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The fifth international crime? Testimonies of ecocide from Ukraine and Tuvalu

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Abstract

Ecocide, defined as the destruction of ecosystems with knowledge of its enduring effects, lacks recognition as an autonomous offence in international criminal law. The Rome Statute limits liability under Article 8(2)(b)(iv) to wartime conduct causing environmental damage that is widespread, long-term, and severe relative to anticipated military advantage. This schema excludes slow-onset harm, such as anthropogenic climate change. Using case studies of Ukraine and Tuvalu, this article juxtaposes two divergent yet equally poignant scenarios: the wartime devastation of habitats and the prospective risk of statehood impairment through sea-level rise. First-person accounts from the countries highlight Radbruch's contention that law forfeits validity when it no longer guarantees the minimum conditions of life, and Alexy's thesis that principles lose normative force when proportionality cannot justify ensuing harm. This article argues that a self-standing Ecocide Convention, equipped with universal jurisdiction, would not merely supplement the Rome Statute but offer the necessary framework to translate ecocide into enforceable criminal responsibility.

Key words

Ecocide; international criminal law; Rome Statute; Ukraine; Tuvalu

Resumen

El ecocidio, definido como la destrucción de ecosistemas a sabiendas de sus efectos duraderos, no está reconocido como delito autónomo en el derecho penal internacional. El Estatuto de Roma limita la responsabilidad en virtud del artículo 8(2)(b)(iv) a las conductas en tiempo de guerra que causen daños medioambientales generalizados, duraderos y graves en relación con la ventaja militar prevista. Este

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esquema excluye los daños de aparición lenta, como el cambio climático antropogénico. Utilizando estudios de casos de Ucrania y Tuvalu, este artículo yuxtapone dos escenarios divergentes pero igualmente conmovedores: la devastación de hábitats en tiempo de guerra y el riesgo potencial de deterioro de la soberanía estatal debido al aumento del nivel del mar. Los relatos en primera persona de los países destacan la afirmación de Radbruch de que la ley pierde su validez cuando ya no garantiza las condiciones mínimas de vida, y la tesis de Alexy de que los principios pierden fuerza normativa cuando la proporcionalidad no puede justificar el daño resultante. Este artículo sostiene que una Convención sobre el Ecocidio independiente, dotada de jurisdicción universal, no solo complementaría el Estatuto de Roma, sino que ofrecería el marco necesario para traducir el ecocidio en responsabilidad penal exigible.

Palabras clave

Ecocidio; derecho penal internacional; Estatuto de Roma; Ucrania; Tuvalu

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1. Introduction

Zierler (2011) contends that the term ecocide surfaced in the 1970s, referring to the destruction wrought by United States military actions in Vietnam. From 1961 to 1971, American soldiers sprayed millions of gallons of pesticides on agriculture and forests, killing trees and harming citizens' health in the short and long term (Hough 2016). Swedish Prime Minister Olof Palme denounced these actions in the 1972 United Nations (UN) Conference on the Human Environment. In 1977, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) came next. Nevertheless, its limited ban on environmental warfare did not significantly impact ecocide's status (Jarose 2024). Half a century later, the word regained urgency. In 2023, Ukraine accused Russia of ecocide in proceedings over the destruction of the Kakhovka Hydroelectric Facility. Located on the Dnieper River, the plant had supplied electricity and potable water to Kherson Oblast and Crimea. Its fall caused the inundation of settlements, pollution of farmlands, and depletion of fish stocks (Shevchuk *et al.* 2024). A different but equally grave threat confronted the Pacific Islands. In 2023, Tuvalu, Vanuatu, Tonga, Fiji, Niue, and the Solomon Islands issued the Port Vila Call for a Fossil Fuel-Free Pacific, pushing for recognition of ecocide at the International Criminal Court (ICC). Among these states, Tuvalu stands as the clearest case. With a land area of only 26 square kilometres, an average elevation of 2 metres, and a population of approximately 12,000, it faces gradual inundation (Mortreux and Barnett 2009). Rising seas have already salinised groundwater, reduced agriculture to subsistence levels, and forced internal relocations. The situation points to a form of ecocide distinct from the rapid erosion of war: a slow disappearance of habitable territory and livelihoods due to climate change. The Rome Statute recognises only four crimes: genocide, crimes against humanity, war crimes, and aggression. Environmental erasure appears solely under Article 8(2)(b)(iv), which confines it to international armed conflict. There is no equivalent in other types of armed conflict. Moreover, Article 8(2)(e)(xii) concerns property destruction, not ecosystem destruction. This paper situates ecocide within international law through the twin cases of Ukraine and Tuvalu. It combines legal analysis with twenty-six interviews to highlight crisis narratives.

2. Theoretical framework

Gustav Radbruch (1919) conceives law simultaneously as an intrinsic philosophical idea, derived a priori and expressed as justice (*Gerechtigkeit*), and as a "cultural phenomenon". For Radbruch, equals ought to be treated equally and unequals unequally, which presupposes not only two parties but also a third authority (e.g., a court) with adjudicating powers (Chroust 1944). However, distributive criteria alone cannot determine who qualifies as equal or unequal. This impasse is resolved through purpose or *Zweckmäßigkeit*, which guarantees substance to an otherwise empty formalism. He observes that the goals adopted by a community affect this content, and since these usually coincide with those of the state, the law often reflects the latter's will. In Radbruch's (1914) schemata, certainty (*Rechtssicherheit*) refers to normative reliability and predictability of law. Without them, the law forfeits its spirit, since no stable point of orientation would exist. Justice, purpose, and certainty necessarily collide. If justice is pursued too rigidly, the law risks endless instability, a process that erodes certainty and

undermines its own foundations. When purpose or utility dominates, law becomes a vehicle of expediency (Saliger 2007). This dynamic oscillation leads Radbruch to seek *Wirksamkeit* (effectiveness) and *Richtigkeit* (normative correctness). He also affirms that law is acceptable insofar as it rests on authoritative command (*beruht auf Befehl*). A stable order, he avows, satisfies essential needs of the citizenry even when its content is perceived as erroneous (Haldemann 2005). He stipulates that, where justice and certainty clash, certainty prevails, except where injustice (*Ungerechtigkeit*) becomes intolerable (*unerträgliches Maß*). Lindgren (2018) advances an argument consistent with Radbruch's logic, suggesting that ecocide may constitute a level of systemic harm that current legality cannot accommodate. Robert Alexy (2004, 2010) famously elaborates on Radbruch's thesis, arguing that, since the law bears an inherent claim to correctness (*Anspruch auf Richtigkeit*), denial of this proposition annuls its juridical character. He also posits that not all norms can be reduced to categorical commands. From this, he distinguishes rules (*Regeln*) from principles (*Prinzipien*). Rules operate in an all-or-nothing modality, whereas he conceptualises the latter as optimisation requirements (*Optimierungsgebote*) (Seoane 2006). These must be realised to the greatest possible extent. To reconcile collisions of interests (*Prinzipienkollisionen*), he prescribes a proportionality reasoning (*Abwägungsargumentation*). Placed beside Radbruch's doctrine, Alexy's rationale clarifies how juridical logic may falter in case of abuses or adjust by weighing principles against one another. This point converges with Higgins's (2016) delineation of ecocide as a crisis whose characteristics extinguish the very conditions that permit principles to be balanced, thus implying that the Radbruch-Alexy ceiling of tolerability is met.

3. Research methods and methodology

The study adopted interpretative phenomenological analysis (IPA) to chart interviewees' meaning-making processes. IPA is grounded in a double hermeneutic, in which participants thematise lived experiences and the researcher, in turn, construes those interpretations (Alase 2017). The choice of Radbruch and Alexy derives from the fact that ecocide unsettles assumptions underpinning legality, ranging from stable territory to ecological conditions that uphold rights and duties. Few theorists attend to what follows when these premises erode. Radbruch traces how law forfeits validity in conditions of extreme injustice, whereas Alexy develops criteria for determining when principles lose purchase once proportionality can no longer arbitrate their conflict in a normative-rational way. Together, they support IPA by furnishing conceptual mirrors for participants' accounts. In building the research design, the author was inspired by Rayfuse's analysis of the structural under-protection of the environment in armed conflict (2014), Higgins's perusal of ecocide as a distinct juridical harm that exceeds existing law categories (2016), Beirne and South's development of green criminology as a bedrock for assessing environmental harm as social injury (2013), and Short's theorisation of ecocide vis-à-vis settler colonialism (2016). The author began recruitment in 2023. Eligible participants were at least 18 years old, self-identified as Tuvaluan or Ukrainian (by citizenship, descent, or heritage), and possessed sufficient English proficiency. They also required knowledge of events relevant to ecocide under Article 8(2)(b)(iv) of the Rome Statute. In Tuvalu, eligibility referred to climate-driven damage consistent with proposed ecocide elements, outside wartime settings. Suitability was

confirmed through a brief pre-interview screener that asked applicants to recount a specific episode of ecological harm they experienced. Initial contacts came through acquaintances in Ukraine from the author's earlier labour residencies, together with Tuvaluan contacts from a study period in New Zealand Aotearoa. Each person shared the study notice with relatives or friends who lived through relevant situations. Recruitment then grew through Facebook and Telegram posts in 2023–2024. After being screened, candidates received a participant information sheet (PIS) and an informed consent form (ICF).

By late 2024, the cohort comprised 26 participants: 14 Ukrainians and 12 Tuvaluans, all women, except for 4 men in the Tuvaluan group. The first group consisted of individuals who left Ukraine prior to 2023. The latter sample encompassed locals and diaspora members in New Zealand/Aotearoa, Australia, the United States, and Canada. The female predominance reflected kinship roles, which were cemented by male out-migration through labour schemes in Tuvalu (Farbotko *et al.* 2022) and by political-legal constraints in Ukraine. All interviews were conducted on Zoom. Sessions lasted 42–108 minutes (median 76). Research questions were: How do participants recount damage to land, water, and air? Which persons, groups, or institutions do they single out as responsible? What forms of redress do they describe as credible? Anonymity was ensured through the use of pseudonyms and altered names for residences, age, status, and workplaces. The PIS permitted withdrawal at any point, and meetings paused or ended if distress was observed. Five transcripts were checked against recordings for phrasing and tone, and all transcribed verbatim, with subsequent review. Codes were clustered into four superordinate categories: wartime ecocide in Ukraine, climate-driven ecocide in Tuvalu, institutional bottlenecks, and gendered consequences. These, in turn, guided the placement of empirical insights within the doctrinal sections, so that accounts informed the identification of evidentiary gaps and areas where statutory provisions proved insufficient. Interviewees could review their transcripts and request removal of their data.

4. Results

Ukraine's situation conjures Radbruch's problem of obedience and higher duty. Russia considers its bombardments to be lawful acts of war or acts of sovereign prerogative. However, Radbruch's postulates could disqualify actions that deliberately extirpate the basic conditions of existence from the category of legality (Radbruch 1919, Haldemann 2005). Just as Nazi decrees (Radbruch's *Formula*, not moral equivalence) abdicated their legal nature by nullifying equality (Radbruch 1914), Russian operations may be deemed devoid of legitimacy, regardless of positivist allegations to conform with statutes or decrees. On Alexy's theory, one could affirm that they vitiate the minimal standard of justice, hence forfeiting any justifiability. Tuvalu also tests these hypotheses. Per the 1933 Montevideo Convention, if a state's land base, resident body, and governing seat vanish, the four criteria come into question within orthodox accounts of sovereignty under public international law. The Holy See retains statehood despite minimal and non-contiguous territory. Governments-in-exile have continued to exist even after total loss of control over territory (e.g., WWII precedents). Nevertheless, Tuvalu represents a more extreme scenario since three predicates risk simultaneous erasure. Radbruch would have asserted that positive law criteria are stretched while acknowledging the injustice of

pushing a population into juridical limbo. The prospect of the future unsettled the participants. They were aware that throughout history, nations have been born, changed, and at times disappeared. However, for them, it was unfair that their polities were subjected to such a phenomenon as they were not responsible for the predicament befalling them.

5. Discussion

5.1. The Court

The International Criminal Court (ICC) is the first permanent tribunal with authority to try natural persons for the most serious international crimes (Bosco 2014). Its jurisdiction covers genocide (Art. 6), crimes against humanity (Art. 7), war crimes (Art. 8), and aggression (Art. 8 bis). Article 8(2)(b)(iv) criminalises 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." According to humanitarian law commentary, "long term" is understood as of years or decades, "widespread", as several hundred square kilometres, and "severe", as disruption with noteworthy consequences for human life or resources (Sand 2005, Kleffner 2008). In non-international conflicts, Article 8(2)(e)(xii) criminalises destroying or seizing the property of an adversary unless such destruction or seizure is demanded by the necessities of the conflict. This provision does not include the tripartite test. Responsibility may attach to direct perpetrators or to commanders under Article 28. Article 12(3) extends jurisdiction without ratification, subject to the admissibility filters under Article 17 (gravity, complementarity, and the interests of justice). As Pre-Trial Chamber I held in *Prosecutor v Gbagbo* (2014), such declarants assume cooperation duties under Article 93. As of 2025, 125 States Parties have ratified the Statute, excluding Burundi and the Philippines, which withdrew in 2017 and 2019. Ukraine did it in 2024, superseding its prior Article 12(3) requests, whereas Russia, the United States (US), and China did not (Bosco 2014). The Court is independent but cooperates with the UN through the 2004 Negotiated Relationship Agreement between the International Criminal Court and the United Nations. Its jurisdiction extends by subject matter (ratione materiae), time (ratione temporis), territory (ratione loci), nationality (ratione personae), and Security Council referral. Convictions require proof beyond a reasonable doubt (Art. 66(3)); sentences may reach thirty years or, in the gravest cases, life imprisonment (Art. 77; Stahn 2019).

Contacted by the author, Lisa, a Tuvaluan sociologist of mixed descent raised in Auckland and now living in the US, criticised the ICC's – in her opinion – "*toothlessness*."

> Big names in The Hague throw at us: 'It is about definitions, state consent and blah blah blah… the Statute can reach a warlord in Congo but not a government whose emissions destroy a Pacific nation. We are supposed to wait for the Security Council, but who is behind the Council?…'[1]

[1] The author alternated between contracted and complete verb forms to convey shifts in emotional charge. The dashes and pauses in this and all other quotations are the author's translational choice to approximate

Her frustration stemmed from years of witnessing Pacific climate petitions fail. To her, the ICC's statutes resembled an ornate chamber capable of punishing perpetrators of battlefield atrocities yet offering no path to hold accountable those who irreparably damage a reef. Her diagnosis remains pertinent today; indeed, it carries even greater weight for SIDS. She also criticised the ICC Prosecutor

> Article 53 gives the Prosecutor the power to decide if an investigation even begins. On paper, it is called 'prosecutorial discretion'; to me, it is a filter. Cases that might anger the Council's permanent members vanish before they start.

The statement that Article 53 serves as a gatekeeping device highlights the very antinomy of values that Radbruch (1946) identified. Formally, discretion is meant to secure justice by ensuring isonomy. Nevertheless, the speaker perceives that it bends toward utility (avoiding political friction with permanent members) and certainty (preserving ICC's authority). Finally, her disillusionment mirrors the duality of *Skepsis* (scepticism) and *Glaube* (faith). What is evident here is Skepsis: the feeling that law implodes into calculation. Nevertheless, within the critique, a minimal tension persists regarding Glaube, or the expectation that the principles of fairness and democracy may still inform ICC decisions. In this impasse, other participants turned toward creative imaginaries, such as their government's proposed "digital Tuvalu," a model of deterritorialised continuity in cyberspace. The plan made public at the 2022 United Nations Climate Change Conference (COP27) exemplifies a refusal to surrender sovereignty, and it is a gesture of Glaube that statehood and its related laws can evolve (Calzolari and Phantanaboon 2025).

5.2. Burned land

The Russo-Ukrainian War has caused not only mass human suffering but also an ecological catastrophe. For Joubert (2023), Tsymbalyuk (2025) and Plotnikov (2024), Moscow's aggression is ecocidal, and the June 2023 obliteration of the Kakhovka Dam seems to confirm its culpability. The event extinguished aquatic ecosystems across Eastern and Southern Ukraine (Vyshnevskyi *et al.* 2023). Shah Maruf (2024) contends that the incident may qualify as a war crime under Article 8(2)(b)(iv). The Council of Europe's Register of Damage for Ukraine (RD4U), created with Resolution CM/Res (2023), also suggested such a possibility. However, readers must be aware that Article 8(2)(b)(iv)'s application has never resulted in a conviction before the ICC. Even where the scale of damage appears compatible with the tripartite test, establishing that it was excessive relative to the anticipated military advantage is evidentially challenging. Earlier, in 2022, Russian divisions damaged nearly one-quarter of Ukraine's designated conservation areas. Undersea detonations in the Black Sea compromised marine balance and occasioned the death of thousands of dolphins (Pipia 2024).

Respondents presented animal losses as emblematic of ecocidal practice. They also affirmed that since 2014, sustained artillery fire and drone strikes incinerated grasslands, which in turn imperilled nearby communities and fractured ecological corridors. Some alleged that the Dnieper River spread chemical pollutants across neighbouring regions, while airborne particulates degraded local, regional and international air quality

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the cadence and syllabic hesitations present in the original speeches. Personal details were modified across vignettes to guard participants' identity.

(Noorali *et al.* 2025). Since the beginning of cross-border clashes, Ukraine has enlisted its juridical arsenal to substantiate ecocide allegations against its adversary. It has done so by merging statutory definitions, institutional capacity, technological surveillance, and judicial records into a single scheme (US Commission on Security and Cooperation in Europe 2024). Article 441 of the Criminal Code of Ukraine, as amended, defines ecocide as the obliteration of flora or fauna, poisoning of the atmosphere or water resources, and other actions capable of causing an ecological catastrophe (Ukraine 2001). It prescribes a penalty of 8–15 years of imprisonment. Building on this statutory horizon, the Operational Headquarters of the State Environmental Inspectorate of Ukraine collected battlefield-related evidence. In tandem, the country harmonised its legislation with the European Union (EU) acquis through the EU–Ukraine Association Agreement, particularly Annexe XXX – ENVIRONMENT (under Title V: Economic and Sector Cooperation), which mandates the implementation of 26 EU ecological directives and three regulations covering air and water quality, waste management, nature conservation, climate change, and industrial pollution (Ivanov 2025).

In 2014, the Verkhovna Rada (Ukrainian Parliament) tendered a declaration under Article 12(3) of the Rome Statute. Precisely, it requested the ICC to accept legal purview of crimes committed on Ukrainian territory between 21 November 2013 and 22 February 2014, the period of the Euromaidan protests and their suppression (International Criminal Court 2014). This step permitted Kyiv to accept ICC competence without ratifying the Statute under Article 125. In 2015, the Republic lodged another formal notice, expanding ICC jurisdiction to offences perpetrated from 20 February 2014 onwards, with no temporal limitation. In March 2022, ICC Prosecutor Karim Khan announced that his office would initiate an inquiry following referrals from 39 States Parties (International Criminal Court 2022). These referrals, made under Article 14 of the Rome Statute, enabled him to launch a probe without first seeking authorisation from the Pre-Trial Chamber. In December 2024, the author met Olena, a Ukrainian refugee who had resettled in central Europe, although she asked not to name the country. She recalled:

> The ground smelled… not of Earth, you know, but of burnt wires, of oil. We tried to sow barley there. Shoots came up thin, yellow — some just shrivelled straight away. My neighbour said, 'It's only one season.' But it was not… I think about my grandson… he drinks from that well. And I do not know how to tell him that the land — the land we trusted — is poisoned.

Her portrayal substantiates Alexy's contention about the Anspruch auf Richtigkeit (Becker and Zimmerling 2006). Law assumes a basis of justification, but in Ukraine, the very mediums of life (the triad of soil, air and water) seem to contradict it. No proportionality calculus can offset a poisoned harvest against any supposed military advantage. In Olena's memories, the landscape itself nullifies the premise of optimisation. Another participant, Olga, describes her husband's work.

> The war changed how sound itself is felt [this experiential trope appeared in multiple accounts]. At night, even silence is not quiet. My husband used to calibrate soil acidity, moisture, fertiliser ratios and other things— all precise numbers. Now he says he cannot rely on any of it…

The speaker's impression that "even silence is not quiet" betrays an interference with dignity and liberty, which Alexy (2004) treats as maxims appraised as Optimierungsgebote. The husband's broken reliance on agricultural measurement implies a dissolution of factual equality and the presumption of rational stability, since empirical postulates are essential to the attribution of weight in the proportionality test. In this situation, the intensity of interference with security overwhelms the residual directrix of livelihood, confirming that constitutional rights provisions possess a definitive level of rules and principles requiring optimisation. The passage also attests to Alexy's discourse-theoretical plea to correctness. Testimony acts as a logical assertion within a justificatory discourse about injustice.

5.3. Lost in the ocean

Tuvalu, a low-lying island state in the Pacific, battles against anthropogenic climate change. The archipelago's exposure renders it vulnerable to inundation and saline intrusion into aquifers. Kiribati and the Marshall Islands have cognate conundrums (Farbotko and Lazrus 2012). Such predicaments inevitably revive debates about the international standing of small island developing states (SIDS), since the 1933 Montevideo Convention on the Rights and Duties of States defines statehood through four criteria: a permanent population, a defined territory, a government, and the capacity to engage in diplomacy (Balesh 2015). The document, however, contains no specification on whether sovereignty continues once land territory ceases to exist. Deterritorialised statehood continues to appear in policy fora, yet it is untested (Lok 2023). This lacuna was partly filled in the 2024 Advisory Opinion of the International Tribunal for the Law of the Sea (ITLOS) on sea level rise, which affirmed that maritime entitlements do not automatically lapse when baselines are submerged and that states retain a continuing juridical personality despite permanent inundation.

There are other controversies surrounding the SIDS. The 1982 UN Convention on the Law of the Sea (UNCLOS) defines a country's maritime entitlements, foremost the exclusive economic zone (EEZ), in relation to baselines drawn along the low-water line of the coast (Article 5). Article 121(3) stipulates that rocks which cannot sustain human habitation or economic life of their own generate neither an EEZ nor a continental shelf, while Article 76 delineates the continental shelf of a coastal State. The problem generates a new line of inquiry: if the land territory of the coastal state becomes submerged, do the maritime entitlements derived from it lapse? Once again, we are on an uncharted path as neither the International Court of Justice (ICJ) nor the International Tribunal for the Law of the Sea (ITLOS) has delivered a ruling. In 2021, Pacific governments submitted proposals to the UN, requesting that EEZs remain intact on the basis of historic rights rather than through reference to ambulatory coastal baselines. The treaty text, however, contains no express provision, leaving the matter unresolved under positive law. Enforcement would hence hinge not on the rule but on the political will of other governments. Most probably, if Tuvalu becomes uninhabitable, its statehood and related rights will be subject to protracted disputes under international law.

As participants reminded the author, the Convention Relating to the Status of Refugees (1951) omits climate-induced displacement from its scope. Absent a treaty-based protection, Tuvaluans may incur conditions of statelessness (Piguet 2019). The interviewees' widespread fear that their passports may lose validity conjures Radbruch's

(1914) extreme injustice exception, under which positive law is compelled to adjust to lived reality once entrenched juridical categories crumble (Mortreux and Barnett 2009). Many described themselves as suspended in a contradiction: yearning for what has already ceased—certainty in international law—while anticipating the vanishing of what still exists—Tuvalu (Duong 2010), situated between a past that is irretrievable and a future displaced elsewhere. Synchronously, unconscious attachments, embodied in a devotion to the motherland, conceived as timeless, uphold both remembrance and desire (Saddington and Hills 2023). The exodus from what they defined as fenua fakaalofa (the land of love and kindness, or paradise) compels them to seek a return through countless gestures, including storytelling with the author and other researchers, as well as commemorative ceremonies abroad. That return, unfortunately, can never be realised (Islam *et al.* 2023). The participants acknowledged that Australia, Fiji, and New Zealand/Aotearoa facilitate migration programmes; however, their testimonies often revealed these programmes to be "chaotic" and lacking clear guidelines. In March 2023, Tuvalu joined the Port Vila Call for a Just Transition to a Fossil Fuel-Free Pacific, alongside ministers and officials from Tonga, Fiji, Niue, the Solomon Islands, Tuvalu, and Vanuatu (2023). In September 2024, Vanuatu, Fiji, and Samoa submitted a Rome Statute amendment proposal to treat ecocide as an independent international crime alongside genocide and war crimes. Tuvalu did not co-sponsor the attempt. Still, its earlier endorsement of the Port Vila Call signals apparent affinity with efforts to criminalise ecocide under international law (De la Rasilla 2024).

Marco, a Tuvaluan emigrant, informed the author that Belgium introduced an ecocide offence in its new Penal Code in 2024, with the provision set to enter into force in Q1-Q2 2026. EU Directive 2024/1203 on environmental crime introduced a "qualified offence" category for catastrophic environmental harm, described in the recitals as comparable to ecocide. On 23 July 2025, the International Court of Justice delivered its advisory opinion on the obligations of States in respect of climate change, pursuant to Article 65 of its Statute and United Nations General Assembly resolution 77/276 (Earth Negotiations Bulletin 2025). The Court affirmed that existing treaty law, interpreted in light of the Paris Agreement's 1.5°C temperature objective and the best available science, imposes binding obligations on States to adopt mitigation and adaptation measures (paras. 174–404). It rejected the contention that climate treaties constitute a self-contained regime, holding instead that obligations under customary international law, including the duties to prevent significant transboundary harm and to cooperate in good faith, continue to apply to greenhouse gas emissions (paras. 162–173). The Court further held that a failure to act in accordance with these duties may constitute an internationally wrongful act under Articles 1–2 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), giving rise to the consequences of cessation, non-repetition, and reparation (Articles 30–37) (paras. 445–455). It confirmed that attribution of emissions to States is possible despite their cumulative nature, and that responsibility may be invoked erga omnes and erga omnes partes, by all States or all treaty parties, not merely those directly affected (paras. 439–441). The opinion confined itself to State responsibility. It did not cover individual criminal liability, though it underscored that States must regulate private actors as a matter of due diligence (paras. 433–438). The author and the respondents did not regard such observations as evidence of personal culpability. Instead, they considered them a normative proposal that a future Ecocide Convention

could translate into erga omnes environmental duties enforceable against natural and corporate persons.

5.4. The authority of precedents

Ukraine alleged environmental devastation by Russia as a war crime. The country predicated it upon the feasibility of prosecution within the ICC. Tuvalu instead posits ecocide as a sovereignty concern, where territorial loss challenges the very premises of international law. Their institutional plight follows this divergence. For instance, Kyiv tendered an Article 12(3) declaration. The ICC seeks to subsume ecological harm under existing war crime categories. Conversely, Tuvalu is excluded from the Court's jurisdiction because it has not ratified the Rome Statute or lodged an Article 12(3) declaration, and, even with ratification, climate-driven loss would fall outside the Statute's crime definitions, leaving its statehood in abeyance (absent a Security Council referral under Article 13(b)). The participants affirmed this divergence in their speeches. Ukrainians depict habitat loss as immediate and visceral. On the other side of the spectrum, the author noticed that Tuvaluans recount their "dispossession" as slow and bureaucratic. Hence, if in Ukraine the predicament is whether ecocide can be prosecuted as a war crime, in Tuvalu the issue is if it constitutes a freestanding offence that threatens the very continuity of statehood. What brings them together is the same hurdle— the question of how the ICC can act when cooperation from key States Parties is absent. The Rome Statute vests competence primarily in Article 12(1), which requires a state party to accept it. Nevertheless, practice attests to instances where unilateral attempts sufficed. Côte d'Ivoire lodged an instrument of acceptance under Article 12(3) in April 2003, covering offences committed after the September 2002 outbreak of civil war between government forces and the Forces Nouvelles. At that time, the polity had not ratified the Statute, but successive administrations, beginning with President Laurent Gbagbo and continuing under Alassane Ouattara, renewed the notice until ratification in 2013. Prosecutor Luis Moreno Ocampo initiated a preliminary inquiry in 2003, expanded it in 2011, and secured arrest warrants and confirmation of charges against senior figures, including Gbagbo and youth leader Charles Blé Goudé. The Pre-Trial Chamber ruled that an instrument filed by a non-party under Article 12(3) imposed duties of cooperation equal to those borne by a ratifying state (Arnould 2017). A parallel example arose in January 2009 when the Palestinian Authority accepted the Court's jurisdiction for alleged crimes committed on its territory since July 2002. The submission provoked sharp debate over Palestine's status, given its absence of UN membership and its unsettled claim to statehood. For several years, the Prosecutor deferred any decision. Momentum shifted after the adoption of UN General Assembly Resolution 67/19 in 2012, which recognised Palestine as a non-member observer state. In 2015, the country deposited its instrument of accession to the Rome Statute with the UN Secretary-General, who acted as treaty depositary. The earlier 2009 document, however, retained significance. After its international standing was acknowledged for Statute purposes, the Court treated the submission as valid, yet both the Prosecutor and the Pre-Trial Chamber restricted its temporal reach to 13 June 2014. This construction was confirmed in 2021, when the Pre-Trial Chamber held that declarations lodged before accession may retain validity once the entity is subsequently treated as a state in international law (Clancy and Falk 2021). In 2025, the Permanent Mission of the State of Palestine to the Kingdom

of the Netherlands branded the biophysical decline in Gaza as ecocide, asserting that under five per cent of agricultural land still permits cultivation (Stop Ecocide 2025). The Council on American Islamic Relations (CAIR), the largest American Muslim civil rights group, called upon the ICC and the ICJ to consider Israel's removal of most of Gaza's olive trees (CAIR 2025).

5.5. From dolus specialis *to* dolus eventualis

The precedents of Côte d'Ivoire and Palestine teach us that access to the Court is possible. Nonetheless, for most participants, admittance is not enough. The reason is that jurisdiction per se does not resolve the issue. Even if the Court may act on behalf of those countries, the content of the crime itself remains unsettled. Unlike the established categories within the Rome Statute, ecocide lacks clear doctrinal parameters. Though the concept has strong moral and political appeal, its translation into criminal law demands precision regarding its actus reus (objective element) and mens rea (mental component). The former is rarely characterised as a crime and is commonly handled as a regulatory or civil wrong (DeFalco 2013). The latter is harder to prove, as authority is dispersed across state organs, each of which renounces liability for the collective outcome (Van der Vyver 2004). Genocide, such as the Nazi atrocities in the 1940s, entails direct top-down directives (Knoops 2016). The International Military Tribunal at Nuremberg meticulously documented this pattern. Archival material confirmed that the crimes were centrally planned and bureaucratically executed. Subsequent rulings by the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY) affirmed that the intent to annihilate, in whole or in part, a protected group (dolus specialis) may be deduced from a range of circumstantial evidence (scale of atrocities, systematic targeting, weapon of choice, etc.), not just written or spoken speeches. This facet sets genocide apart from war crimes, which mandate intent and knowledge under Article 30 of the Rome Statute, and from crimes against humanity, which require awareness of a widespread or systematic attack against a civilian population rather than any intent to terrorise civilians. On the other hand, ecocide tends to be normalised as a byproduct of industrial development, with accidents classified as technical failures or human mistakes.

The 1986 Chernobyl nuclear disaster (International Atomic Energy Agency - IAEA - 2006, UNSCEAR 2008) confirms this tendency, since the Soviet government attributed it to flawed reactor design and operator negligence. The 2011 Fukushima Daiichi nuclear disaster also corroborates the trajectory (National Diet of Japan 2012, IAEA 2015). In 2021, to halt the trend, the Independent Expert Panel on Ecocide proposed a draft definition of ecocide to be embedded in the Rome Statute. The subjective component embedded in their formulation corresponds to dolus eventualis (though the Panel did not adopt the civil-law expression). Specifically, we can observe a recklessness threshold beyond which an actor foresees grave ecological damage yet proceeds nonetheless (Badar 2009, Ecocide Law 2021). The novel standard clarifies liability in cases where large-scale environmental crises originate from deliberate indifference in lieu of explicit commands. Should ecocide be adopted through the amendment procedure under Articles 121–123, its application would depend on the acceptance of the amendment by individual States Parties. Ukraine, now a State Party, would be bound only if it accepts the amendment in accordance with those provisions. This is because, in its case, Article

12(3) no longer provides a pathway (International Criminal Court 2025). On the one hand, Ukraine could classify the Kakhovka Dam's incident or the wreckage of protected habitats as stand-alone international crimes in place of collateral damage to war crimes or crimes against humanity. On the other hand, Article 75 of the Rome Statute authorises reparatory measures, which could enable Kyiv to seek ecological restoration and financial aid via judicial orders against individuals convicted of ecocide. Furthermore, if ecocide enters the Rome Statute, Tuvalu could also deploy it to argue that greenhouse gas emissions, ocean pollution, and other unwarranted practices constitute international crimes.

5.6. Gender(ed) survival

Ukraine and Tuvalu's governments may press for ecocide before the ICC and perhaps succeed over time. In Ukraine's case, this rests on its recent ratification of the Rome Statute, its earlier Article 12(3) declarations, and its ongoing submissions concerning its environmental catastrophe. For Tuvalu, the basis stems from its endorsement of the Port Vila Call and its support for efforts to elevate ecocide to an international offence. However, for ordinary citizens, the immediate concern is survival — and that burden is often gendered (Baxi 2007). Territorial dislocation affects males and females differently. As Enloe (2014) observes, natural and artificial disasters intensify the ways in which gendered hierarchies govern mobility and stability. Whether fleeing a war-torn country or abandoning an island engulfed by rising seas, gender roles and rules can dictate who stays, who departs, and how each endures displacement. When Russia unleashed its full-scale invasion of Ukraine in February 2022, millions of Ukrainians scrambled to evacuate. Consequently, martial law was swiftly announced by Kyiv (Decree of the President of Ukraine No. 64/2022). With it came a strict rule: all adult men aged 18 to 60 were barred from leaving. At the same time, women, minors, and older citizens were permitted to cross borders to safety. Families were torn apart at train stations and border checkpoints as mothers and grandmothers escorted children to safety, leaving fathers, husbands, and adult sons on the platform. Some tried to evade the travel ban. Accounts described men paying smugglers to spirit them across borders. Nonetheless, most lingered and were compelled to shoulder their role. Oksana, a mother from Kyiv, narrated arriving in a Polish reception centre with her two daughters:

> The train was packed with women holding babies, kids crying for their fathers. I have never felt so alone. In Poland, volunteers were kind, but I was overwhelmed.

Men between the ages of eighteen and sixty were prohibited from leaving the country, a measure vindicated as necessary for national defence. For the woman, however, the effect was the separation of her family and the burden of displacement borne alone. Alexy (2010) would contend that the decree retains its character because it professes itself as just. Bix's (2006) critique becomes evident here because the rhetorical entitlements to justice do not cure the underlying problem. If a society upholds such measures as binding until altered by ordinary legislation, are its officials simply mistaken, or does the system itself forfeit the label of law? Many interviewees insisted that the query itself was spurious. For them, the only one worth posing was why Russia compelled Kyiv to adopt such means, and how the international community might censure or penalise Moscow for it. Some assumed that type of suffering was tragic, but it did not annul the "soundness" of the Ukrainian approach. Two refused the dichotomy altogether,

thinking that the decree is defensible in the technical register and unjust in the ethical and gender domains. Tuvaluans, unlike Ukrainians, are not constrained from leaving their country. The nation's seafaring heritage has fostered a long record of outward labour migration, with many employed as sailors or contracted workers across the Pacific. However, female mobility can be quickly curtailed by social expectations and kinship duty (Amin *et al.* 2024). Mele, a young Tuvaluan, shared her candid story that summarises the dynamic:

> My elder brother works on a shipping crew, and my younger brother picked fruit in New Zealand last year…I also dreamed of going overseas…When the time came, I did not leave.

Women must fight harder to secure food and water during droughts and high tides. Charlesworth (1994) zeroes in on how international humanitarian "geometries" rarely prioritise female vulnerability. Another factor is the attitude of gatekeepers in migration programs (Aoláin *et al.* 2011). In Pacific labour schemes, there have been cases of officials deliberately privileging male applicants. It is telling that domestic choices also mould Tuvalu's lottery-based relocation scheme. Typically, entire families transfer together if selected. However, the very need to prioritise who moves first unmasks biases. A family unit might conclude that the husband should establish a foothold abroad while the wife sustains him at home. These testimonies are fundamental because they highlight the distance between the absolutes of legal and moral imperatives (e.g., promoting justice and saving entire nations) and the stream of pressing tasks, such as finding shelter for the winter, buying food for older adults, or applying for a scholarship. Alexy (2004) is instructive for comprehending why gender discrimination is a defect, even when circumstances render it inescapable. For him, all minimally developed legal systems necessarily comprise *Prinzipien* as well as *Regeln*. One differs from another because they do not proceed through rigid subsumption, but through calibration in complex cases. Where law meets indeterminacy, principles enter, and these always carry an appeal to moral correctness. When balancing is required, for example, between economic stability and equal opportunity, the morality thesis insists that discriminatory exclusions cannot be treated as neutral. They produce recognised harms: stereotyping, humiliation, and comparative disadvantage. What sets Tuvalu apart from Ukraine is the locus and modality of exclusion. In Ukraine, the constraint was enacted through a decree applied by subsumption that restricted men in the name of national defence. In Tuvalu, the restriction materialises as a diffuse set of axioms guided by micro and macro biases that hamper women's mobility and call for a rediscussing of power hierarchies. Both instances imply gendered discrimination, but Ukraine attests to a deficit in moral correctness, whereas Tuvalu exemplifies the infringement of standards whose relationship lays bare their incompatibility with equality.

6. Ecocide beyond Rome

Higgins (2016) espouses the classification of ecocide as an international crime within the ICC. In practice, however, that ambition seems improbable. Numerous states rely on the extraction of raw commodities and reject exposing strategic industries to criminal sanctions, as underlined by (Wewerinke-Singh 2019) and Farran (2009). A more realistic pathway may lie not in amending the Rome Statute but in negotiating a self-standing multilateral convention. The instrument cannot be easily revised because amendments

require international consensus, and many governments refuse any expansion of ICC powers. Article 121(4) of the Rome Statute indicates that amendments to the core crimes apply only to those States Parties that accept them and enter into force only after ratification by two-thirds of them. A new treaty does not encounter that barrier. Its drafters can design flexible obligations and phased commitments, which lowers political resistance. A second barrier arises within the ICC itself, as the statute limits the avenues through which ecocide can enter its jurisdiction. Donna Minha (2020) argues that climate-driven harm only enters the ICC through the actions of corporate officers, as outlined in Article 25, with the mental element specified in Article 30. Her study grounds liability in individuals because the Rome Statute excludes corporations from its scope. She assumes that this route remains narrow because the Court applies to natural persons, and slow or diffuse environmental damage rarely meets the thresholds of the four crimes. This limit indicates the need for a separate instrument to reach corporate conduct that produces ecological ruin outside armed conflict. The ICC Draft Environmental Crime Policy states that the institution modifies its internal practice only for the four crimes and has no mandate to expand jurisdiction to climate-driven harm or to corporate conduct outside armed conflict.

The 1984 Convention against Torture (CAT) obliges each State party to prosecute or surrender alleged torturers. Article 7 embodies the principle of aut dedere aut judicare: a country must either submit the case to its competent authorities for prosecution or hand over the suspect. Jurisdiction under the treaty generally presupposes the presence of the alleged offender in the forum State's territory. There are precedents. The 2003 Convention against Corruption (UNCAC) (Articles 51–59) stipulates the seizure and restitution of illicit assets, with cooperation subject to domestic provisions such as dual criminality. By analogy, an Ecocide Convention could require nations to legislate against ecocide and collaborate through collective institutions to punish perpetrators and restore the damage. Such commitments would subsist independently of the ICC's constitutive statute. The proposed Convention might envision mechanisms more ambitious than Higgins's ICC-centred rationale. At its core could stand a specialised tribunal. Moreover, its design might draw lessons from the International Tribunal for the Law of the Sea (ITLOS) or the Permanent Court of Arbitration (PCA), both of which have adjudicated environmental controversies with mixed results. Whereas the ICC limits itself to individual criminal liability, the novel institution could confer jurisdiction over states and corporate entities. Domestic law in the victim state acquires relevance because it supplies evidentiary records that judges may treat as probative when assessing responsibility. The statute might allow liability to take either a criminal or an administrative form, provided that the sanctions are effective, proportionate, and dissuasive. The precept of full reparation for wrongful conduct (see Chorzów Factory 1928) confers juridical weight. Applied to ecocide, that principle would encompass habitat restoration as well as pecuniary redress to injured populations, aspiring to "wipe out all the consequences of the illegal act" insofar as practicable. Such a forum would retain competence to pronounce binding rulings compelling responsible actors to underwrite rehabilitation and indemnify Indigenous and local communities.

Sands (2014) contends that a multilateral instrument would encounter obstacles similar to those afflicting the Rome Statute, given that industrialised countries are unlikely to ratify clauses threatening their extractive sectors. Without broad adherence, a treaty

could generate regional enclaves rather than universal accountability. Schrijver (2008) stresses the difficulty of embedding corporate obligations within public international law, where sanctioning powers remain predominantly state-centred. Furthermore, debates within the International Law Commission (ILC) reveal disagreement about what constitutes guilt and the risk of over-criminalisation. The threshold of harm must thus be fixed in workable form. The offence could be linked to deliberate or knowing acts, yet it should also encompass reckless or grossly negligent conduct where consequences are evident. The agreement might define scale by combining two criteria: either widespread or long-lasting impact, together with irreversibility of ecological processes. These components reflect approaches used in instruments such as ENMOD and Additional Protocol I, though adapted for a distinct offence. Such a dual standard would cover catastrophic environmental degradation without trivialising lesser damage. The benchmark would help avert disputes over intent and magnitude while guarding against excessive liability.

To tackle it, the Convention should include: (i) a nullum crimen provision tied to definitions agreed at ratification; (ii) a foreseeability test requiring that acts be clearly proscribed at the time of commission; and (iii) a temporal clause excluding retroactivity except where harm is continuing. These critiques corroborate the idea that while a tribunal could broaden its reach, it might struggle to gain legitimacy if principal emitters and resource exporters refused to comply. The model here envisaged could, at the same time, equip states with economic instruments of coercion. Rulings exist in the form of coordinated trade and financial measures promulgated by the UN Security Council. An Ecocide Convention might authorise its parties to withhold trade benefits or bar access to capital markets for those entities that disregard their duties toward the international community.

Comparable peer-monitoring techniques are already in operation in other regimes. The OECD Anti-Bribery Convention (1997) obliged states to press one another to indict transnational bribery, with firms from non-compliant parties facing blacklisting. States could censure jurisdictions that shelter culpable corporations. In aggravated scenarios, state and non-state actors might appeal to the Security Council to censure persistent violations. The author contends that universal jurisdiction, rather than a decorative appendage, should become the axis. The aim is to prevent offenders from evading justice by crossing borders. Every signatory could indict offenders where the territorial state fails to act. The decision in *Re Pinochet* (1999) confirmed that even a former head of state could be arrested and extradited once immunity had been lifted under the Convention against Torture. By analogy, a future ecocide treaty incorporating universal jurisdiction could remove safe havens for those responsible. In this design, the mechanism gains force not from a claim to absoluteness in the abstract, but from a treaty-based duty to act whenever an offender is found within a party's jurisdiction, which is a practical form that has worked in other regimes, such as the Convention against Torture and piracy prosecutions under UNCLOS.

6.1. From fale pili *to ecocide*

In Tuvaluan thought, the notion of *fale pili* refers to an ethic of kin-based reciprocity (Kitara *et al.* 2024). It signals a bond that invites those nearby to act as family. Relations in this register span social and spatial realms, and newcomers in Tuvaluan settings often

enter this circle and receive communal support. Beneath this idea sits *fenua* (Kahn 2025), which conveys the unity of land, people and ecological life. A tribunal grounded in these categories, the Fenua Court of Reciprocity, would present an alternative to the ICC. Its treaty would open with kinship rather than a catalogue of competences, and states would treat ecological welfare and human welfare as linked. Ecocide would cover unlawful or reckless conduct that drains key ecological functions, with dolus eventualis as the mental element. Gravity would rest on scale, duration and irreversibility, including reef collapse or species loss. Sacred places would receive direct protection. The statute would apply to natural persons and corporate bodies, with jurisdiction arising from the place of harm or the corporate seat, and (conditional) universal jurisdiction applying when no national forum is available. The Court would contain a presidency, trial chambers and a Chamber of Loto Fenua for cultural claims, aided by scientific advisers and a Reparations and Restoration Directorate. A Council of Kinship Delegates would guide appointments and budgets and gather state spokespeople, elders, women's groups, youth groups and ecological custodians. Individuals could bring cases, the Council could send referrals, and the Prosecutor could initiate inquiries, subject to judicial approval. Victims would include families and ecosystems, each with guardians who submit evidence on their behalf. Warrants would need reasonable grounds, interim orders clear and convincing evidence, and convictions proof beyond a reasonable doubt. Superior orders would not shield defendants, and necessity would only appear in rare circumstances, particularly in cases involving duties of repair (see Gabčíkovo-Nagymaros 1997). Chambers could impose shutdowns where harm continues, and judgments would blend penal and restorative measures. A Reparations and Restoration Fund would operate where restitution cannot be achieved. Trade measures could follow persistent non-compliance. The statute would treat ecosystems as legal persons, and the Chamber of Loto Fenua would class soil poisoning or the flooding of ancestral sites as direct violations. The Court would sit in the Pacific and convene hearings in affected places. Such a model would replace the Rome Statute structure and remove Security Council paralysis, allowing law to serve the bond between human and nonhuman communities.

7. Conclusion

Data from Ukraine and Tuvalu show how ecological ruin besets entire polities and undermines the foundations of legal order. Personal accounts construe environmental ruination as a crime that impugns any government or institution that refuses to tackle and redress it. This predicament bespeaks a gap that international law still leaves unaddressed, for the absence of an ecocide norm renders the gravest ecological injuries marginal. Outcomes reveal that Ukrainians and Tuvaluans mostly feel betrayed and hope for a combined legal and social "revolution" capable of recognising what they endure. Their message was clear. The world must change, and it must do it now.

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