Sustainable Development in International Law and the protection of the Global Commons

Isabel Sarenmalm
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Sustainable Development in International Law and the protection of the Global Commons

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Abstract

The four ‘Global Commons’ – the Atmosphere, Antarctica, the High Seas (Oceans) and Outer Space – are in international law identified and recognised as falling outside the jurisdiction of any state. Whilst crucial to mankind and the global ecosystem as a whole, the commons are severely impacted by the current anthropogenic climate change. This thesis argues that the global commons have a weak legal protection today. Given the significance of the global commons for the achievement of sustainable development, exploring possibilities to strengthen such protection through international law is crucial to secure the future of our world. The purpose of this thesis is to highlight the issues relating to the current legal protection of the global commons and to address them in the perspective of international law and sustainable development as intersecting conceptual and theoretical frameworks.

By applying and analysing the acknowledged New Delhi Declaration of Principles of International Law Relating to Sustainable Development, this thesis will aim to provide insights, and maybe even a fresh point of view, as to how legal instruments could be structured and implemented in the strive for more effective and sustainable protection of the global commons.

Keywords: Sustainable Development, Global Commons, Climate Change, International Law, New Delhi Declaration.

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Sustainable Development in International Law and the protection of the Global Commons

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Summary

This study examines the legal protection of the Global Commons by focusing on the concept of Sustainable Development, as it is understood in the New Delhi Declaration of Principles in International Law Relating to Sustainable Development. The current legal protection of three of the four Global Commons is analysed de lege lata (the law as it is). Then, the study examines three legal proposals in International law selected for their potential to further strengthen the legal protection of the Global Commons. To further assess the proposals’ potential to strengthen the legal protection, the extent of their incorporation of Sustainable Development is examined and analysed de lege ferenda (the law as it should be).

After examining the compatibility of international law as it is today with the protection of the global commons, and by investigating whether other approaches to the legal structures in place today are viable, this thesis concludes that the three legal proposals examined all have their own strengths and weaknesses.

Keywords: Sustainable Development, Global Commons, Climate Change, International Law, New Delhi Declaration.
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<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>ATS</td>
<td>Antarctic Treaty Systems</td>
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<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
</tr>
<tr>
<td>CCAMLR</td>
<td>Convention on the Conservation of Antarctic Living Resources</td>
</tr>
<tr>
<td>CITES</td>
<td>Convention on International Trade in Endangered Species of Wild Fauna</td>
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<tr>
<td>DELC</td>
<td>Division of Environmental Law and Conventions</td>
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<tr>
<td>EEE</td>
<td>End Ecocide on Earth</td>
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<tr>
<td>EEI</td>
<td>Earth’s Energy Imbalance</td>
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<td>FAO</td>
<td>Food and Agriculture Organisation</td>
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<td>IBA</td>
<td>International Bar Association</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICEF</td>
<td>International Court of the Environment Foundation</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IISD</td>
<td>International Institute for Sustainable Development</td>
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<td>ILSA</td>
<td>International Law Association</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>IPCC</td>
<td>Intergovernmental Panel on Climate Change</td>
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<td>IUCN</td>
<td>International Union for Conservation of Nature and Natural Resources</td>
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<td>LRTAP</td>
<td>Long-Range Transboundary Air Pollution</td>
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<td>MEA</td>
<td>Multilateral Environmental Agreements</td>
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<tr>
<td>NASA</td>
<td>National Aeronautics and Space Administration</td>
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<tr>
<td>OSPAR</td>
<td>Convention for the Protection of the Marine Environment of the North-East Atlantic</td>
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<td>POP</td>
<td>Persistent Organic Pollutants</td>
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<td>RoN</td>
<td>Rights of Nature</td>
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<td>SDG</td>
<td>Sustainable Development Goals</td>
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<tr>
<td>UDRME</td>
<td>Universal Declaration of the Rights of Mother Earth</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNCED</td>
<td>United Nations Conference on Environment and Development</td>
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<td>UNEP</td>
<td>United Nations Environment Programme</td>
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<td>UNFCCC</td>
<td>United Nations Framework Convention on Climate Change</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
</tr>
<tr>
<td>WPCCCRME</td>
<td>World Peoples’ Conference on Climate Change and the Rights of Mother Earth</td>
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<td>WWF</td>
<td>World Wildlife Forum</td>
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1. Introduction

1.1. Problem statement

As the world is starting to feel the impact of climate change, there is an urgent need to structure our societies in a more sustainable way. The legal structures in place globally today are no exception. The four areas most commonly referred to in international law as the global commons are the Atmosphere, Antarctica, the High Seas and Outer Space. They cover wide geographical areas and do not fall under the jurisdiction of any state. They are instead placed under the jurisdiction of international law. However, their legal protection thus provided is arguably weak and is constituted mostly by way of voluntary agreements and international conventions (Birnie et al., 2009). Whilst crucial to mankind and the global ecosystem, these areas are also severely impacted by the current anthropogenic climate change (UN, 2012; IPCC, 2014).

The global commons are of crucial importance and have a central role in the effects resulting from anthropogenic changes to the climate. Hypothetically, if we were to burn all the remaining reserves of fossil fuels known today, it would add enough Greenhouse gas to the atmosphere to cause the entire Antarctic ice sheet to melt which in itself would be enough to raise sea levels by 58 meters globally (Winkelmann et al., 2015). In addition, the atmosphere and the oceans are truly international in character and anthropogenic changes to their ecosystems and natural cycles will affect all states, regardless of the origin of the emissions committed. Debates about the categorization of the global commons are ongoing but most scholars and sources in international law still most commonly refer to the four domains; the Atmosphere, Antarctica, the High Seas and Outer Space as ‘the Global Commons’ today. The fragmented picture of which areas that are to be considered as “commons” is in itself however, as will be apparent, arguably also a hindrance to a more effective legal protection in international law.

In light of these difficulties, several different legal alternatives and institutions have been proposed to ensure further legal protection by different stakeholders. The challenge ahead in creating internationally viable legal protection that is effective and enforceable whilst simultaneously respecting state sovereignty and taking into account sustainable development and accelerating climate change predictions, is arguably yet unresolved.

The three legal proposals assessed in this thesis have been met with extensive scepticism and controversy globally and debates about their legal suitability have been ongoing for decades. The difficulty with the implementation of an international Right of Mother Earth is, as stated by Cullinan (2013), that “the idea that legal systems should recognize aspects of Nature as legal subjects with rights sounds strange and even nonsensical to many lawyers trained in legal traditions that define all Nature as property.” In addition, debates about the creation of an international environmental court have also had its fair share of controversy and skepticism. The idea has been referred to as a naive constitutional extrapolation where it is assumed that national institutions easily and effectively can be as successful as international institutions (Stephens; 2009; Allott, 2002). Skepticism of the proposed crime of ecocide has mainly centered around the notion that criminal intent would be too difficult to establish and that “ecocide, as terrible as it could be, has little in common with genocide - a mass and systematically planned extermination of millions - and it would belittle the victims of genocide if they were to be compared with victims of ecological pollution” (Popovski & Mundy, p. 13, 2012).
1.2. Purpose and research questions

The aim of this thesis is to examine possibilities to strengthen the legal protection of the global commons with a focus on the concept of sustainable development as it is formulated in the *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*. The purpose is to contribute knowledge and insight into this area where international law and sustainable development meet in relation to the vulnerable global commons. There are a great number of both existing and proposed international legal instruments addressing the protection of the environment and the adaptation to and mitigation of climate change. By studying a select number of such proposed legal instruments, the attempt is to reach some conclusions about the difficulties and possibilities of protecting and preserving the global commons.

This thesis aims to present and compare legal instruments that could possibly amount to a more effective legal protection than the arguably weak legal protection available today. To more effectively protect these domains, the hope is that by researching and analysing (1) the legal protection of the global commons as the law is structured and formulated (*de lege lata*), and thereafter (2) whether the notion of sustainable development as formulated in the New Delhi Principles, could give better insight into how the legislation examined should be structured and formulated (*de lege ferenda*).

The global commons are specifically chosen as the focus of this thesis since neither their environmental protection nor any effective management institutions have yet been sufficiently implemented internationally (Birnie et al., 2009). UNEP’s Law Division, the Division of Environmental Law and Conventions (DELC), furthermore address the legal situation in this field and argue that the current regulatory frameworks governing the global commons still have fundamental gaps and inconsistencies that require immediate attention (UNEP, 2017). This thesis analyses and looks deeper into how the world of legality is used, and more effectively could be used to protect the global commons from current climate change impacts and thereby simultaneously ensuring sustainable development and sustainability of our planet. The hope is furthermore to contribute to the understanding of the concept of sustainable development as formulated in the New Delhi principles, and whether the principles could help provide more effective legal protection to the global commons.

Based on the difficulties mentioned above, more research exploring different legal alternatives addressing climate change impacts and sustainable development in international law, specifically when discussing the climate and the global commons, is still sought after and needed. My three research questions, based on the above reasoning, are formulated as follows:

1. What legal instruments for the protection and development of the Global Commons exist today in International Law?

2. What major proposals have been formulated that could strengthen the legal protection of the Global Commons through International Law and to what extent do they consider Sustainable Development?

3. Do these proposals have a potential to strengthen the legal protection of the Global Commons through International Law with a focus on Sustainable Development?
1.3. Limitations and clarifications

This thesis will only consider the three first mentioned of the four commons, namely *the Atmosphere, Antarctica, and the High Seas*. The fourth common, Outer Space, falls outside the scope of the study, as it is not directly affected by anthropogenic climate change. The thesis will furthermore only focus on international law. National legislation will regardless of this be addressed in some chapters as a way to deepen the understanding of the legal alternatives proposed and for a better understanding of the completeness of this work.

In recent years, several different legal alternatives and institutions have been proposed in these areas by different stakeholders. As mentioned, this thesis will analyse three of these proposals in relation to the protection of the global commons. The three proposed legal alternatives chosen are:

1. Ecocide – the fifth International Crime Against Peace in Article 5.1 Rome Statute,
2. The Universal Declaration of the Rights of Mother Earth (UDRME) – giving nature a legal personality, and
3. The creation of an International Court for the Environment (ICE)

All three of these proposals have been discussed and debated by scholars, organisations and governments alike for years. They are focused upon in this thesis based on their three common denominators: (i) their international implementation, despite years of debate, have not been successful, (ii) their national equivalents have all been nationally implemented, to different extents, by states globally, and yet, (iii) they have all been met with extensive scepticism and controversy.

1.4. Structure of the thesis

The thesis is outlined and structured as follows. Chapter 1 aims to give the reader a good introduction to the subject by presenting both the problem statement and a brief background description to climate change and the global commons. The notion of Sustainable Development as specified in relation to international law in the New Delhi Declaration of Principles of International Law Relating to Sustainable Development provides the conceptual framework of the thesis. It is introduced in Chapter 2. The significance of the notion of Sustainable Development is highlighted here and the New Delhi Declaration is presented. Reference is also made to key documents of the Intergovernmental Panel on Climate Change (IPCC). Chapter 3 is on methodology. It focuses on the question *how*, i.e., how the research was conducted so that other researchers can easily duplicate it in the future. This includes a comment on qualitative research as well as a literature review.

The results of the work are presented in Chapter 4, which has three sections. The legal instruments protecting the global commons in place today [Research question 1] are presented in the first section. The three legal proposals chosen for further analysis [Research question 2] are presented in the second section. They are (i) Ecocide – a new added fifth crime against peace, found in Article 5 Rome Statute, (ii) a Universal Declaration of the Rights of Mother Earth – a proposal to attribute comprehensive legal rights to Nature, much like a legal entity (e.g., a person or corporation) and, (iii) the creation of an International Court for the Environment – to solely rule on cases involving environmental degradation. The second section concludes by examining the extent to which sustainable development is incorporated and
considered in the three proposals. Based on the results presented in the two sections of Chapter 4, a third result-section examines the question what can we learn from this? – i.e., what potential do these proposals have to strengthen the legal protection of the global commons through International Law with a focus on Sustainable Development? [Research question 3]. Based on the research in the previous chapters, Chapter 5 then tie the thesis together with a discussion. A concluding note including a summary is lastly presented in the final chapter.

1.5. Background

1.5.1. Anthropogenic climate change

The Swedish scientist Svante Arrhenius was one of the first scholars to speculate about whether variations in the atmospheric concentration of carbon dioxide could alter the temperature and contribute to the long-term variations in the climate, thereby correlating with the greenhouse effect (Arrhenius, 1896). Today, 97 per cent of the global climate scientists agree that the current climate trends are very likely the result of human activities (NASA, 2017). Even though the climate has changed dramatically historically, the speed of the current warming trend is unprecedented (IPPC, 2007; IPCC, 2014), and has already resulted in sea level rise, global temperature rise, warming oceans, shrinking ice sheets, declining Arctic sea ice, glacial retreat, extreme events (droughts, intense rainfalls, storms etc.), ocean acidification and decreased snow cover (IPCC, 2014; Nakicenovic et al., 2016). A difference in the fourth and fifth IPCC-reports can be noted. In the fourth report from 2007 it is stated that most of the observed increase in global average temperatures since the mid-20th century is very likely [90 percent confidence] due to the observed increase in anthropogenic greenhouse gas concentrations (IPCC, 2007). Seven years later, in the fifth report, a similar updated statement is included, in that “It is extremely likely [95 percent confidence] more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in greenhouse gas concentrations and other anthropogenic forcings together.” (IPCC, 2014).

![Fig. 1 Climate Change: How do we know? (NASA, 2017).]
The drivers of climate change are defined in the fifth IPCC report as natural and anthropogenic substances and processes that alter the Earth’s energy budget (IPCC, 2014). Climate change has been categorized in various ways. This thesis treats it as a complex hindrance to sustainable development. In 1973 Melvin Webber and Horst Rittel introduced the term **wicked problems** and defined such problems as “societal problems that lack simplistic or straightforward planning responses” (Rittel & Webber, 1973). It has since then been argued that wicked problems expand beyond the notion of societal problems and that they will not be resolved without extensive, collaborative, flexible and innovative responses (Camillus, 2008) and climate change has been described as falling under such a categorization (FitzGibbon & Mensah, 2012). Other scholars have categorized climate change as a **super wicked problem**, as climate change ticks off the four key features of such a problem, namely that (i) time is running out, (ii) those who cause the problem also seek to provide a solution, (iii) the central authority needed to address the problem is weak or non-existent, and (iv) irrational discounting occurs that pushes responses into the future (Levin et al., 2012). The authors proceed to argue that these four features create a global policy failure since the policies adapted by most governance institutions largely respond to short-term time horizons and thereby creates equally short-term “self-interest” strategies or policies (Levin et al., 2012). Similar to Levin et al (2012), Scharmer (2009) defines climate change as a **hyper complex problem** characterized by the following three features: (i) cause and effect are distant in time, (ii) there are conflicting worldviews and interests amongst key stakeholders, and (iii) the events unfold in unfamiliar and unpredictable ways (emergent complexity). Whether or not climate change should be recognised and described as an un-categorised global sustainability threat, a super wicked problem or a hyper complex problem, the fact remains; few today would argue against the notion that climate change is one of the greatest challenges to sustainable development.

### 1.5.2. Global Commons

The Atmosphere, *Antarctica*, the *High Seas* and *Outer Space* are the four domains most often referred to in international law as “the Global Commons”. All states are affected by the status of these domains, both by activities that impact them and the benefits from their well-being (Buck, 1998). They are often described as belonging to the ‘common heritage of mankind’ including future generations and their geographical domains reach beyond the scope of any sovereign state (Kopela, 2016). The international management of these areas started to draw growing international public interest in the late 1950s (Buck, 1998). In the late 1960s, ecologist Garrett Hardin argued in his famous article *The Tragedy of the Commons* that a shared-resource system would be under a constant threat of over-exploitation and depletion due to individuals and states acting in their own self-interest (Hardin, 1968).

Historically, the commons have often been viewed as areas “free for all” and their resources open on a ‘first come, first served basis’, which has also given developed countries a more advantageous position in harvesting their resources (Buck, 1998). However, due to the lack in advanced technology to harvest their resources and extracting the values from these domains, they have historically been left alone (Stoll, 2016). This is no longer the case. As stated by Nobel Prize Winner Elinor Ostrom “the technology for extracting value from these four domains has developed more rapidly than have the appropriate legal mechanisms for establishing an effective property regime” (Forward in Buck, 1998).

In 1980, the International Union for Conservation of Nature and Natural Resources (IUCN) in collaboration with the World Wildlife Fund (WWF), UNESCO and the United Nations
Environment Programme (UNEP) published a report called *the World Conversation Strategy* in which they defined the global commons as;

"A commons is a tract of land or water owned or used jointly by the members of a community. The global commons includes those parts of the Earth's surface beyond national jurisdictions — notably the open ocean and the living resources found there — or held in common — notably the atmosphere. The only landmass that may be regarded as part of the global commons is Antarctica ..." (IUCN, 1980).

As stated above, while these four domains historically and today are most commonly referred to as “the four commons”, more recently, several scholars have argued that this categorization is outdated (Nakicenovic et al., 2016), that climate in itself should be viewed as a fifth common since it can be viewed as a shared resource of common concern that is already treated as a common good in international law (Stoll, 2016), and that the Arctic region should have been labelled a global common simultaneously as Antarctica (Gautam, 2011).

The three global commons focused upon further here are the atmosphere, the oceans and Antarctica. Firstly, the atmosphere is a mechanical mixture of gases and consists of a series of horizontal layers, each with its own specific traits. The layers are, in order, the troposphere, stratosphere, mesosphere, thermosphere and the exosphere (Barry & Chorley, 2009). Around 80% of the mass of the atmosphere is found in the layer closest to the Earth’s surface, the troposphere, and it is mainly changes in the condition and composition of this layer that affect the conditions on Earth (Kreuter-Kirchhof, 2011). The atmosphere is closely linked to all other ecosystems globally and is also a global common-pool resource in that it functions as a sink for CO₂ and provides services to all other ecosystems (Edenhofer et al., 2013). Scientists are reporting that the Earth’s surface during the last three decades has become successively warmer than in any preceding decade since the 1850s and that the atmospheric concentrations of CO₂, methane, and nitrous oxide have increased to levels unprecedented in at least the last 800,000 years (IPCC, 2014). The notion of the atmosphere as a global common has historically been debated, and still is today (Buck 1998; Edenhofer et al., 2013). Authors agree that the atmosphere has characteristics of a common pool resource domain in that it is accessible to all, i.e., it is more or less impossible to exclude anyone from access to the atmospheric absorptive capacity (Buck, 1998). However, since there is no common property regime in place, it is argued that it can and should not be called a global common *per se* (Edenhofer et al., 2013).

Secondly, the High Seas, often also referred to as the Deep Seas, High Oceans, Deep Seabed, or simply, ‘the Oceans’, consist of the Arctic Ocean, the Atlantic Ocean, the Indian Ocean and the Pacific Ocean. These domains cover around 71% of the Earth’s surface and they play a major role in the regulation of the CO₂ concentration of the atmosphere and the global carbon cycle, since the oceans contains 16 times more CO₂ than the biosphere and 50 times more CO₂ than the atmosphere (Roy-Barman & Jeandel, 2016). The oceans are currently facing climate change impacts in the form of water temperature rise and ocean acidification caused by the oceans absorbing about 30% of the emitted anthropogenic CO₂ (IPCC, 2014). In addition, the oceans are also threatened by over-fishing, vast amounts of plastic debris contamination and collapsing ecosystems (Nakicenovic et al., 2016). In a recently published article in the journal *Science Advances*, researchers have found that the oceans may be storing 13% more heat than previously estimated, an alarming finding since the Earth’s energy imbalance (EEI) drives the ongoing global warming and 90% of EEI is stored in the oceans (Cheng et al., 2017). The researches furthermore found that the changes in the amount of heat stored were small up until the 1980s and that all ocean basins since 1989 have experienced a significant warming.
Thirdly, Antarctica and the oceans surrounding it are integral to the Earth’s ecosystems and the influence on global climate by having a central role in driving ocean circulation, absorbing CO$_2$ from the atmosphere and exchanging heat and other climatically relevant properties in the ocean surface (Fogt & Stammerjohn, 2015). Current changes in natural conditions within this region disturb scientists. As an example, the summer surface melt on the Antarctic continent in 2014 was about 25% less than the year before, simultaneously as the last three years have seen a record-breaking sea ice extension. At the same time, on 24 March 2015, the highest temperature ever on the Antarctic continent was recorded, and later verified (Eos, 2017). A rise in sea temperature has also led to increased melting underneath the ice sheets of the Antarctic region, recently beneath the Amundsen Sea ice shelves facing the Pacific Ocean (Nakicenovic et al., 2016; Fogt & Stammerjohn, 2015). There is a current debate as to the categorization of Antarctica as a global common. It has been argued to constitute a special category of a ‘common’ since claims for sovereignty over its territory have been made by various states, e.g., for mining, oil extraction and fishing etc. These claims are currently ‘frozen’ (Schrijver, 2016).

The condition of these three domains presented above is fundamental to the condition of the biosphere, and in that, fundamental to all sub-components of the Earth’s system. According to Rockström et al (2016), the possibilities to restore and strengthen the resilience of the biosphere’s capacity to adapt to anthropogenic changes in the climate should not be taken for granted.

Fig. 2 High stakes on the high seas (The pew charitable trust, 2015).
2. Conceptual framework

2.1. Sustainable Development

The most frequently quoted definition of the concept of sustainable development originates from the so-called Brundtland report and runs as follows: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (Brundtland Commission, 1987). The interconnection between environmental, social and economic objectives is furthermore the core principle of sustainable development and these are often referred to as the three pillars. The integration of the three objectives is often described as the cornerstone that distinguishes sustainability policies from all other forms of policy adaptation and decision-making (Dernbach, 2003; Stoddart, 2011).

The definition offered in the Brundtland report is too broad and open to interpretation to effectively be used as a clear guideline in relation to the research questions in this thesis. Instead, this thesis draws inspiration from another more directly relevant international community source. In 2002, at the 70th Conference of the International Law Association, (ILA) adopted the New Delhi Declaration of Principles of International Law relating to Sustainable Development. This Declaration and the seven principles it contains will be the key reference for the concept of sustainable development used in this study. Due to the overriding aim of analysing the area where law, climate change and sustainable development intersect in relation to the global commons, the concept of sustainable development is crucial to the theoretical framework of the thesis. The importance of including sustainable development in relation to legal alternatives and climate change is addressed by the Intergovernmental Panel on Climate Change (IPCC). In its 2001 report, IPPC suggested that in responding to the threat of climate change, it is helpful for policy makers to view it as part of the broader challenge of sustainable development (IPCC, 2001). Similarly, and more recently, one of the top-level findings of the fifth IPCC report (2014) Impacts, Adaptation and Vulnerability is that climate-related risks call for a special type of decision-making and that future research within this interconnected relationship is of “very high priority”, since integrating sustainable development with climate change responses is a relatively new challenge (IPCC, 2014).

According to scholars in the field (Rogelj et al., 2015; Rockström et al., 2016), there is a possibility to achieve rapid economic, societal and technological transformations towards global sustainability. Key Sustainable Development Goals (SDGs) are improving globally; the number of people living in extreme poverty has halved in the last 15 years (World Bank, 2016), global hunger is decreasing (Global Hunger Index, 2016) and life expectancy has accelerated by a global increase of five years between 2000 and 2015 (WHO, 2016). Despite these positive developments, we as humans are changing the climate and scientists and scholars report about global-scale ecological degradation, a loss of biodiversity at mass extinction rates and rapid changes in the oceans’ chemistry (Nakicenovic et al., 2016). In addition, nine planetary boundaries were proposed in the framework report Planetary Boundaries: Exploring the Safe Operating Space for Humanity in 2009 and it was argued that three had already been transgressed; climate, biodiversity and biochemical flows (Rockström et al., 2009). A reassessment in 2015 concluded that a fourth planetary boundary, land-use change, had now been transgressed in addition to the three mentioned, mainly as a result of deforestation (Steffen et al., 2015).
Within economic theories, the concepts of "weak" and "strong" sustainability is often discussed. Weak sustainability is described as requiring that any depletion of natural capital (e.g., ecosystems, air, water) be offset by increases in human produced capital (e.g., infrastructure, labor, knowledge) or by the substitution of other forms of natural capital, such as renewable assets in place of nonrenewable assets (Solow, 1993; Pearce et al, 1994). Strong sustainability has on the other hand been described as a concept that regards natural capital as providing some functions that are not substitutable by man-made capital (Cabeza Gutès, 1996). Therefore, unlike weak sustainability, strong sustainability puts the emphasis on ecological scale over economic gains.

### 2.2. New Delhi Declaration

ILA’s work to create the New Delhi Declaration was conducted in the years 1992-2002 with the overreaching aim to codify the legal aspects of sustainable development on the international level (Viñuales, 2015). Since then, two other committees have continued the work with the Declaration (‘International Law on Sustainable Development 2003-2012’ and ‘International Law in Sustainable Resource Management for Development 2012-current’). Furthermore, the ILA has since then also presented the 2012 Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development (Sofia Guiding Statements) to advance the use of the Declaration in international judicial practice (Viñuales, 2015). The Sofia Guiding Statements was presented at the 75th Conference of the International Law Association, held in Sofia, Bulgaria in 2012 and reaffirms the New Delhi Declaration by noting that they are “CONVINCED that the ILA New Delhi Declaration is as relevant as it was at the time of its adoption” stated in the Preamble of the Sofia Guiding Statements.

The Declaration does not offer a more precise definition of sustainable development, but it does state the importance of recalling the objectives identified in the Brundtland report and the importance of furthermore “RECOGNIZING the need to further develop international law in the field of sustainable development, with a view to according due weight to both the developmental and environmental concerns, in order to achieve a balanced and comprehensive

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<td>Introduction of novel entities</td>
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*Fig. 3 Planetary Boundary Status 2016 (Eradicating Ecocide, 2017).*
international law on sustainable development, [...]”. The seven principles in the Declaration serve as guidelines as to how sustainable development could, and should be, implemented in international law to codify the legal aspects of sustainable development.

In short, the Declaration states that it;

CONSIDERS that the application and, where relevant, consolidation and further development of the following principles of international law relevant to the activities of all actors involved would be instrumental in pursuing the objective of sustainable development in an effective way:

1. The duty of States to ensure sustainable use of natural resources
2. The principle of equity and the eradication of poverty
3. The principle of common but differentiated responsibilities
4. The principle of the precautionary approach to human health, natural resources and ecosystems
5. The principle of public participation and access to information and justice
6. The principle of good governance
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives

3. Methodology

3.1. Method

This thesis applies a qualitative approach (Denzin & Lincoln, 2011; Hammersley, 2013; Kothari & Ebray, 2004). It focuses on the question of the legal protection of the global commons by looking at the current legal systems in place and by analysing legal proposals not implemented. Therefore, the research method often used in legal research – the traditional legal dogmatic approach where the relevant law and its sources are presented and analysed de lege lata (the law as it is) and de lege ferenda (the law as it should be) – will be used here within an overriding qualitative research approach. This will also involve systematic comparison of legal texts and proposals (Van Hoecke, 2015; Gutteridge, 1946; Chui & McConville, 2007). Qualitative legal research does not differ in principle from any other forms of qualitative research (Chui & McConville, 2007).

3.2. Qualitative research

If simplified, it can be stated that there are two fundamental approaches to research, a quantitative and a qualitative approach (Kothari, 2004). The latter has proved difficult to define in a way to suit all research subjects (Denzin & Lincoln, 2011). This can mainly be attributed to the fact that the term crosscuts between different subject matters, disciplines and fields and because of the many separate uses and meanings of the methods and terminologies of qualitative research that can be found (Denzin & Lincoln, 2011). Hammersley (2013) acknowledges these difficulties but offers the following definition of qualitative research as a “form of social inquiry that tends to adopt a flexible and data-driven research design, to use relatively unstructured data, to emphasise the essential role of subjectivity in the research
process, to study a small number of naturally occurring cases in detail, and to use verbal rather than statistical forms of analysis”. This is also the view adopted in the present thesis.

3.3. Literature review

There is no shortage of literature addressing the difficult relationship between international law and the protection of the global commons (Dodds, 2012; UNEP, 2017; Schrijver, 2016; Kopela, 2016). There is also no shortage of discussions of the problematic nature of international environmental law (Birnie et al., 2009; Shaw, 2014). There is furthermore no lack in academic research and literature addressing the difficult and complex relationship between climate change and law. As a few examples, Birnie, Boyle & Redgwell’s famous book *International Law and the Environment* (2009) devotes a whole chapter specifically to this relationship and in the extensive book *Research Handbook on Climate Change Mitigation Law* (2015) edited by Calster, Vandenbergh and Reins, different sectors (e.g., Energy, Transport, Industry, Waste management etc.) are analysed in an attempt to understand and improve the spectrum of legal and market-based instruments combatting climate change. Another source that addresses this subject in depth is the 2013 book *Climate change and the law* edited by Hollo, Kulovesi and Mehling. In addition, the UNSW Law Journal recently dedicated issue No. 39.4, titled *Rethinking Climate Change and the Law*, to the interdisciplinary relationship between law and climate change and the adequacy of law in addressing climate change impacts (Barnes, 2016).

In the recently published book, *Legal Aspects of Sustainable Development* (2016), twenty-nine authors present different innovative thoughts and perspectives within this new and growing area of law. In the introduction, editor Mauerhofer writes that “The main arguments within the book are addressing the interrelations and interdependences between sustainable development and law. Law is shown to be an essential precondition to approach solutions towards sustainable development” (Mauerhofer et al, p.2, 2016). However, none of the twenty-nine contributions address the topic of this thesis however, the relationship between sustainable development and the global commons.

The meaning of a literature review does not only refer to the work carried out by others in the same academic field as the research conducted. It also refers to “the process involved in creating the review that appears in your dissertation or thesis” (Ridley, 2008). The sources reviewed as the basis for this study consist of books, scientific articles, legal documents, reports and a few newspaper articles.

All published literature and articles read and then referred to have been peer-reviewed. The reports accessed in this study are published by trusted entities and sources such as NASA, the UN and IPCC. The sources are mainly collected from the Uppsala University E-database ([http://www.ub.uu.se/](http://www.ub.uu.se/)). The search words at the E-database have been the following words, separately or in different installations, “Climate”, “Climate Change”, “Sustainable Development”, “Sustainability”, “Climate Change Law”, “Climate change + Sustainable development + Law” and “Policy Guidelines”.

11
4. Results

4.1. Legal instruments today

What legal instruments for the protection and development of the Global Commons exist today in International Law?

The global commons each have specific regimes and institutional structures that will be presented below. Apart from these specific regimes, the environmental protection of the commons also falls under the protection of ‘Earth as a whole’ in international law and under the protection against climate change in the 1992 United Nations Framework Convention on Climate Change (UNFCCC).

4.1.1. International law

A commonly used definition of the sources of international law can be found in Article 38.1 of the Statute of the International Court of Justice (ICJ) and it is often considered as the authoritative statement on the different sources of international law (Birnie et al., 2009).

Article 38.1: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

International law has no overriding international legislator. As can be understood from Article 38.1 above, it does however comprise conventions, treaties, declarations, protocols, customs, legal principles and judicial decisions from generally accepted sources such as international institutions - mainly the UN, conferences and international courts (Birnie et al., 2009). Within the international legal system, a distinction is often made between soft and hard law. The difference can generally be described as the latter being enforceable whilst the former mainly serves as guidelines and commitments. Soft law is therefore often referred to as legally non-binding instruments and hard law as legally binding obligations (Friedrich, 2013). International law historically, and still today, especially in the area of the environment, is usually in the form of soft law (Shaw, 2014).

Deriving from the notion of ‘sovereignty’, historically and today, albeit more controversial now, states are free to exploit the environment and their own natural resources as they see fit under their jurisdiction and within their geographical boundaries (Birnie et al., 2009). In addition, the accountability and responsibility for trans-boundary environmental harm in-between states derives from breaches of obligations undertaken by the states and thereafter imposed on them by international law (Birnie et al., 2009). State sovereignty is thereby limited in these regards by the nonbinding core principles of environmental responsibility that states have agreed to in different legal instruments (Espinosa, 2014).
International law regimes focusing on the environment are often referred to as multilateral environmental agreements (MEAs). This regulatory system and the MEAs, including their protocols, all have in common that no obligation may be imposed on any state without its consent (Birnie et al., 2009). Some of the more famous MEAs are the UNFCCC, the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), the Montreal Protocol on Substances that Deplete the Ozone layer (Montreal Protocol), the Convention on Biological Diversity (CBD) and the Convention on International Trade in Endangered Species of Wild Fauna (CITES).

Furthermore, International conferences and the conventions they amount to are an important source of international law. The Declaration of the 1972 Stockholm Conference on the Human Environment and the 1992 Rio Declaration on Environment and Development are the two most significant ones within this area of environmental protection and sustainable development (Birnie et al., 2009; Friedrich, 2013). These instruments, even when ratified by State parties, are not formally binding, but they do authorize – even if they do not oblige, states to act as agreed upon in the conventions (Birnie et al., 2009).

4.1.2. United Nations Framework Convention on Climate Change

The complexity of climate change and the collective policy responses required on all levels have led to an active exploration of innovative regulatory instruments and approaches (Hollo, 2013). The most prominent instrument in this regard is the UNFCCC and under it, the newly adopted Paris Agreement, urging State Parties to cut their national carbon emissions to keep the increase in global average temperature to well below 2°C above pre-industrial levels. However, critical voices against voluntary international instruments such as the Paris Agreement have been raised. Amongst others, the “father of climate change awareness”, former NASA scientist James Hansen, has pointed out that the Agreement is based on promises without any form of enforcement mechanisms and will thereby not be sufficient to lower the global temperature rise in time (The Guardian, 2015). Furthermore, Hansen has also criticised the goal of the Paris Agreement, saying that: "It's crazy to think that 2 degrees Celsius is a safe limit" (ABC Radio, 2015). In addition, according to the most recent Emissions Gap Report, the commitments undertaken by the State Parties to the agreement will not be enough to keep us below the 2°C threshold (UNEP, 2016).

With 197 signatory parties, the UNFCCC, or simply the climate convention, has almost universal membership. The ultimate objective of the convention is to stabilize greenhouse gas concentrations at a level that will prevent dangerous human interference with the global climate system. The notion that the global commons need to be subject to international regulation in relation to climate change impacts rarely creates controversy today and the creation of the UNFCCC is often considered as the legal framework for such an international commons regime (Vogler, 2016). How to define global commons and climate change, which rules to apply and how and which responsibilities the regulation entails on states are some of the questions that the UNFCCC aims to address. In the book, Climate Change in World Politics, Vogler (2016) argues that climatic stability and the protection of the commons need to be secured by the action of public authority and governance. Due to the nature of environmental international law as soft law, the notion of state sovereignty and the absence of an international government, climate change responses protecting the commons have been described as the ultimate test of the UNFCCC (Vogler, 2016).
4.1.3. The Atmosphere

The atmosphere is mainly protected in international law through different conventions and their protocols. Originally, international air law was subject to the regulation of aviation law controlling commercial and military use of airspace, in essence to exclude other nationals from sovereign airspace (Sand & Wiener, 2016). In the 1970s, with the growing concern of environmental matters, a paradigm shift from a ‘single-use-oriented’ to a ‘resource-oriented’ approach to the law of the atmosphere emerged (Sand & Wiener, 2016).

The first international legal instrument to protect the atmosphere from anthropogenic impacts was implemented to target transboundary air pollution. The Convention on Long-Range Transboundary Air Pollution (LRTAP) came into force in 1983. Since then, LRTAP has been supplemented with eight protocols, specifically targeting specific air pollutants. The prevention of transboundary air pollution was also in the centre of one of the first and still precedential case under international environmental law, the Trail Smelter case. Smoke from a Canadian smelter caused damages to forests, crops and residents in Washington, US, in the 1930s. The dispute could not be resolved between the American farmers and the Canadian company operating the smelter. It was therefore sent to an international arbitration tribunal where the two federal governments took leading roles. The tribunal’s decision awarded the farmers economic compensation and the decision laid the foundation for the since then internationally accepted polluter pays principle.

Whereas LRTAP and its protocols mainly focus on the transboundary nature of air pollution, scientific alarms of an increasing hole in the ozone layer in the 1980s sparked the international community to act (Kreuter-Kirchhof, 2011). The Vienna Convention for the Protection of the Ozone Layer was created and came into force in 1988, shortly followed by the Protocol on Substances That Deplete the Ozone Layer 1989 (Montreal Protocol). The Vienna Convention was the first Convention of any kind to achieve universal ratification in 2009. In addition, the Stockholm Convention on Persistent Organic Pollutants aims to reduce Persistent organic pollutants (POPs). The convention is often mentioned in relation to atmospheric protection since the pollutants are often distributed and travels through the air, even though the aim of the treaty is to protect human health the environment more generally (Kreuter-Kirchhof, 2011).

At present, the atmosphere is not subject to a comprehensive legal regime, but has instead been referred to as a “patchwork” of international instruments regulating different, and sometimes conflicting, economic uses, geographical sectors, vertical zones and categories of risk, e.g., to the environment, security and health (Sand & Wiener, 2016). In addition, there has been growing concern as to the effectiveness of the current international regimes protecting the atmosphere from environmental impacts. Furthermore, the protection of the atmosphere from current climate change impacts has been argued to be one of the most demanding global problems facing mankind today (Vogler, 2016; Kreuter-Kirchhof, 2011).

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4.1.4. The Oceans

Regimes addressing the legality of the oceans are, of the three commons discussed here, the most historically complex with the oldest records dating back to the second century and Roman law proclaiming ‘freedoms of the seas’. The oceans were considered communes omnium naturali jure, i.e., ‘common to all humankind’ (Buck, 1998). Here, the sovereign claims of the oceans could not extend further than the shore which was defined as the high-water mark. However, the access to the oceans with its resources and its marine trade paths have been in the center of many historical disputes and illegal claims and the generous approach taken in the Roman law has been explained with the Roman empire having undisputed control of the Mediterranean Sea during this time period (Buck, 1998). Similar as in early Roman law, in Hugo Grotius’ (1583-1645) famous work Freedom of the Seas (mare liberum), Grotius argued that the open water could not be appropriated by any sovereign state. The nature of territorial claims of the water beyond the shoreline evolved from protection of state territory towards property rights concerning the resources found in the oceans. Historically, the so called three-mile limit was first recognized in the Fishing Convention of 1818. Great Britain, having a leading role in maritime exploration, upheld this limit throughout the nineteenth century.

With the technical revolution, other resources previously unreachable further out in the oceans were suddenly accessible and the nature of the claims to the oceans expanded. A clear indication of this was when the United States found oil and natural gas reserves off their coast in 1945 and claimed extended jurisdiction for offshore development (Buck, 1998). These new developments led to the first comprehensive attempt to codify and unify marine law. The codifying process began in 1950 with the work of a committee under the International Law Commission (ILC), which later developed into three United Nations Law of the Sea Conferences UNCLOS I-III, resulting in the United Nations Convention on the Law of the Sea (UNCLOS).

UNCLOS does not specifically refer to climate change. However, it does contain obligations that could apply to it, for example the term pollution of the marine environment. It has been argued that an opposite interpretation of this, where climate change is not included, would go against the conventions’ objectives and purpose (Jáen, 2007). Indeed, the following article on use of terms in the convention defines the term as:

Article 1(1)(4): “pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities;

Alongside UNCLOS, and even though it is often considered the most extensive legal framework for a ‘common’, there is also the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) and the Food and Agriculture Organization (FAO) of the United Nations’ agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. In addition, the International Maritime Organization (IMO), responsible for regulating shipping, has adapted different conventions which include regulations on pollution from ships and cargos.
4.1.5. **Antarctica**

Antarctica, with its legal protection, the Antarctic Treaty System (ATS) deriving from the 1959 Antarctic Treaty, is considered one of the most comprehensive and successful international legal regimes to this day and, prior to 1959, little consideration was given to a legal regime governing the Antarctic region (Peterson, 1988; Buck, 1998). The management of the ATS is controlled by the Consultative Parties to the Antarctic Treaty, classifying it into a special category of international management, similar to that of a trusteeship (Birnie et al., 2009). The treaty has established a ban on mining until the year 2048 in the region, proclaimed the continent a domain of peace and scientific research and it “froze” the seven sovereign territorial claims made on the continent. However, in the book *Antarctica: The battle for the seventh continent*, Abdel-Motaal (2016) disputes this notion, arguing that the ATS will subject Antarctica to one of the worst cases of the ‘tragedy of the commons’. He argues that the ATS runs the risk of collapsing due to the new developments in the area. Increased economic incentives steaming from fishing, tourism (28,000 tourists between 2013-2014 alone) and more expected resources to be found (oil, freshwater etc.,). Furthermore, the Antarctic Peninsula, as a result of global warming, is already as habitable as Greenland and will see an unprecedented flow of climate migrants sparking new sovereign claims to the territory (Abdel-Motaal, 2016).

The most often cited estimation of climate migrant refugees is 200 million by the year 2050, the International Institute for Sustainable Development (IISD) points out that this number is indeed an estimation, and that most current estimates range between 25 million and 1 billion people by 2050 (IOM Report, 2008). Another challenge for the Antarctic region is illegal fishing and its effect on ecosystems (Orheim, 2013). In light of this, the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) has been created.

The original 12 signatories to the Antarctic Treaty in 1959 were Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom and the United States. As of 2017, the ATS have 56 signatory parties and 22 countries have assigned a total of 37,557 place names in the Antarctic region (SCAR Gazetteer internet homepage, 2017).

Some of the fundamental articles of the Antarctic Treaty are; Article 1 declaring that the area is to be used for peaceful purposes only. Military presence is prohibited, however military personnel and equipment may be sent there, if so for scientific research purposes. Furthermore, Article 2 states the freedom of scientific investigation. Article 4 states that the treaty does not recognize, dispute nor establish sovereignty claims.

In 1998, the legal regime was supplemented with the Protocol on Environmental Protection of the Antarctic Treaty, stating that;

*Article 2: The Parties commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems and hereby designate Antarctica as a natural reserve, devoted to peace and science.*

*Article 3: activities in the Antarctic Treaty area shall be planned and conducted so as to avoid: (i) adverse effects on climate or weather patterns;*

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2 By Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom.
4.2. Legal proposals

What major proposals have been formulated that could strengthen the legal protection of the Global Commons through International Law and to what extent do they consider Sustainable Development?

4.2.1. Ecocide

Many attribute the term ecocide to Polly Higgins, a Scottish lawyer who in 2010 submitted a proposal to the ILC to include ecocide as the fifth international crime against peace in Article 5.1 of the Rome Statute. But years earlier, in 1972, the term was introduced by, amongst others, Olof Palme, then Prime Minister of Sweden. In his opening speech at the historical 1972 Stockholm Conference, Olof Palme proposed the term ecocide to be used in relation to the Vietnam war (The Ecocide project, 2012). A Working Group on Crime Against the Environment was created to consider the possibilities of such a crime. The group produced a draft and submitted it to the UN a year later. The crime of ecocide submitted by the Working Group was included in the draft of the Rome Statute but was later removed despite loud objections (The Ecocide Project, 2012).

More recently, at the UN climate summit in Paris in 2015, a citizens’ movement called End Ecocide on Earth (EEE) presented a similar proposal to include the crime of Ecocide in the Rome Statute (ICC Amendment Proposal, 2015). The two different major proposals above, even though slightly different, share the same concept and overreaching aim to institute the crime of ecocide internationally by adding it as a fifth crime against peace, through the amendment of Article 5.1 in the Rome Statute.

There is no coherent definition of the crime of ecocide. The English Oxford dictionary defines ecocide as “the destruction of the natural environment, especially when deliberate” (English Oxford, 2017). Similarly, in the dictionary Environmental History and Global Change: A Dictionary of Environmental History (Whyte, 2013), ecocide is defined as the destruction of ecosystems by the inadvertent or deliberate activities of human society. Sangster (2011), takes on a slightly different approach and connects ecocide directly to climate change by arguing that the term describes mankind’s drift towards climate change and that we as mankind, for some time now, have committed ecocide on a global scale.

In the two extensive drafts to codify ecocide analysed further here, the definition of the crime is framed as follows. The 2010 proposed amendment by Higgins et al defines the crime of 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 or will be severely diminished” (Higgins, 2010). The 2015 proposed amendment by EEE adopts a slightly different approach in that the global commons are specifically referred to and that any person is to be considered guilty of ecocide that causes severe damage to: (a) any part or system of the global commons, or (b) any part of the Earth’s ecological system (EEE proposal, 2015).

There have also been several different attempts to create and implement the crime of ecocide on national levels. National laws of ecocide have been codified in ten different states, namely in Georgia, Armenia, Ukraine, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan.
and Vietnam (Appendix 1). Whilst many of these laws do incorporate international dimensions, they are by their nature domestic regulations.

The Rome Statute, its full name being the Rome Statute of the International Criminal Court, is arguably one of the most important international documents to date (Bellelli, 2010) and has, as of June 2017, 124 signatory State parties. The Statute is an international treaty establishing the International Criminal Court (ICC) and the court’s jurisdictional scope is stated in Article 5.1.

\textit{Article 5.1: The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:}

1. The Crime of Genocide
2. Crimes Against Humanity
3. War Crimes
4. The Crime of Aggression
5. The Crime of Ecocide (proposed)

According to Article 1 of the Rome Statute, the ICC has the power to exercise its jurisdiction over natural persons for the most serious crimes of international concern. Therefore, the court does not have authority in relation to criminal liability of states. The fundamental characteristics of the court is that it is permanent, independent, universal, and complementary to national jurisdiction (Bellelli, 2010).

As mentioned above, the proposal by EEE specifically targets the protection of the global commons. The preamble of the EEE proposal states that “the global commons may be negatively affected by actions occurring both inside and outside national boundaries” and that “the protection of the global commons is most effectively addressed by a comprehensive and transnational system” and that the ICC offers an appropriate framework for such enforcement (EEE proposal, 2015).

The protection of the global commons is not specifically referred to in the 2010 draft Act constructed by Higgins et al. Instead, protection of the global commons would then indirectly need to be understood by viewing them as ecosystems in Article 2.

\textit{Article 2: Ecocide is a crime against peace because the potential consequences arising from the actual and/or future extensive damage to, destruction of or loss of ecosystem(s) can lead to -}

(i) loss of life, injury to life and severe diminution of enjoyment of life of all inhabitants;
(ii) the heightened risk of conflict arising from impact upon human and non-human life which has occurred as a result of the above;
(iii) adverse impact upon future generations and their ability to survive;
(iv) the diminution of health and well being of inhabitants of a given territory and those who live further afield;
(v) loss of cultural life.
### 4.2.2. Rights of Mother Earth

Giving Nature legal rights of its own means taking an eco-centric approach rather than the more common anthropocentric approach taken to the environment and its resources. Advocates of this approach support this new rule of law for nature as a necessary measure to ensure human rights (Laitos, 2013). The idea of recognizing Nature as having certain rights of its own is not novel, but as can be illustrated in the 1997 Danube Dam case, it is often addressed in relation to property rights. In the words of Judge Christopher Weeramantry; “land is to be respected as having vitality of its own and being integrally linked to the welfare of the community”, adding that, “natural resources are not individually, but collectively, owned” (ICJ, 1997 Danube Dam case).

The most extensive attempt to codify the Rights of Mother Earth, where the global commons are included as part of the Earth as a whole, was made at the UN Conference on Sustainable Development (Rio+20) in Rio de Janeiro in 2012. Here, it was proposed to adopt the Universal Declaration of the Rights of Mother Earth (UDRME), a normative framework seeking the recognition of nature as a subject holding legal rights. The draft of UDRME was created two years earlier at the 2010 World Peoples’ Conference on Climate Change and the Rights of Mother Earth (WPCCCRME) in Cochabamba, Bolivia. The inherent Rights of Mother Earth are defined in Article 2 UDRME as:

Article 2.1: Mother Earth and all beings of which she is composed have the following inherent rights:

(a) the right to life and to exist;
(b) the right to be respected;
(c) the right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions;
(d) the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being;
(e) the right to water as a source of life;
(f) the right to clean air;
(g) the right to integral health;
(h) the right to be free from contamination, pollution and toxic or radioactive waste;
(i) the right not to have its genetic structure modified or disrupted in a manner that threatens its integrity or vital and healthy functioning;
(j) the right to full and prompt restoration for violations of the rights recognized in this Declaration caused by human activities;

The movement of the Rights of Mother Earth, often also referred to as the Rights of Nature (RoN), originates from South America and has gained its most extensive ground in Bolivia and Ecuador, where both states have passed national laws governing such rights. Ecuador was the first country in the world to recognize Nature as having its own legal rights by creating a new seventh chapter in the 2008 Constitution of the Republic of Ecuador titled Rights of Nature in 2008 with its 71th Article stating the following rights.

Chapter 7 Article 71: Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To
enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

Similarly, the Bolivian law, *Law of the Rights of Mother Earth 2010* (Law 071 of the Plurinational State), declares that:

*Article 3: Mother Earth is a living system, dynamically shaped by the community, an indivisible part of all living systems and living beings, interrelated, interdependent and complementary, which shares a common destiny.*

UDRME and the two legislative acts above draw direct inspiration from each other and advocates of UDRME often use Bolivia and Ecuador as standing examples of how successful the implementation of RoN-legislation can be. Contrariwise to this however, it has also been argued that the Bolivian and Ecuadorian regimes are far from being as exemplary as many advocates makes them out to be and that different domestic legislative acts contradict each other (Espinosa, 2014). An example of this is the Ecuadorian law *Asamblea Nacional 2008*, Article 313, where the components of Nature (water, biodiversity, hydrocarbons) are defined as inalienable property and strategic resources of the state (Espinosa, 2014).

Within the concept of giving Nature legal rights, earlier this year (2017), the Whanganui River in New Zealand was, as the first of its kind in the world, specifically recognised as a legal person. The legislative act *The Whanganui River Claims Settlement Bill* was passed on 15 March 2017 and marked the end of the longest running litigation in New Zealand’s history, a somewhat 170 yearlong legal dispute (RNZ, 2017; ABC, 2017). In the same month, the High Court of the Indian state of Uttarakhand ruled that both the Ganges and Yamuna Rivers are now legal entities based on the fact that they are considered sacred to Hindus. The court later expanded its previous judgement granting legal rights to the whole ecosystem in that area (Climate Change News, 2017).

4.2.3. International Court for the Environment

Proposals to create an International Court for the Environment (ICE) regularly resurface in the academic debates but in spite of almost 30 years of advocacy have not yet materialized. Most recently, the creation of an environmental court was called for at the UN climate change conference in Paris in 2015 by Ecuador, Bolivia and Venezuela (Wijdekop, 2016). The proposal was met with similar resistance as previous attempts historically to gather political momentum. One suggested explanation for this is that states are generally reluctant to support institutions that would ultimately allow exposure to increased liability claims by non-state actors (Kalas, 2001; Stephens, 2009).

The first known detailed proposal to create an ICE was presented at a congress in Rome in 1989. The basic idea of the proposal was that the court would have jurisdiction over breaches of environmental regulation and be accessible to states, private citizens and organs of the UN (Postiglione, 1990). Based on the proposal, a draft statute was presented at the United Nations Conference on Environment and Development Conference (UNCED) in Rio de Janeiro in 1992 by the International Court of the Environment Foundation (ICEF) and Judge Postiglione but it was removed from the UNCED agenda and substantially re-drafted before being presented again at a conference in Washington in 1999 since it was deemed too ambitious and the scope too wide (Pedersen, 2012). The draft statute proposes that the court would be a
permanent institution and that the protection of the environment should be viewed as a fundamental human right. Article 7 of the draft statute addresses the responsibility for the global commons and declares that “States are legally responsible to the entire International Community for acts that cause substantial damage to the environment in their own territory, in that of other states or in areas beyond the limits of national jurisdiction and shall adopt all measures to prevent such damage” (Draft Statute, 1992).

One of the most vocal advocates for the creation of an international environmental court is the ICE Coalition, consisting of NGOs, representatives of the legal community, businesses and academics. The Coalition proposes that the ICE should be the principal court addressing international environmental law through adjudication, dispute resolution and advisory opinions and by that centralizing the fragmented nature of international treaties, international principles and State obligations within international environmental law (ICE Coalition, 2017). The ICE Coalition presented a draft protocol for an ICE in 2011. The content of the protocol, compared to the previously mentioned 1992 draft statute, is more concerned with the structure of the court, i.e., the institutional structure. In the preamble, the protocol does however state that the jurisdiction of the proposed court shall have jurisdiction over disputes arising from or in connection with major environmental problems of concern to the international community as a whole.

The idea of centralizing international environmental adjudication is not novel or explicitly centered around the creation of a whole new court. In 1993, the International Court of Justice (ICJ) anticipated an increasing amount of future environmental disputes and created the Chamber for Environmental Matters where states could bring environmental claims. Thirteen years after its introduction, in 2006, the chamber was deconstructed since no state ever requested that a case be dealt with by it (ICJ, 2017). The ICE Coalition argues that reasons for the absence of cases brought before the Chamber were twofold. Firstly, because non-state actors were unable to bring cases before the court. Secondly, the nature of the modern treaty regimes mainly comprises non-binding obligations on states (ICE Coalition, 2017). Regardless of the absence of cases before the environmental chamber, the last few decades have seen an exponential growth in the creation of environmental courts, both on national and regional levels. As of 2014, over 350 environmental dispute resolution fora had been created (Preston, 2014).

According to Schuppert (2014), the following is required to successfully create an ICE: (i) that it can promise benefits for all states, and (ii) that the jurisdiction of the court would not overtly threaten state sovereignty. As to the question how it can promise benefits for all states, better management of the commons is a necessity to all states and as stated by the author; “In a world facing anthropogenic climate change and rapid environmental degeneration virtually no country can afford not to care about resource management practices in other countries” (Schuppert, p, 90, 2014).

As has been presented above, international conventions and treaties addressing different concerns relating to the environment and the climate have been implemented. These legal instruments are between and among states, subjecting the states to commitments and agreements under international law. Individuals are not subject and responsible under international environmental law, but instead under national legislation (Kalas, 2001). Neither of the proposals to create an ICE above extend the jurisdictional liability to natural persons.
4.2.4. To what extent is sustainable development incorporated?

The preamble of the New Delhi Declaration emphasises that sustainable development is a matter of common concern, and that as such, it should be integrated into all relevant fields of policy adaptation. The preamble further recognizes the need to develop international law in the field of sustainable development and to acknowledge the balance between environmental and developmental concerns, keeping in mind that the objective of sustainable development involves an integrated approach to political, social and economic processes.

An analysis of to what extent sustainable development is incorporated in the three legal proposals presented in the previous sections could further indicate the extent of their suitability as international legal instruments, and maybe also their suitability in legally protecting the global commons from further climate change impacts.

According to the first principle, states have a duty to ensure the sustainable use of natural resources, and, in relation to areas outside national jurisdiction, to protect, preserve and enhance the natural environment and to properly manage the climate system, biological diversity and fauna and flora of the Earth. Sub-principle 1.3 further lays out the widespread concept in international law that areas beyond the limits of national jurisdiction are part of the ‘common heritage of humankind’.

The two extensive attempts to codify the crime of ecocide into the Rome Statute, i.e., in 2010 and 2015, are similar with the exception that the proposal by EEE focuses more on the protection of the global commons than the ecocide proposal submitted in 2010. Since the ICC has jurisdiction over natural persons (Article 1 Rome Statute) and not state liability, the proposed amendments to the Rome Statute Article 5.1 would arguably not incorporate a State duty as laid out in the first principle in the New Delhi Declaration. The underlying idea of the crime of ecocide could however arguably in itself be considered a manifestation of the necessity to ensure sustainable use of natural resources by prosecuting persons who severely impacts ecosystems or parts of the environment.

The proposed convention on the rights of mother earth, UDRME, specifically refers to a State duty in Article 3(2) in that all states must act in accordance with the rights and obligations recognized in the Declaration. Article 2 of the convention presents the rights and obligations and protection of all natural resources on earth. UDRME does not however refer to a sustainable use of the natural resources, but rather declares the need for an overall protection of the natural resources.

The draft protocol for an environmental court by the ICE Coalition in 2011 and the draft statute presented in 1992 both indirectly address a State obligation to ensure the sustainable use of natural resources. In the 2011 draft protocol, Article 1 declares that “the court recognises the environment as being the common preserve of all humanity” and in the 1992 draft statute Article 5 that “everyone is under a duty to utilise natural resources with equity and care”.

The second principle, the principle of equity and the eradication of poverty, more specifically entails that the legislative act in question needs to consider the rights of both present and future generations in addition to the need for co-operation for the eradication of poverty.

Both the proposals to add ecocide as a crime against peace in 2015 by EEE and in 2010 by Higgins et al specifically address the principle of equity. The latter proposal declares that the
.consequences of ecocide will affect present and future generations, whereas the 2015-proposal states that the crime of ecocide is needed to ensure the Human Rights of current and future generations. Neither proposals to codify the crime of ecocide address the need to eradicate or co-operate for the eradication of poverty.

Article 2(d) of UDRME includes the principle of equity by stating that all human, states and public and private institutions must ensure that the pursuit of human wellbeing contributes to the wellbeing of Mother Earth, now and in the future. The convention does not address the need to eradicate or co-operate for the eradication of poverty.

Both the 1992 and the 2011 drafts of the creation of an ICE specifically considers the needs of present and future generations, in Article 1 of the 1992 draft statute in that “everyone has a fundamental right to the environment and an absolute duty to preserve life on earth for the benefit of present and future generations” and in the preamble of the 2011 draft protocol that the jurisdiction of the court over environmental matters is “for the sake of present and future generations”. Neither of the drafts includes a need to eradicate poverty through co-operation.

The third principle, common but differentiated responsibilities, is a common principle in international law (Birnie et al., 2009). It stipulates that developed and developing countries have different responsibilities based on their different capabilities and financial situations. The responsibility of developed states is two-fold in that they (i) bear a special burden to reduce their own impact on the global environment by changing unsustainable production- and consumption patterns, and (ii) to contribute to capacity building in developing states. The third principle in the New Delhi Declaration also acknowledges responsibilities and obligations of non-state actors, such as corporations in relation to another common concept in international environmental law, the polluter pays principle.

Neither the 2010 nor the 2015 proposed amendments to codify ecocide as a crime against peace in the Rome Statute address the principle of common but different responsibility, or that developed countries bear a special burden. There is also no acknowledgement of the need to contribute to capacity building as indicated in the third New Delhi principle. Both proposals do however incorporate the polluter pays principle.

UDRME does not incorporate the first part of the third principle in the New Delhi Declaration, the common but differentiated responsibilities principle, but rather applies equal obligations for all humans, states and all public and private institutions (Article 3). The polluter pays principle is however addressed in Article 3(g) in that all damages caused to the rights recognized in the Declaration are to be restored by those held responsible.

Neither the draft statute nor the draft protocol (1992, 2011) of the creation of an ICE contains the principle of common but different responsibilities or a specific duty for developed countries to adapt to certain obligations. The overriding purpose of creating an international court for the environment is however to ensure enforcement to prevent and remedy environmental crimes, and thus incorporates the polluter pays principle for all stakeholders.

The fourth principle, the precautionary approach to human health, natural resources and ecosystems, commits states and all non-state actors to avoid human activity that may cause significant harm, including future harm in the light of scientific uncertainty.
The precautionary principle is included in the proposed international crime of ecocide, in the proposal by EEE by stating that “failure to take reasonable steps to investigate, identify, or prevent” and in the proposal by Higgins et al in 2010 in that there is a “international and transboundary duty of care to prevent the risk of and/or actual extensive damage to or destruction of or loss ecosystem(s)”.

The principle of a precautionary approach is also stated in Article 3(i) UDRME in that “all Human beings, all states, and all public and private institutions need to establish precautionary and restrictive measures to prevent human activities to cause destruction or disruption of ecosystems and the environment”.

In Article 8(d) in the draft statute to create an ICE in 1992, it is stated that activities whose effects cannot be determined, as a precautionary measure, need to be suspended. In the 2011 draft protocol for the creation of the court, it is recognized that the court may be able to influence the international business community to improve present practices and develop more extensive risk management programmes in order to reduce the risk of major environmental problems.

The fifth principle, public participation and access to information and justice, concerns transparency and accountability of governments and concludes that this principle is an essential condition for sustainable development. The 2012 Sofia Guiding Statements specifically focuses on the significance of this principle in the New Delhi Declaration and reaffirms that the principle is fundamental to sustainable development (Sofia, 2012).

In Part III of the 2010 proposal to include the crime of ecocide in the Rome Statute, a publicity order is implemented, stating that the ICC could order the committed defendant to publicly share all information relating to the environmental crime committed. The 2015 proposal emphasise in the preamble that the ICE will guarantee access to international environmental justice to all states, non-governmental organisations and individuals.

Article 3(e) UDRME includes the fifth principle of the New Delhi Declaration by recognizing the need for promoting knowledge and further communication in questions relating to the well-being of Mother Earth. It does not however specify how such public participation or access to information should be implemented or governed.

Articles 2 and 3 in the 1992 draft statute of an ICE addresses this fifth principle in the New Delhi Declaration, stating that everyone has a right of access to environmental information and to participate in procedures that may involve the environment. The 2011 protocol by the ICE Coalition similarly emphasise this need in the preamble, in that one of the duties of the court is to ensure access to international environmental justice.

The sixth principle, good governance, is closely linked to the fifth principle above. The principle highlights the importance of states and international organisations to adopt democratic and transparent decision-making procedures, to ensure financial accountability, to combat corruption and to observe the rule of law and human rights.

In relation to the crime of ecocide, the 2015 proposal submitted by the EEE refers to financial accountability and declares that the ICC would need to establish principles relating to the reparations and reimbursement. There is no reference to corruption or human rights in neither of the proposals relating to the crime of ecocide.
The principle of *good governance* is also included in Article 3(e) UDRME in that states need to establish and apply effective norms and laws for the defence, protection and conservation of the rights of Mother Earth. It does not however address the need for transparency or actions against corruption.

Neither of the drafts concerning the creation of an ICE specifically refers to the combat of corruption. According to the 1992 draft statute however, all court hearings would be public to ensure public participation and transparency. Furthermore, as described above, one of the overriding aims of the creation of an ICE is to ensure financial accountability on the defendant if they were to lose their case in court.

The seventh and last principle, *the principle of integration and interrelationship*, in particular in relation to human rights and social, economic and environmental objectives, reflects the need for interdependence of the three pillars of sustainable development and human rights. Sub-principle 7.3 of the principle stipulates that governments should strive to create new or alter current institutions to resolve conflicts between competing economic, social and environmental considerations.

Neither the 2015 amendments to the Rome Statute proposed by the EEE, nor the draft presented in 2010 have any references to human rights or social and economic objectives, and in that no reference to any integration of the objectives in the seventh principle of the New Delhi Declaration.

The need to integrate economic development is stated in Article 3(l) UDRME, focusing on creating economic systems that are in line with the rights recognized in the Declaration. The integration of the rights of Mother Earth with Human Rights is furthermore recognized in Articles 2(6) and 2(7) UDRME.

The 1992 draft statute of the creation of an ICE connects environmental wellbeing with social development and human rights. It does not however address interrelationships with any economic objectives. The 2011 draft protocol for an ICE does not contain any references to any other pillar of sustainable development apart from environmental objectives.

Figure 4 below is based on the analysis presented in this chapter. It aims to present the extent to which each of the three legal proposals incorporate the seven principles. If the marking is black, it indicates that the proposal is considered to incorporate the principle. If the marking is light grey, it indicates that the proposal is considered to incorporate part of the principle. Since the seven main principles in the New Delhi Declaration all contain sub-principles, as will be evident in the figure below, the majority of the markings are grey due to the proposals incorporating some of the sub-principles but not all. If no marking is present, it indicates that the proposal does not incorporate the principle.
4.3. Could the proposals strengthen the protection of the commons?

Do these proposals have a potential to strengthen the legal protection of the Global Commons through International Law with a focus on Sustainable Development?

As presented above, it has been argued that the current regulatory frameworks governing the global commons need immediate attention (UNEP, 2017) and as stated in the New Delhi Declaration, there is a need to further develop all aspects of international law in relation to the concept of sustainable development. Based on the examination in the previous chapter, the three proposals examined all have potential to further protect the global commons based on their incorporation, to different extent, of the concept of sustainable development.

To summarize the findings, firstly, according to the examination of the two major drafts submitted to implement the crime of ecocide, it is the legal alternative that incorporates the New Delhi Principles of Sustainable Development the least. The drafts indicate that the crime of ecocide would only incorporate one of the seven principles fully, the precautionary principle. Ecocide is also the only legal alternative examined that does not incorporate at least some parts of one of the most fundamental principles, the principle of integration and interrelationship, at all. The remaining five principles are to some extent present in the drafts submitted. Secondly, the proposal to give Nature legal rights through the implementation of the proposed UDRME incorporates the New Delhi Principles most extensively amongst the three proposals examined. Three of the principles can be said to be fully incorporated and the remaining four are
incorporated to a certain extent. Thirdly, the draft statute and the draft protocol concerned with
the creation of an international environmental court fully incorporates two of the seven
principles, the *precautionary principle* and the *principle of public participation and access to
information and justice*. All the remaining principles are to some extent incorporated.

More generally, according to scholars (Dernbach, 2003; Stoddart, 2011), the interconnection
in-between environmental, social and economic objectives is the core principle that needs to be
present in all sustainability policies and regulations. As noted, only one of the legal alternatives
examined can be said to incorporate this fundamental principle completely, the proposal to give
Nature legal rights through UDRME. The crime of ecocide proposed in its current form does
not incorporate the *integration and interrelationship principle* at all. It is also notable that none
of the proposals analysed incorporates the principles (i) eradication of poverty through co-
operation, (ii) common but different responsibilities or (iii) the need to fight corruption, which
are all sub-principles under the seven main principles in the New Delhi Declaration. The only
principle that all three proposals incorporate completely is the *precautionary approach principle*. This principle is one of the most fundamental in international environmental law, and
as described by Birnie et al (2009), the principle is of particular importance when it comes to
global aspects of environmental concern due to the seriousness and possible irreversibility of
the risks involved.

The three proposals do have potential to strengthen the protection of the global commons. The
crime of ecocide, as proposed by EEE in 2015, with its specific focus on the global commons
compared to the proposal submitted in 2010 by Higgins et al would, as evident by its specific
focus, do so in a more direct way. That is not to say that crimes committed affecting the global
commons under the proposal submitted in 2010 would be directly excluded from jurisdiction.
It is noteworthy however that by its definition, the proposal submitted in 2010 has a more
anthropocentric approach in that the focus lay on the inhabitants’ enjoyment of a given territory.
The definition reads; “ecocide is 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 or will be severely diminished*” (Higgins,
2010). Antarctica only has between 1000-5000 permanent scientific research residents and
large parts of the oceans does not have inhabitants directly affected by the state of the
surrounding ocean (e.g., warming sea surface), meaning the anthropocentric approach could be
problematic in relation to protecting the global commons. An international adaptation of the
Convention of Mother Earth could strengthen the protection of the global commons since it
includes these domains as equally protected areas regardless of their lack of national
jurisdiction. However, this holistic view is arguably the downfall of UDRME. The legislation
lacks clear indications on how the rights presented in the Declaration is to be understood or
implemented. It is the proposal analysed that to the furthest extent incorporate sustainable
development, but it is also the proposal that in its current form is furthest away from general
acceptance of the legal community. The creation of an international environmental court would
provide a legal forum for disputes concerning environmental impacts, therein impacts on the
global commons. It is in its essence an enforcement mechanism that could acknowledge the
New Delhi Declaration and sustainable development directly in its adjudication. A fundamental
notion of sustainable development is the interconnection of the three pillars, economic, social
and environmental objectives. An environmental court is by its nature mostly focused on
environmental concern. To be considered a proposal that incorporates sustainable development,
it would arguably need to incorporate the other two objectives when ruling on environmental
disputes.
5. Discussion

Most scientists today stand behind the notion that the current changes to the climate are most likely the result of human activities (NASA, 2017), and climate change has been described and categorised as a *wicked problem* (Rittel & Webber, 1973), a *super wicked problem* (Levin et al., 2012) and as a *hyper complex problem* (Scharmer, 2009). Needless to say, in the face of this unprecedented concern, the legal structures created to protect the vulnerable global commons are of utmost importance. As described above, the global commons are today mostly protected through international non-enforceable conventions and voluntary agreements. This protection has been labelled weak and insufficient (Birnie et al., 2009). UNEP (2017) furthermore addresses this issue by stating that the current regulatory frameworks have fundamental gaps and inconsistencies. In addition to this, the various debates surrounding the categorization of the global commons are arguably problematic, since they create uncertainty as to how and why the commons should be legally protected. If their distinguishing characteristic is that they are ‘the common heritage of mankind’ and thereby crucial to the global community and the world’s ecosystem, one question that could be raised is why the Amazon rainforest, responsible for providing a fifth of the world’s oxygen is not labelled a global common? The categorisation of the global commons is furthermore problematic since their legal protection differs substantially in nature, mainly in that Antarctica is protected through a management system similar to that of a trusteeship (Birnie et al., 2009).

The current legal protection of the three global commons researched in this thesis indicates that there is a gap in their specific legal protection in relation to climate change impacts. The UNFCCC indirectly includes such a legal protection to the global commons since its main objective is to stabilize greenhouse gas concentrations to a level that does not interfere with the global climate system. Whether the UNFCCC and the newly adopted Paris Agreement succeed in keeping the increase in global average temperature below 2°C above pre-industrial levels is still uncertain however.

As has been argued, the categorisation of the global commons is outdated (Nakicenovic et al., 2016), not least as we are facing a new world of anthropogenic climate change. The current commons regimes are furthermore arguably insufficient in protecting the commons from the changing climate. If the global climate system were to be considered a global common in itself in international law, as Stoll (2016) argues, could such a categorisation lead to a more comprehensive international legal protection of the planet as a whole? This would need to be researched further, but the overall success of the UNFCCC in gathering the global community does at least demonstrate that combatting climate change is on the international agenda.

International law in general and international environmental law specifically, is most often in the form of *soft law*. Understandably so, states are reluctant to expose themselves to enforcement mechanisms on the international arena imposing on their sovereignty.

Since climate change is an unprecedented international problem, implicating both present and future generations, the question is whether implementing additional *soft law* instruments is the route forward. As presented above, there are several different sources of international law. However, as *soft* – if simplified – it is in principle non-enforceable. The crime of ecocide, if implemented into the Rome Statute as proposed, would gain recognition as *hard law*. By recognizing Nature as holding inherent legal rights through UDRME, the claims by the legal representatives of Nature submitted and accepted by judicial bodies, i.e., national or international courts, could also gain recognition as *hard law*. The creation of an ICE ruling
solely on existing sources of international environmental conventions, agreements and customs recognized as law could in essence turn all existing environmental protection into hard law.

The environment with all its resources has historically received its protection through different property regimes. The global commons, since they are areas and domains beyond the borders of national jurisdiction, have therefore historically most often fallen outside the scope of different property regimes making them vulnerable to the so called tragedy of the commons.

Today, international agreements and conventions to protect these domains are mostly concerned with their environmental and resource-based protection, but not specifically with protection against climate change, where instead the UNFCCC has a significant role. With the international nature of anthropogenic effects to the environment, e.g., weather extremes, sea level rise etc., impacts on the global commons today directly affect the environment and citizens in sovereign states. States can therefore no longer be confident that their sometimes ambitious domestic legislation will ensure protection against environmental extremes.

This thesis analyses three legal proposals that might be able to provide the global commons with further legal protection. Based on the findings, none of the proposals can be considered ideal for the purpose in question since they all have their own different shortcomings in relation to protecting the global commons. Even though all of them, to some extent, have incorporated a commons-protection, only the EEE has a specific reference to these domains. The EEE’s proposal to include the protection through the crime of ecocide in the Rome Statute is focused on criminalizing the criminal activity of individuals but not of states. Arguably they thus lack the holistic approach needed to truly protect the global commons against the unsustainable emission of greenhouse gas across international borders. The crime of ecocide aims to further criminalize and prosecute individuals, but not states, who cause severe damage to the environment by making the crime equal to the four most serious crimes in international law that exist today in the Rome Statute; Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression. The major difficulty in the pursuit to protect the global commons from climate change impacts through ecocide is that even if a natural person (e.g., head of state or large corporation – Article 1 and 28 ICC), all states, corporations and members of society are emitters of greenhouse gases and could, in that sense, be guilty of committing damage to the environment. The key focus here is the wording severe damage however, a determination the court would need to develop through adjudication.

Legal protection through the Rights of Nature could indeed further protect the global commons by stating Nature’s inherent right not to be exploited. The difficulties in implementing such extensive rights on an international level indicate that this route would most likely not be viable. The developments in India and New Zealand in specifically protecting certain ecosystems might however be a more viable legal solution, if Nature were to be given legal personhood. Further explanation as to how the rights are to be understood and enforced is needed.

Protecting the global commons through an ICE is, based on the analysis above, is probably the most promising alternative among the proposals analysed in this thesis. Such a court would be able to centralize the fragmented nature of international environmental law and serve as a desirable enforcement mechanism. In the two major proposals analysed to create such a court, the focus is on state liability. Additional jurisdiction for an ICE to prosecute natural persons and corporations, much like the current jurisdiction under the ICC, would further demonstrate publicly the serious nature of the current anthropogenic changes to the climate and actions taken to combat it. As has been presented however, scepticism towards the creation of an ICE is
widespread, even though the proposal has gained more support in recent years. Since the main point of criticism against an ICE is that states are reluctant to expose themselves to state liability by an international court, the question has arisen whether the advocates of an ICE would gain even more support if the jurisdictional scope of the court, as with the ICC, were restricted to natural persons instead. With this in mind, arguments for including ecocide directly in Article 5.1 of the Rome Statute, where the jurisdiction is limited to natural persons, would save the time and effort involved in creating a whole new environmental court, as the ICC then would have more or less the same function as an environmental court with limited jurisdiction over natural persons.

The examination of the legal proposals in the Chapter 4 above furthermore indicates that none of the proposals are truly successful in incorporating sustainable development as the concept is presented in the New Delhi Declaration. That, however, is not to say that they could not be useful as legal tools that in theory could provide a more extensive legal protection of the global commons. This naturally leads to another question; does legal protection of the global commons need to have the concept of sustainable development fully incorporated to be considered effective? Such an in-depth theoretical analysis falls outside the scope of this study but would be an interesting extension of it.

In sum, even though the proposals analysed arguably do not fully incorporate sustainable development, since they are still proposals, amendments to further incorporate the New Delhi Principles further would both be possible and desirable. Exploring amendments to the proposals making them more in line with the concept of sustainable development is outside the scope of this thesis, but a few general remarks will be made based on the results presented.

Firstly, further explanation as to how UDRME could and should be understood for states wanting to sign the Declaration is desirable. Giving Nature legal rights on its own would most likely affect all other parts of society. How are property rights to be understood, and how would such rights affect the crucial economic benefits of extracting natural resources by corporations? In addition, who would be the trustees of Nature’s rights? Should this responsibility fall on NGOs, states or any civilian affected by the degradation of the natural environment? Furthermore, which legal fora would be responsible for enforcing the rights in the Declaration? UDRME does refer to economic and social objectives, but it does so by implying that such objectives are secondary to environmental concern, which raises the question of the suitability and probability of states signing the Declaration. Secondly, exploring ways to connect and intertwine the two major proposals to incorporate the crime of ecocide into the Rome Statute is desirable regarding the protection of the global commons, since only one of the proposals specifically refers to these domains. Ecocide, furthermore, is the legal proposal analysed that incorporate sustainable development the least. Further amendments to incorporate the concept into the proposal are therefore needed. Thirdly, an environmental court accessible to the international community would need to ensure that the court acknowledges the remaining two pillars of sustainable development, namely social- and economical objectives. As the debates proceed, the question whether the court should have jurisdiction over states or natural persons, needs to be further analysed.
6. Concluding note

The main difficulty with protecting the global commons is that they are, as the hint in the name indicates, truly global. International law has no overriding legislator, which becomes especially noticeable in relation to the increasing environmental concern and the attempts to mitigate changes to the climate. Exploring innovative legal alternatives that could strengthen the protection of the global commons should, in an ideal world, not be met with such extensive skepticism as can be noted today. The weak legal protection of the global commons found today in international law, although these are without doubt of crucial importance to Earth’s ecosystem, is a growing concern to the international community. Furthermore, climate change is a complex hindrance to sustainable development and whilst none of the proposals analysed in this thesis can be said to be ideal in their current form, they all have potential to further protect the global commons from current anthropogenic changes in the climate. Implementing ecocide in Article 5.1 of the Rome Statute would give environmental destruction status as one of the five most serious crimes in international law. Furthermore, if states were to sign and become parties to UDRME, it would be a revolutionary change of direction away from the historical anthropocentric approach towards a new eco-centric approach. Lastly, if states and the international community agreed to create a new international environmental court, this would indicate awareness of the serious threat of climate change that lies ahead. Further research exploring the importance of incorporating the New Delhi Declaration in legal proposals aimed at protecting the global commons in international law is needed. The three legal alternatives analysed in this thesis, whilst not ideal, still acknowledge the need for further legal protection, and if not successfully implemented or created, they can still influence new innovative alternatives yet to be presented.
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Isabel Sarenmalm
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Convention on the High Seas

Convention on the Continental Shelf

Convention on the Territorial Sea and the Contiguous Zone

Convention on Fishing and Conservation of the Living Resources of the High Seas

Convention on Long-Range Transboundary Air Pollution

Convention on Biological Diversity

Convention on International Trade in Endangered Species of Wild Fauna

ILA New Delhi Declaration of Principles of International Law relating to Sustainable Development, 2 April 2002

Kyoto Protocol to the United Nations Framework Convention on Climate Change

Protocol on Substances That Deplete the Ozone Layer

United Nations Framework Convention on Climate Change


Vienna Convention for the Protection of the Ozone Layer


**Case law**

Gabčikovo-Nagymaros Project, Hungary v Slovakia, Judgment, Merits, ICJ GL No 92, [1997], “Danube Dam case”


**Drafts (proposals)**


Universal Declaration of Rights of Mother Earth (2010) Available at:
Appendix 1

Georgia: Criminal Code of Georgia 1999
Article 409. Ecocide: "Ecocide, i.e. contamination of atmosphere, land and water resources, mass destruction of flora and fauna or any other action that could have caused ecological disaster - shall be punishable by ..."

Article 394. Ecocide: "Mass destruction of flora or fauna, poisoning the environment, the soils or water resources, as well as implementation of other actions causing an ecological catastrophe, is punishable ..."

Ukraine: Criminal Code of Ukraine 2001
Article 441. Ecocide: "Mass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster, - shall be punishable by ...

Belarus: Penal Code of Belarus 1999
Art 131. Ecocide: "Deliberate mass destruction of flora and fauna, or poisoning the air or water, or the commission of other intentional acts that could cause an ecological disaster (ecocide), - shall be punished by ...

Kazakhstan: Code Kazakhstan 1997 (Amended 2011)
Art 161. Ecocide: "Mass destruction of flora or fauna, poisoning the atmosphere, land or water resources, as well as the commission of other acts which caused or a capable of causation of an ecological catastrophe, - shall be punished by ...

Art 374. Ecocide: "Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe, shall be punishable ...

Art 136. Ecocide: "Deliberate mass destruction of flora and fauna, poisoning the atmosphere or water resources, and the commission of other acts that may cause or caused an ecological disaster shall be punished ...

Art 358. Ecocide: "Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe, shall be punishable ...

Tajikistan: Criminal Code Tajikistan 1998
Art 400. Ecocide: "Mass destruction of flora and fauna, poisoning the atmosphere or water resources, as well as commitment of other actions which may cause ecological disasters is punishable ...

Uzbekistan: Criminal Code of Uzbekistan 1994
Art 196. Pollution of Natural Environment: "Pollution or damage of land, water, or atmospheric air, resulted in mass disease incidence of people, death of animals, birds, or fish, or other grave consequences – shall be punished ...

Art 342. Crimes against mankind: "Those who, in peace time or war time, commit acts of ... as well as other acts of genocide or acts of ecocide or destroying the natural environment, shall be sentenced ..."