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The impunity of ecocide during war

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Abstract

This article highlights the issue of ecocide during wartime and the lack of legal consequences for those who commit this crime. Despite the term being coined in 1970, there has been little consensus on how to incorporate it into international law. The paper proposes that the environment should be included within the existing ethical framework that governs permissible and impermissible conduct *in bello*, and that this approach can be used to adequately safeguard the environment under the just war theory. This study will then examine the justification for individual impunity for ecocide committed during times of war and determine whether a shift in the status quo is feasible.

Key Words: Ecocide, just war theory, international humanitarian law, international criminal law, Rome Statute, amendment

Resumen

Este artículo destaca el problema del ecocidio durante tiempos de guerra y la falta de consecuencias legales para quienes cometen este crimen. A pesar de que el término fue acuñado en 1970, ha habido poco consenso sobre cómo incorporarlo en el derecho internacional. El documento propone que el medio ambiente sea incluido en el marco ético existente que rige la conducta permitida e impermisible *in bello*, y que este enfoque pueda ser utilizado para salvaguardar adecuadamente el medio ambiente bajo la teoría de la guerra justa. Este estudio examinará la justificación de la impunidad individual para el ecocidio cometido durante tiempos de guerra y determinará si un cambio en *el status quo* es factible.

Palabras clave: Ecocidio, teoría de la guerra justa, derecho humanitario internacional, derecho penal internacional, Estatuto de Roma, enmienda

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List of terms an abbreviations

Table 1 below portrays the different abbreviations and acronyms employed throughout the present dissertation:

Table 1

HHRR	Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
IEL	International Environmental Law
IHL	International Humanitarian Law
Rome Statute	Rome Statute of the International Criminal Court
UN	United Nations
UNGA	United Nations General Assembly
US	United States

1. Introduction

In recent years, the issue of environmental protection has taken on a sense of pressing urgency, with the conversation increasingly dominated by concerns about environmental degradation during peacetime. Over the past decade, a variety of efforts have been launched to preserve the environment, ranging from Pope Francis' landmark encyclical *Laudato Si'* to the United Nations' Paris Accords. The degradation of the environment during peacetime refers to any actions that harm the environment outside the context of war. This can encompass a wide range of destructive activities, including deforestation, coral reef destruction, river pollution, and wetland destruction, among others (Chu & Karr, 2017). Although such actions technically fall under the definition of ecocide, which will be discussed later in this paper, the focus here will be on the issue of impunity for ecocidal acts committed during times of war. This is because many countries already have laws in place to prosecute environmental crimes committed during peacetime and therefore falls outside the scope of this study (Brihi & Dufourq, 2022).

Throughout history, the destruction of the environment has been utilized as a weapon of war. This is exemplified by Attila, the last King of the Huns, whose famous quote “there where I have passed, the grass will never grow again” referred to the scorched earth policy that he implemented during his conquests (Kelly, 2008). Despite being one of the oldest war crimes ever committed, environmental destruction is one of the few crimes to which Cicero's adage, *inter arma silent leges*¹ applies.

With the aim of examining the reasons behind the prevailing impunity surrounding environmental damage during wartime, this paper attempts to investigate whether it is possible to reverse this impunity or not. As it will be demonstrated through the ethical framework, the impunity of ecocide contradicts war ethics, as evidenced in the works of philosophers dating back to Saint Augustine and Saint Thomas Aquinas during the inception of the just war theory (Aquinas, 1225?-1274). The primary focus of this paper is to explore the possibility of reversing this impunity and the ways in which it can be accomplished. The most recent ongoing debate at an international level on the reversal of the impunity of ecocide centers on the Stop Ecocide Foundation's Proposal on the Amendment of the Rome Statute of the International Criminal Court (Rome Statute) (Independent Expert Panel for the Legal Definition of Ecocide, 2021). The Statute now

¹ *Inter arma silent leges* translates as “in times of war, the law is silent” (ICLR, s.f.).

establishes the four core international crimes: genocide, crimes against humanity, war crimes, and crimes of aggression (Rome Statute of the International Criminal Court, 1998). The proposed amendment seeks to add ecocide as a fifth core international crime in order for it to be criminalized as crime during peacetime and wartime under International Criminal Law (ICL).

Since the term ecocide appeared, the conversation around it has largely been centered on acts committed during times of war, with the term ecocide having been first coined by Professor Arthur W. Galston during the Vietnam War, who defined it as “the willful and permanent destruction of an environment in which people can live in a manner of their own choosing” (Weisberg, 1970). Although there was some initial debate around the term, it was not until after the Syrian War that the issue of the destruction of the environment in wartime was fully revisited and brought to the forefront of the discussion once again (Higgins, Short, & South, *Protecting the planet: a proposal for a law of ecocide*, 2010).

In November 2020, the Independent Expert Panel for the Legal Definition of Ecocide released a legal definition of ecocide. This panel was convened at the behest of Swedish parliamentarians representing different ruling parties through the Stop Ecocide Foundation. The definition, as stated, reads as follows:

“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.” (Independent Expert Panel for the Legal Definition of Ecocide, 2021)

The discussion of this study will later enter around the utility of the definition proposed by the Stop Ecocide Foundation and, therefore. Before that, the study will firstly provide a historical overview of the study of ecocide during wartime, from the first applications of scorched earth policy to the proposed amendment to the Rome Statute, with a particular focus on the Vietnam and Gulf Wars. Secondly, the frameworks under which this paper will operate will be explored. On the one hand through an ethical framework that will examine how the impunity of ecocide contradicts war ethics and the just war theory. On the other hand, through a legal framework that will in-depth analyze the existing international law regulating ecocide, answering the question of whether impunity for ecocide truly exists.

2. Historical overview

The term ecocide was coined in 1970 by Professor Arthur W. Galston during the Conference on War and National Responsibility, defining ecocide as the “massive damage and destruction of ecosystems”. But it was long before then that mankind had been committing ecocide during war time (Independent Expert Panel for the Legal Definition of Ecocide, 2021).

The scorched earth policy, a military strategy that involves destroying valuable items such as crops to render them useless to opposing soldiers, is one of the oldest military tactics still in use today (Corporate Finance Institute, 2015). This strategy was employed during conflicts dating back to centuries before the fall of the Roman Empire and was extensively utilized during the 19th and 20th centuries. Some examples include the Napoleonic Wars, when Russian territory was burned after the passage of the French, and the American Civil War, when Union forces destroyed Confederate crops and resources (Vagts, 1942). The Imperial Russian Army's use of the scorched-earth policy against the Imperial German Army and the later Nazi campaigns to burn Soviet Union-owned communities are some examples of the policy's increased use during both World Wars (Liulevicius, 2000). However, it was not until the Cold War that environmental destruction during wartime became an issue with new and more sophisticated tactics, ultimately leading to the deployment of Agent Orange² during the Vietnam War between 1962 and 1971 (Zierler, 2011).

Professor Galston, a biologist, discovered that the U.S. military had utilized the research he conducted for his Ph.D. in the development of Agent Orange. This herbicide, also referred to as “rainbow herbicide,” was used during the Vietnam War to eliminate the jungle coverage that was shielding the Communist adversaries of South Vietnam, an ally of the United States (Zierler, 2011). Galston, lacking formal training in ICL, was unable to draft a legal provision prohibiting the use of ecocide during times of war. Nonetheless, he asked the United Nations to do so, when during the Conference on War and National Responsibility he stated:

“At the present time, the United States stands alone as possibly having committed ecocide against another country, Vietnam, through its massive use

² Agent Orange was used in the Vietnam War as a defoliant. During wartime, defoliants are mainly used by parties to facilitate observation of enemy troop movements and to deny areas to such troops (Zierler, 2011).

of chemical defoliants and herbicides. The United Nations would appear to be an appropriate body for the formulation of a proposal against ecocide” (Galston, Conference on War and National Responsibility, 1970).

During this period, Galston was not the sole American intellectual actively opposing the Kennedy, Johnson and Nixon administration's use of Agent Orange in Vietnam. Professor Pettigrew, from Ohio University, contended that the Ninth Amendment of the United States Constitution, which pertains to rights not explicitly enumerated in the Constitution, includes the right to be safeguarded against ecocide (Pettigrew, 1971).

Simultaneously, the severity of the issue at hand prompted Craig Johnstone, a member of the Council of Foreign Relations and later the United States Ambassador in Algeria, to write a paper in 1971 titled “Ecocide and the Geneva Protocol.” In his paper, Johnstone highlighted the danger of herbicides being used as a systemic weapon in the Vietnam War, and how their use was having a much more profound impact (Johnstone, 1971). His notice was well-received between the US population, given the context of the United States' public opinion following the negligence in Vietnam. At the same time, the US Senate was deliberating on the ratification of the 1925 Geneva Protocol, which prohibited the use of chemical and biological weapons in warfare, submitted in August 1970 by President Nixon. In the meantime, he also ordered the Military Assistance Command in Vietnam to put an end to its defoliation program. (Johnstone, 1971) A couple years after this Galston stated:

“The [...] decision developed out of our government’s use of Agent Orange and other chemicals to defoliate and kill vegetation during the war in Vietnam violated my deepest feelings about the constructive role of science and moved me into active opposition to official U.S. policy. [...] Our small group was eventually successful in helping to change our country’s policy, when President Nixon ordered the end of the spraying at the end of 1970, almost five years before the end of the war” (Galston, *An Accidental Plant Biologist*, 2002).

In tracing the historical evolution of the term ecocide and the efforts to establish it as an international crime, it is noteworthy to consider the 1972 United Nations Stockholm Conference on Human Environment, which marked the first major international conference on environmental issues. During the conference's opening remarks, Olof Palme, the Swedish Prime Minister, cited the Vietnam War as a striking example of

ecocide (Independent Expert Panel for the Legal Definition of Ecocide, 2021). This declaration garnered support from several influential leaders, including Indira Gandhi, the Prime Minister of India. (Gauger, Rabatel-Fernel, Kulbicki, Short, & Higgins, 2013). It is important to note that while the conference also covered topics such as transnational pollution, which are not relevant to this particular study, it played a significant role in establishing International Environmental Law. The principles of IEL were established at the conference, and its first principle emphasizes the relationship between humans and their environment, acknowledging that humans are both influenced by and have the power to shape their surroundings, which provide them with physical, intellectual, moral, social, and spiritual nourishment. (UN General Assembly, 1972).

In 1973, as the environmental discourse increasingly centered around the concept of ecocide, Professor Richard Falk drafted an Ecocide Convention that defined ecocide as “the conscious or unconscious infliction of irreparable damage to the environment in times of war and peace” (International Rights of Nature Tribunal). Falk's draft explicitly condemned all military tactics that aimed to harm the environment, as well as any actions that disrupted the natural relationship between humans and nature. In essence, Falk attempts to incorporate the requirement to protect the environment into the *ius in bello* (Falk, 1973).

The effort to codify ecocide into international law continued in 1978 when the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities advocated to include ecocide to the Genocide Convention after Falk's article was included in a UN study (Greene, 2019). At this time the Commission studied if other conventions could be drafted to add ecocide and cultural genocide into the 1948 Genocide Convention. During this study and using Falk's Ecocide Convention draft, the Commission considered three places where to add ecocide: ecocide as an international crime similar to genocide, ecocide as a war crime and ecocide as actions to influence the environment for military purposes. Finally, as the ‘question of ecocide’ had been found outside the context of genocide, the Special Rapporteur assigned to the case declared that adding ecocide to the Genocide Convention would be prejudicial for the Genocide Convention (Martínez Cobo, 1983).

Soon after the onset of the 1990s, the Iraqi government's invasion of Kuwait sparked the First Gulf War, which gained notoriety for the vivid images of Kuwaiti oil

wells engulfed in flames. These egregious assaults on the environment evoked comparisons to the environmental devastation wrought during the Vietnam War, resulting in widespread international condemnation of Saddam Hussein's actions (Schwabach, 2003). Historian David Zierler later referred to Hussein as “the greatest violator of the norms of warfare in recent times” (Zierler, 2011)

Amidst ongoing events, the International Law Commission³ developed the Draft Code of Crimes Against the Peace and Security of Mankind in 1991. Initially, the draft included article 26 on environmental crimes, which stated that individuals who intentionally cause widespread, long-term, and severe damage to the natural environment would be sentenced upon conviction. However, in 1996, the final version of the Code was voted on by the United Nations General Assembly (UNGA), and article 26 was omitted due to opposition from several governments. As a result, the environment was left with no legal protection outside of war crimes, as stipulated in the Rome Statute. (International Law Commission, 1996)

Despite early efforts to codify ecocide and address environmental destruction, subsequent academic attempts to advance the study of ecocide or codify the term into international law have been limited throughout the next decade. Scholars such as Stephen McCaffrey, Ludwick A. Teclaff, Mark Gray, and Mark A. Drumbl have primarily focused on ecocide during times of peace or expanded on existing research. However, their efforts have yet to result in substantial progress towards the legal recognition and prosecution of ecocide as an international crime. It was not until Polly Higgins' work in 2010 that the debate on ecocide was reignited, and efforts to establish it as a crime against humanity gained renewed momentum.

In April 2010, lawyer Polly Higgins, commonly known as the “Earth Advocate”, published the book “Eradicating Ecocide”, where she proposed an international law project on the crime of ecocide to the United Nations International Law Commission to amend the Rome Statute to include the crime of ecocide as a fifth crime against peace (Higgins, Short, & South, *Protecting the planet: a proposal for a law of ecocide*, 2010). However, it is important to note that under ICL, only individuals can be prosecuted, not states. Thus, Higgins' proposal would hold any “senior person” responsible for ecocide

³ The International Law Commission IS a body established by the United Nations General Assembly to “initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification” (International Law Commission, 2017).

committed during the course of state, corporate, or any other entity's activity, whether in times of peace or conflict. (Higgins, Short, & South, *Protecting the planet: a proposal for a law of ecocide*, 2010). Nevertheless, despite the promising potential of Higgins' proposal, it faced significant challenges due to the lack of established mechanisms to implement it. This resulted in difficulties in gaining the necessary support from governments and other influential entities, ultimately making it more difficult to fully realize the proposal's objectives.

In 2012, Higgins published her second book, “*Earth is our Business: changing the rules of the game*,” which provided legal answers for those seeking to act against ecocide. The book included a draft Ecocide Act that could be implemented in the United Kingdom, as well as a simulated ecocide trial that was held before the Supreme Court of England and Wales. In this simulated trial, the CEOs of two oil companies were found guilty of ecocide under the proposed Ecocide Act. Higgins' work is infused with a deep understanding of the urgency of the current situation, although tremendously focused on ecocide in times of peace (Higgins, 2012). Despite the failure of her attempts to establish ecocide as an international crime, the momentum reappeared after she died in 2019. In 2021, an Independent Expert Panel, created by the Stop Ecocide Foundation, an organization created to continue Higgins’ legacy, proposed a new amendment to the Rome Statute that once again tries to include the crime of ecocide, on the one hand, not as a fifth international crime, and on the other hand to modify the already existing definition of the destruction of the environment as war crime. (Independent Expert Panel for the Legal Definition of Ecocide, 2021).

To gain a more profound understanding of the obstacles that the fight against ecocide's impunity faces, it is crucial to comprehend the rationale behind the denial of this proposal. This research aims to explore the different elements that led to this result and contemplate alternative approaches that could have been adopted. By delving into the factors that influenced the rejection of this proposal, we can gain valuable insights into the complexities surrounding the criminalization of ecocide, and potentially identify ways to overcome these challenges.

3. Methodology

The research methodology for this study is primarily based on a qualitative approach, involving a combination of literature review and legal analysis. The research is conducted with the aim of addressing the research question on the impunity of ecocide during wartime using two frameworks: ethical and legal.

The literature is conducted to gain an understanding of the existing philosophical and legal literature on ecocide, mainly through environmental ethics, just war theory, International Humanitarian Law (IHL), and ICL. The review of the literature is intended to identify the gaps in the existing accountability on the topic of ecocide and to determine how this thesis can contribute to addressing these gaps.

The theoretical framework for the thesis is based on two primary frameworks: ethical and legal. The ethical framework is based on the principles of environmental ethics and just war theory, which are used to argue why the environment should be protected during wartime and how it can be done legally. The legal framework is based on IHL and ICL, which are analyzed to identify the current gaps in the law regarding the protection of the environment during wartime. The ethical and legal frameworks are used in combination to analyze the issue of impunity of ecocide during wartime. This legal analysis involves a detailed analysis of the Hague Conventions, the Geneva Conventions and the Rome Statute, which are the primary legal instruments governing the conduct of armed conflicts. The legal analysis also involves the identification of the intended amendments to the Rome Statute that as this study will prove are not functional, and the proposal of a new amendment that can effectively protect the environment during wartime.

Overall, the methodology for this study involves a combination of qualitative research methods, including literature review and legal analysis to analyze the issue of impunity of ecocide during wartime. The research is intended to contribute to the understanding of the legal and ethical implications of ecocide during wartime and to propose an effective legal amendment to protect the environment during armed conflicts.

4. Framework

4.1. Ethical framework

When it comes the environment, one of the fundamental questions we need to consider is whether its destruction is ever justified, be it during peacetime or wartime. To answer this question, I will use a qualitative methodology based on the following ethical framework to analyze the existing regulations on ecocide during wartime. It's important to approach this analysis with a strong ethical foundation, as the impact of ecocide extends beyond the present moment and can affect future generations, and other lifeforms.

While there is a limited amount of literature that explores the ethical reasons behind protecting the environment in times of conflict, it remains crucial to establish an ethical framework that helps us determine the legitimacy of environmental devastation (Estève, 2020). This subject can be approached from two perspectives. Firstly, from the standpoint of environmental ethics, which elucidates the relationship between humans and nature. However, authors who specialize in environmental ethics tend to be pacifists and focus primarily on environmental injustices, paying scant attention to the environmental damage wrought by wars. Moreover, they frequently overlook the issue of war itself, condemning violence but failing to address the subject in depth. Secondly, the subject can be approached from the standpoint of war ethics and the just war theory.⁴ Despite the existence of works on war ethics ranging from St. Augustine to more recent writers like Michael Walzer (2021) there has been little interest in studying the relationship between war and the environment (Estève, 2020).

4.1.1. Environmental ethics

In order to comprehend the significance of protecting the environment and whether its destruction is morally legitimate or not, we will refer to Professor Jaime Tatay's article on "Environmental Ethics, in the Face of the Evil of Ecocide" which offers insights into how various philosophical schools have shaped our understanding of environmental ethics over time.

⁴ Just war theory is a philosophical and ethical framework that aims to provide a set of criteria for determining when a war is just and permissible (*jus ad bellum*), and how it should be conducted (*jus in bellum*). It is rooted in the concept that warfare may be necessary, but it ought to be restrained and carried out in a manner that reduces harm to both those engaged in fighting and those who are not (Moseley, 2011)

4.1.1.1. *Consequentialism*

The consequentialist⁵ school of philosophy, to which Peter Singer belongs, places great emphasis on animal welfare as a key component of ethical reasoning. Singer's seminal work "Animal Liberation" (1975) posits that the maximization of utility can be achieved by reducing overall suffering, not just for humans but also for animals. This premise rests on the notion of sentience⁶ which is predominantly observed in higher animals with developed nervous systems similar to that of humans (Singer, 1975). Nonetheless, some detractors argue that Singer's utilitarian approach is limited by its focus on sentient animals alone and that a more comprehensive ecological or ecosystem-based framework is needed to fully address the broader question of life preservation (Tatay, 2023). One such advocate is Holmes Rolston. On the other hand, also within the consequentialist framework, the United Nations Conference on the Human Environment in Stockholm (1972) declared that the Earth's natural resources, including representative samples of natural ecosystems, should be preserved for the benefit of present and future generations. This declaration views nature as a collection of natural resources that must be conserved for human benefit (UN General Assembly, 1972). The consequentialist ethical perspective on the environment is anthropocentric in nature, emphasizing that the value of the environment lies in its instrumental usefulness to humans. However, it also stresses that the destruction of these natural resources, which are meant to be preserved for human benefit, is not legitimate. This ethical tradition views ecocide as highly undesirable due to the severe negative impact it has on all forms of life, particularly human beings (Tatay, 2023).

4.1.1.2. *Deontologist*

It is not until we explore deontological⁷ ethics with philosophers like Holmes Rolston and Paul W. Taylor that we fully recognize the intrinsic value of all forms of life and the importance of respecting and protecting the natural system as a whole. Both authors agree that environmental ethics should not solely focus on humans and their interests, but instead consider the interconnected relationship between all forms of life and the

⁵ This school of philosophy contends that an action's morality is solely determined by its consequences (Diccionario Ferrater Mora, 2023).

⁶ Sentience refers to the ability to experience pleasure and pain (Singer, 1975).

⁷ This ethical theory focuses on the regulation of duties and translates them into moral norms, precepts, and rules of conduct. It specifically excludes other aspects of morality outside of its field of interest (Diccionario Ferrater Mora, 2023).

environment they inhabit. In other words, they believe that environmental ethics should acknowledge that all living beings and their natural surroundings are part of a complex and dynamic system where each has a role and intrinsic value that must be respected and protected. Finally, they emphasize that the indiscriminate destruction of the environment is an evil in itself and demonstrates a lack of respect for nature (Taylor, 1986). This shows that from a deontological perspective, the destruction of the environment is also not legitimate.

4.1.1.3. *Virtue ethics.*

In relation to virtue ethics,⁸ St. Thomas Aquinas explores in his work *Summa Theologica*, the question of whether it is morally permissible to kill any living being. He argues that since God has given manpower over animals and plants, he will not be held accountable for using them for his own benefit (Aquinas, 1225?-1274). However, it should be noted that St. Thomas' ethical framework is anthropocentric and does not consider other living beings as objects of moral consideration. Additionally, St. Thomas was not aware of the possibility of ecocide or the devastating effects of large-scale biological extinction (Tatay, 2023). It is worth noting that St. Thomas' virtue ethics emphasizes that causing unnecessary suffering to other forms of life can become a vice that makes human beings violent and cruel, leading to cruelty towards other humans. Thus, it is not only the instrumental value of the environment that is important for humanity, but also the act of its own destruction can disturb the goodness of the human being (Aquinas, 1225?-1274). Some contemporary philosophers have attempted to reconcile the Thomistic tradition of virtues with the new ethical concern for the environment. They have made “ecological virtues” such as care, compassion, and respect for nature central to the formation of human character. Therefore, in the context of virtue ethics, addressing the evil of ecocide requires working on the human condition itself and the root causes of its disorder. (Tatay, 2023) In simpler terms, because causing harm to other forms of life is considered a vice, humans cannot destroy the environment indiscriminately without developing a vicious character.

⁸ According to Aristotle's school of thought, an individual's character development determines the adoption of virtues and vices that ultimately shape their personality. (Diccionario Ferrater Mora, 2023)

4.1.1.4. *Ecocentrism.*

Finally, within ecocentric ethics,⁹ Aldo Leopold (1949) stands out for proposing the “Land Ethic” that expands the moral community to include not only humans, but also soils, waters, plants, and animals while considering their intrinsic value. He also emphasizes the need to extend social consciousness about the implications of environmental degradation for human beings (Leopold, 1949). Leopold's ecocentric approach values and respects not only biodiversity, but also the ecosystem as a whole, in order to prevent “ecological death”. According to this approach, the role of humans in the biosphere must shift from conqueror to respectful member and citizen of the community of the earth (Tatay, 2023). Through environmental ethics, we do not only recognize that the destruction of the environment is illegitimate, but we also understand that the responsibility for its protection falls on humans.

4.1.2. **Just War Theory**

Now that it has been shown that under no environmental ethics’ framework the destruction of the environment is legitimate, the objective of this section is to demonstrate the necessity of establishing liability for ecocide committed during wartime specifically within the purview of the just war theory. To do this, we must first understand the main three objectives of the just war theory. This theory provides guidelines for determining if war is permissible (*jus ad bellum*) and how it should be conducted (*jus in bello*) (International Committee of the Red Cross, 2015). As this study focuses on ecocide during wartime, we will only consider the *jus in bello*,¹⁰ which governs the limitations of the effects of armed conflict. According to the just war theory, all regulations in the *jus in bello* (or IHL) aim to (1) end the war as quickly as possible, (2) with the fewest possible casualties, and (3) establish a new status quo that avoids relapses and establishes a lasting peace (Rawls, 1999). It is pertinent to acknowledge that these objectives are the fundamental pillars of IHL,¹¹ which as we will later see, serves as a codification of these principles. The IHL does not explicitly cover the subject of environmental destruction in

⁹ The aim of ecocentric ethics is to utilize moral principles in guiding human behavior towards nature. (Diccionario Ferrater Mora, 2023)

¹⁰ *Jus in bello*, or International Humanitarian Law, is the law that governs the way which warfare is conducted. (International Committee of the Red Cross, 2015)

¹¹ International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. (International Committee of the Red Cross, 2015)

times of war, largely due to the fact that the concept of ecocide has not received much attention within the context of just war theory. This, as it will later be exemplified has translated also in impunity for war crimes against the environment compiled in the Rome Statute. In the following section, this study will elaborate on the work of Adrien Estève (2020), a postdoctoral researcher at the Center for International Studies at Sciences Po University. Specifically, Estève's research focuses on the potential incorporation of environmental destruction into the tenets of just war theory, and whether if looked at closely, the theory can also protect the environment.

St. Augustine, a Catholic philosopher, and theologian introduced the concept of the just war and defined eight elements, with the most significant being the assessment of the moral evil of attitudes and desires in terms of the evil of war, and the use of Biblical texts to legitimize participation in war (Langan, 1984). St. Thomas Aquinas further developed the just war theory and established the principles of just conduct in war to justify Christians' involvement in warfare (Aquinas, 1225?-1274). Francisco de Vitoria, another Christian philosopher, legal scholar, and theologian, was the last to write about the just war theory in relation to Christianity. He argued that the Spanish had the right to use war as a last resort when the Native Americans resisted their evangelization (Fernández-Santamaría, 1988). All that came after the writings of these Christian philosophers about just war theory drove away from the Christian perspective and started adding more standpoints to the theory, but never included the protection of the environment.

To this lack of inclusion, Estève responded by advocating for the addition of environmental protection in the just war theory, citing three main arguments to support his proposal (Estève, 2020). The first argument, which is utilitarian in nature, maintains that some natural elements are vital resources necessary for the survival of non-combatant populations. It suggests that these elements should be granted moral protection due to the advantages acquired from their use, based on the distinction principle. The second argument, which is consequentialist, stipulates that certain wartime behaviors and especially destructive weapons against nature must be prohibited from being employed in battle, based in the proportionality principle. Additionally, a third argument, grounded in virtue ethics, elucidates the challenges involved in making ethical decisions regarding the destruction of the environment during wartime and relies upon the principle of double effect or last resort. (Estève, 2020)

4.1.2.1. *Utilitarian argument: Principle of distinction*

The principle of distinction, which prescribes who are legitimate targets in a war and distinguishes between combatants (legitimate targets) and noncombatants (illegitimate targets), is codified in IHL, and criminalized by the International Criminal Court (ICC) in the Rome Statute. The principle was first established in 1625 by Hugo Grotius in his book “On the Law of War and Peace”, where he argued for protecting non-combatants due to their vulnerability and the long-term impact of war on them (Grotius, 1625). Later, Francis J. Connell built on Grotius’ work, establishing five criteria for determining the justifiability of a war, one of which was that only combatants can be considered military targets. Expanding on these ideas, Paul Ramsey, in his book “The Just War: Force and Political Responsibility”, he proposed the principle of discrimination in warfare, which limits attacks on non-combatants to uphold moral immunity. The principle is rooted in the belief that for the sake of justice, intentional killing of innocent non-combatants cannot be justified to deter an enemy's actions. Although identifying non-combatants in modern warfare can be challenging, it is critical to avoid harming civilians who are not directly supporting the military force (Ruede, 1970). The distinction between combatants and non-combatants is crucial in identifying legitimate military objectives, and the principle of discrimination upholds the moral boundaries of warfare. Rawls and Walzer have also contributed to the discussion, emphasizing the importance of distinguishing between various groups in a war and subjecting soldiers to potential attacks once the war has begun (Walzer, 2021).

The principle of distinction can be applied to the environment from both an anthropocentric and ecocentric perspective, both founded on the idea that, similar to civilians, the environment is not belligerent and therefore should not be considered a legitimate target of war (Estève, 2020). From an anthropocentric perspective, there are three reasons why the environment should be protected. Firstly, resources are vital for the survival of civilian populations, and destroying the environment that provides those resources could lead to civilian deaths, which violates the principle of the just war theory that aims to minimize casualties. Essentially, harming the environment can be viewed as equivalent to harming the civilians who depend on it for their survival. Secondly, an anthropocentric perspective regards the environment as human property, and destroying it would be akin to destroying someone's property, which is only legitimate under specific circumstances (Estève, 2020). According to Grotius, destroying someone's property is

only legitimate when it is legitimate to kill that person, meaning that if killing a non-combatant is illegitimate, then destroying their property is also illegitimate (Grotius, 1625). The destruction of civilian property is also criminalized under the Rome Statute in article 8.2. meaning that if the environment were really to be seen as a property to humans its destruction would automatically be criminalized under ICL (Rome Statute of the International Criminal Court, 1998). Lastly, the destruction of the environment during war can pose a significant threat to the long-term survival of peace. Grotius emphasizes on the importance of preparing for the aftermath of war to sustain peace (Grotius, 1625). Therefore, if all resources are destroyed, such as burnt crops and poisoned water sources, there may still be a need to fight for resources after the war has ended. This violates the principle of the just war theory, which requires the establishment of a new status quo that prevents relapses and ensures a lasting peace. In relation to these two points, Estève suggests that the environment should be granted the same protection from the damages of war as civilians or non-combatants. Essentially, just as civilians should not be targeted in war, the environment should not be targeted or harmed either (Estève, 2020).

On the other hand, looking at the situation from an ecocentric viewpoint, the environment is not just a backdrop to war but can actually suffer from it, it is a victim of war (Estève, 2020). Michael Walzer highlights that non-combatants, who are not directly targeted by war, can still experience lasting harm due to their proximity to it. In his book, “Just and Unjust Wars”, he refers to these harmful effects as “evil consequences” and argues that they can only be justified if certain conditions are met: (1) the act is a legitimate act of war, (2) the direct effect is morally acceptable, (3) the intention of the actor is good, and (4) it is justifiable under Sidgwick's¹² proportionality rule, which takes into account the usefulness of the act in winning the war and the harm caused in relation to the ultimate goal (Walzer, 2021). The ecocentric viewpoint asserts that these conditions are the only ones under which the environment can be destroyed, just as they are the same and only conditions under which a civilian can be killed during wartime (Estève, 2020). By recognizing the intrinsic value of the environment and considering it a noncombatant, the environment is effectively demilitarized,¹³ preventing its destruction from becoming a military target. A compelling example of this approach is the demilitarization of certain

¹² Henry Sidgwick published the book “The Methods of Ethics” in 1874, where he established the rules of utility (Stanford Encyclopedia of Philosophy, 2004)

¹³ A demilitarized zone is an area in which treaties or agreements between nations, military powers or contending groups forbid military installations, activities, or personnel (Kim, 1997).

areas, such as the Antarctic. Once an area is declared demilitarized, any attack on it would fail to fulfill Walzer's four requirements, and hence, be deemed an “evil consequence”, as they are now considered direct victims of the war and not just mere objects (Walzer, 2021).

4.1.2.2. *Consequentialist argument: Principle of proportionality*

The principle of proportionality is an important component of the just war theory, which seeks to define the circumstances under which the use of military force is morally justified. The origins of this principle can be traced back to the so-called “Salamanca School” and the 16th-century Spanish theologian Francisco de Vitoria, who argued that the use of force in war should be limited to what is necessary to achieve the goal of restoring order, security, and peace (Fernández-Santamaría, 1988). Later thinkers, such as Hugo Grotius and Francis J. Connell, expanded on this idea, emphasizing that the use of force must also be proportionate to the threat faced and that war should only be waged when there is a good reason to believe that the benefits of victory outweigh the harm caused by the conflict (Grotius, 1625). Michael Walzer further developed these ideas, emphasizing the importance of limiting harm to civilians and using military force only when necessary for the attainment of the desired outcome. Ultimately, the principle of proportionality requires an economy of war, where military leaders exercise discipline and calculation in their decision-making, ensuring that the interests of individuals are not sacrificed for the sake of achieving victory (Walzer, 2021). However, Sidgwick's proportionality rule is a challenge to this principle. This rule states that “in order for an act to be morally permissible in war, it must (a) be useful toward the end of winning the war, and (b) the harm done must not be out of proportion to the good achieved.” Walzer argues that this rule focuses too much on achieving victory, and the interests of individuals are given lesser value, prohibiting only the excessive harm. This rule conflicts with the two first principles of the just war theory, which aim to finish the war as quickly as possible with the fewest possible casualties (Walzer, 2021).

Assessing the proportionality of attacks during wartime in relation to the destruction of the environment raises a significant issue as it seems to be comparing unmatched dimensions. Estève's study of the proportionality principle, as it pertains to the environment, and other related studies have identified three crucial factors to consider

in order to attempt to compare both dimensions: (1) temporality, (2) disproportionate means, and (3) ecosystem hierarchy (Estève, 2020).

The temporality factor of environmental harm must be considered when assessing the proportionality of acts of war, as exemplified in the Rome Statute's article 8(2)(b)(iv), which requires the harm to be “long-term” to be considered criminal (Rome Statute of the International Criminal Court, 1998). Robyn Eckersley in her book “The Green State” discusses the concept of ecological intervention and argues for the establishment of an international environmental court to address crimes of ecocide. Essentially, she argues that if an attack causes irreplaceable damage to the environment, it should be considered a severe breach of proportionality, as the natural environment cannot regenerate itself. However, this is not the case for other types of attacks, where the environment has the ability to regenerate, and therefore the breach of proportionality may not be as severe (Eckersley, 2004). In other words, the intensity of the damage caused in times of war needs to be distinguished. Thus, assessing the proportionality of attacks on the environment during wartime requires a nuanced consideration of the specific circumstances and context surrounding the attack (Estève, 2020). Essentially, this dimension adds complexity to the assessment, as measuring the long-term impact of an act of war on the environment is immensely challenging and should be done case by case. The second factor relates to the types of weapons and strategies used during warfare that cause environmental harm. Some weapons, such as poisoning water sources, are immediately considered disproportionate. The International Court of Justice Advisory Opinion on the Legality of the Threat Nuclear Weapons recognizes the severe environmental destruction that nuclear weapons can cause, but it does not always consider their use disproportionate (Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996). Nevertheless, certain weapons, such as nuclear, incendiary, chemical, and biological, are generally regarded as *prima facie* disproportionate, meaning they require heightened scrutiny when evaluating their proportionality (Estève, 2020). The third and final factor relates to the creation of an ecosystem hierarchy, which means that, as exemplified in the first factor, the proportionality of the act committed should be analyzed on a case-by-case basis. According to this last factor, the case-by-case study to determine the proportionality of the damage should be done according to the importance of the area to the ecosystem as a whole (Estève, 2020). For instance, harming the Amazon rainforest will not have the same consequences as harming a small forest somewhere else,

as the Amazon rainforest is one of the most biodiverse and ecologically significant areas on the planet. Therefore, the consequences of committing such a crime should not be the same. To accomplish the goal of creating a hierarchy, this study will later suggest the implementation of an efficient demilitarization strategy in specific regions of the globe, as recommended in the Half-Earth Project¹⁴ created by the E.O. Wilson Biodiversity Foundation. This research was conducted based on the book “Half-Earth: Our Planet's Fight for Life” by biologist Edward O. Wilson (2016). In his book, Wilson advocates for reserving half of the Earth's land and oceans for natural reserves devoid of human intervention, as a means of safeguarding biodiversity as established in the 1972 UN Stockholm Conference on Human Environment (Wilson, 2016). In line with this classification, this study suggests that designated protected areas should also undergo effective demilitarization to avoid its destruction in time of war, despite being completely devoid of human presence.

Despite the potential effectiveness of these proportionality factors in aiding the implementation of the Rome Statute and the punishment of those who violate it, it is worth noting that none of these classifications have yet been formally integrated into legal frameworks.

4.1.2.3. Virtue ethics argument: Principle of double effect and last resort

The previous principles discuss the limitations of the existing modes of thinking only about military action against the environment. In opposition to this closed mind thinking, Estève proposes virtue ethics as an alternative approach that centers the responsibility of military decision-makers and soldiers to protect the environment (Estève, 2020). Virtue ethics is a philosophical framework that prioritizes the development of personal character traits, such as courage, honesty, and justice, as the foundation for ethical behavior. Within the context of warring parties, virtue ethics suggests that ethical behavior goes beyond adhering to the rules of war and should consider what qualities make a good soldier (Baldari, 2018). This means that, in addition to the usual considerations of victory or defeat, a good soldier should also consider the impact of their actions on the environment. In this context, the author, Estève, identifies two military virtues that incorporate

¹⁴ To consult the Half-Earth Project initiative: <https://www.half-earthproject.org/>

environmental protection and make a “good soldier” in situations where the principle of last resort applies: temperance and prudence (Estève, 2020).

The principle of double effect is a concept that has been explored by various philosophers and scholars throughout history, beginning with Aquinas who tackled the question of whether it is permissible to kill someone in self-defense. This principle applies to the virtue of temperance, one that Aquinas defined as a cardinal virtue. Aquinas argued that an act can have two effects, one intended and one unintended, and that using more violence than necessary would make the act illicit. Similarly, killing a person solely for self-defense is prohibited unless it is done by someone with public authority, such as a soldier fighting against an enemy (Aquinas, 1225?-1274). In other words, always have temperance when faced with a self-defense scenario. Other scholars such as Grotius, Francis Connell, and Paul Ramsey also explored the principle of double effect, focusing on the proportionality of effects and the distinction between directly intended and indirectly permitted killing (Ruede, 1970). In the context of war, Michael Walzer argued that noncombatants should not be attacked at any time, but proximity alone does not make them liable to attack. The direct effect of the action should be morally acceptable, such as the destruction of military supplies or the killing of enemy soldiers, and the intention of the actor should be aimed only at the acceptable effect. The doctrine of double effect, therefore, considers that it is permissible to cause unintentional damage, but that ignorance of the consequences of one's actions does not absolve one of responsibility. Within the context of war, a good soldier is one whose conduct is guided by restraint and controlled action. Those actions that are considered justified pose a problem because, as Walzer pointed out, being unaware of the consequences of one's actions does not redeem them of responsibility (Walzer, 2021). This means that even if someone did not have the intention of killing a non-combatant, they are still accountable for the outcomes of their actions. To avoid such situations, one should exercise temperance. Essentially, in accordance with the just war theory, a good soldier is one who exhibits self-control and exercises restraint in their actions.

The principle of last resort suggests that traditional rules of war can be disregarded, and unjust actions can be tolerated if they save the lives of combatants, as it can be seen in Rule 17 of the Customary IHL that reads:

“Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event

to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.” (International Committee of the Red Cross, s.f.)

However, applied to the environment, this would mean that it is acceptable to destroy the environment to save lives, providing impunity for environmental destruction. From the perspective of virtue ethics, the only way to combat this and protect the environment is to rely on the virtues that makes a good soldier and call for prudence. Prudence, in this context, refers to the capacity to make judgments in the face of a changing context, and emphasizes the responsibility of military decision-makers and soldiers. This approach, as will be further analyzed, is not only compatible with, but should be incorporated into IHL (Estève, 2020).

4.2. Legal Framework

The ethical framework portrayed earlier, particularly the just war theory, has long prohibited certain behaviors during armed conflict. As it was explained above, the just war theory is the basis of IHL and some of the ICL, therefore these groups of law codify the ethics behind war (Bantekas & Nash, 2007). On the one hand, IHL is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. Meanwhile, ICL defines international crimes like genocide, war crimes, crimes against humanity, and the crime of aggression and creates the ICC to condemn them (International Committee of the Red Cross, 2015). Only these two legal frameworks codify the protection of the environment during wartime. It is important to note that while these laws exist, this section and study do not aim to find missing laws but to highlight the lack of implementation and genuine criminalization of ecocide.

The customs that the just war ethics portrayed were first established under the Lieber Code in the United States, treaty that was used as the basis of the Hague Conventions of 1899 and 1907, the first codifications of the prohibitions under just war theory and the basis of IHL (Bantekas & Nash, 2007). Since then, other treaties such as the Geneva Conventions and the subsequent Additional Protocols have been established. Giving way to the Rome Statute, which outlines the violations of IHL that hold individual criminal responsibility under international law (Rome Statute of the International Criminal Court, 1998).

4.2.1. Hague Conventions (1899 and 1908)

The Hague Conventions of 1899 and 1908 represent some of the earliest formal pronouncements of the laws of war and war crimes within the realm of secular international law. These conventions establish the regulations and traditions of warfare by defining the standards that warring parties must adhere to during armed conflict. The principles embodied within the Hague Conventions are largely derived from the earlier Lieber Code,¹⁵ and encompass a range of issues including disarmament, the laws of war, and war crimes (International Committee of the Red Cross, s.f.). The Hague Conventions consisted of two separate agreements. The first, in 1899, sought to curb the progressive development of weaponry and identify effective methods for ensuring lasting peace. At the second Hague Conventions in 1907, proposals for arms limitation were not accepted. However, the convention did adopt agreements on various issues, including the rights of neutral powers and persons during wartime, the establishment of an international prize court, and the principle of compulsory arbitration (Hague Conventions, 1899/1908). Although the planned 1915 convention did not take place because of World War I, the principles established by the Hague Conventions greatly influenced the formation of the League of Nations.

The Hague Conventions are considered binding as many of their provisions have become customary international law. While there is no specific court that regulates them, the International Court of Justice (ICJ) has jurisdiction to hear disputes between states related to the Conventions, as they are part of international law (International Court of Justice, 1945). Additionally, the ICC has the authority to prosecute individuals for war crimes, among others, that may violate some provisions of the Hague Conventions. The ICC can exercise jurisdiction over individuals from states that have ratified the Rome Statute, which is based on several treaties, including the Hague Conventions (Bantekas & Nash, 2007). This implies that prior to the incorporation of the Hague Conventions into other treaties that do include Courts or different Treaty Bodies,¹⁶ the regulations outlined in the Hague Conventions could have not been enforced.

¹⁵ The Lieber Code, enacted by President Lincoln in 1863 during the American Civil War, marked the first attempt to formalize the rules of warfare. While its scope was limited to the U.S. military, the code was consistent with the prevailing laws and customs of war during that era. Its significance extends beyond its initial application, as the Lieber Code laid the foundation for subsequent international codification of the laws of war (International Committee of the Red Cross, s.f.).

¹⁶ The Treaty Bodies are committees of independent experts that monitor the implementation by States parties of their obligations under these international human rights treaties. (UN Sustainable Development

4.2.2. Geneva Conventions (1949)

The Geneva Conventions are composed of four conventions of 1949 and three protocols that were adopted after the increase in the number of non-international armed conflicts and wars of national liberation at the end of the 20th Century (Yingling & Ginnane, 2017). For the purposes of this study, the focus will only be in the 1st Additional Protocol, as it contains provisions that prohibit the destruction of natural resources and the contamination of drinking water. The 1st Additional Protocol to the Geneva Conventions relates to the protection of victims in international armed conflicts and is the first time that the issue of the destruction of the environment during wartime is addressed at a legal level (Protocol I Additional to the Geneva Conventions, 1977). There are two articles in this Convention that relate to the protection of the environment: Article 35.3, “It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.” (Article 35.3, Protocol I Additional to the Geneva Conventions, 1977), and 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” (Article 55, Protocol I Additional to the Geneva Conventions, 1977).

The International Committee of the Red Cross (ICRC) operates as an independent organization that aims to offer humanitarian protection and aid to those who have been affected by armed conflicts. Although the ICRC was established by the Geneva Conventions, which are legally binding to ratified countries, the committee has no enforcing power. This implies that the ICRC is not authorized to bring legal action against a country that has ratified the treaty, even if that country has violated it. The ICRC only promotes compliance with the Conventions by providing legal advice and assistance to states (International Committee of the Red Cross, 1863). There are no other Treaty Bodies in charge of enforcing the Geneva Conventions or its Additional Protocols therefore the only obligation of state parties is to comply with these obligations in their own

Group, s.f.)

jurisdictions. Some armies, such as the Spanish, have incorporated Article 55 of the Geneva Conventions into their operational procedures (Ministry of Defense, 2018). While the principle behind Article 55 is reflected in Article 8 of the Rome Statute, the protection of the environment under the Geneva Conventions has not been criminalized.

4.2.3. Rome Statute (1998)

Initial notions of the concept of international crimes began to emerge in the Roman Empire with the writings of jurist Marcus Tullius Cicero and the concept of *hostes humani generis*, the enemies of humanity. However, it was not until the Nuremberg and Tokyo tribunals that some crimes became criminalized under international law and the foundation for what we currently refer to as ICL law was laid (Bantekas & Nash, 2007). The term “war crime” was officially defined in the Rome Statute, which outlines the violations of IHL that hold individual criminal responsibility under international law and to try and find the punishment that was missing through other Conventions or treaties like those previously stated (Rome Statute of the International Criminal Court, 1998). The Rome Statute is the constituent instrument of the ICC which investigates and prosecutes individuals accused of the most serious crimes of concern to the international community. However, it should be noted that the ICC does not have the authority to investigate and prosecute states or individuals for violations of the Hague Conventions, the Geneva Conventions, or any other treaties related to IHL or HHRR. While many of the provisions contained in these treaties are also included in the Rome Statute and therefore protected by the ICC, its jurisdiction is limited to the crimes specified in the Rome Statute. For instance, although the crime of torture is covered by both the Rome Statute as an international crime and a crime against humanity, and the Third Geneva Convention Relative to the Treatment of Prisoners of War, the ICC can only prosecute individuals who are nationals of countries that have ratified the Rome Statute. If a country that has ratified the Third Geneva Convention has committed an act of torture, the ICC does not have the power to prosecute them for this crime. In short, while the ICC and the Rome Statute provide accountability for certain crimes under IHL and Human Rights, their jurisdiction is limited to the crimes specified in the Rome Statute.

The Rome Statute, deriving from different provisions in the Geneva Convention, collects the crime of ecocide under war crimes in article 8(2)(b)(iv).

Article 8 - War crimes

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(iv) 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;

(Article 8, Rome Statute of the International Criminal Court, 1998)

There are certain ambiguities in this article which pertain to war crimes. One of the primary issues with this article is that it fails to provide clear definitions for key terms such as “widespread,” “long-term,” “severe,” and “excessive.” Sometimes, it is necessary to use a vague definition of a term in an article so that the article remains useful in the future. This is particularly important in the field of law, where treaties and articles need to be able to adapt and remain relevant for many years after their creation (Bantekas & Nash, 2007). However, this is not the case with the article in the Rome Statute that addresses ecocide as a war crime. In this instance, a more specific definition can be used without causing any complications. As a result of the vagueness of the terms, the interpretation of these terms becomes subjective to the court, and individuals who commit crimes against humanity may enjoy impunity due to the lack of clarity in the law (Bantekas & Nash, 2007).

Interestingly, this article draws heavily on Article 55 of the 1st Additional Protocol to the Geneva Conventions, which did not need to define these terms due to the absence of any enforcing mechanism. However, when this article was incorporated into the Rome Statute, which aims to prosecute individuals for their actions, the lack of specificity became a significant issue. The ICRC cannot enforce the Protocol, but the Rome Statute has the authority to prosecute individuals, therefore, the lack of specificity in this article poses a significant obstacle in prosecuting individuals who commit ecocide. Moreover, the absence of a clear standard for proving knowledge of the effects of an attack before it occurs is another significant flaw in this article. This lack of clarity poses a considerable challenge for prosecutors, as it is difficult to establish culpability without evidence of prior knowledge.

In essence, the article does not provide a comprehensive legal framework for prosecuting individuals who commit ecocide, and this gap in the law can result in significant impediments in the fight for justice. Therefore, it is essential to address these shortcomings and work towards developing a more robust legal framework that can effectively prosecute perpetrators of ecocide.

5. Discussion: Amendment to the Rome Statute

Currently, the only means by which an individual could be prosecuted for the crime of ecocide is by passing an amendment to the Rome Statute that would give the ICC jurisdiction to do so. Although some regional courts such as the African Court on Human and Peoples' Rights, recognize the fundamental human right to a healthy environment and have displayed a willingness to hold states accountable for their environmental protection obligations, the ICC is the sole international court that could prosecute individuals for environmental destruction if the amendment is passed (Ssenyonjo, 2018). In order to pass an amendment to the Rome Statute, a Head of State (or more than one) must propose the amendment and submit it at least three months before a meeting of the state parties to the Rome Statute. If a simple majority approves the amendment during the meeting, it can be considered for adoption. Further discussions may take place through formal and informal negotiations between representatives of States Parties, and a Crime Review Conference may be convened. If at least two-thirds of member states (currently 82 out of 123) agree to the amendment, it can be adopted into the Statute, and the process of ratification and enforcement can begin. Any country that ratifies the amendment can enforce it in their own domestic legislation (Bantekas & Nash, 2007).

In 2019, Vanuatu and the Maldives called for serious consideration of an amendment that added ecocide to the Rome Statute and started to collaborate with the Stop Ecocide Foundation to pass an amendment (Slade & Clark, 2021). In 2021, the Stop Ecocide Foundation put forth a proposal to amend the Rome Statute, which would make ecocide a new international crime. This would be the first time the list of international crimes is modified since 1945 (Bantekas & Nash, 2007). The proposed amendment targets article 5 of the statute, which defines international crimes, and is built upon article 8(b)(iv) that already covers the destruction of the environment during wartime. To clarify the terms "wanton," "severe," "widespread," and "environment," which were not explicitly defined, the foundation established a definition. The foundation foresees the adoption of the amendment to no earlier than 2025 (Stop Ecocide Foundation, s.f.). Additionally, the foundation suggested adding a preambular paragraph 2 bis to express concern about the environment's daily threat due to severe destruction and deterioration, posing a grave danger to natural and human systems worldwide (Independent Expert Panel for the Legal Definition of Ecocide, 2021).

The proposal read as follows:

- A. Addition of a preambular paragraph 2 bis Concerned that the environment is daily threatened by severe destruction and deterioration, gravely endangering natural and human systems worldwide,
- B. Addition to Article 5(1) (e) The crime of ecocide.
- C. Addition of Article 8 ter

Article 8 ter

Ecocide

1. 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.
2. For the purpose of paragraph 1:
 - a. “Wanton” means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
 - b. “Severe” means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;
 - c. “Widespread” means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;
 - d. “Long-term” means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;
 - e. “Environment” means the earth, its biosphere, cryosphere, lithosphere, hydrosphere, and atmosphere, as well as outer space.

(Independent Expert Panel for the Legal Definition of Ecocide, 2021)

This amendment aims to create a new category of international crime that would prosecute ecocide even during times of peace, with the intention of holding CEOs¹⁷ accountable for the actions of their enterprises, separate from Heads of State or military

¹⁷ Holding individuals accountable for their destruction of the environment has already been implemented at a national level. An example of this was seen after the Deepwater Horizon oil spill where the BP company was pleaded guilty to 14 criminal counts for its illegal conduct leading to and after the 2010 Deepwater Horizon disaster (Deepwater Horizon Oil Spill, 2013).

leaders who would be prosecuted under the article implemented for war crimes. While the amendment is a positive step towards centering the ecocide debate on tangible aspects, the definitions provided for the key terms in the article lack specificity.

For instance, the term “wanton” refers to reckless disregard for damage, but it does not provide an explanation of the proportionality rule between recklessness and the social and economic factors anticipated, nor does it clarify what is meant by “disregard.” This definition implies that, for example, the construction of a group of houses in the Amazon Forest, which involves logging many trees to connect tribes (social effect) and boost the economy (economic effect), would be deemed acceptable.

Similarly, the term “severe” lacks recognition of the proportionality principle, failing to establish tangible rules to assess what constitutes “serious adverse changes.” Moreover, the term “widespread” fails to provide a clear rule for defining the geographic area affected. In the same case of the Amazon Forest earlier explained, if the logging occurs in only a part of the Amazon that does not affect the forest as a whole nor extend beyond state boundaries, it would not be covered under the definition of ecocide.

These are just a few of the loopholes present in the amendment. Even if an individual is prosecuted for ecocide, there are many other ways in which the act could be hidden. Consequently, this amendment does not eliminate the problem of impunity for committing ecocide, whether as a war crime or an international crime committed during times of peace.

6. Solutions

According to this study, the eradication of ecocide during wartime requires an amendment to the Rome Statute based on the just war theory. The study proposes a new amendment that incorporates the Independent Expert Panel's proposed changes to article 8(2) and article 2 of the Rome Statute (Independent Expert Panel for the Legal Definition of Ecocide, 2021). Notably, the proposed amendment does not include changes to article 5, which would establish a new international crime for ecocide. The exclusion of this amendment is driven by the recognition that such a step may divert attention from the primary goal of preventing ecocide in times of war and may not align with the interests and priorities of the Rome Statute's signatory states (Minkova, 2023). The effort to establish a standard for preventing ecocide during peacetime is a complex undertaking that should be studied on its own. The purpose of this section is to underscore the potential of an effective amendment to article 8 of the Rome Statute as a crucial initial step toward deterring ecocide. Such an amendment would signal a significant move in the right direction, aiding in the prevention of ecocide by holding individuals accountable for their actions.

The proposed amendment reads as follows:¹⁸

A. Addition of a preambular paragraph 2 bis

Concerned that the environment is daily threatened by severe destruction and deterioration, gravely endangering natural and human systems worldwide

B. Addition to Article 8 (2)(a)

(ix) attacks against the natural environment by way of reprisals

C. Modification to Article 8 (2)(b)

“civilian”, “civilian population” should be modified for “*non-combatants*”

D. Modification to Article 8 (2)(b)(ii)

“objects” should be modified for “*property*”

E. Modification to Article 8 (2)(b)(iv)

Intentionally, or unintentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects, that will cause a widespread, long-term, and severe damage to the natural

¹⁸ The proposed amendment includes new (original) text in cursive and strikes out text from the original statute that should be removed.

environment which would be clear excessive in relation to the concrete and direct overall military advantage anticipated.

F. Addition to Article 8 (2)(b)(xvii)

Employing poison or poisoned weapons, *particularly when targeted at water or food resources.*

G. Creation of Article 8 (3)

For the purpose of paragraph 2:

- a. *“Non-combatants” refers to the civilian population as well as the environmental areas essential for their survival, such as water resources, crops, areas with high biodiversity, etc.*
- b. *“Property” also refers to the environmental areas owned by civilians*
- c. *“Long-term” means damage that is permanent or cannot be restored to its previous state through natural recovery within a decade after the end of the conflict.*
- d. *“Severe” refers to a case-by-case analysis to determine the proportionality of de damage according to the importance of the area affected. Any attack on the protected areas defined by the “Half Earth project” are considered de facto severe as these are demilitarized areas.*
- e. *“Excessive” means damage that meets the requirements of long-term proportionality, but fails to comply with Sidwick's proportionality rule, which stipulates that the harm caused must be useful towards achieving victory in the war and must not be disproportionate to the good achieved.*

By integrating the aforementioned modification, this study's ethical framework is enshrined in the proposed amendment. Specifically, the amendment incorporates the environment as a non-civilian entity, accounting for both anthropocentric and ecocentric perspectives. From an anthropocentric standpoint, the environment is often viewed as human property. To protect the environment, the amendment proposes substituting the term "object" with "property," thereby incorporating the environment into the definition of property under paragraph (G) section (b). Conversely, from both anthropocentric and ecocentric viewpoints, the environment should be considered a non-combatant, as some of its resources are critical to the civilian survival, and the environment suffers at the same time as a victim in the conflict. From an anthropocentric view, moral protection should be afforded to the environment due to the advantages civilians acquire from their use,

aligning with the distinction principle second objective of the just war theory to end the conflict with minimal casualties (Rawls, 1999). Additionally, the environment is not merely a backdrop to war but can actually suffer from it, as previously noted (Estève, 2020).

Secondly, in accordance with consequentialist ethics, the amendment considers three dimensions in order to avoid Walzer's "evil consequences" (Walzer, 2021). The dimensions of temporality, disproportionate means, and ecosystem hierarchy are reflected in the definitions of different terms in Article 8 (2)(b)(iv). The definition of the term "long-term" is based on Eckersley's book (2004) where she argues that if an attack causes irreplaceable damage, it should be considered disproportionate (see page 21 of this paper). The second dimension referring to disproportionate means is reflected in the term "excessive", where, according to the proportionality rule, some means, and use of weapons are prima facie disproportionate. Finally, when referring to the dimension of the ecosystem hierarchy, the definition of "severe" explains the need to effectively analyze the situation on a case-by-case basis resting on the importance of the environment to the safeguard of the biodiversity based on the Half-Earth project. Furthermore, those areas referred to in the project as human-free areas should be demilitarized. These areas should be demilitarized as while it is true that the proposed amendment addresses many of the issues surrounding the impunity of ecocide during wartime, it is important to ensure that this impunity is not undermined. This can only be ensured with the demilitarization of certain areas. Currently, only some areas of the world are demilitarized. One of them being the Antarctic, that, as specified in Article I of the Antarctic Treaty, "the Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons" (Article 1, Antarctic Treaty, 1959). As analyzed in the ethical framework section, the regions recommended for demilitarization are the same areas identified as human-free zones in the Half-Earth Project. To achieve this objective, this study recommends a supplementary addition to amendment, taking into account the guidelines outlined in Article 60 of the First Additional Protocol to the Geneva Conventions (Protocol I Additional to the Geneva Conventions, 1977).

A. Addition to the Article 8

(3) Demilitarized zones

- a. *It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zones as based on the Half-Earth project, if such extension is contrary to the terms of this agreement.*
- b. *The subject of such demilitarization will mean that:*
 - i. *all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;*
 - ii. *no hostile use shall be made of fixed military installations or establishments;*
 - iii. *no acts of hostility shall be committed by the authorities or by the population; and*
 - iv. *any activity linked to the military effort must have ceased.*
- c. *The presence, in this zone, of persons specially protected under Rome Statute, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2.*
- d. *The Party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.*
- e. *If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status.*

Ultimately, all the amendments proposed in this last section adhere to the three principles of just war theory, as they do not impede the principle of ending the war as soon as possible, nor the principle of attempting to minimize casualties (in fact, they enhance this principle by protecting natural resources during wartime, indirectly saving lives), nor the principle of lasting peace (since if the resources can regenerate naturally, the ongoing fight for resources can be avoided).

7. Conclusion

The analysis between the existing regulations in ICC and the protection of the environment during wartime has confirmed that henceforth there is an existing impunity over the crime of ecocide during wartime.

The concept of ecocide and the related debate on its impunity has been in existence since 1970, when Professor Galston first coined the term in response to the atrocities committed during the Vietnam War. However, despite numerous instances of environmental destruction throughout history, there has been a lack of consensus on the codification of ecocide into international law. Even after the egregious acts committed during the First Gulf War, efforts to establish ecocide as a criminal offense under the Roman Statute, the cornerstone of ICL, have fallen short. In 2021, the Independent Expert Panel made the first attempt to incorporate a definition of ecocide into the Rome Statute, which currently does not explicitly criminalize the offense. Regrettably this amendment has yet to be ratified into the statute.

International law is established upon ethical principles, and as this research demonstrates that there is limited connection between the ethics of war and environmental ethics. The paper proposes an approach to include the environment within the existing ethical framework that governs permissible and impermissible conduct *in bello*. After establishing the viability of this relationship and showcasing that the environment can be safeguarded under the just war theory, the objective of this study is to demonstrate that the environment can be adequately safeguarded in ICL within this novel ethical framework. Subsequently, this study delves into the underlying reasons behind the prevailing impunity surrounding the crime of ecocide within the realm of ICL. It also highlights the inadequacy of the previous efforts to address this issue, including the amendment proposed by the Independent Expert Panel. Within the discourse of this paper, a new amendment is put forth to overcome these shortcomings by establishing a link between the aforementioned inclusion of environmental protection in the just war theory.

During the drafting of this study, various limitations have emerged, primarily related to the constraints of time and length leading to the focus of this study on the restraints of the Rome Statute. However, these limitations have also given rise to several potential lines of research that warrant further exploration.

One such area is the lack of accountability for environmental destruction during peacetime. Future research could investigate the impact of adding ecocide as a fifth international crime in the Rome Statute, as well as examining the how other international courts and treaties protect the environment.

Another potential avenue of inquiry is the impact of recognizing the protection of the environment as a human right. Human rights treaties commonly establish treaty bodies responsible for ensuring state compliance, which could prove useful in the short term for ending the impunity of crimes such as ecocide.

Further research could also analyze regional courts and how the environment is protected in different parts of the world, examining which regions criminalize the destruction of the environment and which do not. Another avenue of research could be exploring whether the protection of the environment, particularly during times of war, could be considered a crime against all and thus be subject to universal jurisdiction.

Finally, research has already been conducted by scholars such as Eckersley (2007) on whether the international community should allow the deliberate destruction of the environment to continue and whether there should be a shift from intervention to protection, including the invocation of R2P (Responsibility to Protect), but this research is still on its very early stages (Eckersley, 2007). These are important issues that require further exploration and analysis.

8. References

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