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The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?

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THE CAMPAIGN TO MAKE ECOCIDE AN INTERNATIONAL CRIME: QUIXOTIC QUEST OR MORAL IMPERATIVE?

Anastacia Greene

I. INTRODUCTION

Can anything be done to prevent environmental destruction? This is the stark question that confronts the international legal community. Environmental destruction is a global problem; many environmental disasters affect multiple countries. Further, issues like global warming and the thinning ozone layer do not affect just one country, but the entire world. However, international law has not addressed the issue, leaving this matter to individual countries.

In recent decades, international law has created a solid body of law on international criminal law but has not done so with regard to environmental law. Indeed, a regime of international environmental criminal law simply does not exist at this time. Although various treaties address certain conduct,¹ no treaty exists that codifies environmental law or criminalizes environmental destruction.

Many attorneys and organizations are campaigning to change this in order to make environmental destruction an international crime. Advocates want the crime of ‘ecocide’ to be included as a fifth crime against peace, which can be heard by the International Criminal Court.

1. For example, a few environmental treaties have provisions requiring States to criminalize certain conduct. The Convention on International Trade in Endangered Species includes a provision against trafficking in endangered species; Article VIII of the Convention requires the State parties to “penalize trade in, or possession of” the protected specimens, while the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal states that illegal trafficking of hazardous waste is criminal. See Alessandra Mistura, *Is There Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework*, 43 COLUM. J. ENVTL. L. 181, 191, 201 (2018).

Is this campaign feasible? Can it accomplish the goal of protecting the environment?

II. PROPOSAL TO MAKE ECOCIDE A FIFTH CRIME AGAINST PEACE.

A. 2010 UN Proposal

In April 2010, Polly Higgins introduced a proposal to the UN Law Commission; this proposal would amend the Rome Statute to include “ecocide” as a fifth crime against peace.² If the crime of ecocide is added to the Rome Statute, ecocide cases could be heard by the International Criminal Court.³ Higgins defines ecocide as “the extensive destruction, damage to 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.”⁴

Higgins later expanded this definition into a model law that states: “1. Acts or omissions committed in times of peace or conflict by any senior person within the course of State, corporate or any other entity’s activity which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystem(s) of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely

2. *Ecocide should be treated like a war crime, U.K. lawyer says*, The Star, (March 30, 2012), https://www.thestar.com/news/insight/2012/03/30/ecocide_should_be_treated_like_a_war_crime_uk_lawyer_says.html [https://perma.cc/GY22-KELG].

3. The Rome Statute is a treaty that created the International Criminal Court. It was adopted on July 17, 1989 and became effective on July 1, 2002. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The International Criminal Court (ICC) is an international tribunal that has jurisdiction to prosecute individuals for international crimes of crimes against humanity, war crimes, genocide and aggression. Currently, 122 countries are State Parties to the Rome Statute and the International Criminal Court. *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [https://perma.cc/3END-ESVT].

4. POLLY HIGGINS, ERADICATING ECOCIDE: EXPOSING THE CORPORATE AND POLITICAL PRACTICES DESTROYING THE PLANET AND PROPOSING THE LAWS NEEDED TO ERADICATE ECOCIDE 3 (2010).

diminished. 2. To establish seriousness, impact(s) must be widespread, long-term or severe.”⁵

Who would be subject to prosecution?

The proposed amendment applies to any “senior person” who perpetrated ecocide within the course of State, corporate or any other entity’s activity in times of peace or conflict. This amendment applies to individual persons, not to the States or corporations themselves. So, for example, an oil company CEO or corrupt head of state could be subject to prosecution.⁶

What is the intent requirement?

Notably, unlike other International Criminal Court “core crimes,” the proposed ecocide law does not require criminal intent.⁷ This, this is a crime of strict liability.⁸ Higgins explains that ecocide is a crime of consequence, not of specific intent. Often ecocides result from industrial accidents, without a specific intent. The gravity of the harm justifies conviction without criminal intent. Historically, courts have found that corporations cannot have a criminal intent and could not be convicted of offenses that require a mental element.⁹ Strict liability would also ensure that corporations can be held responsible. Finally, strict liability places the onus on the individual to prevent the harm, rather than on the issue of blame.¹⁰

What proof is needed that the individual caused an ecocide?

The draft definition of ecocide includes ecological damage, “whether by human agency or by other cause,” indicating that ecocide

5. *Ecocide Law*, MISSION LIFEFORCE, <https://www.missionlifeforce.org/ecocide-law> [<https://perma.cc/L326-S4KA>].

6. HIGGINS, *supra* note 4, at 68.

7. *See*, e.g. war crimes of “willful killing,” “willfully causing great suffering,” and “[i]ntentionally directing attacks against civilian objects.” Rome Statute, *supra* note 3, art. 8. Genocide “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” *Id.* art. 6.

8. HIGGINS, *supra* note 4, at 68 (“It is proposed that the ecocide be a crime of strict liability, one without the requirement of a *mens rea*.”).

9. *Id.*

10. *Id.*

also includes natural disasters like hurricanes, volcanic eruptions, etc. Higgins divides ecocide into two types: “Ascertainable vs. unascertainable.”¹¹ Ascertainable ecocides are caused by human actions, while unascertainable ecocides are natural disasters. However, the model ecocide law targets harms created by human actions or omissions. This includes an act that “causes extensive damage to, destruction of, or loss of human and/or non-human life to the inhabitants of the territory.”¹²

Who is protected?

The law criminalizes actions that severely diminish the peaceful enjoyment of the inhabitants of the territory. According to the model law proposed by Higgins, “Inhabitants” include “indigenous occupants and/or settled communities of a territory consisting of one or more of the following: (i) humans, (ii) animals, fish, birds or insects, (iii) plant species, (iv) other living organisms.” Thus, ecocide is a crime against all life, not just human life.¹³

What level of environmental damage is considered “ecocide”?

The model law considers ecocide as “*serious* ecological, climate or cultural loss or damage to or destruction of ecosystem of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely diminished.”¹⁴ To establish seriousness, “impact(s) must be widespread, long-term or severe.”¹⁵ The wording in this section is adopted from an existing UN treaty that defines the terms of “widespread, long-term or severe.”¹⁶ The Understanding Regarding Article I of the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD)

11. *Id.* at 63.

12. POLLY HIGGINS, *EARTH IS OUR BUSINESS: CHANGING THE RULES OF THE GAME* 160 (2012).

13. For the text of proposed model law, see *Ecocide Crime*, ERADICATING ECOCIDE, <https://eradicatingecocide.com/the-law/the-model-law/> [<https://perma.cc/3V9H-XG9K>] (last visited May 6, 2019).

14. *Id.*

15. *Id.*

16. Geneva Convention Additional Protocol I Relative to the Protection of Victims of International Armed Conflicts, art. 35, art. 55, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

defines widespread as “encompassing an area on the scale of several hundred kilometers,” long-lasting as “lasting for a period of months, or approximately a season,” and severe as “involving serious or significant disruption or harm to human life, natural and economic resources or other assets.”¹⁷

B. *Grassroots Campaign*

Higgin’s proposal to the UN is part of a much larger campaign. A number of different organizations have formed to promote the cause of making ‘ecocide’ an international crime.¹⁸ On October 15, 2016, a civil society held a mock international tribunal of Monsanto at the Hague, eventually finding the company liable for the crime of ‘ecocide.’¹⁹ The UN ecocide proposal has received international coverage in news media and legal discussions.²⁰ Much of this activism is centered in the UK and Europe. In 2014, the group “End Ecocide on Earth” presented 170,000 signatures to Parliament in support of a European Union law against ecocide.²¹ In 2017, the European Green Party considered a draft resolution for an international recognition of the crime of ecocide, and the Global Greens Congress adopted a resolution to consider destructive mining in Venezuela to be an

17. Understanding Relating to Article I, Rep. of the Conference of the Comm. on Disarmament, U.N. GAOR, 31st Sess., Supp. No. 27, at 91–92, U.N. Doc. A/31/2 (1976), available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=A951B510E9491F56C12563CD0051FC40> [<https://perma.cc/F53E-CA3R>] (last visited May 6, 2019).

18. Such organizations include End Ecocide on Earth, *see* END ECOCIDE ON EARTH, <https://cop21.endecocide.org/en/> [<https://perma.cc/6RCW-G2VB>] (last visited June 13, 2019), and End Ecocide in Europe, *see* CITIZENS OF EUROPE, <http://www.citizens-of-europe.eu/articles/end-ecocide-europe-campaign> [<https://perma.cc/ETW8-J76L>] (last visited June 13, 2019).

19. *See International Monsanto Tribunal*, MONSANTO TRIBUNAL, <http://www.monsanto-tribunal.org/> [<https://perma.cc/7YWD-CKDH>] (last visited May 6, 2019).

20. *See Eradicating Ecocide; the woman behind the campaign*, THE ECOLOGIST, (May 14, 2013), <https://theecologist.org/2013/may/24/eradicating-ecocide-woman-behind-campaign> [<https://perma.cc/8KG4-UP85>].

21. Ian Johnston, *Campaign to put ecocide on par with genocide*, THE INDEPENDENT (2014), <https://www.independent.co.uk/environment/green-living/campaign-to-put-ecocide-on-a-par-with-genocide-in-attempt-to-curb-environmental-destruction-9789297.html> [<https://perma.cc/M945-FWYQ>].

ecocide.²² The Cambridge Dictionary added the word “ecocide” to its dictionary in 2018, defining it as the “destruction of the natural environment of an area, or very great damage to it.”²³ At the end of the year, the Cambridge Dictionary released its shortlist of four candidates for the “word of 2018,” words that they felt best summed up the year, and held a contest for people to vote for the best one. One of the four candidates for Word of 2018 was Ecocide.²⁴ This is a campaign that may be gaining strength, and it merits serious evaluation.

C. *Enacting the Proposed Amendment to the Rome Statute*

To enact the proposal, a signatory country must first call for an amendment to the Rome Statute.²⁵ The country submits the text of the proposed amendment to the Secretary-General of the United Nations, who circulates it to all States Parties.²⁶ The States Parties then vote on whether to take up the proposal.²⁷ If the proposal is taken up, the amendment can be referred to a review conference, or to a vote by the Assembly of States Parties. If a two-thirds majority of the States Parties vote in favor, the amendment is adopted.²⁸ No country has veto power, and the votes of small countries have the same effect as larger countries.

22. See Draft European Green Resolution, On an international recognition of the crime of ecocide: For a binding international environmental law architecture, 5th European Green Cong. (April 2, 2017), https://europeangreens.eu/sites/europeangreens.eu/files/9%20On%20Ecocide%20-%20EGP%20Congress%20Liverpool%20_0.pdf; *Ecocide, Ethnocide, Extractivism and Land Grabbing*, GLOBAL GREENS <https://www.globalgreens.org/Liverpool2017/Resolutions/Ecocide-Ethnocide-Extractivism-Land-Grabbing> [<https://perma.cc/GUM3-AZQ8>] (last visited April 19, 2019).

23. The People’s Word of 2018, CAMBRIDGE WORDS DICTIONARY BLOG (Nov. 29, 2018), <https://dictionaryblog.cambridge.org/2018/11/29/the-peoples-word-of-2018/> [<https://perma.cc/JA8E-EJKU>].

24. Olivia Petter, ‘Nomophobia’ crowned word of 2018, but what does it mean?, THE INDEPENDENT (Dec. 31, 2018), <https://www.independent.co.uk/life-style/nomophobia-word-of-the-year-2018-cambridge-dictionary-smartphone-anxiety-a8705106.html> [<https://perma.cc/YD5E-BKSU>].

25. See Polly Higgins et al., *Protecting the Planet: A Proposal for a Law of Ecocide*, 59 CRIME, LAW AND SOCIAL CHANGE, 251, 251–66 (2013).

26. Rome Statute, *supra* note 3, art. 121.

27. *Id.* art. 121(2).

28. *Id.* art. 121(3).

It just takes one country to submit the proposed amendment for it to be considered by the wider assembly. One country, Vanuatu, recently expressed its support for the proposal, and its intention to introduce it before the ICC. In December 2018, Vanuatu's ambassador to the European Union stated that he supported the call for ecocide to be made into a crime of atrocity under international law,²⁹ and Vanuatu foreign minister Ralph Regenvanu stated that he will propose that the Vanuatu government take the proposed ecocide amendment forward to the ICC.³⁰ But is such a law feasible? What would be its effects? Can the law prevent international environmental destruction?

The following sections will address these questions. Section III will cover the history of ecocide as a concept, Section IV will address why a law against ecocide is needed, Section V will address criticisms and problems with formulating a crime of ecocide, and Section VI will discuss whether the ICC is the appropriate forum for an ecocide crime.

III. HISTORY OF ECOCIDE

A. *Earliest Use – Vietnam War*

Supporters of the proposal point out that an international law against ecocide is not as radical as it might initially seem.³¹ “Ecocide” is not a new concept in international law. The term has been in use since at least the 1970's, and the crime of ecocide was included in early drafts of the Rome Statute. Reviewing the history of “ecocide” can be helpful in establishing its potential validity as an international crime today.

The term “ecocide” was first used in the 1970's, most often in reference to the Vietnam War.³² The US military was using chemical

29. *Vanuatu supports call to make climate ecocide an atrocity crime*, PACNEWS (Dec. 11, 2018), <http://www.loopvanuatu.com/vanuatu-news/vanuatu-ambassador-supports-call-climate-ecocide-be-identified-atrocity-crime-under> [<https://perma.cc/DE3J-2EDN>].

30. *Healing Polly – And Testing Existing Law*, MISSION LIFEFORCE (March 26, 2019), <https://coen-dahlhaus-xnyg.squarespace.com/news> [<https://perma.cc/2KNN-TC5W>].

31. GAUGER ET AL., *ECOCIDE IS THE MISSING 5TH CRIME AGAINST PEACE* (2012), https://sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf.

32. For example, a 1970 book review stated that “those who are concerned with the preservation of life as we now know it can only hope that the presidential statement portends a cessation of America's current practice of ecocide (ecological

warfare and creating extreme environmental destruction; these actions provoked discussions over whether the US was creating an “ecocide” in Vietnam.³³ In 1970, Prof. Arthur W. Galston spoke at the Conference on War and National Responsibility and proposed “a new international agreement to ban ‘ecocide.’³⁴ In his speech, Galston stated:

After the end of World War II, and as a result of the Nuremburg trials, we justly condemned the willful destruction of an entire people and its culture, calling this crime against humanity genocide. It seems to me that the willful and permanent destruction of environment in which a people can live in a manner of their own choosing ought similarly to be considered as a crime against humanity, to be designated by the term ecocide . . . At the present time, the United States stands alone as possibly having committed ecocide against another country, Vietnam, through its massive use of chemical defoliants and herbicides. The United Nations would appear to be an appropriate body for the formulation of a proposal against ecocide.³⁵

Galston was actively campaigning against the US military’s use of the toxic defoliant Agent Orange in Vietnam. Galston, a biologist, discovered that the US military had used his Ph.D. discoveries to help develop Agent Orange. Appalled by this use, Galston joined a group of scientists protesting the US’s use of chemical warfare.³⁶ The US claimed that herbicides like Agent Orange were not a chemical weapon, but Galston contended that its use violated the UN Resolution against the wartime use of poisonous gases. Galston traveled to Vietnam, interviewed victims of chemical weapons, and lobbied the US government to stop using the substance. He appealed to the US Department of Defense to investigate Agent Orange’s effects on

murder) in Vietnam.” Arnold W. Reitze Jr., *Book Review*, 21 CASE W. RES. L. REV. 596 (1969-1970).

33. DAMIEN SHORT, *REDEFINING GENOCIDE, SETTLER COLONIALISM, SOCIAL DEATH AND ECOCIDE* 40 (2016).

34. GAUGER ET AL., *supra* note 31, at 1.

35. DAVID ZIERLER, *THE INVENTION OF ECOCIDE: AGENT ORANGE, VIETNAM, AND THE SCIENTISTS WHO CHANGED THE WAY WE THINK ABOUT THE ENVIRONMENT* 19 (2011).

36. *Id.* at 17.

humans. The Department of Defense's investigation found that Agent Orange caused birth defects in rats. This report forced Pres. Nixon to ban use of Agent Orange in 1971.³⁷

Galston was a biologist, not an attorney, and he was campaigning on a single issue; not drafting a legal provision.³⁸ He was opposed to the use of herbicides in warfare, but a later interview indicates that he would not consider resource extraction to be "ecocide."³⁹ Nevertheless, this is an example of the rapid spread of a new legal concept. After Galston coined the term "ecocide," the term began to appear in news articles about Agent Orange, in legal scholarship,⁴⁰ and other books about the Vietnam War.⁴¹ Most often, authors referred to 'ecocide' as an act of war, rather than adopting a more expansive concept that included acts during peacetime.

However, in his 1971 article, "A Constitutional Right of Freedom from Ecocide," Professor Pettigrew of Ohio University argued that the Constitution implies a right to be free from ecocide, and that the courts must act to protect this individual right from ecocidal acts of businesses or governments.⁴² He defined Ecocide as "the substantial destruction of an integral part of a particular ecosystem or the unreasonable degradation of the environment in general. The environment is composed of "ecosystems" within which all natural

37. Jeremy Pearce, *Arthur Galston, Agent Orange Researcher, Is Dead at 88*, NY TIMES, June 23, 2008.

38. See SHORT, *supra* note 33, at page 41. Short states Galston's articulation of ecocide doesn't command the same level of intellectual respect as Lemkin's formulation of the crime of genocide, because Lemkin "went to great lengths to justify the integrity of his concept, its etymology and its application – the same cannot be said of Galston and ecocide."

39. ZIERLER, *supra* note 35, at 18.

40. Arthur H. Westing, *Herbicides as Agents of Chemical Warfare: Their Impact in Relation to the Geneva Protocol of 1925*, 1 ENVTL. AFF. 578, 583 (1971) ("Small wonder that one eminent biologist recently was forced to coin an ominous new word for the English language 'ecocide.'").

41. See, e.g., BARRY WEISBERG, *ECOCIDE IN INDOCHINA: THE ECOLOGY OF WAR* (1970), containing articles on the ecological effects of the Vietnam War, chemically poisonous products' effect on agriculture, and the bombing of Vietnam. See also L. Craig Jonstone, *Ecocide and the Geneva Protocol*, 49 Foreign Affairs 711 (1971); Harry W. Pettigrew, *A Constitutional Right of Freedom from Ecocide*, 2 ENVTL. L. 1 (1971) (arguing that a constitutional right of freedom from ecocide is secured by the due process clause as constructed by the Ninth Amendment).

42. Pettigrew, *supra* note 41.

cycles, both organic and inorganic, are interrelated. If one of the cycles is upset, the entire system is damaged.”⁴³

B. 1970's–1980's—UN Stockholm Conference: Draft International Convention on Ecocide and proposals to Include Ecocide in Revised Genocide Convention

In June 1972, representatives from 113 nations gathered at the United Nations Conference on the Human Environment in Stockholm, Sweden (also known as the Stockholm Conference).⁴⁴ This was the UN's first ever major conference on international environmental issues.⁴⁵ In his opening speech, Olaf Palme, the Prime Minister of Sweden, called the Vietnam War an “ecocide,” and said that “the immense destruction brought about by indiscriminate bombing, by large-scale use of bulldozers and herbicides is an outrage sometimes described as ecocide, which require[s] international attention.”⁴⁶ Other delegates also denounced the war as an environmental danger, including Indian Prime Minister Indira Gandhi. “Almost every popular movement and group of NGOs addressed the issue,” one observer noted.⁴⁷

However, the Conference did not focus only on war, but other issues related to transnational pollution and environmental degradation as well.⁴⁸ The Conference formed the first declarations of principles of international environmental law, including Principle 1, which stated that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being,” and Principle 6, which stated that “the discharge of toxic substances . . . in such quantities or concentrations as to exceed the capacity of the environment to render them harmless,

43. *Id.* at 1.

44. Tord Björk, The emergence of popular participation in world politics: United Nations Conference on Human Environment 1972 (Fall 1996) (unpublished seminar paper, University of Stockholm), available at <http://folkrorelser.org/johannesburg/stockholm72.pdf>.

45. *Id.* at 5.

46. *Id.* at 19.

47. *Id.* at 20.

48. *See* SHORT, *supra* note 33, at 41.

must be halted to ensure that serious or irreversible damage is not inflicted upon ecosystems.”⁴⁹

During the Conference, many unofficial parallel events were held, including the “People’s Summit.” At this Summit, participants discussed creating a law against Ecocide, and a Working Group on the Law against Genocide and Ecocide was formed.⁵⁰ This unofficial Working Group drafted an Ecocide Convention, which was eventually submitted to the UN in 1973. One member of the group, Professor Falk, later published the proposed International Convention on the Crime of Ecocide, along with an in-depth analysis of the elements of an ecocide crime.⁵¹

The Environmental Forum also had ecocide as a recurring theme. The Environmental Forum was intended to be side event for non-governmental organizations, who could not participate in the Stockholm Conference itself.⁵² The Forum invited the Administrator of the US Environmental Protection Agency, William B. Ruckelshaus, to speak on the issue of Ecocide in front of 700 people.⁵³ At the Forum, he faced an audience that was “aggressively critical” of the Vietnam War.⁵⁴ Participants lined the aisle to ask questions, often preceded by an attack against US foreign policy or the illegal war in Vietnam.⁵⁵ One person asked, “Are you going to tell the President that everyone at the Conference and everyone you met demanded US withdrawal from Vietnam, or will you tell him that everything was rosy at Stockholm?” Ruckelshaus responded, “I shall tell him that I was invited to a very interesting meeting where there were a lot of people who seemed to regard issues of war and the environment as one and the same.”⁵⁶ This confusion, on whether ecocide is a war issue or an environmental issue, seems to run throughout early discussion of

49. *Id.* at 93.

50. *See* Björk, *supra* note 44, at 15.

51. Richard A. Falk, *Environmental Warfare and Ecocide: Facts, Appraisal and Proposals*, 9 *Belgian Rev. Int’l L.* 1, 1 (1973).

52. *Environmental Conference Will Offer Some Sideshows*, *NY TIMES* (June 5, 1972), <https://www.nytimes.com/1972/06/05/archives/environment-conference-will-offer-some-sideshows.html> [<https://perma.cc/SY6B-URM8>].

53. Frances Gendlin, *Voices from the Gallery*, *BULLETIN OF THE ATOMIC SCIENTISTS* 26 (Sept. 1972).

54. *Id.*

55. *Id.*

56. *Id.*

ecocide, which often went hand-in-hand with a general condemnation and demand for US withdrawal from the Vietnam War.

In 1973, Professor Falk published the proposed International Convention on the Crime of Ecocide.⁵⁷ This draft contained a full analysis, definition and framework for the proposed ecocide law. The Draft Convention stated: “The Contracting Parties confirm that ecocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”⁵⁸ The Proposed Convention contains a required criminal intent “to disrupt or destroy, in whole or in part, a human ecosystem.”⁵⁹ It does not contain a general definition of ecocide; instead, it contains a list of acts that can constitute ecocide:

“In the present Convention, ecocide means any of the following acts committed with intent to disrupt or destroy, in whole or in part, a human ecosystem”:

- a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
- b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
- c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of soil or the enhance the prospect of diseases dangerous to human beings, animals, or crops;
- d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;
- e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
- f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.⁶⁰

Although the article states that ecocide can occur in times of peace or war, the enumerated acts of ecocide almost all relate to war or military actions. Only one provision, the forcible

57. See Falk, *supra* note 51, at 21–24.

58. *Id.* at 21.

59. *Id.*

60. *Id.*

removal of human beings or animals from their habitual places of habitation, relates to the pursuit of industrial objectives. In his article, Falk summarizes the current danger of ecocide as a counterinsurgency tactic, as a military seeks to eliminate the insurgents by destroying the population, economy, and environment in which the insurgents live.⁶¹

Falk's article was later included in a UN study related to the issue of ecocide. The UN Sub-Commission was asked to evaluate the effectiveness of the Genocide Convention, and potential changes to the Convention. In 1978, the Commission issued a "Study of the Question of the Prevention and Punishment of the Crime of Genocide."⁶² This study evaluated the possibility of preparing additional conventions in order to make punishable acts of genocide which were not included in the original 1948 Convention. The Study discussed proposals to include ecocide and cultural genocide into the Convention.

In regard to ecocide, the Study considered three different concepts: Ecocide as an international crime similar to genocide, ecocide as a war crime and ecocide as actions to influence the environment for military purposes. It quoted two separate writers who have pointed out that ecocide does not have a legal definition. It considered ecocide as an international crime, using the draft Ecocide Convention from Falk.⁶³

Romania voiced support, stating that the present Convention did not cover the acts most likely to be committed, "the suggestions made to punish cultural genocide, cultural ethnocide and ecocide are well known. A thorough study and analysis of these aspects could lead to the conclusion either that it is necessary to adopt supplementary conventions or that the 1948 Convention should be revised." However, the UK opposed, on the grounds that "there is no definition of the crime of ecocide and it would appear the term is incapable of carrying any precise meaning . . . the term has been used in certain debates for the purposes of political propaganda and it would be inappropriate to attempt to make provisions in an International Convention for dealing with matters of this kind."

61. *Id.*

62. U.N. Human Rights Comm., Sub-comm. On Prevention of Discrimination and Protection of Minorities, Study of the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2/416 (July 4, 1978).

63. *Id.*

Ultimately, the Study found that the “question of ‘ecocide’ has been placed by States in a context other than that of genocide. This fact has led the Special Rapporteur to believe that it is becoming increasingly obvious that an exaggerated extension of the ideas of genocide to cases which can only have a very distant connexion with that idea is liable to prejudice the effectiveness of the 1948 Genocide Convention very seriously.”⁶⁴ Ecocide is mentioned again in a 1985 update to the Study, “Cultural genocide, ethnocide and ecocide.” This update notes that some members of the Sub-Commission have proposed that the definition of genocide be broadened to include “ecocide,” defined as “adverse alterations, often irreparable, to the environment - for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest - which threaten the existence of entire populations, whether deliberately or with criminal negligence.”⁶⁵ The report mentions that indigenous groups are often the victims of such acts, and that the UN is giving more attention to the rights of indigenous peoples. However, others argued that ecocide should be considered a crime against humanity instead of an act of genocide.⁶⁶

Notably, the proposed crime of ecocide has broadened in scope from war actions to industrial and commercial actions like nuclear explosions, acid rain, serious pollution and destruction of the rain forest; and the intent is broadened to include both deliberate actions or criminal negligence. However, the proposal to include “ecocide” within the Genocide Convention never gathered speed. The 1985 Report did not reach any conclusion on ecocide. Ultimately, in the

64. *Id.*

65. Benjamin Whitaker, Special Rapporteur on the Economic and Social Council, *Revised and Updated Rep. on the question of the prevention and punishment of the crime of genocide*, ECOSOC, ¶ 33, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985).

66. *See id.* at 17. (“Indigenous groups are too often the silent victims of such actions. The Study on Indigenous Populations emphasized the need for special and urgent attention to “cases of physical destruction of indigenous communities (genocide) or destruction of indigenous cultures (ethnocide).” The case for the proposed additions has subsequently been reinforced by the increasing attention given by the United Nations bodies to the rights of indigenous peoples, including the establishment of the Working Group at the Sub-Commission. Other opinions have argued that cultural ethnicity and ecocide are crimes against humanity, rather than genocide.”); *see also* José Martínez Cobo, *The Study on Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1983 (Aug. 5, 1983).

Sub-Commission's final report on its 38th session, it was recommended that Special Rapporteur Whitaker further investigate the expansion of the Genocide Convention to include the cultural and ecocidal methods of genocide and report back in its 40th session, which did not happen."⁶⁷

C. Formation of the Rome Statute—Enabling Law of the International Criminal Court

In 1948, the United Nations General Assembly recognized the need for a permanent international court to deal with atrocities of the kind prosecuted after the Second World War. At the General Assembly, the International Law Commission ("ILC") drafted two statutes in the early 1950s but the General Assembly postponed considering the drafts due to disputes about the crime of aggression.⁶⁸ The ILC continued working on a draft statute for an international criminal court. In 1984-1986, the International Law Commission considered whether to include a law regarding environmental damage into the draft Code. An early proposal criminalized "acts causing serious damage to the environment."⁶⁹ Members debated whether this environmental crime should be a crime of intent or not. The 1984 proposal required criminal intent to cause environmental destruction, but some countries objected to the "willful intent" requirement, considering it too restrictive. Australia and Belgium wanted the required intent to be lowered to match Art. 22 (War Crimes), which requires intent and knowledge. Austria did not want intent to be a condition for liability at all, because perpetrators usually act with a profit motive.⁷⁰

In 1991, the International Law Commission created the Draft Code of Crimes Against the Peace and Security of Mankind. The initial draft Code contained 12 crimes, including an environmental crime, Article 26, "Willful and Severe Damage to the Environment." Article 26 of the Code stated, "an individual who willfully causes or orders the

67. See SHORT, *supra* note 33, at 68.

68. See OVERVIEW OF THE INTERNATIONAL CRIMINAL COURT, <http://legal.un.org/icc/general/overview.htm> [https://perma.cc/F54Y-ZRFT] (last visited April 5, 1983).

69. See SHORT, *supra* note 33, at 68.

70. *Id.*

causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced.”⁷¹

However, by the time the Assembly voted on the final Code in 1996, Article 26 had completely disappeared from the Code. Instead of deciding the issue of intent for environmental crimes, the ILC decided to remove Art. 26 completely from the Draft Code. Once that Article was removed, the Rome Statute lost any protections for the environment outside of war crimes. Figuring out how and why this happened is a bit like figuring out an Agatha Christie mystery.

In 1995, in ILC’s 47th Session, a working group was established to examine covering environmental crimes in the Draft Code.⁷² In 1996, this working group issued a report, recommending that environmental crimes be included: (1) as a separate provision; (2) as a crime against humanity; or (3) as a war crime.⁷³

On May 17, 1996 meeting, Mr. Tomuschat introduced the draft proposals that the working group had agreed upon on the issue of “willful and severe damage to the environment.” The working group had concluded that crimes against the environment should be included in the draft Code, as (1) A War Crime under Article 22; (2) A Crime Against Humanity under Article 21; or (3) An autonomous offense under Article 26.⁷⁴ The draft proposal for Article 26 (Willful and severe damage to the environment) stated: “An individual who willfully causes such widespread, long-term and severe damage to the natural environment that the health or survival of a population will be gravely prejudiced, shall, on conviction thereof, be sentenced[.]”

Some members asked for more time to consider the proposals. The Chairman suggested that the working group’s proposals be sent to the Drafting Committee to consider. The Chairman suggested that the Commission should “leave aside” draft Article 26 and take a decision at the following meeting on referral to the Drafting Committee of the

71. “This was in light of legal precedent and corresponded with Article 19 of Part I of the draft Articles on State Responsibility: ‘willful and severe damage to the environment’ – legislation that the ILC was working on concurrently with the Code.” SHORT, *supra* note 33, at 45.

72. *Document on crimes against the environment, prepared by Mr. Christian Tomuschat, member of the Commission*, ¶1, ILC(XLVIII)/DC/CRD.3.

73. Rep. of the Int’l Law Comm’n, 48th Sess., May 6–July 26, 1996, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10 (1996).

74. *Id.*

text to be included in Article 22 and then on referral of the text to be included in Article 21.

At the next meeting, the Chairman raised only Article 21 and 22. Article 26 was never voted upon by the Commission, and never passed to the Drafting Committee. The record does not show that any decision was, in fact, made on Article 26. Instead, the May 17 meeting ended with Article 26 being “left aside” until later; at the next meeting, the Chairman incorrectly stated that a vote had already been taken to exclude the provision. The members debated briefly whether setting aside the proposal without objection counted as a technical rejection. One member said, “He would like the record to show that he did not believe a procedural issue should prevent the Drafting Committee from examining the options that were in the best interests of mankind.” However, that is exactly what happened. Article 26 died not with a bang but a whimper. After nearly two decades of discussions and inclusions in different drafts of the Statute, the provision against environmental crime was simply left aside, without a vote.

According to a comment from the Rapporteur, Article 26 was removed because a few governments opposed its inclusion in any form.⁷⁵ Christian Tomuschat, a member of the Working Group, stated on the issue of willful damage to the environment that nuclear arms played a decisive role in weakening the law.⁷⁶ What, exactly, did he mean? Why were nuclear arms, in particular, such a hot-button issue? The recorded ILC debate does not reveal any clues. The discussion does not show a preoccupation with nuclear arms; indeed, the subject does not come up at all in the ILC transcript for these meetings. So how could a topic that was not brought up at all in the debate on the issue of environmental damage play such a decisive role in defeating it?

The written record does hold a clue. Tomuschat prepared a “[d]ocument on crimes against the environment” for the Commission;

75. *Id.*

76. Tomuschat said “One cannot escape the impression that nuclear arms played a decisive role in the minds of many of those who opted for the final text, which now has been emasculated to such an extent that its conditions of applicability will almost never be met even after humankind would have gone through disasters of the most atrocious kind as a consequence of conscious action by persons who were completely aware of the fatal consequences their decisions would entail.” Christian Tomuschat, *Crimes Against the Environment*, 26 ENVTL. POL’Y & L. 242, 243 (1996).

this document contains references to nuclear arms.⁷⁷ He gave examples of crimes against the environment, including the use of a nuclear device by a terrorist or criminal group. He also states, “a last question to be raised is whether atmospheric testing of nuclear bombs or grenades would—today! —come within the scope of the draft Code of Crimes against the Peace and Security of Mankind.”⁷⁸ He brings up the long-term impact of the Chernobyl nuclear disaster, and states that no government or individual could still plead “ignorance of the fatal consequences of nuclear contamination.”⁷⁹ Therefore, he opines that there are “good reasons to assume” that atmospheric nuclear tests “would fall within the scope of crimes against the environment” as drafted.⁸⁰ It could be, then, that the Rome Statute’s environmental provisions were weakened and removed because governments were afraid of becoming criminally liable for peacetime nuclear arms testing.

Whatever the reason, Article 26 was removed from the draft Code. The ILC likewise voted not to include “Willful and severe damage to the environment” as an enumerated crime against humanity under Article 21.⁸¹ However, it did vote to allow it to be included in the draft War Crimes provision under Article 22.⁸²

In the final version of the Code, environmental damage is only mentioned in the context of war crimes. Article 8(b)(iv) on War Crimes is the only provision under international criminal law that holds a perpetrator responsible for environmental damage. Article 8(b)(iv) includes as a war crime: “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.”⁸³

77. *Document on crimes against the environment, prepared by Mr. Christian Tomuschat, member of the Commission, supra* note 72.

78. *Id.* ¶ 49.

79. *Id.* ¶ 50.

80. *Id.*

81. Summary Records of the Meetings of the 48th Sess., [1996] 1 Y.B. Int’l L. Comm’n 14, U.N. Doc. A/CN.4/SER.A/1996.

82. *Id.*

83. Rome Statute, *supra* note 3, at art. 8(b)(iv) (emphasis added).

This provision incorporates the “widespread, long-term and severe damage” from the original draft ecocide provision but limits it to the context of attacks of war. In addition, the war crimes provision requires that all three elements be present (widespread, long-term AND severe damage) and includes a very high standard of intent. Taken together, these elements made it very difficult, if not impossible, to convict a perpetrator of war crimes for damaging the natural environment. Scholars have pointed out that actions like the burning of oil wells in Kuwait could be justified under the current War Crimes statute as not clearly excessive to the military advantage gained.⁸⁴ Indeed, no individual has ever been charged for war crimes for damaging the natural environment since the Rome Statute was enacted.⁸⁵

After the final Rome Statute was adopted, removing almost all references to environmental damage, it seemed that acts of environmental destruction could not be punished under international criminal law.

D. National Crimes

However, although the ILC removed Article 26 from the final Rome Statute, some countries used the original draft articles as a basis to formulate their own crime of ecocide. Ten countries have enacted laws against “ecocide” as a crime during peacetime.⁸⁶ The language of these ecocide laws closely track the ILC draft Article 26’s language that “An individual who willfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced . . . “

Vietnam became the first country to make “ecocide” a crime in 1990, likely in response to the environmental damage it suffered during the Vietnam War. Vietnam’s ecocide statute is included in Chapter 5, “Crimes of Undermining Peace, Against Humanity and War

84. W.G. Sharp Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1 (1992).

85. Ryan Gilman, *Expanding Environmental Justice after War: The Need for Universal Jurisdiction over Environmental War Crimes*, 22 COLO. J. INT’L ENVTL. L. & POL’Y 447, 453 (2011).

86. These countries include: Vietnam, Uzbekistan, Tajikistan, Russian Federation, Republic of Moldova, Kyrgyzstan, Kazakhstan, Belarus, Ukraine, Armenia and Georgia. See Higgins, et al., *supra* note 25, at 262–63.

Crimes,”⁸⁷ Article 342 “Crimes Against Mankind” and is defined as “Those who, in peace time or war time, commit acts of annihilating en-mass population in an area, destroying the source of their livelihood, undermining the cultural and spiritual life of a country, upsetting the foundation of a society with a view to undermining such society, as well as other acts of genocide or acts of ecocide or destroying the natural environment, shall be sentenced to between ten years and twenty years of imprisonment, life imprisonment or capital punishment”⁸⁸

After the Soviet Union (“USSR”) fell in 1990, the Russian Federation and several former USSR Republics also included the crime of “ecocide” in their Criminal Codes from 1994-2001.⁸⁹ For example, Kyrgyzstan defines the crime of ecocide as: “Art. 374, Ecocide. Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe, shall be punishable by deprivation of liberty for a term of 12 to 20 years.”⁹⁰ Kyrgyzstan’s Criminal Code lists protecting the environment as one of its goals, and an entire Chapter of the Criminal Code is devoted to Environmental Crimes (Chapter 26).⁹¹

A number of countries have incorporated environmental protections into their national Constitution; for example, Ecuador’s constitution includes legally enforceable rights of Nature, and a duty to implement measures to prevent ecosystem destruction and species extinction.⁹² Some countries have created domestic environmental courts to hear cases involving environmental damage. Guatemala recently passed a law against ecocide, and created an environmental court to hear such claims.⁹³

National courts have tried cases under these ecocide laws. After a palm oil company poisoned a major river, killing all the fish, a

87. Penal Code Vietnam, Ch. 5, art. 342 (1990).

88. *Id.*

89. SHORT, *supra* note 33, at 48.

90. Criminal Code Kyrgyzstan, Ch. 34, art. 374 (1997).

91. *See id.* at Ch. 1, art. 2 § 1.

92. Higgins, *supra* note 12, at 153.

93. Alana Marsili, *A New Court in Guatemala Tackles Ecocide*, FRONTLINES, (Nov./Dec. 2015), <https://www.usaid.gov/news-information/frontlines/resilience-2015/new-court-guatemala-tackles-ecocide> [<https://perma.cc/DSC7-YA58>].

Guatemalan village brought an ecocide claim against the company in the new environmental court—a case that got widespread international coverage among environmental activists.⁹⁴ In 2012, Kyrgyzstan’s prosecutors brought criminal ecocide charges after 9000 tons of radioactive coal were imported into the country and sent to schools, orphanages and nursing homes.⁹⁵ The prosecutor’s office brought ecocide charges against the head of the Kyrgyz company that shipped the radioactive coal, and also opened criminal investigations into the government officials who had authorized the hazardous shipment.⁹⁶

However, there are few reports of successful prosecutions in the few countries who have a domestic law against ecocide. In the Kyrgyzstan case, the charges against the company head were dismissed for lack of evidence, and the government officials were cleared of wrongdoing (although one later resigned under embezzlement charges).⁹⁷ In the Guatemala case, the case stagnated after being brought to the Environmental Court. One environmental activist was murdered on the court steps, and others were threatened and harassed by the palm oil company. After a brief shutdown, the palm oil plant reopened, and continues polluting the river today.⁹⁸ These cases are perhaps a

94. *Guatemala’s Environmental Crimes Court Hears First Case*, SUSTAINABLE BUSINESS (Jan. 19, 2016), <https://www.sustainablebusiness.com/guatemalas-environmental-crimes-court-hears-first-case-55448/> [https://perma.cc/U3BW-RQ6A].

95. James Kilner, *Radioactive coal sent to schools in Kyrgyzstan*, THE TELEGRAPH (Feb. 12, 2012), <https://www.telegraph.co.uk/news/worldnews/asia/kyrgyzstan/9071329/Radioactive-coal-sent-to-schools-in-Kyrgyzstan.html> [https://perma.cc/2M86-FZSV]; *Kyrgyz officials facing charges over radioactive coal*, THE JOURNAL (Feb. 8, 2012), <https://www.thejournal.ie/kyrgyz-officials-facing-charges-over-radioactive-coal-350265-Feb2012/> [https://perma.cc/K2N4-P59K].

96. Sanya Khetani, *OOPS: Kazakhstan (Accidentally) Sent Radioactive Coal To Kyrgyzstan Orphans*, BUSINESS INSIDER (Feb. 10, 2012), <https://www.businessinsider.com/oops-kazakhstan-accidentally-sent-radioactive-coal-to-kyrgyzstan-orphans-2012-2> [https://perma.cc/WBJ9-2QWF].

97. The deputy PM cleared of wrongdoing in 2012 eventually resigned in 2018 under embezzlement charges after a probe revealed he had massive hidden wealth. See *Kyrgyzstan: Probe into ex-deputy PM reveals unexplained riches*, EURASIAN NET, (March 8, 2018), <https://eurasianet.org/kyrgyzstan-probe-into-ex-deputy-pm-reveals-unexplained-riches> [https://perma.cc/M4DY-VVNN].

98. Carlos Chavez, *Guatemala’s La Pasi3n River is still poisoned, nine months after an ecological disaster*, MONGABA (Feb. 16, 2016), <https://news.mongabay.com/2016/02/16/guatemala-la-pasion-river-is-still-poisoned-nine-months-after-an-ecological-disaster/>.

cautionary tale about the limits of domestic laws against environmental crimes; and the potential need for an international body to adjudicate such cases.

E. 2016 Office of the International Criminal Court Prosecutor Policy Paper Prioritizing Cases for Prosecution that Involve Damage to the Environment

In 2016, the Office of the ICC Prosecutor said that it would prioritize crimes for prosecution that had resulted in environmental destruction, exploitation of natural resources or illegal dispossession of land. From being shoved out of the Rome Statute's ambit, crimes against the environment now seemed to be a focus of the ICC. On September 15, 2016, the Office of the Prosecutor for the ICC published a Policy Paper on Case Selection and Prioritization.⁹⁹ This policy paper set out priorities in the cases the Prosecutor would investigate and bring before the Court.

Several provisions cited environmental destruction as a consideration. Most notably, when a Prosecutor's Office is assessing the gravity of crimes, it will now consider damage to the environment. "The impact of the crimes may be assessed in light of . . . the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land."¹⁰⁰

Finally, the Prosecutor pledged to cooperate with States who are prosecuting individuals who have committed crimes under the Rome Statute, and stated that "The Office will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the *illegal exploitation of natural resources*, arms trafficking, human

com/2016/02/guatemalas-la-pasion-river-is-still-poisoned-nine-months-after-an-ecological-disaster/ [https://perma.cc/4PZA-3V7Q].

99. Office of the Prosecutor, *Policy Paper on Case Selection and Prioritization*, INT'L CRIM. CT. (2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

100. *Id.*

trafficking, terrorism, financial crimes, *land grabbing or the destruction of the environment.*”¹⁰¹

The Policy Paper created a great deal of news coverage and discussion after its release. One headline of *The Guardian* proclaimed “ICC Widens Remit to Include Environmental Destruction Cases. In change of focus, Hague court will prosecute government and individuals for environmental crimes such as land grabs.”¹⁰² The Policy Paper seemed to expand the ICC’s ability to prosecute environmental crimes. But is this really true? Can the ICC now consider crimes against the environment, including “ecocide?”

Chapter 5 of the Policy Paper outlines the Prosecutor’s Case Selection Criteria.¹⁰³ It states that the Prosecutor will select cases for investigation and prosecution based on the gravity of the crime, the perpetrator’s degree of responsibility, and the potential charges.¹⁰⁴ The Office selects the most grave crimes for prosecution because the Office’s objective is to focus on “the most serious crimes with a given situation that are of concern to the international community as a whole.”¹⁰⁵

When evaluating the gravity of a crime, the ICC Regulations state the Prosecutor must consider the scale, nature, manner of commission, and impact of the potential crime.¹⁰⁶ With this Policy Paper, the ICC prosecutor can now consider environmental damage when evaluating the gravity of the crime. The Policy Paper included the environmental effect as a factor when considering both the manner of commission, and the impact of the potential crime. The Paper states that “The *manner* of commission of the crimes may be assessed in light of . . . crimes committed by means of, or resulting in, the destruction of the

101. *Id.* (emphasis added).

102. John Vidal & Owen Bowcott, *ICC Widens Remit to Include Environmental Destruction Cases*, THE GUARDIAN (Sept. 15, 2016), <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases> [<https://perma.cc/8RY3-4AZ8>].

103. Office of the Prosecutor, *Policy Paper on Case Selection and Prioritization*, *supra* note 99 at § 5.

104. *Id.* ¶ 34.

105. *Id.* ¶ 35.

106. ICC, *Regulations of the Office of the Prosecutor*, Reg. 29, ICC-BD/05-01-09 (Apr. 23, 2009), <https://www.icc-cpi.int/nr/rdonlyres/fff97111-ecd6-40b5-9cda-792bcbe1e695/280253/iccbd050109eng.pdf>.

environment or of protected objects.”¹⁰⁷ This means that crimes that are committed by, or result in, environmental destruction will be considered to be graver.

In addition, when Prosecutors are considering the impact of a crime, that now includes environmental impacts. “The impact of the crimes may be assessed in light of . . . the social, economic and *environmental* damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, *the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.*”¹⁰⁸

ICC Prosecutors can now consider three different kinds of environmental impacts: environmental destruction, illegal exploitation of natural resources, or the illegal dispossession of land. This provision seems to greatly expand the kinds of cases that the ICC prosecutors can investigate to include, for example, ‘landgrabs’ and forced evictions of indigenous populations, illegal mining and fishing, or destruction of an ecosystem. All of these environmental impacts have been considered ‘ecocide’ under most definitions of the term.

Under this Policy Paper, can the ICC Prosecutor now bring charges for acts of ‘ecocide,’ even without it being listed as a specific crime? Probably not. As a number of scholarly articles have pointed out, in spite of the Policy Paper’s language, the ICC prosecutor is still limited by the restrictive provisions of the Rome Statute itself.¹⁰⁹ The Rome Statute only allows the ICC to prosecute the four “core crimes” of genocide, crimes against humanity, war crimes and aggression.¹¹⁰ The ICC’s jurisdiction only extends to these four crimes.¹¹¹ As outlined above, only one crime, War Crimes, makes any reference to environmental destruction.

107. *Id.* ¶ 40.

108. *Id.* ¶ 41 (emphasis added).

109. Alessandra Mistura, *Is There Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework*, 43 *Colum. J. Envtl. L.* 181, 220 (2018) (“Indeed, it is important to stress that the Policy Paper is merely an internal document, aimed at guiding the exercise of the OTP’s discretion in the selection and prosecution of cases. It does not in any way alter the ICC’s current jurisdiction, which remains limited to the prosecution of the core crimes.”).

110. *Id.*

111. Rome Statute, *supra* note 3, art. 5.

However, before the ICC Prosecutor can make any assessment of the crime's gravity, the crime must first fall within the scope of the four crimes that are admissible before the Court.¹¹² The policy paper does not change the admissible cases, and in that sense, does not expand the remit of the ICC to include environmental crimes per se. However, it does allow Prosecutors to consider the environmental impact when evaluating the gravity of cases and prioritizes cases for prosecution that involve environmental damage. Given the small number of cases that are brought for prosecution before the court, this can allow cases with environmental damage to be highlighted, and publicized. In that sense, it can allow for heightened public awareness of environmental damage. It also shows that the ICC Prosecutor intends to focus on environmental issues, and perhaps shows an attempt to remedy the impact of removing earlier environmental provisions.

The ICC still does not consider environmental crimes. However, the Policy Paper was significant: It is the only Policy Paper that the ICC prosecutor has created on Case Selection, and one of only five Policy Papers that the ICC Prosecutor has released on case policy since the ICC was created.¹¹³

The ICC Policy Paper could be interpreted as supporting the position that ecocide is “the missing Crime against Peace.” Not just that ecocide should be included in the Rome Statute now, but that it should never have been removed in the first place. Its removal created a hole in the statute, by removing important factors needed for prosecution under the enumerated “core crimes.” Lacking a necessary element of the statute, the prosecutor must utilize policy papers in an attempt to fill the gap and perform its proper function in prosecuting “the most serious crimes of concern to the international community.”¹¹⁴ If the

112. *Id.*

113. The ICC Office of the Prosecutor has released the following policy papers: The Interest of Justice, Victims' Participation, Policy Paper on Preliminary Examinations, Policy Paper on Case Selection and Prioritisation, Policy Paper on Sexual and Gender-Based Crimes and Policy on Children, which may be accessed at: *Policies and Strategies*, ICC, <https://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx> [<https://perma.cc/N6K8-Y4AC>] (last visited June 13, 2019).

114. Rome Statute, *supra* note 3, art. 5 (“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.”).

time wasn't right to include environmental crimes when the Rome Statute was formulated, perhaps that is changing.

IV. WHY A LAW AGAINST ECOCIDE IS NEEDED

A. *Philosophy and Principles underlying campaign to criminalize ecocide*

For many proponents, a law against ecocide isn't just about creating a new crime, but rather, changing the principles and assumptions that underlie the current legal system. In that sense, it is a "radical" attempt at changing a system that has failed to prevent environmental destruction. In *Eradicating Ecocide*, Higgins outlines some of the principles underlying her proposal:

i. Prohibition, not compromise

In her book, Higgins advocates for complete prohibition over compromises and quotas. She considers a crime against ecocide to be a 'trim tab,' a drastic measure that can quickly turn the boat around and prevent ecological disaster. Her book highlights the failures of laws that were aimed at minimizing or reducing a certain harm, as opposed to those laws that banned the harm altogether. She brings up the example of slavery; traders argued that slavery was needed for the economy, and argued for compromises, quotas, and other restrictions to "minimize" the harm of slavery. One man, William Wilburforce, crusaded for a complete ban against slavery in the United Kingdom. After slavery was banned, those same traders switched easily to trading other goods. She highlights the success of environmental campaigns to ban DDT and prohibit toxic emissions, as compared with the failure of later compromise measures meant to regulate harmful substances. Basically, if government prohibits the action first, businesses can adapt. But trying "to build a construct to protect the planet on market mechanisms is to build on sand."¹¹⁵

Higgins' recommendations to prevent ecocide include efforts to "amend all compromise treaties, laws, rules and regulations: (i) replace with prohibition of all damaging and destructive practices and (ii)

115. HIGGINS, *supra* note 4, at 172.

include provisions to enable restoration of damaged territories to be prioritized over existing practices that are premised on financial penalty alone.”¹¹⁶

ii. Imposing a Duty of Care

Under the current legal system, corporate directors have a legal duty to ensure that profit is their only goal, but “different, new, radical laws such as the ones we suggest here can easily change the framework in which we now function.”¹¹⁷ By having a law against ecocide, corporations would be forced to consider the environmental consequences of their decisions.

Proponents believe that a law of ecocide will hold corporations responsible for environmental destruction. Higgins highlights the negative effect of the current legal regime, in which corporations are considered “fictional persons” that can sue and lobby and create harm, but cannot be tried in criminal court for the harm they create.¹¹⁸ This creates an incentive to maximize profit at all cost. A law of ecocide would impose a duty of care on corporations, and a binding obligation. Directors, CEOs and senior officials could all be held criminally responsible for the ecological disasters the company creates. This would create an incentive for corporations to act with more care in the environment and prevent reckless or profit-driven actions that have led to numerous environmental disasters. An ecocide law can thus prevent such disasters from occurring in the first place, by acting as a check on corporate irresponsibility.

Because the proposed law is one of strict liability, directors cannot use lack of knowledge or intent as a defense. Typically, the larger a company is, the easier it is for its leaders to evade criminal responsibility. Due to large corporations’ size and complexity, no individual officer will have overall responsibility, intent or knowledge about its actions; this makes it difficult to hold any one person responsible under crimes of intent. Ecocide, as a crime of strict liability, avoids this escape route, and considers the *effect* of the relevant act, not the *intent*. This forces companies to take preventative steps to prevent such acts from occurring in the first place. Ecocide

116. *Id.* at 57.

117. *Id.* at 26.

118. *Id.*

goes “upstream” to prevent the ecological harm from occurring, rather than going “downstream” to try to collect damages and fines after the destruction has already happened.¹¹⁹

Signatories to the Rome Statute are expected to enact similar laws at the national level, so enacting the ecocide amendment would create pressure for countries to quickly implement the crime at the national level.¹²⁰ A law against ecocide would help to protect indigenous communities that are being harmed from the destruction of their natural environment, and promote the interests of the community to a healthy environment over the interests of businesses.

Many supporters of a law against ecocide emphasize the need for drastic measures, and the inadequacy of the current environmental regulations to prevent the approaching ecological disaster. “Humanity is at an existential crossroads,” and must take strong actions to prevent a catastrophe.¹²¹

iii. Moral imperative

Academics like Mark Allen Gray have expressed that an international law against ecocide is an expression of moral outrage. According to Gray’s formulation of ecocide:

Ecocide is identified on the basis of the deliberate or negligent violation of key state and human rights and according to the following criteria: (1) serious, and extensive or lasting, ecological damage, (2) international consequences, and (3) waste. Thus defined, the seemingly radical concept of ecocide is in fact derivable from principles of international law.¹²²

The key element that elevates ecocide from a delict into a crime is the element of waste – environmental damage on a scale that breaches a duty of care owed to humanity in general.¹²³ Gray states that the

119. *Id.*

120. *Id.* at 70.

121. Sailesh Mehta & Prisca Merz, *Ecocide – A New Crime Against Peace?*, 17 *ENVTL L. REV.* 1 (2015).

122. Mark Allan Gray, *The International Crime of Ecocide*, 26 *CAL. W. INT’L L.J.* 215, 216 (1996).

123. *Id.* at 218.

“International intolerance towards environmental destruction increasingly mirrors the moral outrage underlying the Nurnberg Charter and Judgment” that resulted in the formation of new humanitarian laws.¹²⁴

B. Deficiencies in Current International Law

Many scholars have commented on the lack of any criminal convictions following major environmental disasters, stating that the international criminal law is insufficient or lagging behind the emerging threat of transnational pollution.¹²⁵ One could be forgiven for thinking that the legal field of “international environmental crime” does not exist at all.

A patchwork of different environmental treaties create rules on certain issues, but there is not a comprehensive, codified international treaty that deals with environmental issues. The environmental treaties that exist only address one subject (for example, protecting whaling or waterfowl) and it is left to the individual countries to create domestic laws and methods of compliance with those treaties.¹²⁶ At least two environmental treaties require countries to create domestic criminal laws on the topic; however, these remain “episodic and limited in scope.”¹²⁷ This has led many to call for defined “international offense against the environment” that codifies and collects the offenses that the international community considers to be the greatest environmental threats.¹²⁸ Currently, no such international crime against the environment exists.

When it comes to international criminal law, (as opposed to transnational law), only one court exists: The International Criminal

124. *Id.* at 269.

125. “Despite much progress in the field of international environmental law and an increased perception of the fundamental values at stake, the response to such catastrophes has remained focused on non-criminal solutions. The criminal prosecutions that have occurred typically have been based on local regulations only. There are several plausible hypotheses as to why international criminal law has lagged behind the emergence of major transnational pollution events.” Frédéric Mégret, *The Case for a General International Crime Against the Environment* (April 3, 2010), <https://dx.doi.org/10.2139/ssrn.1583968>.

126. *Id.*

127. *Id.* at 3.

128. *Id.*

Court. Only one Article of the Rome Statute even refers to the environment at all – Article 8(b)(iv) – and even then only tangentially in the context of war crimes. Since the ICC was created, no defendant has ever been charged under that subsection for damaging the environment.¹²⁹ So, effectively, there *is* no criminal liability under international law for destroying the environment. This appears to be a deficiency in the current legal landscape, which creates a need for new law.

Although there is significant cross-pollination between, for example, “international family law” and “international criminal law,” there is almost none between the areas of “international environmental law” and “international criminal law.” McGill professor Frédéric Mégret writes, “Both international environmental law and international criminal law are booming disciplines in their own right, but their interaction remains, apart from a few exceptions, curiously under-explored.”¹³⁰

Instead, each field has adopted very different approaches to the law. International environmental law favors the use of ‘soft law’ instruments and customary law,¹³¹ flexibility to adapt to scientific changes, a preventative and negotiated approach, and incentives to increase countries’ compliance with goals. In contrast, international criminal law favors traditional ‘hard law,’ with well-established legal precepts, and enforcement/imprisonment as a means to punish non-compliance with international norms. The vagueness, flexibility and imprecision of international environmental law can be difficult to reconcile with the specificity and rigidity required of international criminal law provisions.¹³²

However, many activists have called for criminal mechanisms to be used to enforce international environmental treaties.¹³³ They argue that

129. See Brownyn Lay et al., *Timely and Necessary: Ecocide Law as Urgent and Emerging*, 28 J. JURIS 431 (2015).

130. Frederic Mégret, *The Problem of an International Criminal Law of the Environment*, 36 COLUM. J. ENVTL. L. 195, 201 (2011).

131. Mégret, *supra* note 125, at 5.

132. *Id.*

133. Lisa Mastny & Hilary French, *Crimes of (a) Global Nature*, WORLD WATCH MAGAZINE (September/October 2002), <http://www.worldwatch.org/international-environmental-crime-shouldnt-pay> [<https://perma.cc/US2S-JZVV>] (“Enforcement of international environmental treaties is so weak that there is little check on

some criminal regime or framework is required to deter violations of environmental provisions and effect compliance.¹³⁴ Otherwise, companies can simply choose to ignore the provisions and absorb the costs of civil liabilities as a cost of doing business. Civil fines can encourage companies to factor in environmental harm as a production expense; if that expense is outweighed by profit, the pollution can still be worthwhile.¹³⁵ The deterrence value of criminal punishment for environmental crimes could thus be even higher than for other areas of international criminal law, because attacks on the environment are more often the result of a deliberate, cold-blooded cost/benefit analysis.¹³⁶ International criminalization of environmental destruction could deter and prevent such harm, and lead to a healthier planet.

V. CRITICISMS AND PROBLEMS

a. Difficulties with Formulation of Ecocide as a Crime

i. Lack of agreement about definition

It seems there are as many different definitions of ‘ecocide’ as there are people advocating for its inclusion. The use of the same term to describe many different crimes and actions has led to confusion and uncertainty and reduced the term’s effectiveness. The lack of a firm definition of ‘ecocide’ has been a problem throughout the legal debate over the criminalization of environmental destruction.

Linguistically, “Ecocide” is a combination of two terms. ‘Eco’ is derived from the ancient Greek word ‘oikos,” meaning house or home; and ‘cide’ is derived from the Latin verb ‘caedere,’ meaning cut/strike down.’ So ‘ecocide’ literally means ‘killing our home’¹³⁷ – an apt

violations such as the smuggling of endangered species, illegal fishing and logging, and the illicit dumping of hazardous wastes.”)

134. *Id.*

135. Hamdan Qudah, *Towards International Criminalization of Transboundary Environmental Crimes* (May 2014) (SJD dissertation, Pace University School of Law), available at <http://digitalcommons.pace.edu/lawdissertations/16/> [<https://perma.cc/T77U-AWT7>].

136. Mégret, *supra* note 124, at 5.

137. Prisca Merz, Valérie Cabanes and Emilie Gaillard, *Ending Ecocide – the next necessary step in international law*, 18TH CONGRESS OF THE INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS 4 (2014).

description for destruction of the natural environment. Beyond this broad meaning, opinions differ. Originally, Gaston used the term to refer to the use of herbicides during the Vietnam War. Academics have created more substantial legal definitions of the term. However, the vagueness can make ‘ecocide’ seem more like a concept than a crime; one that can encompass indigenous rights, corporate profits, and women’s rights. Unlike other crimes, such as war crimes or crimes against humanity, ‘ecocide’ has not settled into a final form. The 1978 UN Sub-commission evaluation of “Ecocide as an international crime” opens by stating that the term or concept of ‘ecocide’ is not legally defined, though its “essential meaning can be understood.”¹³⁸ In 2015, the authors of “Ecocide – a new crime against peace?” urged the adoption of ecocide before the ICC.¹³⁹ The author gives a broad definition of the term, but the footnote states “there is no consensus on the exact definition of ecocide and the meaning of peaceful enjoyment, but this is the author’s working definition.”¹⁴⁰ Ecocide can mean whatever the user wants it to mean. This slipperiness of meaning could make it inappropriate for use in the ICC, which adopts the criminal law principle of *nullum crimen sine lege* (no crime without law).¹⁴¹

b. Establishing intent

Proponents argue that ecocide should be a crime of strict liability, however, this raises problems from a procedural point of view. Gray, for example, believes that a strict liability standard would best encourage preventive behavior, and advance the “polluter pays” and “precautionary” principles, by forcing companies to preemptively address and dangerous practices.¹⁴² However, strict liability is generally disfavored in criminal law. “Strict liability, where the defendant need have no particularly blameworthy mental state, is rare and disfavored in criminal law.”¹⁴³

138. Report on the Study of the Question of the Prevention and Punishment of the Crime of Genocide, UN Doc. E/CN.4/Sub.2/416 at 128 quoting John H.E. Fried, *War by ecocide: some legal observations*, BULLETIN OF PEACE PROPOSALS 43 (1973).

139. Mehta & Merz, *supra* note 121.

140. *Id.* at note 1.

141. Rome Statute, *supra* note 3, art. 22.

142. Gray, *supra* note 122, at 218.

143. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of*

Advocates point out that none of the existing ecocide laws have an intent requirement.¹⁴⁴ If intent was a necessary part of the crime, that would create a large legal loophole, where perpetrators would simply claim that they had not *intended* the massive damage. And most acts of corporate ecocide are not intended, but are considered an accident, or collateral damage in pursuit of other goals.¹⁴⁵ White says that for crimes like ecocide, the question of intent is overridden by the magnitude of harm, and the penalty and response must be proportionate; this allows higher-end sanctions even in a crime of strict liability.¹⁴⁶ However, even under a ‘strict liability’ standard, a certain threshold needs to be set regarding when the pollution is harmful enough to be criminalized, and who serves as the company’s responsible agent. For example, all humans emit carbon dioxide even in breathing; when is the carbon emission enough to be considered ecocide? How much rainforest destruction is ecocide—destroying an entire territory, or an acre? White states that these questions must have precise answers to allow prosecutions to occur. Without having clear guidelines in place, that level of precision is difficult to obtain.¹⁴⁷

This ‘strict liability’ standard also conflicts with the existing intent requirements of the Rome Statute. Article 30 (Mental Element) states that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”¹⁴⁸ It breaks down intent into conduct and consequence: “the person means to engage in the conduct,” and “meant to create that consequence or is aware that it will occur in the ordinary course of events.”

However, many examples of ecocide are a result of industrial accidents, such as Chernobyl and the BP Deepwater Horizon oil spill, where a disastrous result is not intended by the responsible parties. BP did not intend to create a massive oil spill, and it is difficult to argue

International Criminal Law, 93 CAL. L. REV. 75, 147 (2005) (“Strict liability, where the defendant need have no particularly blameworthy mental state, is rare and disfavored in criminal law.”).

144. Higgins et al., *supra* note 25.

145. *Id.*

146. Rob White, *Carbon criminals, ecocide and climate justice*, in CRIMINOLOGY AND THE ANTHROPOCENE 50, 68 (Cameron Holley & Clifford Shearing, eds. 2017).

147. *Id.* at 69.

148. Rome Statute, *supra* note 3, art. 30.

that an extraordinary accident “occurred in the ordinary course of events.” Therefore, even if the Ecocide crime is added to the ICC, it would still seem to be limited by the existing intent requirements of the Rome Statute. That intent requirement, as Higgins states, could prevent prosecutions for many of the ecological disasters that the Ecocide crime is meant to address.

c. Causation - Climate Change as an Ecocide

In order to establish the crime of ecocide, the perpetrator must have *caused* severe, widespread, long-term harm to the environment. However, it could be very difficult to establish that any one act caused environmental damage for purposes of criminal liability.¹⁴⁹

Ecological destruction sometimes occurs as result of a dramatic event (like a nuclear explosion or oil spill), but often it occurs as a result of many small, undramatic actions, by many individuals over many years. No one individual destroyed the coral reefs,¹⁵⁰ or made manatees endangered, or caused climate change. The environment is so vast, with so many different interacting elements, that causation can be impossible to discern or prove in court.

Most scientists state that climate change is an “ecocide” in the making, but if so, it is a crime without a criminal. We are all both perpetrator and victim. Some advocates have argued that the crime of ecocide can be used to hold accountable the “most significant generators of carbon emissions.”¹⁵¹ White argues that global warming occurs as a result of the normal operations of the current capitalist system. Criminologists then face a dilemma around climate change, because although the system is blameworthy, it can’t be criminally responsible. He believes it is a mistake to focus on individual consumer consumption. Instead, he argues that state leaders and corporate heads should be the ones held responsible, as they are the ones who effectively plan and control the current system.¹⁵²

149. Mistura, *supra* note 1, at 224.

150. Renne Cho, *Losing our Coral Reefs*, STATE OF THE PLANET (JUNE 13, 2011), <https://blogs.ei.columbia.edu/2011/06/13/losing-our-coral-reefs/>.

151. *How one law can disrupt climate change*, ERADICATING ECOCIDE (2018), <https://eradicatingecocide.com/our-earth/earth-justice/> [https://perma.cc/M7FL-NAQW].

152. White, *supra* note 140, at 63.

However, even taking all this as a given, who goes to jail? Every corporate head and leader in the world? Although very compelling reasons are given for calling climate change an ‘ecocide,’ the analysis seems to falter when it comes to establishing causation or criminal liability for one perpetrator. Thus, while the law of ecocide can be used to hold individuals who cause specific ecological disasters responsible, it seems unable to address the wider environmental destruction caused by humanity at large.

VI. FORUM – IS THE ICC THE RIGHT FORUM FOR AN ECOCIDE CRIME?

Some scholars support the idea of an international crime against ecocide but argue that the International Criminal Court is not the right forum for it.¹⁵³ The Rome Statute poses a number of potential issues for any criminal provision against ecocide.

A. Historic basis for “core crimes” of the ICC

The historic basis for the four “core crimes” of the ICC stretches back to the post-World War II tribunals of war criminals at Nuremburg. The Nuremburg charter included war crimes, crimes against humanity, crimes against peace (aggression), and the crime of genocide. This mirrors the four core crimes that form part of the ICC today. At the time of the Nuremburg trials, all four crimes had already been banned under international conventions.

The Genocide Convention was enacted in 1948, which recognized the crime of genocide. The Geneva Conventions recognized “Crimes Against Humanity” and “War Crimes.” Prior to the formation of the ICC, the UN held ad hoc International Criminal Tribunals to investigate atrocities that occurred in Yugoslavia and Rwanda. These criminal tribunals also charged individuals for the crimes of aggression, crimes against humanity, war crimes, and genocide.

153. See, e.g., Mark Drumbl, *International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?*, 6 ILSA J. INT’L & COMP. L. 305, 327 (1999).

The Rome Statute did not create any new crimes under international law;¹⁵⁴ rather, it simply incorporated these pre-existing crimes into a permanent International Criminal Court. The Rome Statute's "war crimes" provision incorporates the pre-existing Geneva Convention, and states that a war crime includes "grave breaches of the Geneva Convention . . ." The Rome Statute's provision against Genocide mirrors the language from the pre-existing Genocide Convention. Thus, the four "core crimes" of the ICC have a shared history; each of these crimes were recognized in UN Conventions prior to the Rome Statute, and they were all raised in international tribunals from Nuremburg to Rwanda that investigated post-conflict atrocities. In that sense, it is natural that these four crimes would form the core of the International Criminal Court's mandate.

In this context, the proposed crime of 'ecocide' sticks out like a sore thumb, as it lies completely outside the context in which the other core crimes formed. Unlike the other ICC core crimes, there is no pre-existing Convention that has recognized or banned ecocide, nor has it been utilized in prior war tribunals or international court proceedings. By the time the Rome Statute was drafted, the other core crimes had already been established as legitimate and valid under international law. This gave them a firm foundation to be considered by the International Criminal Court. Ecocide, in contrast, has not been recognized as a crime under international law, has little to no established validity, and does not have a preexisting definition. Taking this into account, there is a very weak historic foundation in international law for ecocide be included as a crime before the ICC.

B. The ICC's focus on human rights abuses

The International Criminal Court is primarily intended to address human rights abuses.¹⁵⁵ The ICC's enabling statute was originally called the "Code of Crimes Against the Peace and Security of Mankind," and in its Preamble, it recites that millions of people have been victims of atrocities, and such "grave crimes threaten the peace,

154. Mohammad Saif-Alden Wattad, *Rome Statute & Captain Planet: What Lies Between Crime Against Humanity and the Natural Environment*, 19 *FORDHAM ENVTL. L. REV.* 265, 279 (2009).

155. Peter Sharp, Note, *Prospects for Environmental Liability in the International Criminal Court*, 18 *VA. ENVTL. L.J.* 217 (1999).

security and well-being of the world.” The driving force behind the ICC’s creation was the need to protect international peace and security after World War II. The primary intent of the ICC is to prevent crimes that threaten mankind’s peace and security. The Rome Statute is anthropocentric and is expressly intended to protect human beings from atrocities and crimes against peace. It is clear how the core crimes fit into this goal, but it may be less clear when it comes to environmental crimes. Proponents have drawn a direct connection between ecological harm and war; stating that damage to the environment will result in turmoil, displacement and resource wars. However, some are skeptical of this theoretic assumption, stating that humans might cooperate to find solutions instead of fighting wars over resources.¹⁵⁶ At any rate, because the ICC is philosophically focused on crimes involving mankind’s peace and security, it may be less favorable to eco-centric claims that involve damage to the environment per se.

C. *Including ecocide could diminish the “core crimes”*

Some international lawyers have voiced concern that including ‘ecocide’ as a crime could trivialize the crime of genocide. Wesley J. Smith, senior fellow at the conservative Discovery Institute, stated “Equating resource extraction and/or pollution with genocide trivializes true evils such as the slaughter in Rwanda.”¹⁵⁷ Dr. Vesselin Popovski, Senior Academic Officer at UNU-ISP, has been critical of the campaign to make ecocide an ICC crime.¹⁵⁸ Although he sympathized with the need to address environmental destruction, he believed that international humanitarian law is not the right vehicle to address it. He emphasized the different levels of intent required for each crime; where genocide requires a specific criminal intent and planning, ecocide is often a result of negligence or mistake.¹⁵⁹ “Let’s not diminish genocide with ecocide. Genocide is a horrific anti-human

156. Mark Notaras, *Should Ecocide Be Deemed a Crime against Peace?*, OUR WORLD, <https://ourworld.unu.edu/en/should-ecocide-be-deemed-a-crime-against-peace> [<https://perma.cc/8H35-2NYJ>] (last visited Apr. 29, 2019).

157. Ido Liven, *ICC Urged to Accept ‘Ecocide’ as an International Crime*, INTER PRESS SERVICE, <http://www.ipsnews.net/2011/06/icc-urged-to-accept-ecocide-as-an-international-crime/> [<https://perma.cc/T2UA-YZT7>] (last visited Apr. 29, 2019).

158. Notaras, *supra* note 156.

159. Mégret, *supra* note 130, at 21.

policy deliberately orchestrated by individual leaders to annihilate a large group of people. If we play around with words and push for equalizing genocide with ecocide, we may de-facto dishonor the victims of the Holocaust or the Rwandan genocide.”¹⁶⁰

Stoett contends that the term ‘ecocide’ will remain highly contentious, because it evokes murder, and strongly resonates with ‘genocide;’ for this reason, he suggests that activists use the term ‘transnational environmental crime’ instead.¹⁶¹ Mégret calls ecocide an “interesting theoretical possibility,” but believed mimicking the term ‘genocide’ can create condemnatory responses. Because it does not distinguish different levels of harm, it is not helpful term for smaller environmental offenses.¹⁶²

Similar concerns were voiced during the ILC’s 1978 review, when the ILC Sub-commission considered proposals to add ‘ecocide’ or ‘ethnocide’ to the Genocide Convention. The Special Rapporteur concluded that “. . . it is becoming increasingly obvious that an exaggerated extension of the idea of genocide to cases which can only have a very distant connexion with that idea is liable to prejudice the effectiveness of the 1948 Genocide Convention very seriously.”¹⁶³

All of these critiques show the same concern that broadening the existing scope of international crimes to include ‘ecocide’ could trivialize or diminish the gravity of the original “core crimes” under international law.

D. Does ICC have the knowledge or resources to prosecute environmental crimes

The ICC may not have the specialized knowledge necessary to prosecute environmental crimes. Neither the prosecutors nor the judges are experts in environmental law. The ICC court is composed of 18 judges, who serve only one nine-year term each.¹⁶⁴ Member

160. *Id.*

161. Peter Stoett, *Ecocide as a Global Governance Issue: Between Transnational Environmental Crime and Environmental Justice*, LOYOLA SUSTAINABILITY RESEARCH CENTRE 12 (2014).

162. Mégret, *supra* note 130, at 233 n. 169.

163. United Nations Social and Economic Council, Art. V, ECN.4/Sub.2/416 (July 4, 1978).

164. *The Court Today*, ICC, March 18, 2019, <https://www.iccpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf>.

States nominate a judicial candidate, and a meeting of the Assembly of States Parties is convened for the election; Members vote by secret ballot, and the 18 candidates with the highest votes are elected to the Court.¹⁶⁵ ICC judges are chosen based on their “high moral character” and have “established competence” and experience in criminal law as a judge or prosecutor, or in relevant areas of international law (the ICC cites international humanitarian law and the law of human rights as relevant areas). At least nine judges need to have experience in criminal law and procedure, and at least five need to have competence in relevant areas of international law.¹⁶⁶

The composition of the ICC Court is a reflection of the ICC’s main focus. The judges are experts in criminal law or humanitarian law, *not* environmental law. The biographies of the current ICC judges show that none of the judges have any experience in environmental law.¹⁶⁷ The current ICC Court would need considerable outside help and time in order to be able to properly consider environmental issues. Because the areas of “international criminal law” and “international environmental law” are so distinct and specialized, it is difficult to imagine many judges who could have relevant experience in both fields. Presenting environmental cases before the ICC judges could be similar to presenting patent law cases to a family law judge – simply inappropriate. In addition, the Prosecutors have a similar background, with the Chief and Deputy Prosecutors serving in international criminal tribunals in Rwanda.¹⁶⁸ While the ICC Court and Prosecutors undoubtedly have a wealth of experience in human rights law and criminal law, they are not environmental experts.

Asking ICC judges and prosecutors to consider cases of ‘ecocide’ could negatively impact the credibility of the court, leaving it open to criticism that the Court’s judgment is a result of ignorance or

165. Judges and prosecutors on the ICC will likely not have expertise in the area of environmental law, policy or science. This can heighten the transaction costs of proceeding judicially, as well as produce ineffective jurisprudence. Were environmental crimes to be litigated in a separate forum or before a specialized agency, there could be a greater guarantee of some level of scientific expertise. See Mark A. Drumbl, *supra* note 153, at 327.

166. *Id.*

167. *Procedure for the Nomination and Election of Judges of the International Criminal Court*, ICC, Sep 10, 2004, https://web.archive.org/web/20071009093032/http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res6_English.pdf.

168. *Id.*

inexperience. Such a result could actually weaken, rather than strengthen, the (still shaky) creditability of environmental crimes.

For this reason, many academics have commented that environmental crimes should be prosecuted in a separate environmental court, rather than the ICC. In an environmental court, the judges and prosecutors could have the specialized scientific knowledge necessary to properly investigate and decide environmental issues.¹⁶⁹ However, advocates for placing ecocide before the ICC have suggested that a separate panel of ICC judges could address environmental crimes.¹⁷⁰

The ICC is a criminal court with limited remedies. The Rome Statute allows victims to receive forfeited funds from the perpetrator, but does not have provisions to order recovery or remediation of the harm.¹⁷¹ It lacks typical “equity” remedies of, for example, ordering an injunction to prevent future damages. In addition, in the case of ecocide, such proceeds would go to the individuals affected, rather than towards remediating the land itself.¹⁷²

E. Jurisdictional Issues

The Rome Statute has other limitations. Under its terms, it only has jurisdiction over Signatory Countries. Some of the biggest countries on the planet have not signed onto the Rome Statute, including the United States, Russia, China, and India. These countries are also some of the biggest polluters on the planet.¹⁷³ China is the top polluter in the world, followed by the United States, India, and Russia.¹⁷⁴ Without having the participation of, and jurisdiction over, these major polluters,

169. Gar Smith, *Ecocide, the Fifth War Crime?*, EARTH ISLAND JOURNAL (2010), http://www.earthisland.org/journal/index.php/magazine/entry/ecocide_the_fifth_war_crime/ [<https://perma.cc/5ENM-QJPH>].

170. *Id.*

171. See Mark A. Drumbl, *supra* note 153, at 328.

172. *Id.*

173. *Who are the world's biggest polluters?*, REUTERS (June 2, 2017), <https://www.reuters.com/news/picture/who-are-the-worlds-biggest-polluters-idUSRTXRKSI> [<https://perma.cc/DV69-8Q5C>].

174. *Id.* See also *Top Five Most Polluting Countries*, SUSTAINABILITY FOR ALL, <https://www.activesustainability.com/environment/top-5-most-polluting-countries/> [<https://perma.cc/QE4T-6GAC>] (last visited May 9, 2019).

the impact of any ‘ecocide’ provision in the ICC is limited. Even if the most expansive possible definition of ecocide was enacted—one that criminalized excessive carbon emissions—the biggest perpetrators would remain out of its reach.

The International Criminal Court has jurisdiction to bring cases against individuals, or “natural persons.”¹⁷⁵ It does not have jurisdiction to bring cases against States or “fictional persons,” such as corporations. This could present an obstacle, because States are sometimes directly involved in actions of ecocide (like land-grabs or colonization); however, individual heads of state could be charged in the ICC, as they have been for other “core crimes.”¹⁷⁶

And corporations commit the majority of the typically cited acts of peacetime ecocide. However, corporations cannot be charged by the ICC. Although a draft provision was introduced to charge “legal persons” before the ICC, that provision was defeated.¹⁷⁷

However, the Rome Statute could allow directors or CEOs to be criminally charged for corporate activities, at least in theory. Under Article 28(b), superiors can be criminally responsible for crimes committed by subordinates under his or her effective authority and control, where the superior knew or had information about the crime, and the superior failed to take necessary steps to prevent the crime from occurring.¹⁷⁸

However, applying this provision to corporate CEOs seems far removed from its original intent. Article 28 is titled “Responsibility of commanders and other superiors,” and Art. 28(a) refers specifically to military commanders.¹⁷⁹ The language regarding commander liability is based on the *Yamashita* standard. In *U.S. v. Yamashita*, the U.S. Supreme Court decided whether a General can be held criminally

175. Rome Statute, *supra* note 3, art. 25 (“The Court shall have jurisdiction over natural persons pursuant to this Statute.”).

176. For example, the ICC tried former Ivory Coast President Laurent Gbagbo, with “Crimes Against Humanity” related to post-election violence. He is the first former head of state to stand trial at the ICC, and was acquitted on January 15, 2019. Laurent Gbagbo, *Former Ivory Coast Leader, Acquitted of Crimes Against Humanity*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/world/africa/laurent-gbagbo-ivory-coast-icc.html> [<https://perma.cc/9W3B-4G5H>].

177. *See* Wattad, *supra* note 154, at 272.

178. Rome Statute, *supra* note 3, art. 28.

179. *Id.*

responsible for war crimes committed by his subordinates.¹⁸⁰ The majority held that an army commander had a duty to take appropriate measures in his power to control his subordinate troops and prevent them from committing war crimes.¹⁸¹ This 1946 holding was incorporated into the language of the Third Geneva Convention,¹⁸² which was incorporated into the Rome Statute. While it is possible to argue that a CEO can be held criminally liable under this Article, it has never been used for that purpose, nor does it seem intended for that purpose. Instead, this Article shows the focus on war crimes and crimes against humanity that runs throughout the entire Statute. Even if Article 5 of the Statute were amended to add ‘ecocide’ as a fifth crime, the other Articles and procedural rules would remain tailored to the “core crimes” and this could make it awkward to utilize them in the context of an ecocide case.

F. Feasibility Concerns

The biggest objection to adding Ecocide to the Rome Statute seems to be that it is not realistic. Some commentators have dismissed the proposal as “utopian.”¹⁸³ Even some academics who support the idea in principle have concluded that it is not feasible in practice. For example, Nissura evaluates the case for making ecocide a fifth crime against peace, and potential objections to the crime, but concludes that there is a more compelling reason to rule out the possibility of criminalizing ecocide – it is simply unlikely that a two-thirds majority of countries will agree to it.¹⁸⁴

The Amendment would require approval from 82 countries, and even before it reaches that step, the international community would need to reach an agreement on the existence and definition of the crime. Considering the lack of an established framework, international Convention or legal definition of ecocide, this would be extremely difficult to accomplish. The Rome Statute itself took roughly 50 years

180. *In re Yamashita*, 327 U.S. 1, 15 (1946).

181. *Id.* at 17-18.

182. See *The Geneva Conventions of 1949 and Their Additional Protocols*, INT’L COMMITTEE RED CROSS, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions> [https://perma.cc/7B3T-DRZK] (last visited June 13, 2019).

183. See Mégret, *supra* note 130, at 254.

184. Nissura, *supra* note 1, at 25.

to enact, from the 1947 UN mandate to the final draft, and that statute was limited to crimes that had already been recognized in international law.

International treaties involve many countries, with many different legal systems and geopolitical interests; which makes it difficult to come to agreement regarding establishing a definition for a crime. For example, the crime of aggression was included as one of the four “core crimes” in the original draft Code of Crimes Against Peace and Security of Mankind.¹⁸⁵ Although various drafts of the aggression provision were circulated among member states since the 1970’s, the states could not arrive at an agreed-upon definition of the crime. Finally, the States passed the Rome Statute in 1998 without a legal definition of the crime, with a statement that the elements of aggression would be defined at a later point.¹⁸⁶ Although “aggression” was one of the four core crimes under the Rome Statute, ICC did not have jurisdiction to act under this provision until an agreed-upon definition of the crime was ratified.¹⁸⁷ The States agreed on a definition of aggression in 2010, and on December 15, 2017, the States voted to activate the fourth “core crime” under the Rome Statute. The crime of “aggression” finally entered into force on July 17, 2018, on the 20th anniversary of the treaty’s adoption.¹⁸⁸ Given the long time frame it took for the crime of aggression to be defined and approved, it seems unlikely, if not impossible, for the global community to include an international crime of ecocide into the Rome Statute at this point in time.

G. *Alternatives to the International Criminal Court*

Instead of making ecocide an international crime under the Rome Statute, scholars and activists have proposed alternate methods of

185. Draft Code of Crimes Against Peace and Security of Mankind, art. 2, U.N. Doc. A/46/10 (1991).

186. *The Crime of Aggression*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression> [<https://perma.cc/LAH5-K699>] (last visited May 9, 2019).

187. Assembly of States Parties, *Rep. on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression*, Nov. 27, 2017, ICC-ASP/16/24

188. *Id.*

addressing the threat of environmental destruction. This section will describe several such alternatives.

i. International Environmental Court

Rather than amending the Rome Statute to add ecocide, a new Ecocide Convention could be negotiated. As part of this Convention, an International Environmental Court could be convened to hear cases involving transnational environmental crime. Under this proposal, the Convention could include ecocentric provisions relating to, for example, restitution and recovery for the affected territory, or injunctions to prevent further ecologic damage. In addition, the Convention would not be bound by the prior restrictions of the Rome Statute, and could require a less stringent *mens rea*. An International Environmental Court could be composed of experienced environmental experts capable of evaluating ecological harm and remedies. Such a court could also potentially adjudicate less serious environmentally damaging acts as tort or civil claims. Instead of placing ecocide crimes before the International Criminal Court, the International Environmental Court could adjudicate both criminal and civil cases.¹⁸⁹

ii. Indirect Enforcement

Alternately, 'ecocide' could be made a transnational crime, with indirect enforcement in domestic courts. Although the ICC is the only international criminal court, a number of UN Conventions have adopted broad definitions of a crime, with the member states committing to create domestic criminal offenses with similar language. These crimes are then prosecuted in domestic courts pursuant to national laws. This is the model for other environmental statutes that have enforcement provisions. For example, the International Convention on International Trade is aimed at preventing trade in endangered species; the State parties agree to take necessary domestic measures to prevent such trade. This international Convention became the basis for the U.S. Endangered Species Act. The Basel Convention against Hazardous Waste also requires

189. There has been a great deal of activism in this area. Organizations have created model codes for an International Environmental Court, and an NGO is dedicated to establishing such a court. *See generally* Mégret, *supra* note 130.

signatory nations to create domestic criminal provisions to enforce the offenses.

If ‘ecocide’ were defined in such a convention, it may allow for more expediency. Rather than trying to create a new court, with independent Rules of Procedure, funding mechanisms and jurisdiction, countries could simply use the existing domestic courts. Such a convention would create a mandate, requiring countries to adopt national laws against ecocide accordingly. This could rapidly transform ‘ecocide’ from a rarity to a new international norm. In addition, considering the difficulties in trying cases before an international tribunal, allowing the crimes to be tried at a national level could actually be more effective. Instead of trying a handful of cases each year in front of an international tribunal, thousands of cases could be potentially tried every year. Introducing uniform terms with widespread implementation would prevent a situation in which some countries suffer economic loss to the benefit of their neighbors as a result of adopting ecocide laws. However, domestic courts are not well-equipped to deal with transnational harm (as in an oil spill that crosses borders). And domestic courts can be hampered by corruption and political interests. Ecocide cases will undoubtedly tend to involve powerful government officials, or corporate leaders, who likely have considerable influence to intimidate, sway or suppress prosecutions.

iii. International Court of Justice

The ICC is not the only international court; the International Court of Justice hears cases involving disputes between states. One State who has been harmed by an act of ecocide could potentially bring their grievance before the ICJ and sue the responsible State. Indeed, this has nearly happened already— In 2005, the country of Tuvalu issued a legal threat to sue the United States in the International Court of Justice over its contribution to climate change.¹⁹⁰

The ICJ only hears cases between States, not individual parties, so only the State itself could bring such a case. In addition, both States must submit to the Court’s jurisdiction, which the “polluting” State has a good reason not to do. Unlike the ICC, the ICJ is not a criminal court

190. Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu’s Threat to Sue the United States in the International Court of Justice* 14 PAC. RIM L. & POL’Y J. 103, 103 (2005)

and cannot issue sentences, but its opinions are binding upon the State. The ICJ can also issue an advisory opinion to the UN General Assembly. For example, scholars have suggested that the ICJ could issue an opinion on the international community's legal obligations under human rights laws to populations most affected by climate change.¹⁹¹ This advisory opinion could focus on the best legal mechanisms to address transnational environmental destruction; though not binding, such an advisory opinion could bolster the validity of 'ecocide' as a claim under international law.

iv. Human rights tribunals

Human rights tribunals could also potentially hear cases involving ecocide. However, because these tribunals are focused on core human rights, they have generally not been favorable towards hearing environmental cases. For example, in 2005, the Inuit filed a claim with the Inter-American Human Rights Tribunal against the United States for damages related to climate change, but the Tribunal rejected the case as falling outside the ambit of the IAHRT Treaty.¹⁹²

v. Domestic Laws

Finally, ecocide could simply be criminalized at a national level. Although these acts sometimes do have transboundary effects, often the damage is contained to one country, or even one locality. National laws against ecocide can have immediate effects within that country, which is especially important when it comes to stopping ongoing damage resulting from rainforest destruction and other continuing harms to the environment. The crime can be recognized at a state or even local ordinance level. Rather than starting from the "top down," penal laws can be established from the "ground up." Eventually, when enough countries recognize the crime, it could be recognized as a norm under customary international law.

191. Mariya Gromilova, *Rescuing the People of Tuvalu: Towards an ICJ Advisory Opinion on the International Legal Obligations to Protect the Environment and Human Rights of Populations Affected by Climate Change*, 10 *INTERCULTURAL HUM. RTS. L. REV.* 233, 234 (2015).

192. Patrick Foster, *Climate Torts and Ecocide in the Context of Proposals for an International Environmental Court* at 26 (2011), https://academicworks.cuny.edu/cc_etds_theses/40/ [<https://perma.cc/V6MX-P6KX>].

vi. Non-criminal proposals

In *Eradicating Ecocide*, Higgins also presents a smorgasbord of other legal measures that can be adopted to address ecological destruction. This includes granting Rights to Nature, establishing Crimes against Future Generations, or creating a UN trusteeship to protect indigenous lands. In addition, she proposes adopting banking rules that prevent financing of the most environmentally dangerous projects, adopting a precautionary principle¹⁹³ and establishing a trust to protect global commons, and enacting laws to protect environmental whistleblowers. These non-criminal recommendations are favored by other environmental activists as a means of changing the corporate culture, and creating a duty of care towards the community and the planet.

VII. CONCLUSION

The current legal scheme does not adequately address the massive problem of environmental destruction, and international criminal laws on the environment could help to bridge this gap. However, the campaign to recognize a crime of ecocide suffers from having numerous inconsistent definitions. The law of ecocide proposed by Higgins seems, at the same time, overbroad and insufficient. The most expansive definitions of the crime could criminalize simply running a company that generates emissions based on strict liability. However, because the law seeks to hold liable one individual perpetrator, it seems insufficient to address the multifarious causes of climate change. As the debate continues, a more consistent definition of ecocide can emerge.

The idea of including ecocide as a fifth crime against peace before the ICC is initially appealing. And the history of the Rome Statute, which included an environmental provision in many drafts, seems to support its inclusion. However, upon closer examination, the proposed ecocide provision appears at odds with several other provisions of the existing Rome Statute dealing with the required *mens rea* and

193. The Precautionary Principle states that “When there is a lack of full scientific certainty in establishing a link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it.” Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (Phil).

command responsibility, as well as the ICC's overall focus on humanitarian issues and human rights. Although the recent ICC Prosecutor Policy Paper seems to expand the Court's consideration of environmental harm, it still only considers these issues in relation to its effects on humans. The anthropocentric focus of the ICC could prevent the court from considering the gravity of harm to the earth itself, independent of its effect on human beings.

The law of ecocide, if it is created, seems most appropriate for consideration by a specialized international court. In addition, a new Ecocide Convention could create more flexible remedies that are not present in the Rome Statute (for example, a global trust or injunctions). A new environmental convention, with a focus on the ecosystem *per se*, could incorporate provisions to protect and recover from the ecological harm. A new Convention could also create separate provisions related to climate change and other harms that may not be easily criminalized.

Is there the will to do this? Perhaps not. But as the environmental crises facing us get increasingly worse, the need for an international response increases as well. The concept of a law of ecocide, even if not adopted as currently proposed, creates a framework to prohibit dangerous and damaging actions against the environment.

On a practical level, the campaign to make ecocide into an international crime seems rather hopeless and unrealistic. But humans are not practical beings; bold ideas can create new momentum, and great changes can be accomplished with enough vision and drive. The models in this story may be the examples of William Wilburforce, who fought a seemingly hopeless battle to ban slavery, Raphael Lemkin, who spent his life formulating the crime of genocide and eventually saw it enacted as a UN Convention, or Arthur Galston, the biologist who was so appalled by Agent Orange that he joined a group of scientists who stopped the Vietnam bombings, and created the concept of ecocide. So, were these quixotic quests, or moral imperatives? Well, both.