In the interests of justice, criminal proceedings *in absentia,* including cases of war crimes and crimes against humanity, may also take place against an uninformed person, in which case the individual must be guaranteed an effective right to a new trial.

The individual's right to request new proceedings can be guaranteed both in the context of new judicial proceedings and with broad appeal possibilities.

In assessing whether the right to a new procedure is an effective remedy, the case-law of the ECtHR and the CJEU allows the following main requirements to be distinguished: a person is not required to appear before the domestic authorities, and they are entitled to request a new assessment of the charges in terms of fact and law.

3.2. Should Ecocide Be an International Crime?

3.2.1. Background

Critical environmental impacts both during and in the aftermath of conflict can take decades to restore. Climate change, biodiversity and wellbeing are affected by wars. Thus, practical and legal instruments should be used to reduce their environmental impact. Nevertheless, the environment does not feature as part of the main international conventions on the law of war, such as the Hague Conventions of 1899 (Convention for the pacific settlement of international disputes 1899) and 1907 (Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land 1907) or the GC of 1949. In fact, the word 'environment' does not even appear in these treaties. International law does, however, recognise that parties to a conflict are responsible for protecting the environment and minimising harm to it. This obligation is codified in a few international legal instruments, including the additional protocols to the GC of 1949 and the Protection of Victims of International Armed Conflicts (Protocol I) of 1977, which address the protection of the natural environment during armed conflict.[9]

9 'Article 55 – Protection of the natural environment:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.'

The ICC, which is the principal international judicial body to investigate and prosecute individuals for the gravest crimes of concern to the international community, currently recognises four core international crimes:

1. Genocide as acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.
2. Crimes against humanity as widespread or systematic attacks against civilian populations, including acts such as murder, torture, enslavement, and others.
3. War crimes as grave breaches of the laws and customs of international armed conflicts.
4. The crime of aggression as the planning, preparation, initiation, or execution of an act of aggression by a state against another state.

While the ICC can prosecute for environmental crimes, this is only possible within the context of these four crimes mentioned above, and only during war. It does not place any legal restrictions on legal harms that occur during times of peace. In 1998, the destruction of the environment was proposed as an international crime against peace, but ultimately was not adopted as part of the Rome Statute (1998) due to political factors (the reluctance of major powers to stop various weapons tests). The latter document includes genocide, crimes against humanity, war crimes and the crime of aggression.

At the moment, the concept of ecocide is not formally recognised as an international crime under the framework of international law. However, there has been growing interest and discussion around the idea of recognising ecocide as an international crime to hold individuals and corporations accountable for environmental harm.[10] Efforts to recognise ecocide as a fifth core international crime are based on the belief that environmental harm should be considered on a par with other international crimes due to its potentially catastrophic impact on humanity and the planet.

In December 2019, at the ICC in the Hague, Vanuatu's ambassador to the EU formally proposed to amend the Rome Statute (Statement by H. E. John H. Licht

10 In 2021, the European Commission produced a proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, In 2023 In 2023 the European Parliament's Committee on Legal Affairs made a report on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC with an amendment of the new Article 3a: ecocide https://www.europarl.europa.eu/doceo/document/A-9-2023-0087_EN.html.

2019), the treaty that established the International Criminal Court, to include ecocide as the fifth international crime. The proposed amendment aims to hold individuals, including corporate executives, accountable for actions that cause severe environmental damage. Changing the Rome Statute would require a two-thirds majority among the 123 countries that have ratified the treaty (according to the ICC 2023 data), so many countries' political will and international cooperation are required, which poses a challenge.

3.2.2. The Concept of Ecocide

The term *ecocide* is derived from the Greek word *oikos* (house or environment) and the Latin word *caedere* (to kill or destroy). It was first coined in the 1970s by Arthur Galston, an American plant biologist and chair of the Department of Botany at Yale University, in the context of discussing the use of herbicides in warfare and their impact on the environment at the Conference on War and National Responsibility in Washington (Weisberg, B., 1970). Ecocide in Indochina. Canfield Press, San Francisco.). The term *ecocide* became widely recognised in 1972 at the UN Stockholm Conference on the Human Environment, when Olof Palme, then the Prime Minister of Sweden, called the Vietnam War an example of ecocide in his opening speech (Björk, 1996, p. 15). In 1973, Richard A. Falk proposed his draft Ecocide Convention. In this convention, the following definition of ecocide was proposed – 'any of the following acts committed with intent to disrupt or destroy, in whole or in part, a human ecosystem:

(a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
(b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
(c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of soil or to enhance the prospects of diseases dangerous to human beings, animals or crops;
(d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes; The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
(e) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives' (Falk 1973, p. 12).

In April 2010, a proposal for an international ecocide law was submitted to the UN Law Commission by UK-based lawyer Polly Higgins (2010), who proposed to define the Crime of Ecocide as:

'Acts or omissions committed in times of peace or conflict by any senior person within the course of State, corporate or any other entity's activity which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystem(s) of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely diminished.

1. To establish seriousness, impact(s) must be widespread, long-term or severe' (Higgins, ca. 2010).

David Zierler's 2011 book, *The Invention of Ecocide*, also gives a historical account of how the use of herbicidal warfare in the Vietnam War resulted in a movement of scientists who advocated for ecocide to be recognised as an international crime.

In 2017, Laurent Neyret *et al.* proposed a Draft Convention against and offered the following definition:

'1. For the purposes of the present Convention, Ecocide means intentional acts committed as part of a widespread or systematic attack on the security of the planet, as follows:
   a. release of radioactive ('ionising') substances;
   b. transport or disposal of waste;
   c. factory production of dangerous substances;
   d. production, transport, etc. of radioactive substances;
   e. destruction, possession or capture of wild flora or fauna, whether protected or not;
   f. other acts of a similar nature which threaten the security of the planet.'

Thus, the term *ecocide*, without one coherent definition, has been well understood since the 1970s.

In 2023, several notable mentions of ecocide were not purely theoretical and involved individuals other than scientists and environmentalists. In June 2023, Ukrainian President Volodymyr Zelensky called the destruction of the Nova Kakhovka damn an example of brutal ecocide. Suddenly, ecocide became an international issue discussed in many countries, as well as in international organisations such as EU institutions. Therefore, there was another chance to discuss it as a necessary norm of international law.

3.2.3. The Path Towards International Law Recognising Ecocide as an International Crime

As discussed above, the framing of environmental damage known as ecocide can be traced back to the 1970s, when it emerged in response to the environmental

atrocities caused by the use of herbicides such as Agent Orange in the Vietnam War. Since then, attempts to respond to large-scale environmental destruction have included Professor Richard A. Falk's draft of an International Convention on the Crime of Ecocide in 1973. Debates over whether to criminalise environmental destruction in the report of the International Law Commission entitled 'Draft Code of Crimes Against the Peace and Security of Mankind' (1996) were developed in the 1990s (this document was eventually to become the Rome Statute, adopted in 1998 and entering into force on 1 July 2002).

Until now, perhaps the most significant initiative to create a new norm of international law occurred in 1991; then, the International Law Commission created the Draft Code of Crimes Against the Peace and Security of Mankind. This contained twelve crimes, which included an environmental crime:

> '*Article 26 Willful and Severe Damage to the Environment*
> An individual who willfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced.'

However, this article was withdrawn from the final version of the Draft Code of Crimes Against the Peace and Security of Mankind. It did not become part of the Rome Statute or an international crime due to the abovementioned political reasons.

Given the likely political challenges associated with actually introducing and implementing a new international crime into the Rome Statute (i.e., this will depend on the political consensus of more than 120 countries – the signatories and parties of the Rome Statute), it is worth reviewing how prosecuting the crime of ecocide could be possible in the International Criminal Court.

For example, in 2008, the ICC prosecutor charged Omar Al-Bashir (*Prosecutor v. Omar Hassan Ahmad Al Bashir* (2010) para. 34) with genocide under Article 6(c) of the Rome Statute,[11] noting the connection between genocide and the deliberate destruction of the environment by systematically destroying properties and vegetation, leading to the pollution of water sources by the militia and the Janjaweed in Darfur.

In the jurisprudence of the ICC, the possibility to frame environmental crimes as crimes of aggression, or the 'use of armed force by a State against the sovereign territorial integrity or political independence of another State' can also be identified. The initial inquiry into NATO's bombing campaign against Serbian military positions in 1999 examined aggression-related environmental harm (Final

11 '(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.

report to the Prosecutor 2000), but no criminal case followed, and the ICC did not assess what kind of environmental damage can be considered excessive.

On 22 June 2021, a group known as the Independent Expert Panel for the Legal Definition of Ecocide officially launched what they described as a 'practical and effective definition of the crime of ecocide'. The twelve members of this panel – lawyers from around the world with backgrounds in criminal, environmental, and climate law – expressed their hope that the 'proposed definition might serve as the basis of consideration for an amendment to the Rome Statute of the International Criminal Court'. As they argued, 'the time has come to extend the protections for serious environmental harm'. Ecocide, as they envisioned it, would form a new distinct international crime, defined thus: 'For the purpose of this Statute, ecocide means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts' (Stop Ecocide Foundation 2021, p. 5).

Jérôme de Hemptinne summarised three reasons in support of marking ecocide as the 'fifth international crime':

> First, the 'safety of the planet' is increasingly recognised as being among the core 'supranational' values and interests that must be protected internationally. This is evidenced by the fact that Ecocide is often referred to as being 'of concern to the international community as a whole'. Second, the massive exploitation and destruction of natural resources usually transcend national borders by involving or affecting the interests of several States. To stop these exploitation and destruction, coordinated action at the international level is required. Third, committing environmental criminality on a massive scale usually threatens peace and security, like any other international crime. (Hemptinne 2022)

However, even if many states and politicians agree with the abovementioned reasons, introducing a new crime to the Rome Statute is not straightforward. Furthermore, it would be frivolous to assume that criminalisation will offer an effective response to environmental destruction by itself, as the criminalisation of the current four core international crimes (genocide, crimes against humanity, war crimes, and crimes of aggression) does not prevent them entirely.

Another aspect of the popularity of codifying ecocide could be its criminalisation through national laws. Individual countries have their own rules and regulations to prevent such harm (ecocide is officially a crime in 10 countries). Vietnam, as a consequence of its experiences during the harmful Vietnam War, was the first country to include the crime of ecocide in its domestic law; other countries also have domestic ecocide laws, including France, Ecuador, Ukraine and Russia. Certainly, there is an amplified interest in ecocide crimes at the

national level. However, this interest is still limited, and very little or no judicial practices concern the investigation and prosecution of ecocide perpetrators.

At the level of the EU, in its resolutions on Human Rights and Democracy in the World 2019 and the EU Biodiversity Strategy for 2030, the European Parliament voted to urge 'the EU and the Member States to promote the recognition of Ecocide as an international crime under the Rome Statute of the International Criminal Court' (European Parliament resolution of 20 January 2021, para. 1) and the European Commission proposed the revision of the Directive 2008/99/EC on the protection of the environment through criminal law (hereafter – the Environmental Crime Directive) (Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law). Here, ecocide is defined as 'any conduct <…> committed with intent, which may cause, or substantially contribute to causing, severe and long-term damage or severe and irreparable or irreversible damage to an ecosystem or ecosystems in the natural environment'.

While definitions have differed due to authors, eras or circumstances, proponents of the specific crime of ecocide have been united by the belief that existing criminal laws are insufficient to address environmental crimes. Environmental activists, ecocide campaigners and others concerned about the global environment argue that mass environmental destruction (in biodiversity destruction wars, such as the hostilities in the Democratic Republic of the Congo (UN Environment Programme 2018), the Republic of Côte d'Ivoire (UN Environment Programme 2015), Ukraine (UN Environment Programme 2023; Pereira *et al.* 2022) or Gaza (Environment Programme 2021)) will continue until a global law is in place. While there may be variations in specific definitions, it could be summarised that ecocide generally refers to large-scale environmental impacts that result from harmful activities that cause profound or irreversible damage. The most important parts of the term ecocide could be divided into three: first, the environmental impact; second, activity that causes damage to nature; and third, the damage to nature itself. This is a complex and multifaceted concept with various definitions and interpretations, but its core idea is the severe harm or destruction of ecosystems due to human actions.

3.2.4. Ecocide as a Crime of the State

The idea of ecocide as a crime of the state would involve holding governments and their representatives accountable for actions or omissions that result in extensive environmental impact.

Using the ICC system to prosecute ecocide has a significant disadvantage – only individuals can be charged with crimes under the Rome Statue. In wartime situations mentioned above (in the Democratic Republic of the Congo, the Republic of Côte d'Ivoire or Ukraine) or in times of peace (for example, oil extraction in Canada (Stockholm Environment Institute 2020) and mining in Venezuela (Unit 2023)), the crime of ecocide was or is being committed by corporations or even states.

Another disadvantage is that the jurisdiction of the ICC does not cover the whole world – only 123 states have accepted its jurisdiction. Some of the largest countries have not, such as China, the USA, India, and Russia. For instance, in the context of the destruction of the Nova Kakhovka damn (Ukraine) by Russia, it would be exceedingly difficult to hold the Russian government and its representatives accountable.

Without the international legal norm of ecocide, it is difficult to see how a state could be prosecuted at the international level as a perpetrator of ecocide. National laws or even the proposals of international organisations (for example, the European Commission's proposal for revising the Environmental Crime Directive) include only the liability of natural and legal persons. At the same time, the increasing number of activities that entail risks of environmental damage with transboundary and global impacts (e.g., pollution) raise questions about principles and criteria governing states' responsibility for environmental damage. There is a need to identify, harmonise and develop the principles of international law applicable to responsibility and liability in the context of environmental damage.

There are other ways in which a state could potentially be prosecuted for environmental damage, such as diplomatic efforts to resolve the matter amicably. This can include negotiations, discussions, or diplomatic pressure to encourage the state to rectify its actions. However, it is tough to foresee whether diplomatic means would be effective and how long they would take; this would also depend on states' relationships and past events. Diplomatic and economic sanctions can be used as pressure tactics to compel a state to address its environmental crimes.

Regarding environmental disputes involving states, the ICJ can hear cases in which one state alleges that another state has violated its international legal obligations concerning the environment (Statute of the ICJ 1945, Art. 34). This might involve issues such as transboundary pollution, disputes over shared natural resources, or disagreements regarding the interpretation and application of international environmental agreements. However, it is important to understand that the role of the ICJ is to resolve disputes between states, and it can only do so

if both parties involved agree to its jurisdiction. States are sovereign entities that can choose whether to participate in proceedings. Additionally, ICJ decisions are typically related to providing remedies for disputes, such as compensation or injunctive relief, rather than imposing criminal sanctions.

Another way in which state responsibility arises from regional agreements is, for example, if an EU Member State is responsible for environmental damage in another Member State. These actions might breach EU environmental laws. Those cases could potentially fall within the jurisdiction of the CJEU; this would be resolved similarly in other regional organisations.

Another option may involve one state prosecuting another at the national level, but this is a complex and often politically sensitive procedure. The principles of state sovereignty and international law play a significant role in these cases. Therefore, such prosecutions are relatively rare and involve cases of extreme gravity, such as acts of aggression or gross human rights violations. Additionally, specific legal procedures and requirements can vary widely among countries. First of all, in order to initiate proceedings against another state there must be a legal basis under domestic law for doing so; national laws must permit the prosecution of foreign states or their officials for the alleged offences. Then, the state must clearly define the offences or actions for which it is seeking prosecution, gather substantial evidence to support these allegations, and determine the appropriate legal jurisdiction to hear the case. In some cases, this may be the state's domestic criminal courts, while in others, it may involve specialised courts or tribunals explicitly established for certain types of offences. After a court or tribunal renders a judgment that a state has violated the national legislation of another state, the most challenging part can be enforcing that judgment due to state sovereignty and political or other motives.

Another possibility is to mobilise wide public attention and international civil society organisations to raise awareness about the environmental crimes committed by the state; this could be used to stop a state.

3.2.5. Interim findings

After evaluating possible definitions of ecocide, another new option could be proposed that covers all of its essential aspects: ecocide is the wilful and systemic act of severe harm, damage, or destruction of natural ecosystems, including but not limited to terrestrial, aquatic, and atmospheric systems, resulting from human activities, whether direct or indirect, that significantly disrupt the ecological balance, endanger the continuity of species, or threaten the well-being of present and future generations. Of course, ecocide encompasses actions that

violate international environmental agreements, customary international law, and the fundamental principles of environmental protection.

In order to recognise ecocide as a crime under international law, it is necessary to ensure the following main aspects:

(a) Advocacy and awareness: environmental activists and organisations, such as the Stop Ecocide Foundation, have been working to raise awareness of ecocide and promote its recognition as an international crime. Public support and engagement are crucial to driving this initiative forward.
(b) Legal formulation: proposals and draft codes have been put forward to define and codify ecocide as a crime under international law. The draft law should outline ecocide, ensuring accountability for state and corporate actors, addressing issues of sovereignty and jurisdiction, and providing potential penalties for those found guilty.
(c) Political will and international cooperation: the recognition of ecocide as an international crime requires support and cooperation from the international community. Countries must come together to agree on the legal framework.
(d) Ratification and enforcement: if an agreement is reached and a legal framework is established, countries need to ratify and incorporate this new law instrument into their national legal systems. Effective enforcement and exercise would then become a key aspect of making ecocide a meaningful deterrent against large-scale environmental destruction.

3.3. Lay Participation in Ukrainian Court Proceedings During Russian Aggression: Constitutional Aspects

3.3.1. Context

Article 1 of Ukraine's Constitution states that 'Ukraine is a sovereign and independent, democratic, social, and state which upholds the rule of law' (Constitution of Ukraine 1996). Thus, the constitutional principle of the rule of law is enshrined in the Ukrainian Constitution, which implies that states have a duty to guarantee human rights and freedoms. One way to help ensure this is through the establishment and functioning of a transparent and efficient judiciary. Such a judicial system is one of the means of achieving justice, which is, among other things, an integral part of the fundamental principle of the rule of law. It is noteworthy that the core function of the judiciary in Ukraine, which is to protect human rights and freedoms, is carried out by judges together with *lay* judges (a mixed court model) in the administration of justice, who, among other things, do not have a

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