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The Potential of Mediation in the Resolution of Crimes of Ecocide

Minor Dissertation presented for the Degree of LLM in Dispute Resolution

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15 September 2020

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WILDERNESS

Have we forgotten
that wilderness is not a place,
but a pattern of soul
where every tree, every bird and beast
is a soul maker?

Have we forgotten
that wilderness is not a place
but a moving feast of stars,
footprints, scales and beginnings?

Since when
did we become afraid of the night
and that only the bright stars count?

Or that our moon is not a moon
unless it is full?

By whose command
were the animals
through groping fingers,
one for each hand,
reduced to the big and little five?

Have we forgotten
that every creature is within us
carried by tides of Earthly blood
and that we named them?

Have we forgotten
that wilderness is not a place,
but a season
and that we are in its
final hour?

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Introduction

1. Preliminary Remarks

The minor dissertation examines the question of the potential of mediation in the resolution of crimes of ecocide. For this purpose, it is essential to examine the field of environmental mediation in detail and to make a link to the crime of ecocide.

Mediation is a structured, voluntary process for the constructive resolution of a conflict.¹ Environmental mediation is a form of mediation and often takes place in the area of interplay between environmental, political, economical and social issues.²

The word "ecocide" is a term that has become increasingly common in the recent past – whether in the daily newspaper, on television or in scientific literature. In brief, ecocide is an act of destruction or damage to the environment. For example, oil spills in the oceans, the deforestation of tropical forests or the drying up of lakes through excessive human extraction of water from its tributaries are referred to as ecocide or, more pointedly, as "ecological suicide". The term is a combination of the words ecosystem and genocide, the meaning of which is the systematic and complete destruction of an ecosystem, whereby the destruction is not necessarily intended.³

Although global climate conferences – in which respect the United Nations play a central role – have long been used to achieve the goal of enforcing the same rules on environmental protection worldwide, in the view of the accelerating cli-

¹ Oppermann, Bettina and Langer, Kerstin *Umweltmediation – In Theorie und Anwendung* 15 f.

² Ibid. at 11 ff.

³ See in detail Chapter 2, Title 1.

mate change and the associated challenge for ecosystems, the need to adapt and further develop international environmental law has become increasingly urgent.⁴

2. Research Questions

The main research question, which this minor dissertation attempts to answer is, whether there is a potential for mediation in relation to the resolution of conflicts concerning the crime of ecocide. Focusing on this question, the emphasis of this thesis results from the following subjects: First, the research topic is contextualised and the terminology and conceptuality of ecocide and environmental mediation is presented. This is followed by an analysis of the situation regarding mediation in the solution of ecocide crimes. Based on the findings, the potential of mediation for resolving crimes of ecocide is then discussed. The minor dissertation is therefore divided into five main chapters.

Within these chapters, the minor dissertation deals with several preliminary questions. These include questions such as: What is ecocide's legal nature? Is ecocide a constructive way to categorise certain environmental disputes? What are the legal grounds of environmental mediation? Is environmental mediation in any way special compared to conventional mediation? Are there any useful experiences to gain from ecocide mock trials? Which would be the premises to constructive resolutions of ecocide by mediation?

3. Research Method

In order to approach the main research question, the minor dissertation is based on the evaluation of relevant literature and the investigation of case studies, so called mock trials⁵. By doing so, the author hopes to gain insights into how ecocide can effectively be combated. Thus, protecting the environment, which is the very basis of life.

⁴ See <https://www.unenvironment.org/explore-topics/climate-change/what-we-do> (last accessed 13 September 2020).

⁵ Mock trials are only experimental and have no binding effect.

Chapter 1: Contextualisation of the Research Topic

1. The Subject of International Environmental Law

International law is a supranational legal system consisting of principles and rules by which relations between subjects of international law (usually states) are regulated on the basis of equality.⁶ Its sources applied by the community of nations are listed in Article 38 of the Statute of the International Court of Justice⁷ and consist of international conventions, international custom and general principles of law recognised by civilized nations. Furthermore, judicial decisions and the teachings of the most highly qualified publicists of the various nations may be applied as subsidiary means for the determination of rules of law.⁸

International environmental law as a part of the international law comprises itself numerous international treaties⁹, customs as well as decisions of international courts and tribunals.¹⁰ It is governed by various principles, whereby the principle of sustainable development is the comprehensive leitmotif.¹¹ The promotion of sustainable development is therefore an overarching objective. Probably the most popular definition can be found in the so-called Brundtland Report of 1987 – a report of the WCED (World Commission on Environment and Development) commissioned by the UN with the title "Our Common Future" – and reads as follows: "Sustainable development is development that meets the needs of the present without compromising the ability of the future generations to meet their own needs."¹²

⁶ <https://www.britannica.com/topic/international-law> (last accessed 13 September 2020).

⁷ The International Court of Justice was established by the Charter of the United Nations as the principal judicial organ of the United Nations. The Statute is available at <https://www.icj-cij.org/en/statute> (last accessed 19 June 2020).

⁸ Article 38 of the Statute of the International Court of Justice.

⁹ For example the 1979 Convention on the Conservation of Migratory Species of Wild Animals (available at https://www.cms.int/sites/default/files/instrument/CMS-text.en_.PDF [last accessed 13 September 2020]).

¹⁰ Beyerlin, Ulrich and Maruhn, Thilo *International Environmental Law* at 241 ff.

¹¹ *Ibid.* at 73 ff.

¹² Available at <http://www.un-documents.net/our-common-future.pdf> (last accessed 13 September 2020).

In addition to the principle of sustainable development, three other principles of international environmental law are to be highlighted. These are the principles of prevention and precaution as well as the polluter pays principle.¹³

The principle of prevention is inseparably linked to the prohibition on causing transboundary environmental harm.¹⁴ The so-called “no harm” concept was enshrined for the first time in Principle 21 of 1972 the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration). It declares that “States have [...] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.”¹⁵ The purpose of the prevention principle is to prevent hazards by prohibiting actions that are likely to cause environmental damage.¹⁶

In contrast to the principle of prevention, it is sufficient for the precautionary principle that an environmental hazard is “merely” possible, since precaution is not aimed at averting danger but is general risk management.¹⁷ In other words, the probability that the impacts of an action will occur is not certain. Environmental damage is possible, but not sufficiently likely.¹⁸ The precautionary principle can be found in numerous international treaties and other documents (“soft law”). At a global level, the core elements of the precautionary principle were described for the first time in Principle 15 of the 1992 Rio Declaration on Environment and Development, which is therefore of particular importance. It states that “[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for

¹³ Beyerlin and Marauhn op cit note 10 at 39 ff., 47 ff. and 57 ff.

¹⁴ Proelss, Alexander Internationales Umweltrecht 75.

¹⁵ Available at <http://www.un-documents.net/aconf48-14r1.pdf> (last accessed 19 June 2020).

¹⁶ Proelss op cit note 14 at 79 f.

¹⁷ Ibid. at 85.

¹⁸ Ibid.

postponing cost effective measures to prevent environmental degradation."¹⁹ It is clear that the precautionary principle legitimates protective measures against potential risks to the environment.²⁰ It also serves to implement the concept of sustainable development.²¹ Accordingly, if the perspective of future generations is understood as the core idea of sustainability, it is indispensable to take the precautionary principle into account for the concept of sustainable development itself. As with the concept of sustainable development, the perspective of future generations is the basic idea behind the precautionary principle. The precautionary principle can thus be seen as a strategic instrument for implementing the overarching objective of promoting sustainable development.²²

Contained in Principle 16 of the Rio Declaration the polluter pays principle states that "[n]ational authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution."²³ The purpose of the polluter pays principle is to pass on the costs incurred by third parties or the general public to those who cause them.²⁴ The polluters should therefore pay the social costs of their actions themselves.²⁵

Furthermore, the principle of protecting future generations is contained in several international declarations, for example the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)²⁶ or the 1992 Rio Declaration on Environment and Development²⁷.

¹⁹ Available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf (last accessed 19 June 2020).

²⁰ Birger, Ardnt *Das Vorsorgeprinzip im EU-Recht* at 124.

²¹ Epiney, Astrid and Scheyli, Martin *Strukturprinzipien des Umweltvölkerrechts* at 89.

²² *Ibid.* at 92 f.

²³ Available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf (last accessed 19 June 2020).

²⁴ Beyerlin and Maruhn, *op cite* note 10 at 58 f.

²⁵ *Ibid.*

²⁶ Available at <http://www.un-documents.net/aconf48-14r1.pdf> (last accessed 15 May 2020).

²⁷ Available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf (last accessed 19 June 2020).

The aforementioned principles represent the theoretical foundations of international environmental law, the aim of which is to achieve the highest possible level of environmental protection, for us as well as for future generations. It is evident that environmental destruction of any kind and in particular environmental destruction to the extent of an ecocide stands in sharp contradiction to these principles.

Environmental criminal law serves to protect the environment and thus supports compliance with these principles.²⁸ However, only in certain areas such as hazardous waste, illegal fishing, logging or wildlife trade exist specific penal provisions.²⁹ The committing of an ecocide, as described below, is not (yet) established as a legal provision in international environmental criminal law. It should, though, be established in international environmental criminal law in order to improve the protection of the environment, primarily through the preventive effect of the criminal provision.

2. Overview of Existing Dispute Settlement Mechanisms in International Environmental Law

The existing dispute settlement mechanisms in international environmental law are the same as in other areas of international law.³⁰ These are the means of dispute settlement referred to in Article 33 (1) of the UN Charter, namely negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The most common methods of dispute settlement listed in international environmental agreements are – as Gerhard Loibl has found through his study – negotiations and consultations, conciliation as well as arbitration and judicial settlement.³¹ More

²⁸ Beyerlin and Maruhn, op cit note 10 at 359.

²⁹ A list of the conventions regarding international environmental law is available at https://en.wikipedia.org/wiki/List_of_international_environmental_agreements (last accessed 13 September 2020).

³⁰ Beyerlin and Maruhn, op cit note 10 at 377 ff.

³¹ Loibl, Gerhard 'Dispute Avoidance and Dispute Settlement in International Environmental Law – Some Reflections on Recent Developments' in Organisation of American States – Comité de Derecho Internacional (ed) *Curso de Derecho Internacional* (1997) Volume XXIV 113 f.

than a decade later, many multilateral environmental agreements provide for parties who have been unable to resolve their dispute through negotiation or consultation to seek the mediation or good offices of a third party.³²

³² Beyerlin and Maruhn, op cit note 10 at 379.

Chapter 2: Terminology and Conceptuality of Ecocide

1. Definition

As mentioned in the introduction, the term “ecocide” is a combination of the words ecosystem and genocide. From an etymological point of view, the word fragment “eco” stems from the Greek word “oikos” for “house” or “home” and the other fragment “cide” can be traced back to the Latin verbum “caedere” meaning “to destroy” or “to kill”. Hence, ecocide describes the destruction of the natural environment. The term became known after the Second World War, especially after the Vietnam War.³³

Several scholars have elaborated legal definitions of the term “ecocide”. Among them is Lynn Berat, who uses the term “geocide” as the environmental counterpart of the crime of genocide.³⁴ Her definition dates from the year 1993 and reads as follows, “Geocide is the intentional destruction, in whole or in part, of any of portion of the global ecosystem, via killing members of a species; causing serious bodily or mental harm to members of the species; inflicting on the species conditions of life that bring about its physical destruction in whole or in part; and imposing measures that prevent births within the group or lead to birth defects.”³⁵

With respect to the crime of ecocide, an important contribution to the scientific research was made by Mark Allan Gray, who states that “[e]cocide is identified on the basis of the deliberate or negligent violation of key state and human rights and according to the following criteria: (1) serious, and extensive or lasting, ecological damage, (2) international consequences, and (3) waste.”³⁶

³³ Meheta, Sailesh and Merz, Prisca ‘Ecocide – a new crime against peace?’ 4. Comprehensively regarding the etymology of ecocide: Zierler, David *The Invention of Ecocide* 14 ff.

³⁴ Berat, Lynn ‘Defending the Right to a Healthy Environment – Toward a Crime of Geocide in International Law’ 328.

³⁵ Ibid. at 343.

³⁶ Gray, Mark Allan ‘The International Crime of Ecocide’ 216.

In April 2010, Polly Higgins, a Scottish advocate, submitted to the United Nations International Law Commission a proposal for an international law of ecocide as an amendment to the Rome Statute in order to include ecocide as the fifth international crime against peace.³⁷ She defines ecocide as “the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished”.³⁸ With her definition, Higgins describes two different types of ecocide, namely “human caused and naturally occurring ecocide”.³⁹ Furthermore, regarding environmental crime, Higgins, Short & South distinguish primary and secondary forms of environmental harm and crime.⁴⁰ The former result directly from the destruction of natural resources through human activity.⁴¹ The latter are related to this destruction, such as efforts to regulate or prevent it.⁴² For illustration the authors mention four categories of crimes or harms, namely air pollution, water pollution, deforestation and spoiling of the land as well as crimes/harms against non-human species.⁴³ Of course there are countless other examples like overfishing, mining and tar sands extraction to name just a few more.

Worth mentioning is a recent definition by Laurent Neyret, where he provides a list of acts and sets out that “[e]cocide means any of [these] intentional acts when they threaten the security of the planet and are committed as part of a widespread or systematic action”.⁴⁴

³⁷ The proposition is published in Higgins, Polly *Eradicating Ecocide* Chapters 5 & 6.

³⁸ Higgins, Polly, Short, Damien and South, Nigel ‘Protecting the Planet – A Proposal for a Law of Ecocide’ 257; Higgins op cit note 37 at 10.

³⁹ Higgins, Short and South op cit note 38 at 257.

⁴⁰ Ibid. at 252.

⁴¹ Ibid.

⁴² Ibid. See more detailed below.

⁴³ Higgins, Short and South op cit note 38 at 252 ff. See as well Schwegler, Vanessa ‘The Disposable Nature – The Case of Ecocide and Corporate Accountability’ 76 ff.

⁴⁴ Neyret, Laurent *Des écocrimes à l’écocide – le droit pénal au secours de l’environnement* 288; Lay, Bronwyn, Neyret, Laurent, Short, Damien, Baumgartner, Michael Urs and Oposa, Antonio A. Jr ‘Timely and Necessary – Ecocide Law as Urgent and Emerging’ 434 f.

2. Historical Summary

The histories of genocide and ecocide are closely interrelated, although genocide refers to social groups and ecocide has its focus on the dependence of humans on ecosystems.⁴⁵ In 1933 Raphael Lemkin, a Polish jurist, strived for an inclusion of “cultural genocide” in the United Nations Convention on Prevention and Punishment of the Crime of Genocide by defining it as “the deliberate destruction of a nation or ethnic group” “by undermining its way of life”.⁴⁶ Ecocide often not only causes environmental damage, but also cultural damage and destruction.⁴⁷ Similar to genocide, ecocide can have direct and indirect effects.⁴⁸ It can be the destruction of a territory as well as the undermining of a way of life.⁴⁹ However, cultural genocide was ultimately not included in the Genocide Convention of 1948.

First publicly used was the term “ecocide” by a biologist Professor at Yale University, Arthur Galston, in relation with his research on herbicides.⁵⁰ At the Conference on War and National Responsibility in Washington in 1970 he made a proposition of a new international agreement to ban ecocide.⁵¹ After the Vietnam War in which herbicidal warfare had been used, a movement developed that stood up for the recognition of ecocide as an international crime.⁵² Since the beginning of this movement jurists advocated for the inclusion of ecocide in the Rome Statute.⁵³ At the Stockholm Conference for the Human Environment in 1972, the former Swedish

⁴⁵ Higgins, Short and South op cit note 38 at 258; Lay et al op cit note 44 at 437.

⁴⁶ Higgins, Short and South op cit note 38 at 258 with reference to R Lemkin *Axis rule in occupied Europe: laws of occupation – analysis of government – proposals for redress* (Washington 1944) at 79–95.

⁴⁷ Higgins, Short and South op cit note 38 at 258.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Gauger, Anja, Rabatel-Fernel, Mai Pouye, Kulbicki, Louise, Short, Damien and Higgins, Polly *Ecocide is the missing 5th Crime Against Peace* 1.

⁵¹ New York Times, 26 February 1970, quoted in Gauger et al op cit note 50 at 1; see as well Higgins, Short and South op cit note 38 at 256; Lay et al op cit note 44 at 433.

⁵² Lay et al op cit note 44 at 433. More detailed on the efforts in connection with ecocide at that time: http://eradicatingecocide.com/the-law/history/#_ftnref7 (last accessed 15 May 2020).

⁵³ Lay et al op cit note 44 at 433.

Prime Minister, Olof Palme, called the War in Vietnam an “ecocide”.⁵⁴ Thereupon “The Folkets Forum” (The People’s Forum) initiated a working group on genocide and ecocide, of which Richard Falk was among others part of.⁵⁵ In 1973, Falk proposed an International Convention on the Crime of Ecocide, which was part of the evaluation process on the effectiveness of the 1948 United Nations Convention on Prevention and Punishment of the Crime of Genocide.⁵⁶ Falk’s proposal of an International Convention on the Crime of Ecocide, which aimed at amending the Genocide Convention by introducing a law against ecocide, insistently states in its preamble “that we are living in a period of increasing danger of ecological collapse” and “that man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace”.⁵⁷ It was proposed to include both direct ecological crimes and ancillary cultural ecocide.⁵⁸ However, the convention was not pursued any further.⁵⁹

Whereas nowadays many different legal definitions of the term “ecocide” exist, there was no legal definition at that time.⁶⁰ The meaning of the term was however already well-understood in 1972 by John Fried. He described that “it denotes various measures of devastation and destruction which have in common that they aim at damaging or destroying the ecology of geographic areas to the detriment of human life, animal life, and plant life”.⁶¹

The draft Code of Crimes Against Peace and Security of Mankind (precursor to the Rome Statute, in which the International Criminal Court was established) and the draft of the Rome Statute itself contained ecocide as a crime against peace.

⁵⁴ Björk, Tord *The emergence of popular participation in world politics – United Nations Conference on Human Environment 1972* Department of Political Science, University of Stockholm (Stockholm 1996) 15 (available at <http://www.folkroelser.org/johannesburg/stockholm72.pdf> [last accessed 15 May 2020]); Gauger et al op cit note 50 at 3.

⁵⁵ Björk op cit note 54 at 15; Gauger et al op cit note 50 at 4.

⁵⁶ Higgins, Short and South op cit note 38 at 259.

⁵⁷ Falk, Richard A. ‘Environmental Warfare and Ecocide – Facts, Appraisal and Proposals’ 21.

⁵⁸ Higgins, Short and South op cit note 38 at 259.

⁵⁹ Gauger et al op cit note 50 at 9.

⁶⁰ Ibid. at 1; Lay et al op cit note 44 at 433.

⁶¹ Quoted in Gauger et al op cit note 50 at 1 f. with reference to Fried, John H. E. ‘War by Ecocide’ in Marek (ed) *Bulletin of Peace Proposals* (1973) Volume 1.

Hence, ecocide was meant to be included in the final version of the Rome Statute alongside genocide until its obscure last minute removal in 1996.⁶² The key rapporteur at that time, Christian Tomuschat said in this respect, “One cannot escape the impression that nuclear arms played a decisive role in the minds of many of those who opted for the final text which now has been emasculated to such an extent that its conditions of applicability will almost never be met even after humankind would have gone through disasters of the most atrocious kind as a consequence of conscious action by persons who were completely aware of the fatal consequences their decisions would entail.”⁶³

In the current Rome Statute only Article 8 (2)(b)(iv), which sets out war crimes in more detail, refers to the environmental damage by saying that “war crime” means *inter alia* “serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely [...] intentionally launching an attack in the knowledge that such attack will cause [...] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”. Such a widespread, long-term and severe damage is regarded as almost impossible to ever proof.⁶⁴ Not only was the crime of ecocide removed from the draft and environment damage just mentioned in a war context, but also has the provision been void of its substantial content by this wording.⁶⁵

Since its foundation, the International Criminal Court (ICC) has been able to judge four forms of crimes against peace (genocide, war crimes, crimes against humanity and crimes of aggression), but has not yet recognised environmental dam-

⁶² In more detail: Higgins, Short and South op cit note 38 at 259 ff.; Gauger et al op cit note 50 at 2 f. & 10 ff.; Gray op cit note 36 at 262 f.; Garin, Manon, Glasenhardt, Blanka, Houston Robert and Pham, Jason *Report on the Ecocide Project* 8 ff. (available at https://www.sciencespo.fr/ecole-de-droit/sites/sciencespo.fr.ecole-de-droit/files/rapport_ecocide_project.pdf [last accessed 15 May 2020]).

⁶³ Tomuschat, Christian ‘Crimes Against the Environment’ 243.

⁶⁴ Gauger et al op cit note 50 at 3.

⁶⁵ The provision is an adaption of the 1977 Environmental Modification Convention’s definition of a crime against the environment, except that “widespread, long-term or severe” was changed into “widespread, long-term and severe”. See Gauger et al op cit note 50 at 3 & 12.

age as a conflict factor threatening peace.⁶⁶ Polly Higgins initiated a movement called "Stop Ecocide" to make up for this deficiency by attempting to condemn people involved in a crime known as ecocide.⁶⁷ In April 2010, the movement launched the initiative to make environmental crime the fifth crime against peace.⁶⁸ The movement aimed to broaden the jurisdiction of the ICC in order to enable it to force multinational companies and states to reduce their emissions and pollution levels below the permitted levels.

Moreover in January 2013 the European citizens' movement "End Ecocide" launched an initiative to request the European Union (EU) to adapt its legislation to the ban on ecocide by introducing a Directive on Ecocide.⁶⁹ The initiative was aimed at individuals who hold executive positions (such as heads of government and CEOs) and whose decisions and actions could harm the environment.⁷⁰ The draft "Ecocide Directive" thus aimed to ensure that the responsibility of natural and not only legal persons was recognised according to the principle of hierarchical superiority, irrespective of whether the acts were committed intentionally or unintentionally. It would eliminate all impunity. The initiative also aimed to hold accomplices such as financial institutions or consulting firms accountable for having made ecocide possible by advising or subsidising dangerous activities.⁷¹

However, an adaption of the European law has not yet happened. Although a honourable number of signatures have been collected for the initiative until January 2014, this was not enough to allow the European Commission to examine the initiative.⁷² Since not enough signatures were collected, a petition was handed in in the

⁶⁶ Gauger et al op cit note 50 at 5.

⁶⁷ <https://www.stopecocide.earth> (last accessed 13 September 2020).

⁶⁸ Higgins, Short and South op cit note xx at 257.

⁶⁹ Text available at <https://ecocidelaw.com/the-law/ecocide-directive/> (last accessed 13 September 2020).

⁷⁰ Article 5 of the draft „Ecocide Directive“ (available at <https://ecocidelaw.com/the-law/ecocide-directive/> [last accessed 13 September 2020]).

⁷¹ https://www.europarl.europa.eu/meetdocs/2014_2019/documents/peti/dv/eciendecocidein-europe_/eciendecocideineurope_en.pdf (last accessed 13 September 2020).

⁷² Required are one million signatures. See https://ec.europa.eu/info/about-european-commission/get-involved/european-citizens-initiative_en (last accessed 13 September 2020).

European Parliament in February 2015, in which over 185'000 citizens supported the introduction of a law of ecocide prevention.⁷³

Although the initiative has not received sufficient support, its achievement may not be underestimated, as it can be assumed that the initiative has spread the ecocide concept widely and could raise awareness of the needs of international justice on environmental issues. Movements like these contribute to the inspiration of other movements fighting for more climate justice in Europe and around the world.

3. Legal Grounds and Legal Nature

3.1. Preliminary Remarks

Although the crime of ecocide is not enshrined on an international level, certain countries have it included in their domestic legislation.⁷⁴ Countries that have already recognised the rights of nature, ecosystems and animals are Bolivia and Ecuador.⁷⁵ In 2008, Ecuador dedicated an entire chapter of its Constitution to the rights of Mother Earth (Pachamama)⁷⁶ and Bolivia enacted its Law of the Rights of Mother Earth⁷⁷ in 2010.⁷⁸

On the international stage, the UNECE⁷⁹ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Mat-

⁷³ https://www.europarl.europa.eu/meetdocs/2014_2019/documents/peti/dv/endecocidpetitionforconsiderationbyep_/endecocidpetitionforconsiderationbyep_en.pdf (last accessed 15 May 2020).

⁷⁴ Vietnam, Russia, Armenia, Belarus, Republic of Moldova, Ukraine, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan. See Gauger et al op cit note 50 at 12 f; Meheta and Merz op cit note 33 at 5.

⁷⁵ <http://www.environmentandsociety.org/arcadia/constitution-republic-ecuador-pachamama-has-rights> (last accessed 13 September 2020).

⁷⁶ Constitución del Ecuador, Capítulo séptimo: Derechos de la naturaleza, available at <http://www.wipo.int/edocs/lexdocs/laws/es/ec/ec030es.pdf> (last accessed 15 May 2020).

⁷⁷ Ley de Derechos de La Madre Tierra, available at <http://www.bdlaw.com/assets/html-documents/Bolivia%20Law%2071-2010.pdf> (last accessed 15 May 2020).

⁷⁸ Meheta and Merz op cit note 33 at 5.

⁷⁹ United Nations Economic Commission for Europe.

ters (Aarhus Convention)⁸⁰ of 1998 with its 47 parties (including the European Union) plays an important role. The Convention allows the public to conduct legal proceedings directly in the name of nature.⁸¹

3.2. International Criminal Law

Ecocide belongs to the family of environmental crimes (so called “eco-crimes” like wild animal traffic or illegal logging), but has not (yet) been incorporated into international environmental criminal law.⁸² From an eco-centric point of view,⁸³ environmental crimes can be broadly defined as illegal acts that harm the environment and are liable for prosecution.⁸⁴ A definition from an anthropocentric perspective⁸⁵ also mentions impairments to human health.⁸⁶ Two categories are distinguished in the doctrine: primary and secondary green crimes. Whereas the former cause direct environmental damage like air and water pollution, deforestation and crimes against animals, the latter include “symbiotic green crime, meaning for instance violence by the state against green pressure groups as well as crimes of fraud committed by corporations in the attempt of avoiding environmental legislation.⁸⁷ These secondary or symbiotic green crimes may result from the exploitation of conditions that follow environmental damage. Such include, for example, illegal markets for food, medicines, water, but also when states violate their own regulations.⁸⁸

⁸⁰ Available at <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> (last accessed 15 May 2020).

⁸¹ Meheta and Merz op cit note 33 at 6. In order to enforce the rights guaranteed by the Aarhus Convention, numerous legal proceedings have already been conducted, as can be seen from the compilation of the Case Law by the UNECE: https://www.unece.org/fileadmin/DAM/env/pp/-compliance/CC_Publication/ACCC_Case_Law_3rd_edition_eng.pdf (last accessed 13 September 2020).

⁸² Lay et al op cit note 44 at 439.

⁸³ This view is based on the environment as a separate legal good of common interest.

⁸⁴ Hall, Matthew *Exploring Green Crime – Introducing the Legal, Social & Criminological Contexts of Environmental Harm* 58.

⁸⁵ This perspective considers humans and their existence as the most important and central fact in the universe (see <https://dictionary.cambridge.org> [last accessed 15 May 2020]).

⁸⁶ Comprehensively Hall op cit note 84 at 58 ff.

⁸⁷ Ibid. at 11 f.

⁸⁸ Higgins, Short and South op cit note 38 at 252.

There is an international legal system designed to combat environmental crime, but it is limited to transboundary harm in connection with movement of hazardous waste, illegal fishing, logging and wildlife trade.⁸⁹ A large part of environmental protection therefore takes place at the national level, whereby eco-crimes are not or not efficiently pursued in countries with poor environmental legislation and weak enforcement mechanisms.⁹⁰

As mentioned above, Article 8 (2)(b)(iv) of the Rome Statute regarding war crimes is all that remains from the intention to enshrine ecocide as an autonomous international crime. This regulation is so weak that it has never been used to prosecute anyone.⁹¹ Nevertheless one can argue that ecocide can be considered at least a war crime.⁹²

3.3. Human Rights

A clean and healthy environment is essential for human life. Environmental degradation is often associated with the violation of human rights. For example, deforestation can systematically undermine the rights of local populations. The protection of the environment is therefore interrelated with the protection of human rights.⁹³

The development in human rights emphasises the duty to protect the environment as a prerequisite for the realisation of human rights. The right to a healthy environment is not (yet) a *jus cogens* norm,⁹⁴ but at least partly considered as cus-

⁸⁹ Lay et al op cit note 44 at 438; Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal of 1989, available at <http://archive.basel.int/text/con-e-rev.pdf> (last accessed 13 May 2020); UN Fish Stocks Agreement of 2001, available at https://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm (last accessed 13 May 2020); Convention on International Trade and in Endangered Species of Wild Flora and Fauna of 1983, available at <https://www.cites.org/sites/default/files/eng/disc/CITES-Convention-EN.pdf> (last accessed 13 May 2020).

⁹⁰ Ibid. at 439.

⁹¹ Meheta and Merz op cit note 33 at 4.

⁹² Schwegler op cit note 43 at 76.

⁹³ Comprehensively Lytton, Christopher H. 'Environmental Human Rights – Emerging Trends in International Law and Ecocide' 74 ff.

⁹⁴ Lay et al op cit note 44 at 442; Lytton op cit note 93 at 84.

tomary international law, as a considerable number of states have recognised corresponding rights at constitutional level.⁹⁵ Although efforts are being made to extend human rights in relation to the environment,⁹⁶ until now such provisions are only enshrined in international soft law instruments.⁹⁷ A quite recent and important example is the UN Resolution 25/21 on Human Rights and the Environment of 2014,⁹⁸ which stresses the importance of a safe, clean, healthy and sustainable environment.

A major step forward in recognising the importance of a healthy environment for humanity took place at the 1972 UN Conference on the Environment in Stockholm. The Stockholm Declaration states in its preamble that the environment is “essential to [human’s] well-being and to the enjoyment of basic human rights the right to life itself” and that “[t]he protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world”.⁹⁹ The first principle sets out that “[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”.¹⁰⁰

Another important development concerning human rights and the environment is the 1992 Rio Declaration on Environment and Development¹⁰¹. Principle 1 recognises that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” It is only mentioned for the sake of clarity that these declarations are not binding.

⁹⁵ Berat op cit note 34 at 338.

⁹⁶ Rajamani, Lavanya ‘The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change’ 407 ff.

⁹⁷ Lay et al op cit note 44 at 442; Rajamani op cit note 96 at 407.

⁹⁸ Available at [https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/136/17/PDF/G1413617.-pdf?OpenElement](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/136/17/PDF/G1413617.pdf?OpenElement) (last accessed 15 May 2020).

⁹⁹ Preamble of the Stockholm Declaration, Section 1 and 2.

¹⁰⁰ Principle 1 of the Stockholm Declaration.

¹⁰¹ Available at http://www.unesco.org/education/pdf/RIO_E.PDF (last accessed 15 May 2020).

However, in interpreting existing binding human rights, protective content exists. For example, there are certain environmental conditions that must be satisfied in order to guarantee the right to an adequate standard of living, including adequate food¹⁰² or the right to the enjoyment of the highest attainable standard of physical and mental health.¹⁰³

Timothy Schorn aptly points out that a basic environmental human right seems “necessary in order to make all other human rights truly meaningful”.¹⁰⁴ Or in other words, it forms a crucial foundation for the realisation of all other human rights.¹⁰⁵

3.4. Others

Besides the possible basis for an ecocide law particularly in international criminal law, younger authors base their arguments in the fight against ecocide on the rights of nature and earth law.¹⁰⁶ The People’s Agreement on Climate Change and the Rights of Mother Earth, the Indigenous People’s Declaration and the Universal Declaration of the Rights of Mother Earth – all documents of the World People’s Conference on Climate Change and the Rights of Mother Earth in Cochabamba, Bolivia in 2010 – are notable examples.¹⁰⁷

Although not binding either, but still worth mentioning is furthermore the 2007 UN Declaration on the Rights of Indigenous Peoples¹⁰⁸, which enshrines in its

¹⁰² Article 11 para. 1 UN Covenant I (International Covenant on Economic, Social and Cultural Rights [ICESCR] of 1967; available at <http://2covenants.ohchr.org/downloads/ICCPR.pdf> [last accessed 15 May 2020]) and Article 24 para. 2 c) and e) as well as Article 27 para. 3 UN Convention on the Rights of the Child (available at <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> [last accessed 15 May 2020]).

¹⁰³ Article 12 para. 1 UN Covenant I; Article 24 para. 1 and 25 UN Convention on the Rights of the Child.

¹⁰⁴ Schorn, Timothy J. ‘Drinkable Water and Breatheable Air – A Livable Environment as a Human Right’ 142.

¹⁰⁵ Gray op cit note 36 at 257.

¹⁰⁶ Lay et al op cit note 44 at 437 f.

¹⁰⁷ Available at <https://readingfromtheleft.com/PDF/CochabambaDocuments.pdf> (last accessed 15 May 2020).

¹⁰⁸ Available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last accessed 15 May 2020).

Article 29 (1) the right of indigenous peoples to “the conservation and protection of the environment and productive capacity of their lands or territories and resources”.

4. Reflections on the Legal Establishment of Ecocide at International Level

A major deficiency in the present situation is that many environmentally harmful activities are neither criminalised at national nor international level, not to mention that ecocide is not an internationally recognised crime. And even if states or the international community make certain polluting activities punishable, there may often be problems with the enforcement, as this is a well-known weakness at international level. The urgent need to protect the environment requires the integration of appropriate and enforceable provisions, particularly in international criminal law.¹⁰⁹

The international community has only begun to pay attention to the link between environmental crime and organised crime as well as related corruption and money laundering.¹¹⁰ In this respect, not only are there problems in the enforcement of environmental law, but there are already difficulties in the discovery and investigation of organised environmental crime.¹¹¹

Ecocide is not (yet) recognised as an international crime on its own, but by many authors considered as such.¹¹² According to them the criminalisation of ecocide will eventually be necessary in the interest of the survival of mankind.¹¹³ Mark Allan Gray for instance examines comprehensively the extent to which ecocide could be considered an international crime and ultimately affirms a duty of care

¹⁰⁹ Vervaele, John A. E. and van Uhm, Daan P. Criminal Justice and Environmental Crime – how to tackle organized crime and ecocide? 1.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Gray op cit note 36 at 266 & 270; Meheta and Merz op cit note 33 at 7.

¹¹³ Gray op cit note 36 at 270.

based on international environmental law and human rights law.¹¹⁴ He argues that all the criteria of an international crime of ecocide, namely serious and either extensive or lasting damage, international consequences and waste, can already be regarded as established principles of international law.¹¹⁵

The question of which activities are referred to as ecocide is a pivotal one. It will be necessary to determine which types and/or levels of environmental degradation are unacceptable.¹¹⁶ With reference to the definition of Gray, the required seriousness of an environmental damage can result, for example, either from the extent of the damage and the number of people and species affected or from the impact on people in terms of social and economic costs.¹¹⁷ An exhaustive list of activities, which would constitute an ecocide, would limit the concept accordingly and would mean that not all possible environmentally harmful activities would be covered by the definition.¹¹⁸ Nevertheless it seems important to provide precise definitions in order to determine as accurately as possible in which cases the prerequisites for an ecocide are met. This is where the common legal dilemma between predictability and flexibility is encountered. The tension between legal certainty and justice in individual cases often poses a difficult, if not impossible task to solve. Taking a fair decision in an individual case may come into conflict with the demand for legal certainty. For precise legal regulations can make it difficult, if not entirely impossible, to ensure, that individual circumstances are adequately taken into account. A wholly flexible law allows great judicial discretion, but is at the same time unpredictable and a contradiction in terms. On the other hand legal certainty based on the clarity, consistency, predictability and reliability of legal norms plays an important role in a constitutional state. However, it may not do justice in the individual case due to its lack of flexibility. The only way to tackle the dilemma is finding a balance between flexibility to ensure a case-by-case justice and a certain degree of

¹¹⁴ Ibid. at 254 & 270.

¹¹⁵ Ibid. at 217 f.

¹¹⁶ Lytton op cit note 93 at 81.

¹¹⁷ Gray op cit note 36 at 216; Lytton op cit note 93 at 82.

¹¹⁸ Lytton op cit note 93 at 82.

predictability in order to control equity and preserve legal certainty at least to a certain extent.

According to Higgins, to successfully introduce an international ecocide law, an amendment to the Rome Statute is necessary. Such law could contain duties and responsibilities for governments as well as for major economic players and have significant impact on economic and governmental activities.¹¹⁹ Business enterprises play an important role in social and economic development, especially by creating jobs and trading opportunities. However, companies may also have effects that are not positive. They often neglect human and ecological aspects because they operate solely for profit. Multinational corporations in particular have great power and, as a result, a great influence on the environment.¹²⁰

An ecocide law proposed by many authors is intended to be applicable in war-time as well as peacetime.¹²¹ Higgins, Short & South set out that “[b]y creating a crime of Ecocide, no longer will it be lawful to commit daily damage, destruction or loss of ecosystems of the kind already criminalised during time of war”.¹²² It aims at prosecuting individuals rather than states in order to include as well non-governmental activities.¹²³

The crime is meant to be of strict liability, which significantly alleviates the problem of proof of knowledge and intent. The act or omission can be deliberate, reckless or negligent.¹²⁴ Liability would even arise if environmental damage was not intended but is only a side effect of industrial activity. This is of paramount importance, as most cases of corporate ecocide are not intended. If intent or knowledge were required, many companies would hide behind the defence that they did not know what was or could be happening.¹²⁵ According to Higgins, Short &

¹¹⁹ Higgins, Short and South op cit note 38 at 257.

¹²⁰ Schwegler op cit note 43 at 81, with examples linked to the different types of ecocide (p. 81 ff.).

¹²¹ See among others Lay et al op cit note 44 at 435; Higgins, Short and South op cit note 38 at 257.

¹²² Higgins, Short and South op cit note 38 at 257.

¹²³ Lay et al op cit note 44 at 435.

¹²⁴ Gray op cit note 36 at 218.

¹²⁵ Higgins, Short and South op cit note 38 at 262.

South natural environmental degradation, whether or not related to climate change, shall be the responsibility of governments. Human-caused environmental degradation in turn shall be the responsibility of both governments and companies.¹²⁶ Moreover, strict liability also means accountability.¹²⁷ In addition, according to Vanessa Schwegler the concept of penalty and culpability needs to be addressed.¹²⁸

An important point in the context of a legal implementation of the crime of ecocide is the application of the precautionary principle. In order to protect the environment effectively, people must be encouraged to make responsible decisions and to do so preventively, that is, before an ecocide is a fact. As Polly Higgins stated in an interview with the British newspaper “The Guardian”, the legal anchoring of a crime of ecocide could force governments to change incentive structures for companies by redirecting fossil fuel subsidies to clean energy sources.¹²⁹ In this way, the dirty energy companies that are destroying the environment today could be transformed into the clean energy companies of tomorrow.¹³⁰ An ecocide law would impose a legal duty of care on all nations to act preventively to combat the risk of ecocide. The law on prevention of ecocide would therefore focus on potentially devastating consequences of such activities.¹³¹ It would stop the destruction at its source and address the cause of destruction by establishing a duty for persons with superior responsibility, CEO’s and directors of businesses, governmental actors, financiers and investors to prevent mass damage and destruction of ecosystems from the outset.¹³² This would keep the main polluters from continuing to cause environmental damage. The crime of ecocide could become an effective precautionary measure.

¹²⁶ Ibid. at 257. See as well Gray op cit note 36 at 219 ff.

¹²⁷ Higgins, Short and South op cit note 38 at 262.

¹²⁸ Schwegler op cit note 43 at 85 f.

¹²⁹ Online Article with the title „Test trial convicts fossil fuel bosses of ‚ecocide‘“ (available at <https://www.theguardian.com/environment/damian-carrington-blog/2011/sep/29/ecocide-oil-criminal-court> (last accessed 15 May 2020)).

¹³⁰ <https://www.theguardian.com/environment/damian-carrington-blog/2011/sep/29/ecocide-oil-criminal-court> (last accessed 15 May 2020).

¹³¹ Meheta and Merz op cit note 33 at 5.

¹³² See www.eradicatingecocide.com/the-law/factsheet (last accessed 15 May 2020).

Instead of "the polluter pays" principle¹³³, that only takes effect if the polluter is caught, the principle "the polluter does not pollute"¹³⁴ would be applicable. Thus, the focus shifts from the protection of interests of the few who have property to the many who are threatened by suffering.¹³⁵ Besides, as Higgins points out, if one starts with the source of the problem, namely where the ecocide happens and one prevents it, it will eventually be the much cheaper solution. It is always way more expensive to fix something after it has happened. Therefore, the preventive approach of the law of ecocide is not only conducive for the people and our planet, but also for the economy.¹³⁶

Regarding the creation of a duty of care, of course, companies will need a transitional period during which no criminal prosecution will take place, while they will change their practices from "the polluter pays" principle to the principle "the polluter does not pollute". The financing of dangerous industrial activities will be discontinued. During the transitional period, bridging loans are needed to help companies to take back certain illegal activities without the risk of prosecution.¹³⁷

The implementation of an ecocide law could also be linked to the question of an International Environmental Court. The added value of specialised courts lies in the availability of the expertise required in the most complex and technical matters.¹³⁸

Whether an ecocide regulation should be introduced as an amendment to the Rome Statute or whether it makes more sense to establish a separate international convention remains to be evaluated. The fact is that the Rome Statute, with its 124 signatory states, has considerable power, which, however, is tempered by the fact

¹³³ The principle requires that the polluter should bear the cost of pollution (Principle 16 of the 1992 Rio Declaration).

¹³⁴ The precautionary principle is embodied in Article 3 of the 1992 UN Framework Convention on Climate Change.

¹³⁵ Higgins, Short and South op cit note 38 at 262 f.

¹³⁶ <https://www.theguardian.com/law/2012/jun/04/ecocide-earth-business-extract> (last accessed 15 May 2020).

¹³⁷ <https://www.theguardian.com/law/2012/jun/04/ecocide-earth-business-extract> (last accessed 15 May 2020).

¹³⁸ Higgins, Short and South op cit note 38 at 263.

that the USA has signed but not ratified the Rome Statute, while China – probably the biggest polluter – has neither signed nor ratified the treaty.¹³⁹ In addition, the International Court of Justice (ICC) does currently not have much room for restitution, injunctive powers or the possibility of determining civil liability. This could be tackled by a separate convention, which could enshrine criminal and civil liability as well as establish a specialised court. However, for an autonomous convention to be effective it would first have to be generally recognised, which could prove very difficult.

5. Concluding Remarks

To conclude it can be said, that in order to protect the environment effectively, it seems indispensable to take a more eco-centric approach and to enshrine an ecocide provision in international criminal law¹⁴⁰ – in view of recognition and enforceability, preferably first of all in the Rome Statute.

In the opinion of the supporters, the consequences of an ecocide law would be enormous. Renewable technologies could be given priority by law, dangerous industrial activities could be banned and at the same time a legal duty of care would be imposed. In this way, investment in clean technologies and an environmentally friendly economy could be encouraged. The potential of the law to combat environmental degradation and promote a greener economy must therefore not be underestimated. Not only can international criminal law be used as an instrument to punish actions that are already harmful to the environment. The law could also have a preventive effect by requiring the introduction of environmentally friendly and renewable technologies and prohibiting dangerous industrial activities.¹⁴¹ Such a law would therefore make it possible to introduce a comprehensive and effective approach.

¹³⁹ https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last accessed 13 September 2020).

¹⁴⁰ Vervaele and van Uhm op cit note 109 at 2.

¹⁴¹ Higgins, Short and South op cit note 38 at 263.

The persistence of efforts to introduce an ecocide law can be regarded as a decisive factor in the fight against climate change. To bind states as well as companies and private individuals legally by establishing a strict liability can be a major step towards preventing environmental degradation.

Chapter 3: Terminology and Conceptuality of Environmental Mediation

1. Definition and Historical Summary

Mediation is an alternative dispute resolution procedure.¹⁴² Alternative dispute resolution includes both adjudicatory proceedings, such as arbitration, in which a third party makes a binding decision, and non-adjudicatory proceedings, in which the parties – with varying degrees of support from third parties – settle the dispute amicably. This last category includes among others mediation.¹⁴³

The term “mediation” originates from the Latin language.¹⁴⁴ The practice of mediation for dispute resolution has a long history in almost all cultures.¹⁴⁵ The conflict resolution practices of many different peoples and cultures show the basic principles of mediation and were already applied in antiquity: the search for consensus with all parties to the conflict, the involvement of impartial mediating third parties, the informal discussion of problems before they end in formal or judicial disputes.¹⁴⁶

Mediation has become formally institutionalised in the beginning of the twentieth century and has first grown primarily and rapidly in the USA and Canada, where mediation had been applied particularly in the resolution of labour conflicts – hence commercial disputes.¹⁴⁷ Mediation as a means of resolving environmental conflicts was demonstrably used in the USA in the beginning of the 1970’s.¹⁴⁸ In 1973 mediation as an environment dispute settlement procedure was launched by

¹⁴² Harrison, John ‘Environmental Mediation – The Ethical and Constitutional Dimension’ 80.

¹⁴³ Ibid.

¹⁴⁴ <https://www.duden.de/rechtschreibung/Mediation> (last accessed 13 September 2020).

¹⁴⁵ Moore, Christopher W. *The Mediation Process – Practical Strategies for Resolving Conflict* 21.

¹⁴⁶ Oppermann and Langer op cit note 1 at 10.

¹⁴⁷ Moore op cit note 145 at 22 f.

¹⁴⁸ Cormick, Gerald W. and Patton, Leah K. in Lake, Laura M. *Environmental Mediation – The Search for Consensus* 76 ff.

Gerald W. Cormick and Jane E. McCarthy in connection with the planned construction of dams on the Snoqualmie River in Washington State.¹⁴⁹

A broader application began in the end of the 1980's, particularly again in the USA and Canada, but also more frequently in the entire common law area.¹⁵⁰ Mediation was used for example concerning site-specific conflicts such as water projects and conservation, facility siting, development issues, wildlife management and habitat protection.¹⁵¹ Since the 1990s, environmental mediation has been used more and more intensively worldwide.¹⁵²

Defining the term mediation is not easy, as there is no analytical model that can be well described and differentiated from other decision-making processes.¹⁵³ Hence many different definitions exist, not all of which can be discussed in detail here. Since definitions always have a limited range, no definition can claim absoluteness. Definitions may either be descriptive or normative¹⁵⁴ and can be found primarily in literature and legislation.

A pioneer in mediation, Gerald W. Cormick, defines it in 1980 as “[a] voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has not authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution.”¹⁵⁵

¹⁴⁹ Ibid.; Birkhoff, Juliana and Lowry, Kem ‘Whose Reality Counts?’ in O’Leary, Rosemary and Bingham, Lisa (eds) *The Promise and Performance of Environmental Conflict Resolution* 27; Harrison op cit note 142 at 81 ff.

¹⁵⁰ Trenzcek, Thomas in Trenzcek, Thomas, Berning, Detlef and Lenz, Cristina (eds) *Mediation und Konfliktmanagement – Handbuch* 30; Moore op cit note 145 at 28.

¹⁵¹ Moore op cit note 145 at 30.

¹⁵² Weidner, Helmut *Alternative Dispute Resolution in Environmental Conflicts – Experiences in 12 Countries* 24 ff.; Williams, Brett A. ‘Consensual Approaches to Resolving Public Policy Disputes’ 144.

¹⁵³ Boule, Laurence and Rycroft, Alan *Mediation – Principles Process Practice* 3.

¹⁵⁴ Trenzcek in Trenzcek, Berning and Lenz op cit note 150 at 35.

¹⁵⁵ Cormick and Patton op cit note 148 at 78; see as well Weidner op cit note 152 at 16.

A newer and more detailed definition (2014) provides Christopher Moore, according to whom mediation is “a conflict resolution process in which a mutually acceptable third party, who has no authority to make binding decisions for disputants, intervenes in a conflict or dispute to assist the parties to improve their relationships, enhance communications, and use effective problem-solving and negotiation procedures to reach voluntary and mutually acceptable understandings or agreements on contested issues.”¹⁵⁶

The meaning of the term "mediation" is not the same in all countries due to language and national legislation. In particular, there are some differences between Anglo-Saxon definitions and definitions of other countries, especially countries with a civil law tradition like Germany.¹⁵⁷

The term mediation has changed over time into a technical term and contains a concept, which has also become the basis of normative regulations.¹⁵⁸ For example, Article 3a of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters refers to mediation as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator". Definitions can also be found in national laws such as the German Mediation Act, which says as follows in its Section 1 (1): „Mediation is a confidential and structured process in which the parties strive, on a voluntary basis and autonomously, to achieve an amicable resolution of their conflict with the assistance of one or more mediators.“ And paragraph 2 adds: “A mediator is an independent and impartial person without any decision-making power who guides the parties through the mediation”.¹⁵⁹

¹⁵⁶ Moore op cit note 145 at 20.

¹⁵⁷ Trencsek in Trenczek, Berning and Lenz op cit note 150 at 23 ff.

¹⁵⁸ Ibid. at 35.

¹⁵⁹ Mediation Act of 21 July 2012 *Federal Law Gazette I* on p. 1577.

For South Africa the Government Notice Nr. 37448 of 18 March 2014 defines mediation as "means the proces by which a mediator asists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute".¹⁶⁰

There is also a large number of definitions at the level of codes of conduct, the 2005 Model Standards of Conduct for Mediators of the American Bar Association¹⁶¹ being mentioned here as an example. Mediation is defined there as "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."

In view of the above, it can be stated that the essential points, which are characteristic of the mediation process are voluntariness, confidentiality, third party intervention, assistance, impartiality and neutrality, acceptability and no authoritative decision-making power.

2. Legal Grounds

On the international stage, mediation was enshrined after the Second World War in decisive documents such as Article 33 (1) of the UN Charter, according to which "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

¹⁶⁰ Available at https://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf (last accessed 13 September 2020).

¹⁶¹ Available at https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf. (last accessed 13 September 2020).

Numerous international treaties in the environmental field provide for mediation – even if only as part of their dispute settlement regime.¹⁶² At the international level, mediation is not mandatory, but it is listed either as an option for a peaceful settlement or as a possible step in the dispute settlement procedure before resorting to compulsory means.

At the national level, the situation may of course be different and various states – including South Africa – have declared mediation mandatory, at least in certain areas.¹⁶³

3. Specialities in Environmental Mediation

3.1. Preliminary Remarks

The subject of environmental mediation is an environmental dispute. Environmental disputes deal with the relationship between natural resources and humans and the latter's impact on public good.¹⁶⁴ The disputes are such over natural resources, meaning that human activity is believed to affect air, soil, water or living resources negatively, what may lead to serious harm of public health.¹⁶⁵ Furthermore, there is the possibility of irreversible consequences as extinction of particular species.¹⁶⁶

¹⁶² For example 1980 Convention on the Conservation of Antarctic Marine Living Resources, 1968 African Convention on the Conservation of Nature and Natural Resources, 1985 Vienna Convention for the Protection of the Ozone Layer, 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, 1992 Convention on Biodiversity, 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1993 North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, 1995 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

¹⁶³ For example, South Africa has declared mediation mandatory in the field of labour law. Comprehensively Rycroft, Alan J. *Legal Review of the Mandatory Mediation Process in South Africa* (2016) Mediation Theory and Practice, Equinox Publishing (available at <https://pdfs.semanticscholar.org/bf75/be5563282d36b2a3e0c9dc462e8531b6932f.pdf> [last accessed 13 September 2020]).

¹⁶⁴ Zeinemann, Robert 'The Characterization of Public Sector Mediation' 55.

¹⁶⁵ Shmueli, Deborah and Kaufman, Sanda *Environmental Mediation* (Jerusalem 2006) 19; see as well Zeinemann op cit note 164 at 55 and 56.

¹⁶⁶ Zeinemann op cit note 164 at 56.

The variety of possible environmental disputes is immense. Environmental disputes can reach from only two parties to a large number of parties or stakeholders and from conflicts of a mainly “private” character to such of a mostly “public” nature.¹⁶⁷ The parties involved have different views, experiences and resources.¹⁶⁸ Public mediations such as environmental mediations are often about high stakes, meaning that large sums of money are involved and/or many people are affected by the outcome.¹⁶⁹ As Robert Zeinemann writes, implications of the dispute and a possible settlement could go “far beyond the disputants to impact natural systems and the general public”.¹⁷⁰

In the following, the various advantages and disadvantages of environmental mediation are discussed, with power imbalances deserving special consideration.

3.2. Advantages of Environmental Mediation

The advantages to be mentioned are also those of mediation in general, but the focus should lie on the advantages especially relevant for environmental mediation.

Mediation is usually faster and less cost effective than litigation.¹⁷¹ So it came that environmental mediation was first applied in the USA due to the dissatisfaction of people with the time handling of increasing environmental cases by the government.¹⁷² Mediation may maximise total benefits for all, while minimising collective costs.¹⁷³ The reason for the reduced costs is that it is normally less cost effective to reconcile the parties’ underlying interests rather than determining who is right or

¹⁶⁷ Tromans, Stephen ‘Environmental Mediation’ 113.

¹⁶⁸ Zeinemann op cit note 164 at 55.

¹⁶⁹ Ibid. at 53.

¹⁷⁰ Ibid. at 57.

¹⁷¹ Tromans op cit note 167 at 114; Kubasek, Nancy and Silverman, Gary ‘Environmental Mediation’ 540; Williams op cit note 152 at 144; Mank, Bradford C. ‘The Two-Headed Dragon of Siting and Cleaning up Hazardous Waste Dumps – Can Economic Incentives or Mediation Slay the Monster?’ 281.

¹⁷² Williams op cit note 152 at 144.

¹⁷³ Kubasek and Silverman op cit note 171 at 543.

more powerful.¹⁷⁴ A mediation process provides the possibility of reaching a win-win solution.¹⁷⁵ With regard to environmental disputes, this means, for example, that a construction project can be realised, but environmental protection is taken into account through certain conditions.

A consensual approach can be considered superior to litigation,¹⁷⁶ as the outcome of a mediation process has been proved to be more acceptable to the parties.¹⁷⁷ This is because the parties themselves decide on the outcome and no judgment is imposed on them. A characteristic feature of court proceedings is that there is usually a loser who is punished or cannot enforce his or her claims. One person's profit is usually offset by another person's loss of the same or even greater amount. The satisfaction with an agreement is higher when the parties were able to voluntarily and actively participate in the solution finding process, as the parties' underlying needs and interests can be addressed more adequately.¹⁷⁸ Furthermore, mediation serves a future perspective by aiming at the preservation of long-time relationships.¹⁷⁹ This is essential to achieve the goal of establishing sustainable environmental protection. Moreover, through mediation relationships may transform positively,¹⁸⁰ which means that through mediation the conservation and at best the improvement of our natural resources can be achieved.

Since environmental disputes are in general public law disputes, agreements usually subsequently require adoption by political bodies or government agencies.¹⁸¹ Some authors emphasise the positive effect of government participation in the mediation process, as in such cases on the one hand the chances of an agree-

¹⁷⁴ Zeinemann op cit note 164 at 51.

¹⁷⁵ Fisher, Roger, Ury, William and Patton, Bruce *Getting to Yes* 58 ff. & 113; Susskind, Lawrence and Cruikshank, Jeffrey *Breaking the Impasse – Consensual Approaches to Resolving Public Disputes* 11; Kubasek and Silverman op cit note 171 at 546; Weidner op cit note 152 at 23.

¹⁷⁶ Williams op cit note 152 at 145.

¹⁷⁷ Kubasek and Silverman op cit note 171 at 545.

¹⁷⁸ Zeinemann op cit note 164 at 51.

¹⁷⁹ Williams op cit note 152 at 145; Kubasek and Silverman op cit note 171 at 545 f.; Tromans op cit note 167 at 114; Niewisch-Lennartz, Antje in Trenczek, Thomas, Berning, Detlef and Lenz, Cristina (eds.) *Mediation und Konfliktmanagement – Handbuch* 596.

¹⁸⁰ Zeinemann op cit note 164 at 51.

¹⁸¹ *Ibid.* at 53.

ment would increase through the involvement of the decision-making authority.¹⁸² On the other hand, if state authorities are not involved in mediations, they approve of the results significantly less often than in cases in which they participate in the process.¹⁸³

Environmental disputes are predominantly multi-party disputes and these often pose difficulties to adjudicative processes, since litigation is primarily designed for private disputes between two parties.¹⁸⁴ Mediation, in contrast, is a process, which provides the possibility to address “broader causes of social conflict”.¹⁸⁵

3.3. Disadvantages of and Obstacles to Environmental Mediation

Environmental disputes are often factually extremely complex, about fundamental values and can therefore be highly emotional.¹⁸⁶ Though, the same applies to disputes in many other areas as well. However, there are issues specific to environmental disputes:¹⁸⁷

As mentioned, in environmental disputes often large numbers of parties with different interests participate. First of all, in this respect, difficulties may occur to find all the affected parties or stakeholder.¹⁸⁸ The participation of a large number of people also places high demands on the time potential and patience of the participants. It is also financially relevant. The mediator is faced with the challenge of perceiving and meeting all participants with their individual interests and sensitivities. However, this may be remedied by calling in additional mediators (so-called co-mediators) and by appointing representatives of individual interest groups.¹⁸⁹

¹⁸² Harrison op cit note 142 at 91; Niewisch-Lennartz in Trenzcek, Berning and Lenz op cit note 179 at 597.

¹⁸³ Tompkins, Raymond E. ‘Mediation, the Mediator, and the Environment’ 30; Williams op cit note 152 at 145.

¹⁸⁴ Kubasek and Silverman op cit note 171 at 542; Williams op cit note 152 at 144 f.; Harrison op cit note 142 at 101.

¹⁸⁵ Zeinemann op cit note 164 at 54.

¹⁸⁶ Tromans op cit note 167 at 113.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Niewisch-Lennartz in Trenzcek, Berning and Lenz op cit note 179 at 597 f.

Another concern is that when regulatory authorities participate in mediations, they may lose their distance and objectivity. In other words, they are too closely involved in the process and become co-opted. There is a risk that the greater public interest will be overlooked.¹⁹⁰ By keeping an eye on its BATNA¹⁹¹, the regulatory authority can resist the pressure to reach an agreement that it will later regret. An experienced mediator can help in such a case. However, this is not always free of problems for the latter either, as he must pay particular attention to maintaining his impartiality. Moreover, such a situation is mitigated by the fact that the agreement is merely a draft and the conclusion of the informal agreement is followed by a formal decision-making process.¹⁹²

Technical complexities or uncertainties as well as the relating scientific questions make the mediation process difficult, although not impossible. However, one must bear in mind that those problems would as well arise in other dispute resolution processes like litigation.¹⁹³ A possible solution may be to engage a co-mediator with technical expertise.¹⁹⁴ As in the end the agreement should be politically, technically and financially feasible.¹⁹⁵

Mediation is based on voluntariness, which consequently means that nobody is forced into a mediation process. This applies at international level, although at national level, depending on the legal system, there may well be a compulsion to mediate. Hence, again speaking only for the international level, there is a lack of joinder mechanisms, which are applicable in litigation. However, for a successful and acceptable mediation the participation of all interested parties is required. The possibility of parties filing a suit during the mediation process is always present¹⁹⁶ as

¹⁹⁰ Harrison op cit note 142 at 94.

¹⁹¹ The abbreviation stands for "Best Alternative to the Negotiated Agreement", which stands for the best alternative option in the event of failure to reach agreement at a negotiation. On this subject see Fisher, Ury and Patton op cit note 175 at 97 ff.

¹⁹² Harrison op cit note 142 at 95.

¹⁹³ Tromans op cit note 167 at 113; Watson, John L. and Danielson, Luke J. 'Environmental Mediation' 701.

¹⁹⁴ Amy, Douglas J. 'The Politics of Environmental Mediation' 9; Tompkins op cit note 183 at 30.

¹⁹⁵ Kubasek and Silverman op cit note 171 at 554.

¹⁹⁶ Ibid. at 550; Williams op cit note 152 at 146.

well as the possibility of a party deliberately delaying the process (lack of good faith bargaining).¹⁹⁷ A very important premise for a successful mediation is therefore the parties' shared interest in resolving the dispute by mediation.¹⁹⁸ And if there is institutional mistrust, it is the mediator's task to gain the confidence of the participants.¹⁹⁹

Environmental disputes can raise issues of public interest that go beyond the parties' immediate interests. In this context must be noted that mediation will by no means replace the legal and democratic decision-making process.²⁰⁰

The environmental consequences may be so severe that there is no room for compromise.²⁰¹ A compromise would not be in society's best interests.²⁰² A dispute suitable to mediation must therefore leave room for a compromise.²⁰³ Moreover, binding environmental regulations leave no room for compromise either (yes or no decision).²⁰⁴ In other words, mandatory law always constitutes a substantive restriction to any agreement. Only litigation is furthermore a solution, when a legal precedent or an interpretation of a statute is needed.²⁰⁵

If there are not uniform outcomes in similar cases, legal certainty is compromised. Mediation outcomes are not bound by any precedent decision as judges are in their decision-making processes. This could also lead to unfairness.²⁰⁶ Further-

¹⁹⁷ Schoenbrod, David 'Limits and Dangers of Environmental Mediation – A Review Essay' 1453; Kubasek and Silverman op cit note 171 at 551; Lake, Laura M. *Environmental Mediation – The Search for Consensus* 73.

¹⁹⁸ Kubasek and Silverman op cit note 171 at 553.

¹⁹⁹ Tromans op cit note 167 at 113.

²⁰⁰ Ibid. at 113.

²⁰¹ Tompkins op cit note 183 at 68; Kubasek and Silverman op cit note 171 at 547; Williams op cit note 152 at 145.

²⁰² Kubasek and Silverman op cit note 171 at 547.

²⁰³ Ibid. at 554.

²⁰⁴ Ibid. at 547; Williams op cit note 152 at 146.

²⁰⁵ Schoenbrod op cit note 197 at 1468; Kubasek and Silverman op cit note 171 at 551.

²⁰⁶ Kubasek and Silverman op cit note 171 at 548; Williams op cit note 152 at 146.

more, there is no judicial review what may be of importance in relation with very significant cases.²⁰⁷

Mediation is a confidential process.²⁰⁸ This is problematic if the case is of public interest and is resolved behind closed doors, as it may contradict public participation provisions in environmental acts, statutes and regulations.²⁰⁹ For the results to be credible and acceptable, the mediation process needs to be transparent²¹⁰ and public participation possible²¹¹. As well – in relation with power imbalances problems – the weaker party is generally not allowed to resort to the media as support because of the mediation's confidential nature.²¹² Moreover, the on average large number of parties involved and the presence of parties with little organisational cohesion jeopardise confidentiality enormously.²¹³

3.4. Power Imbalances and Degree of Intervention

Where considerable power asymmetries exist, the informal frame mediation provides could favour the more powerful parties to impose their will – mostly economic interests – on the weaker parties.²¹⁴ The problem of power imbalances typically exists in environmental disputes between conservation groups and large companies or government agencies. The difference in power is caused by various factors, such as unequal access to resources, legal assistance, expert opinion and the news media.²¹⁵ Kubasek & Silverman for example deem mediation therefore as

²⁰⁷ Schoenbrod op cit note 197 at 1457; Kubasek and Silverman op cit note 171 at 552; Williams op cit note 152 at 146.

²⁰⁸ See for example the 2005 Model Standards of Conduct for Mediators of the American Bar Association (available at https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf [last accessed 13 September 2020]).

²⁰⁹ Tompkins op cit note 183 at 68; Williams op cit note 152 at 146.

²¹⁰ Zeinemann op cit note 164 at 59.

²¹¹ Boule and Rycroft op cit note 153 at 184.

²¹² Bingham, Gail Resolving Environmental Dispute – A Decade of Experience 159 f.

²¹³ Harrison op cit note 142 at 89.

²¹⁴ Fiss, Owen M. 'Against Settlement' 1076; Zeinemann op cit note 164 at 52.

²¹⁵ Amy op cit note 151 at 6 ff.; Boule and Rycroft op cit note 153 at 55.

probably not recommendable in cases of a party having clearly superior economic power.²¹⁶

Even though a mediator is not enabled to make a binding decision, he still has considerable practical power regarding the control of the mediation process.²¹⁷ According to Michel Foucault's analysis, power is fluid and not confineable to the categories of existence or absence. Power is always relative and one should consider each specific situation when trying to resist power or rectify its imbalance. The mediator's power allows him to intervene where he deems it appropriate to preserve or alter the power balance between the parties.²¹⁸ However, a mediator should as well be aware of risks concerning the power he believes to possess, as he may also 'fall prey' to party manipulation and charm.²¹⁹

As its Standard I of the Model Standards of Conduct for Mediators of the American Bar Association states that a 'mediator shall conduct a mediation based on the principle of party self-determination'. The Model Standards define self-determination as 'the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome'. In other words the parties to the conflict shall remain responsible for the measures and arrangements regarding the resolution of conflicts, and in particular for the content of an agreement.²²⁰ A mediator is unlike a judge or arbitrator not authorised to make a binding decision.

The duty of the mediator to support and promote the self-determination of the parties means, in its absoluteness, that the mediator is not allowed to provide any own advice or even solution proposals.²²¹ His sole task is to accompany the parties on their way to a solution by leading them through the process.²²² In some

²¹⁶ Kubasek and Silverman op cit note 171 at 555. See as well Zeinemann op cit note 164 at 61.

²¹⁷ Boulle and Rycroft op cit note 153 at 208.

²¹⁸ Roper, Isabel 'Mediation – Good Faith, Bad Faith' 51 f.

²¹⁹ Ibid. at 52.

²²⁰ Rabe, Christine and Wode, Martin Mediation – Grundlagen, Methoden, rechtlicher Rahmen 21.

²²¹ Ibid.

²²² Ibid.

countries only this purely facilitative mediation is allowed (e.g. in Germany).²²³ Basically, in a facilitative mediation the mediator's role is only to conduct the process and providing the framework that allows the parties to constructively find a settlement, whereas evaluative mediation includes the intervention of a mediator in terms of giving the parties additional information and advice.²²⁴ The latter is a prominent method especially in the Anglo-American area.²²⁵

The principle of self-determination requires a voluntary, uncoerced decision and free and informed choices by the parties as to process and outcome. Such free choices are only conceivable if the prerequisite of equality of the parties is given.

With regard to the method of mediation, there is no general recommendation for environmental mediation, but it must be decided on a case-by-case basis which procedure is appropriate. Facilitative mediation may certainly be suitable for matters with several issues and parties, as it is often the case in environmental disputes.²²⁶ On the other hand as well a "directive intervention" approach, in which the intervention of a mediator is more directly and actively, may seem appropriate under certain circumstances.²²⁷

Facilitative mediators face the ethical issue that power and information imbalances between the participants may lead to an unfair agreement.²²⁸ The question if the mediator should leave his purely facilitative role and intervene to assist the weaker party in order to ensure a fair settlement,²²⁹ must be assessed individually for each case. According to Lawrence Susskind an environmental mediator has to intervene more often and more intensely than mediators in other fields, alt-

²²³ § 2 of the German Mediation Law (available at <https://www.gesetze-im-internet.de/mediationsg-/MediationsG.pdf> [last accessed 13 September 2020]).

²²⁴ Boulle and Rycroft op cit note 153 at 27.

²²⁵ Burns, Robert P. 'Some Ethical Issues Surrounding Mediation' 702.

²²⁶ Boulle and Rycroft op cit note 153 at 68.

²²⁷ Ibid. at 21.

²²⁸ Burns op cit note 225 at 702; McCorkle, Suzanne 'The Murky World of Mediation Ethics – Neutrality, Impartiality and Conflict of Interest in State Codes of Conduct' 166; Mulcahy, Linda 'The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?' 510 and 514.

²²⁹ Boulle and Rycroft op cit note 153 at 210 f.

though this may interfere with the appearance of the mediator's neutrality and hence the parties' trust towards the mediator.²³⁰

In that context must be noted that a mediator with his own life experience and knowledge can never be completely neutral or impartial in conducting the mediation process.²³¹ It is illusionary that a mediator as a human being can be totally neutral.²³² No mediator is able to remain totally unaffected by reputation, success rates or self-esteem.²³³

A different approach to ensure procedural fairness and effective participation would be that all parties – in case they do not already have the necessary knowledge – are represented by an expert person with such specialised knowledge.²³⁴

Another question in this regard is, if and to what extent the mediator should protect interests of potentially affected third parties, which are not present in the mediation.²³⁵

4. Deficiencies in the Present Situation

4.1. Accountability

In conventional decision-making procedures of states under the rule of law, authorities and courts can be held politically and/or legally responsible for their actions.²³⁶ In contrary, a mediator usually does not hold an official position, which can lead to undue influence or actions depending on the position he holds. But of course he may behave improperly as well. For example, a mediator may exert undue influence, as he could act in favour of a certain interest or a certain party, or

²³⁰ Susskind, Lawrence 'Environmental Mediation and the Accountability Problem' 47.

²³¹ Burns op cit note 225 at 702; McCorkle op cit note 228 at 166.

²³² Boulle and Rycroft op cit note 153 at 18.

²³³ Ibid. at 19.

²³⁴ Susskind op cit note 230 at 47.

²³⁵ Boulle and Rycroft op cit note 153 at 19 and 211.

²³⁶ In Switzerland, for example, legal responsibility is anchored in both private law (civil code) and public law (liability law). From a political point of view, officials can be voted out or will not be re-elected.

work in an improper way to reach an agreement. With regard to the former, any party concerned could apply for the replacement of the mediator or threaten to withdraw from mediation. For this reason, the mediator's impartiality and neutrality are held so high in various codes of conduct. Although it is not the purpose of mediation, there is a risk that mediators may want to persuade the parties to reach an agreement because they have a certain personal interest or ambition in concluding an agreement, even if only for personal satisfaction.²³⁷ As the mediators' actions are often likely to be subtle, it may be difficult from an evidentiary point of view to hold them liable in these cases.

Furthermore, as already pointed out, it may occur that the parties reach a settlement, but “fail to maximize the joint gains possible”.²³⁸ Although the parties are pleased with the agreement, it may have a negative impact on the environment, as they did not take into account interests of public health and safety and ultimately the interests of future generations.²³⁹

To prevent such outcomes, mediators need to be aware of “the impact of negotiated agreements on underrepresented or unrepresentable groups in the community” and the long-term consequences for the environment.²⁴⁰ To be able to do this, an environmental mediator must have a specific knowledge regarding the issue in dispute and its legal context.²⁴¹ Although John Harrison mitigates the danger that public interests are overlooked nowadays,²⁴² this risk is not entirely averted.

According to Harrison it is the mediator's duty to ensure that the agreement is viable.²⁴³ The manifold facets of mediation disputes require case-related adjustments of the process and hence a wide range of skills and experience. It is therefore

²³⁷ Harrison op cit note 142 at 95.

²³⁸ Susskind op cit note 230 at 7.

²³⁹ Ibid. at 8.

²⁴⁰ Ibid. at 46.

²⁴¹ Ibid. at 46 f.

²⁴² Harrison op cit note 142 at 92.

²⁴³ Ibid. The mediator has to do a reality check for this purpose.

essential that mediators attend a high-quality training²⁴⁴ before and as well after they start practicing to help them being constantly aware of possible issues. Besides facilitation and negotiation skills as well as an organisational talent, communication skills are of utmost importance. This includes in particular effective listening, re-framing, questioning, paraphrasing, summarising, empathising and non-verbal communication.²⁴⁵ Environmental mediators ideally possess apart from the professional knowledge the emotional intelligence and communication techniques to assess and adapt to the requirements of each mediation process.²⁴⁶ The importance of the social competence of the mediator must not be underestimated. The mediator must be able to design the mediation process as a social process in such a way that a capacity for discussion and action is created between the parties involved and each individual feels understood in his or her needs and interests. In this way the mediation process can generally be conducted in a fair manner and lead to satisfying and just solutions.

Along with many others, Harrison stresses the importance of ethical principles such as impartiality and neutrality, with which the dangers of environmental mediation can and must be countered.²⁴⁷ In order to hold mediators accountable, particular regulations – in terms of effectiveness preferably binding ones – and compulsory public consultation/participation need to be established.²⁴⁸

4.2. Inexpediency of Environmental Disputes for Mediation?

This question is not well answered in the literature.²⁴⁹ According to Brett Williams there exist some disadvantages regarding the resolution of environmental

²⁴⁴ In Germany, the Mediation Law stipulates in § 5 that training and regular continuing training are required, which are attested by a state certificate (see <https://www.gesetze-im-internet.de/mediationsg/MediationsG.pdf> [last accessed 13 September 2020]). In South Africa there is as well a body that certifies or accredits mediators (see <http://disac.co.za> [last accessed 13 September 2020]).

²⁴⁵ More detailed: Boulle and Rycroft op cit note 153 at 139 ff.

²⁴⁶ Roper op cit note 218 at 52.

²⁴⁷ Harrison op cit note 142 at 80.

²⁴⁸ See Susskind op cit note 230 at 41 and 47.

²⁴⁹ Zeinemann op cit note 164 at 62.

disputes by mediation, but for many environmental disputes the choice of mediation as a consensual dispute resolution process is still more suitable than traditional litigation.²⁵⁰

However, certain disputes are considered not suitable or appropriate to be mediated, as for example conflicts over “constitutional questions, definitions of basic rights, and fundamental and moral values”.²⁵¹ Issues concerning binding regulations are not mediatable.²⁵² On the other hand, issues regarding the distribution of resources are accessible to mediation.²⁵³ Although as well in that respect there are cases where issues are just not negotiable.²⁵⁴

Environmental disputes represent the so called “polycentric disputes”. These are disputes that cannot be settled by proof of ascertainable claims, whether because of the multitude of parties involved, the rapidly changing context or because of the complex and extensive effects of a decision.²⁵⁵ It can be argued as certain authors do, that such disputes might be better resolved through legislation or administrative decisions.²⁵⁶

According to some authors only a few environmental disputes are suitable for mediation, as there has to be met a number of criteria for the dispute to be suitable for mediation.²⁵⁷ There must exist some interdependence between the parties in terms of offer and need. Furthermore, a universal participation of all parties affected must be ensured and the timing has to be right (the dispute has to be “ripe” for negotiation²⁵⁸).²⁵⁹

²⁵⁰ See Williams op cit note 152 at 147.

²⁵¹ Zeinemann op cit note 164 at 59.

²⁵² Ibid.

²⁵³ Ibid. at 60.

²⁵⁴ Ibid.

²⁵⁵ Boulle and Rycroft op cit note 153 at 183 f.; Harrison op cit note 142 at 101.

²⁵⁶ Comprehensively Schoenbrod op cit note 197 at 1471 ff.; Boulle and Rycroft op cit note 153 at 184.

²⁵⁷ Zeinemann op cit note 164 at 61, with further references.

²⁵⁸ The right timing is elusive and must be assessed individually depending on the case. See ; Zeinemann op cit note 164 at 61.

²⁵⁹ Harrison op cit note 142 at 83; Zeinemann op cit note 164 at 61.

5. Concluding Remarks

Despite the confidentiality issue, many authors stress that broad public participation in the decision-making process is of great importance.²⁶⁰ It is therefore in the public interest that all parties concerned are represented at the negotiating table. Hence, the mediator should be obliged to ensure that the interests of the parties that are not represented are also taken into account. Harrison proposes to require public regulators to involve all interested parties and ensure transparency.²⁶¹

The results of a mediation procedure serve to advise the decision-makers and cannot override legal and political regulations, but can supplement decisions taken formally and politically. Mediation procedures therefore often take place in advance of or in addition to legally regulated decision-making procedures at an informal level.²⁶² Especially in connection with public participation, the environmental impact assessment prior to the realisation of a concrete project and the strategic environmental assessment at the higher planning level play an extremely valuable role. The results of these procedures can also be incorporated into mediation procedures and make an important contribution to transparency and objectivity.

On the basis of the above it can be concluded that mediation is a valid option in a large number of environmental disputes²⁶³, provided that due consideration is given to the particularities of this kind of conflicts.

²⁶⁰ Boulle and Rycroft op cit note 153 at 184.

²⁶¹ Harrison op cit note 142 at 101.

²⁶² See for example in the Swiss Code of Civil Procedure, Article 213 ff. (available at <https://www.admin.ch/opc/de/classified-compilation/20061121/index.html> [last accessed 13 September 2020]).

²⁶³ See as well Philipps, Barbara Ashley and Piazza, Anthony C. 'The Role of Mediation in Public Interest Disputes' 1240.

Chapter 4: Mediation in the Resolution of Crimes of Ecocide – A Situation Analysis

1. Mediation in the Field of International Criminal Law

1.1. Preliminary Remarks

In the following, it will be shown that the concept of restorative justice is a promising option for dealing with ecocide crimes. The approach of restorative justice seems particularly appropriate in view of the goal of achieving sustainable environmental protection.²⁶⁴ The focus is thus on the protection of the environment and not only on punishing the perpetrators, as it is the case in conventional criminal proceedings.²⁶⁵

1.2. The Concept of Restorative Justice

a) The Approach

The idea of restorative justice is quite simple in a sense and has a history, which is thousands of years old.²⁶⁶ The traditional criminal justice system is structured as a two-party process: the state on the one side and the offender or his defence on the other.²⁶⁷ The purpose is to determine whether the perpetrator has actually committed a crime against the state.²⁶⁸ The system is largely focused on the offender, the offender's rights must be protected from investigation until conviction.²⁶⁹ In principle, the victim is not assigned a role that goes beyond that of a witness, as crimes are regarded as harm to the state.²⁷⁰

²⁶⁴ Pain et al op cit note 218 at 1 f. and 4 f.

²⁶⁵ See Higgins, Short and South op cit note 38 at 255.

²⁶⁶ Ibid.

²⁶⁷ Daigle, Leah E. *Victimology – A Text/Reader* 127.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

The restorative justice approach takes into account the reality that in many cases more people are affected by a crime than just the victim and the offender.²⁷¹ In criminal proceedings, however, the focus is only on the part of the event on which the judgment is based. Many other aspects remain unconsidered. As a result of this need, restorative justice is already applied in many countries within the framework of criminal proceedings.²⁷²

Restorative justice is based on the belief that the way to reduce crime is not just to punish the offender.²⁷³ Instead, all those affected by the crime should come to a table and work together to deal with the crimes that were committed. In this way, restorative justice understands crime as harm to the state, the community and the victim.²⁷⁴ Accordingly, the system pursues the idea of involving all relevant parties rather than simply bringing criminals to justice and convicting them, with the victim and the community playing only a secondary role.²⁷⁵ In other words, it considers criminal behaviour to be an offense against an individual or a community, rather than just against the state.

Restorative justice is a process in which, as far as possible, all parties involved in a particular crime are included.²⁷⁶ The aim is to jointly identify and address damage, needs and obligations in order to heal and correct events as best as possible.²⁷⁷ The restorative perspective is based on unresolved conflicts that require dialogue between victims, offenders and the community to focus on their impacts.²⁷⁸ The victim, the offender and the community are the key actors who must all participate in the process so that the needs of the victims can be taken into account and the

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Umbreit, Mark S., Coates, Robert B. and Vos, Betty 'The Practice of Victim Offender Mediation – A Look at the Evidence' 692.

²⁷⁷ Ibid.

²⁷⁸ Wolhuter, Lorraine, Olley, Neil and Denham, David *Victimology – Victimisation and Victims' Rights* 215.

offenders held accountable for the harm they have caused.²⁷⁹ The approach aims at greater victim participation, greater responsibility of offender and a higher level of community protection than is possible under the traditional criminal justice system.²⁸⁰

Instead of a judge or jury deciding how to proceed with the offender, restorative justice allows the offender, victim and community members harmed by the crime to make a decision on how to repair the damage caused by the offender.²⁸¹ In this way, justice is not proclaimed by an authoritarian instance, but a cooperative agreement is concluded.²⁸² Briefly, restorative justice is a process in which the persons involved or affected by a crime jointly decide how they want to deal with what had happened.²⁸³

According to the restorative justice approach, not only the outcome of the process itself is crucial, but also how the final decision was reached. Justice does not only arise through the application of the law by third parties, but ideally becomes a life experience.²⁸⁴

Investigations in different Western countries showed that the participants in restorative justice trials were less likely to relapse, that is to commit another criminal offence than people with similar offences, who were convicted and punished by the court.²⁸⁵ The success rates of restorative justice programmes have often been much better.²⁸⁶ However, it cannot be said whether part of this difference stems from the fact that perhaps above all those who would not otherwise have been recidivist would agree to (voluntarily) participate in a restorative justice pro-

²⁷⁹ Ibid.

²⁸⁰ Ibid. at 215 f.

²⁸¹ Daigle op cit note 267 at 127.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Zanolini, Veio Wiedergutmachung durch Mediation – Eine Untersuchung über praktische Erfahrungen in Strafsachen 14.

²⁸⁵ Latimer, Jeff, Dowden, Craig and Muise, Danielle *The Effectiveness of Restorative Justice Practices – A Meta-Analysis* 137.

²⁸⁶ Ibid.

gramme.²⁸⁷ A reverse trend – that the recidivism would increase due to restorative justice – is not apparent in any case.²⁸⁸ In addition to relapse rates, the satisfaction of those involved, in particular the victims, and the extent to which they have actually received reparation or compensation can also be used as a criterion for success. Meta studies confirm that restorative justice programmes are also more successful on these two points.²⁸⁹ The analysis by Latimer, Dowden and Muise concludes that restorative programmes are a more effective way to improve the satisfaction of victims and/or offenders, increase offenders' compliance with restitution and reduce recidivism compared to traditional criminal law measures.²⁹⁰

b) Legal Ground

At international level, the concept of restorative justice is anchored in a UN Resolution: The ECOSOC²⁹¹ Resolution 2002/12 on “Basic principles on the use of restorative justice programmes in criminal matters” defines restorative process as “any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator”. Furthermore is added that “[r]estorative processes may include mediation, conciliation, conferencing and sentencing circles”.²⁹²

The resolution is based on Recommendation No. R (99) 19, adopted by the Committee of Ministers of the Council of Europe with the title “Mediation in Penal Matters”, which highlights “mediation in penal matters as a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings”. Particular emphasis is given to the following aspects:

²⁸⁷ Ibid.

²⁸⁸ Ibid. See as well Pain, Nicola, Pepper, Rachel, McCreath, Millicent and Zorzetto, John *Restorative Justice for Environmental Crime – An Antipodean Experience* at 5.

²⁸⁹ Latimer, Dowden and Muise op cit note 285 at 136 ff.

²⁹⁰ Ibid. at 138.

²⁹¹ United Nations Economic and Social Council.

²⁹² Available at <http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf> (last accessed 15 May 2020).

the active participation of both victim and offender, the involvement of the community, the interests of victims and the encouragement of taking responsibility by the offender.²⁹³

c) Application in Relation to Environmental Crimes

With regard to the fact that ecocide is a serious crime, it is to underline that the concept of restorative justice has been applied in particular to severe crimes. The best known example is the Truth and Reconciliation Commission in South Africa, which, after the end of apartheid, was to make it possible to process a history of the most serious, systematic human rights violations in order to pave the way for a peaceful future.²⁹⁴

The theory of restorative justice is seen as a promising means of identifying responsibility and of agreeing compensation for crimes against the environment and the human and non-human beings concerned.²⁹⁵ Restorative justice is consistent with the understanding of our relationship to nature and the obligation to repair the damage caused. It concentrates on the needs of the injured and restores the damage, instead of just focusing on the punishment of the offender.²⁹⁶

The concept of restorative justice bears the potential of transformative impacts for environmental crime and can lead to more just outcomes for environmental offences.²⁹⁷ The starting point is that those responsible for an ecocide have a duty to restore the affected areas. The parties concerned agree to initiate a process in which all parties can actively participate and seek dialogue. The goal of the process is solution-oriented: transformation and restoration.²⁹⁸

²⁹³ Available at [http://www.mediacio.hu/files/EU_dok/CoE_R\(99\)19_mediation.pdf](http://www.mediacio.hu/files/EU_dok/CoE_R(99)19_mediation.pdf) (last accessed 21 May 2020).

²⁹⁴ <https://www.justice.gov.za/trc/> (last accessed 13 September 2020).

²⁹⁵ See Higgins, Short and South op cit note 38 at 255; Pain et al op cit note 218 at 1.

²⁹⁶ See Higgins, Short and South op cit note 38 at 255.

²⁹⁷ Pain et al op cit note 218 at 1 f. and 4 f.

²⁹⁸ Higgins, Polly in *The Guardian*: <https://www.theguardian.com/law/2012/jun/04/ecocide-earth-business-extract> (last accessed 15 May 2020).

However, while roles in non-environmental crime are usually clearly defined (victim, offender, community), they tend to be less clear with regard to environmental crime. Certain adjustments must therefore be made in order to be able to respond fully to the characteristics of environmental crime.²⁹⁹ With regard to environmental crime, stakeholders include offenders (individuals, private companies or public authorities), the environment as the main victim, affected groups of people interacting with this environment as secondary victims and regulating/governmental authorities (prosecutors) as representatives of the wider community or the state.³⁰⁰ Thus, the issue arises who speaks for or represents each victim or group of victims and especially for the environment. There are a number of possible representatives for the environment such as the public prosecutor's office, environmental authorities, committed environmental groups or the general public. As a preferred choice, the view can certainly be taken that committed environmental groups and affected citizens should be given the opportunity to represent the environment.³⁰¹

d) Issues Related to Restorative Justice in General

Restorative justice is seen in literature as a possibility that could replace the traditional criminal justice system eventually.³⁰² However, there are some open questions in this respect, which are dealt with below.

As most literature on restorative justice has been written by its proponents, this concept is usually presented as ethically better and more effective than traditional criminal proceedings. However, criticism is also being expressed of this concept. The objections relate in particular to the inaccurate description of processes and goals.³⁰³ The diversity of objectives then prevents the formation of coherent

²⁹⁹ Pain et al op cit note 218 at 6.

³⁰⁰ Ibid. at 6.

³⁰¹ Ibid. at 7.

³⁰² Zanolini op cit note 284 at 42.

³⁰³ Ibid.

concepts.³⁰⁴ The informality of restorative justice procedures is linked to the lack of the safeguards that are mandatory for formal criminal proceedings. Although, for example, Recommendation (99) 19 and the UN Convention require adequate procedural safeguards, including legal assistance, to prevent abuse, it is nevertheless difficult to ensure that these safeguards are respected in practice, particularly in view of the fact that the process is supervised by non-legal mediators.³⁰⁵

Furthermore, restorative justice proceedings are considered discretionary, as it depends on the people involved in the individual case to decide which solution is the best. As there is a wide framework available for pursuing any objectives.³⁰⁶

Another problem is seen in reconciling the restorative value of voluntary participation with the reality that such participation often does not take place.³⁰⁷

Restorative justice, as already mentioned, has also been applied to serious crimes. However, there are also those who want to exclude serious crimes from restorative processes.³⁰⁸ Lode Walgrave responds very clearly to these critics by stating that no principled or empirical arguments seem sufficient to exclude offenders and victims of serious crimes from restorative processes.³⁰⁹ On the contrary, the extent of harm and suffering caused by a crime can be used as a means of restoration. Victims of serious crimes and communities in which these crimes have been committed are in principle injured more than in the case of a simple crime and therefore need a restoration process rather than victims of minor crimes.³¹⁰ Although difficulties may arise in practice, this does not mean that victims of serious crimes should be excluded from the possible benefits of restorative measures from the outset.³¹¹

³⁰⁴ Ibid.

³⁰⁵ Wolhuter, Olley and Denham op cit note 278 at 229.

³⁰⁶ Zanolini op cit note 284 at 42 f.

³⁰⁷ Wolhuter, Olley and Denham op cit note 278 at 229.

³⁰⁸ Walgrave, Lode 'Restorative Justice – An Alternative for Responding to Crime?' 672, with further references.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Ibid.

Moreover, some critics fear that the victim's interests and needs could be lost in the extended concept of harm in restorative justice, as his/her interests might only be brought forward to focus on other stakeholders, such as the offender.³¹² Sometimes social pressure is exerted on the victim to take part in the proceedings, to demand that his or her claims be moderate or that he or she accepts agreements that primarily benefit the offender.³¹³ Those occurrences due to social pressure have a name – secondary victimisation.³¹⁴ These possible problems are undoubtedly serious, but are no reason not to pursue the restorative approach further. Finally, research clearly shows the benefits that victims can derive from restorative processes.³¹⁵ It must be clear that secondary victimisation is by no means the purpose of restorative justice. Such action must be stopped and must distinctively be considered unacceptable.³¹⁶

e) Issues Related to Restorative Justice for Environmental Offences

One of the obvious objections to the application of restorative justice to environmental offences is that the environment is the primary victim and not a person.³¹⁷ This leads to the need to involve other stakeholders more closely in the process, which could be seen as detracting from a specific feature of restorative justice, namely victim/offender interaction. This view is quite plausible. One could, however, view the slightly different situation as a shift in focus. The definition of "victim" would then have to be broadened to include secondary victims – persons who have been physically injured by the offender's actions and persons who suffer loss or damage to property.³¹⁸

³¹² Ibid.

³¹³ Ibid.

³¹⁴ Ibid.

³¹⁵ As set out above, it is primarily about the joint decision on how to deal with the crime that has occurred, which can help in turn the victims to cope with what has happened.

³¹⁶ Ibid.

³¹⁷ Verry, John, Heffernan, Felicity and Fisher, Richard *Restorative Justice Approaches in the Context of Environmental Prosecution* 4 f.

³¹⁸ Ibid.

This expansion of the circle of victims in environmental conflicts, however, very often leads – as already mentioned – to the need to work with multiple groups representing a variety of different, maybe competing interests. The fact that power imbalances can also lead to problems in this context does not need to be explained here again.³¹⁹

1.3. Victim-Offender Mediation

The most common program that meets the objective of restorative justice is victim-offender mediation.³²⁰ The victim-offender mediation is the oldest, most widespread and most intensively studied form of restorative practices.³²¹ The intention is above all to find out which form of reparation and which form of punishment are considered appropriate by both sides.³²²

The procedure offers victims as well as offenders the opportunity to meet with a trained mediator in a safe, structured and neutral environment.³²³ The aim is to hold the offender(s) directly responsible for their actions and at the same time to help and compensate the victim.³²⁴ The qualified mediator can help the victim to communicate with the offender, to get answers to open questions and to participate directly in the development of a restitution plan.³²⁵ Offenders, on the other hand, are able to take direct responsibility for their behaviour and also participate in the elaboration of the restitution plan.³²⁶ The victim-offender mediation offers the possibility of personalising the consequences of crime and thereby increases the satisfaction of everyone involved.³²⁷

³¹⁹ See Chapter 1, Title 2.3.d).

³²⁰ Daigle op cit note 267 at 128.

³²¹ Umbreit, Coates and Vos op cit note 276 at 692.

³²² Oppermann and Langer op cit note 1 at 11.

³²³ Umbreit, Coates and Vos op cit note 276 at 692.

³²⁴ Ibid.

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Ibid.

Mediation in criminal matters is in most cases a diversion from prosecution.³²⁸ This means that if an offender and a victim agree to mediation and the offender meets all the requirements set out in the mediation agreement, he or she will not be formally prosecuted in the criminal justice system.³²⁹ Thus, the offender receives a clear benefit³³⁰ if he or she agrees to the mediation and successfully completes the whole process. On the contrary, this means that the agreement must be enforceable in court if an offender does not meet the requirements. Otherwise, he could not be held liable for the crime he committed.³³¹

In order to achieve the goals of restorative justice, mediation programmes in criminal justice use humanistic mediation, which is more dialogue-oriented than settlement-oriented.³³² Humanistic mediation focuses on healing and peace making over problem solving.³³³

Victim-offender mediation is seen as a restorative procedure with considerable potential to repair the damage caused by a crime, to hold the offender accountable, and to enable those affected by the crime to have a say in the resolution.³³⁴ Research shows that, when practised in accordance with their guidelines and values, victim-offender mediation improves the participation and healing of victims, increases the extent to which offenders take responsibility for their behaviour and learn from their experiences, gives community members a role in shaping a just response to violations and contributes to a more positive public attitude towards criminal courts.³³⁵ A particular success is the significant drop in the recidivism rate, as the negative effects of criminal behaviour and the chance of reparation are made clear.³³⁶ In return, the injured parties thus have the opportunity to quickly and

³²⁸ Daigle op cit note 267 at 128.

³²⁹ Ibid.

³³⁰ For example, he does not have to go through a public trial and there may not be a criminal record.

³³¹ Ibid.

³³² Ibid. at 128 f.

³³³ Ibid.

³³⁴ Umbreit, Coates and Vos op cit note 276 at 704.

³³⁵ Ibid.

³³⁶ Latimer, Dowden and Muise op cit note 285 at 137.

unbureaucratically receive both material damages and non-material compensation.³³⁷ This avoids lengthy and costly civil proceedings for the victims.

With regard to the advantages and disadvantages of mediation, in particular compared with litigation, reference is made to the corresponding explanations in Chapter 3 (Title 3.2 and 3.3).

1.4. Concluding Remarks

A study on New Zealand case law has shown that restorative justice can lead to positive environmental outcomes.³³⁸ The cases examined indicate that restorative justice can cover a wide range of stakeholders. Thus, the interests of the environment, the local community and particular groups were involved.³³⁹ Furthermore, the study in New Zealand demonstrates that restorative justice is suitable for a wide range of environmental offences.³⁴⁰

In the past, mediation was often equated with restorative justice.³⁴¹ This is understandable insofar as the restorative element is immanent in mediation. Most communication is about damage and suffering.³⁴² The result is aimed at restitution, reparation or compensation.³⁴³ A crucial limitation of mediation is that its scope is generally reduced to voluntary processes. In these cases, mediation can only take place if everyone concerned is willing to cooperate, which drastically reduces the applicability. This is according to Lode Walgrave incompatible with the growing desire to see restorative justice as a comprehensive alternative to traditional punitive measures against crime.³⁴⁴

³³⁷ Ibid.

³³⁸ Verry, Heffernan and Fisher op cit note 317 at 7, with further reference.

³³⁹ Ibid.

³⁴⁰ Ibid. at 8.

³⁴¹ Walgrave, Lode 'Restorative Justice and the Law – Socio-ethical and Juridical foundation for a systematic approach' 629.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid.

Not only Walgrave, but also other authors stress the difficulty with voluntary participation in reality, namely that such participation often does not take place.³⁴⁵ However, some proponents of restorative justice believe that voluntary participation is essential and therefore claim that processes with coercive elements cannot be considered restorative.³⁴⁶ Nevertheless, most supporters allow the use of coercive measures to strengthen restorative values.³⁴⁷

Lode Walgrave, for example, advocates the use of "restorative coercion" because the voluntary procedure has limits that require the use of force by the formal criminal justice system.³⁴⁸ He therefore believes that restorative justice should not be conceived as a completely isolated model, but must be incorporated into a formal system, which allows the combination of restorative processes with the legal system and its courts and law enforcement.³⁴⁹

In the cases investigated in New Zealand, restorative justice is only a part of the criminal procedure. This means that additional judicial sanctions can be imposed.³⁵⁰ If the amount to be paid in the restorative justice process is less than the amount that would have been imposed by a fine in the conventional judicial process, the court may offset payments made in the restorative justice process with the imposition of additional corresponding fines.³⁵¹ The restorative justice system should not be a way for offenders to minimise their punishment.³⁵² The study concludes that it is a promising new way of dealing with environmental crime that can produce positive results and reduce prosecution costs, creating a win-win-win solution for the environment, the offender and the prosecution authority.³⁵³

³⁴⁵ Wolhuter, Olley and Denham op cit note 278 at 229, with further references.

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Walgrave op cit note 308 at 672.

³⁴⁹ Ibid. at 674.

³⁵⁰ Verry, Heffernan and Fisher op cit note 317 at 7.

³⁵¹ Ibid. at 8.

³⁵² Ibid.

³⁵³ Ibid.

However, from the victim's point of view, the threat of punishment in the background can serve to undermine the credibility of the process of restorative justice. One study found that many criminals believed that they were obliged to participate.³⁵⁴ Apologies and reparations from offenders who feel obliged, or only do so to avoid court sanctions, are not likely to be regarded as restorative by victims.³⁵⁵ Another study has shown that victims do not consider reparation by threatening court proceedings in the background to be convincing.³⁵⁶

There is thus a tension between the importance of voluntariness for the victim and the application of coercive measures due to the fact that restorative justice always remains unattainable to a certain extent because of our humanity, since no one can have complete certainty regarding the good faith of another.

Restorative justice fosters dialogue between victim and offender and leads to high rates of victim satisfaction and offender accountability. It can therefore be concluded, that restorative justice offers victims and the community a chance to be heard. Such procedure provides a concrete approach to environmental crime that ultimately benefits all parties involved, including the offender. The restorative justice system definitely represents a valid option as well for solving environmental conflicts.³⁵⁷

2. Experiences with Mediation regarding Ecocide

There are only a few cases where experience has been gained from mediation in relation to ecocide. Furthermore, all these cases took place in the form of so-called mock trials, in other words they were only experiments and had no binding effect. However, the message sent to the public by such events should not be underestimated.

³⁵⁴ Wolhuter, Olley and Denham op cit note 278 at 229.

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Pain et al op cit note 218 at 20.

2.1. International Tribunal for the Rights of Nature and Mother Earth

In the aftermath of the failed Copenhagen negotiations on climate change in December 2009, the World People's Conference on Climate Change and the Rights of Mother Earth took place from 19 to 22 April 2010 as a global meeting of civil society and government representatives organized by the Bolivian government near the city of Cochabamba.³⁵⁸ More than 35'000 people from over 140 countries took part in the event.³⁵⁹ The result was the People's Agreement, which proposes fundamental solutions to the climate crisis. These solutions require people to change their global social relationships and their relationship with nature.³⁶⁰ Topics of the conference included a General Declaration on the Rights of Mother Earth and the establishment of a Climate Justice Tribunal.³⁶¹

The International Tribunal for the Rights of Nature and Mother Earth was later created by the Global Alliance for the Rights of Nature, an international civil society network. The first tribunal was held in January 2014 in Quito, Ecuador, followed by three other tribunals (Lima, Peru in December 2014, Paris, France in December 2015 and Bonn, Germany in November 2017). The International Tribunal for the Rights of Nature and Mother Earth is organised and hosted by members of the Global Alliance for the Rights of Nature under the supervision of a Tribunal Secretariat. The Tribunal's main source of law is the Universal Declaration of the Rights of Mother Earth (UDRME)³⁶². It offers the possibility to raise and decide prominent cases of environmental and social conflicts within the framework of an earth jurisdiction based on the rights of nature. The decision-making process provides a platform for a well-founded legal analysis. In any case, the Tribunal will recommend measures for compensation, mitigation, restoration and prevention of further damages. The Tribunal provides a framework for educating civil society and govern-

³⁵⁸ Turner, Terisa E. 'From Cochabamba, A New Internationale and Manifesto for Mother Earth' 56 f.

³⁵⁹ Ibid.

³⁶⁰ Ibid.

³⁶¹ Ibid. at 57 f.

³⁶² Available at <https://therightsofnature.org/wp-content/uploads/FINAL-UNIVERSAL-DECLARATION-OF-THE-RIGHTS-OF-MOTHER-EARTH-APRIL-22-2010.pdf> (last accessed 25 June 2020).

ments on the fundamental principles of natural rights and an instrument for legal experts to examine the constructs needed for better integration of the rights of nature.³⁶³

The Tribunal's outputs to date are manageable, but it is to its credit that it is still in its beginnings. However, there is certainly the potential to exert greater influence.

2.2. Mock Trial in the Supreme Court of England and Wales

a) Introductory Remarks

In September 2011, two fictitious Chief Executive Officers were tried in a mock trial in the Supreme Court of England and Wales, amongst others organised by Polly Higgins.³⁶⁴ The aim was to test mechanisms to ensure individual responsibility on the basis of a real case of ecocide. The charge was that they were superiorly responsible for environmental destruction in the tar sands of Athabasca in Canada by extracting oil and in the Gulf of Mexico by spilling oil. The facts and evidence are based on true events and are documented in publicly available documents. The process was not executed as a script. The judge and the jury were independent and the latter was properly vetted. Furthermore, some renowned British lawyers participated in the proceedings.³⁶⁵

Legally, the process was based on a draft of a British Ecocide Act – containing the same wording proposed by Polly Higgins as an amendment to the Rome Statute.³⁶⁶ This was applied to an international crime of ecocide as if the law was already in force.³⁶⁷ Section 6 of the Ecocide Act contains the explicit right that is given recognition by the crime of ecocide. Regulations on restorative justice are also in-

³⁶³ Detailed information available at <http://therightsofnature.org/rights-of-nature-tribunal/> (last accessed 15 May 2020).

³⁶⁴ <http://eradicatingecocide.com/the-law/mock-trial/> (last accessed 15 May 2020).

³⁶⁵ All the information set out in this section as well as more detailed information available at <http://eradicatingecocide.com/the-law/mock-trial/> (last accessed 15 May 2020).

³⁶⁶ Available at www.eradicatingecocide.com/the-law/factsheet (last accessed 15 May 2020).

³⁶⁷ <http://eradicatingecocide.com/the-law/mock-trial/> (last accessed 13 September 2020).

cluded.³⁶⁸ The court proceedings made it possible to apply and examine the draft law and shed light on whether and to what extent such a crime can be prosecuted. The draft law was considered a success by those responsible.³⁶⁹

b) The Outcome

The court ruled for one of the defendants on the basis of the successful restorative justice hearing.³⁷⁰ The defendant, who agreed to the restorative justice process, was sentenced to six months imprisonment, which was deferred subject to compliance with the restorative justice agreement.³⁷¹ However, the other defendant, who refused to take part in the restorative justice process, was sentenced to four years in prison and was also subject to a formal restoration order.³⁷² This order comprised a number of measures, including the suspension of operations until the affected area was restored to an acceptable level and the payment of the financial costs of the restoration.³⁷³

The Mock Ecocide process clearly demonstrated the need to appoint legal representatives who speak on behalf of the environment. This is an important step in promoting a more comprehensive approach to earth law.

The process has received wide international attention in the press, which reports about the event were thoroughly positive.³⁷⁴

c) Functionality of Restorative Justice

The effectiveness of the restorative justice concept – coming to an agreement between parties that have been adversely affected by the ecocide – has proven

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ Ibid.

³⁷⁴ See for example the Financial Times: <https://www.ft.com/content/7e42cb72-eb88-11e0-a576-00144feab49a> (last accessed 15 May 2020), The Independent: <https://www.independent.co.uk/environment/green-living/mock-trial-finds-tar-sands-spill-bosses-guilty-of-ecocide-2363988.html> (last accessed 15 May 2020).

itself in this case and offers promising prospects for a future in which this approach could be integrated as standard option in ecocide processes. As in the case at hand, courts that judge crimes of ecocide could offer restorative justice sentencing as an option to traditional convictions – in other words as a alternative sentencing possibility.

The experiment with the mock trial has shown that there is real potential for the application of restorative justice in relation to ecocide. It enables dialogue, understanding, healing and creativity.³⁷⁵ It is about recreating a whole, rather than intensifying separation and fragmentation by punishing perpetrators and excluding victims from the process.³⁷⁶ The experiment showed that it is possible to – in a meaningful way – give voice to different and other than human elements in our system, such as birds or the earth itself.³⁷⁷

2.3. The International Monsanto Tribunal

a) Introductory Remarks

The International Monsanto Tribunal took place from 14 to 16 October 2016 in The Hague as a symbolic trial. The purpose was to investigate the business of the US company Monsanto with regard to its compatibility with the UN's guiding principles for business and human rights. The initiator of the process was an international citizens' initiative, the European Civic Forum.

Monsanto is a large international agrochemical company, which produces seeds and herbicides and has been using biotechnology to produce genetically modified crops since the 1990s.³⁷⁸ Well-known products are various transgenic corn varieties and broad-spectrum herbicides with the controversial active ingredient

³⁷⁵ Hall op cit note 84 at 75 and 184; Rivers, Liz 'Shareholder Return – a "Nurmburg defence"? Ecocide and Restorative Justice' (2012) 24:1 *Environmental Law and Management* 18.

³⁷⁶ Rivers op cit note 375 at 18.

³⁷⁷ Ibid.

³⁷⁸ Verein Europäisches BürgerInnen Forum Ökozid – Konzerne unter Anklage – Internationales Monsanto Tribunal, Den Haag 2016 103.

glyphosate under the name Roundup.³⁷⁹ In 2015, Monsanto employed 22'500 people in 66 countries and had a turnover of 15 billion US-dollars.³⁸⁰ Monsanto was taken over by Bayer AG in June 2018. The name Monsanto no longer exists.³⁸¹

The general objective was that, according to the functioning of an international court, a tribunal consisting of five competent judges (lawyers and professional judges) should issue a judgment, even if only a symbolic one, against Monsanto.³⁸² This should promote the implementation of international mechanisms to enable the victims of transnational corporations to take legal action against these companies.³⁸³ More specifically, the facts should be assessed both with regard to current international legislation and with regard to a (still to be implemented) crime of ecocide. With regard to the latter, the possibility of reforming the Rome Statute in order to incorporate the crime of ecocide should be examined.³⁸⁴

30 affected people, farmers and scientists from various countries were consulted on the damage to people and the environment caused by Monsanto products and business practices.³⁸⁵ Monsanto, on the other hand, refused to participate. The process was lead under the chairmanship of Françoise Tulkens, who was a judge at the European Court of Human Rights for 14 years.³⁸⁶

In assessing Monsanto's conduct, the Tribunal has relied on the Rome Statute as well as the United Nations Guiding Principles for Business and Human Rights³⁸⁷ adopted by the UN Human Rights Council in June 2011.³⁸⁸ These guiding principles set out the responsibilities of business enterprises with regard to human rights. Accordingly, companies are obliged to respect all human rights, including the right to

³⁷⁹ Ibid.

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² Ibid. at 29 f.

³⁸³ Ibid. at 30.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ Available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last accessed 15 May 2020).

³⁸⁸ Verein Europäisches BürgerInnen Forum op cit note 378 at 30.

life, the right to health and the right to a healthy environment. The Monsanto Tribunal has focused on the following principles: Right to a healthy environment³⁸⁹, right to health³⁹⁰, right to food³⁹¹, right to freedom of science and opinion³⁹², aid to war crimes³⁹³, crimes of ecocide.³⁹⁴

b) The Outcome

In their report, the judges conclude that Monsanto is guilty of crimes against humanity and the environment, including the marketing of toxic products that would have killed thousands of people, such as polychlorinated biphenyls (PCBs), glyphosate (a component of herbicides such as Roundup) or 2,4,5-trichlorophenoxyacetic acid (a component of Agent Orange defoliant sprayed by US military aircraft during the Vietnam war).³⁹⁵ The judges believe that Monsanto is engaged in practices that have a serious impact on the environment – activities that affect the rights of indigenous peoples and local communities. The right to food and health would also be violated, including by Monsanto's damage to soils, water and the environment in general.³⁹⁶ The Court also referred to the aggressive marketing of GMO seeds, which restricts these rights by forcing farmers to adopt farming methods that do not respect the practices of traditional crops.³⁹⁷ Furthermore, the

³⁸⁹ According to the UN Resolution 25/21 on Human Rights and the Environment of 2014, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/136/17/PDF/G1413617.pdf?OpenElement> (last accessed 15 May 2020).

³⁹⁰ Article 12 para. 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR, UN Covenant I) of 1967, available at <http://2covenants.ohchr.org/downloads/ICCPR.pdf> (last accessed 15 May 2020); Article 24 para. 1 UN Convention on the Rights of the Child of 1989, available at <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> (last accessed 15 May 2020).

³⁹¹ Article 11 para. 1 UN Covenant I; Article 24 para. 2 c) and e) and Article 27 para. 3 UN Convention on the Rights of the Child.

³⁹² Article 15 para. 3 UN Covenant I; Article 19 of the International Covenant on Civil and Political Rights (CCPR, UN Covenant II) of 1966, available at <https://treaties.un.org/doc/publication/unts/-volume%20999/volume-999-i-14668-english.pdf> (last accessed 15 May 2020).

³⁹³ According to Article 8 para. 2 Rome Statute.

³⁹⁴ Verein Europäisches BürgerInnen Forum op cit note 378 at 31 and 72 ff.

³⁹⁵ International Monsanto Tribunal – Advisory Opinion on p. 15 ff., available at http://de.monsanto-tribunal.org/upload/asset_cache/189791450.pdf (last accessed 15 May 2020).

³⁹⁶ Ibid.

³⁹⁷ Ibid.

five judges condemned Monsanto's practices to undermine the freedom of scientific research, freedom of expression and the right of access to information.³⁹⁸

With regard to ecocide, the Tribunal states in its report that Monsanto's activities "could possibly constitute a crime of ecocide" if such a crime was one day to be enshrined in international law.³⁹⁹ Various commercial activities could be involved, such as the sale of glyphosate-containing herbicides to Colombia, where these substances are sprayed by aircraft over coca plantations, thereby affecting both the environment and public health, and the mass use of hazardous agricultural chemicals in industrial agriculture, such as Roundup, and the production, marketing and distribution of genetically modified organisms. Serious pollution of soil and water as well as impairment of plant diversity are likely to qualify as ecocides too. This also applies to the use of long-lived organic pollutants such as polychlorinated biphenyls (PCBs), which cause considerable and lasting damage that will as well affect the rights of future generations.⁴⁰⁰

The Monsanto Tribunal has also been criticised by the press. For example, the renowned Swiss newspaper *Neue Zürcher Zeitung* (NZZ) described the whole thing as a masked show trial. It criticised the fact that the Monsanto Tribunal only had witnesses of the prosecution who took a stand against Monsanto. Although Monsanto voluntarily waived participation, no "public defender" or the like was given to the company in the proceedings. Furthermore not only Monsanto, but also the entire industrial agriculture was pilloried.⁴⁰¹ *Forbes* also described the tribunal as a "fake trial", whose verdict had been established from the outset. The tribunal used Monsanto as a symbolic scapegoat to spread misinformation about the modern food industry. Among other things, it is criticised that the taking of evidence was

³⁹⁸ Ibid.

³⁹⁹ Verein Europäisches BürgerInnen Forum op cit note 378 at 78.

⁴⁰⁰ Ibid. at 78 f.

⁴⁰¹ Article available at <https://www.nzz.ch/meinung/m Monsanto-tribunal-in-den-haag-wenig-hilfreiches-kesseltreiben-ld.122143> (last accessed 15 May 2020). See as well the commentary in the German newspaper *Frankfurter Allgemeine*, available at <http://www.faz.net/aktuell/wirtschaft/aktivisten-monsanto-und-die-maer-vom-oeko-14435524.html> (last accessed 15 May 2020).

unilateral and was largely based on theatricality, including skits, performances and short films.⁴⁰²

3. Concluding Remarks

Mock trials or symbolic trials such as those described above can provide important insights and can undoubtedly be valuable in terms of developing procedures of a binding nature. First and foremost, there are questions about ensuring procedural guarantees such as the independence of the judiciary or the right to be heard.

For example, the organising committee of the International Monsanto Tribunal has selected only very experienced and outstanding lawyers and has imposed a ban on contact itself in order to prevent a possible risk of collusion with the judges.⁴⁰³ In a binding process enshrined in international law, such selective measures would hardly suffice, but a comprehensive organisational regulation would have to be drawn up which adequately protects and ensures the procedural guarantees.

With regard to the possibility of using mediation for ecocide, an important aspect that has been demonstrated by the mock trials in the Supreme Court of England and Wales is the effectiveness of the concept of restorative justice. It can therefore be concluded that there is as well a promising potential for the application of the restorative approach in mediation concerning crimes of ecocide.

⁴⁰² Available at <https://www.forbes.com/sites/kavinsenapathy/2017/04/21/monsanto-found-guilty-in-fake-trial-that-distracted-from-real-problems/#15576ed9534f> (last accessed 15 May 2020).

⁴⁰³ International Monsanto Tribunal – Advisory Opinion on p. 47, available at http://de.monsanto-tribunal.org/upload/asset_cache/189791450.pdf (last accessed 15 May 2020); Verein Europäisches BürgerInnen Forum op cit note 378 at 17.

Chapter 5: The Potential of Using Mediation in the Resolution of Crimes of Ecocide

1. Premises for Constructive Resolution of Ecocide Crime Disputes by Mediation

The following section deals with the question of the prerequisites for a constructive resolution of ecocide crime disputes by mediation. In order to be able to resolve disputes concerning ecocide properly, a number of issues must be considered. In particular, there are some specific aspects to be considered compared to conventional environmental mediation.

As previously mentioned (Chapter 3.1), the mediation process is characterised by the factors confidentiality, voluntariness, third party intervention, assistance, impartiality and neutrality, acceptability and no decision-making power.

The fact that mediation procedures follow the principle of confidentiality poses a problem for mediation in environmental disputes and thus also with regard to ecocide. Due to the extent and scope of the effects of an ecocide, which regularly by far exceed those in average environmental mediations, public information and participation is extremely important as a means of ensuring that all parties concerned have the opportunity to participate and contribute to the procedure. In the case of ecocide mediation, compliance with the confidentiality requirement and reaching and involving all those concerned would therefore be a major challenge.

Another point that is also related to the problem of the large number of affected parties and which is decisive for the functioning of mediation procedures in ecocide is that conflict resolution can take place with organised groups of stakeholders. Particularly in the case of a very large number of affected parties with competing interests, the principle of representative delegates should be followed and it should be clarified at the beginning of the procedure who the respective contact persons are.

Given the scale and effort involved in doing justice to all those involved, it may be helpful to involve a co-mediator. The choice of an expert co-mediator could also help to clarify complexities, uncertainties and related scientific questions due to his technical expertise. Furthermore, this would help to find a politically, technically and financially feasible agreement.

However, the problem of the effectiveness and enforcement of the agreements remains unsolved. This is a consequence of the voluntary principle that lacks a joinder mechanism as in court procedures, which ensures the enforceability of a binding agreement. Mediation procedures therefore, like in Switzerland, often take place in advance of or in addition to legally regulated decision-making procedures.

This, though, carries the risk that, because of its coercive elements, an imminent or parallel court proceeding may, from the victim's perspective, undermine the idea of completely voluntary participation. As a result, the credibility of the "restorative justice" approach, which is seen as particularly promising for mediation in the field of ecocide, is dwindling. A forthcoming or already pending court procedure can therefore have a significant influence on the parties' attitude to mediation.

A major prerequisite – especially in the field of ecocide, where the most diverse interests are represented – is neutrality. Therefore the choice of a mediator must meet high quality standards. In order to find a suitable mediator, potential candidates should preferably face a selection procedure by testing his or her skills, what could, for example, be done by a public authority. It is therefore appropriate – also for reasons of the dimension and scope of mediation in the case of ecocide – to entrust the organisation of the procedure to a professional framework institution.⁴⁰⁴

Moreover, it will be important to establish a balance of power and to keep the powerful actors in check to the extent that they do not take up more leeway than they are equitably entitled to. The problem of power imbalances is likely to reoccur

⁴⁰⁴ For example, the international community could set up a specialised institution.

in ecocide mediation, as large international companies will regularly be involved and experience shows that they can resort to greater resources. Attention must therefore be paid to ensuring that the population affected by the environmental impacts and other – often – non-profit organisations are not disadvantaged because of their limited means. It can therefore be expected that a mediator will have to intervene more (in the sense of a compensatory strengthening of the weaker position through expertise, for example) in a mediation involving ecocide than he usually does in mediation cases. However, more intervention also means that the appearance of neutrality of the mediator and thus the trust of the parties towards the mediator may be affected. Therefore, it would certainly be worth considering whether the various parties should be represented by an expert person, which would not only have procedural economic effects (large interest groups should elect a representative anyway in order to participate effectively) but could also better ensure procedural fairness.

Apart from the already mentioned difficulty of ensuring the participation of all the parties concerned, it will be challenging in the case of an ecocide to identify a certain interdependence between the parties in terms of “offer and need” which is used as a criterion for the suitability of the dispute for mediation.⁴⁰⁵ For regularly, the sense of wrongdoing and thus the need for reparation will not be very strong on the part of those responsible in large international corporations, if not (almost) completely absent.

If due account is taken of the specificities discussed, the use of a mediation procedure may also be promising for the type of conflict of ecocide.

2. Possible Next Steps and Future Challenges

The current situation is such that there is no legal ground at international level for the crime of ecocide. Of course, the legal anchoring in international law plays a role in particular with regard to an effective enforcement of the prosecution of

⁴⁰⁵ See Chapter 3, Title 4.2.

the crime of ecocide, since there would then exist the possibility of legal proceedings with a binding judgment. At the same time, mediation would also be provided for as a means of voluntary peaceful settlement of disputes (cf. Article 33[1] of the UN Charter), that is, as a step before the mandatory dispute settlement procedure. This would alleviate the problem of enforceability inherent in the non-compulsory element of mediation. However, the outcome of mediation would possibly lose acceptance for precisely this reason – the forthcoming court proceedings.⁴⁰⁶

A central point that would have to be taken into account in legal implementation is the anthropocentric approach. In order to protect the environment effectively under criminal law, the need for an eco-centric approach must be addressed by considering the environment as a separate legal good of common interest deserving criminal law protection.

With regard to the legal anchoring it will be necessary to evaluate whether an ecocide regulation should be introduced as an amendment to the Rome Statute or whether it would be more conducive to draw up a separate international convention. In view of the dispute settlement mechanisms mentioned above, the implementation in a separate convention appears to be the preferable solution. The fact that the Rome Statute has 124 signatory states, but the ratification of the USA and the signing and ratification of China are missing, and that the International Court of Justice (ICC) currently has little room for restitution, injunctive powers or the possibility of determining civil liability, also speak in favour of this solution. On the other hand, a separate convention could not only provide for an appropriate dispute settlement mechanism, but could also enshrine criminal and civil liability as well as establish an international environmental court.

In addition to the question of how victimhood is to be conceived and how the representation of victims – in particular of nature as the primary victim – is to be regulated, various other legal questions arise, especially with regard to the concrete definition of the offence of ecocide and how best to deal with the various types of

⁴⁰⁶ See Chapter 5, Title 1.

offenders (natural and legal persons). It is therefore first and foremost necessary to draw up a suitable concept to be able to prosecute multinationals that cause serious environmental damage.

One of the essential points is that the definition of the crime of ecocide constitutes a strict liability for states as well as companies and private individuals, as this would considerably alleviate the problem of proof of knowledge and intention. Thus, liability would also arise where environmental damage was not intentional but merely a side effect of a particular activity.

In line with the precautionary principle, which is one of the fundamental principles of international environmental law, an ecocide law should above all pursue a preventive approach and prefer the principle "the polluter does not pollute" to the "polluter pays" principle. The legal anchoring of an ecocide crime could create incentive structures for environmentally friendly behaviour. In particular, the legal priority of renewable technologies and the prohibition of certain environmentally hazardous activities can promote investment in advanced technologies and thus an environmentally friendly economy.

It is now up to the international community to ensure the protection of the environment through appropriate measures and to establish precisely and clearly the legal definition of the crime of ecocide.

Conclusion / Appraisal

A prerequisite for effective environmental protection and for the promotion of sustainable development is to ensure an adequate system that meets the needs and characteristics that arise in connection with the resolution of ecocide crimes. The objective to be achieved in the future, however, is not merely to penalise environmental offenders retrospectively, but to implement the principles of prevention, precaution and "the polluter does not pollute". The implementation of such a system – above all legal regulations – should create incentive structures for environmentally friendly behaviour, that is, it should have a preventive effect in particular, so that the greatest possible impact can be made on achieving a sustainable high level of environmental protection. And, in the event that an ecocide has occurred, strict liability can be provided for states as well as for companies and private individuals, so that environmental damage that is merely a side effect of a particular activity would also be comprised.

From the findings of the present thesis it can be concluded that mediation is to be considered as a suitable procedure for dispute resolution in cases of ecocide. This is supported by the obvious positive factors such as cost benefits or the higher speed compared to conventional court proceedings. Furthermore, a win-win solution can be achieved, the result of which is acceptable to all parties. The resulting higher level of satisfaction is primarily based on voluntary and active participation and the appropriate consideration of interests and needs.

Furthermore, the possibility of using mediation to maintain long-term relationships and thus achieve a longer-term improvement in environmental quality seems highly desirable in view of the considerable effects of an ecocide.

Nevertheless, the use of mediation for ecocide also poses major challenges that need to be overcome. One of these is to maintain confidentiality while at the same time reaching and involving all those who may have an actual interest.

Important with regard to ecocide conflicts is the suitability of mediation for multi-party disputes. Another key factor is the possibility of using this procedure to address broad causes of conflict. Preferably, conflict resolution takes place when there is a large number of parties involved with organised interest groups represented by an expert delegate. In this way, interdependencies between the parties in terms of "offer and need" can also be identified to the best possible extent. It also seems advisable to evaluate whether a co-mediator should be called in as an expert who, on the one hand, would bring relief from the procedural point of view and, on the other hand, could contribute to high-quality agreements through profound expertise.

However, the requirement of neutrality must always be respected. This can be particularly challenging where power imbalances are likely, a wide variety of interests are represented and co-mediators are involved. By requiring the mediators to have a certificate of competence (awarded by a public authority) and by entrusting the organisation of the procedure to a professional framework institution, can be ensured that this requirement is met in the best possible way.

The greatest challenge I consider to be solving the problem of the effectiveness and enforcement of agreements concluded in mediation procedures regarding ecocide. The possibility of mediation before a criminal prosecution takes place seems to be the only solution in terms of enforcing the outcome of the proceedings. But the problem that imminent or already pending court proceedings can have a significant influence on the attitude of the parties concerned towards the mediation procedure cannot be argued away. It would therefore have to be carefully evaluated to what extent the prospect of obtaining an enforceable court decision if mediation fails outweighs the undermining of the credibility of the restorative justice approach due to the coercive element inherent in court proceedings.

Finally, combating ecocide requires a paradigm shift – from the mere perception of the earth as property or a set of resources to be exploited, to the recognition of the intrinsic value of ecosystems such as the pleasure we get from strolling in a

forest or drinking fresh water from a spring. We have a legal duty to protect our nature, which we inherited from our ancestors and on which we depend.⁴⁰⁷

In conclusion, some inspiring thoughts of a woman who has not yet lost faith in the saving of our planet. The excerpt is from Jane Goodall's⁴⁰⁸ book "Reason for Hope: A Spiritual Journey", which should make us all ponder:

“Yes, we are destroying our planet. The forests are going, the soil is eroding, the water tables are drying, the deserts are increasing. There is famine, disease, poverty, and ignorance. There is human cruelty, greed, jealousy, vindictiveness, and corruption. [...] All this would seem to suggest a hopeless millennium ahead. Indeed, environmentalists have produced terrifying statistics that “prove” that life on planet earth is doomed, statistics computed from the rate at which the rain forests are being destroyed, the greenhouse gases building up, the human population growing, and so on. It is as though we were on a large ship. The lookout in the bow suddenly sees rocks ahead and alerts the crew. Yet it takes time for a big vessel to change course, so all attempts to avert disaster will fail. Of course, it will take time for the ship to disintegrate in the waves. Our world will end “not with a bang but a whimper.” It is easy to imagine that such a fate awaits life, as we know it, on Space-ship Earth. Yet despite this, I do have hope for the future – for our future. But only if changes are made in the way we live – and made quickly. We do not, I think, have much time. And these changes must be made by us, you and me. If we go on leaving it to others, shipwreck is inevitable. My reasons for hope are fourfold: (1) the human brain; (2) the resilience of nature; (3) the energy and enthusiasm that is found or can be kindled among young people worldwide; and (4) the indomitable human spirit. [...] I truly believe that more and more people are seeing the appeal in the eyes around them, feeling it in their hearts, and throwing themselves into the bat-

⁴⁰⁷ Merz, Prisca 'Ecocide' 18.

⁴⁰⁸ Jane Goodall is considered the world's leading chimpanzee expert and is best known for her 55-year old study of the social and family interactions of wild chimpanzees in Gombe Stream National Park, Tanzania. She is the founder of the Jane Goodall Institute and the Roots & Shoots Programme. She has worked extensively on nature conservation and animal welfare and has written several books. In 2002 she was appointed UN Messenger of Peace.

tle. Herein lies the real hope for our future; we are moving toward the ultimate destiny of our species – a state of compassion and love. Yes, I do have hope. I do believe we can look forward to a world in which our great-grandchildren and their children after them can live in peace. A world in which there will still be trees and chimpanzees swinging through them, and blue sky and birds singing, and the drumbeats of indigenous peoples reminding us powerfully of our link to Mother Earth and the Great Spirit – the God we worship. But, as I’ve stated repeatedly, we don’t have much time. The planet’s resources are running out. And so if we truly care about the future of our planet we must stop leaving it to “them” out there to solve all the problems. It is up to us to save the world for tomorrow: it’s up to you and me.”⁴⁰⁹

⁴⁰⁹ Goodall, Jane Reason for Hope – A Spiritual Journey 230 ff.

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