

ECOCIDE AND THE *ROME STATUTE*: A NEW LEAF IN INTERNATIONAL CRIMINAL LAW

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I INTRODUCTION

With the increasing urgency of the climate crisis, it is time for the International Criminal Court ('ICC') to shift its human-focused jurisdiction towards interspecies justice. Ecocide must be addressed as one of the most serious crimes of concern as entire populations and species are increasingly vanishing and planetary boundaries are being exceeded. This study begins by examining the importance of environmental protection and why international criminal law ('ICL') is a necessary tool for the achievement of systemic change. The shortcomings of the current provisions in the *Rome Statute* addressing environmental harm are discussed. The study then analyses the practical difficulties and limitations of a proposed crime of ecocide, including issues of jurisdiction and anthropocentrism. Despite these challenges, it is clear that a crime of ecocide is an appropriate and required addition to the *Rome Statute*.

II NEED FOR A CRIME OF ECOCIDE

A Environmental Crisis

The term 'ecocide' was coined by Arthur Galson in the 1970s in relation to the use of incendiary chemical-based weapons in the Vietnam War.¹ While there are now numerous variations of the definition of ecocide, most notably by Higgins,² this study is based upon the definition proposed by the Independent Panel of Experts ('IPE').³ This definition was proposed specifically for inclusion in the *Rome Statute*, defining ecocide as, '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'.⁴ Examples include large-scale mining

¹ Liana G Minkova, 'The Fifth International Crime: Reflections on the Definition of "Ecocide"' (2023) 25(1) *Journal of Genocide Research* 62, 69.

² See Polly Higgins, 'Seeding Intrinsic Values: How a Law of Ecocide Will Shift Our Consciousness' (2012) 5(1) *Cadmus* 9.

³ Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text* (Report, June 2021).

⁴ *Ibid* 5.

and deforestation of the Amazon rainforest leading to the loss of habitat for endangered species and interference in global weather patterns; oil spills in oceans, harming marine life and ecosystems, and; overfishing, which can deplete fish populations.⁵

The ICC was created to punish the ‘most serious crimes of international concern’,⁶ whereby seriousness is determined by reference to crimes that ‘threaten the peace, security and wellbeing of the world’.⁷ A United Nations-commissioned study identified environmental degradation that prompts ‘large-scale death or lessening of life chances’ as one of the most significant threats to international security, particularly due to its potential to destabilise states as the basic units of the global system.⁸ A further mounting body of scientific evidence warns that the Earth has reached a ‘tipping point’, one that ‘threatens the premature extinction of Earth originating intelligent life or the permanent and drastic destruction of its potential for desirable future development’.⁹ While ecocide and climate change are distinct phenomena, they are closely related. Destruction of ecosystems contributes to climate change, whilst climate change can also exacerbate ecocide by causing more severe and frequent climate catastrophes. For example, deforestation activities and consequential fires in the Amazon rainforest, the most biodiverse region on the planet, emit significant quantities of carbon dioxide into the atmosphere, impeding global efforts to achieve the emissions target set by the *Paris Agreement*.¹⁰ Loss of vegetation has also led to the reduction of rain across South America and other regions in the world, leading to climate-induced drought.¹¹ In Brazil, mining, wildlife trafficking and forest fires pose a threat to more than 20 million people, including one million Indigenous peoples who reside in the Amazon.¹² More species are accordingly threatened with extinction today than ever before in human history. It is anticipated that this will converge with existing security issues, exacerbating regional instability and forced migration, and intensifying cycles of socio-political and humanitarian crises.¹³ Drastic measures are required to curb and reverse this process.

B International Criminal Law

⁵ Malayna Raftopoulos and Joanna Morley, ‘Ecocide in The Amazon: The Contested Politics Of Environmental Rights in Brazil’ (2020) 24(1) *The International Journal of Human Rights* 1616, 1622.

⁶ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 1 (‘*Rome Statute*’).

⁷ *Ibid* Preamble para 3.

⁸ Anand Panyarachun et al, *A More Secure World: Our Shared Responsibility*, UN GAOR, 59th sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) 12.

⁹ David Spratt and Ian Dunlop, *Existential Climate-Related Security Risk* (Policy Paper, May 2019) 3.

¹⁰ Raftopoulos and Morley (n 5) 1617.

¹¹ *Ibid*.

¹² *Ibid*.

¹³ Sailesh Mehta and Prisca Merz, ‘Ecocide: A New Crime Against Peace?’ (2015) 17(1) *Environmental Law Review* 3.

The rationale for criminalising ecocide lies in the doctrine of individual criminal responsibility, which conveys a deterrent message that individuals accountable for such acts will not go unpunished. ICL possesses numerous advantages compared to other international legal regimes, such as international environmental law, as the latter is generally plagued with vagueness and operates under soft law.¹⁴ Conversely, ICL largely functions under a hard law approach with firmly established principles and mechanisms that induce compliance.¹⁵

Further, criminal law is used to delimit what is morally permissible. The act of criminalisation serves as a collective recognition of the natural environment's intrinsic value and the seriousness of the ecological crisis. To illustrate, sexual violence during armed conflicts was historically ignored or treated as a minor offence.¹⁶ Today, it is possible to claim that it has risen to the level of a *jus cogens* norm.¹⁷ This is because ICL's treatment of sexual violence has evolved significantly over the past decades, particularly due to the jurisprudence of International Criminal Tribunals for the former Yugoslavia and Rwanda.¹⁸ Additionally, in the context of ecocide, the stigma of committing a crime that is deemed by international law as essentially as serious as genocide functions as a strong deterrent. As asserted by the Stop Ecocide Foundation, 'no CEO or financier wants to be seen in the same way as a war criminal'.¹⁹ Moreover, encompassing the crime of ecocide in the *Rome Statute* would strengthen the ICC's stance against allegations of hypocrisy and claims that its investigations are disproportionately skewed towards African states and the Global South.²⁰ This will serve to strengthen the reputation and credibility of the ICC.

C The 'Green Shift'

It may be argued that ecocide has not attained the necessary degree of global recognition to be incorporated in the *Rome Statute*. The ICC did not create the four crimes against peace, but rather they were prohibited under international law at the time of their incorporation.²¹ However, a stand-alone crime of ecocide is not a novel idea but was discussed during the drafting of the *Rome Statute*.²² This appears to be expunged from collective memory, despite extensive evidence that many

¹⁴ Anastacia Greene, 'The Campaign to Make Ecocide an International Crime' (2019) 30(3) *Fordham Environmental Law Review* 1, 30.

¹⁵ Ibid.

¹⁶ Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 4th ed, 2019) 280.

¹⁷ David Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens' (2005) 15(2) *Duke Journal of Comparative and International Law* 219.

¹⁸ See, eg, *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998).

¹⁹ 'Making Ecocide A Crime', *Stop Ecocide Foundation* (Web Page) <<https://www.stopecocide.earth/making-ecocide-a-crime>>.

²⁰ Cryer, Robinson and Vasiliev (n 16) 170.

²¹ Ibid.

²² Mehta and Merz (n 13) 4.

governments at the time actively supported the criminalisation of ecocide in both wartime and peacetime.²³ As discussed by Tomuschat, the crime was removed completely without determination, indicating that ‘nuclear arms played a decisive role in the minds of many of those who opted for the final text’.²⁴ Furthermore, the 2016 Policy Paper by the Office of the Prosecutor emphasised its prioritisation and willingness to address environmental harm, committing itself to ‘give particular consideration to prosecuting ... crimes that are committed by means of, or that results in ... the destruction of the environment’.²⁵ This received substantial media attention, with scholars labelling it the ICC’s ‘green shift’.²⁶

National jurisdictions are increasingly recognising the rights of nature and animal sentience. For example, Ecuador enacted an entire chapter on the ‘Rights of Mother Earth’ in its 2008 Constitution and Bolivia introduced the ‘Law of the Rights of Mother Earth’, conferring upon nature the rights to life, restoration and freedom from pollution.²⁷ Notions of legal personhood are evolving as reflected by the Whanganui River in New Zealand, the Spanish Mar Menor lagoon and all rivers in Bangladesh, which have been declared legal persons.²⁸ Endeavours to expand *locus standi* to initiate legal proceedings directly on behalf of nature reflects the attempts by states to achieve a realistic solution for crimes against the environment. International law should reflect this concern. Moreover, in the jurisprudence of many national, regional and international courts, legal concepts such as public interest are used to acknowledge a duty of care owed by all individuals to protect the earth.²⁹ In accordance with this logic, the imposition of criminal liability for damage to ecosystems constitutes a natural progression in legal development. Therefore, while prohibition of ecocide has not yet attained the status of customary international law, incorporating ecocide in the *Rome Statute* would not constitute a radical departure from the general values of international law.

III EXISTING PROVISIONS

A War Crimes

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Ibid.

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Christian Tomuschat, ‘Crimes against the Environment’ (1996) 26(6) *Environmental Policy and Law* 243, 246.

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Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation* (Report, September 2016) para 41.

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Minkova (n 1) 62.

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Mehta and Merz (n 13) 5.

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Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ); Sam Jones, ‘Endangered Mar Menor Lagoon in Spain Granted Legal Status as a Legal Person’ *The Guardian* (online, 22 September 2022)

<<https://www.theguardian.com/world/2022/sep/21/endangered-mar-menor-lagoon-in-spain-granted-legal-status-as-a-person>>; *Human Rights and Peace for Bangladesh v Government of Bangladesh* [2016] HCD (WP No 13989/2016) 283.

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Rosemary Mwanza, ‘Enhancing Accountability for Environmental Damage under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity’ (2018) 19(2) *Melbourne Journal of International Law* 586, 587.

The current *Rome Statute* provisions do not sufficiently address crimes against the environment. The sole provision that imposes accountability for harm against the environment is the definition of war crimes under article 8(2)(b)(iv), which is extremely restrictive for numerous reasons.³⁰ This is substantiated by the fact that no individual has been charged under the provision.³¹

Firstly, the act must occur in the context of an international armed conflict, whereas the vast majority of environmental crimes are committed during peacetime.³² Secondly, the crime's *actus reus* is incredibly vague, namely the requirement that the environmental damage be 'widespread, long-term and severe'.³³ These terms are not defined in the *Rome Statute* nor in its Elements of Crimes, rendering it near impossible to predict the extent and forms of environmental devastation that can justify conviction.³⁴ This uncertainty is problematic as the principle of legality requires that the elements of a crime be as specific and clear as possible, so that the prohibited conduct is manifest.³⁵ The ambiguity in article 8(2)(b)(iv) is heightened by the fact that environmental damage is scientifically difficult to measure in comparison to prototypical forms of collateral damage, such as deaths. For example, initial investigations in the Kuwaiti oil fields reported degraded air quality and catastrophically devastated ecosystems.³⁶ However, the damage turned out to be less severe than initially projected, illustrating the inherent difficulties in assessing severity and longevity.³⁷ This is especially pertinent given the environment's capacity to heal itself.

Thirdly, even if the requirement of 'widespread, long-term and severe' damage was precisely defined, the malleability of the proportionality assessment would likely impede prosecution. The damage must be 'clearly excessive in relation to the ... military advantage anticipated'.³⁸ This is problematic as 'anticipated' denotes that the evaluation is subjective; not only may it be permissible if the perpetrator's *ex ante* judgement of the situation was incorrect, but even if it was negligent.³⁹ This leads to the fourth complication, which is that the test of *mens rea* is purely subjective. A perpetrator will only be liable under article 8(2)(b)(iv) if they: (1) knew that the attack would cause 'widespread, long-term and severe' environmental damage; (2) anticipated that the attack would yield little military advantage, and; (3) consciously decided that the act would be 'clearly excessive'.⁴⁰ It is difficult to envision a successful conviction due to such reliance on the accused's value judgements, forcing one to question the utility of the provision. An accused would

³⁰ *Rome Statute* (n 6) art 8(2)(b)(iv).

³¹ Mehta and Merz (n 13) 4.

³² Jessica Lawrence and Kevin Heller, 'The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute' (2007) 20(1) *Georgetown International Environmental Law Review* 61, 62.

³³ *Rome Statute* (n 6) art 8(2)(b)(iv).

³⁴ Lawrence and Heller (n 32) 72.

³⁵ Cryer, Robinson and Vasiliev (n 16) 18.

³⁶ Lawrence and Heller (n 32) 64.

³⁷ *Ibid.*

³⁸ *Rome Statute* (n 6) art 8(2)(b)(iv).

³⁹ Lawrence and Heller (n 32) 81.

⁴⁰ *Ibid* 83; *Rome Statute* (n 6) art 8(2)(b)(iv).

also likely raise the defence of mistake of law or mistake of fact.⁴¹ For example, a commander may have mistakenly believed that ‘widespread’ equated to damage of a minimum of 1,000 square kilometres, where it may actually refer to several hundred. Similarly, a commander may have believed that ‘long-term’ implied damage persisting for a century, whereas in actuality, decades may suffice.⁴² The mistake in both instances may exculpate the accused. Furthermore, if the damaged precipitated by an attack cannot be accurately quantified, the principle of legality dictates that the accused be acquitted, irrespective of the enormity of the attack. It is therefore clear that article 8(2)(b)(iv) is overly broad and an unsuitable yardstick for the work of the ICC.

B Crimes Against Humanity

Harm against the environment is also addressed by ICL under crimes against humanity.⁴³ While this crime is relevant during peacetime, it is applicable only in instances where environmental damage has led to human atrocities. For example, in the case against Al-Bashir, the Pre-trial Chamber held that contamination of waterways constituted a genocidal policy.⁴⁴ This anthropocentric approach is problematic as it is focused upon harm to humans that merely ‘incidentally’ defiles the environment. The issues with this prevailing approach in ICL are examined further in Part V(A).

It is clear that a standalone crime of ecocide is required, one that is truly ecocentric and has more fixed standards than propounded by article 8(2)(b)(iv).

IV CRIME OF ECOCIDE: DIFFICULTIES AND LIMITATIONS

A crime is not required to be customary international law to be included in the *Rome Statute*. Rather, an amendment must be proposed by a state party in accordance with article 121.⁴⁵ After potentially several rounds of negotiations, a minimum of two-thirds of state parties must vote in favour of the amendment.⁴⁶ The process of amendment is hence a significant challenge in itself. Additional limitations and practical difficulties are discussed below.

A Jurisdiction

The effectiveness of an ecocide crime is undermined by the fact that the world’s top four carbon offenders are not signatories to the *Rome Statute*: China, the United States, India and Russia.⁴⁷ However, the transborder nature of many

⁴¹ *Rome Statute* (n 6) art 32.

⁴² Lawrence and Heller (n 32) 80.

⁴³ *Rome Statute* (n 6) art 7.

⁴⁴ *Prosecutor v Al Bashir (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09-1, 4 March 2009).

⁴⁵ *Rome Statute* (n 6) art 121.

⁴⁶ *Ibid.*

⁴⁷ ‘State of the Climate: Climate Action Note’ *United Nations Environment Programme* (Web Page, 17 May 2021) <<https://climatetrade.com/which-countries-are-the-worlds-biggest-carbon-polluters/>>.

environmentally-harmful acts will expose non-party states to the ICC's jurisdiction if impacts of their decisions materialise on the territory of a state party, such as excessive pollution.⁴⁸ The nationality of perpetrators is also pertinent; for example, a British CEO of a Chinese corporation would be liable to the ICC's jurisdiction. The issue of jurisdiction can hence be overcome in a number of ways.

B Resources

Expanding the ICC's jurisdiction to crimes of ecocide will require substantial resources that may strain the Court's ability to deliver justice competently and without delay. The ICC's workload is well-known to be overburdened and its capacity is restricted to addressing only a few of the gravest international crimes.⁴⁹ It is therefore questionable whether the ICC can provide effective and centralised adjudication necessary for ecocide prosecutions. It may be argued that ecocide should not be included in the *Rome Statute*, but rather a more feasible alternative is the creation of a separate international environmental court. However, this requires the establishment of a new treaty and the experience of establishing international courts cautions that it would be as equally, if not more, expensive and challenging to initiate.⁵⁰ A clear advantage of introducing the crime in the *Rome Statute* is that it is a widely signed treaty and the ICC already exists.

The prosecutor should not necessarily prioritise crimes against the environment, as there may be more urgent and pressing humanitarian crises, especially in relation to war crimes and crimes against humanity. One method in which issues of competence and capacity can be addressed is by establishing a specialised environmental chamber and ecocide department in the prosecutor's office. Such a bureaucratic arrangement would help ensure that investigations and adjudication of cases are streamlined.⁵¹ It would also greatly alleviate the prosecutor's workload, simultaneously allowing for a more calculated and nuanced development of ecocide law. This dedicated chamber would be instrumental in ensuring that environmental cases are handled with the expertise and focus they require, acting as a central hub for international collaboration on environmental crimes.

V RETHINKING PRINCIPLES OF INTERNATIONAL CRIMINAL LAW

A Anthropocentrism vs Ecocentrism

A constraint within international law is that it is cloaked in an anthropocentric veil, conceiving the natural environment as a passive entity which exists primarily to

⁴⁸ Greene (n 15) 12.

⁴⁹ Mwanza (n 29) 606.

⁵⁰ Ibid.

⁵¹ Ibid.

serve human interests.⁵² This is embodied in the IPE's definition of ecocide; specifically, the second paragraph permits consideration of the anticipated economic and social benefits of an environmentally harmful act in evaluating whether that act amounts to ecocide.⁵³ This is problematic as it relegates nonhuman life to an entirely utilitarian purpose. The IPE's proposed definition reinforces the problematic supposition that the welfare of the environment and humans are separate, neglecting the fact that human beings are environmentally-embedded.⁵⁴

ICL's failure to address the realities of contemporary security (and environmental) threats is substantially due to the prevailing economic rationality of neoliberalism, which propagates notions of anthropocentrism and atomism.⁵⁵ As discussed by Raftopoulos and Morley, the commodification of nature and capitalist exploitation have altered the value of resources from use value to exchange value, leading to the formation of new resource frontiers and the eruption of socio-environmental conflicts.⁵⁶ The protection of ecosystems is severely debilitated by the constant prioritisation of economic growth as seen in the Amazon Rainforest. To repel this approach, it must be recognised that even environmental elements that do not contribute to human survival fundamentally deserve protection. Entire ecosystems and nonhuman species exist not simply as features 'in an anthropocentric utilitarian calculus or as extensions of human moral characteristics, but as entities with moral value in their own right'.⁵⁷ For the genuine protection of the environment, the IPE's definition must be rooted in an ecocentric perspective that acknowledges the value of protecting the nonhuman environment independently of human interests. By addressing the structural violence generated by industrial modes of organisation, a crime of ecocide could challenge the legal-epistemological foundation of ICL that is fundamentally rooted in the Western enlightenment/rationalist tradition and hence contribute towards the decolonisation of international law.

B Mental Element

The requirement in the IPE's definition that the unlawful act be 'committed with knowledge' is problematic for the reasons discussed in Part III(A). This study suggests that the standard of proof should instead be one of strict liability, which does not require proof of intention. Numerous studies have proven that crimes of strict liability provide a strong deterrent effect that other crimes do not, primarily due to the certainty of punishment.⁵⁸ The importance of this cannot be understated as ecocide is inextricable from an international crisis that is both existential and accelerating. A standard of strict liability would also render it more manageable and less expensive for the prosecution to collect evidence and prove wrongdoing. However, strict liability conflicts with article 30 of the *Rome Statute*, which requires

⁵² Ibid 583.

⁵³ Stop Ecocide Foundation (n 3).

⁵⁴ Mwanza (n 29) 583.

⁵⁵ Raftopoulos and Morley (n 5) 1624.

⁵⁶ Ibid 1629.

⁵⁷ Sarah Krakoff, 'Mountains Without Handrails' (2003) 27(1) *Harvard Environmental Law Review* 417, 462.

⁵⁸ Mwanza (n 29) 600.

the establishment of knowledge and intention on the part of the accused for all crimes within the ICC's jurisdiction. To ensure a standard of strict liability, article 30 must be amended to exempt the crime of ecocide from its application. This challenge is reflective of a larger issue, namely that many principles of environmental law and criminal law are difficult to harmonise, such as corporate criminal responsibility.

C Individual Criminal Responsibility

A limitation of the ICC's jurisdiction is that it applies only to natural persons, excluding legal persons such as corporations.⁵⁹ This is problematic as corporations, notably in the gas and oil industries, are the most common perpetrators of ecocide.⁶⁰ To illustrate, Exxon, Chevro, Shell and BP have jointly produced 10% of global carbon emissions and should be especially vulnerable to ecocide charges.⁶¹

Individual criminal responsibility has certain advantages as it would ensure that senior executives are held personally accountable for their decisions, as opposed to imposing fines against corporations, which may not substantially disrupt their operations. However, this may also lead to the scapegoating of individuals, rather than inciting the structural reforms necessary to rectify harmful business practices. Strict liability for the crime of ecocide should therefore be extended to corporations, as it reduces the likelihood of decision-makers evading accountability. ICL's reluctance to recognise that corporations can owe legal obligations should be contested as companies are playing more influential roles in society.⁶² However, this will require amendments to articles 25 and 17 of the *Rome Statute*, which is an expensive and arduous process. A further consideration is that corporate criminal liability may violate the principle of complementarity.

The ICC's operation as a court of last resort is undermined if the *Rome Statute* recognises legal entities, as many domestic jurisdictions do not. The ICC can only prosecute a case if the relevant state does not have the capacity to prosecute or decides not to.⁶³ A state's failure to recognise legal entities likely does not equate to a lack of capacity.⁶⁴ Therefore, whilst corporate criminal responsibility is desirable in the context of ecocide, it requires controversial amendments to existing provisions and faces accusations of violating the foundational principle of complementarity.

VI CONCLUSION

⁵⁹ *Rome Statute* (n 6) art 25.

⁶⁰ Mwanza (n 29) 601.

⁶¹ Damien Carrington, 'Oil Firms' Climate Claims Are Greenwashing, Study Concludes' *The Guardian* (online, 17 February 2022) <<https://www.theguardian.com/environment/2022/feb/16/oil-firms-climate-claims-are-greenwashing-study-concludes>>.

⁶² Mwanza (n 29) 601.

⁶³ *Ibid.*

⁶⁴ *Ibid*; David Scheffer, 'Corporate Liability under the Rome Statute' (2016) 57 *Harvard International Law Journal* 35, 38.

The environmental crisis poses a clear and present danger to the peace, security and wellbeing of the world, thereby satisfying the ICC's criteria for the gravest crimes of international concern. As national jurisdictions are increasingly recognising the rights of nature, there is a burgeoning legal and moral consensus for the ICC to adopt a similar stance. Furthermore, the incorporation of ecocide into the *Rome Statute* is not a radical innovation but a revival of principles considered during the Statute's drafting. Sceptics may dismiss the criminalisation of ecocide as idealistic, yet such a perspective loses sight of the fact that reality is continuously evolving, and the law must adapt with it.