[261] First and foremost, the crime of ecocide could define legal avenues to respond to violations of the right to a healthy environment — notably criminalisation, prosecution, and punishment. Such a duty fundamentally derives from the assumption that where there is a legal right, there should be a corresponding remedy in case it is violated and, as the right to a healthy environment has gained traction in international law, the establishment of remedies for those instances in which it is abused seem necessary.[262] As such ecocide could be contemplated as a potential cause of action, penalising violations of the right to a healthy environment and providing effective remedies to victims in cases where the repercussions of environmental damage warrant global condemnation.

2.1.3. The prohibition against harm

Standing as a well-established tenet of customary international law, the 'do no harm' principle creates duties on states to take measures to prevent, mitigate, and control the risk of environmental harm that their actions could cause on their territories and those of other states.[263] Elucidated by scholars like Brownlie, Birnie, Boyle, and Redgwell, this foundational principle underscores the imperative for states to uphold their responsibility to the international community.[264] Indeed, although states still retain the sovereign right to exploit the resources residing in their territories, they are also bound to the crucial responsibility to ensure that any activity conducted within their jurisdiction does not result in harm to the environment or extend beyond their geographical confines.[265] Such interpretation undoubtedly echoes the principles of the Rio Convention, according to which States have the duty to pursue development in a responsible and ethical way, capable of recognising the interconnectedness of the different spheres of the environment.[266]

The introduction of ecocide law fundamentally brings forth a heightened significance of the 'do no harm' principle for what concerns environmental matters. Indeed, given its transboundary character, the integration of ecocide in the domain of international law — and in particular criminal law given its enforceability — would represent the concretisation of the international community's willingness to

[261] Ibid.
[262] Ibid.
[263] UN Environment (n.d.). *No Harm Rule | Global Pact Website*. [online] globalpact.informea.org. Available at: https://globalpact.informea.org/glossary/no-harm-rule [Accessed 27 Feb. 2024].
[264] Ian Brownlie in: Principles of Public International Law, 7th ed., 2008, pp.275-285; Patricia Birnie, Alan Boyle and Catherine Redgwell in: International Law and the Environment, 3rd ed., Oxford 2009, pp.143-152
[265] UN Environment (n.d.). *No Harm Rule | Global Pact Website*. [online] globalpact.informea.org. Available at: https://globalpact.informea.org/glossary/no-harm-rule [Accessed 27 Feb. 2024].

[266] UN Environment (n.d.). *No Harm Rule | Global Pact Website*. [online] globalpact.informea.org. Available at: https://globalpact.informea.org/glossary/no-harm-rule [Accessed 27 Feb. 2024].

prohibit significant harm inflicted upon nature by humans, fundamentally addressing the imperative to prohibit, pre-empt, and prevent the most severe forms of harm.[267]

As underlined by Lay et al., in contemporary cases, state responsibility has started to encompass an inherent duty to protect the environment to guarantee the absence of harm to its different facets and to those inhabiting them.[268] These findings undoubtedly echo Polly Higgins' argument, according to which those occupying positions of control fundamentally bear a duty to ensure that their decisions do not inflict harm, not only on those within their immediate sphere but also on others whose lives can be profoundly affected by their actions. In practice, Higgins emphasises the need for a framework encompassing prevention and precaution, fundamentally positing that decisions or actions with potential adverse environmental effects should prioritise the prevention of harm.[269]

While international ecocide law might not resolve environmental harm as a whole, Higgins underscores its significance as a vital component within the legal framework.[270] The recognition of ecocide as an international crime could fundamentally strengthen environmental law, ensuring that the most serious environmental issues are not relegated to soft consensus, instead attempting to hold those responsible for grave environmental damage accountable.[271]

In contemporary legal contexts, cases are proliferating across diverse domestic jurisdictions, wherein legal actions are brought against governments and states to enforce the duty of care owed to those within the jurisdiction and beyond on the basis of the protection of trust and public interest doctrines, tortious claims, and an extension of the principles governing the duty of care. While not necessarily pertaining to criminal law, these cases underscore the progressive delineation of the boundaries of State-sponsored harm against the environment and unequivocally affirm a responsibility for states to protect the environment.[272]

In this context, the longstanding jurisprudential void concerning humanity's responsibilities towards the environment could find some form of resolution through the establishment of obligations deriving from international crimes like ecocide. As more and more cases brought forth under the 'public trust' doctrine — which obliges governments to safeguard the different facets of the environment for the benefit of humanity — seek to identify the duties of states to protect humans and the environment, ecocide emerges as a mechanism to enforce said obligations. As such, the recognition of ecocide as an

[267] Bronwyn, L. (2015). Timely and Necessary: Ecocide Law as Urgent and Emerging. The Journal Jurisprudence, (431). p.448.
[268] *Ibid*.
[269] Higgins, P. (2012). *Earth Is Our Business*. Shepheard-Walwyn, pp.87, 165.
[270] *Ibid*.
[271] Bronwyn, L. (2015). Timely and Necessary: Ecocide Law as Urgent and Emerging. The Journal Jurisprudence, (431). p.443.
[272] *Ibid. p. 444.*

international crime would somewhat complement the notion of public interest, as ecocide constitutes not only a breach of the duty of care but also a violation of the duty to protect public interests .[273]

In one particular case, the Urgenda Foundation, alongside 900 Dutch citizens, took legal action against the Dutch government, requesting more substantial measures to combat global climate change. Despite the argument brought forth by the Netherlands according to which a state should not be held accountable for the global scope of climate change, the Court delivered a landmark decision through which it declared that the shared nature of environmental harm does not exempt individual states from taking appropriate measures to mitigate its adverse effects within their jurisdictions. Emphasising in particular the relevance of the 'do no harm' principle, the Court emphasised that each state has a duty to prevent activities within its jurisdiction from causing environmental damage that transcends national boundaries.[274]

The Urgenda Foundation case underscores how across a diverse spectrum of courts, actors are underscoring the relevance of the 'do no harm' principle and of the duty of care of states for what concerns environmental matters. As such, the recognition of ecocide as an international crime could further uplift the demands for obligations of these national cases, fundamentally complementing currently emerging obligations with strong enforcement mechanisms in view of preventing any further harm to the environment.

2.2. Shaping International Refugee Law

Although the crime of ecocide is primarily an ecocentric tool coined to prevent environmental harm, its analysis in the light of international refugee law proves relevant and beneficial to protecting the rights of environmental refugees. In fact, the international crime of ecocide pertains to the realm of international criminal law, which shares some intersections with international refugee law.

2.2.1. Ecocide and the notion of 'persecution'

International criminal law and international refugee law somewhat present similarities regarding the concept of 'persecution'. Persecution is simultaneously identified as a crime against humanity in Article 7(1)(h) of the Rome Statute and as a core component of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees ('Refugee Convention'), where refugees are all those individuals who *"owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, are outside the country of their nationality and are unable [...] to avail themselves of the protection of that country [...]"*.[275]

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[273] *Ibid. p. 445.*

[274] *Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment*. [2015] Case C/09/456689/HA ZA 13-1396.

[275] Li, Y. (2020). *Persecution in International Criminal Law and International Refugee Law*. [online] Available at: https://www.zis-online.com/dat/artikel/2020_6_1372.pdf [Accessed 26 Feb. 2024].

As such, persecution constitutes both an international crime and one of the fundamental aspects in the recognition of refugees, underscoring the presence of discriminatory practices and human rights violations occurring in the country of provenance of refugees.[276] The substantial difference between the two interpretations, concretised in the much more confined definition employed by the Rome Statute, derives from the fact that, in the ICC framework, the element of persecution is employed in the identification of individuals responsible for crimes against humanity rather than on the human rights violation for which the refugee seeks protection.[277] Nonetheless, while the legal definitions may not align entirely, there could be factual circumstances allowing an inference from one phenomenon to the other. For instance, the UNHCR relies on the definition of persecution in the ICC Statute when affirming that persecution could be perpetrated by non-state agents. The UNHCR argues that *"It would be contradictory if the international community were to qualify such offenses as persecution under criminal law and punish their perpetrators but were to refuse to acknowledge an offense of persecution under refugee law and deny the victims reasonable international protection."*[278]

As previously noted, the concept of persecution is a fundamental component of the refugee definition outlined in the Refugee Convention but, within this framework, it also poses a significant challenge for environmental refugees seeking asylum as the concept remains abstract and general, fundamentally lacking clarity on how to ascertain whether an individual genuinely experiences a well-founded fear of persecution.[279] As such, some scholars have proposed to interpret the Refugee Convention progressively in order to foster the recognition of 'environmental persecution'.[280] This concept, particularly relevant for indigenous communities and the widespread infringements of their essential rights arising from environmental harm, underscores how the concept of persecution should be reconsidered on the basis of the severe and targeted discrimination that ethnic, social, and cultural groups experience in situations of displacement deriving from environmental harm.[281] In this regard, Westra notably underlined how, in cases of significant environmental harm like actions of multinational corporations depriving communities of crucial natural resources, the rights of indigenous communities may be sufficiently impacted to meet the criteria of 'racial' persecution under the Refugee Convention.[282]

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[276] Ibid.

[277] *Trial Judgement – IT-95-16-T (Prosecutor v. Zoran Kupreškić Et al.)* [2000] (ICTY) Available at: https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf [Accessed 26 Feb. 2024].

[278] UNHCR (1999). *Opinion of UNHCR regarding the Question of non-State persecution, as Discussed with the Committee on Human Rights and Humanitarian Aid of the German ParliaMent (Lower House)*.

[279] Cournil, C. (2017). The inadequacy of international refugee law in response to environmental migration. *Research Handbook on Climate Change, Migration and the Law*, pp.85–107. doi:https://doi.org/10.4337/9781785366598.00011.

[280] UNHCR (2011). Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection. UNHCR, para.63.

[281] Cournil, C. (2017). The inadequacy of international refugee law in response to environmental migration. *Research Handbook on Climate Change, Migration and the Law*, pp.85–107. doi:https://doi.org/10.4337/9781785366598.00011.

[282] Westra, L. (2013). *Environmental justice and the rights of ecological refugees*. Routledge, pp.14, 178.

Furthermore, the same notion of 'membership of a particular social group' outlined in Article 1A(2) of the Refugee Convention has been progressively interpreted to include a wider range of qualifications under the umbrella of the Convention.[283] The UNHCR in particular clarifies the concept of 'particular social group' as indicating an ensemble of individuals with similar backgrounds, habits, and social status, sharing characteristics that could be innate - sex, caste, socio-economic background - referring to past experiences, or referring to shared values or beliefs.[284] As such, the extension of the concept of persecution finds further confirmation in international practice and, as environmentally displaced individuals often belong to 'particular social groups' whose fundamental rights are tightly interconnected with the environment they inhabit, it can be derived that a further expansion of persecution to encompass environmental harm would not be a farfetched idea.

From the standpoint of the ICC framework, persecution is understood as applicable only when it is directed towards *"any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender […] or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court"*.[285] Nonetheless, as the Statute underscores that one of the grounds of persecution is 'any crime within the jurisdiction of the Court', the recognition of ecocide as an international crime would undoubtedly expand the scope of Article 7(1)(h) to encompass ecocide-related persecution. The original language of the Statute is meant to encompass all the possible forms of discrimination prohibited by international law and by the Statute itself, and the introduction of ecocide in the Statute-sanctioned crimes would allow the Court to investigate the persecution arising from the detrimental impacts of environmental degradation, particularly when considering its effects on marginalised communities.

The clauses relating to persecution in both the ICC framework and the Refugee Convention lay the foundations for a nuanced analysis of environmental harm as a form of persecution. Indeed, environmental atrocities, often deriving from the activities of powerful entities, disproportionately affect specific social groups like indigenous populations that often find themselves victimised by corporate exploitation and government negligence, resulting in severe environmental degradation that undermines their traditional ways of life.[286] As established by various studies, certain marginalised

[283] Li, Y. (2020). *Persecution in International Criminal Law and International Refugee Law*. [online] Available at: https://www.zis-online.com/dat/artikel/2020_6_1372.pdf [Accessed 26 Feb. 2024].

[284] UNHCR (2011). *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*. UNHCR, para.77.

[285] International Criminal Court (1998). *Article 7(1)(h) of the Rome Statute*. [online] ICC. Available at: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf [Accessed 26 Feb. 2024].

[286] Cournil, C. (2017). The inadequacy of international refugee law in response to environmental migration. *Research Handbook on Climate Change, Migration and the Law*, pp.85–107. doi:https://doi.org/10.4337/9781785366598.00011.

communities bear a disproportionate burden of the impacts stemming from climate change and environmental pollution.[287]

As such, the recognition of ecocide as an international crime could provide a framework for understanding the persecutory effects of environmental harm both in international criminal law and international refugee law. As previously mentioned, international bodies like the UNHCR have drawn upon the ICC Statute to clarify their practice and ecocide law, outlawing environmental damage, which in turn exacerbates existing inequalities, leading to displacement, loss of livelihoods, and disruption of cultural practices, would help inform the notion of persecution in refugee law. Considering the ecocentric nature of the crime of ecocide, the argument gains further traction as ecocide law would provide a robust legal foundation to establish a threshold of environmental degradation that amounts to persecution, enforcing the perspectives of scholars advocating for environmental persecution as reasoning for obtaining refugee status. Ecocide, as a widespread or systematic attack on the environment, would therefore be perceived as a form of persecution against nature itself and, by extension, the communities connected to it. The destruction of the environment deriving from ecocidal acts, that affect not only individuals but society at large, would give resonance to the severe deprivation of fundamental rights outlined in Article 7(2)(g) of the Statute.

For the sake of refugee status determination, it is necessary not only to identify the grounds of persecution but also the agent of persecution.[288] If under refugee law, persecution primarily considers state actors as perpetrators, with particular emphasis on the State's inability or unwillingness to provide protection, in the context of ecological degradation the landscape becomes more intricate, involving a broader array of actors. States contributing significantly to environmental harm can be seen as indirectly persecuting vulnerable communities worldwide through their actions that either exacerbate the impacts of climate change or fail to comply with their obligations to take all the appropriate steps set out by the UN Guiding Principles on Business and Human Rights to guarantee that business enterprises under their jurisdiction do not incur in human rights abuses. Further, in circumstances where corporate activities cause significant environmental damage, such as land exploitation, mining, and pollution, the concept of 'ecocide' becomes a relevant framework for identifying the executives of those companies and guaranteeing accountability for the communities affected by their activities. Ecocide acknowledges the inherent link between environmental harm and violations of human rights, much like the concept of persecution, enabling the identification of

[287] Sanaullah, N. (2022). *Racialised Communities in Europe Hit Hardest by the Climate crisis: New ENAR Report*. [online] European Network against Racism. Available at: https://www.enar-eu.org/racialised-communities-in-europe-hit-hardest-by-the-climate-crisis-new-enar-report/ [Accessed 26 Feb. 2024].

[288] Li, Y. (2020). *Persecution in International Criminal Law and International Refugee Law*. [online] Available at: https://www.zis-online.com/dat/artikel/2020_6_1372.pdf [Accessed 26 Feb. 2024].

specific individuals or companies directly responsible for severe and long-lasting damage to ecosystems.

Finally, under the refugee definition persecution requires an intent by the perpetrator(s) to cause harm. The proposed crime of ecocide fundamentally alters the regime surrounding the mens rea behind the persecutory act, emphasising the unlawfulness of perpetrators acting *"with knowledge that there is a substantial likelihood [...] of damage to the environment being caused by those acts"*, and 'wantonly', displaying 'reckless disregard' for the potential damage.[289] Aligning with the principles of *dolus eventualis* or recklessness, under the definition of ecocide law, perpetrators are not required to specifically intend to harm the environment, as the fact that they acted with the awareness of the substantial likelihood of ecocide suffices in establishing criminal responsibility. In light of the scientific consensus attributing environmental degradation to human activities, particularly those of developed states, no actor operating activities with high risks of environmental damage can wilfully ignore such internationally recognised and fact-based obligations to instead prioritise their personal, financial, and economic gains over the public good.[290] This nuanced approach to mens rea not only captures the complexity of ecological harm but also emphasises the significance of accountability for those who, with awareness, contribute to the substantial likelihood of ecocide. By defining such a low level of mens rea, the proposed crime of ecocide would allow for more situations to fall under the umbrella of environmental persecution, fundamentally promoting a more extensive identification of environmentally displaced individuals under the definition of 'refugees'.

The recognition of ecocide as an international crime thus becomes imperative for addressing the complexities of environmental persecution, notably for what concerns the awarding of refugee status. Providing a comprehensive framework underscoring the permeating effects of environmental harm, ecocide identifies not only new grounds of persecution rooted in the interconnectedness between humanity and the environment, but also new agents of persecution, whose actions — and, at times, inactions — might actively contribute to the degradation of the environment and the displacement of its inhabitants.

2.2.2. Ecocide and the principle of non-refoulement

Another potential implication of the recognition of ecocide as an international crime in the sphere of international refugee law pertains to its potentially transformative effect on the principle of non-refoulement. As environmental calamities led to the internal displacement of at least 228 million individuals between 2008 and 2016, current international law is lagging in the development of

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

[290] Stop Ecocide Foundation (2021). *Independent Expert Panel for the Legal Definition of Ecocide - COMMENTARY AND CORE TEXT*. [online] Stop Ecocide Foundation. Available at: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf [Accessed 26 Feb. 2024].

comprehensive legal frameworks capable of codifying and safeguarding the rights of environmental refugees.[291] Nonetheless, the international legal principle of 'non-refoulement' - mandating that states refrain from expelling or repatriating individuals to a region where they confront a genuine risk of persecution, severe human rights violations, or irreparable harm - presents a promising pathway.[292] Consistently upheld as a peremptory norm of 'jus cogens', the principle of non-refoulement has been identified by scholars as a potential starting point for the development of international policies asserting that states return environmental migrants to uninhabitable lands because of environmental harm.[293]

As such a strategic approach to navigating the complexities surrounding environmental displacement could involve the implementation of an extended and progressive interpretation of Article 33 of the Refugee Convention, and the ensuing non-refoulement principle, to guarantee protection to environmental refugees by broadening the scope of the definition of 'unsafe place' to degraded ecosystems, fundamentally prohibiting the forceful return to such areas.[294] For what concerns environmental displacement specifically, legal scholars have suggested the implementation of a 'returnability test', a procedure aligning with the 2018 UN Principles and Practical Guidance on the Protection of the Human Rights of Migrants in Vulnerable Situations and aimed at evaluating the safety of the country of provenance based on the human rights violations taking place thereof.[295]

In practice, while courts have not yet acknowledged environmental harm as creating the conditions for the country to meet the non-refoulement threshold, its adverse effects on human rights, notably on the right to a healthy environment and even to life, suggest a potential shift in the future. An illustrative instance of the evolving application of non-refoulement to environmentally displaced individuals is the 2019 case of Ioane Teitiota before the Human Rights Committee. Teitiota, a national of Kiribati, claimed that New Zealand violated his right to life when it denied his application for refugee status and returned him to Kiribati as the severe environmental degradation on the island state created life-threatening conditions.[296] Although eventually confirming the decision of the domestic court, the Committee still recognised the potentiality of extending the principle of non-refoulement beyond its

[291] Keshen, S., Lazickas, S. and Solórzano, L. (2021). *Non-refoulement: a Legal Hope for the Protection of Environmental Migrants and Their Rights | International organisation and United Nations Studies Specialization (IOUNS)*. [online] multilateralism.sipa.columbia.edu. Available at: https://multilateralism.sipa.columbia.edu/news/non-refoulement-legal-hope-protection-environmental-migrants-and-their-rights [Accessed 26 Feb. 2024].
[292] Ibid.
[293] Ibid.
[294] Mazurek, M. (2023). From Agent Orange to the Amazon: criminalising and Defining Ecocide under the Rome Statute. [online] International Law Blog. Available at: https://internationallaw.blog/2023/05/08/from-agent-orange-to-the-amazon-criminalising-and-defining-ecocide-under-the-rome-statute/ [Accessed 26 Feb. 2024].

[295] Pelliconi, A.M. (2023). *The Human Crisis in the Climate crisis: on the Legal Limbo of climate-related Displacement*. [online] International Law Blog. Available at: https://internationallaw.blog/2023/06/19/the-human-crisis-in-the-climate-crisis-on-the-legal-limbo-of-climate-related-displacement/#_edn11 [Accessed 26 Feb. 2024].
[296] Ibid.

traditional confines to encompass the effects of environmental degradation. Notably, the Committee stressed that environmental harm might trigger non-refoulement obligations in future cases to prevent violations of the right to life and the prohibition of torture or other cruel, inhuman, or degrading treatment or punishment under Articles 6 and 7 of the International Covenant on Civil and Political Rights.[297]

Nonetheless, although representing a potential avenue for environmental refugees to eventually gain recognition, the principle is still non-systemic in nature and its application is likely to vary among domestic courts globally, potentially leading to inconsistent outcomes. As such, the ongoing efforts to incorporate the crime of ecocide in the Rome Statute as a fifth international crime could lead to the emergence of a compelling argument concerning the scope of the non-refoulement principle.[298] Indeed, as the principle routinely evaluates situations involving systemic and widespread rights violations potentially amounting to international crimes, the recognition of ecocide as an international crime and its assumption that individuals fleeing the impacts of environmental harm should be entitled to international protection would ground the applicability of non-refoulement in cases extending beyond the traditional 'refugee' designation.

In the evolving landscape of environmental protection, the recognition of ecocide as an international crime would therefore constitute a transformative avenue for seeking protection under an extended non-refoulement principle anchored in the international recognition of the adverse impacts of environmental harms on human rights. Indeed, the codification of ecocide in the Rome Statute would alter the perception of environmental displacement, elevating it to a grave and prosecutable offence that demands collective international intervention. Aligning seamlessly with the principle of non-refoulement, such a development would extend protection measures — whether under complementary or temporary protection mechanisms — not only to those fleeing immediate threats but also to individuals displaced by the broader impacts induced by ecocide, irrespective of their conventional categorisation as refugees.

2.2.3. Ecocide and the right to return

Although the profound trauma associated with displacement remains immutable, the opportunity for individuals to return to their places of origin in a manner characterised by safety, dignity, and sustainability holds the potential to engender hope and mitigate the enduring suffering precipitated by displacement. This avenue represents one of the three primary durable solutions employed by the international community to address displacement, alongside local integration and resettlement.

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[297] Ibid.

[298] Kennedy, C. (2023). Why Is an International Crime of Ecocide necessary? [online] International Law Blog. Available at: https://internationallaw.blog/2023/06/01/why-is-an-international-crime-of-ecocide-necessary/ [Accessed 26 Feb. 2024].

The ‘right of return’ represents a foundational principle within international law, safeguarding the prerogative of individuals to voluntarily return to, or re-enter, their country of origin or citizenship. Integral to the broader framework of human rights concerning border freedoms, this right finds explicit recognition in various international instruments, including but not limited to the Universal Declaration of Human Rights, the Fourth Geneva Convention of 1948, and the 1966 International Covenant on Civil and Political Rights. Its status as customary international law underscores its binding nature even upon states not party to these specific agreements.[299]

While historically associated with the entitlement of refugees to repatriate to their countries of origin unrestrictedly, the notion of the ‘right of return’ is progressively extending to internally displaced persons seeking to return to their habitual places of residence. For the majority of displaced individuals, whether unable to return to a former home because it is occupied, it has been destroyed, or they have lost the property, compensation is previewed as a potential response. However, compensation does not constitute a substitute for the right to return, at least to the vicinity of a former home.[300] The exercise of the right of return thus presupposes the comprehensive mitigation of factors constituting a breach of the principle of non-refoulement, ensuring their cessation and the establishment of conducive circumstances for voluntary, secure, and dignified return.[301]

In the context of environmental flight caused by ecocide, people were forced to leave their habitual place of residence as a result of severe, widespread or long-term damage to the environment, which resulted in creating an environment unfit for human life. Consequently, for displaced persons to be able to return to their place, the State of origin must reinstate the *status quo ante*, that is to say, restore the environment to its previous state, or to a state that guarantees the same enjoyment of human rights.[302]

The current ICC reparation system, which through Article 75 of the Rome Statute and Rule 85 of the Rules of Procedure and Evidence adopts an anthropocentric approach, would encounter difficulties in tackling the ecocentric reparation model that is required to properly provide restoration for ecocidal

[299] Rosand, E. (1998). The Right to Return under International Law following Mass Dislocation: the Bosnia Precedent? *Michigan journal of international law*, 19(4), pp.1091–1139.
[300] Human Rights Watch (2019). *Right to Return - Human Rights Watch Policy Page*. [online] Hrw.org. Available at: https://www.hrw.org/legacy/campaigns/israel/return/ [Accessed 27 Feb. 2024].
[301] United States Insitute of Peace (n.d.). *Return and Resettlement of Refugees and Internally Displaced Populations*. [online] United States Institute of Peace. Available at: https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/social-well-being/return-and-res [Accessed 27 Feb. 2024].
[302] Armengaud , Y. and Rodde, A. (n.d.). La Pertinence De La Justice Restaurative Dans Le Cas D’un Écocide Et La Pertinence Des Réparations Classiquement Admises En Droit Pénal Français Et International. [online] NotreAffaireATous. NotreAffaireATous. Available at: https://notreaffaireatous.org/wp-content/uploads/2019/05/R%C3%A9parations-de-l%C3%A9cocide-Alice-et-Ys%C3%A9e-.pdf [Accessed 27 Feb. 2024].

acts. Indeed, traditional legal frameworks often prioritise punitive measures, focusing on punishing offenders rather than addressing the harm done to victims and communities.[303]

A potential avenue to achieve such an ecocentric form of reparation and restoration involves acknowledging the environment as a survivor, which the recognition of ecocide intends to do. Gaining traction in jurisdictions like that of the Inter-American Court of Human Rights, which is moving towards recognising the environment as a rightsholder with several domestic jurisdictions like Colombia or Ecuador already doing so, such an approach could have transformative effects. In the specific ICC framework, while interpreting the existing Rule 85 of the RPE through an ecocentric approach might be a stretch, the potential approval of the definition outlined in Article 8 ter by the Stop Ecocide Foundation's amendment to the Rome Statute could incorporate a new type of survivor — the environment.[304]

As such, judges might sketch out restitution measures directed towards the reversal of environmental damage, for example through reforestation, as well as satisfaction and guarantees of non-repetition to empower citizens to undertake protective measures.[305] In this regard, the acknowledgement of ecocide could prompt international endeavours directed at restoring damaged ecosystems and remediating polluted areas. With a long-term view, these initiatives may not only facilitate the return of refugees to their original lands by incorporating projects like reforestation, soil remediation, and water purification to restore habitability but also mobilise resources to aid in their resettlement in their native regions.[306] This assistance could encompass financial support for rebuilding infrastructure, fostering sustainable agriculture, and ensuring access to clean water and renewable energy sources. Investments in resilient infrastructure, as well as educational programs, information dissemination, and awareness campaigns, could centre on fortifying communities against future environmental challenges.[307]

Considering the scale of ecocides, such an operation might take several decades, which could mean that some of the EDPs will likely never be able to return. However, the right of return has been recognised as an inalienable right by the United Nations. This has notably been precised concerning Palestinians' right to return to their homes and property from which they have been displaced and uprooted by the 1974 United Nations General Assembly Resolution 3236.[308] This implies that the

[303] Langmack, F.-J. (2021). Repairing Ecocide: A Worthwhile Challenge to the ICC Reparation System. *Völkerrechtsblog*. [online] doi:https://doi.org/10.17176/20210708-135721-0.
[304] Ibid.
[305] Higgins, P., Short, D. and South, N. (2012). Protecting the Planet after Rio – the Need for a Crime of Ecocide. *Criminal Justice Matters*, 90(1), pp.4–5. doi:https://doi.org/10.1080/09627251.2012.751212.
[306] Langmack, F.-J. (2021). Repairing Ecocide: A Worthwhile Challenge to the ICC Reparation System. *Völkerrechtsblog*. [online] doi:https://doi.org/10.17176/20210708-135721-0.

[307] Ibid.
[308] UN General Assembly, Question of Palestine, A/RES/3376, UN General Assembly, 10 November 1975, https://www.refworld.org/legal/resolution/unga/1975/en/6972 [Accessed 27 Feb. 2024].

entitlement to this right extends beyond the individuals who initially were forcibly displaced from the territory to include their descendants, as long as they have sustained a link with the relevant territory.[309]

For what concerns specifically environmental flight situations, the right to return becomes particularly striking as applied to indigenous people, whose notable link to the lands and environments they inhabit constitutes the very core of their culture, religiosity, and sustenance. In the case of indigenous communities, but at large for the entire international community, the right to return constitutes a central aspect of proper international practice, especially since the restoration of environments subjected to ecocides may require lengthy periods. Such prolonged commitments, which are inevitably characterised by changes in governance, policies, and approaches to the question at hand, may lead states to forget or undermine these processes, and it is precisely in this that ecocide law could come in handy, serving as a pressing reminder of States' responsibilities towards environmentally displaced individuals.

Eventually, the recognition of ecocide as a crime would not only act towards the prevention and prohibition but also keep states accountable for their restoration obligations to comply with their human rights obligations, identifying one of the most compelling arguments for recognising ecocide as a crime which lies in its potential to promote such restorative justice. As such, the reparative efforts underscored by the implementation of ecocide as an international crime promote a restorative justice approach that emphasises the interconnectedness and interdependence of human rights and the environment, promoting the reparation and restoration of the environment for the sake of the environment and its implications on human rights at large.[310]

2.3. Ecocide and the Responsibility of States

In July 2022, the United Nations General Assembly provided a landmark resolution through which it formally acknowledged the fundamental right to a clean, healthy, and sustainable environment, building upon the prior efforts of the UNHRC, which had officially recognised the right to a healthy environment in 2021.[311] Underscoring the inherent connection between human rights and the environment, this resolution sparked active debate on the scope of states' obligations to advance, safeguard, and uphold this newly acknowledged right to a healthy environment on their territory but also beyond their national borders.[312]

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[309] Ecocide Law Alliance (2021). *Why an Ecocide Law?* [online] Available at: https://endecocide.se/wp-content/uploads/2022/06/Why-ecocide-law.pdf [Accessed 27 Feb. 2024].
[310] Higgins, P., Short, D. and South, N. (2013). Protecting the planet: a Proposal for a Law of Ecocide. *Crime, Law and Social Change*, 59(3), pp.251–266. doi:https://doi.org/10.1007/s10611-013-9413-6.
[311] United Nations General Assembly, Resolution 76/300 (28 July 2022), UN Doc A/Res/76/300, p. 3
[312] Teillet, L. (2023). Are breaches of the Right to a Healthy Environment capable of triggering the Responsibility to Protect in International Law? Exploring the potential of mental health protection as a catalyst. Zenodo (CERN European organisation for Nuclear Research), p.21. doi:https://doi.org/10.5281/zenodo.8301855.

As human rights law emerged in the 19th century within an international context in which the sovereignty of states was primary, it undoubtedly brought upon a paradigmatic shift that emphasised the significance of human beings, irrespective of their nationality, as rights-holders under international law.[313] Under the auspices of human rights law, the doctrine of humanitarian assistance emerged in inter-state relations, eventually paving the way for the conceptualisation of the Responsibility to Protect.[314] The Responsibility to Protect is anchored in three pillars of equal importance: the responsibility of each State to safeguard its populations (pillar I); the responsibility of the international community to aid States in protecting their populations (pillar II); and the responsibility of the international community to intervene when a State demonstrably fails to protect its populations (pillar III).[315]

Initially developed to tackle major humanitarian disasters qualified as international crimes under the Rome Statute - namely genocide, crimes against humanity, crimes of aggression, and war crimes - R2P might appear distant from environmental concerns, but recent legal scholarship has nonetheless underscored the intricate links between human rights and the environment.[316] As such, positing that acts of ecocide could qualify as international crimes if it was to be incorporated into the Rome Statute, its tragic effects on the environment and its inhabitants could potentially trigger the activation of the R2P, in particular for what concerns its second and third pillar in the case of environmental intervention.

Indeed, conceived to safeguard individual human integrity, R2P was occasionally framed as a right of interference or humanitarian interventionism as both theories of humanitarian assistance and, subsequently, R2P fundamentally rejected an absolute interpretation of a State's sovereignty, promoting instead the protection of human rights as the ultimate and unquestionable objective.[317] As such, the question of humanitarian assistance without the consent of the host country began to surface in the 1980s with UNGA Resolution 43/131 underscoring that non-governmental entities with purely humanitarian motives could intervene in situations involving natural disasters or comparable emergencies without questioning the sovereignty.[318] In the 1990s the doctrine of humanitarian assistance further evolved to encompass the concept of the ‘responsibility to protect’ marking a

[313] Yann Kerbrat and Dupuy, P.-M. (2022). Droit International Public. 16th ed. Dalloz, p.617.
[314] Teillet, L. (2023). Are breaches of the Right to a Healthy Environment capable of triggering the Responsibility to Protect in International Law? Exploring the potential of mental health protection as a catalyst. *Zenodo (CERN European organisation for Nuclear Research)*, p.21-22. doi:https://doi.org/10.5281/zenodo.8301855.
[315] Šimonović, I. (2016). *The Responsibility to Protect*. [online] United Nations. Available at: https://www.un.org/en/chronicle/article/responsibility-protect#:~:text=The%20responsibility%20to%20protect%20 [Accessed 26 Feb. 2024].
[316] Evans, G.J. and Sahnoun, M. (2001). *The Responsibility to Protect : Research, Bibliography, Background*. Ottawa: International Development Research Centre, p.33.
[317] Yann Kerbrat and Dupuy, P.-M. (2022). Droit International Public. 16th ed. Dalloz, p.617.
[318] United Nations General Assembly, Resolution 43/131 (08 December 1988), UN Doc A/RES/43/131, p. 207.

transition from discretionary and non-binding humanitarian intervention to the shared responsibility of R2P.[319]

In recent times, R2P has re-emerged in the public fora as the interconnection between human rights and the environment has become increasingly apparent, with scholars advocating for a broadening of the scope of R2P to encompass concerns extending beyond anthropocentric interests.[320] As demonstrated before, the concept of ecocide underscores the profound impact of environmental degradation on the fundamental rights of populations, for instance, those who have been displaced because of environmental destruction, consequently identifying those circumstances where environmental degradation infringes upon their fundamental rights. As such, the integration of ecocide in the list of ICC-recognised crimes might thereby establish the foundations for invoking R2P not only to protect the environment as a whole but also those who inhabit it and might find themselves displaced because of damage caused by human activities. In Chapter 1 we underlined that within the broader framework of international law, the primary responsibility for providing humanitarian aid typically lies with the concerned State—the State of origin.[321] Such understanding has been recently questioned by the growing recognition that third states should contribute, based on pillar II of the R2P, to disaster mitigation. Nonetheless, the reception of aid by third states remains contingent on the approval of the concerned State and its imposition — in light of pillar III — requires the intervention of the UN Security Council.

As of the time of writing, the narrow scope of application of the concept of R2P hinders the possibility for states to invoke it to establish additional international obligations in the context of environmental disasters but, as the international community continues to grapple with the environmental degradation, the discourse surrounding environmental R2P is expected to intensify.[322] In this view, on August 22, 2019, faced with the devastating wildfires engulfing the Amazon rainforest and the severe threat posed to ecological equilibrium, French President Emmanuel Macron highlighted the international significance of the crisis and stressed the collective responsibility to address it.[323] Even from a purely academic standpoint, a growing number of experts have started to

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[319] Viikari, L.E. (2015). *Responsibility to Protect and the Environmental Considerations: a Fundamental Mismatch of the Way Forward?* [online] University of Lapland Research Portal. Available at: https://research.ulapland.fi/en/publications/responsibility-to-protect-and-the-environmental-considerations-a- [Accessed 26 Feb. 2024].

[320] Shrivastava, A. (2022). Forestalling the Responsibility to Protect Against Ecocide. *Völkerrechtsblog*. [online] doi:https://doi.org/10.17176/20221031-095506-0.

[321] Ammer, M. and Nowak, M. (2010). *Legal Status and Legal Treatment of Environmental Refugees*. [online] *Intergovernmental Panel on Climate Change*, Germany: Federal Environment Agency, pp.1–14. Available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6671 [Accessed 2 Jan. 2023].

[322] Teillet, L. (2023). Are breaches of the Right to a Healthy Environment capable of triggering the Responsibility to Protect in International Law? Exploring the potential of mental health protection as a catalyst. *Zenodo (CERN European organisation for Nuclear Research)*, p.37. doi:https://doi.org/10.5281/zenodo.8301855.

[323] FranceInfo (2019). *On Vous Résume La Passe d'armes Entre Emmanuel Macron Et Jair Bolsonaro Sur l'Amazonie*. [online] Franceinfo. Available at: https://www.francetvinfo.fr/monde/ameriques/amazonie/on-vous-resume-la-passe-d-armes-entre-emmanuel-macron-et-jair-bolsonaro-sur-l-amazonie_3587637.html [Accessed 10 Dec. 2022].

advocate for the development of a right to ecological interventionism[324]. Among them, Petite recently argued that national sovereignty cannot be absolute and that, when a State fails to fulfil its fundamental obligations towards the environment, the international community bears a subsidiary responsibility.[325] As the notion of environmental interventionism is gaining traction, the potential recognition of ecocide as an international crime would provide further clarification in the definition of its thresholds, limitations, and contours, addressing the imperative need to establish international norms for the protection of the environment and the rights of those impacted by environmental harm.

2.4. Ensuring Justice and Accountability

The crime of ecocide has recently garnered increasing attention as a potential instrument for fostering justice and accountability in the face of environmental degradation and its severe consequences. As environmental issues escalate and their global ramifications become more apparent, there is a growing recognition of the need to hold individuals and entities accountable for acts that lead to widespread environmental harm. By recognising ecocide as a prosecutable offence, international legal systems aim to provide a mechanism through which perpetrators, including corporations and government officials, can be held accountable for their actions and therefore open avenues for reparations for victims of environmental degradation, including environmental refugees.

2.4.1. Ecocide and accountability of corporate actors

The proposition of establishing ecocide as a criminal offence presents an avenue through which multinational corporate entities can be held internationally accountable, a dimension not adequately addressed within the confines of the human rights framework alone. Concurrently, the incorporation of corporate obligations outlined in the United Nations Guiding Principles on Business and Human Rights (hereafter, Guiding Principles) can contribute to refining the proportionality assessment integral to the proposed ecocide crime, thereby enhancing its enforceability as a deterrent.

Under international human rights law, states bear the primary responsibility for upholding human rights standards. This encompasses ensuring protection against human rights violations perpetrated by business enterprises, as well as facilitating mechanisms for accountability and access to redress in cases of business-related abuses. The Guiding Principles, endorsed by the UN Human Rights Council

[324] Teillet, L. (2023). Are breaches of the Right to a Healthy Environment capable of triggering the Responsibility to Protect in International Law? Exploring the potential of mental health protection as a catalyst. *Zenodo (CERN European organisation for Nuclear Research)*, p.37. doi:https://doi.org/10.5281/zenodo.8301855.

[325] Teillet, L. (2023). Are breaches of the Right to a Healthy Environment capable of triggering the Responsibility to Protect in International Law? Exploring the potential of mental health protection as a catalyst. Zenodo (CERN European organisation for Nuclear Research), p.37. doi:https://doi.org/10.5281/zenodo.8301855. See also, Petite, S. (2019). Droit d'ingérence Écologique En Amazonie - Le Temps. www.letemps.ch. [online] 27 Aug. Available at: https://www.letemps.ch/articles/droit-dingerence-ecologique-amazonie [Accessed 26 Feb. 2024].

in 2011[326], delineate the state's duty to protect against such abuses and outline corporate responsibilities to respect human rights. This includes the imperative for businesses to avoid contributing to adverse human rights impacts and to address such impacts promptly when they occur[327]. The Office of the UN High Commissioner on Human Rights has contextualised these responsibilities in relation to climate change, emphasising the need to mitigate actions that adversely affect human life, ecosystems, and biodiversity, including *"the emission of greenhouse gases and toxic wastes, the contamination of air, water and soil, and deforestation"*.[328]

The Guiding Principles prescribe a framework for companies to identify, prevent, mitigate, and account for their adverse human rights impacts through a process of human rights due diligence. This process comprises four key steps: assessing actual and potential human rights impacts, integrating and acting upon the findings, monitoring the effectiveness of responses, and transparently communicating how impacts are addressed.[329] While the Guiding Principles carry legal weight only when translated into national legislation, efforts towards establishing an international legally binding instrument concerning transnational corporations and human rights, initiated in 2014, are ongoing[330]. Nevertheless, some states have begun to consider implementing mandatory human rights due diligence regimes domestically and regionally to mitigate environmental and climate-related harm and bolster corporate accountability.[331]

The impetus for such due diligence measures partly stems from the recognition by certain corporate entities of the business imperatives posed by the climate crisis and the significance of safeguarding human rights against the adverse impacts of severe environmental degradation. In certain jurisdictions, businesses have acknowledged the utility of developing and implementing robust due diligence policies to identify, assess, prevent, and mitigate adverse environmental and human rights impacts. Calls have been made for national legislation mandating corporate actors to prevent human

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[326] UN Human Rights Council resolution 17/4 (2011). *Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/17/4*. [online] Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC%20/RES/17/4 [Accessed 26 Feb. 2024].

[327] UN Human Rights Council (2011). *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework"'*. A/HRC/17/31. [online] Available at: https://digitallibrary.un.org/record/705860 [Accessed 25 Feb. 2024].

[328] UN OHCHR (2021). *Fact Sheet No. 38: Frequently Asked Questions on Human Rights and Climate Change*. [online] p.36. Available at: https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf [Accessed 25 Feb. 2024].

[329] UN Human Rights Council (2011). *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework"'*. A/HRC/17/31. [online] Available at: https://digitallibrary.un.org/record/705860 [Accessed 25 Feb. 2024].

[330] UN Human Rights Council (2014). *Resolution 26/9, A/HRC/RES/26/9*. [online] Available at: https://documents-ddsny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement [Accessed 26 Feb. 2024].

[331] Oldring, L. and Mackintosh, K. (2022). *The Crime of Ecocide Through Human Rights: A New Tool For Climate Justice*. [online] Available at: https://promiseinstitute.law.ucla.edu/wp-content/uploads/2022/12/The-Crime-of-Ecocide-Through-Human-Rights-A-New-Tool-for-Environmental-Justice.pdf [Accessed 26 Feb. 2024].

rights abuses and environmental harm in their global operations[332], garnering support from a significant number of large businesses, associations, and investors.[333]

While these measures are crucial for establishing legal clarity and ensuring corporate accountability, they alone may not suffice to prevent or remedy the most severe environmental damage and human rights violations perpetrated by corporate actors worldwide. Instances of corporate accountability for acts resulting in significant and widespread or long-term environmental harm have been rare.[334] However, there is a growing trend of human rights-based litigation against both governments and corporations at the national level concerning climate and environmental issues.[335]

For instance, in a notable case against Royal Dutch Shell, the district court in The Hague found the corporation in breach of its duty of care under relevant provisions of the Dutch Civil Code and ordered substantial emissions reductions across its activities.[336] Legal actions have also been taken against entities like the Belgian National Bank for failing to meet climate, environmental, and human rights requirements in their investment practices.[337]

In particular, the pending *Município de Mariana v BHP* case serves as a poignant example of how corporate actors, through their reckless activities, can endanger the environment and human rights, resulting in severe environmental degradation and displacement of communities. The Mariana Dam disaster, which led to extensive environmental damage in Brazil, underscores the devastating impact of corporate negligence on ecosystems and livelihoods. In cases like this, where corporate activities directly contribute to environmental harm and human rights violations, there is a pressing need for accountability and reparations.[338]

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[332] Business & Human Rights Resource Centre (2021). *UK Businesses Call for a New Human Rights and Environmental Due Diligence Law*. [online] *business-humanrights.org*. Available at: https://www.business-humanrights.org/en/latest-news/uk-businesses-call-for-a-new-human-rights-and-environmental-due-diligence-law/ [Accessed 26 Feb. 2024].

[333] Business & Human Rights Resource Centre (2019). *List of Large businesses, Associations & Investors with Public Statements & Endorsements in Support of Mandatory Due Diligence Regulation*. [online] *business-humanrights.org*. Available at: https://www.business-humanrights.org/en/latest-news/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-mandatory-due-diligence-regulation/ [Accessed 26 Feb. 2024].

[334] United Nations Office of the High Commissioner (n.d.). *OHCHR Accountability and Remedy Project: Improving Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses*. [online] Available at: https://www.ohchr.org/en/business/ohchr-accountability-and-remedy-project [Accessed 26 Feb. 2024].

[335] Setzer, J. and Higham, C. (2021). *Global trends in climate change litigation: 2021 snapshot Policy report*. [online] Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf [Accessed 26 Feb. 2024].

[336] *Milieudefensie et al. V Royal Dutch Shell PLC* [2021] Case No. C/09/571932 / HA ZA 19-379 (The Hague District Court) Available at: https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:R [Accessed 26 Feb. 2024].

[337] ClientEarth v. Belgian National Bank [2021]www.climatechangedomains.com (Brussels Tribunal of First Instance) Available at: https://www.climatelaws.org/geographies/belgium/litigation_cases/clientearth-v-belgian-national-bank [Accessed 26 Feb. 2024].

[338] Suelen Tavares, G. (2023). *Litigating Elsewhere: Learning from Mariana Dam environmental disaster in Brazil*. [online] International Law Blog. Available at: https://internationallaw.blog/2023/07/03/litigating-elsewhere-learning-from-mariana-dam-environmental-disaster-in-brazil/ [Accessed 26 Feb. 2024].

This litigation trend reflects a broader shift towards holding business entities accountable for human rights abuses and environmental harm, including advocating for individual criminal liability for the crime of ecocide. Some large investment funds are pressuring firms to align their business practices with environmental and human rights goals, with calls for stringent accountability measures for boards and individual directors.[339] In this context, the establishment of an international crime of ecocide has garnered support from corporate entities and investors seeking enhanced human rights and environmental accountability.[340]

The introduction of an international crime of ecocide would align with the growing demands from corporate entities and investors for enhanced accountability regarding human rights and environmental concerns. This initiative would incentivise states to enact timely and robust legislative measures at the domestic level. By defining ecocide as a crime, the law would recognise the severe harm inflicted on ecosystems and communities, thereby shifting the focus from mere regulatory violations to criminal liability. Within the framework of the Rome Statute, the establishment of ecocide as a crime would entail holding individuals accountable for their actions and oversights, implicating decision-makers in both governmental and industrial spheres for activities amounting to ecocide. This international legal development would serve as a definitive moral and legal boundary against the most severe forms of environmental destruction. Indeed, strengthening criminal accountability could dissuade certain individuals from committing environmental crimes, thereby influencing decision-making processes in sectors susceptible to environmental damage. For instance, it may discourage corporate executives from participating in activities that could be deemed harmful to the environment, as they seek to avoid associations akin to those of war criminals.[341]

A globally recognised crime of ecocide, guided by the principles outlined in the UN Guiding Principles on Business and Human Rights, would provide an effective deterrent to reinforce existing commitments to climate, environmental, and human rights standards. Specifically, the incorporation of human rights due diligence requirements would facilitate the evaluation of environmentally harmful acts, particularly those categorised as 'wanton' according to the Independent Expert Panel's definition of ecocide. The term 'wanton' denotes acts committed with reckless disregard for the

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[339] Prakash, N.D. and A. (2022). *Larry Fink, Stakeholder Capitalism, and Climate Action*. [online] Forbes. Available at: https://www.forbes.com/sites/prakashdolsak/2022/01/23/larry-fink-stakeholder-capitalism-and-climate-action/ [Accessed 26 Feb. 2024]; The Guardian (2022). *£262bn Investor Says It Will Target Bosses Who Fail on Climate or Human Rights*. [online] Available at: https://www.theguardian.com/business/2022/jan/24/investor-bosses-climate-human-rights-aviva-investors [Accessed 26 Feb. 2024].

[340] ICGN (2021). *ICGN Statement of Shared Climate Change Responsibilities to the United Nations Climate Change Conference of the Parties 26*. [online] Available at: https://www.icgn.org/sites/default/files/2022-03/23.%20UK%20-%20COP26%20-%20Statement%20of%20Shared%20Climate%20Change%20Responsi [Accessed 26 Feb. 2024].

[341] Killean, R. (2021). Could criminalising ecocide increase accountability for environmental harm in conflicts? [online] CEOBS. Available at: https://ceobs.org/could-criminalising-ecocide-increase-accountability-for-environmental-harm-in-conflicts/ [Accessed 26 Feb. 2024].

disproportionately excessive environmental damage relative to anticipated social and economic benefits.[342]

The due diligence framework mandates businesses to assess the environmental and human rights impacts of their activities[343], offering a systematic approach to weigh the harm against the potential benefits of corporate actions. This integration of due diligence requirements into ecocide legislation would clarify the scope of corporate responsibility, shielding compliant businesses from allegations of acting with reckless disregard for environmental damage.

Ecocide recognition could further empower affected communities to seek justice through legal avenues, ensuring their voices are heard, and their rights protected in the face of corporate wrongdoing. Additionally, it could facilitate the provision of reparations to affected communities. By acknowledging ecocide as a crime, courts could impose penalties and sanctions on corporations responsible for environmental destruction, with the proceeds directed towards compensation, restoration, and rehabilitation efforts.

Overall, ecocide recognition offers a promising pathway towards greater accountability and reparations for environmental harm caused by corporate actors. By addressing the root causes of environmental degradation and promoting corporate responsibility, ecocide recognition can help prevent future disasters like the Mariana Dam disaster and uphold the rights of both present and future generations to live in a healthy and sustainable environment.

2.4.2. Ecocide and universal jurisdiction

The inclusion of ecocide as a prosecutable crime within the jurisdiction of the International Criminal Court is undeniably a pivotal advancement in the global effort to combat environmental crimes. Nonetheless, it is imperative to acknowledge the inherent constraints on the ICC's jurisdiction, which arise from the voluntary adherence of states to the Rome Statute, the foundational instrument establishing the Court. This limitation presents a formidable obstacle, particularly given that major contributors to environmental degradation, such as the United States and China are not parties to the Rome Statute, thereby falling beyond the direct purview of the ICC. In light of this challenge, the concept of universal jurisdiction emerges as a potential transformative mechanism for holding perpetrators accountable for ecocide.[344]

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[342] Stop Ecocide Foundation (2021). Independent Expert Panel for the Legal Definition of Ecocide Commentary and Core Text. [online] Available at: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/16243688 [Accessed 26 Feb. 2024].

[343] UN Human Rights Council (2011). *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework"'*. A/HRC/17/31. [online] Available at: https://digitallibrary.un.org/record/705860 [Accessed 25 Feb. 2024].

[344] TRIAL International (n.d.). *Universal Jurisdiction*. [online] TRIAL International. Available at: https://trialinternational.org/topics-post/universal-jurisdiction/.

Traditionally, a state retains jurisdiction to adjudicate crimes that occur within its territorial boundaries or involve its citizens. However, the gravity of international crimes is such that they are considered offences against the global community, necessitating unique legal provisions.

One of these unique legal principles is universal jurisdiction, founded on the premise that combating impunity transcends national borders. Universal jurisdiction allows a national court to prosecute individuals for grave violations of international law, such as crimes against humanity, war crimes, genocide, and torture. This principle is rooted in the understanding that such crimes inflict harm not only on specific states or individuals but also on the broader international community and order, justifying intervention by any state to uphold justice. Under universal jurisdiction, states have the discretion, and sometimes the obligation, to prosecute perpetrators of international crimes present within their territory. Universal jurisdiction is somehow the judicial counterpart to the 'responsibility to protect'. Universal jurisdiction typically comes into play when traditional bases of criminal jurisdiction are unavailable. For instance, if the accused is not a national of the prosecuting state, if the crime did not occur within that state's territory or involve its nationals, or if the state's own national interests are not directly impacted. Since its emergence following World War II, universal jurisdiction has evolved into a prominent principle of international law. Its recognition can be traced back to main international instruments such as the Geneva Conventions of 1949, which established regulations for warfare. Over time, universal jurisdiction has been further solidified and incorporated into various international treaties and conventions.[345]

National courts are empowered to invoke universal jurisdiction when the state has enacted laws acknowledging the pertinent crimes and granting authorisation for their prosecution. In certain instances, this domestic legislation is compelled by international treaties, such as the Convention Against Torture and the Inter-American Convention to Prevent and Punish Torture, requiring that state parties implement the necessary legal frameworks to prosecute or extradite individuals accused of torture present within their territorial jurisdiction.[346]

As per the assessment of the United Nations Environment Programme (UNEP), universal jurisdiction holds the potential to substantially enhance the enforcement of international environmental law by addressing existing gaps. However, it is noteworthy that, thus far, the application of universal jurisdiction within the realm of environmental law has been lacking. UNEP acknowledges that environmental crimes constitute severe transgressions closely intertwined with various forms of transnational organised crime, which collectively pose significant challenges to peace, sustainable

[345] TRIAL International (n.d.). *Universal Jurisdiction*. [online] TRIAL International. Available at: https://trialinternational.org/topics-post/universal-jurisdiction/.

[346] International Justice Resource Center (2012). *Universal Jurisdiction | International Justice Resource Center*. [online] Ijrcenter.org. Available at: https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/.

development, and security. These crimes jeopardise the welfare of communities and legitimate businesses, underscoring the urgent need for robust enforcement mechanisms.[347]

Hence, it is imperative for the international community to acknowledge and confront crimes related to the environment as significant menaces to both peace and sustainable development. Moreover, there exists an immediate necessity to enhance the environmental rule of law across all tiers of governance to deter the existence of safe havens and effectively enforce environmental legislation. This entails a comprehensive assessment of the scope and utilisation of universal jurisdiction in addressing environmental crime, scrutinising its pertinence and efficacy in combatting such crimes.

The recognition of ecocide as an international crime would lead to its recognition under the jurisdiction of the ratifying countries. Moreover, under the principles of universal jurisdiction, any ratifying state possesses the authority to arrest a non-national suspected of ecocide committed elsewhere, provided they deem the offence sufficiently severe. Consequently, even those countries that are not signatories to international agreements, such as the United States and China, would be subject to the implications of ecocide prosecution. In this context, universal jurisdiction serves as a complementary safeguard to the Rome Statute, addressing jurisdictional gaps inherent in the Court's limited jurisdiction. Pursuant to the principle of universal jurisdiction, perpetrators of ecocide could face legal proceedings in any ratifying country, irrespective of their citizenship, status, or the location of the offence. Regarding the status of the perpetrators, the precedent set by the landmark arrest of Pinochet in 1998, which stripped heads of state of immunity for human rights violations, underscores the evolving application of universal jurisdiction. Accordingly, there has been a notable increase in the number of cases brought before courts based on this principle in recent years.[348]

This alignment with the transboundary impacts of ecocide will facilitate swifter and more effective prosecutions, as it enables the targeting of corporations operating in non-signatory countries. As of 2012, 163 out of 193 United Nations Member States possessed the capacity to assert universal jurisdiction over various international crimes, either directly or through their national legal frameworks[349]. Although discrepancies between national definitions and international legal standards may result in impunity gaps, universal jurisdiction has the potential to enhance the power of ecocide law enshrined in the Rome Statute by extending its applicability and reach.

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[347] United Nations Environmental Programme (2018). *The State of Knowledge of Crimes That Have Serious Impacts on the Environment*. [online] Available at: https://www.unep.org/resources/publication/state-knowledge-crimes-have-serious-impacts-environment [Accessed 25 Feb. 2024].

[348] Paulet, V. and Philip, G. (2018). *Make Way for Justice #4 Momentum Towards accountability. Universal Jurisdiction an Annual Review 2018*. [online] Available at: https://trialinternational.org/wp-content/uploads/2018/03/UJAR-Make-way-for-Justice-2018.pdf [Accessed 25 Feb. 2024].

[349] Amnesty International (2012). *Universal Jurisdiction a Preliminary Survey of Legislation around the World*. [online] *amnesty.org*. Available at: https://www.amnesty.org/en/documents/ior53/019/2012/en/ [Accessed 25 Feb. 2024].

Moreover, universal jurisdiction has the potential to catalyse international cooperation and coordination in addressing environmental crimes. States can collaborate to investigate and prosecute individuals or entities responsible for ecocide, regardless of where the crimes occurred or the nationality of the perpetrators. This collective approach not only strengthens accountability but also sends a powerful message that environmental destruction will not be tolerated anywhere in the world. It therefore increases the deterrent power of ecocide as an international crime.

While the ICC's jurisdiction may be limited by the voluntary participation of states, the concept of universal jurisdiction offers a promising avenue for overcoming these limitations and holding perpetrators of ecocide accountable on a global scale. By embracing universal jurisdiction and recognising ecocide as a crime of universal concern, states can take decisive action to combat environmental crimes and protect as well as repair the rights of those affected, such as environmentally displaced persons.

Chapter 3: Reparations for ecocide and challenges for its recognition at the international level

The recognition of the crime of ecocide at the international level, and its translation into the domestic legal system of the ratifying State parties, will allow for effectively holding accountable perpetrators of ecocide. Advocates of such recognition have emphasised the deterrent effects and other benefits of individual criminal accountability for environmental crimes, though comparatively less scrutiny has been directed towards an additional prospective benefit of enshrining the offence within the jurisdiction of the International Criminal Court: the prospect of implementing environmentally reparative measures. Noteworthy in this context is the ICC's capacity to dispense reparations to victims of crimes perpetrated by a convicted party, with the supplementary capability of the Court's Trust Fund for Victims (TFV) to provide aid to victims prior to the issuance of a decision.

Although reparations and victim assistance are widely recognised as pivotal components of recovery in the aftermath of conflicts and atrocities, there exists a tendency to prioritise addressing severe human rights abuses, potentially overshadowing the significance of environmental destruction.[350] This oversight arguably disregards the intricate interdependencies between humans and their environments. Environmental degradation and the depletion of natural resources can jeopardise livelihoods — in some cases triggering displacement —, impeding the path to recovery, and laying the groundwork for subsequent human rights infringements.[351]

Instead of framing environmental and human well-being as diametrically opposed, the recognition of ecocide would build upon the international recognition of the interdependence of human rights and the environment to introduce an eco-sensitive approach to designing and implementing reparations for harms inflicted by human activity. Consequently, it would affirm the ICC's evolving awareness of environmental issues and might prompt ICC entities to integrate heightened environmental consciousness into reparative actions. This integration could encompass the tailored allocation of reparations and the expansion of the Trust Fund for Victims' mandate to address environmental concerns.

Building on the current limits of the Court’s reparation framework as a means of redressing ecocide, this chapter contends that integrating ecocide as a prosecutable crime within the jurisdiction of the Court could establish suitable avenues for redress that might be appropriate in the aftermath of environmental flight caused by ecocides, to preserve the basic rights of EDPs and repair the harm

[350] Dixon, P.J. (2015). Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo. *International Journal of Transitional Justice*, 10(1), pp.88–107. doi:https://doi.org/10.1093/ijtj/ijv031.

[351] Milburn, R. (2014). The roots to peace in the Democratic Republic of Congo: conservation as a platform for green development. *International Affairs (Royal Institute of International Affairs 1944-)*, [online] 90(4), pp.871–887. Available at: https://www.jstor.org/stable/24538202 [Accessed 9 Mar. 2024].

suffered. Nevertheless, many obstacles stand in the way of the recognition of ecocide as an international crime and therefore of the availability, accessibility and effectivity of reparative measures for victims of ecocide. The subsequent section of this chapter analyses these hurdles, encompassing notably the highly political ecocide recognition process, the jurisdictional and operational obstacles to its effective implementation and the challenges for victims to access justice. It should be noted the generalised nature of the conclusions drawn in this chapter, given the unique circumstances of each environmental displacement event, suggests that there isn't a universally applicable set of reparative measures. In this respect, reparations should always take into consideration the specific circumstances and needs of the intended beneficiaries.

1. Reparations for victims of environmental flight

Reparations serve dual purposes as delineated in the Statute of the International Criminal Court. Initially, they compel convicted individuals to repair the damage they have inflicted. Subsequently, reparations strive, within reason, to alleviate the suffering of victims by mitigating the repercussions of criminal deeds perpetrated by the convicted individual. This endeavour not only deters future transgressions but also fosters a sense of justice through accountability.[352]

The large majority of refugees and internally displaced persons (IDPs) often do not receive any form of redress for the wrongs they have suffered. Nonetheless, as survivors of human rights violations, they would still be entitled to reparations — whether through restitution, compensation, rehabilitation or symbolic measures — under the auspices of international human rights law or mechanisms provided for in international criminal law, such as Reparations Orders by the International Criminal Court.[353]

For what concerns the Court, Article 75 of the Rome Statute stipulates that the ICC may identify appropriate reparations to victims, ranging from restitution and compensation to rehabilitation. These requests can be made directly against a convicted person or through the Court's Trust Fund for Victims, an independent, non-judicial institution that operates within the Rome Statute system and can use funds made available by voluntary contributions to complement any reparation collected from the convicted person. Furthermore, in addition to its contribution to the delivery of reparations, the TFV could also provide assistance for rehabilitation, whether physical or psychological and material support to victims who have suffered harm as a result of a crime within the Court's jurisdiction. Such assistance programmes have been delivered in the DRC and Uganda, and have included medical referrals, counselling, and socioeconomic support.

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[352] *Prosecutor v. Thomas Lubanga Dyilo*. Observations of the Trust Fund for Victims on the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations'. [2013] para. 105. (International Criminal Court).
[353] Shelton, D. (2015). *Remedies in international human rights law*. Oxford, United Kingdom: Oxford University Press.

These provisions directly correlate to the establishment, by the ICC's jurisprudence, of the conditions necessary for victims to claim reparations. These include that the victim be a natural person or legal entity that has suffered harm — whether material, physical, or psychological — as a result of the commission of any of the crimes under the jurisdiction of the Court. Reparations can be individual, collective, or both, and the Court may order awards to intergovernmental, international or national organisations, although it has yet to do so. Prior to ordering reparations, the Court may invite representations from the convicted person, victims, and other relevant actors.

The stipulation that harm must be 'personal' to either a natural or legal person underscores the anthropocentric orientation of the reparative process, constituting a fundamental constraint in the Court's ability to address environmental harm independently, disconnected from any other concurrent human rights violation. In this regard, the introduction of ecocide as a crime within the Court's Statute could serve as a step towards the identification of an ecocentric rationale, which could in turn prompt adjustments to the existing reparation regime to ensure justice for non-human actors.[354] Marja Lehto, the Special Rapporteur for environmental protection, has notably highlighted that the repercussions of environmental damage often extend to both individual and collective dimensions, necessitating reparations that are either individual, collective or a combination of both.[355] As such, various modalities of reparations — like restitution, compensation, rehabilitation, symbolic measures, and guarantees of non-repetition — could be explored as avenues for redress following ecocide, each warranting thorough consideration.

1.1. Restitution

Restitution is commonly understood as a type of reparative measure aimed at re-establishing the situation that existed before the commission of the violations — as long as the process is not materially impossible or involves a disproportional burden — either by returning the material or, if this is not possible, by paying the value of it. Traditionally, efforts to provide refugees and IDPs with remedies have focused predominantly on the restitution of housing, land, and property, with the assumption that this is the most pertinent remedy for forcibly displaced individuals, as it may help enable return as the 'preferred' solution to displacement.[356]

For what instead concerns environmental flights, restitution would involve restoring an environment conducive to the enjoyment of a dignified life, to allow environmentally displaced persons to exercise their right to return. In this regard, the proposal to criminalise ecocide by the Stop Ecocide

[354] Mwanza, R. (2018). Enhancing Accountability for Environmental Damage under International law: Ecocide as a Legal Fulfilment of Ecological Integrity. *Melbourne Journal of International Law*, 19(2), pp.586–613.
[355] International Law Commission. (2019). Second Report of the Special Rapporteur Maria Lehto on Protection of the Environment in Relation to Armed Conflicts. UN Doc A/CN.4/728. [online] Available at: https://digitallibrary.un.org/record/3801185?ln=fr [Accessed 7 Mar. 2024].
[356] Bradley, M. and University Of Cambridge (2015). *Refugee repatriation : justice, responsibility and redress*. Cambridge: Cambridge University Press.

Foundation's Independent Expert Panel (IEP) constituted a significant shift from the traditional anthropocentric approaches to protection, towards a more ecocentric interpretation of the same processes. As such, the potential amendments proposed by the IEP to the Rome Statute encompassed specific provisions addressing environmental victimisation, raising particular questions within the broader framework of restitution for environmental harms.

The recognition of the environment as a potential victim of man-made harm, and therefore also as a beneficiary of compensation and restitution, would challenge the traditional definition of victims presented in the Rules of Procedure and Evidence (RPE). Defining victims as *"natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court"*, Rule 85(a) of the RPE seems to be preemptively excluding non-human actors from its scope. Nonetheless, the application of RPE 85(a) to the environment could be achieved by tapping into indigenous traditional knowledge and a deeper understanding of the interactions among biotic and abiotic elements. Such a perspective would entail a necessary shift involving the rethinking of the linkage between humans and the notion of 'natural persons' through less anthropocentric understandings of the concept. While this may pose challenges, the materiality shared by both humans and nonhumans could pave the way for constructing a new understanding of a natural person.

Recognising the possibility for the environment to be considered a victim under the ICC framework would allow legal practitioners to extend the notion of restitution to environment-related initiatives geared at re-establishing the ecological conditions preceding cases of ecocide. As such, the traditional characterisation of restitution practices could be seamlessly incorporated with environmental notions. This novel form of restitution could include: (i) orders for restoration of any harm to the environment caused by the commission of the offence, if feasible, and if not, payment of the costs and expenses incurred in restoring the environment; (ii) costs for carrying out a specified project for the restoration or enhancement of the environment for the victims' benefit; or/and (iii) payment to an environmental trust or environmental organisation for a specified restoration project.[357]

Nevertheless, acknowledging the very nature of ecocide, ensuring complete restitution might be inherently challenging, especially since the IEP's definition encompasses 'severe and either widespread or long-term damage' to the environment. For instance, displacement often represents the last resort of individuals facing intolerable levels of risk, hazard, and threat deriving from the growing uninhabitability of their ecosystems.[358] According to this rationale, environmental flight usually occurs in situations where ecosystems have been severely damaged on a widespread and long-term

[357] Killean, R. (2023). Reparations in the Aftermath of Ecocide, [online] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4315496 [Accessed 7 Mar. 2024].
[358] Platform on Disaster Displacement, Follow-up to the Nansen Initiative (2023). *Key Messages for the 2023 United Nations Climate Change Conference – COP28*. [online] Available at: https://disasterdisplacement.org/perspectives/platform-on-disaster-displacement-key-messages-for-the-2023-united-nations-climate-change-conference-cop28/#:~:text=Displacement%20is%20generally%20an%20outcome [Accessed 9 Mar. 2024].

scale, for instance, through ecocidal acts. Therefore, reparation through restitution appears as an unlikely scenario in the case of individuals or communities that were displaced as a result of environmental harm, as the realisation of such restitution would take decades, while their increased vulnerability calls for timely and effective responses. Nevertheless, this does not mean that restitution measures should not be ordered. In fact, while in the short-term their impact is limited, in the long-term view, restitution measures are instrumental to creating the conditions for the safe return of displaced populations.

Restitution therefore does not constitute a viable option to respond to the pressing needs of environmentally displaced people, whose precarious situation often requires significant amounts of resources. As such, options for compensation have also been explored by scholars as potential avenues to respond to the material and immaterial damages experienced by environmentally displaced individuals.

1.2. Compensation

The potential for compensation, traditionally understood as financial compensation for the damage caused as well as the value of material that cannot be restituted, has been acknowledged by various entities at the international level among which the International Law Commission's commentary on State responsibility, the International Law Institute, the UN Compensation Commission, the International Court of Justice, and the International Center for Settlement of Investment Disputes.[359] For what concerns environmental harm, these actors have all stressed the importance of compensation for material damages that can be valued in money — for instance losses of income or physical harm — as well as non-material damages — such as losses of opportunities for education and psychological harm.

Nonetheless, the evaluation of the level of destruction, and the degree of compensation necessary, undoubtedly presents challenges like the need for expert testimony, site visits, and appropriate evidence collection.[360] In the case of environmental harm, the analysis for compensation becomes even more complex as it might be hindered by a lack of information, scientific agreement on thresholds, and limited resources, fundamentally creating the premises for impediments in the identification and analysis of relevant factors. Nonetheless, recent international law and human rights

[359] See, International Law Commission (2001). *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001*. [online] Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [Accessed 9 Mar. 2024]. See also, International Law Institute (1997). *Session of Strasbourg - Responsibility and Liability under International Law for Environmental Damage Recalling the 'Declaration on a Programme of Action on the Protection of the Global Environment' Adopted at the 65th Session of the Institute in Basle*. [online] Available at: https://www.idi-iil.org/app/uploads/2017/06/1997_str_03_en.pdf [Accessed 9 Mar. 2024]. See also, Governing Council, UN Compensation Commission, 'Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of "F4" Claims', UN Doc S/AC.26/2005/10, 4 April 2005, para. 58.

[360] Killean, R. (2022). Reparations in the Aftermath of Ecocide. *SSRN Electronic Journal*. doi:https://doi.org/10.2139/ssrn.4315496.

law practice, including the Environmental Panel of the UN Compensation Commission, the International Court of Justice, and notably the Inter-American Court of Human Rights, have started to provide guidance on this process.[361] Although distinct from the ICC in terms of its legal framework focused on state responsibility the IACtHR has demonstrated that environmental destruction is compensable under international law by ordering compensation for both material damage and immaterial damage, especially acknowledging the impact of environmental harm on a community's spiritual connection with their territory.[362]

While the ICC operates within its legal framework, the potential introduction of ecocide in the Rome Statute would elevate this notion to that of international crime, fundamentally transposing ecocide into unlawful acts whose commission could lead to the ICC's request for compensation for victims. Indeed, if ecocide were to be introduced as an international crime, the recognition of compensability for environmental harm could be introduced into the Court's legal framework through fines or forfeitures of property, supporting the notion that environmental harm can be compensated, further fostering accountability for those responsible for such destruction.

Concerning the identification of compensation measures for environmental harm, other scholars have underscored the necessity of addressing the responsibility of high-emitting countries and providing reparation for historical and contemporary damages.[363] As environmental vulnerability is shaped by both natural and social processes, with historical injustices contributing to the inability of some communities to enjoy their fundamental rights because of environmental degradation, the acceptance of refugees and asylum seekers by major polluters can be viewed as a form of compensation.[364] Environmental law scholars often emphasise the need for high-emitting states to welcome environmentally displaced persons into their territories in proportion to their contributions to environmental degradation, arguing that migration, based on a country's historical emissions, can be a form of reparation. Among them, migration law scholar E. Tendaye Achiume underlined the alleged

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[361] See, Governing Council, UN Compensation Commission, 'Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of "F4" Claims', UN Doc S/AC.26/2005/10, 4 April 2005, para. 80. See also, Desierto, D. (2018). *Environmental Damages, Environmental Reparations, and the Right to a Healthy Environment: the ICJ Compensation Judgment in Costa Rica v. Nicaragua and the IACtHR Advisory Opinion on Marine Protection for the Greater Caribbean*. [online] EJIL: Talk! Available at: https://www.ejiltalk.org/environmental-damages-environmental-reparations-and-the-right-to-a-healthy-environment-the-icj-compensation-judgment-in-costa-rica-v-nicaragua-and-the-iacthr-advisory-opinion-on-marine-protection/. See also, Antkowiak, T. (2014). A Dark Side of Virtue: the Inter-American Court and Reparations for Indigenous Peoples. *Duke Journal of Comparative & International Law*, [online] 25(1), pp.1–80. Available at: https://scholarship.law.duke.edu/djcil/vol25/iss1/2/ [Accessed 9 Mar. 2024].

[362] Killean, R. (2022). Reparations in the Aftermath of Ecocide. *SSRN Electronic Journal*. doi:https://doi.org/10.2139/ssrn.4315496. P. 10.

[363] Gonzalez, C. (2020). Migration as Reparation: Climate Change and the Disruption of Borders. *Faculty Publications & Other Works*. [online] Available at: https://lawecommons.luc.edu/facpubs/687/ [Accessed 9 Mar. 2024]. P. 434.

[364] Gerrard, M. (2023). America Is the Worst Polluter in the History of the world. We Should Let Climate Change Refugees Resettle here. *Washington Post*. [online] 10 Apr. Available at: https://www.washingtonpost.com/opinions/america-is-the-worst-polluter-in-the-history-of-the-world-we-should-let-climate-change-refugees-resettle-here/2015/06/25/28a55238-1a9c-11e5-ab92-c75ae6ab94b5_story.html [Accessed 9 Mar. 2024].

obligation of Northern states to admit refugees and asylum seekers from the Global South as compensation for the North's political and economic subordination of the South.[365]

Questioning the traditional notion of bounded, autonomous, and sovereign States, this perspective would struggle to acquire support in the established ICC framework, which prosecutes individuals rather than States and therefore would find itself unable to embark on efforts to influence State policies in the matter of migratory flows. As elucidated in the following sections, the implementation of such an integrated approach to environmental degradation would be likely to find more relevance under the auspices of other regional or local fora — such as the ICJ or the IACtHR — or in a tailor-made judicial body dedicated to environmental harm, whose capacities would be geared precisely to the investigation and adjudication of cases related to environmental justice.

1.3. Rehabilitation

The worrisome impacts of environmental harm on communities and individuals across the globe have prompted a profound examination of the justice and rehabilitation measures available to environmentally displaced individuals. While the understanding of migration as a form of reparation might offer a glimpse into compensation, its applicability is predominantly discussed in the context of international refugee law. However, a significant segment of affected populations comprises internally displaced persons, who in turn necessitate more comprehensive rehabilitation paradigms. As such, an exhaustive and interconnected approach seamlessly integrating psychosocial rehabilitation with the physical relocation of affected communities proves to be fundamental to addressing the intricate facets of resettlement as part of broader rehabilitation frameworks.

Financial compensation, one of the most commonly employed forms of reparation, inherently falls short of mitigating the psychological trauma inflicted by the indiscriminate nature of environmental harm, which often results in mass displacement leaving entire communities grappling with the aftermath. As such, a profound shift towards more comprehensive mechanisms for rehabilitation becomes imperative in addressing the collective nature of the harm experienced by communities and in reinstating fundamental rights, such as life, health, food, water, shelter, property, and resettlement.[366]

Most often the trajectory of rehabilitation unfolds through the resettlement of internally displaced individuals in safer living environments through secure habitation sites, the allocation of land to displaced families, the provision of support for small businesses, and the creation of mandatory employment opportunities. Nonetheless, the recognition of identity and the psychosocial aspects of

[365] Achiume, E.T. (2019). *Migration as Decolonization*. [online] Stanford Law Review. Available at: https://www.stanfordlawreview.org/print/article/migration-as-decolonization/ [Accessed 9 Mar. 2024].
[366] Killean, R. (2023). Reparations in the Aftermath of Ecocide, [online] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4315496 [Accessed 7 Mar. 2024].

displacement prove to be crucial aspects of this process. For instance, the establishment of educational institutions and infrastructural mechanisms tailored to the needs of the communities, as well as the designation of environmentally displaced individuals through identification not only facilitate inclusion in government schemes but also act as a safeguard against potential marginalisation, guaranteeing equitable access to support systems. Furthermore, the emphasis on eco-sensitive and environmentally sustainable capacity-building efforts becomes pivotal in ensuring that rehabilitation efforts contribute not only to the economic recuperation of affected communities but also to broader environmental sustainability goals.[367]

Nonetheless, as the consequences of displacement extend way beyond the physical sphere, permeating into the psychological substrate of individuals, resettlement must extend beyond geographical relocation to encompass access to psychosocial rehabilitation services.[368] Indeed, it is estimated that approximately one-third of displaced individuals, notably women and children, deal with mental health issues, ranging from depression and anxiety to post-traumatic stress disorder.[369] As the disruptions caused by ecocide impact the victims' livelihoods, cultural ties, and social dynamics, psychiatric support, trauma-based counselling, and all-around mental health support become integral components of comprehensive psychosocial rehabilitation.

Moreover, as situations of displacement could heighten the social discrepancies between groups, a commitment to non-discrimination proves to be fundamental for the resettlement process to avoid replicating patterns of marginalisation. As such, these mechanisms should involve measures ensuring that income-generating opportunities are accessible to all affected groups based on horizontal inclusion.[370] As such, resettlement emerges not as a standalone solution but as a cornerstone in the broader and exhaustive rehabilitation of environmentally displaced individuals. Recognising the inherent intersectional effects of ecological harm, a holistic approach to rehabilitation would have to address both the physical and mental dimensions of displacement.

1.4. Symbolic and Transformative Measures

The Rome Statute acknowledges various transitional justice strategies to address the peculiar challenges of post-conflict societies. Notably, Article 75 of the Statute stresses the relevance of symbolic and restorative reparation forms in the ICC framework to guarantee the reconstruction of societal bonds in the aftermath of a conflict, building upon the recognition, by the Office of the

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[367] *Ibid*.

[368] Physiopedia (n.d.). *Mental Health and Forced Displacement*. [online] Physiopedia. Available at: https://www.physio-pedia.com/Mental_Health_and_Forced_Displacement#:~:text=About%20one%20third%20of%20displaced [Accessed 11 Mar. 2024].

[369] World Health Organization (2023). *Mental Health of Refugees and migrants: Risk and Protective Factors and Access to Care*. [online] Available at: https://iris.who.int/bitstream/handle/10665/373279/9789240081840-eng.pdf?sequence=1 [Accessed 11 Mar. 2024].

[370] Killean, R. (2023). Reparations in the Aftermath of Ecocide, [online] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4315496 [Accessed 7 Mar. 2024].

Prosecutor, of the power of capacity-building, local justice, and institutional reforms.[371] As the ICC somewhat blurs the line between prosecution and reconstruction in its transitional justice mechanisms, the proposition of ecocide as a fifth international crime in the Statute would also entail the integration of transitional justice mechanisms to tackle the issues arising from environmental damage.

If initially transitional justice mechanisms were understood as either judicial or non-judicial measures addressing rights violations and establishing the rule of law through accountability, reconciliation, and redress for victims' rights violations, scholars have started exploring the gaps and avenues associated with the potential recognition of ecocide as an international crime.[372] Some of them have asserted that suggestions like the identification of forensic practices aiding ecocide evidence collection and presentation go hand in hand with the deployment of complementary transitional justice mechanisms in enhancing the criminalisation of ecocide for the advancement of human rights.[373] For instance, as vulnerable groups like indigenous communities and women are known to be disproportionately affected by environmental degradation, transitional justice mechanisms would play a crucial role in amending the wrongs of societies where social and political systems have failed to prevent and prosecute environmental destruction.[374]

Guarantees of non-repetition represent a primary example of transformative transitional justice mechanisms as they have the capacity to prevent the recurrence of crimes by addressing their structural causes.[375] Understood as a concept more commonly associated with human rights violations and state-led reparations, these guarantees can be valuable tools in guaranteeing recuperation in the aftermath of ecocidal acts.[376] Indeed, despite their traditional interpretation, the decision of the ICC in the Al-Mahdi case highlighted the Court's willingness to award this form of reparation in the realm of individual accountability.[377] As such, just as *"effective measures to guarantee non-repetition of the*

[371] Rome Statute of the International Criminal Court, art 75

[372] Srivastava, M. (2022b). *Transitional Justice Mechanisms: Fortifying the Fifth Crime of Ecocide*. [online] BJIL. Available at: https://www.berkeleyjournalofinternationallaw.com/post/transitional-justice-mechanisms-fortifying-the-fifth-crime-of-ecocide [Accessed 9 Mar. 2024].

[373] Hellman, J. (2014). The Fifth Crime Under International Criminal Law: Ecocide? In: D. Brodowski, M. Espinoza de los Monteros de la Parra, K. Tiedemann and J. Vogel, eds., *Regulating Corporate Criminal Liability*. [online] Freiburg, Germany: Springer, pp.273–280. Available at: https://link.springer.com/chapter/10.1007/978-3-319-05993-8_22#citeas [Accessed 4 Nov. 2022].

[374] UNFCCC (2018). *Considerations regarding Vulnerable groups,communities and Ecosystems in the Context of the National Adaptation Plans Least Developed Countries Expert Group*. [online] UNFCCC. Available at: https://unfccc.int/sites/default/files/resource/Considerations%20regarding%20vulnerable.pdf [Accessed 9 Mar. 2024].

[375] Killean, R. (2022). Reparations in the Aftermath of Ecocide. *SSRN Electronic Journal*. doi:https://doi.org/10.2139/ssrn.4315496. P. 12.

[376] Sandoval, C. "Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change inTimes of Transition," in Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies, 178–180; Halmai.

[377] ICC Trial Chamber VIII (2017). *Situation of the Republic of Mali - Reparations Order*. [online] ICC. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_05117.PDF [Accessed 9 Mar. 2024].

attacks" were used to address the destruction of cultural sites in the Al-Mahdi's case, future decisions may consider awarding guarantees against potential future environmental harm.[378]

For what concerns the implementation process, the Basic Principles and Guidelines on the Right to a Remedy and Reparation outline eight potential modalities, which in turn encompass activities ranging from law enforcement training to the promotion of conflict resolution mechanisms, and to the reform of laws that facilitated the violations.[379] Holding the potential to guarantee greater environmental protection through legislative adaptation, these measures could be adapted to the individual concerns of the affected areas and, building upon the practice of the IACtHR, they could be defined based on the guidance of victims' groups.[380] Further, the Principles stress that reparations should always "*restore the victim to the original situation before the gross violations*" and, for what concerns environmentally displaced individuals, such restoration would undoubtedly pass through attempts to restore the damaged environment.[381] Such a process, which would entail lengthy eco-system reconstruction, would necessarily have to tap into the knowledge and guidance of local inhabitants to guarantee the full realisation of the right to return.

Moreover, additional symbolic actions, such as apologies, acknowledgements of responsibility, and recognition of suffering, could serve as reconciliation measures after ecocidal acts.[382] Indeed, in combination with other forms of reparation, like compensation, these could contribute to a broader identification of responsibility in alignment with the evolving practices of the ICC.[383] Encompassing initiatives aimed at commemorating, memorialising, and revitalising communities and their natural heritages, these symbolic forms of reparations could play a fundamental role in acknowledging the psychological and moral injuries caused by ecocide and in furthering the principles of eco-sensitivity and interconnected harm.[384]

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[378] Killean, R. (2022). Reparations in the Aftermath of Ecocide. *SSRN Electronic Journal*. doi:https://doi.org/10.2139/ssrn.4315496. P. 12.

[379] United Nations (2005). *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. [online] OHCHR. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation [Accessed 9 Mar. 2024].

[380] Capone, F. (2018). An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements. *Journal of International Criminal Justice*, 16(3), pp.645–661. doi:https://doi.org/10.1093/jicj/mqy031.

[381] United Nations (2005). *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. [online] OHCHR. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation [Accessed 9 Mar. 2024].

[382] Killean, R. (2022). Reparations in the Aftermath of Ecocide. *SSRN Electronic Journal*. doi:https://doi.org/10.2139/ssrn.4315496. P. 12.

[383] Greiff, P. de ed., (2006). *The Handbook of Reparations*. Oxford University Press. doi:https://doi.org/10.1093/0199291926.001.0001.

[384] Killean, R. (2022). Reparations in the Aftermath of Ecocide. *SSRN Electronic Journal*. doi:https://doi.org/10.2139/ssrn.4315496. P. 12.

Awarding reparations for environmental destruction having caused environmental flights would acknowledge the symbiotic relationship between restoring the environment and repairing harm experienced by individuals who were forced into leaving their habitual place of residence.

2. Challenges for ecocide recognition and implementation within the International Criminal Court jurisdiction

Acknowledging the benefits of the recognition of ecocide as an international crime with regard to rights protection and reparative measures for environmentally displaced persons, many obstacles stand in the way of its effective implementation.

2.1. Standing challenges for the recognition of ecocide as a fifth international crime against peace

Expanding the ICC's material scope to embrace environmental crimes qualifying as ecocide would require the undertaking of a complex and time-sensitive process.[385] In December 2019, during the 18th International Criminal Court Assembly of States Parties, the Republic of Maldives and the Republic of Vanuatu brought forth a proposal for the criminalisation of acts amounting to ecocide within the ICC's scope.[386] The 2019 intervention of Vanuatu's ambassador John Licht, building on the legacy of Swedish premier Olof Palme who in 1972 called upon a shared duty of care for the environment against ecocidal acts, advocated for an amendment of the Rome Statute capable of criminalising acts that amount to ecocide.[387] Exploring the concept of universal justice for the gravest crimes, among which environmental ones, Vanuatu's statement called upon the Assembly to act to avert the catastrophic consequences of environmental harm and advocated *"to strengthen the international rule of law to protect our common heritage and environment could be our joint legacy."*[388] As such, Vanuatu and the Maldives urged the 123 State Parties to consider expanding the ICC's jurisdiction to ecocide, emphasising its role in protecting humanity against climate emergencies and severe environmental threats.[389] The proposed amendment would hold individuals, including chief

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[385] Nazareth, C. (2023). *A Critical Analysis of the Inclusion of 'Ecocide' in the Rome Statute*. [online] CEA NLUD. Available at: https://ceanludelhi.wixsite.com/ceablog/post/a-critical-analysis-of-the-inclusion-of-ecocide-in-the-rome-statute [Accessed 9 Mar. 2024].

[386] Sarlière, M. (2020). Ecocide: Past, Present, and Future Challenges. *Encyclopedia of the UN Sustainable Development Goals*, pp.233–243. doi:https://doi.org/10.1007/978-3-319-95981-8_110. P. 7.

[387] Stop Ecocide International (2019). *Vanuatu Calls for Internatioal Criminal Court to Seriously Consider Recognising Crime of Ecocide*. [online] Stop Ecocide International. Available at: https://www.stopecocide.earth/press-releases-summary/vanuatu-calls-for-international-criminal-court-to-seriously-consider-recognising-crime-of-ecocide- [Accessed 9 Mar. 2024].

[388] Sarlière, M. (2020). Ecocide: Past, Present, and Future Challenges. *Encyclopedia of the UN Sustainable Development Goals*, pp.233–243. doi:https://doi.org/10.1007/978-3-319-95981-8_110. P. 7.

[389] Stop Ecocide International (2019a). *Sovereign States Call on ICC to Seriously Consider Ecocide Crime*. [online] Stop Ecocide International. Available at: https://www.stopecocide.earth/newsletter-summary/sovereign-states-call-on-icc-to-seriously-consider-ecocide-crime- [Accessed 9 Mar. 2024].

executives and government ministers, criminally liable for harm, establishing a legal duty of care for life on Earth.

Nonetheless, the process of amendment of the Rome Statute, which is outlined by Article 121 of the Statute, involves four steps that present both political, procedural, and diplomatic challenges.[390] First and foremost, after seven years from the Statute's entry into force and at least three months before the next Assembly of State Parties, any State Party can propose amendments to the Secretary-General of the United Nations, who promptly circulates it to all States Parties.[391] In the context of the aforementioned Assembly, a decision requiring a majority of those present and voting is taken and can either lead to direct handling of the proposal or the convening of a Review Conference if deemed necessary.[392] Once the negotiations are initiated, the draft undergoes negotiation rounds until a final version is ready for a vote, becoming an amendment only with two-thirds approval from States Parties.[393] Unless specified otherwise, an amendment becomes effective for all States Parties one year after instruments of ratification or acceptance are deposited with the Secretary-General.[394]

Seemingly procedural, each of the aforementioned steps is nonetheless shaped by diplomatic and political discussions which are, in turn, shaped by the specific interests of each State Party. As such, those who would be the most targeted by the prosecution of human-caused environmental disasters might resist the negotiations, while others, like Vanuatu for instance, might strive to push for an effective integration.[395] Indeed, as identified by Stop Ecocide International, although more and more countries are showing support for the recognition of ecocide as an international crime, many others, among which those most responsible for the growing levels of environmental degradation, are still recalcitrant to the criminalisation of environmental harms.[396] As such, the process of recognition of ecocide as an international crime could potentially fall victim to political and diplomatic discussions, which in turn are often informed by the individual interests of each State Party.

Furthermore, even under the assumption that the international community would share a common engagement with the need to criminalise ecocide, the very understanding of the notion of ecocide seems to be diverse and not homogeneous. Indeed, one major challenge to the successful recognition lies in the necessity for the international community to acquire a common and widely accepted

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[390] Killean, R. (2022b). *The Benefits, Challenges, and Limitations of criminalising Ecocide*. [online] IPI Global Observatory. Available at: https://theglobalobservatory.org/2022/03/the-benefits-challenges-and-limitations-of-criminalising-ecocide/ [Accessed 9 Mar. 2024].
[391] Rome Statute of the International Criminal Court, Art 121
[392] Rome Statute of the International Criminal Court, Art 121 (2)
[393] Rome Statute of the International Criminal Court, Art 121 (3)
[394] Rome Statute of the International Criminal Court, Art 121 (4)
[395] Sarlève, M. (2020). Ecocide: Past, Present, and Future Challenges. *Encyclopedia of the UN Sustainable Development Goals*, pp.233–243. doi:https://doi.org/10.1007/978-3-319-95981-8_110. P. 7.
[396] Stop Ecocide International (n.d.). *Leading States*. [online] Stop Ecocide. Available at: https://www.stopecocide.earth/leading-states [Accessed 9 Mar. 2024].

agreement on the definition of ecocide.[397] As the future of the doctrine of ecocide depends on political consensus and on the willingness of States to bear the costs deriving from the enforcement of international criminal law for environmental purposes, a shared agreement on the contours of the notion of ecocide proves to be fundamental. Nonetheless, in the current landscape, characterised by the diversified incorporation of ecocide into the penal codes of fourteen different countries, such perspective is very differentiated.[398] For instance, while Article 245 of Ecuador's penal code employs an expansive definition, identifying ecocide as those "*crimes against the environment and nature or Pacha Mama and crimes against biodiversity*", France's 'Climate & Resilience Act', passed in 2021, adopted a narrower approach, including ecocide as a 'délit' under national law criminalising the conduct of actors committing offences that "*cause serious and lasting damage to health, flora, fauna or the quality of the air, soil or water*."[399]

The differentiated incorporation of ecocide in the national legislation of various countries has undoubtedly led to the emergence of discrepancies not only in the core definition of the notion and the levels of criminalisation but also concerning the very perspective of identifying nature as a potential rights-holder. In its Preamble, Ecuador's Constitution highlights the need to celebrate "*nature, the Pachamama, of which we are a part and which is vital to our existence [...]*", underlying further on how: "*Nature or Pachamama [...] has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes."*[400] Such a perspective has not been mirrored in other constitutional texts like Article 441 of the Ukrainian Constitution or the aforementioned 'Climate & Resilience Act' which notably qualifies ecocide as a mere offence to an aspect of the environment as a context rather than an entity. Furthermore, even despite extensive calls from entities such as the European Parliament and the United Nations Environment Programme, State practices concerning the investigation and prosecution of environment-related crimes are still not homogenous. This fundamentally creates the premises for a peculiar context in which environmental protection has emerged domestically through national means in the absence of a single universally binding source of international law entrenching such obligations.[401]

The most recent proposal for the criminalisation of ecocide at the national level came from Belgium, which became the first European state to officially recognise ecocide as an international crime in its

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[397] Palarczyk, D. (2023). Ecocide Before the International Criminal Court: Simplicity is Better Than an Elaborate Embellishment. *Criminal Law Forum*. doi:https://doi.org/10.1007/s10609-023-09453-z. P. 174

[398] Ibid.

[399] See, Article 245, Ecuador's Penal Code. See also, Article 231-233, France's 'Climate & Resilience Act

[400] See, Preamble and Art. 71, Ecuador's Constitution

[401] See, European Parliament News Room (2021). *Revamping EU Environmental Liability Rules | 17-05-2021 | News | European Parliament*. [online] www.europarl.europa.eu. Available at: https://www.europarl.europa.eu/news/en/agenda/briefing/2021-05-17/7/revamping-eu-environmental-liability-rules [Accessed 9 Mar. 2024]. See also, UNEP (n.d.). *Observations on the Scope and Application of Universal Jurisdiction to Environmental Protection*. [online] Available at: https://www.un.org/en/ga/sixth/75/universal_jurisdiction/unep_e.pdf [Accessed 9 Mar. 2024].

national penal code. Based on the definition proposed in 2021 by the independent expert panel convened by the Stop Ecocide Foundation, the law situates Belgium at the forefront of the global conversation surrounding the criminalisation of ecocide, especially in the framework of the ICC, where Belgium is expected to advocate for the admission of ecocide among the other international crimes.[402]

2.2. Challenges for the implementation of the crime of ecocide

The ever-expanding discourse concerning the criminalisation of ecocide within the framework of the ICC has undoubtedly led to the emergence of many multifaceted challenges. Nonetheless, while the recognition of the crime is pivotal in guaranteeing justice for environmental harms, assuming the success of such a process, its implementation would also face considerable intricacies — notably concerning the jurisdiction of the Court and its organisational matters.

2.2.1. *Challenges attached to the jurisdiction of the Court*

At the heart of the challenges in implementing ecocide as an international crime lies the intricate web of jurisdictional hurdles that have affected the efficacy of the Court's action. In its preamble the Rome Statute underlines the complementary character of the Court, underscoring how its jurisdiction only extends to those crimes recognised within the Statute that national jurisdictions, whether because of unwillingness or lack of capacity, fail to investigate and prosecute.[403] The complementarity of the Court qualified the ICC as a court of last resort whose adjudication capacities only concern those crimes for which State Parties have agreed to potentially delegate jurisdiction. As such, for a potential crime of ecocide to have a meaningful impact, a considerable number of State parties would have to ratify the aforementioned amendment to Article 8, creating the premises for the Court to exercise its jurisdiction over ecocide-related matters.

Even looking beyond the ratification process per se, gathering the ratification support of a considerable amount of State Parties also represents a vital step in increasing the deterrence against ecocidal acts. Indeed, widespread ratification of an amendment recognising ecocide as an international crime could constitute a powerful deterrent in dissuading individuals and entities from engaging in environmentally harmful activities, situating the process as a strategic step in enhancing the global governance of the environment. Along these lines, the concept of universal jurisdiction, underscoring the idea that a national court may prosecute individuals for serious crimes against international law based on the principle that such crimes harm the international community as a whole, could emerge as

[402] Stop Ecocide International (2024). *Belgium Becomes First European Country to Recognise Ecocide as International Level Crime*. [online] Stop Ecocide International. Available at: https://www.stopecocide.earth/2024/belgium-becomes-first-european-country-to-recognise-ecocide-as-international-level-crime [Accessed 9 Mar. 2024].
[403] Rome Statute of the International Criminal Court - Preamble

an important approach to guarantee the widespread implementation of ecocide laws.[404] As exemplified by New Zealand's International Crimes and International Criminal Court Act, national courts can exercise universal jurisdiction when they adopt legislation recognising the global relevance of a crime and formalising its prosecution.[405] For what concerns ecocide, universal jurisdiction stands as a linchpin in addressing environmental crimes at the global scale as it puts forth that certain crimes, such as ecocide, are so egregious that they concern the entire international community. The recognition of ecocide in the ICC framework could represent a profitable push for national courts to integrate its prosecution in their local systems in a perspective that transcends geopolitical boundaries and acknowledges the protection of the environment as a shared responsibility.

Nonetheless, for universal jurisdiction to be maximised in its efficiency, it would require recognition by as many States as possible to guarantee wide-ranging and forward-looking approaches to environmental accountability. As such, the very nature of the ICC's jurisdiction, confined to States that are parties to the Rome Statute, presents a complex landscape of hindrances in addressing environmental crimes at a global scale. For instance, one fundamental challenge lies in the acknowledgement that many major polluters — among which significant economic powers like China, the United States of America, and Russia — are not currently part of the ICC statute. In this regard, concerns have been raised about the potential effectiveness of the ICC in prosecuting individuals for ecocidal acts, notably those nationals of non-state parties whose activities contribute to environmental degradation.[406] This particular limitation implies that nationals from non-state parties cannot be prosecuted for ecocidal acts unless these acts either have a direct impact on citizens of a State party that has ratified the amendment or occur on the territory of the aforementioned State party.

For instance, as of the time of writing, one-third of the largest US companies do not disclose any of their environmental impacts, and certain well-known corporations registered in the United States have been implicated in environmental controversies because of some practices of theirs that have contributed to environmental harm.[407] However, the actions of these corporations fundamentally fall outside of the direct jurisdiction of the ICC since the United States is not a signatory to the Rome Statute. Consequently, unless the damage caused by corporate actors directly impacts citizens of ICC member states or occurs within the territories of such states, the ICC would face challenges in prosecuting individuals associated with these entities for ecocide. Such limitations reflect a critical concern about the global accountability framework for ecocide, which finds itself hinges on the

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[404] International Justice Resource Center (2012). Universal Jurisdiction | International Justice Resource Center. [online] Ijrcenter.org. Available at: https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/.

[405] *International Crimes and International Criminal Court Act*. Available at: https://www.legislation.govt.nz/act/public/2000/0026/28.0/DLM63091.html [Accessed 9 Mar. 2024].

[406] Sarlième, M. (2020). Ecocide: Past, Present, and Future Challenges. *Encyclopedia of the UN Sustainable Development Goals*, pp.233–243. doi:https://doi.org/10.1007/978-3-319-95981-8_110.

[407] Olick, D. (2022). *One-third of the largest US companies don't disclose any of their environmental impact*. [online] CNBC. Available at: https://www.cnbc.com/2022/04/28/one-third-of-largest-us-companies-dont-disclose-climate-impact.html [Accessed 9 Mar. 2024].

willingness of States to ratify and integrate the relevant amendment into their national jurisdiction. The particular emphasis placed on willingness is inevitably informed by political and national interests that would make certain States reluctant to ratify an amendment introducing ecocide as a crime within the ICC's jurisdiction as this could create hindrances to their national businesses potentially implicated as perpetrators of ecocide. Therefore, as the challenges relating to the jurisdiction of the ICC in the implementation of ecocide as an international crime are undoubtedly linked to the complex interplay between international accountability and national interests, the notion of universal jurisdiction re-emerges as a potential avenue for growth. Indeed, recognising the inherent limitation of the current ICC framework, it would become imperative for the international community to explore the avenues provided by universal jurisdiction to hold individuals responsible for ecocide accountable, even in the absence of national ratification of the ICC statute in the State of origin of the perpetrator and/or in the area subjected to the ecocidal act.

Other than challenges purely related to membership, the jurisdictional scope of the ICC also brings forth significant impediments in the prosecution of environmental harms. Indeed, according to the Rome Statute, individuals can be held accountable for a crime *"whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible"*.[408] As such, corporate executives could be held accountable for environmental harms if they are found guilty of (1) indirectly perpetrating the abuse if they are found guilty of (2) aiding, abetting, and supporting the violation, or through (3) superior responsibility. Involving a significant level of control over the actions of subordinates, the notion of (1) indirect perpetration encounters challenges when applied to corporate structures because, unlike military hierarchies, corporations are compartmentalised and function through delegation, two aspects that blur the line between decision-making actors. Further, introducing a heightened mens rea standard, Article 25(3)(c), which focuses on establishing liability for (2) aiding, abetting, or supporting the commission of a crime, requires the establishment that actions were authorised with the aim of facilitating a wanton act by subordinates. Finally, Article 28 of the Statute introduces the concept that (3) a superior in an organisation can be held accountable for the actions of those under their command and control, offering a potential avenue for holding CEOs liable.[409] Holding CEOs, rather than companies at large responsible for their ecocidal acts could help overcome the limitations deriving from the inability of the Court to prosecute legal persons and potentially even promote changes in the governance of corporations themselves as imposing reparations, for example through financial compensation, would

[408] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), ISBN No. 92-9227-227-6, UN General Assembly, 17 July 1998, Art.25. Available at: https://www.refworld.org/legal/constinstr/unga/1998/en/64553 [Accessed 9 Mar. 2024].
[409] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), ISBN No. 92-9227-227-6, UN General Assembly, 17 July 1998, Art.28. Available at: https://www.refworld.org/legal/constinstr/unga/1998/en/64553 [Accessed 9 Mar. 2024].

impact their very own financial capacities and act both as deterrent and promoter of environmentally-friendly governance.

Nonetheless, this potential is accompanied by challenges related to the common exoneration of executives in corporations due to the complex structures of corporate hierarchies, which often create obstacles for the Court to hold them accountable and instead force the Court to turn to other avenues to guarantee redress. In this regard, the United Nations Guiding Principles on Business and Human Rights, outlining obligations for States to regulate corporations within their jurisdictions, could create the premises to hold State officials accountable for ecocides resulting from their failure to monitor and control private corporate activities.[410] Furthermore, Article 75(2) of the Rome Statute provides that reparations might be executed either directly against the convicted person or through the Trust Fund for Victims. Yet, since in most cases, reparations might be too heavy for one single perpetrator to cover, their financial burden would fall upon the TFV, which draws from private and public funds.[411] Not recognising companies as subjects under the ICC jurisdiction would protect them from being condemned to repair the harm created by their activities and instead burden national taxpayers with such financial consequences. Against this backdrop, States might be even more incentivised to address ecocide at the national level, taking proactive stances in their national jurisdictions to avoid the complementary intervention of the ICC jurisdiction. As such, States could be even more incentivised to address ecocide at the national level, taking proactive stances in their national jurisdictions to avoid the complementary intervention of the ICC jurisdiction.

In light of the above, the debate surrounding the recognition of legal entities as pertaining to the jurisdiction of the Court seems to appear as a question whose implications are undoubtedly crucial for corporate liability. Proposed by France during the initial negotiations of the Rome Statute, Corporate Criminal Liability (CCL) was fundamentally rejected as, at the time, its recognition in domestic jurisdictions was almost non-existent and multiple States from civil law traditions actively opposed the notion.[412] Nonetheless, since then the international community has gained growing awareness of the impacts of corporate actors on international peace and security and many nations have progressively recognised corporate liability in their national legal systems. This shift indicates a significant transformation in the global legal landscape since the 1998 proposal, with an increasing

[410] United Nations (2011b). *Guiding Principles on Business and Human Rights Implementing the United Nations 'Protect, Respect and Remedy' Framework*. [online] United Nations. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [Accessed 9 Mar. 2024].

[411] Gómez Rojo, A. (2013). The Right to Reparations at the International Criminal Court. [online] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2769807 [Accessed 7 Mar. 2024].

[412] Schreurs, F. (2020). Revisiting the Possibility of Corporate Criminal Responsibility in International Criminal Law: Amending Article 25 of the Rome Statute to Include Legal Entities Within the Jurisdiction of the ICC. [online] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3700432 [Accessed 7 Mar. 2024].

number of states embracing some form of corporate criminal responsibility.[413] Furthermore, the contemporary acknowledgement of CCL as a general principle in international law has challenged the initial grounds for its exclusion from the Statute, and advocates for the potential recognition of ecocide as an international crime have continuously argued in favour of its relevance.[414]

2.2.2. *Challenges attached to organisational matters of the ICC*

Against this backdrop of jurisdictional hurdles, the International Criminal Court also seems to be facing substantial challenges related to organisational matters that undoubtedly hinder its capacity to effectively prosecute environmental crimes, including ecocide cases if proposals like that of the Stop Ecocide Foundation gain resonance. Issues relating to the availability of funds and resources, as well as the ingrained operational selectivity of the Court's potential capacity — and albeit willingness — to address a broad spectrum of cases within its jurisdiction.

One of the most pressing challenges facing the ICC is the growing constraint of limited funds and resources. As of the time of writing, the Court is operating under significant financial constraints which inevitably led it to struggle with a shortage of procedural capacities to adjudicate the diverse range of crimes potentially falling under its jurisdiction.[415] Constituting an issue that characterised the ICC since its creation, funding-related problems have become more pronounced in recent years. Despite Article 115 of the Rome Statute underscoring how both State Parties and the United Nations are to provide the necessary financial support to the activities of the Court, especially for situations referred by the UN Security Council, such funding often seems to be dependent on political equilibriums.[416] Indeed, since the approval of UN funding is subjected to the approval of the General Assembly, political interests introduced a new dimension to the discussion that inevitably binds the ICC practice to State interests.

In October 2022, the ICC's President, Judge Piotr Hofmański presented to the General Assembly the unprecedented workload faced by the Court, highlighting how the ICC is currently confronting a significant strain on its resources, especially in maintaining the Court's commitment to

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[413] Singhania, V. (2022). *The Proposed Crime of Ecocide – Ignoring the Question of Liability*. [online] Opinio Juris. Available at: https://opiniojuris.org/2022/02/16/the-proposed-crime-of-ecocide-ignoring-the-question-of-liability/ [Accessed 9 Mar. 2024].
[414] Ibid.
[415] International Criminal Court (2022). ICC President Addresses United Nations General Assembly to Present Court's Annual Report. [online] 31 Oct. Available at: https://www.icc-cpi.int/news/icc-president-addresses-united-nations-general-assembly-present-courts-annual-report [Accessed 9 Mar. 2024].
[416] Baars, L., de Boer, V., López Antezana, R., Sexton, J.P. and Weck, N. (2021). *In for a penny, in for a pound? the (lack of) ICC Funding for Situations Referred by the Security Council*. [online] www.leidenlawblog.nl. Available at: https://www.leidenlawblog.nl/articles/in-for-a-penny-in-for-a-pound-the-lack-of-icc-funding-for-situations-referred-by-the-security-council [Accessed 9 Mar. 2024].

victim-centered justice.[417] The escalating workload faced by the ICC therefore tends to exacerbate the resource and fund-related challenges faced by the ICC, as underlined by Registrar Peter Lewis during the Assembly of States Parties which approved a budget of €169,649,200 for the 2023 program only.[418] Noting that the ICC anticipated an unprecedented workload in terms of volume and complexity, Lewis stressed the importance for State parties to cooperate both in matters of judicial cooperation and financial support.[419] In this regard, the escalating workload resulting from investigations into international crimes related to Russia's war in Ukraine and the Israel-Hamas conflict in Palestine will likely increase the weight of the workload, fundamentally hindering the chances for a concrete and effective recognition of the crime of ecocide if the resource-related issues plaguing the ICC.

Beyond the purely resource-oriented hurdles experienced by the Court, the ICC has nonetheless a dismally low rate of processing cases, having disposed of 30 cases in over 20 years.[420] Operational selectivity, which refers to the processes informing the choice behind which cases are taken on by the Court and which others are discarded, undoubtedly poses further significant impediments to the ICC's prosecution capacity. Indeed, the selection of cases and investigation processes is often based on practical considerations related to, for instance, (1) access to evidence and knowledge of the matter in question, as well as (2) pre-existing biases for which the Court has been extensively criticised by many scholars.[421]

For what concerns the former (1), and in particular in the case of environmental crimes, one of the obstacles to the effective integration of crimes like ecocide in the Rome Statute would derive from the relatively limited knowledge of judges of environmental matters. As the jurisdiction of the Court has been confined until now to the commonly-accepted categorisations of anthropocentric international crimes, the introduction of ecocide would inevitably create the premises for uncovering potential inadequacies in the judges' backgrounds. Not irreparable, these discrepancies could be tackled through top-down training opportunities geared at sensitising staff to environmental matters, especially in relation to the established mechanisms of the Court, but the aforementioned resource constraints would nonetheless complicate the capacity-building process for environment-related proceedings.

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[417] International Criminal Court (2022). ICC President Addresses United Nations General Assembly to Present Court's Annual Report. [online] 31 Oct. Available at: https://www.icc-cpi.int/news/icc-president-addresses-united-nations-general-assembly-present-courts-annual-report [Accessed 9 Mar. 2024].

[418] Sankale, J. (2022). *Larger Budget Reflects Increased ICC Workload in 2023*. [online] Journalists For Justice (JFJ). Available at: https://jfjustice.net/larger-budget-reflects-increased-icc-workload-in-2023/ [Accessed 9 Mar. 2024].

[419] Ibid.

[420] Saumya, U. (2021). *International Criminal Court: a Report Card*. [online] The Wire. Available at: https://thewire.in/rights/international-criminal-court-a-report-card [Accessed 9 Mar. 2024].

[421] Killean, R. (2022b). *The Benefits, Challenges, and Limitations of criminalising Ecocide*. [online] IPI Global Observatory. Available at: https://theglobalobservatory.org/2022/03/the-benefits-challenges-and-limitations-of-criminalising-ecocide/ [Accessed 9 Mar. 2024].

Concerning instead the latter (2), the initial optimism that characterised the foundation of the ICC eventually gave way to growing criticism in regard to the Court's relationship with non-Western states, which notably argued that their countries bear the brunt of ICC convictions.[422] Since the adoption of the Rome Statute, allegations have surfaced asserting the role of political considerations in the ICC's decisions on which actors to investigate and prosecute.[423] Better known as the post-colonial perspective, this strand of legal theory suggested that the Court's actions often replicate post-colonial power dynamics through its operational selectivity concerning the prioritisation of extreme acts of violence taking place in non-Western countries, while also overlooking more structural and gradual forms of violence.[424] Identified by Mamdani as a worrisome trend that tends to impede the Court's capacities, the current procedural framework would lead ICC practice to encounter many complications in the identification of the causality and responsibility for environmental harms, which often unfold gradually, and in the adjudication of crimes that often are committed by physical and legal personalities belonging to the world's West.[425] Constituting a significant threat to the legitimacy of the ICC as a system, the post-colonial perspective weakens the perception of the Court among relevant audiences like non-Western states, which often question whether it disposes of the means to appropriately select crimes and persecutors for prosecution.[426] Although facing ample backlash from Western states, this critique should not be dismissed as it constitutes an opportunity to pinpoint some of the primary weaknesses of the ICC and work towards their improvement.[427] Notably, the potential recognition of ecocide as an international crime could play a pivotal role in restoring the Court's legitimacy, particularly in the eyes of non-western States. As these States often are at the forefront of the advocacy efforts for environmental justice, the recognition of ecocide as an international crime and its inclusion in the Rome Statute could represent a positive step not only in addressing global environmental concerns but also in reconciliation those dissenting opinions that have criticised the biases of the Court, going as far as denouncing its founding Statute.

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[422] Schneider, L.I. (2020). The International Criminal Court (ICC) – a Postcolonial Tool for Western States to Control Africa? *Journal of International Criminal Law*, [online] 1. Available at: https://www.jicl.ir/article_113047_b18837011c947bc858207da4ed1fa8de.pdf [Accessed 9 Mar. 2024].

[423] Olugbuo, B.C. (2014). The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa. *African Journal of Legal Studies*, 7(3), pp.351–379. doi:https://doi.org/10.1163/17087384-12342051.

[424] Schneider, L.I. (2020). The International Criminal Court (ICC) – a Postcolonial Tool for Western States to Control Africa? *Journal of International Criminal Law*, [online] 1. Available at: https://www.jicl.ir/article_113047_b18837011c947bc858207da4ed1fa8de.pdf [Accessed 9 Mar. 2024]. P. 90.

[425] Mamdani, M. (2016). *Darfur, ICC and the New Humanitarian Order | Pambazuka News*. [online] www.pambazuka.org. Available at: https://www.pambazuka.org/governance/darfur-icc-and-new-humanitarian-order [Accessed 9 Mar. 2024]. See also, Nazareth, C. (2023). *A Critical Analysis of the Inclusion of 'Ecocide' in the Rome Statute*. [online] CEA NLUD. Available at: https://ceanludelhi.wixsite.com/ceablog/post/a-critical-analysis-of-the-inclusion-of-ecocide-in-the-rome-statute [Accessed 9 Mar. 2024].

[426] Charlesworth, H. and Coicaud, J.-M. (2010). Conclusion: The Legitimacies of International Law. In: *Fault Lines of International Legitimacy*. pp.389–398.

[427] De Guzman, M. (2012). Choosing to Prosecute: Expressive Selection at the International Criminal Court. Michigan Journal of International Law, [online] 33(2), pp.265–320. Available at: https://repository.law.umich.edu/mjil/vol33/iss2/2/ [Accessed 23 Oct. 2021]; Schneider, L.I. (2020). The International Criminal Court (ICC) – a Postcolonial Tool for Western States to Control Africa? Journal of International Criminal Law, [online] 1. p.91. Available at: https://www.jicl.ir/article_113047_b18837011c947bc858207da4ed1fa8de.pdf [Accessed 9 Mar. 2024].

2.3. Challenges for victims to access justice

In October 2022, during the United Nations General Assembly, the ICC President highlighted how *"More than 21,000 individual victims have formally participated in ICC proceedings so far; close to 3,000 individual victims have received court-ordered reparations, and this number is rising all the time as implementation progresses. And almost a hundred thousand individuals have directly benefitted from projects of the Trust Fund for Victims under its assistance mandate."*[428] This perspective highlighted the important role of victim-centered justice in the ICC framework. It was the very Statute of the ICC that initially brought about innovative provisions for victims' rights, with numerous articles putting the interests of victims at the forefront of the institution's objectives.[429] Nonetheless, the practical implementation of these provisions still encounters persistent challenges, including limited access to information during investigations and restricted participation in various stages of the proceedings.[430]

As such, the promise of victim-centered justice at the core of the ICC's action is currently falling short and hampering the ability of the Court to execute its programs effectively and in a timely manner. In the event that ecocide was to be recognised as an international crime within the Rome Statute, victim-centered approaches would take centre stage as ecocidal acts often impact large portions of the population, whose livelihoods, housing, lands, property, and, in the worst case scenario, lives, could be endangered. For instance, considering individuals facing displacement because of deep-rooted environmental harm, a timely and victim-centered approach would prove to be fundamental to efficiently provide them with the means of sustenance that they have been deprived of because of ecocidal acts.

Nonetheless, the ICC's current funding shortfall for victims' activities further hampers its ability to execute programs effectively. In the specific context of outreach activities — notably referring to those mechanisms through which victims can adequately understand the Court's mandate, proceedings, and decisions — the ICC's efforts are being criticised for failing to meet the needs of victims and affected communities.[431] This deficiency negatively affects victims' connection to the Court, impeding their right to information and therefore their chances to access justice. In one recent instance, the FIDH reported that the Registry's Report on Information and Outreach Activities dated 13 November 2023, on victims and affected communities in the Palestine Situation, particularly

[428] International Criminal Court (2022). ICC President Addresses United Nations General Assembly to Present Court's Annual Report. [online] 31 Oct. Available at: https://www.icc-cpi.int/news/icc-president-addresses-united-nations-general-assembly-present-courts-annual-report [Accessed 9 Mar. 2024].
[429] Rome Statute of the International Criminal Court - Preamble, Article 65, Article 68
[430] FIDH. (2023). The Rome Statute at 25: Making Victim-Centred Justice work at the ICC, *FIDH Recommendations to the ICC Assembly of States Parties, 4-14 December 2023, New York.* [online] p.5. Available at: https://coalitionfortheicc.org/sites/default/files/FIDH%20Recommendations%20to%20the%20ICC%20Assembly%20of%20States%20Parties.pdf [Accessed 9 Mar. 2024].
[431] *Ibid*.

mentions victims' concerns about not being directly engaged, consulted, or informed of the developments of the proceedings.[432]

Such a situation is directly correlated to the progressive reduction of capacities and staff dedicated to victims' support and outreach. Indeed, despite an increase in the commitments of the ICC to victim-centered justice, the FIDH reported that the amount of resources allocated to the Victims Participation and Reparation Section has substantially decreased. As such, there is a pressing need for the Court to bridge the gap between the Court and victims through the reevaluation of budgetary allocations and procedural practices in light of the necessity for timely, comprehensive, and accessible information about proceedings, which in turn proves fundamental for meaningful participation. For instance, prioritising concrete support, along with the provision of comprehensive translated information is crucial to enhance the participation of marginalised groups, mitigate the risk of re-traumatisation, and fortify the impact of the ICC's justice mechanisms. This change is not only fundamental to empower victims and ensure informed engagement, but also to address the aforementioned legitimacy challenges and foster connection between the different levels of global judicial governance.[433]

Nonetheless, the ICC's relative limitations concerning its supposed victim-centered approach also represent an extension of discrepancies that emerged in the very initial negotiation process of the Rome Statute. At the time of the negotiation process, different working groups considered the possibility of involving victims throughout the adjudication process, eventually settling for a flexible interpretation of the concept of 'victim' depending on their potential role in different phases of the proceedings.[434] In light of this practice, 'victims' in the ICC framework are understood as *"different persons at different times, as specific victims interact in distinct ways with different parts of the [c]ourt at different phases of the proceedings."*[435] In this framework, Article 68(3) of the Statute further requires a decision of the judges on whether or not a person is a victim from a legal standpoint, a decision which is based on the definition 'victim' outlined in the 'Rules of Procedure and Evidence' (RPE).[436] In Rule 85(a) of the RPE, the Court defined victims as *"natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."*[437]

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[432] *Ibid. p.5-7.*
[433] *Ibid. p.6.*
[434] Frisso, G.M. (2023). *Ecocide: The Environment as Victim at the International Criminal Court*. [online] pp.5. Available at: https://www.internationalcrimesdatabase.org/upload/documents/20230308T111040-Ecocide%20-%20The%20Environment%20as%20Victim%20at%20the%20International%20Criminal%20Court%20[FINAL].pdf [Accessed 9 Mar. 2024].
[435] International Criminal Court - Assembly of States Parties (2009). *Report of the Court on the Strategy in Relation to Victims*. [online] asp.icc. Available at: https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf [Accessed 9 Mar. 2024]. Para. 8.
[436] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), ISBN No. 92-9227-227-6, UN General Assembly, 17 July 1998, Art.68. Available at: https://www.refworld.org/legal/constinstr/unga/1998/en/64553 [Accessed 9 Mar. 2024].
[437] ICC (2005). *Rules of Procedure and Evidence*. [online] ICC. Available at: https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf [Accessed 9 Mar. 2024].

Nonetheless, for what specifically concerns environmental harm, although the negotiations of the Statute criminalised intentional environmental harm during armed conflicts, they were also plagued by a lack of similar provisions for peacetime and an extension of the victim status to non-human actors.[438] Building upon this profound absence, the 2021 definition of ecocide developed by Stop Ecocide International's Independent Expert Panel was used to offer a reinterpretation of some core aspects of the Rome Statute in light of the need to acknowledge the environment as a victim within the ICC framework.[439] Building upon White's categorisation of environmental justice, focusing on human victims, ecological justice, focusing on the protection of specific environments, and species justice, oriented towards the protection of flora and fauna, the Panel's definition acknowledges the potential victmisation of nonhumans.[440] This perspective, while revolutionary, would nonetheless encounter multiple procedural hurdles as the Statute still does not consider nature as a potential victim of harm, especially during peacetime.

The potential of including environmental harm in the Rome Statute underlines the multifaceted nature of justice, as the concept tends to extend beyond individual considerations and instead encompasses the well-being of communities and the environment in its own right. In recent years, the global community has experienced a progressive shift in national legal perspectives towards the recognition of the rights of nature, with the 2008 Constitution of Ecuador representing one of the landmark decisions in the field. Such developments created the premises for a compelling argument that justice is most effectively delivered when it is at the closest level to the victims, especially concerning environmental issues.

Indeed, local courts are often more attuned to the particular needs and contexts of the affected communities they oversee and the practicality of resources, both in terms of financial availabilities and accessibility. For instance, when legal proceedings take place at the local level, the financial burdens on victims are significantly reduced, as the costs associated with long-distance travel are eliminated and accessibility is guaranteed regardless of economic constraints. Furthermore, other procedural intricacies like cultural and contextual nuances of communities, can be better streamlined at the local level, providing a more approachable legal process for the affected parties, especially when dealing with environmental issues that are inextricably linked to the local ecosystems. Indeed, for what concerns environmental harms, justice is best served when it is directly linked to the affected communities and embracing ecocide, for instance through its recognition at the different levels of judicial protection, could allow different legal systems to ensure that remedies are provided to victims

[438] Frisso, G.M. (2023). *Ecocide: The Environment as Victim at the International Criminal Court*. [online] pp.6. Available at: https://www.internationalcrimesdatabase.org/upload/documents/20230308T111040-Ecocide%20-%20The%20Environment%20as%20Victim%20at%20the%20International%20Criminal%20Court%20[FINAL].pdf [Accessed 9 Mar. 2024].
[439] *Ibid. pp.1-2.*
[440] White, R. (2018). Green Victimology and non-human Victims. *International Review of Victimology*, 24(2), pp.239–255. doi:https://doi.org/10.1177/0269758017745615.

and environmental grievances are addressed in a tangible way that benefits both human and non-human entities in our shared environment.

2.4. Exploring multi-level approaches to addressing environmental crimes

In a context in which environmental harms are threatening the lives, livelihoods, and homes of millions of individuals worldwide, the imperative to address environmental crimes, particularly ecocide, is emerging as a pressing need demanding nuanced approaches to justice. The recognition of ecocide at various levels of governance — whether national, regional, or international — would offer the implementation of a comprehensive framework for guaranteeing effective legal remedies to those most affected by environmental harm. As such multi-level recognition of ecocide, whether through the implementation of ecocide in existing institutions like the International Court of Justice (ICJ) or through the constitution of a novel Environmental Court, become valuable options to safeguard the fundamental rights in light of environmental challenges.

As previously underlined, embracing the principle of complementarity would allow justice to operate in close proximity to victims. For what specifically concerns ecocide, such notion should be acknowledged at every level in order to guarantee that diverse courts ensure the safeguarding of the unique needs of affected communities, promoting swifter responses and taking into account their immediate concerns. Notably, in the case of environmental harms, bodies like people's tribunals, like the International Monsanto Tribunal and Permanent People's Tribunal, constitute examples of crucial fora in which vulnerable communities can advocate for their rights.[441] As they are led by private citizens and civil society organisations who serve as judges, investigators, and witnesses, people's tribunals tend to operate with relative freedom from political influence, therefore facilitating active participation and open discussions, even when the perpetrators are powerful corporate entities, state bodies, or state-enabled actors operating through licensing regimes.[442] These instruments are particularly adept at gathering local evidence and knowledge without encountering the traditional difficulties of the ICC framework, underscoring their capacity to foster collaboration between civil society, victims, and experts, as well as to tap into practices of local/indigenous communities.[443] This aspect becomes particularly relevant in cases of environmental degradation, where the traditional practices of local communities often constitute the bedrock of restorative processes.

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[441] Srivastava, M. (2022b). *Transitional Justice Mechanisms: Fortifying the Fifth Crime of Ecocide*. [online] BJIL. pp48-49. Available at: https://www.berkeleyjournalofinternationallaw.com/post/transitional-justice-mechanisms-fortifying-the-fifth-crime-of-ecocide [Accessed 9 Mar. 2024].

[442] Byrnes, A. and Simm, G. (2017). *Peoples' Tribunals and International Law*. [online] Cambridge University Press. Available at: https://www.cambridge.org/core/books/abs/peoples-tribunals-and-international-law/introduction/B87FA7D7CFC81C32C465B820DCA6C3BB [Accessed 9 Mar. 2024].

[443] Srivastava, M. (2022b). *Transitional Justice Mechanisms: Fortifying the Fifth Crime of Ecocide*. [online] BJIL. pp48-49. Available at: https://www.berkeleyjournalofinternationallaw.com/post/transitional-justice-mechanisms-fortifying-the-fifth-crime-of-ecocide [Accessed 9 Mar. 2024].

Furthermore, bodies like the International Court of Justice (ICJ) can also serve as potential alternative forums to the International Criminal Court in tackling ecocidal disputes and cases like Tuvalu's 2002 legal threat against the United States over its contribution to climate change represent poignant examples of the potential of these avenues.[444] Predicted to become one of the first populated islands to be engulfed by the ocean because of the rising of sea levels, in 2002 Tuvalu announced its intention to bring a suit to the ICJ against States that did not ratify the Kyoto Protocol, as their inaction was considered by Tuvalu to be contributing to the island's environmental degradation.[445]

More recently, in March 2023, during the 77th session of the United Nations General Assembly, resolution A/77/L.58, promoted once more by Tuvalu and other pacific nations, was adopted, urging the ICJ to provide an advisory opinion on the responsibilities of States concerning climate change.[446] The plea for an advisory opinion recognises that *"climate change is an unprecedented challenge of civilizational proportions and that the well-being of present and future generations of humankind depends on our immediate and urgent response to it."*[447]

These initiatives indicate how the ICJ could hold the potential to represent a driver in the development of innovative legal frameworks and in the elucidation of climate-related responsibilities. Because of its peculiar positioning, the ICJ is facing an opportunity to actively contribute to developing global awareness on climate issues and to promoting a critical catalyst for instigating climate action.[448] Nonetheless, as the ICJ's jurisdiction pertains to inter-State disputes, its approach would be bound by the agreement of each State to the Court's jurisdiction, posing significant hurdles to its efficacy as the 'polluting' states often have compelling reasons to evade the Court's authority.[449]

Nonetheless, recognising the structural issues within the ICC framework, many scholars also started exploring alternative avenues to prosecute ecocentric crimes, among which proposals for an 'Ecocide

[444] Jacobs, R.E. (2005). Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice. *Washington International Law Journal*, [online] 14(1). Available at: https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1372&context=wilj#:~:text=Abstract%3A%20In%202002%2C%20in%20response [Accessed 9 Mar. 2024].
[445] Moore, M. (2002). Turning Up the Heat When an Island Disappears: The Threat of Global Warming Has Loomed at the Back of Insurers' Minds for a Very Long Time. LEXIS, Nexis Library, ALLNWS File.
[446] Climate Change Litigation. (2023). *Request for an advisory opinion on the obligations of States with respect to climate change.* [online] Available at: https://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-obligations-of-states-with-respect-to-climate-change/ [Accessed 24 Feb. 2024].
[447] *Ibid*.
[448] Tigre, M.A., Bañuelos, J.A.C. and Bañuelos, M.A.T. and J.A.C. (2023). *The ICJ's Advisory Opinion on Climate Change: What Happens Now?* [online] Climate Law Blog. Available at: https://blogs.law.columbia.edu/climatechange/2023/03/29/the-icjs-advisory-opinion-on-climate-change-what-happens-now/. [Accessed 9 Mar. 2024].
[449] Greene, A. (2019b). *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?* [online] FLASH: The Fordham Law Archive of Scholarship and History. Available at: https://ir.lawnet.fordham.edu/elr/vol30/iss3/1/ [Accessed 24 Oct. 2023].

Convention' and a subsequent 'International Environmental Court' are some of the most prominent.[450] Such a Convention would set the standards for a robust legal framework of ecocentric provisions, guaranteeing the outlining of mechanisms and practices to prevent and repair ecological damage.[451] Detached from the traditional constraints of the ICC, this approach would enable a holistic approach to environmental justice, assessing environmental harm and proposing remedies like restitution and recovery for impacted territories.

Therefore, the proposal for an 'Ecocide Convention' and for the subsequent 'International Environmental Court' reflect the recognition of the need for a paradigmatic shift in the approaches to justice, which are more and more turning towards ecocentric perspectives. This proposed Court could embody the capacity to address both civil and criminal matters, expanding its scope past the traditional confines of the ICC and echoing the requests of advocates to establish a comprehensive international framework for environmental protection.[452]

[450] Srivastava, M. (2022b). *Transitional Justice Mechanisms: Fortifying the Fifth Crime of Ecocide*. [online] BJIL. pp48-49. Available at: https://www.berkeleyjournalofinternationallaw.com/post/transitional-justice-mechanisms-fortifying-the-fifth-crime-of-ecocide [Accessed 9 Mar. 2024].

[451] Greene, A. (2019b). *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?* [online] FLASH: The Fordham Law Archive of Scholarship and History. Available at: https://ir.lawnet.fordham.edu/elr/vol30/iss3/1/ [Accessed 24 Oct. 2023].

[452] Srivastava, M. (2022b). *Transitional Justice Mechanisms: Fortifying the Fifth Crime of Ecocide*. [online] BJIL. pp48-49. Available at: https://www.berkeleyjournalofinternationallaw.com/post/transitional-justice-mechanisms-fortifying-the-fifth-crime-of-ecocide [Accessed 9 Mar. 2024].

Conclusion

Over the last two decades, environmental displacement has emerged as a pressing global challenge, driven by climate change, environmental degradation, and resource depletion. In parallel, the recognition of ecocide as an international crime has gained more and more momentum as a viable tool to fight against environmental injustice. In this respect, perhaps one of the most pressing environmental injustices of our time lies in environmental displacement. The growing number of people being forced to flee their habitual places of residence because of environmental degradation has sparked novel interest in the notion of environmental displacement and an increasing amount of civil society actors are advocating for States and international bodies to tackle its nefarious impacts on the fundamental rights of vulnerable communities. Nevertheless, the existing academic and legal literature on the protection of people displaced as a result of environmental change shows that the existing legal framework — whether international refugee law, international humanitarian law or international environmental law — is insufficient to provide effective protection of their most fundamental rights.

Against this backdrop, this research undertook a comprehensive examination to assess the potential of recognising ecocide as an international crime in guaranteeing the rights and access to reparations for individuals at risk or victims of environmental displacement. To identify what would be the added value of an internationally recognised crime of ecocide for the protection of victims of environmental flight, it was necessary to identify existing State obligations in this respect as well as their gaps. The exploration of the Inter-American System of Human Rights — known as the most progressive system in protecting human rights with regard to the environment — offered insights into the obligations of States concerning environmental protection and their responsibility in addressing environmental displacement. Among these, obligations to guarantee a human right to a clean, healthy and sustainable environment were identified as necessary preconditions to avoiding environmental flight situations from occurring. Such State duties encompass obligations to prevent such situations, minimising their negative consequences and mitigating such situations to avoid displacement. Further, duties to cope with the consequences of environmental flight situations have been identified in the system as a prerogative of States, whether it unfolds through the protection of internal environmental refugees or the obligation to repair and protect international environmental refugees against future violations. Nevertheless, within the IASHR, such obligations usually lack clarity, and implementation and apply exclusively to the Member States of the regional system. The very global nature of environmental change and environmental displacement fundamentally calls for the exploration of complementary avenues for environmental justice at the international level. Addressing such challenges requires great interstate cooperation, which is rendered difficult by the multiplicity of national legal frameworks providing for different levels of protection. Hence, the analysis particularly focused on the potential of

recognising ecocide as a means to clarify and uniformise existing international obligations and as a powerful tool to guarantee the implementation of already existing State obligations. This research advances that given the internationally recognised interdependence of human rights with the environment, an ecocentric tool applied to situations of human mobility could bear positive human rights implications. Starting from its capacity to directly target the root causes of environmental flight, the discussion identified its potential symbolic influence on concrete mechanisms of international law. From strengthening the capacities of deterrence of international criminal law to extending the scope of action of national jurisdictions, and providing new avenues of application of international law principles, the recognition of ecocide as an international crime is understood as having significant potential.

Having situated the notion of ecocide in the wider international law framework, the analysis argues that its recognition as an international crime and its incorporation into the jurisdiction of the International Criminal Court could represent a significant opportunity to address the devastating environmental consequences of human activity on human mobility, emphasising an additional prospective benefit: the implementation of environmentally reparative measures. In fact, as identified, environmental displacement usually occurs in cases of severe environmental degradation, comparable to ecocides. Recognizing the unique circumstances of each environmental displacement event, the discussion underscored how the ICC's framework holds promise for addressing environmental harm, providing reparations for victims of environmental flight, and promoting a more comprehensive understanding of justice that encompasses both human and environmental well-being. However, while contending that integrating ecocide within the jurisdiction of the ICC could establish suitable avenues for redress, the research also acknowledged the numerous obstacles standing in the way of such recognition. These hurdles include the highly political ecocide recognition process, jurisdictional and operational challenges, and difficulties for victims in accessing justice. Overcoming the identified obstacles requires concerted efforts and a commitment to recognizing the intertwined nature of human rights and environmental protection on the international level. Exploring the possibility of extending the jurisdiction of other regional courts and outlining the contours of an environment-specific international court, the research reflects the recognition of the need for a paradigmatic shift in the approaches to justice, which is more and more turning towards ecocentric perspectives.

The research made significant contributions to the field by adopting an innovative approach that acknowledges the dual nature of the crime of ecocide, not only as an ecocentric tool of environmental justice but also as a driver for positive human rights implications. While addressing the pressing issue of the rights of environmentally displaced persons, the thesis contributed to the ongoing discourse on ecocide, incorporating a human rights lens and a more victims-oriented approach to this international criminal law tool. This shift broadened the scope of the conversation, recognizing the interconnectedness of human rights and environmental preservation.

However, it is essential to acknowledge the limitations of this study. As an ecocentric tool, ecocide is not fitted to protect the rights of environmentally displaced populations alone. Its protective power, even if universally recognized, cannot singularly address the complex challenges faced by environmentally displaced persons, such as militarised borders, detention centres, and denial of legal representation. In this respect, only an international instrument meant to address the specific situation and needs of protection of environmentally displaced persons could provide all the protection measures required.

Despite these limitations, this research has laid the groundwork for future exploration and development in this critical field. The recognition of ecocide and its implications for environmental displacement, particularly from a human rights perspective, represents a pioneering step. By delving into the complexities and nuances of environmental displacement, the thesis has opened avenues for further research, addressing gaps in existing literature and exploring uncharted territories.

In conclusion, the exploration of ecocide as an international crime and its potential implications for the protection of environmentally displaced persons has illuminated a path for future research and advocacy. The integration of a human rights perspective into the discourse on ecocide expands its relevance and applicability, offering a holistic approach to address the intricate challenges posed by environmental displacement. As the international community grapples with the pressing issues of ecological degradation and climate change, recognizing ecocide as a tool for justice and reparations becomes increasingly crucial, fostering a symbiotic relationship between the preservation of the environment and the protection of human rights.

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https://notreaffaireatous.org/wp-content/uploads/2019/05/R%C3%A9parations-de-l%C3%A9cocide-Alice-et-Ys%C3%A9e-.pdf [Accessed 27 Feb. 2024].

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