

How to Forge an International Crime

Daniel Bertram¹

Abstract

The idea of assigning international criminal liability to severe environmental transgressions has made a spectacular comeback in recent years. The overall case for and legal parameters of the crime of ecocide are the subject of heated debates. Considerably less attention has been paid to ways in which ecocide's criminalization could unravel in practice. What does it take for a prohibitory norm to gain international legal recognition? In this essay, I draw on legal and empirical literature on the international criminalization process to illustrate the paths that ecocide may take (or could have taken). Such processual knowledge, I argue, is critical to understanding what it may mean for ecocide to become an international crime in the first place.

¹ Daniel Bertram is a PhD candidate at the Department of Law, European University Institute (daniel.bertram@eui.eu).

Introduction

Picture a classroom discussion at a law faculty during the interwar period. The topic of debate is the spectacular assassination of exiled Ottoman grand vizier Talaat Pasha in Berlin, who was widely known to be the main architect behind the Armenian genocide. A young student confronts the professor of with a burning question:

S: Why has Pasha not been tried for his crimes by a German court, if his deeds were so widely known?

P: 'Consider the case of a farmer who owns a flock of chickens. He kills them, and this is his business. If you interfere, you are trespassing.'

S: 'But the Armenians are not chickens.'

This poignant exchange is reported to have taken place between the criminal law professor Juliusz Makarewicz and his student Raphael Lemkin at the University of Lwów in 1921.² Morally repulsive as it may seem, Makarewicz's analogy was in keeping with the law of the time, for which the Armenians were little more than chickens subject to the exercise of sovereign Ottoman authority. The idea of piercing the veil of sovereignty to try foreign state officials in domestic courts was all but unthinkable in 1921. Lemkin, appalled by such sweeping impunity, would later dedicate his life to outlawing the destruction of protected groups as 'genocide'. At his persistent bidding, the Genocide Convention was finally adopted in 1948 in the aftermath of an atrocious war that had pushed the international community to converge on new legal protections for targeted groups and individuals. Today, the crime of genocide is a corner stone of international criminal law (ICL) – one of the most vibrant fields of international legal scholarship and practice.³

As ICL has grown in power and reach over the past decades – most notably so following the adoption of the Rome Statute and the creation of the International Criminal Court in 1998 – so have calls for expanding the list of punishable offences to cover global issues as diverse as

² As recounted in Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (University of Pennsylvania Press 2016) 36–37.

³ See, e.g. William A Schabas, 'National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes"' (2003) 1 *Journal of International Criminal Justice* 39.

climate change⁴ or ransomware attacks.⁵ Unsurprisingly, the fate of such ambitious proposals has often been dim. As the history of genocide's genesis intimates, it takes unwavering advocacy and a favorable international environment for normative change to take a hold in ICL. Standing out from the field of academic pipedreams is the ongoing campaign to ban grave environmental destruction as 'ecocide'. Having recently garnered the support of civil society, legal practitioners, and increasingly, states,⁶ ecocide's criminalization is being seriously considered by a number of key decision-makers. Most conversations in this space have moved along two dimensions: a conceptual and a normative one.

The first, conceptual dimension concerns the proper definition of ecocide in ecological, social, and legal terms. Understandably, this is the issue that has attracted a lion's share of attention. While the environmental sciences have furnished ample evidence of the ecological pathologies of 'ecocidal' events,⁷ criminologists have linked these pathologies to social deviance and harm.⁸ From these ecological and social dimensions of ecocide, the debate has now moved on to legal queries.⁹ For instance, the elaboration of a draft definition by an illustrious consortium of legal experts in June 2021 marked an ambitious, if controversial, attempt to carve out the putative crime's precise parameters.¹⁰

The second, normative dimension wrestles with the extent to which the imposition of international criminal punishment for environmental transgressions can be justified. Why, if at all, does ecocide deserve the label of international criminality? Various commentators have

⁴ Geoff Gilbert, 'International Criminal Law Is Not a Panacea - Why Proposed Climate Change "Crimes" Are Just Another Passenger on an Overcrowded Bandwagon' (2014) 14 *International Criminal Law Review* 551.

⁵ Asaf Lubin, 'The Law and Politics of Ransomware' (2022) 55 *Vanderbilt Journal of Transnational Law* 597.

⁶ See, for a complete overview, <<https://www.stopecocide.earth/leading-states>>.

⁷ Indeed, the term 'ecocide' was first coined by biologist and botanist Arthur Galston. On the scientist-led campaign against Agent Orange, see David Zierler, *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment* (University of Georgia Press 2011).

⁸ See, e.g., Robert Agnew, 'The Ordinary Acts That Contribute to Ecocide: A Criminological Analysis', *Routledge International Handbook of Green Criminology* (2nd edn, Routledge 2020); Martin Crook, Damien Short and Nigel South, 'Ecocide, Genocide, Capitalism and Colonialism: Consequences for Indigenous Peoples and Global Ecosystems Environments' (2018) 22 *Theoretical Criminology* 298; Avi Brisman and Nigel South, *Green Cultural Criminology: Constructions of Environmental Harm, Consumerism, and Resistance to Ecocide* (Routledge 2014).

⁹ For a sober overview of pertinent legal questions, see Darryl Robinson, 'Ecocide — Puzzles and Possibilities' (2022) 20 *Journal of International Criminal Justice* 313.

¹⁰ Haroon Siddique, 'Legal Experts Worldwide Draw up "Historic" Definition of Ecocide' (*The Guardian*, 22 June 2021) <<http://www.theguardian.com/environment/2021/jun/22/legal-experts-worldwide-draw-up-historic-definition-of-ecocide>> accessed 22 September 2021. The definition is available at <url>.

elaborated the case for (or against) criminalization in all its philosophical diversity,¹¹ arguing, among others, for the expressive function of ICL as an institution of extraordinary symbolic power, or the apparent failure of many states to battle endemic environmental criminality to justify ecocide's status as an international crime.¹²

In this essay, however, I would like to sideline these two issues to focus on a third, equally intriguing question:¹³ *How* does harmful conduct become outlawed as an international crime? *Which levers* need to be engaged for international criminality to materialize? While most commentators can intuit an answer to this question – lawyers would presumably point to source doctrines, diplomats to key political players that need to be onboarded, activists to grassroots mobilization – there have been relatively few systematic and empirically grounded attempts at thinking through ecocide's criminalization process.

While a general theory of international criminalization processes is still lacking – and perhaps unattainable – several contributions have recently grappled with the formation of international criminal categories. The insights offered by this literature may not be directly applicable to the specificities of ecocide (much less predict its future fate!), but they are nonetheless illustrative of the many paths that international criminalization may take. Moreover, attaining a better grasp of ecocide's processual dimension helps to better understand what it *means* – in functional and symbolic terms – for ecocide to become an international crime. In this sense, the processual sensitivity that I highlight directly ties back to central conceptual and normative concerns.

1. What is an International Crime?

¹¹ With the usual battle lines running between consequentialist and deontological theories of criminalization and punishment, with the added twist of having to account for ecocide's international ambitions. See Kai Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 *Oxford Journal of Legal Studies* 293.

¹² See, e.g., Frédéric Mégret, 'The Problem of an International Criminal Law of the Environment' (2011) 36 *Columbia Journal of Environmental Law* 195. Note that Mégret explicitly rejects the label 'ecocide' as it was applied in 2011, however. See also Mark Allan Gray, 'The International Crime of Ecocide' (1995) 26 *California Western International Law Journal* 215.

¹³ To do so, I assume, without presuming the precise content of the definition, that (1) a workable legal definition of ecocide can be reached and (2) that ecocide indeed warrants international criminalization on normative grounds.

International criminalization describes the process by which certain types of conduct become outlawed as international crimes. But which norms are covered by the somewhat opaque notion of an 'international crime'? This question has proven controversial among legal experts. One camp of writers posits that the label of international criminality is reserved for the four 'core' offences falling within the jurisdiction of the International Criminal Court (ICC) as mentioned in article 5 of the Rome Statute: genocide, crimes against humanity, war crimes, and the crime of aggression. Others would add a few additional 'atrocities' crimes, such as torture, to the list.¹⁴ This narrow definitional approach has attracted much criticism, though,¹⁵ not least because it breaks with the term's consistent use by international tribunals and by generations of scholars before the Rome Statute came into existence.¹⁶

This is why another school has adopted a much broader definition of international crimes that includes 'internationalized' or transnational crimes, for instance certain wildlife trafficking offenses under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).¹⁷ In contrast to 'core crimes', which give rise to criminal responsibility *under* international law itself, 'internationalized' crimes are merely criminal *pursuant to* criminal law, as Roger O'Keefe elaborates. That is, their criminality is required by international law, but individuals cannot be held to account directly under international law for their violation. Instead, they give rise to international state liability, for instance where a state fails to implement the criminalizing provisions of a treaty that it has ratified. To complicate the picture, both types of crimes – those *under* and those *pursuant to* international law – can find their source in either a binding treaty, or in customary international law. Because of this messy doctrinal picture, O'Keefe concludes that the label 'international crime' must apply to any crime that is defined by international law.¹⁸ His taxonomy of different international criminal species can be summarized as follows:

¹⁴ Kevin Jon Heller, 'What Is an International Crime: (A Revisionist History)' (2017) 58 *Harvard International Law Journal* 353, 353–354.

¹⁵ Christine Schwöbel-Patel, 'The Core Crimes of International Criminal Law' in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020).

¹⁶ M Cherif Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law' (1983) 15 *Case Western Reserve Journal of International Law* 27.

¹⁷ Douglas Guilfoyle, 'Transnational Crimes' in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020).

¹⁸ Roger O'Keefe, *International Criminal Law* (Oxford University Press 2015) 60–63. Alexander Greenawalt seems to endorse a similarly inclusive definition, pointing to the pluralistic legal landscape comprised by

Figure 1. A Taxonomy of International Crimes

Where is crime X defined?

		Treaty	Custom
<i>Does crime X give rise to individual international responsibility?</i>	Yes	<i>Crime under a treaty, e.g., genocide</i>	<i>Crime under customary law, e.g., terrorism.</i>
	No	<i>Crime pursuant to a treaty, e.g., torture.</i>	<i>Crime pursuant to customary law, e.g., piracy.</i>

The separations between these species are not as neat as the table may suggest, though. An international crime can evolve from one to another over time, or span two species altogether. Crimes against humanity, for instance, was long part of customary law before its contours were inscribed (and significantly widened) in the Rome Statute.¹⁹ Because of tensions between the two sources, however, there are efforts underway towards a new convention on crimes against humanity.

The ecocide campaign keeps with the narrow definitional approach (the top left quadrant in the matrix above) by pushing for ecocide to be added to the list of crimes triable by the ICC as the so-called ‘fifth crime’.²⁰ This focus seems to arise less from a doctrinally principled position than from pragmatic considerations, however. Advocates have repeatedly invoked the many putative benefits of a Rome Statute amendment: the speedy amendment process, the opportunity to piggyback on the ICC regime’s established institutional apparatus, and the expressive force and visibility of the ICC crimes.

international criminal law. Alexander KA Greenawalt, “‘What Is An International Crime?’” in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020).

¹⁹ Darryl Robinson, ‘Defining “Crimes Against Humanity” at the Rome Conference’ (1999) 93 *The American Journal of International Law* 43.

²⁰ Anja Gauger and others, ‘Ecocide Is the Missing 5th Crime against Peace’ (School of Advanced Study London 2012) <https://sas-space.sas.ac.uk/4686/1/Ecocide_is_the_missing_5th_Crime_Against_Peace.pdf> accessed 23 March 2022.

The ICC-strategy also has disadvantages, however, in that it would incur the same long list of issues and obstacles that have plagued the ICC since its creation – politicization, international backlash, the lack of direct corporate liability, etc.²¹ For these and other reasons, some commentators place their hopes in the development of a separate ecocide convention,²² an idea going back to the 1970s.²³ Such a convention would presumably amount to a 'suppression convention' that obliges states to enact national legislation rather than making ecocide a crime under international law outright. The final option – a customary norm criminalizing ecocide – can be discarded at this point because exceedingly few countries currently impose criminal liability on general environmental destruction; in legal lingo, there is not sufficient state practice to entertain the possibility of a custom developing any time soon.²⁴

In conclusion, the distinction between the different species of international crimes matters significantly because each species attains its criminal status in different ways. The next section elaborates what the two most-promising pathways in the case of ecocide – an amendment of the Rome Statute and the creation of a separate convention – could entail.

2. The Formal Process

2.1 Amending the Rome Statute

The legal procedure for amending the Rome Statute is set out in Article 121. The steps include (1) the amendment's proposition by any state party, (2) its consideration at the following Assembly of State Parties (ASP) or (more likely in the case of ecocide) at a designated Review Conference, and (3) its adoption by a two-thirds majority of state parties. After its adoption, the amendment would become binding only on those states who have ratified it. This process has been initiated (and completed) once so far, resulting in the criminalization of the crime of aggression.²⁵

²¹ Frédéric Mégret, 'The Anxieties of International Criminal Justice' (2016) 29 *Leiden Journal of International Law* 197.

²² Robinson (n 9).

²³ Richard A Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals' (1973) 4 *Bulletin of Peace Proposals* 80.

²⁴ Some scholars argue that 'instant custom' may materialize if opinion juris changes rapidly, but this idea has been disputed: '[T]he majority view today is that although there is no minimum amount of time required to generate CIL, some time must nevertheless elapse.' Andrew T Guzman, 'Saving Customary International Law' (2005) 27 *Michigan Journal of International Law* 115, 157.

²⁵ Dapo Akande and Antonios Tzanakopoulos, 'The Crime of Aggression before the International Criminal Court: Introduction to the Symposium' (2018) 29 *European Journal of International Law* 829. The road to criminalizing aggression was long and stony, despite states already having reached agreement on their will to do

Should a party to the ICC decide to submit an amendment proposal (via the Secretary General of the United Nations), states would have to consider at the following ASP whether to take up the proposal by a simple majority (of those present and voting). After or even before submitting an official request, a number of leading states could work towards a draft text, either informally or formally (through the creation of a dedicated working group, as seen with the crime of aggression, or via the standing Working Group on Amendments). Depending on the progress at the working group level and the general appetite for a crime of ecocide, states could then either put an amendment text to a final vote at the subsequent ASP or hammer out an agreement at a designated review conference. Given the politically sensitive nature of the topic, however, there is reason to believe that a review conference would be called rather than the amendment being silently adopted at an ASP.²⁶

There is much uncertainty regarding how exactly this process would play out in the case of ecocide. Earlier experiences with the crime of aggression are highly specific to the historic and geopolitical context of that crime. Although these experiences may caution against campaigners' hopes of a swift amendment process, ecocide may chart a different path altogether, as Shirleen Chin's contribution to this symposium makes clear.²⁷

2.2 *A Separate Convention*

The formation of a potential ecocide treaty involves a different, more flexible set of decision-making procedures from a Rome Statute amendment. A first question in this regard concerns the format: Should the treaty be independently negotiated or adjoined to an existing legal framework (for instance, as a protocol to the Convention on Biological Diversity (CBD), the United Nations Framework Convention on Climate Change (UNFCCC), or CITES)? Potential

so when the Rome Statute was negotiated. A definition was not agreed upon before 2010 at the Kampala Review Conference, and it took another eight years for the crime to enter into effect. As of September 2022, 43 states have ratified the amendment. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en

²⁶ Shirleen Chin argues that states have showed little appetite for a review conference after the Kampala Review Conference in 2010. For instance, the idea to convene a regular review conference every seven years failed to garner the necessary support. This may be so, but if an amendment proposal survived the initial ASP vote and the ensuing bureaucracy to be proposed for adoption (which is far from certain), then this must be read as an earnest indication of states' continued interest in the topic, in my view. See Chin, Shirleen, 'Lessons Learned from the Adoption of the Crime of Aggression: Ecocide to Charter its own Path' in this symposium.

²⁷ *Ibid.*

interconnections between ecocide and the biodiversity, climate change, or wildlife trafficking regimes may point towards the latter option – particularly so when considering the continued presence and advocacy of ecocide advocates at the conferences of the parties to the UNFCCC and to the CBD, respectively.²⁸ Ultimately, however, ecocide's criminal qualities cut against the grain of the UNFCCC's and the CBD's consensual approach, whereas CITES seems too narrowly focused on wildlife trafficking to satisfy campaigners' demands for a comprehensive crime. To ensure global participation in a separate ecocide convention, pertinent negotiations could either be sponsored by an international organisation – the United Nations Environment Programme (UNEP) being a promising candidate – or by a pioneering state like Belgium or Vanuatu. After one or multiple rounds of conference-based drafting and negotiation, state delegations agree on an authoritative text, which is subsequently signed. The treaty then requires ratification by a previously agreed-upon number of parties to enter into force.²⁹ The entire procedure requires committed leadership and concerted action by a significant number of states and usually spans multiple years from the pre-negotiation stage to entry into force.

Despite these drawbacks in swiftness and directness vis-à-vis the ICC amendment, the treaty route also allows for significantly more flexibility and ambition beyond the path dependencies imposed by the Rome Statute – which precludes corporate liability³⁰ and has adopted a strongly anthropocentric outlook,³¹ for instance. Moreover, the treaty route could, at least in theory, attract the support of major powers like the US or China, who are strongly opposed to the ICC but may be open to signing a 'suppression convention' that does not entail international prosecutions.

It is worth noting that (apart from academic experiments)³² there have been previous multilateral efforts to pursue environmental objectives through criminal law. A rather sobering example is the Council of Europe's Convention on the Protection of the Environment through Criminal Law. Adopted in 1998 (curiously, the same year as the Rome Statute) and regional in

²⁸ See, e.g., <https://www.stopecocide.earth/cop27>.

²⁹ Vaughan Lowe, *International Law* (Oxford University Press 2007) 65–68.

³⁰ David Scheffer, 'Corporate Liability under the Rome Statute' (2016) 57 *Harvard International Law Journal* 35.

³¹ Ammar Bustami and Marie-Christine Hecken, 'Perspectives for a New International Crime against the Environment: International Criminal Responsibility for Environmental Degradation under the Rome Statute' (2021) 11 *Goettingen Journal of International Law* 145.

³² See Falk (n 23).

geographic scope, the Convention has failed to attract more than one ratification (Estonia) to this date – of only three required to enter into force.³³ This episode illustrates the final hurdle that both an amendment to the Rome Statute as well as a dedicated ecocide convention would face: ratification. Depending on domestic requirements, the ratification step might require the approval of domestic parliaments and stall or significantly delay the formal criminalization process.

3. International Criminalization in Practice

Both formal routes available to criminalize ecocide, then, come with benefits, but also with considerable drawbacks. How these dynamics will ultimately play out is impossible to foretell with any measure of confidence. Clearly, much will depend on how the procedures and protocols are filled with life and how the discretionary space they draw up is used by key decision makers. This social aspect of international crime-making has long evaded the academic radar, apart from largely anecdotal accounts of historic episodes such as Lemkin's quixotic quest for the recognition of genocide. Indeed, legal scholars' interest tends to lie with the enforcement of international crimes, leading them to consider the genesis of criminal forms only insofar as it aids statutory construction or the interpretation of customary rules. This situation leaves much in the dark about how and why international crimes actually come to be established as such.

To bridge this gap, an eclectic group of social scientists has attempted to theorize the complexities of international criminalization more systematically.³⁴ These contributions reveal two crucial insights that bear important implications for ecocide's future course. First, international criminality is best understood as a social category, next to and in addition to a legal one. As such, ecocide's international criminalization relies on several wider social processes that underpin formal legal efforts. Second, international criminalization is a recursive process that oscillates between domestic, transnational, and international lawmaking spheres and does not unfold along linear timelines.

3.1 *Criminalization as Social Construction*

³³ See <<https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyid=172>>.

³⁴ Much groundwork has been commendably shouldered by Suwita Hani Randhawa, 'International Criminalization and the Historical Emergence of International Crimes' (2022) 14 *International Theory* 460.

Legal scholarship departs from the notion that a crime only attains this label by virtue of its legal form. In other words, there is no crime before its legal inscription. On this view, the state holds a monopoly over the all-important task of defining criminality and create the fiction of crimes as a 'knowable' entity.³⁵ This view is rejected by critical criminologists, who posit that the contours of (international) criminality are not defined by rational policy but result from social and legal processes in which the boundaries of deviant behavior are constantly contested.³⁶

Drawing on the critical model, Suwita Hani Randhawa's theory of international criminalization distinguishes between two consecutive steps, (1) the formation of an international criminal norm, and (2) the translation of that norm into legal jargon. The first step requires agreement to be reached as to the crime's status (i.e., separate international criminality) and form (i.e., core definitional elements). Aligning herself with the constructivist school of international relations theory, Randhawa describes 'political shocks' as well as 'agents of criminalization' to drive a process of 'political contestation' in which agents' 'status', as well as the proposed crime's 'compatibility' with existing norms determine whether agreement is ultimately reached.³⁷ On this account, the legal translation that occupies a central position in most formal accounts is merely a postlude to the social process of norm formation.

Although Randhawa's model is developed with crimes *under* international law in mind, it arguably applies outside that context, too. Consider the well-known criminalization of intellectual property (IP) right violations in the 1994 Agreement on Trade-Related Aspects of International Property Rights (TRIPS). The 'political shock' conducive to the growth of a criminal norm against IP violations was the collapse of the Soviet empire and the concomitant rise of a truly global liberal trade order. Although industrialized countries – above all, the United States – stood to gain the most from trade liberalization, concerns over potential abuse and theft of exported technologies were on industry leaders' mind. It comes as no surprise that business associations (as a driving 'agent of criminalization') lobbied US negotiators to include what would later become Article 61: 'Members shall provide for criminal procedures and

³⁵ LHC Hulsman, 'Critical Criminology and the Concept of Crime' (1986) 10 *Contemporary Crises* 63, 66.

³⁶ See, e.g., Godfried Engbersen and Joanne van der Leun, 'The Social Construction of Illegality and Criminality' (2001) 9 *European Journal on Criminal Policy and Research* 51.

³⁷ Randhawa (n 34) 19–23.

penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.³⁸ No doubt, these associations' status as powerful economic players and the congruence of their criminalizing intentions with the boom in global prohibitory norms of the time spurred the eventual inclusion of criminal penalties in TRIPS.³⁹

Viewing ecocide's criminalization predominantly as a social process of norm formation shines a bright light on the variety of non-legal factors that make up the broader environment within which legal discussions are embedded, and by which they are enabled. On this account, a 'political shock' – such as the blatant destruction of the Amazon rainforest under the watch of the Bolsonaro administration between 2018 and 2022 – may serve a catalyzing function in bringing various actors to consider new ways of addressing environmental transgressions. Among these actors, so-called 'norm entrepreneurs' have taken a lead role in popularizing the idea that ecocide deserves to be outlawed, including civil society actors such as the Stop Ecocide Foundation and pioneering states such as Vanuatu, Bangladesh, or more recently, Belgium. The political contestation set in motion and maintained by norm entrepreneurs is currently unfolding with full force. Where does this leave the process in terms of the two-pronged threshold element identified by Randhawa – consensus as to ecocide's *status* and *form* as an international crime? While the advent of the 2021 draft definition indicates that a tacit consensus around ecocide's contours may be emerging among key stakeholders, some commentators have expressed doubts over the depth and breadth of such consensus.⁴⁰ On Randhawa's account, which, if any, of the current proposals will ultimately prevail, then, hinges upon their alignment with existing legal doctrines, as well as their support by powerful 'agents of criminalization'.

The first element, compatibility with existing norms, explains the 2021 definition drafters' choice to stay close to the language and normativity of the Rome Statute. This alignment is contested, though. For instance, as Darryl Robinson suggests, the 'holy grail' of ecocide lies in combining the punitive logic of ICL with the balancing approach that is commonly found in

³⁸ Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press 2003).

³⁹ Peter Drahos and John Braithwaite, 'Intellectual Property, Corporate Strategy, Globalisation: TRIPS in Context' (2002) 20 *Wisconsin International Law Journal* 451.

⁴⁰ Kevin Jon Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)' (*Opinio Juris*, 23 June 2021) <<http://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/>> accessed 20 March 2022.

international environmental law.⁴¹ Even an eventual lack of norm compatibility, however, may be made up for by the support of dedicated, ideally powerful 'agents of criminalization'. These may include influential states, but the history of ICL is replete with criminalization occurring against the express will of powerful states. The discursive and epistemic power of NGOs like the Stop Ecocide Foundation and legal celebrities such as Philippe Sands,⁴² paired with consistent interventions by smaller states such as Vanuatu or Bangladesh may play an important role in finding an agreement.⁴³

3.2 *Recursivity*

While Randhawa's theory suggests a linear development of international criminal norms with a particular focus on international negotiations, Ely Aaronson and Gregory Shaffer's research suggests that criminal categories are formed through the interaction of different scales of law-making, from the national to the supranational.⁴⁴ They capture this trans-scalar quality of criminalization processes through the label of 'recursivity', borrowing from earlier ideas by Terrence Halliday and Bruce Carruther's.⁴⁵ Their model stresses how national actors are influenced by regional and international forces, but also how different actors within or next to the state – civil society organizations, activist collectives, business forces, etc. – exercise national influence while being transnationally interconnected.

Ecocide's criminalization already features such recursive elements. For instance, Belgium's recent efforts to recognize ecocide in its domestic criminal code imported large blocks of the language used in the 2021 draft definition. It also departed from such language at key points,

⁴¹ Robinson (n 9).

⁴² Katie Surma, 'The Essential Advocate, Philippe Sands Makes the Case for a New International Crime Called Ecocide' (*Inside Climate News*, 22 December 2021) <<https://insideclimatenews.org/news/22122021/philippe-sands-ecocide/>> accessed 9 January 2022.

⁴³ The unexpected influence of smaller countries on international normative processes has been documented in relation to the climate change regime, among others. Inés de Águeda Corneloup & Arhutr P. J. Mol, 'Small Island Developing States and International Climate Change Negotiations: the Power of Moral "Leadership"' (2014) 14 *International Environmental Agreements* 281.

⁴⁴ Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2021) 46 *Law & Social Inquiry* 455.

⁴⁵ Terence C Halliday and Bruce G Carruthers, 'The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes' (2007) 112 *American Journal of Sociology* 1135.

however, which might cast a shadow on developments at the international level.⁴⁶ On the other hand, ecocide's journey must not end in the case that negotiations break down at the international level – criminalization could proceed in domestic fora, coordinated by the transnational expertise of the existing ecocide movement. In final consequence, this might even lay the ground for a customary criminal rule in the longer term.

Ultimately, the idea of a recursive process also implies that the criminalization process has no clear end but constitutes a continuing engagement with and contestation of what counts as internationally criminal. For instance, even once an offence of ecocide has been established in international law, its subsequent enforcement through prosecution and adjudication continually develops the boundaries of what falls within the scope of criminality.⁴⁷

4. Conclusion

Having experienced many ups and downs over the past fifty years, ecocide's fundamental premise – that certain environmental transgressions are worthy of criminal punishment – is likely to endure in one way or another. Whether this idea will succeed in becoming established at the international level depends on a complex mesh of legal and non-legal factors. By focusing on the process of criminalization rather than the content of the putative norm, I have sought to widen the imagination of ecocide's destiny. Although ecocide advocacy has concentrated exclusively on amending the Rome Statute, there are other, in principle equally plausible pathways to international criminality, such as a separate ecocide convention. Both formal containers admittedly bring their own advantages and pitfalls.

The focus on formal categories might be misplaced altogether, though. As empirical explorations of past criminalization experiences suggest, the social processes that lead to the formation of an international criminal norm matter a lot. Considering this messy, trans-scalar, and non-linear – in short, recursive – nature of international criminalization, a disruption in the

⁴⁶ Kevin Jon Heller, 'Belgium Set to Criminalise Ecocide (Kinda Sorta)' (*Opinio Juris*, 8 November 2022) <<https://opiniojuris.org/2022/11/08/belgium-set-to-criminalise-ecocide-kinda-sorta/>> accessed 3 January 2023.

⁴⁷ The criminalizing practices of legal officers has been on the (socio-)legal research agenda for a while now. See Ron Levi, John Hagan and Sara Dezalay, 'International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority in International Criminal Law' (2016) 79 *Law and Contemporary Problems* 289; Jens Meierhenrich, 'The Practice Of International Law: A Theoretical Analysis' (2014) 76 *Law and Contemporary Problems* 1; John Hagan and Ron Levi, 'Crimes of War and the Force of Law' (2005) 83 *Social Forces* 1499.

'simple 4 stage process'⁴⁸ envisaged by the Stop Ecocide Foundation would not necessarily bring ecocide's ambitions to a halt. Keeping the full range of criminalization pathways in mind might ultimately allow for new visions of ecocide's content beyond the Rome Statute's blindfolds to be entertained.

⁴⁸ See, <<https://www.stopecocide.earth/making-ecocide-a-crime>>.