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Crimes Against the Environment, Ecocide, and the International Criminal Court

Milena Sterio

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CRIMES AGAINST THE ENVIRONMENT, ECOCIDE, AND THE INTERNATIONAL CRIMINAL COURT

Milena Sterio [†]

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I. INTRODUCTION

“The idea of ecocide is a *cri de coeur* for accountability against all odds.”¹ In the aftermath of World War II, after Nazi Germany exterminated millions of Jews and other minorities, the General Assembly of the United Nations developed and codified the crime of genocide in the Genocide Convention, and in customary law during the decades that followed.² More recently, a growing number of world

[†] The CSU Distinguished Professor of Law and The Charles R. Emrick Jr.—Calfee Halter & Griswold Professor of Law, Cleveland State University College of Law. The author has presented a briefer version of this paper at the Case Western Reserve University School of Law, Frederick K. Cox International Law Center’s conference on Crimes Against the Environment on September 29, 2023.

1. David Sassoon, *Ecocide: Should Destruction of the Planet be a Crime?*, INSIDE CLIMATE NEWS (Apr. 7, 2021), <https://insideclimatenews.org/news/07042021/ecocide-should-destruction-of-the-planet-be-a-crime/> [<https://perma.cc/AAS3-RRFT>].
2. Nicholas Kusnetz et al., *As the Climate Crisis Grows, a Movement Gathers to Make ‘Ecocide’ an International Crime Against the Environment*, INSIDE CLIMATE NEWS (Apr. 7, 2021), https://insideclimate.news.org/news/07042021/climate-crisis-ecocide-vanuatu-the-fifth-crime/?gclid=EAIaIQobChMI7bvshO-lgQMVuhWzAB2IBwcrEAAYAiAAEgKZbPD_BwE [<https://perma.cc/G7DC-937F>]; *Genocide*, U.N. OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://un.org/en/genocideprevention/genocide.shtml> [<https://perma.cc/24ZB-R5RH>].

leaders, such as Pope Francis and French President Emmanuel Macron, have been advocating in favor of developing a new offense called ecocide, which would criminalize the widespread destruction of the environment.³ The crime of ecocide represents a parallel to genocide: while the latter refers to an international destruction of a particular group of people, the former contemplates a similar outcome with the environment as the ultimate victim. Pope Francis has thus “endorsed a campaign by environmental activists and legal scholars to make ecocide the fifth crime before the International Criminal Court (ICC) in The Hague as a legal deterrent to the kinds of far-reaching environmental damage that is driving mass extinction, ecological collapse[,] and climate change.”⁴

In addition to the Pontiff and President Macron, a global ecocide campaign, Stop Ecocide International, led by Jojo Mehta, has advocated for developing the crime of ecocide.⁵ Mehta, through the Stop Ecocide Foundation, convened an Independent Expert Panel for the Legal Definition of Ecocide (the “Expert Panel”); the Expert Panel, assisted by outside experts, and through input from various perspectives around the globe, developed commentary and a core text defining ecocide and proposing that ecocide be added to the Rome Statute of the ICC as a fifth crime.⁶

Ecocide, as well as other crimes against the environment,⁷ has become a new focus of global discussion in the wake of the Russian invasion of Ukraine,⁸ as Russia has launched indiscriminate attacks that threaten the wellbeing of the Ukrainian ecosystem.⁹ This Paper will discuss the crime of ecocide by first focusing on its history (Section II); then discussing whether and how ecocide can be investigated and prosecuted as a war crime, crime against humanity, or a separate crime

3. Kusnetz et al., *supra* note 2.

4. *Id.*

5. *Id.*

6. STOP ECOCIDE FOUNDATION, INDEPENDENT EXPERT PANEL FOR THE LEGAL DEFINITION OF ECOCIDE (2021) [hereinafter STOP ECOCIDE FOUNDATION].

7. See, e.g., Jonathan Watts, *The ‘Silent Victim’: Ukraine Counts War’s Cost for Nature*, THE GUARDIAN (Feb. 20, 2023, 10:39 AM), <https://www.theguardian.com/world/2023/feb/20/ukraine-war-cost-for-nature-russia> [https://perma.cc/UVB4-B6PW].

8. Radina Gigova, *Russia is Accused of ‘Ecocide’ in Ukraine. But What Does That Mean?*, CNN, <https://cnn.com/2023/07/02/world/ukraine-ecocide-dam-collapse-crime-climate-intl-cmd/index.html> [https://perma.cc/ZM97-9RJX] (July 3, 2023, 3:55 AM).

9. Andriy Yermak & Margot Wallström, *Russia Is Committing Grave Acts of Ecocide in Ukraine and the Results Will Harm the Whole World*, THE GUARDIAN (Aug. 16, 2023, 1:00), <https://theguardian.com/commentisfree/2023/aug/16/russia-ecocide-ukraine-world-war-crimes> [https://perma.cc/8EAZ-ZN8Y].

under the Rome Statute (Section III). Next, this Paper will briefly discuss ecocide and other crimes against the environment in the context of the Ukraine war (Section IV). Finally, this Paper will conclude that it is crucial to continue to discuss and develop ecocide and the possibility of prosecuting ecocide and other environmental crimes at both the national and international levels (Section V).

II. HISTORY OF ECOCIDE

The term ecocide is not new; it was used as early as 1970, at a conference where Professor Arthur W. Galston proposed the development of a new international agreement to prohibit “ecocide.”¹⁰ Although there was no definition of ecocide at the time, the crime was understood as destructive measures aimed at damaging or destroying the entire ecosystem of a specific geographic area, causing the loss of human, animal, and plant lives.¹¹ At the United Nations Stockholm Conference on Human Environment, the Prime Minister of Sweden, Olof Palme, explicitly referred to the Vietnam war as an “ecocide.”¹² In parallel to the Conference, the so-called Folkets Forum (The People’s Forum) established a working group on Genocide and Ecocide.¹³ The following year, a Convention on Ecocidal War took place also in Stockholm.¹⁴ Richard Falk, one of the participants at this Convention, proposed an Ecocide treaty, which would have recognized “that man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace.”¹⁵ Falk thus drafted the International Convention on the Crime of Ecocide; the majority of the draft Ecocide Convention focused on ecocide as a war crime.¹⁶

Over the subsequent decades, records developed seemingly showing that ecocide had been discussed as a Crime Against Peace, which would have been included in an amended version of the Genocide Convention and would have existed during both war and peace times.¹⁷ In fact, during the 1970s, the Sub-Commission on Prevention of Discrimination and Protection of Minorities prepared a study which proposed the adoption of ecocide and cultural genocide to the list of crimes prohibited

10. ANJA GAUGER ET AL., HUM. RTS. CONSORTIUM, ECOCIDE IS THE MISSING 5TH CRIME AGAINST PEACE 5 (2013 ed.).

11. *Id.* at 5–6.

12. *Id.* at 5.

13. *Id.*

14. *Id.*

15. Richard A. Falk, *Environmental Warfare and Ecocide—Facts, Appraisal, and Proposals*, 4 BULLETIN OF PEACE PROPOSALS 80, 93 (1973).

16. GAUGER ET AL., *supra* note 10, at 5.

17. *Id.* at 4.

under the Genocide Convention.¹⁸ The issue of ecocide surfaced again in a subsequent Sub-Commission report in 1985, and was recommended for reconsideration.¹⁹

Most notably, the 1991 draft Code of Crimes Against the Peace and Security of Mankind,²⁰ developed by the International Law Commission (ILC), precursor to the 1998 Rome Statute, included ecocide as a Crime Against Peace.²¹ In 1996, an ILC Working Group had issued a report titled, "Document on crimes against the environment."²² This document suggested three options: (1) to retain environmental crimes as a distinct provision in the Code of Crimes; (2) to include environmental crimes as crimes against humanity; or (3) to add ecocide to the provision on war crimes.²³ At a subsequent 1996 meeting of the ILC, then-Chairman Ahmed Mahiou unilaterally removed the crime of ecocide as a separate provision, and the ILC was left to solely decide whether to include environmental damage in the context of war crimes or also as a crime against humanity.²⁴ Ultimately, the ILC's drafting committee was charged with addressing environmental damage only in the context of war crimes.²⁵ Thus, all references to ecocide were removed from the Code of Crimes. As the ILC drafting committee led directly to the drafting and development of the Rome Statute, ecocide was ultimately excluded from the Rome Statute itself.²⁶ It is interesting to note that only three countries were officially on record as opposing the crime of ecocide within the Rome Statute: the United States, the United Kingdom, and the Netherlands.²⁷ Although it is unclear why exactly the crime of ecocide was excluded from the Rome Statute, in light of such

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18. *Id.* at 8; Nicodème Ruhashyankiko (Special Rapporteur on Prevention and Punishment of the Crime of Genocide), *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, ¶¶ 441–74, U.N. Doc. E/CN.4/Sub.2/416 (July 4, 1978).
 19. Benjamin Whitaker (Special Rapporteur on Prevention and Punishment of the Crime of Genocide), *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, ¶ 33, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985).
 20. *Draft Code of Crimes Against the Peace and Security of Mankind*, [1991] 2 Y.B. Int'l L. Comm'n 94, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2).
 21. *Id.* at 97; GAUGER ET AL., *supra* note 10, at 8.
 22. See *Document on Crimes Against the Environment*, ILC(XLVIII)/DC/CRD.3 (1996), *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n 15, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 1).
 23. See *generally id.*, GAUGER ET AL., *supra* note 10, at 10.
 24. GAUGER ET AL., *supra* note 10, at 10.
 25. *Id.*
 26. *Id.*
 27. Kusnetz et al., *supra* note 2.

limited state opposition thereto, one key rapporteur, Christian Tomuschat, stated as follows:

One cannot escape the impression that nuclear arms played a decisive role in the minds of many of those who opted for the final text which has now been emasculated to such an extent that its conditions of applicability will almost never be met even after humankind would have gone through disasters of the most atrocious kind as a consequence of conscious action by persons who were completely aware of the fatal consequences their decisions would entail.²⁸

III. ECOCIDE AS A CRIME WITHIN THE ICC ROME STATUTE?

The ICC's Rome Statute contemplates crimes against the environment as a war crime: Article 8(2)(b) provides as one of the enumerated war crimes the intentional launching of an attack with the knowledge that such an attack will cause "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."²⁹ Although this war crimes provision has not been enforced in any ICC cases, the Court's Office of the Prosecutor (OTP) has indicated, in a 2016 policy paper, that it would prioritize crimes that result in the "destruction of the environment," "exploitation of natural resources," and the "illegal dispossession" of land.³⁰ In the same policy paper, the OTP also indicated that it would provide cooperation and assistance to ICC member states regarding their own investigations and prosecutions of crimes related to the destruction of the environment.³¹ As of today, the ICC has not investigated or prosecuted cases involving charges of crimes against the environment as a war crime, despite the OTP's resolve to focus on environmental crimes.³² Thus, the inclusion of this particular war crime focused on environmental destruction has had limited utility within the ICC's investigative and prosecutorial mandate.

In light of such limited utility of the Rome Statute itself when it comes to environmental crimes, advocates and experts have recently

28. GAUGER ET AL., *supra* note 10, at 11

29. Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

30. Int'l Crim. Ct. [ICC], Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, ¶ 41, (Sept. 15, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [<https://perma.cc/L47Q-ZBAA>].

31. *Id.* ¶ 7.

32. Ricardo Pereira, *After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?*, 31 CRIM. L. F. 218, 222 (2020).

focused on developing the crime of ecocide as a separate offense.³³ Most recently, the Stop Ecocide International campaign has convened a group of experts to develop the definition of ecocide and to lobby states toward amending the ICC statute to include ecocide as a fifth crime.³⁴ According to the group of ecocide experts, the so-called Expert Panel, the crime is defined as “unlawful or wanton acts committed with knowledge that there’s a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.”³⁵ This definition of ecocide would be included within the Rome Statute as Article 8 ter.³⁶ The same Article 8 ter would further define terms included in the ecocide definition. Thus, Article 8 ter (a) would define “wanton” as an act committed with “reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated.”³⁷ Article 8 ter (b) would clarify that “severe” means “damage which involves very serious adverse changes, disruption or harm to any element of the environment,” and Article 8 ter (c) would specify that “widespread” means “damage which extends beyond a limited geographic area . . . or is suffered by an entire ecosystem or species or a large number of human beings.”³⁸ According to Article 8 ter (d), “long-term” is “damage which is irreversible or which cannot be readdressed through natural recovery within a reasonable period of time.”³⁹ Finally, Article 8 ter (e) defines the environment as “the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.”⁴⁰

According to the Expert Panel, the proposed definition of ecocide, to be included in the Rome Statute, contains two specific thresholds for prohibited conduct. First, “there must exist a substantial likelihood that the conduct . . . will cause severe and either widespread or long-term damage to the environment.”⁴¹ Second, the prohibited acts must be unlawful or wanton.⁴² Thus, “the prosecution would need to prove a substantial likelihood of causing severe and either widespread or long-

33. See Brianna Baker, *These Activists Want to Stop Ecocide. The First Step is Making it a Crime.*, GRIST (Mar. 19, 2021), <https://grist.org/fix/advocacy/ecocide-crime-jojo-mehta-julia-jackson/> [https://perma.cc/9EAC-LCUR].

34. *Id.*; see also STOP ECOCIDE FOUNDATION, *supra* note 6.

35. STOP ECOCIDE FOUNDATION, *supra* note 6, § II.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* § III.

42. *Id.*

term damage through acts or omissions that are either unlawful or wanton.”⁴³

Mehta has further explained the impetus behind the ecocide campaign as follows:

Conviction for ecocide would require demonstrating willful disregard for the consequences of actions such as deforestation, reckless drilling and mining. This threshold implicates a number of global and corporate leaders through their complicity in deforesting the Amazon and Congo basins, drilling recklessly in the Arctic and the Niger delta, or permitting unsustainable palm oil plantations in south-east Asia, among other destructive practices.⁴⁴

In addition to Mehta’s campaign, Vanuatu and the Maldives, two island nations threatened by rising sea levels, have also lobbied the ICC to consider amending its statute to include the crime of ecocide.⁴⁵ Belgium has asked the ICC member states to consider adding ecocide as a fifth crime to the Rome Statute, and French lawyers filed a request with the ICC, on behalf of Amazonian indigenous groups, asking the ICC to investigate Brazil’s former president, Jair Bolsonaro, for crimes against humanity.⁴⁶ The French request alleged that deforestation, orchestrated by Bolsonaro’s government, has displaced indigenous populations and lead to murders in the region.⁴⁷ While this request encouraged the ICC to consider alleged crimes committed by Bolsonaro’s government as a crime against humanity, not as ecocide, the lawyers who submitted the request have indicated that this case could be treated as ecocide and that they would support the campaign to amend the Rome Statute.⁴⁸ Finally, the U.N. Special Rapporteur on human rights in the context of climate change, a position established by the U.N. Human Rights Council in October 2021, has also urged states to recommend that the ICC Rome Statute be amended to include

43. *Id.*

44. Jojo Mehta & Julia Jackson, *To Stop Climate Disaster, Make Ecocide an International Crime. It’s the Only Way*, THE GUARDIAN (Feb. 24, 2021, 2:16), <https://theguardian.com/commentisfree/2021/feb/24/climate-crisis-ecocide-international-crime> [<https://perma.cc/RE3C-RXGB>].

45. Kusnetz et al., *supra* note 2.

46. *Id.*

47. Travis Waldron, *Brazil’s Indigenous Leaders Sue President Jair Bolsonaro for Crimes Against Humanity*, HUFFPOST (Jan. 23, 2021, 6:00 AM), https://huffpost.com/entry/brazil-jair-bolsonaro-amazon-rainforest-crimes-against-humanity_n_600af412c5b6f401aea3e2f7 [<https://perma.cc/5YFC-Q8HE>].

48. *See id.*

ecocide as a separate crime.⁴⁹ “The special rapporteur’s support for the establishment of a crime of ecocide under the ICC jurisdiction reflects the need to address this accountability gap for the most serious harms to the environment.”⁵⁰

If ecocide were prosecuted at the ICC, either as a crime against humanity or as a separate fifth crime, through an amendment to the Rome Statute, this could have significant impact—even if the Court only prosecuted a handful of cases. According to Alex Whiting, former prosecutor at the ICC, “When a crime becomes an international crime, it has a ripple effect The environment is the issue of our time. Being able to do something about that seems important.”⁵¹

For the moment, the ICC does not have jurisdiction over the crime of ecocide as a separate, fifth crime.⁵² The Stop Ecocide campaign and the Expert Panel have advocated for an amendment to the Rome Statute, which would add ecocide as an additional crime, but the amendment procedure is complex and requires significant support from states parties; it is unlikely that such an amendment will be adopted in the near future.⁵³ While crimes against the environment can in theory be prosecuted at the ICC as war crimes, the ICC’s Prosecutor has thus far not brought any such charges against any defendants.⁵⁴ Finally, there has been academic and expert debate about potentially prosecuting ecocide as a crime against humanity.⁵⁵

At Nuremberg, crimes against humanity had to be committed “in execution of or in connection with” a crime against peace or a war crime.⁵⁶ Over time, the definition of crimes against humanity has

49. Kate Mackintosh & Lisa Oldring, *Watch This Space: Momentum Toward an International Crime of Ecocide*, JUST SECURITY (Dec. 5, 2022), <https://justsecurity.org/84367/watch-this-space-momentum-toward-an-international-crime-of-ecocide/> [<https://perma.cc/GV89-8Y2U>].

50. *Id.*

51. Kusnetz et al., *supra* note 2.

52. See Haroon Siddique, *Legal Experts Worldwide Draw Up ‘Historic’ Definition of Ecocide*, THE GUARDIAN (June 22, 2021, 12:00), <https://theguardian.com/environment/2021/jun/22/legal-experts-worldwide-draw-up-historic-definition-of-ecocide> [<https://perma.cc/Z8SH-VZQM>].

53. In order to amend the Rome Statute, a state party to the ICC must bring forth an amendment proposal. To be considered, the proposal must be supported by a simple majority of states present and voting. Under Article 121 of the Rome Statute, a final proposal needs the support of two-thirds of states parties to be adopted. See, Mackintosh & Oldring, *supra* note 49.

54. Pereira, *supra* note 32, at 222.

55. See Siddique, *supra* note 52; see also GAUGER ET AL., *supra* note 10, at 10.

56. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

evolved to no longer require such linkage.⁵⁷ Thus, Article 7 of the ICC's Rome Statute defines crimes against humanity as a series of acts, "when committed as part of a widespread and systematic attack directed against any civilian population, with knowledge of the attack."⁵⁸ Crimes against the environment and ecocide are not featured within the list of Article 7's enumerated acts that amount to crimes against humanity.⁵⁹

Although it is possible to argue that such crimes could come within Article 7(k)'s "catch-all" provision, which refers to "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health,"⁶⁰ this argument is difficult at best. First, one would have to establish that ecocidal acts have caused great suffering or serious injury to mental or physical health of a human population.⁶¹ This is, of course, possible as acts of environmental degradation and harm invariably cause human suffering, but the difficult legal test focuses on *causality*: one would need to establish that an environmental attack was launched with knowledge that such an attack would directly cause tremendous human suffering.⁶² It is highly probable that ICC prosecutors would struggle to amass evidence sufficient to demonstrate such causality. Second, the ICC's Rome Statute is meant to reflect customary law;⁶³ those advocating in favor of including the crime of ecocide as a crime against humanity would need to also demonstrate that ecocide was a customary law crime at the time that the Rome Statute was negotiated. It is disputable whether ecocide truly formed part of customary law in 1998, and whether it does so today.⁶⁴ Thus, prosecuting ecocide as a crime against humanity remains a challenging legal proposition.

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57. Jérôme de Hemptinne, *Ecocide: An Ambiguous Crime?*, EJIL: TALK! (Aug. 29, 2022), <https://www.ejiltalk.org/ecocide-an-ambiguous-crime/> [https://perma.cc/4VLJ-CPNB] ("It took time and energy for international institutions, States, judges, and scholars to progressively accept the removal of such linkage with war related criminality.").
58. Rome Statute, *supra* note 29, art. 7(1).
59. *See id.*
60. *Id.* art. 7(1)(k).
61. *Id.*
62. *Id.*; *Challenging the Growth of Environmental Disinformation in Armed Conflicts Will Take the Concerted Efforts of all Stakeholders*, CONFLICT & ENV'T OBSERVATORY (May 16, 2019), <https://ceobs.org/the-weaponisation-of-environmental-information-in-the-era-of-fake-news/> [https://perma.cc/3GBP-RBSE].
63. Yudan Tan, THE IDENTIFICATION OF CUSTOMARY RULES IN INTERNATIONAL CRIMINAL LAW, 34 Utrecht J. Int'l & Eur. L. 92, 102 (2018).
64. *See, e.g.*, Hemptinne, *supra* note 57 ("There is currently no general State practice that univocally considers ecocide to be a crime under customary international law.").

Even if ecocide were to be prosecuted at the ICC, such prosecutions would face limitations inherent in the Rome Statute's structure: first, the ICC's territorial and temporal jurisdiction are limited; second, any cases brought forth at the ICC are subject to the complex gravity threshold as well as to the ICC's complementarity regime; third, the ICC only prosecutes individuals; and finally, corporate wrongdoing would remain beyond the ICC's investigative and prosecutorial reach.⁶⁵ In sum, while prosecuting environmental crimes or ecocide at the ICC remains an appealing idea, such prosecutions would likely have limited effect.

IV. PROSECUTING CRIMES AGAINST THE ENVIRONMENT WITHIN NATIONAL JURISDICTIONS

Although criminalizing crimes against the environment or ecocide at the international level, such as at the ICC, would carry significant symbolic value, prosecuting such crimes at the national level will realistically produce more significant deterrent impact.⁶⁶ Moreover, national jurisdictions are typically able to carry out a substantially higher number of prosecutions than international courts.⁶⁷ It is thus important to examine how ecocide has been criminalized within various national criminal codes of different countries.

Ecocide is recognized as a crime by national criminal codes of various countries. Article 441 of the Ukrainian Criminal Code defines ecocide as "mass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster."⁶⁸ Article 358 of the Russian Criminal Code defines this crime as "massive destruction of the animal or plant kingdoms, contamination

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65. See, e.g., Mackintosh & Oldring, *supra* note 49; Rome Statute, *supra* note 29, arts. 11, 12, 17.
66. See Mackintosh & Oldring, *supra* note 49; see also Thomas Obel Hassan, *Prosecuting Ecocide: The Norms-Adoption/Enforcement Paradox*, JUST SEC. (June 22, 2023), <https://www.justsecurity.org/87009/prosecuting-ecocide-the-norms-adoption-enforcement-paradox/> [<https://perma.cc/2L9P-X9JA>].
67. See generally William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice*, 49 HARV. INT'L L.J. 53, 64 (2008).
68. Matthew Gilett, *Four Key Elements of the Proposed Crime of Ecocide (Part I)*, OPINIO JURIS (June 20, 2023), <https://opiniojuris.org/2023/06/20/a-tale-of-two-definitions-fortifying-four-key-elements-of-the-proposed-crime-of-ecocide-part-i/> [<https://perma.cc/54BX-YTBA>]; Jiayi Zhou & Ian Anthony, *Environmental Accountability, Justice and Reconstruction in the Russian War on Ukraine*, STOCKHOLM INT'L PEACE RSCH. INSTIT. (Jan. 25, 2023), <https://sipri.org/commentary/topical-backgrounder/2023/environmental-accountability-justice-and-reconstruction-russian-war-ukraine> [<https://perma.cc/RA4G-U82C>]; CRIMINAL CODE [CRIM. CODE] art. 441 (Ukr.).

of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe.”⁶⁹

Vietnam, in light of the environmental damage caused by the Vietnam War, was the first country to include the crime of ecocide in its domestic law.⁷⁰ Several former Soviet republics, which became independent states with the collapse of the Soviet Union, included ecocide as a crime against peace in their new domestic codes; these modern-day nations include Armenia, Belarus, Moldova, Ukraine, Georgia, Kazakhstan, Kyrgyzstan, and Tajikistan.⁷¹

As an example, in Georgia, ecocide is recognized as a crime on a national level. Article 409 of the Georgian Criminal Code⁷² defines ecocide as “contamination of the atmosphere, soil, water resources, mass destruction of fauna or flora, or any other act that could have led to an ecological disaster.”⁷³ The same act, if committed during armed conflicts, shall be punished by imprisonment for a term of fourteen to twenty years or with life imprisonment.⁷⁴

France’s Climate & Resilience Act⁷⁵ includes ecocide in two contexts. First, as a “délit” under national law (Article 231–3),⁷⁶ providing for up to ten years imprisonment for those committing offenses that “cause serious and lasting damage to health, flora, fauna or the quality of the air, soil or water.”⁷⁷ Second, the government is obliged, under Article 296⁷⁸ of the new law, to report back to parliament

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69. Ugolovnyĭ Kodeks Rossiĭskoi Federatsii [UK RF] [Criminal Code] art. 358 (Russ.).
70. *History*, ECOCIDE L., <https://ecocidelaw.com/history/> [https://perma.cc/4GQW-98G2].
71. Jesús Verdú Baeza, *Ecocide, a New Legal Figure Under Construction*, in 10 EUR. UNION AND ITS NEIGHBORS IN A GLOBALIZED WORLD 195, 201 (Marc Bungenber et al. eds. 2023).
72. CRIMINAL CODE [CRIM. CODE] art. 409 (Geor.).
73. *Id.*
74. *Id.*
75. Loi 2021-1104 du août 2021 portant lute contre le dérèglement climatique et renforcement de la résilience face à ses effets [Law 2021-1104 of August 2021 on the Fight Against Climate Change and Strengthening Resilience Against to its Effect], Journal Officiel de la Republique Francaise, Aug. 24, 2021; see *Ecocide / Serious Environmental Crimes in National Jurisdictions*, ECOCIDE LAWS, <https://ecocidelaw.com/existing-ecocide-laws/> [https://perma.cc/MV4D-3U2U].
76. *Ecocide / Serious Environmental Crimes in National Jurisdictions*, *supra* note 75; Law 2021–1104 of August 2021, art. 280 (Fr.)
77. *Id.*
78. *Id.*, art. 296.

within one year on “its action in favor of the recognition of ecocide as a crime which can be tried by international criminal courts.”⁷⁹

In addition to criminal laws that penalize environmental harms, several different countries have civil laws that have allowed for the proliferation of civil litigation over environmental issues. Thus, such civil litigation has already taken place in several countries, over governmental action or inaction causing environmental harm. In France, a Paris administrative court ruled that the French government was responsible for failing to meet its goals to reduce greenhouse gas emissions.⁸⁰ This ruling relied in part on France’s commitments under the Paris Agreement, “taking what had been the soft pledge of politics and turning it into a legally binding commitment.”⁸¹ In the Netherlands, in the *Urgenda* case,⁸² a Dutch court held in 2015 that the government had acted negligently by failing to take action to limit its greenhouse emissions; the decision was upheld⁸³ by the Supreme Court of the Netherlands in 2019, which also ordered the government to hit specific emissions reduction targets.⁸⁴ As of July 1, 2020, at least 1,550 climate change cases have been filed in thirty-eight countries, according to the U.N.’s Global Climate Litigation Report.⁸⁵

The combination of the criminalization of ecocide and other crimes against the environment with the imposition of civil liability on governments as well as corporate entities may produce a significant deterrent impact and may contribute toward reducing environmental harm caused by humans, corporate entities, and governments. Such national-level action could work alongside international-level efforts to impose accountability on those who commit crimes against the environment.

V. ECOCIDE AND CRIMES AGAINST THE ENVIRONMENT IN THE CONTEXT OF THE UKRAINE WAR

Russia has been accused of causing serious environmental harm to Ukraine, among other atrocities committed during its full-scale invasion of Ukraine.⁸⁶ Examples of such environmental harm in Ukraine include

79. *Id.*

80. Kusnetz et al., *supra* note 2.

81. *Id.*

82. Hof Hague 24 June 2015, HA ZA 13–1396, ECLI:NL:GHDHA:2015:7196 m.nt. (State of the Netherlands/Urgenda Foundation).

83. *Id.* ¶ 4.93.

84. Hof Hoge Raad 8 October 2019, § 4, 19/00135, ECLI:NL:PHR:2019:1026 m.nt (State of Netherlands/Urgenda).

85. U.N. Envir. Programme, Rep. on Global Climate Litigation, U.N. Doc. DEL 2333/NA, at 2 (2020).

86. *Ukraine Claims Russia Has Committed 2,500 Environmental Crimes During Full-Scale Invasion*, RADIO FREE EUROPE / RADIO LIBERTY (Oct.

Russian attacks on nuclear facilities in Ukraine, the Russian seizure of the Zaporizhzhia Nuclear Power Plant, and the mining of Ukrainian land with explosives.⁸⁷ A recently released U.N. Environment Programme report⁸⁸ has detailed such environmental damage, and the Programme's executive director has referred to it as "quite literally toxic."⁸⁹ As an expert has recently argued:

Hundreds of industrial facilities, warehouses, and factories have also been damaged, some storing a range of hazardous substances ranging from toxic chemical solvents to ammonia and plastics. Hazardous substances have been released from explosions in agro-industrial storage facilities, including fertilizer and nitric acid plants. Billowing clouds of orange noxious fumes could be seen for miles after attacks on such chemical plants. These poisonous gases are extremely hazardous to humans and livestock.⁹⁰

Ukrainian President Volodymyr Zelenskyy has addressed such Russian-caused environmental harm. In November 2022, President Zelenskyy presented Ukraine's latest ten-point peace formula, which specifically includes the call for prevention of ecocide and the protection of the environment, with a focus on demining and restoring water treatment facilities.⁹¹ Moreover, to amass evidence of Russian-caused environmental harm in Ukraine, President Zelenskyy established a National Council for the Recovery of Ukraine from the War, with a working group on environmental security headed by the Minister of the Environment.⁹²

President Zelenskyy has further called for the international community to recognize the Russian-inflicted environmental damage as

21, 2023, 6:04 PM), <https://rferl.org/a/ukraine-russia-environmental-crimes-invasion/32648161.html> [<https://perma.cc/Y2VP-KAGB>].

87. Amernak Ohanesian, *Holding Russia Accountable for the Crime of Ecocide in Ukraine*, KEENAN INSTIT., WINSTON CTR. (Apr. 11, 2023), <https://wilsoncenter.org/blog-post/holding-russia-accountable-crime-ecocide-ukraine> [<https://perma.cc/J4GH-E5B6>].

88. U.N. Envir. Programme, *The Environmental Impact of the Conflict in Ukraine*, U.N. Doc. EO/2466/NA (2022).

89. *Id.*; *The Toxic Legacy of the Ukraine War*, U.N. ENVIR. PROGRAMME (Feb. 22, 2023), <https://www.unep.org/news-and-stories/story/toxic-legacy-ukraine-war> [<https://perma.cc/7YDM-VRBC>].

90. Eugene Z. Stakhiv, *Destroying the Environment is a War Crime, Too*, FOREIGN POL'Y (July 27, 2022, 2:30 PM), <https://foreignpolicy.com/2022/07/27/russia-ukraine-war-environment-war-crime/> [<https://perma.cc/G9EJ-LT3A>].

91. *What is Zelensky's 10-Point Peace Plan?*, REUTERS (Dec. 28, 2022, 2:34 AM), <https://war.ukraine.ua/faq/zelenskys-10-point-peace-plan/> [<https://perma.cc/R2C7-42D9>].

92. Stakhiv, *supra* note 90.

ecocide, and to hold Russia accountable for it.⁹³ The Ukrainian Minister of Environmental Protection has discussed, with international experts and the Ukrainian Prosecutor General, the various mechanisms available for holding Russia accountable for crimes against the environment and the recognition of such damage as ecocide.⁹⁴ As mentioned above, ecocide is recognized as a crime on the national level in Ukraine.⁹⁵ While there is no known national case law in Ukraine on ecocide,⁹⁶ Ukrainian criminal law could potentially offer a more straightforward way for prosecuting Russia's actions in Ukrainian courts or tribunals than at the ICC under the Rome Statute. It remains clear that Ukrainian leaders are resolute in their determination to hold Russia accountable for environmental damage caused by its invasion;⁹⁷ it is also significant that the international community seems to be embracing this stance and acknowledging that those who cause harm to the environment need to face accountability.⁹⁸

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93. Martin Fornusek, *Zelensky: 'Russia Needs to Bear Full Responsibility for Ecocide'*, THE KYIV INDEP. (June 28, 2023, 11:57 PM), <https://kyivindependent.com/zelensky-russia-needs-to-bear-responsibility-for-ecocide/> [https://perma.cc/8TYT-MFTJ].
94. *Ukraine Justice Conference Addresses Ecocide Law*, STOP ECOCIDE INT'L (Mar. 13, 2023), <https://www.stopecocide.earth/breaking-news-2023/ukraine-justice-conference-addresses-ecocide-law> [https://perma.cc/N5V4-UDV8].
95. Andriy Yermak & Margot Wallström, *Russia Is Committing Grave Acts of Ecocide in Ukraine—and the Results Will Harm the Whole World*, THE GUARDIAN (Aug. 16, 2023, 1:00), <https://theguardian.com/commentisfree/2023/aug/16/russia-ecocide-ukraine-world-war-crimes> [https://perma.cc/DGF7-YW78].
96. *Ecocide and Crimes Against the Environment: What Can We Do About It Now? Summary of the Environmental Discussion*, INT'L RENAISSANCE FOUND. (June 30, 2023), <https://www.irf.ua/en/ecocide-and-crimes-against-the-environment-what-can-we-do-about-it-now-summary-of-the-environmental-discussion/> [https://perma.cc/E7ZC-FZWP].
97. Nicole Lin Chang, *Ukraine Wants the "Whole World" to Hold Russia Responsible for Environmental Damages of War*, EURONEWS, <https://euronews.com/green/2022/11/15/ukraine-wants-the-whole-world-to-hold-russia-responsible-for-environmental-damages-of-war> [https://perma.cc/L82R-8ETN] (Nov. 15, 2022, 14:15).
98. See Dr. Jiayi Zhou & Dr. Ian Anthony, *Environmental Accountability, Justice and Reconstruction in the Russian War on Ukraine*, STOCKHOLM INT'L PEACE RSCH. INST. (Jan. 25, 2023), <https://sipri.org/commentary/topical-background/2023/environmental-accountability-justice-and-reconstruction-russian-war-ukraine> [https://perma.cc/RGN4-U9G5]; U.S. Senior Adviser for European Affairs Ambassador Elizabeth Millard, Remarks at a Third Committee Interactive Dialogue with the Independent International Commission of Inquiry on Ukraine (Oct. 25, 2023), <https://usun.usmission.gov/remarks-at-a-third-committee-interactive-dialogue-with-the-independent-international-commission-of-inquiry-on-ukraine/> [https://perma.cc/T99T-J69D]; *Heads of State and Government Agree to Strengthen Council of Europe, Ensure*

VI. CONCLUSION

Ecocide as well as other crimes against the environment have become a feature of warfare, as exemplified in the Russian invasion of Ukraine and the devastating environmental harm caused as a result.⁹⁹ As this Paper has described, significant obstacles remain associated with the ICC's ability to prosecute environmental crimes, either as war crimes or crimes against humanity. And despite the Stop Ecocide campaign's advocacy and drafting work toward developing ecocide as a fifth crime within the Rome Statute, it remains uncertain whether ICC state parties have the appetite to amend the Rome Statute. Nonetheless, such international advocacy efforts are important as they demonstrate that a global consensus is emerging regarding the importance of imposing accountability on those who deliberately harm the environment. Ecocide, as well as other environmental crimes, can be prosecuted at the national level, as multiple countries have criminal codes which have defined and embraced this type of crime.¹⁰⁰ In addition, as this Paper has discussed, civil litigation in various national courts against governmental inaction to protect the environment has brought additional focus on the need to impose both criminal responsibility as well as civil liability on individuals, corporations, and governments for significant environmental harm. It is crucial to continue to discuss the development of ecocide and other environmental crimes as prosecutable and punishable offenses at both international and national levels.

Accountability for Russia's War of Aggression Against Ukraine, and Support Victims, COUNCIL OF EUR. (May 17, 2023), <https://www.coe.int/en/web/portal/-/heads-of-state-and-government-agree-to-strengthen-council-of-europe-ensure-accountability-for-russia-s-war-of-aggression-against-ukraine-and-support-victims> [<https://perma.cc/AJ3N-FZNR>].

99. Ohanesian, *supra* note 87.

100. Danuta Palarczyk, *Ecocide Before the International Criminal Court: Simplicity is Better than an Elaborate Embellishment*, 34 CRIM. L.F. 147, 174 (2023).

