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REFLECTION

The Fifth International Crime: Reflections on the Definition of "Ecocide"

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Introduction

International criminal law has increasingly been seen as one of the tools that could be used to address environmental harm. In June 2021 a panel of independent experts made a major step in that direction by presenting a draft text for the crime of "ecocide" and proposing the incorporation of that crime in the Rome Statute of the International Criminal Court (ICC) alongside other grave crimes, such as genocide, crimes against humanity, war crimes, and aggression. This definition of "ecocide" is noteworthy for its engagement with the multiple dimensions and various manifestations of environmental harm. But some of the definition's elements, namely its perspective on the relationship between the interests of humans and nature and the definition of the mental element of liability for "ecocide," might present obstacles to the goal of ensuring greater environmental protection through international criminal law. In this reflection article I discuss those aspects of the proposed crime of "ecocide" and draw attention to the inadvertent consequences they might have for the message, that the criminalization of "ecocide" would convey to the international public. Despite its merits, the proposed definition of "ecocide" reinforces the problematic assumption that the welfare of the environment and that of human beings are separate things.

Some small steps towards the prosecution of environmental harm have already been made at the ICC. The 2016 Policy Paper on Case Selection and Prioritisation by the Office of the Prosecutor at the ICC[1] for the first time in the Court's history made an explicit indication of the prosecutor's readiness to investigate environmental harm. Academic commentators quickly called this a "green shift" at the ICC.[2] The Court's "change of focus" also received significant media coverage.[3] Non-governmental organizations, which had been campaigning for the ICC to investigate the seize of land and natural resources, celebrated the new policy as an indication that "the age of impunity" for environmental crimes was "coming to an end."[4]

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[1] ICC, "Policy Paper on Case Selection and Prioritisation," Office of the Prosecutor, The Hague, 15 September 2016, https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf.

[2] Eliana Teresa Cusato, "Beyond Symbolism: Problems and Prospects with Prosecuting Environmental Destruction Before the ICC," *Journal of International Criminal Justice* 15, no. 3 (2017): 491–507, 493.

[3] John Vidal and Owen Bowcott, "ICC Widens Remit to Include Environmental Destruction Cases," *The Guardian*, 15 September 2016.

[4] Global Witness, "Company Executives Could Now be Tried for Land Grabs and Environmental Destruction," Press release, 15 September 2016, https://www.globalwitness.org/en/press-releases/company-executives-could-now-be-tried-land-grabbing-and-environmental-destruction-historic-move-international-criminal-court-prosecutor/.

But a closer look at the 2016 Policy Paper reveals that its ambitions with respect to investigating environmental harm were quite modest, and that some commentators may have been raising unrealistic expectations about the Court. Specifically, the Policy Paper noted that environmental damage would be taken into consideration when assessing the gravity of other criminal conducts.[5] However, the Policy Paper did not mention the prosecution of environmental crimes *as such*.[6] In fact, the ICC prosecutor did not have many tools at her disposal to do this. There is only one provision in the Rome Statute of the ICC that specifically criminalizes environmental damage: Article 8(2)(b)(iv) prohibits the intentional launching of an attack in the knowledge that such attack would cause "widespread, long-term and severe damage to the natural environment" and that would be clearly excessive to the military advantage anticipated. Moreover, this restrictive article applies only to international armed conflicts, constituting a significant limitation given that so much environmental damage occurs outside of international armed conflicts and during peacetime.

The alternative route for the ICC prosecutor would have been to use some of the "anthropocentric" provisions of the Rome Statute, such as crimes against humanity or genocide, to prosecute environmental harm.[7] There is already a precedent for this at the Court. In 2010 the Pre-trial Chamber in the case against the former Sudanese president Omar Al-Bashir found reasonable grounds to believe that the contamination of the water pumps was part of a genocidal policy inflicting conditions of life that were calculated to bring about the physical destruction of parts of the Fur, Masalit, and Zaghawa ethnic groups.[8] However, the problem with relying on anthropocentric provisions to prosecute environmental harm is that those provisions address damage that is inflicted upon human beings and that only "incidentally" harms the environment.[9] A real "green shift" at the ICC would require a provision that recognizes the gravity of environmental damage as such, the complexities of its commission, and the variety of situations in which it could occur.

Addressing this lacuna in the ICC's Rome Statute became the main goal of the Independent Expert Panel (IEP) convened in late 2020 by the Stop Ecocide Foundation that included 12 international members with backgrounds in criminal, environmental and climate law. After several months of discussions, the IEP presented a legal definition of the crime of "ecocide" in June 2021.[10] According to the expert panel:

> … "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.

[5] ICC, *Policy Paper*, paras. 34, 40, 41.

[6] Environmental harm was absent from the list of crimes that the prosecutor was going to focus on. See ICC, *Policy Paper*, para. 46.

[7] Tara Weinstein, "Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian," *Georgetown International Environmental Law Review* 17, no. 4 (2005): 697–722, 713–21; Peter Sharp, "Prospects for Environmental Liability in the International Criminal Court," *Virginia Environmental Law Journal* 18, no. 2 (1999): 217–43, 233–9.

[8] *Al-Bashir*, "Second Decision on the Prosecution's Application for a Warrant of Arrest" (ICC-02/05-01/09-94), Pre-Trial Chamber I, 12 July 2010, para. 38.

[9] Mark Drumbl, "Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development," *International Center for Transitional Justice* 11 (2009): 1–33, 8.

[10] Independent Expert Panel for the Legal Definition of Ecocide, "Commentary and Core Text," June 2021, https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE±Foundation±Commentary±and±core±text±revised±%281%29.pdf (hereinafter: IEP, *Commentary*).

Unlike Article 8(2)(b)(iv) of the Rome Statute, the IEP's definition of "ecocide" extends the protection of the environment to peacetime. The IEP also offers detailed exploration of the types of environmental harm that would fall under the scope of "ecocide."

The aim of the IEP is that the definition of "ecocide" would serves as a basis for an amendment to the Rome Statute, which would make "ecocide" the fifth international crime by adding a new Article 8ter. The rationale behind including the crime of "ecocide" as Article 8ter in the Rome Statute is not only to provide a useful tool to the ICC to prosecute environmental harm, but also to recognize the latter as harm of equal significance as genocide, crimes against humanity, war crimes, and aggression.

Although other attempts to define and criminalize ecocide have been made previously,[11] the IEP's project is of special significance. It has been observed that the proposed Article 8ter presents the "culmination of years of progress" of legal thought on the criminalization of ecocide and it comes at a time when state backing for the recognition of such crime has increased.[12] During the 18th session of the Assembly of State Parties to the Rome Statute, the Republic of Vanuatu called climate change and environmental destruction "the greatest threat to human rights in the Pacific" and expressed support for the idea of criminalizing ecocide.[13] The recent accession of the Republic of Kiribati[14] and the ICC's engagement with Pacific nations indicates a growing interest among countries in exploring the potential of international criminal law to address environmental harm.[15] The European Union parliament has also urged member states to support the recognition of ecocide as a fifth crime at the ICC.[16]

Considering the context, it is unsurprising that the IEP's definition quickly became one of the most discussed topics in international criminal law and that numerous expert commentaries were published in academic online forums within days of the announcement of the definition.[17] While some of the commentaries were

[11] See Richard Falk, "Environmental Warfare and Ecocide – Facts, Appraisal and Proposal," *Bulletin of Peace Proposals* 4, no. 1 (1973): 80–96; Mark Allan Gray, "The International Crime of Ecocide," *California Western International Law Journal* 26, no. 2 (1996): 215–71; Polly Higgins, "Seed-Idea: Seeding Intrinsic Values: How a Law of Ecocide will Shift our Consciousness," *Cadmus* 1, no. 5 (2012): 9–10; Polly Higgins, Damien Short, and Nigel South, "Protecting the Planet: A Proposal for a Law of Ecocide," *Crime Law and Social Change* 59, no. 3 (2013): 251–66.

[12] Mrinalini Shinde, "Opinion: The New Legal Definition of 'Ecocide' Could Be a Gamechanger for the Environmental Movement," *Climatetracker.org*, 25 June 2021, https://climatetracker.org/new-legal-definition-ecocide-gamechanger-environment/.

[13] Statement by H. E. John H. Licht, General Debate of the 18th Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court, 2nd to 7th December 2019, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.VAN.2.12.pdf.

[14] "Kiribati Becomes the 123rd State Party to the ICC Rome Statute," CICC, 28 November 2019, https://www.coalitionfortheicc.org/news/20191128/kiribati-accedes-rome-statute.

[15] "Pacific Islands States Commit to Advancing International Criminal Justice," CICC, 11 June 2019, https://www.coalitionfortheicc.org/news/20190611/pacific-islands-states-commit-advancing-international-criminal-justice.

[16] "European Parliament Urges Support for Making Ecocide an International Crime," Stop Ecocide, 21 January 2021, https://www.stopecocide.earth/press-releases-summary/european-parliament-urges-support-for-making-ecocide-an-international-crime.

[17] Kevin Heller, "Skeptical Thoughts on the Proposed Crime of 'Ecocide' (That Isn't)," *OpinioJuris*, 23 June 2021, https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/; Kai Ambos, "Protecting the Environment through International Criminal Law?," *EJIL:Talk!*, 29 June 2021, https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/; Donna Minha, "The Proposed Definition of the Crime of Ecocide: An Important Step Forward, but Can Our Planet Wait?," *EJIL:Talk!*, 1 July 2021, https://www.ejiltalk.org/the-proposed-definition-of-the-crime-of-ecocide-an-important-step-forward-but-can-our-planet-wait/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2; Christina Voigt, "'Ecocide' as an International Crime: Personal Reflections on Options and Choices," *EJIL:Talk!*, 3 July 2021, https://www.ejiltalk.org/ecocide-as-an-international-crime-personal-reflections-on-options-and-choices/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2.

supportive,[18] others have highlighted important issues of concern with the way in which the crime of ecocide is framed.[19]

In this reflection article, I seek to engage with the debate on the IEP's definition of "ecocide" by exploring in more detail two specific aspects of that definition that have caused concern among legal experts. First, the proposed Article 8ter has attracted criticism for incorporating an anthropocentric element.[20] Specifically, the second paragraph of the proposed Article 8ter allows for consideration of the "social and economic benefits anticipated" from a particular environmentally harmful activity in assessing whether that activity amounts to an ecocide. I explore the rationale for incorporating the anthropocentric element in the definition of ecocide and its implications for the environmental justice project. I conclude that the cost–benefit test obstructs the symbolic value of criminalizing the crime of ecocide at the ICC in the first place, namely, to communicate the idea that the wellbeing of nature and that of humans are inherently interlinked. Instead, the juxtaposition of environmental harm versus socio-economic benefits conveys the wrong message to the international public – that the problems of the environment and the problems of human communities can be separated and that humans may, in some cases, legitimately benefit from the severe and widespread or long-term degradation of the environment.

Second, I discuss the mental element of liability for ecocide incorporated in the proposed Article 8ter. The first paragraph of that text requires evidence of the accused's "*knowledge* that there is a substantial likelihood"[21] that their actions would cause severe and either widespread or long-term environmental harm. However, in the commentary to the text, the IEP suggests that their understanding of the mental element of liability for ecocide is closer to "recklessness or *dolus eventualis*" with respect to the ensuing environmental harm. Legal experts quickly pointed out the conceptual ambiguity of the mental element of ecocide and noted that all three terms (knowledge, recklessness, and *dolus eventualis*) in fact pose very different requirements.[22] Based on an analysis of the term "knowledge" as codified in the Rome Statute and interpreted in ICC jurisprudence, I concur with the latter position. Specifically, in the ICC context "knowledge" constitutes a higher standard than either recklessness or *dolus eventualis*, which would cause significant interpretative difficulties to the judges if Article 8ter is adopted in this manner. I suggest that these difficulties could be avoided if the term "knowledge" is removed and explicitly substituted with the words "awareness of a substantial likelihood," which are used in the IEP's commentary. Even though that mental element is lower than the default Rome Statute standard codified in Article 30, this approach could be justified by view of the complexities of ecocide, where environmental harm is often anticipated but not necessarily intended or known with certainty.

[18] Rachel Killean, "Prosecuting Environmental Crimes at the International Criminal Court – Is a Crime of Ecocide Necessary?," *Intlawgrrls*, 30 June 2021, https://ilg2.org/2021/06/30/prosecuting-environmental-crimes-at-the-international-criminal-court-is-a-crime-of-ecocide-necessary/.

[19] See Heller, *Skeptical Thoughts*. Kevin Heller, "Ecocide and Anthropocentric Cost-Benefit Analysis," *OpinioJuris*, 26 June 2021, http://opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/; Kevin Heller, "The Crime of Ecocide in Action," *OpinioJuris*, 28 June 2021, http://opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action/; Ambos, *Protecting the Environment*.

[20] Ambos, *Protecting the Environment*; Heller, *Ecocide and Anthropocentric Cost-Benefit Analysis*; Heller, *Crime of Ecocide in Action*.

[21] Emphasis added.

[22] Ambos, *Protecting the Environment*; Heller, *Skeptical Thoughts*.

Overall, I argue that if the two problematic elements of the definition of ecocide – the cost–benefit test and the term "knowledge" – are overcome, this would elucidate the important innovations that the IEP work has brought with respect to disentangling the complexities of environmental harm. The cost–benefit test and the term "knowledge" are, at present, unfortunately casting a shadow over what is otherwise a significant improvement over existing provisions for addressing environmental harm in international criminal law and international humanitarian law.

This article is structured as follows: section two provides context to the analysis by reviewing several related existing provisions addressing environmental harm in international law, section three analyses the anthropocentric element of the proposed definition of "ecocide," section four explores the problems with using the term "knowledge" in the definition, section five concludes.

Brief History of the Idea of "Ecocide"

Wartime Environmental Protection

This section discusses several international law provisions that address environmental harm, which influenced the drafting of the proposed Article 8ter: Article 1(1) of the Environmental Modification Convention (ENMOD), Articles 35(3) and 55(1) of Additional Protocol I (API) to the Geneva Conventions and Article 8(2)(b)(iv) Rome Statute. All of those provisions address environmental harm caused during the course of warfare, which has prompted criticism for neglecting the fact that severe environmental destruction could also occur during peacetime.

At the international level, the first convention which has exclusively focused on the intrinsic value of the environment was the Environmental Modification Convention (ENMOD) opened for signature in 1977.[23] ENMOD provides for protecting the environment regardless of whether any human interests have been violated.[24] According to Article 1(1):

> Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.[25]

Article 1(1) ENMOD is of special significance for the environmental justice movement because, as will be discussed, its reference the "severe," "widespread" and "long-term" effects of environmental damage has often provided the basis for articulating a definition of environmental harm in international law, including in Additional Protocol I to the Geneva Conventions, Article 8(2)(b)(iv) Rome Statute and the IEP's proposed Article 8ter on ecocide. However, ENMOD's scope is considerably narrow, as the Convention concerns only cases involving manipulation of nature and only those ones which occur on the territory of a state party.

[23] United Nations General Assembly, Resolution adopted by the General Assembly 31/72. "Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques," 10 December 1976.

[24] Jessica Lawrence and Kevin Jon Heller, "The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute," *Georgetown International Environmental Law Review* 20, no. 1, (2007): 61–95, 66.

[25] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Adopted by Resolution 31/72 of the United Nations General Assembly on 10 December 1976, http://www.un-documents.net/enmod.htm, Article 1(1).

Another important development with respect to the protection of the environment during war was the 1977 Additional Protocol I (API) to the Geneva Conventions. Article 35(3), which was included in the part of the Protocol concerning the methods and means of warfare provides: "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." Article 55(1) API is positioned in the part on the protection of the civilian population against the effect of hostilities and prohibits "the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population." While Article 35(3) protects the environment *as such*, i.e. is ecocentric in nature, Article 55 is anthropocentrically oriented. The protection of the environment is based on its instrumental value for the wellbeing of the civilian population.[26] The provisions of API are narrower in scope than Article 1 of ENMOD. Articles 35(3) and 55(1) list the terms: "widespread, long-term and severe" in the conjunctive. Hence, all three should be met for a breach of the Protocol. By contrast, ENMOD requires the alternative: "widespread, long-lasting *or* severe."[27]

The high threshold of assessing environmental damage of Article 35(3) has triggered concerns about its capacity, and the capacity of international humanitarian law more generally, to deal with environmental damage. Orellana refers to the existing provisions as "a patchwork of norms" which could prove insufficient to ensure environmental integrity during war.[28] It has been observed that the ambiguity in language could create loopholes for combatants to justify their destructive actions.[29] Richard Falk explains the inability of international humanitarian law to provide adequate protection to the environment with the anthropocentric nature of the *jus in bello*, which has been historically preoccupied with protecting civilians. According to him the environmental norms incorporated into international humanitarian law are of "manifestly incidental character" and could even run against traditional humanitarian concerns, if in certain cases the concern for the environment ends up exposing civilians and combatants to increased risks.[30] It is relatively easy from a military perspective to justify environmental destruction on the basis of a victory or saving lives.[31] Consequently, for Falk environmental norms appear "misclassified" within Protocol I and legal provisions for wartime environmental protection, with the "largely irrelevant" exception of ENMOD, which he calls "a sideshow, without serious impact."[32] Overall, international

[26] Michael Schmitt, "Humanitarian Law and the Environment," *Denver Journal of International Law and Policy* 28, no. 3 (2000): 265–323, 276; Lawrence and Heller, *First Ecocentric Environmental War Crime*, 66–7; Eric Talbot Jensen, "The International Law of Environmental Warfare: Active and Passive Damage during Armed Conflict," *Vanderbilt Journal of Transnational Law* 38, no. 1 (2005): 145–85, 171.

[27] Jensen, *International Law of Environmental Warfare*, 171, emphasis added.

[28] Marcos Orellana, "Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad," *Georgetown International Environmental Law Review* 17, no. 4 (2005): 673–96, 683–4.

[29] Florencio Yuzon, "Deliberate Environmental Modification through the Use of Chemical and Biological Weapons: Greening the International Laws of Armed Conflict to Establish an Environmentally Protective Regime," *American University Journal of International Law and Policy* 11, no. 5 (1996): 793–846, 824–5.

[30] Richard Falk, "The Inadequacy of the Existing Legal Approach to Environmental Protection in Wartime," in *The Environmental Consequences of War: Legal Economic and Scientific Perspectives*, ed. Jay Austin and Carl Bruch (Cambridge: Cambridge University Press, 2000), 137–55, 140.

[31] Ibid., 145.

[32] Ibid., 146.

law "more by accident than by design" has included some provision that seek to protect the environment from harm during warfare.[33]

Another attempt to address wartime environmental harm, this time in the field of international criminal law, was made in the 1998 Rome Statute. Article 8(2)(b)(iv) criminalizes:

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects *or* widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[34]

Article 8(2)(b)(iv) does not require actual damage to the environment – the mere launching of attack in the knowledge that it will result in such damage suffices to criminalize the conduct. It is not necessary that the environment is the direct target of the attack.[35] The disjunctive "or" renders individual criminal responsibility specifically for attacks, which result in "widespread, long-term and severe" damage to the environment, without making it conditional on any harm caused to the civilian population. This makes Article 8(2)(b)(iv) "the first genuinely ecocentric war crime" in international criminal law.[36] Although the conduct has already been "prohibited" by virtue of Protocol I and the ENMOD Convention, Article 8(2)(b)(iv) for the first time "criminalized" it.[37] In other words, after the adoption of Article 8(2)(b)(iv) the causing of severe, widespread and long-term environmental harm during armed conflict attracted liability for punishment at the ICC. Consequently, Article 8(2)(b)(iv) has been called a "significant advance for international law."[38]

However, Article 8(2)(b)(iv) has a limited reach. Article 8(2)(b)(iv) Rome Statute applies only to international armed conflict, despite the damage which internal conflicts could cause to the environment.[39] Furthermore, any environmental damage caused during peace time falls outside its scope.[40] Yet, as Drumbl points out, important environmental crimes occur outside conflict, for example, reckless management of nuclear power facilities or dumping oil and chemical wastes at sea.[41]

To address the lack of an international criminal law provision that reflects the complexity and variety of environmental harm, many legal experts have relied on the concept of "ecocide." As the next section discusses, these efforts eventually led to the IEP's proposal for amendment of the Rome Statute.

[33] Anthony Liebler, "Deliberate Wartime Environmental Damage: New Challenges for International Law," *California Western International Law Journal* 23, no. 1 (1992): 67–137, 132.
[34] Rome Statute of the International Criminal Court, Article 8(2)(b)(iv), emphasis added.
[35] Ines Peterson, "The Natural Environment in Times of Armed Conflict: A Concern for International War Crimes Law?," *Leiden Journal of International Law* 22, no. 2 (2009): 325–43, 327.
[36] Lawrence and Heller, *First Ecocentric Environmental War Crime*, 71.
[37] Mark Drumbl, "Waging War against the World: The Need to Move from War Crimes to Environmental Crimes," *Fordham International Law Journal* 22, no. 1 (1998): 122–53, 135.
[38] Lawrence and Heller, *First Ecocentric Environmental War Crime*, 70.
[39] Drumbl, *Waging War*, 136–7; See also Cusato, *Beyond Symbolism*, 497; Marie-Claire Cordonier Segger, "International Law, Criminal Justice, and Sustainable Development," in *Sustainable Development, International Criminal Justice, and Treaty Implementation*, ed. Sébastien Jodoin and Marie-Claire Cordonier Segger (Cambridge: Cambridge University Press, 2013), 17–35, 34.
[40] Sébastien Jodoin, "Conclusion: Protecting the Rights of Future Generations Through Existing and New International Criminal Law," in Jodoin and Cordonier Segger, *Sustainable Development* (see note 39 above), 346–62, 352.
[41] Mark Drumbl, "International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps," *ILSA Journal of International & Comparative Law* 6, no. 2 (2000): 305–41, 325.

Ecocide

The idea of the crime of "ecocide" originated in relation to the Vietnam War. During the war the US used chemical-based incendiary weapons, such as Agent Orange, and systematic ploughing to clear the land of vegetation and deny protective cover and means of sustenance to the National Liberation Front.[42] It has been suggested that part of the region's crop lands and forests and half of its swamp areas have been destructed during the war.[43] The term "ecocide" was coined by Arthur Galston, a plant biologist, who asked the international community to come together against ecocide.[44] This idea was developed by Richard Falk in 1973 who proposed an International Convention on the Crime of Ecocide.[45] Falk considered that the environmental damage resulting from the Vietnam War was so significant that it presented "a target of opportunity comparable to Nuremberg" for outlawing environmental destruction during wartime.[46]

Historically, there have been several unsuccessful attempts to criminalize ecocide. Research on UN papers has showed that for a period of over forty years members of various UN commissions and the General Assembly have discussed the criminalization of "environmental destruction."[47] In 1985 in the context of a debate whether to expand the Genocide Convention, the suggestion to criminalize ecocide was put forward. But the Sub-Commission on Prevention of Discrimination and Protection of Minorities finally decided not to pursue the criminalization of ecocide for reasons, which remain unclear.[48] From 1984 to 1996 there has been an extensive debate on including ecocide into the list of Crimes against Peace. Article 26 of the Draft Code of Crimes Against the Peace and Security of Mankind provided for the criminalization of the conduct of: "an individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment." This provision corresponded to Article 19 of the draft Articles on State Responsibility, which proscribed "wilful and severe damage to the environment."[49] However, the International Law Commission eventually decided to remove Article 26. Based on observations of what was recorded at the time, the Ecocide Project concludes that the decision was not based on agreement between the parties.[50]

The challenges that the criminalization of "ecocide" has faced are not uncommon in international law. All forms of international law constrain to some extent the sovereignty of states, but not all international legal systems offer the same in exchange. Anderson distinguishes between "regimes of mutual benefit" to states, such as international trade law, and "regimes of altruism," such as international criminal law.[51] In the case of the former

[42] Falk, *Environmental Warfare*, 85–6.
[43] Yuzon, *Deliberate Environmental Modification*, 795–6.
[44] Cusato, *Beyond Symbolism*, 493.
[45] Falk, *Environmental Warfare*, 91.
[46] Ibid., 84.
[47] Martin Crook and Damien Short, "Marx, Lemkin and the Genocide-Ecocide Nexus," *The International Journal of Human Rights* 18, no. 3 (2014): 350–68, 306.
[48] Anja Gauger, Mai Pouye Rabatel-Fernel, Louise Kulbicki, Damien Short, and Polly Higgins, "The Ecocide project: Ecocide is the missing 5th Crime Against Peace" (Human Rights Consortium, 2013), 8, https://sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf.
[49] Ibid., 9.
[50] Ibid., 10.
[51] Kenneth Anderson, "The Rise of International Criminal Law: Intended and Unintended Consequences," *The European Journal of International Law* 20, no. 2 (2009): 331–58, 332.

the sovereignty costs to states are largely offset by the material benefits of international cooperation. By contrast, international criminal law has high costs – the possibility to prosecute and incarcerate state nationals – and provides symbolic benefits, namely the promise of building a more peaceful and just international community. Consequently, obtaining support for the criminalization of any act in international law is challenging because it requires persuading states into the normative value of that act. The criminalization of ecocide poses a particular challenge: it proscribes conducts which may be economically advantageous to governments and corporations to protect the welfare of the environment, which has historically been neglected in international affairs. Reports and commentaries suggest that some states were unconvinced or sceptical about the benefits of criminalizing environmental damage. The Ecocide Project's archival research observed that the exclusion of Article 26 from the Draft Code of Crimes Against the Peace and Security of Mankind resulted from a few states opposing it.[52] The Netherlands, the UK, and the US expressed concern with the proposed Article 26.[53] Similarly, two of the Rome Statute drafters observed that the scope of Article 8 (2)(b)(iv) was narrowed in order to obtain support from "several States that otherwise were rather hesitant about the inclusion of this provision in the Statute," but without specifying which states.[54]

Yet, non-governmental organizations and activists have continued the efforts to criminalize "ecocide." In the new millennium, the work of the barrister and international environmental lawyer Polly Higgins became one of the greatest contributors to the idea of criminalizing ecocide. Higgins defined ecocide as:

> … the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.[55]

The definition is significantly broader than the existing provisions in international criminal law, such as Article 8(2)(b)(iv) Rome Statute, and international humanitarian law, such as Articles 35(3) and 55(1) API. The term "ecocide" offers a holistic understanding of ecological crises and the need for protecting entire ecosystems[56] rather than limited appreciation of environmental harm cause during armed conflict.

The Stop Ecocide project, which was founded in 2017 by Polly Higgins and Jojo Mehta seeks to make ecocide the fifth international crime recognized by the Rome Statute of the ICC, alongside genocide, crimes against humanity, war crimes and the crime of aggression. The rationale for *criminalizing* ecocide is that international criminal law imposes a specific form of penalty that is absent from other international legal systems, namely individual criminal responsibility. In other words, international criminal law has the power to hold individual persons, and not states or corporations, criminally responsible for their

[52] Gauger et al., *Ecocide Project*, 11.
[53] International Law Commission, Documents of the 45th session (1993), "Comments and Observations Received from Governments" (A/CN.4/448 and Add.1), 88, 102, 105.
[54] Herman von Hebel and Darryl Robinson, "Crimes within the Jurisdiction of the Court," in *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, ed. Roy Lee (The Hague: Kluwer Law International, 1999), 79–126, 112.
[55] Ibid., 10.
[56] Martin Crook, Damien Short, and Nigel South, "Ecocide, Genocide, Capitalism and Colonialism: Consequences for Indigenous Peoples and Glocal Ecosystems Environments," *Theoretical Criminology* 22, no. 3 (2018): 298–317, 303.

conducts and to impose harsh sanctions on those individuals, such as incarceration. According to the Stop Ecocide project, unlike suing and fining corporations, which may not significantly disrupt their budget or operation, the criminalization of ecocide would hold personally accountable the individuals who make decisions which lead to grave environmental damage.[57] For Higgins: "By levying responsibility on persons, not legal fictional entities (i.e. a corporation), the cycle of destruction and accrual of silent rights (the right to pollute, the right to destroy) will die."[58]

To accomplish that goal, in late 2020 the Stop Ecocide convened an Independent Expert Panel (IEP) which included twelve international legal experts with different working backgrounds to draft a definition of the crime of "ecocide" that would be proposed as an amendment to the Rome Statute. The rest of this reflection article discusses two aspects of the IEP's proposal that may obstruct the application of what is otherwise a very comprehensive definition of ecocide.

The Anthropocentric Element in the Definition of "Ecocide"

The IEP's definition of "ecocide" builds upon the only existing ecocentric Rome Statute provision – a war crime codified in Article 8(2)(b)(iv). The proposed "ecocide" provision expands the language of Article 8(2)(b)(iv) to cover a broader scope of environmental harm and allows for the prosecution of ecocide committed during peacetime. However, despite this accomplishment the definition of "ecocide" allows for evaluating the "social and economic benefits" of a particular activity against the environmental harm that it causes. I concur with the opinion expressed by some legal scholar that the definition of "ecocide" did not need to incorporate such an element.[59] The incorporation of a cost–benefit analysis in Article 8ter perpetuates the flawed assumption that the welfare of the environment and the welfare of human beings are separate, and thus, negatively affects the expressivist power of international criminal law.

Defining Environmental Harm

As the IEP notes, with respect to the applicable threshold of environmental harm Article 8ter is a "mid-point" between the tests provided by ENMOD and Article 8(2)(b)(iv) Rome Statute. While ENMOD's definition is disjunctive (it concerns environmental harm that is either severe, *or* widespread, *or* long-term), Article 8(2)(b)(iv) Rome Statute is strictly conjunctive (it applies to environmental harm that is severe *and* widespread *and* long-term). The IEP offers a mixed conjunctive/disjunctive test, according to which ecocide includes environmental harm that is "severe and either widespread or long-term."

In the commentary to Article 8ter, the expert panel makes a convincing point for choosing this option. On the one hand, environmental harm always needs to be "severe" to classify as "ecocide." This reasoning makes sense, considering that genocide (the concept which influenced the term "ecocide") has often been described as the

[57] Stop Ecocide, "Making Ecocide a Crime," https://www.stopecocide.earth/making-ecocide-a-crime (accessed 7 July 2021).
[58] Higgins, *Seed-Idea*, 10.
[59] Ambos, *Protecting the Environment*; Heller, *Skeptical Thoughts*; Heller, *Ecocide and Anthropocentric Cost-Benefit Analysis*; Heller, *Crime of Ecocide in Action*.

"crime of crimes" in international law.[60] This does not mean that forms of environmental harm that do not fit the definition of "severe" offered by the IEP are not important or that they do not deserve to be investigated and prosecuted. Rather, the inclusion of the "severe" requirement as a compulsory element of Article 8ter is consistent with the ICC's limited mandate, which focuses on the "gravest" crimes.[61] Less severe forms of environmental harm could still be addressed at other international bodies or at the domestic level. Furthermore, this does not have to be done solely by means of criminal law. Legal experts have long advocated for a "polycentric" approach to addressing environmental harm, that would reflect the responsibility not only of individual persons, but also of legal persons and states, and would further incorporate non-penal measures.[62]

Nevertheless, the IEP aimed to expand the scope of environmental harm that could be prosecuted at the Court compared to Article 8(2)(b)(iv) Rome Statute. In the commentary, the expert panel explained that the strictly conjunctive test was "unnecessarily high" and it would have ended up excluding certain conducts whose consequences might have been widespread but not long-term or vice-versa. As observed by Heller, it makes some sense to keep a higher standard in the case of environmental damage caused during warfare (Article 8(2)(b)(iv)), compared to that caused during peacetime (the proposed Article 8ter) because it is "impossible to engage in armed conflict without causing some environmental damage."[63]

The IEP has also addressed another problem with Article 8(2)(b)(iv) Rome Statute, namely, that the terms "severe," "widespread" and "long-term" were nowhere explained in the Statute or the Elements of Crimes.[64] This vagueness presents a challenge for the ICC prosecution in terms of determining what harm meets the damage threshold and merits the initiation of criminal proceedings.[65] The IEP's Article 8ter, thus, makes an important contribution by providing detailed definitions of the terms in question:

> b. "Severe" means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;
> c. "Widespread" means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;
> d. "Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time.

These definitions also address some concerns that had earlier been expressed by legal scholars regarding the scope of the terms "severe," "widespread" and "long-term." Mark Drumbl has made the important observation that environmental destruction does not know geographical and temporal boundaries because environmental degradation in one part of the Earth could affect the entire world ecosystem. He also found the term "severe" problematic, as environmental damage which occurs in an isolated section of

[60] William Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009).
[61] Rome Statute of the International Criminal Court, Preamble.
[62] Drumbl, *International Human Rights*, 340; see also Frédéric Mégret, "The Problem of an International Criminal Law of the Environment," *Columbia Journal of Environmental Law* 36, no. 2 (2011): 195–257, 247–8.
[63] Heller, *Skeptical Thoughts*.
[64] Cusato, *Beyond Symbolism*, 496.
[65] Peterson, *Natural Environment*, 333.

the global commons that has not yet been valued by global markets, could fall outside its scope.[66] But the definitions provided by the IEP are flexible enough to reflect the complexities of environmental harm and its consequences. The definition of "widespread" recognizes that the term may relate not only to a large number of human beings but also to "entire ecosystems or species." Similarly, the severeness of ecocide is assessed with regard to the disruption or harm caused "to *any* element of the environment."[67] Hence, the definitions provided by the IEP allow for considering as ecocide even those forms of environmental harm that do not directly affect human beings or that have not occurred in proximity to human communities.

In that regard, the expert panel's definitions constitute an improvement over the definitions of the same terms contained in the "Understandings" attached to ENMOD.[68] The latter define "severe" as "involving serious or significant disruption or harm to human life, natural and economic resources or other assets." By adding the phrase "any element of the environment," the proposed Article 8ter shifts sets the overall tone of the definition as a more ecocentric one compared to that contained in the "Understandings" of ENMOD. Furthermore, the latter define "widespread" in a unidimensional manner – simply as "encompassing an area of several hundred square kilometres." By contrast, the IEP's definition recognizes that "widespread" may refer not only to physical distance, but also to the spread of environmental harm across an "entire ecosystem," thus, addressing the complex dynamics of ecocide.

Overall, the proposed Article 8ter brings important improvements compared to Article 8(2)(b)(iv) Rome Statute: the definition of ecocide applies to peacetime, provides a less demanding mixed disjunctive/conjunctive test for assessing environmental harm, and defines in detail the terms "severe," "widespread" and "long-term" by demonstrating sensitivity to the far-reaching consequences of environmental harm. However, as the next section observes, these improvements have unfortunately been shadowed by the incorporation of an anthropocentric element that may significantly obstruct the application of Article 8ter if adopted at the ICC.

The Wantonness Element

Despite the improvements that it brings with respect to defining the threshold for criminalizing environmental damage, the IEP considered that the "severe and either widespread or long-term" threshold is "overly inclusive" and decided to include a further limitation to the scope of the proposed provision.[69] Specifically, the text of Article 8ter specifies that the proposed provision can be applied *only* to "unlawful or wanton" acts that have caused severe and widespread/long-term environmental harm. As observed by Heller, the first alternative, "unlawful" acts, would be of limited use because, unfortunately, most environmentally harmful acts are lawful both at the international and the domestic level.[70] Consequently, the scenarios covered by the second alternative,

[66] Drumbl, *Waging War*, 128–9.
[67] Emphasis added.
[68] Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, 10 December 1976, "Understandings," https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=A951B510E9491F56C12563CD0051FC40.
[69] IEP, *Commentary*.
[70] Heller, *Ecocide and Anthropocentric Cost-Benefit Analysis*.

"wanton" acts, are of crucial importance for enforcing the proposed "ecocide" crime. Here, the term "wanton" becomes the criminalizing factor with respect to otherwise lawful acts. However, the definition provided by the IEP of the term "wanton" incorporates considerations of socio-economic benefits, which rely on questionable assumptions about human welfare.

Article 8ter defines "wanton" as acts undertaken "with reckless disregard for damage which would be *clearly excessive* in relation to the social and economic benefits anticipated."[71] Consequently, not all environmental damage that amounts to severe and either widespread or long-term harm can be prosecuted at the ICC pursuant to the proposed definition of ecocide. The IEP's definition allows those instances of environmental damage that do not "clearly" exceed the benefits to society to escape the reach of the law.

The IEP's commentary makes efforts to justify the incorporation of this anthropocentric element. The IEP considers that there are activities that are "legal, socially beneficial and responsibly operated to minimize impacts that nonetheless cause … severe and either widespread or long-term damage to the environment." On this account, not all acts that cause this type of environmental damage are "illegitimate, or even *undesirable*."[72] Consequently, the IEP has decided to include the wantonness criterion as means to "balance" socio-economic benefits with environmental damage by view of the concept of sustainable development.[73]

This is a problematic assumption that has already triggered critique.[74] Following the definition of the other elements of ecocide, the incorporation of the wantonness element essentially suggests that an act that causes "grave impacts on human life or natural, cultural or economic resources" and is either irreversible or spans across state borders or ecosystems, can still bring socio-economic benefits that exceed the costs. The IEP does not go into detail explaining what those conducts would look like, but briefly mentions that this could include "housing developments and transport links."[75] While such activities could certainly be considered socially beneficial in principle, the benefits of those particular housing and transport projects that cause *the degree* of environmental damage which the crime of "ecocide" is concerned with are highly questionable. It is also questionable whether those acts would fall under the ambit of "sustainable development," which in essence is development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[76] Acts that harm the environment to the extent that amounts to an ecocide would arguably be detrimental to the rights of future generations.

A more convincing justification of the inclusion of the wantonness element comes from outside the IEP. Darryl Robinson has made a compelling argument for balancing the protection of the environment with human interests. Robinson points out that the major computer-making companies, airlines, and food producers cause severe and either widespread or long-term environmental damage considering the *scale* of their

[71] Emphasis added.
[72] IEP, *Commentary*, emphasis added.
[73] IEP, *Commentary*.
[74] Ambos, *Protecting the Environment*; Heller, *Skeptical Thoughts*; Heller, *Ecocide and Anthropocentric Cost-Benefit Analysis*; Heller, *Crime of Ecocide in Action*.
[75] IEP, *Commentary*.
[76] "Report of the World Commission on Environment and Development: Our Common Future" (1987), para. 27, https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.

activities. Yet, providing worldwide access to technology, air travel and food could also be considered socially desirable activities.[77] The examples used by Robinson are more useful to illustrate the potential benefits of incorporating a wantonness element in the definition of "ecocide" compared to the examples used in the IEP commentary. When hearing the words "housing" and "transportation" works, used in the IEP commentary, one thinks of one-off events that cause environmental damage, such as reckless management of nuclear facilities, oil spills, or dumping toxic waste in oceans. By contrast, Robinson reminds us that most environmental damage is caused by systemic processes, namely, the accumulation of our everyday activities, which are hard to reverse or avoid.

While this is a very compelling point, I still find the inclusion of the wantonness standard in the definition of "ecocide" problematic, because it contradicts one of the rationales behind criminalizing that act in the Rome Statute – to convey a message to the broader international audience that harming the environment is wrong and punishable. The power of international criminal law to *express* the wrongfulness of a particular conducts has received recognition by many legal experts.[78] International trials are argued to have a socio-pedagogical effect: by stigmatizing atrocities as socially unacceptable, those trials are said to facilitate lawful behaviour within communities and instil norms of appropriate behaviour.[79] The expressivist or "symbolic" power[80] of international criminal law is of crucial importance because it offsets some of the problems associated with the small number of persons who actually get prosecuted in international courts and tribunals. The trials of even a few individuals could communicate the wrongfulness of the conducts criminalized in the Rome Statute.[81]

The expressivist or symbolic function of international trials is among the most cited rationales for criminalizing environmental harm. Legal scholars have argued that the prosecution of environmentally harmful conducts through international criminal law would have an "important declaratory function."[82] For Drumbl, international trials of environmental harm could help foster a culture of supporting environmental rights.[83] Similarly, the Stop Ecocide project considers that by stigmatizing environmental harm as one of the gravest crimes, the incorporation of the crime of ecocide in the Rome Statute would promote a new way of thinking about the relationship between humans and nature:

> Harming nature will begin to feel *the same as* harming human beings. This will help us to grasp the fact of our connection with the natural living world. … *Without a healthy Earth, there can be no healthy human beings* … .[84]

[77] Darryl Robinson, "Your Guide to Ecocide: Part 2: The Hard Part," *OpinioJuris*, 16 July 2021, http://opiniojuris.org/2021/07/16/your-guide-to-ecocide-part-2-the-hard-part/.
[78] Barrie Sander, "The Expressive Turn of International Criminal Justice: A Field in Search of Meaning," *Leiden Journal of International Law* 32, no. 4. (2019): 851–72; see also Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), 173–4.
[79] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?," *The American Journal of International Law* 95, no. 1 (2001): 7–31, 12–13.
[80] Marina Aksenova, "Symbolism as a Constraint on International Criminal Law," *Leiden Journal of International Law* 30, no. 2 (2017): 475–99.
[81] Ibid., 489.
[82] Matthew Gillett, "Environmental Damage and International Criminal Law," in Jodoin and Cordonier Segger, *Sustainable Development* (see note 39 above), 73–99, 98. See also Cusato, *Beyond Symbolism*, 506.
[83] Drumbl, *Accountability for Property Crimes*, 21.
[84] Stop Ecocide, "Making Ecocide a Crime," https://www.stopecocide.earth/making-ecocide-a-crime, emphasis added.

The message that the criminalization of ecocide seeks to convey is particularly well articulated in the final sentence of this quote – the wellbeing of humans and the environment cannot be treated separately. By view of this message, the terms "ecocentric" and "anthropocentric" seem problematic because they imply a false separation between the natural and the social world. Unfortunately, the inclusion of the wantonness element in the definition of "ecocide" *reinforces* the latter way of thinking about environmental harm.

Rather than inviting us to think about the complexity of human interactions with the environment, the definition of the wantonness element presents a simplified idea of a cost–benefit test. The way in which the definition is framed, namely to "balance social and economic benefits with environmental harms"[85] implies that humans are the ones to benefit, and the environment is the one to suffer the costs of particular actions. However, in reality both humans and the environment bear the costs of ecocide. Humans may benefit from having everyday access to technology, food and transportation, but humans also endure floods, drought, and air pollution. The problem is that the benefits are more tangible than the costs, which may occur years later. Furthermore, the abstract idea of balancing costs and benefits obfuscates the very different manner in which people across the globe experience those costs and benefits. The benefits of particular action, such as mining for rare metals to produce electronic devices, are far more likely to be felt in the Global North, while the cost – in the Global South. These considerations make an assessment of the "wantonness" of a particular conduct especially challenging.

One could still make the argument that the inclusion of the wantonness standard in the definition of "ecocide" could be justified as a *pragmatic* solution to the moral dilemma of protecting the environment v. reflecting the complexities of environmental harm. The wantonness element was said to reflect "a certain degree of realism" among the drafters. From this perspective, a definition without a wantonness-like element "could perhaps have given a stronger environmental signal but might have been detrimental to the likelihood for being adopted."[86]

These types of compromises are in fact common in the international criminal law field, where legal experts and human rights activists have tried to reconcile their ideas with the inescapable reality of sovereignty interests and political and economic power. Such compromises are enabled by the liberal idea of *progressive* development. From this perspective, it is better to deliver some justice than no justice at all. Specifically, in the case of ecocide, it is considered better to criminalize some grave instances of ecocide at the ICC than none. These first steps are hoped to lead to future developments and are often pointed out that the "progressive internalization" of international criminal law norms in the world of power politics[87] would take a "fairly long period of time."[88] It is also pointed out that the entire field of international criminal law has come a long way

[85] IEP *Commentary*.
[86] Voigt, "Ecocide."
[87] Akhavan, *Beyond Impunity*, 30.
[88] Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections," in *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, ed. Antonio Cassese, Paola Gaeta, and Salvatore Zappalà (Oxford: Oxford University Press, 2008), 499. See also Christopher Stephen, "International Criminal Law: Wielding the Sword of Universal Criminal Justice?," *International and Comparative Law Quarterly* 61, no. 1 (2012): 55–89, 84.

since its early days.[89] From this perspective, the proposed definition of "ecocide" that contains the wantonness element could be considered a step towards a future definition that would reflect more accurately the complex relationship between humans and nature. One commentator suggested that even with the wantonness element, the criminalization of ecocide would still have some symbolic affect and could raise public consciousness.[90]

But the reality is more complicated. What could in principle constitute a positive development, might have significant negative implications because of the way in which it is pursued in practice. The incorporation of the wantonness standard does not simply prevent the proposed criminalization of "ecocide" to convey the right message, namely that the wellbeing of the natural and that of the human world are inherently linked. Rather, the wantonness element itself conveys a wrong message: first, that the problems of the environment and the problems of human communities can be separated, second, that humans can in principle benefit from the *severe and widespread or long-term* degradation of the environment, and third, that the costs and benefits of environmentally harmful acts could be assessed with respect to human beings in the abstract, without taking into consideration global inequality. By including the wantonness element, the proposed definition of "ecocide" consolidates this problematic way of thinking about environmental harm, as a mere externality to otherwise beneficial activities, instead of instilling norms of appropriate behaviour towards the natural world.

I concur with Darryl Robinson that there is no easy solution to these dilemmas and that any definition of "ecocide" would be an imperfect compromise.[91] I am not arguing that the discussion of criminalizing ecocide should stop because of the inevitable challenges of defining it. But it is of crucial importance to recognize and engage with those challenges from early on. The "missing link," as Robinson calls it, between human action and its global consequences could only be found if engaging in such debates.

Overall, the IEP has recognized the complexity of ecocide in the definition of the terms "severe," "widespread," and "long-term." However, the juxtaposition of environmental harm versus socio-economic benefits in the proposed definition reinforces problematic assumptions about environmental harm, which shadows the significance of those achievements. As the next section discusses, the definition of the mental element of lability for ecocide triggered similar problems: the IEP recognized that the crime may often be committed with reckless disregard for the environment rather than a concrete intent to harm it, but ambiguously relied on the term "knowledge" of the crimes in the actual definition.

The Mental Element of Ecocide

Criminal responsibility has two pillars: a physical element (*actus reus*), such as an act or omission that has resulted in the commission of a crime, and a mental element (*mens rea* or guilty mind). Defining the mental element of criminal responsibility is crucial for determining the scope of criminal responsibility for a particular crime. The more

[89] David Luban, "After the Honeymoon. Reflections on the Current State of International Criminal Justice," *Journal of International Criminal Justice* 11, no. 3 (2013): 505–15.
[90] Natascha Kersting, "On Symbolism and Beyond: Defining Ecocide," *Völkerrechtsblog*, 8 July 2021, https://voelkerrechtsblog.org/on-symbolism-and-beyond/.
[91] Robinson, *Guide to Ecocide: Part 2*.

specific the mental element is, for example a requirement to prove that the accused had intended or desired the criminal result, the harder the task of the prosecutor to collect evidence and meet that standard. Conversely, the more relaxed the mental element is, for example where mere negligence is required to establish criminal responsibility, the easier the task of the prosecutor because they simply have to prove that a reasonable person in the place of the accused would have avoided the commission of a crime. The definition of the mental element of liability is of particular importance in international criminal law, where evidence is hard to collect and the link between the crime and high-level perpetrators is often opaque.

The IEP did not have to define the mental element of the proposed crime of "ecocide" because, unlike the statutes of previous international tribunals, Article 30 of the ICC Statute provides a *general* rule for establishing the mental element of criminal responsibility that is applicable to all crimes subject to the Courts jurisdiction. Article 30 stipulates that "[u]nless otherwise provided," a person should bear criminal responsibility if the material elements of the crime were committed with "intent and knowledge,"[92] where "knowledge" is defined as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[93]

But the IEP decided to provide "otherwise" in their definition of "ecocide" because they were concerned that Article 30 "was too narrow" and would not capture a sufficiently broad scope of conducts that may constitute "ecocide."[94] For that reason, the expert panel provided a definition of the mental element of liability that would apply specifically for the crime of ecocide: "knowledge that there is a *substantial likelihood* of severe and either widespread or long-term damage to the environment."[95] Here, the words "will occur in the ordinary course of events" used in Article 30 have been substituted with the words "substantial likelihood." In effect, the tone of the provision on "ecocide" differs from that of Article 30 – while the latter implies relative *certainty* of the result of one's actions, exemplified in the words "will occur," the IEP's definition of "ecocide" suggests merely an assessment of the *probability* of that result. As the commentary explains, the mental element in the definition of ecocide is close to that of "recklessness" in common law systems, or that of "*dolus eventualis*" found in some civil law systems. Consequently, as Karnavas observes, the IEP has used the "knowledge" standard "in name only," because in practice the panel has suggested a lower mental element.[96] In this manner, the expert panel has attempted to expand the scope of liability for "ecocide" compared to the default Rome Statute mental element requirements and, in effect, to ease the burden on the prosecutor concerning ecocide – it should be easier to prove the accused's awareness of the substantial likelihood that severe and widespread/long-term environmental damage would occur, compared to establishing the accused's certainty of such results. Indeed, the assessment of the precise degree or nature of the environmental damage that may ensue from particular actions may not always be easy to assess in advance, so "substantial likelihood" seems like a more appropriate standard compared to "certainty" when ecocide is concerned.

[92] Article 30 (1) Rome Statute.
[93] Article 30(3) Rome Statute.
[94] IEP, *Commentary*.
[95] Emphasis added.
[96] Michael Karnavas, "Ecocide: Environmental Crime of Crimes or Ill-Conceived Concept?," *OpinioJuris*, 29 July 2021, http://opiniojuris.org/2021/07/29/ecocide-environmental-crime-of-crimes-or-ill-conceived-concept/.

But while the goal of the IEP is convincing, the way in which it has been executed in practice is confusing. The reason is that while the commentary on the draft of Article 8ter speaks of "*awareness* of a substantial likelihood of severe and either widespread or long-term damage,"[97] the actual text of the draft provision concerns "*knowledge*" of such likelihood. As observed by Kevin Heller, this choice of language could possibly be explained with the IEP's desire to convince as many state parties as possible to adopt the "ecocide" provision.[98] The *travaux préparatoires* of the Rome Statute shows that the idea of incorporating a "recklessness" mental element in the statute did not gain support and that concept was dropped out from the negotiations.[99] However, the use of the term "knowledge" in the text of the proposed Article 8ter, while proposing that term to be interpreted as something closer to "recklessness" in practice, is at best unnecessary and, at worst, could have negative implications for the prosecution of ecocide at the Court.

It is true that some definitions of ecocide set the bar for conviction too low to be included in the Rome Statute. The Eradicating Ecocide project argues that the grave consequences of ecocide make the question of intent otiose in most cases. They suggest that the nature of ecocide requires a strict liability approach: "intention need not be proved because it is effectively irrelevant – simply establishing that the act was committed by the indicted person would be sufficient to secure a conviction."[100] The incorporation of a strict liability standard would be very hard to reconcile with the nature of the ICC as a *criminal* court. Criminal law imposes "the highest legal sanctions available to society," namely, deprivation of personal freedom.[101] Furthermore, convictions at the ICC further carry a special type of stigma – a persons is not merely convicted for any type of criminal conduct, but for the "unimaginable atrocities that deeply shock the conscience of humanity."[102] The harsh nature of ICC sanctions requires an inquiry of the mental state of the accused and proof of their culpability. This observation is supported by the remarks of one of the Statute's drafters: "it cannot be stressed enough that the Rome Statute explicitly proclaims basic postulates of culpability by requiring a certain state of mind" and "dissociat[ing] itself from notions of 'strict liability.'"[103] Indeed, there are no Rome Statute provisions that invoke strict liability.

Yet, there are many options between the high standard set in Article 30 Rome Statute and the problematically low standard of strict liability, which the IEP could have chosen from. Specifically, the IEP might have opted for explicitly including a "recklessness" or "awareness of substantial likelihood" standard in the definition of Article 8ter, citing as justification the reasonable observation that environmental damage need not be intentionally caused. After all, the Rome Statute drafters dismissed the concept of "recklessness"

[97] IEP, *Commentary*, emphasis added.
[98] Heller, *Skeptical Thoughts*.
[99] Per Saland, "International Criminal Law Principles," in *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, ed. Roy Lee (The Hague: Kluwer Law International, 1999), 189–216, 205.
[100] Eradicating Ecocide, "Closing the Door to Dangerous Industrial Activity: A Concept Paper for Governments to Implement Emergency Measures" (2012), 13, http://eradicatingecocide.com/wp-content/uploads/2012/06/Concept-Paper.pdf.
[101] Kenneth Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 17.
[102] Rome Statute, Preamble.
[103] Albin Eser, "Mental Elements – Mistake of Fact and Mistake of Law," in *The Rome Statute of the International Criminal Court*, Vol. 1, ed. Antoni Cassese, Paola Gaeta, and John Jones (Oxford: Oxford University Press, 2002), 889–947, 890.

only as a *general rule* that would be applicable to all crimes subject to the Court's jurisprudence. The Rome Statute recognizes that in specific situations lower mental elements could apply at the ICC.[104] A clear example of this is Article 28(a) which criminalizes negligent omissions by military commanders, which have led to the commission of crimes by their subordinates.[105] The rationale behind this exception to the default mental element of Article 30 is that military commanders are "in charge of an inherently lethal force"[106] and by virtue of their professional duty bear greater responsibility compared to other persons.

In a similar manner the IEP could have justified the explicit incorporation of a "recklessness" or "*dolus eventualis*" mental element in the definition of "ecocide." Some commentators have correctly pointed out that provisions with a lower mental element, such as Article 28, remain the exception in the Rome Statute and that a definition of ecocide that introduces another lower mental element may trigger opposition by states.[107] However, there are good reasons to consider the proposed crime of "ecocide" an exception to the general rule. Ecocide is very different from the existing international crimes. Unlike the crime of genocide, which is committed with a specific intent, namely, "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,"[108] ecocide is more likely to constitute a disregarded risk. Consequently, scholars in the field of international criminal justice have generally suggested that the crime of ecocide covers a variety of mental elements, including recklessness and even negligence.[109] Nevertheless, as observed by Mégret, the different mental elements may attract different penalties.[110] For example, intentional environmental damage could trigger more severe punishment than a reckless conduct. This would ensure proportionality between the degree of culpability of a given act and the penalty and stigma it attracts and could possibly appeal to states.

The use of the term "knowledge" instead of a lower mental element in the definition of "ecocide" is not only unnecessary, but also problematic. The biggest source of concern is that, if adopted by the state parties, this provision may end up imposing higher mental element than intended by the IEP. As already pointed out by authoritative legal experts, the concept of "knowledge" is inherently different from those of "recklessness" or "*dolus eventualis*."[111] The term "knowledge" is clearly defined in the Rome Statute. Furthermore, there is already extensive ICC jurisprudence on Article 30. The *Bemba* Pre-trial Chamber concluded that a person can be convicted at the ICC for committing a crime only if the prosecutor had proven that the accused had acted with "virtual certainty" or "practical certainty" that the commission of the crime would follow from her conduct, "barring an unforeseen or unexpected intervention that prevent[ed] its

[104] Eser, *Mental Elements*, 898–9.
[105] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June–17 July 1998, Vol. II: "Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole," 136, https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf.
[106] Ibid., 136.
[107] Anastacia Greene, "Mens Rea and the Proposed Legal Definition of Ecocide," *Völkerrechtsblog*, 7 July 2021, https://voelkerrechtsblog.org/mens-rea-and-the-proposed-legal-definition-of-ecocide/.
[108] Article 6 Rome Statute.
[109] Drumbl, *Waging War*, 151–2. See also Frédéric Mégret, "The Case for a General International Crime against the Environment," in Jodoin and Cordonier Segger, *Sustainable Development* (see note 39 above), 50–70, 67; Lawrence and Heller, *First Ecocentric Environmental War Crime*, 88; Gray, *International Crime of Ecocide*, 218.
[110] Mégret, *Problem of an International Criminal Law*, 232.
[111] Ambos, *Protecting the Environment*; Heller, *Skeptical Thoughts*.

occurrence."[112] This narrow interpretation of Article 30 has been justified on the grounds that the statutory language defined "knowledge" as awareness that the crime "*will* occur" and not that it *may* occur in the ordinary course of events.[113] With some exceptions,[114] ICC chambers have generally endorsed the restrictive interpretation of Article 30 that was proposed by the *Bemba* Pre-trial Chamber.[115] Furthermore, ICC jurisprudence has explicitly rejected an interpretation of the term "knowledge" that incorporates the "*dolus eventualis*" standard.[116] Consequently, to interpret the term "knowledge" contained in the definition of "ecocide" as something akin to recklessness or *dolus eventualis* would differ from the accepted interpretation of that term in ICC jurisprudence and its definition in the Rome Statute.

This creates significant problems of interpretation. The ambiguity concerning the mental element of Article 8ter is hard to reconcile with the *nullum crimen sine lege* principle (the legality principle) codified in Article 22 Rome Statute. Article 22(2) provides that the definition of a crime shall be "strictly construed." The rationale behind the legality principle is that the law provides fair notice about which conducts bear criminal responsibility. By using the term "knowledge" in the proposed statutory text, but implying "recklessness" or "*dolus eventualis*" in practice, the definition of "ecocide" fails to provide clarity about the scope of the criminalized conduct. Hence, it places the ICC judges in a challenging position where they must navigate between the goal of enforcing environmental protection (by interpreting the term "knowledge" as a lesser degree of *mens rea*) and safeguarding the defendant's rights (by interpreting the term "knowledge" strictly and in line with ICC jurisprudence). Considering that the ICC is a criminal court and that its judges have often stressed the importance of respecting the principles of legality and personal culpability,[117] even if that meant "the acquittal of persons who may actually be guilty,"[118] the second option seems like the more plausible one.

The problem is that the IEP uses one mental element standard, when they mean a different one. This could easily be addressed by dismissing the concept of "knowledge" from the definition of Article 8ter and substituting it either with the term "recklessness" or with the phrase "awareness of a substantial likelihood." Both of those alternatives are mentioned in the commentary of the IEP. Both would make the definition of "ecocide" clearer and, hence, more compliant with the legality principle. The other term mentioned by the IEP – *dolus eventualis* – seems like a less appropriate option

[112] *Bemba*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo" (ICC-01/05-01/08-424), Pre-Trial Chamber II, 15 June 2009 (hereinafter: *Bemba* Confirmation Decision), para. 362.

[113] Eser, *Mental Element*, 915, emphasis added.

[114] *Lubanga*, "Judgment pursuant to Article 74 of the Statute" (ICC-01/04-01/06-2842), Trial Chamber I, 14 March 2012, paras. 1011–12.

[115] *Katanga*, "Judgment pursuant to article 74 of the Statute" (ICC-01/04-01/07-3436-tENG), Trial Chamber II, 7 March 2014 (hereinafter: *Katanga* Judgment), para. 776; *Bemba et al.*, "Judgment pursuant to Article 74 of the Statute" (ICC-01/05-01/13-1989-Red), Trial Chamber VII, 19 October 2016, para. 29; *Lubanga*, "Public Redacted Judgment on the Appeal of Mr Thomas Lubanga Dyilo against His Conviction" (ICC-01/04-01/06-3121-Red), Appeals Chamber, 1 December 2014, para. 447.

[116] *Bemba* Confirmation Decision, para. 363.

[117] See *Katanga* Judgment, paras. 54–7; *Gbagbo and Blé Goudé*, "Reasons of Judge Geoffrey Henderson" (ICC-02/11-01/15-1263-AnxB-Red), Trial Chamber I, 16 July 2019, para. 10.

[118] *Bemba*, "Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison" (ICC-01/05-01/08-3636-Anx2), Appeals Chamber, 8 June 2018, para. 5.

because of its conceptual ambiguity. It has often been observed that in domestic law *dolus eventualis* has been interpreted in different manners, with some conceptualisations requiring a higher degree of awareness of the criminal result than others.[119] Furthermore, the Court has relied on the *dolus* terminology in earlier decisions,[120] but this triggered some academic criticism. Weigend makes a convincing argument that the use of a Latin concept which "has over the centuries been given different meanings by different writers does not present a solid basis for the interpretation of a statute that does not even mention these Latin words."[121] Over the years, the ICC judges appear to have distanced themselves from the *dolus* terminology and their judgments generally refer to the plain language of Article 30 Rome Statute.[122] Consequently, to avoid further interpretative difficulties to the ICC judges, the definition of ecocide could simply refer to the somewhat more straightforward term "recklessness" or the phrase "awareness of substantial likelihood" of the ensuing environmental damage from one's conduct.

Overall, the IEP has recognized the peculiarity of environmental harm – unlike the crime of genocide, which is committed with a specific intent, namely, "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,"[123] ecocide is more likely to constitute a disregarded risk. This requires specification of the mental element of liability for ecocide. However, the way in which this task has been accomplished in the proposed text of Article 8ter is likely to cause important interpretative challenges, if adopted. A more explicit recognition of the fact that ecocide requires a lower mental element than the default rule of Article 30 Rome Statute could help avoid such difficulties and facilitate the enforcement of ecocide at the ICC.

Conclusion

The IEP's definition of "ecocide," proposed as an amendment to the Rome Statute, aims to promote international recognition of the gravity of environmental harm and its devastating consequences for all species. The proposed Article 8ter brings important improvements over the existing international legal provisions that address environmental harm in the context of ENMOD, API and the Rome Statute. To begin with, the proposed crime of "ecocide" applies to environmental harm caused during peacetime. Furthermore, the definitions of the terms "severe" and "widespread" in the second paragraph of Article 8ter recognize the complexity of environmental harm and the fact that damage to other species which may not directly concern human beings could, nevertheless, fall under the scope of ecocide. Finally, the IEP has correctly recognized that severe environmental harm is often not indented as such, but rather constitutes a substantial risk. Consequently, to deter such environmentally harmful activities, the mental element needs to be lower than the one that may be generally applied to other international crimes.

However, these important developments are shadowed by the incorporation of the wantonness element and the ambiguous term "knowledge" in the definition of

[119] Mohamed Elewa Badar, "The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective," *Criminal Law Forum* 19, no. 3 (2008): 473–518, 490.
[120] For example, in the *Lubanga* trial judgment (see note 104 above).
[121] Thomas Weigend, "Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges," *Journal of International Criminal Justice* 6, no. 3 (2008): 471–87, 482.
[122] An example is the *Ongwen* trial judgment delivered in 2021.
[123] Article 6 Rome Statute.

"ecocide." The former conveys the problematic message to the international public that society and the economy can benefit from severe and either widespread or long-term environmental damage and obfuscates the inescapable link between the welfare of nature and that of human communities. The term "knowledge" masks the real mental element that the commentary to the text of Article 8ter suggests should apply to ecocide, namely, recklessness or awareness of substantial risk.

Overall, the definition of "ecocide" could benefit from engaging in more detail with the complexities of environmental harm and its global consequences and removing the controversial term "knowledge." This would enhance the expressivist or symbolic power of the law prohibiting ecocide and avoid the reinforcement of problematic assumptions about the relationship between the human and the natural world. If one of the main goals of criminalizing ecocide at the ICC is to communicate the wrongfulness of that act to the international audience, it is of utmost importance to ensure that the message is the correct one.

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