

Exploring the Potential Inclusion of Environmental Destruction as an International Crime: Examining the Scope of International Legal Accountability for Environmental Harm within the Framework of the Rome Statute

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Abstract

This article emphasises the need of improving environmental protection through the application of international criminal law, as described in the International Criminal Court's Rome Statute. After offering a brief summary of how international criminal law treats environmental protection during both times of war and peace, it is clear that the existing system falls short of maintaining effective environmental safeguards. This study contends that there is no compelling reason in international criminal law to regard environmental harm differently depending on whether it happens during war or peacetime. Instead, it indicates that using an eco-centric approach to environmental protection, which prioritises the environment over human interests, will improve environmental protection more successfully. As a result, the paper proposes for the Rome Statute to include a new comprehensive and eco-centric international crime targeting environmental harm. The paper then examines previous suggestions for such a crime and provides insights into its distinctive qualities. It focuses on identifying the level of severity necessary for the new crime and defines the fundamental mental state (mens rea) conditions that must be met.

Key Words: *Environmental protection, International Criminal Court, Rome Statute, Mens rea, Ecocide.*

1. Introduction

According to the Preamble to the Rome Statute (hereinafter statute) of the International Criminal Court (ICC), the ICC has jurisdiction over the “most serious crimes of concern to the international community as a whole”. (Bustami, A., & Hecken, M.-C.2021) Among the crimes falling under this jurisdiction are genocide, crimes against humanity, war crimes, and the crime of aggression. During the drafting of the Rome Statute, there were discussions about including other crimes, such as "wilful and severe damage to the environment." However, these environmental crimes were not ultimately included in the final

version of the Rome Statute. (Patel, B. N. 2000)

While the Rome Statute didn't ultimately include this specific crime, contemporary times show that the environment, which encompasses living conditions, the health of current and future generations and quality of life, faces constant threats. These threats occur in various scenarios, including armed conflicts and times of peace. During peacetime, environmental threats can take the form of significant carbon dioxide emissions, deforestation, pollution leading to natural resource contamination, and unsustainable extraction of resources. (Cuypers, M. 2022) Environmental crimes have now become a pressing concern, endangering not only wildlife but entire ecosystems (Unep, A., & ASSESSMENT, I. R. R. 2016) and by extension, the peace and security of humanity. (Harris, C., Marshall, R., & Cavanaugh, P. O. 1992)

Individuals and corporations play a significant role in causing harm to the environment, raising questions about whether international criminal law can be used to protect it. (Mistura, A. (2018). The International Criminal Court's (ICC) Office of the Prosecutor (OTP) acknowledged this link in a 2016 planning document on case selection and prioritisation. In the paper, the OTP announced its intention to give special attention to prosecuting crimes defined by the Rome Statute that involve actions leading to environmental destruction, the illegal exploitation of natural resources, or the unlawful dispossession of land. (OtP, I. 2016) It is crucial to highlight that this policy document did not establish new ICC jurisdictional grounds, (Pereira, R. 2020) but rather outlined the standards that a Prosecutor would consider when choosing cases for prosecution, focusing on existing Rome Statute crimes. (Patel, P. 2016)

The Policy Paper may offer the prospect of a more effective approach to environmental protection through the use of International Criminal Law (hereinafter ICL). However, it is worth noting that there have been only a limited number of instances where environmental issues have been considered in international criminal investigations. (Bustami, A., & Hecken, M.-C. 2021) Furthermore, there have been no publicly known cases where environmental damages were prioritized for prosecution under the Statute. Two examples that touch on environmental concerns include allegations of land grabbing linked to environmental degradation in Cambodia (DeFalco, R. C. 2011) and a recent submission by Palestinian Human Rights Organizations. The latter submission includes claims of crimes such as destruction, pillage, and appropriation, of Palestinian natural resources. (Darcy, S. (2023). Up to this point, it appears that the OTP has neither rejected these requests nor initiated preliminary examinations based on them. (Bustami, A., & Hecken, M.-C. 2021)

In light of the growing threats to the environment, unrelated to wartime situations, and the limited mechanisms available to uphold environmental safeguards under ICL, this paper aims to make a valuable contribution to the ongoing discussion. It claims that there is an urgent need to investigate the notion of comprehensive environmental protection within the context of ICL. This paper's major focus is on ICL as defined in the ICC Statute, although it does not encompass the entirety of the field of international criminal law.

The process starts by first analysing the current structure of international criminal law that deals with environmental issues. Following that, it calls for an extensive and environmentally focused strategy to environmental crime prosecution within the context of international criminal law. Next, the paper outlines various perspectives for creating a new category of crime related to environmental harm, often referred to as "ecocide." It begins by delving into existing suggestions and then offers insights into the

essential elements and characteristics of such an ecocide crime.

2. Modern International Criminal Law's Safeguarding of the Environment

Before anything else, it is critical to evaluate the current scope of international criminal law for pursuing offences that have a negative impact on the environment. While various publications have already investigated about ICL to discourse environmental harm during both conflict and peace, this article will merely present a brief summary of the history of environmental offences (Section I) and the existing framework for safeguarding the environment during wartime (Section II) and peacetime (Section III).

I. Historical Progression

The initial proposals to introduce an environmental crime into international criminal law emerged during the 1970s. These proposals were prompted by the extensive environmental harm in the Vietnam War caused by the US Army. As the Statute was being developed, the International Law Commission (hereinafter ILC) considered "wilful and severe damage to the environment" as a significant crime against the peace and security of humanity, even if it was unrelated to an armed war. Individuals who deliberately cause or demonstrate to others that they are causing "severe, widespread and long-term damage to the natural environment" would be classified as international criminals under Article 26 of the Proposed Code of Crimes against the Peace and Security of Mankind.(Mundorff, K. 2020) This recognition of environmental damage as a distinct international offense was rooted in the belief that such damage had serious consequences not only for the current generation but also for future generations. Consequently, it was considered necessary to address environmental crimes separately from other offenses aimed at protecting human beings.(Sunga, L. S. 1997) The ILC attempted to reconcile this expanding legal framework with the principles of the law of state responsibility, which was being considered concurrently by the Commission. Initially, the law of State responsibility designated "serious violations of an international obligation of essential importance for the safeguarding and protection of the human environment" as international crimes.(UN Doc 1976)

Notwithstanding, lengthy and exhaustive considerations on including severe breaches of environmental duties into the purview of ICL,(Randelzhofer, A., & Tomuschat, C. 1999) Proposed Article 26 was eventually rejected, and environmental preservation as an autonomous clause was removed from the Rome Statute's final text.(Stock, C. 2023) It appears that a significant number of countries were swayed by economic motivations when objecting to its incorporation.(Variath, A. A. 2021) As a result, international criminal law, as a whole, continues to prioritize the welfare of human beings, placing them at the core of its protective framework.(Jodoin, S. 2010) The only clear acknowledgment of the environment within this legal context is found in Article 8(2)(b)(iv) of the Rome Statute, which pertains to wartime situations.

II. Safeguarding the Environment during Wartime

Armed conflicts often pose a significant threat to the environment, whether through direct attacks or as an unintended consequence. This has been seen in conflicts such as those in the Former Yugoslav,(ICTY, 2000) Kuwait,(Robertson, J. W. 2004) Vietnam(Killeen, R. 2021) and Colombia.(Dunning, T., & Wirpsa, L. 2004) As a result, it is unsurprising that the ILC is actively examining this topic and has just endorsed draft principles intended at protecting the environment during armed conflicts.(Jacobsson, M., & Lehto, M. 2020) International criminal law recognizes the

importance of environmental protection in international armed conflicts (1) and provides implicit safeguards for the environment in non-international armed conflicts as well (2).

1. International Armed Conflict (IAC)

a) Direct Protection of the Environment

The Rome Statute's Article 8(2)(b)(iv) is a one-of-a-kind provision that clearly addresses individual liability for activities that destroy the environment during armed conflicts. This limitation on environmental deterioration in IHL is founded in Additional Protocol I (AP I) Articles 35(3) and 55(1). (McDonald, G. K., & Swaak-Goldman, O. 2000) Article 8(2)(b)(iv) makes it a crime to conduct an attack knowing that it would create significant, long-lasting, and severe environmental harm that is manifestly disproportionate to the projected military benefit. This provision represents the first crime centered solely on environmental protection during wartime, offering potential safeguards for the natural environment. (Lawrence, J. C., & Heller, K. J. 2007) However, it has not escaped criticism.

To start, it's important to note that the specific criteria outlined in Article 8(2)(b)(iv) are still subject to debate and lack clear definition. The phrases "widespread," "long-term," and "severe" are not defined. (Weinstein, T. 2004) and neither the Rome Statute nor the Elements of Crime (Philipp, C. E. 2003) explain the actus reus (the physical aspect) in Article 8(2)(b)(iv). Furthermore, the ICC is however to give specific instructions on this concern. While there is universal understanding that the interpretation of identical phrases in the ENMOD Convention (ENMOD Art 1) was not meant to be extended to other agreements, similar wording in Article 35(3) of Additional Protocol I (AP I) can provide some insights. AP I, article 35(3) was a primary provision of insight for Article 8(2)(b)(iv), and it can help you grasp these phrases.

In Article 8(2)(b)(iv), there is a stringent threshold that is extremely difficult to meet, making environmental crimes seem almost impossible to prove. (Smith, T. 2016) To establish a violation, three cumulative conditions must be met: the harm to the environment must be widespread, long-lasting, and severe. (Sari, A., & Tinkler, K. 2019) This requirement sets the bar so high that it exceeds what modern weaponry is capable of achieving. (Hulme, K. 1997) In fact, no environmental damage in recent years has met this specified threshold.

The scope of the offense is significantly limited by the condition that the attack must be excessively disproportionate. (Bustami, A., & Hecken, M.-C. 2021) which places an even greater restriction on it. The introduction of a proportionality assessment raises the already stringent criteria to an even more elevated level. Because of the blend of vague terminology, the high threshold, and the proportionality examination, there are doubts about whether Article 8(2)(b)(iv) genuinely serves to safeguard or prevent environmental protection. Consequently, while there may be a recognized international crime against the environment in theory, it remains uncertain if it holds any practical significance beyond mere rhetoric.

b) Indirect Protection of the Environment

Three provisions in the Rome Statute might possibly imply individual criminal culpability for activities that affect the natural environment. To begin, Article 8(2)(b)(ii) defines intentional targeting of civilian objects as a war crime. Second, under Article 8(2)(b)(iv), the first choice precludes initiating assaults that would cause significant incidental injury in comparison to the projected military gain. (Henckaerts, J.-M., & Doswald-Beck, L. 1997) As a result, if the natural environment is regarded as a civilian object, any direct attacks on it or serious harm done during military operations would be considered war crimes. (Werle, G., & Jessberger, F. 2020) However, there is a substantial distinction between Article 8(2)(b)(ii) and (iv): the latter is ecocentric and focuses on the environment, whilst the

former is ultimately anthropocentric.

Thirdly, the crime of pillage, as outlined in the Rome Statute, implicitly protects the natural environment because it encompasses natural resources. Therefore, it indirectly safeguards the environment from being plundered or exploited. (Ventura, M. J. 2023) However, it's important to keep in mind that these provisions offer environmental protection indirectly, as they were not originally drafted with the specific intention of addressing environmental concerns. (Bustami, A., & Hecken, M.-C. 2021)

2. Non-International Armed Conflict (NIAC)

Article 8(2)(b)(iv) is applicable only to situations involving IAC, there is no comparable provision in modern ICL for non-international conflicts. This is likewise true for crimes involving attacks on civilian objects. (Stoitchkova, D. 2011) A similar tendency emerges when we study traditional international humanitarian law. (Henckaerts, J.-M., & Doswald-Beck, L. 1997) Unlike in international armed conflicts, there are no specific conventional bans against attacks on civilians (Klamberg, M. 2017) or the environment. (Dinstein, Y. 2001) Only customary humanitarian law establishes such bans. As a result, whether criminal culpability for time of war environmental destruction under the Statute applies eventually relies on the opposite party, that is, whether the State armed forces are involved in the fight with non-State armed groups or another State party. (Burchill, R. 2010)

III. Peacetime Environmental Protection

International criminal law lacks clear measures for environmental preservation in peacetime, similar to Article 8(2)(b)(iv), which applies to wartime conditions. The protection of the natural environment, on the other hand, may be deduced from both crimes against humanity and genocide, will be discussed in detail in the subsequent section. These crimes are not restricted to particular contexts and can occur during both times of peace and times of war.

1. The Crime of Genocide

The crime of genocide could potentially provide some unintended protection in certain situations. Article 6 of the relevant legal framework penalizes, among other things, actions that intentionally create conditions of life for a specific national, ethnic, racial, or religious group with the aim of causing their physical destruction, either in whole or in part. It's possible that environmental destruction, which could indirectly lead to the physical destruction of such a group, may fulfil the *actus reus* (the guilty act) criteria for the crime of genocide. (Bustami, A., & Hecken, M.-C. 2021)

However, due to the high *mens rea* (the requisite standard of criminal intent), it is difficult to connect environmental crimes to the crime of genocide. This stringent subjective requirement presents a substantial obstacle for successful prosecution. (Smith, T. 2016) To meet this threshold, one must demonstrate the intent to destroy the targeted group in whole or in part, which can be exceptionally difficult to prove. While Article 6 of the legal framework does cover cases where the committer pursues to damage a protected group through environmental destruction, establishing this intent in environmental damage cases is even more challenging to establish.

2. The Crime against Humanity

Article 7 of the Rome Statute deals with the punishment of crimes against humanity, and it indirectly serves to protect the environment. (Skogly, S. I. 2001) These crimes are defined as specific acts that are committed as part of a widespread or systematic attack targeting civilian populations, and the perpetrators must have knowledge of the attack. (Bustami, A., & Hecken, M.-C. 2021) The key difference between crimes against humanity and genocide lies in the mental state or *mens rea* element. In the case of Article 7, the actions should be carried out with both knowledge and intent, as specified

in Article 30. Furthermore, the offender should be aware that their actions are part of a widespread or systematic attack on civilian populations. (O. Triffterer & K. Ambos (eds), 2016) Unlike genocide, Article 7 does not need the intent to damage a specific protected group, making its mens rea element less stringent when it comes to environmental damage. (Smith, T. 2016)

Article 7(1) of the statute doesn't explicitly mention environmental harm as one of the listed offenses. However, it's worth noting that several of the acts listed in this article could potentially involve actions that result in environmental degradation. For instance, acts like extermination, forcible population transfer, persecution, and other inhumane acts of a similar nature might, in some cases, (Prosperi, L., & Terrosi, J. 2017) lead to environmental damage as a consequence.

Specifically, Article 7(1)(k) could be seen as relevant when it comes to prosecuting crimes related to the environment. The article addresses inhumane acts that involve intentionally causing significant suffering or serious harm to the body, mental health, or physical health of individuals. In certain situations, actions harming the environment could lead to severe suffering or harm to people, making Article 7(1)(k) potentially applicable in cases involving environmental crimes. (Werle, G., & Jessberger, F. 2002)

However, it's crucial to consider three important limitations. First, as with other offences listed in Article 7, the activities in issue must be part of a systematic or widespread, which is the relative criterion for crimes against humanity. (Philipp, C. E. 2003) This indicates that the conduct must be part of a sequence of activities carried out in accordance with a State or organisational policy intended at carrying out such an assault. (Werle, G., & Jessberger, F. 2020) Second, when it appears to environmental harm, it is significant to stress the magnitude of a large humanitarian impact. In other words, the act in issue will not be punished until it has such a destructive effect on humans that it may be called a crime against humanity. (Smith, T. 2016) Third, it is critical not to oversimplify existing offences in circumstances involving environmental damage. This prudence is required to prevent contradiction with the legality principle, which demands that crimes be precisely defined and not unduly broad in their reach. (Bustami, A., & Hecken, M.-C. 2021)

3. The Justification for Providing Comprehensive Environmental Protection within the Framework of International Criminal Law

ICL, while not the sole or primary tool for enhancing environmental protection, can certainly play a role in creating a more comprehensive framework for safeguarding the environment in conjunction with other branches of international law. There are several compelling justifications for advancing international criminal law to better address environmental preservation. Firstly, there is no compelling rationale for treating environmental harm differently in times of war compared to peacetime. It is essential to maintain a consistent approach within international criminal law regarding environmental damage. Secondly, it is high time to transition from the predominantly human-centered perspective of international criminal law to a more environmentally conscious one. Lastly, it is both reasonable and fitting to introduce a new international crime specifically targeting environmental offenses.

I. Striving for Comprehensive Safeguarding Against Environmental Harm in Times of Conflict and Peace

The protection of the environment varies depending on whether certain actions take place during peacetime or wartime, but this distinction is not acceptable according to international law, both in terms of established norms and actual circumstances.

The Rome Statute recognises the necessity of protecting the environment for the benefit of mankind during times of armed conflict by classifying environmental destruction as a war crime in Article 8(2)(b)(iv). The importance of the environment is likewise acknowledged in other areas of international law.(Dupuy, P.-M., & Viñuales, J. E. 2018) Over recent decades, international environmental law has expanded rapidly, evolving from non-binding principles to legally enforceable agreements.(Downs, J. A. 1992) International courts have likewise emphasized the value of the environment in various contexts, such as sustainable development.(Petersen, N. 2017) Importantly, this intrinsic value of the environment remains constant, regardless of whether harm occurs during peacetime or wartime.

Therefore, if ICL determines that the environment merits protection for its own purpose during IAC's, it is conceptually incompatible with international law not to extend such recognition to situations other than those involving international armed conflicts.(Bustami, A., & Hecken, M.-C. 2021)

While the obvious efforts to safeguard the environment during wartime may seem justified due to the increased risks posed to it during armed conflicts,(Mrema, E., Bruch, C., & Diamond, J. 2009) it's worth questioning whether these elevated risks truly compare to the ongoing environmental degradation during peacetime. When we examine the bigger picture, it becomes evident that the environmental damage caused during wartime is relatively small in comparison to the myriad of other factors that constantly threaten the environment in times of peace.(Mistura, A. 2018)

Environmental crimes, for example, contribute significantly to the endangerment of wildlife and ecosystems irrespective of whether there is war or peace.(Hecken, M.-C. 2021) Furthermore, military considerations may indeed heighten environmental risks during wartime, but economic interests of both states and private corporations often serve as the justification for environmental harm during peacetime. In reality, These economic factors have matured into a far more serious threat to the global environment, both in terms of non-human and human components, than any armed action could possibly pose.(Ezekiel, A. 2007)

As an outcome, there is no persuasive case for the necessity to offer more environmental protection through ICL, particularly during times of conflict, in comparison to the essentially missing safety it obtains during peacetime.

II. Advancing Ecocentric Approaches for Safeguarding Against Environmental Harm

The emphasis placed on safeguarding the natural environment within international criminal law should also involve a change in viewpoint. Currently, most international criminal law provisions, with the exception of Article 8(2)(b)(iv), are primarily rooted in human-centric perspectives.(Prosperi, L., & Terrosi, J. 2017) However, these human-centric approaches overlook the fundamental reality that humans are deeply interconnected with the environment.(Mwanza, R. 2018) This relationship between environmental protection and the fulfilment of human rights has been recognized and reaffirmed in various court rulings and documents (Bekker, P. H. 1998) since at least the 1970s.(Knox, J. H. 2015)

The "greening" of human rights and the exploration of a potential human right to a healthy environment have been made possible by recent advancements in human rights legislation. (Bustami, 2021) These innovations break from the traditional anthropocentric view of the environment, viewing it not only as a tool of ensuring fundamental human rights, but also as having inherent worth in and of itself.

In 2017, the Inter-American Commission on Human Rights (IACHR) emphasized the need for specific protection of nature and the environment, not solely for their benefits to humanity but also due to their importance to other living things, which also deserve preservation in their own right. (Campbell-Durufilé, C., & Atapattu, S. A. 2018)

These developments suggest a growing recognition of the interdependence of human rights and environmental protection, as well as a broader ethical consideration for the environment beyond its utility to humans.

The argument for defining environmental crimes with a focus on protecting the environment itself is grounded in two key points. Firstly, it challenges the conventional approach that emphasizes an ecocentric perspective in international law, (Lawrence, J. C., & Heller, K. J. 2007) which asserts that environmental protection is better achieved by considering the well-being of ecosystems as a whole. This departure is important because many existing legal provisions require actual harm to human beings, which often leads to hopeless environmental protection under current ICL.

Secondly, the argument highlights the growing risk of surpassing planetary boundaries, which can result in detrimental damage to complex global ecosystems. (Centre, S. R. 2022) This destruction, in turn, has an impact on both human and non-human life in broad terms, even if there isn't always a clear cause-and-effect link involving explicit environmental damages and individual lives.

Providing the prosecution of behaviours that harming the environment is predicated on demonstrating injury to particular humans, the deep links between human behaviour's consequences on the environment and eventual damage to life in common are ignored. As a result, some experts argue for a completely ecocentric approach to environmental ethics and legislation. This approach would ascribe inherent worth to the environment itself, allowing for a more effective response to our time's most critical environmental concerns.

III. Advancing Global Safeguards within the Realm of International Criminal Law

The question of why protection for the environment should be provided through international criminal law is not fully addressed in the previous discussion. Although a complete assessment of the efficiency of international criminal law in this situation is beyond the scope of this paper, the following analysis presents various points. For starters, the limiting component of criminal law is a fundamental justification for seeking criminal prosecution for bearing that cause considerable environmental harm. (Gillett, M. 2022) When it comes to preventing ecologically hazardous action, criminal fines are more effective than civil or administrative remedies. (Watson, M. 2005) This means that individuals and entities are more likely to think twice about engaging in actions that harm the environment if they know they could face criminal consequences. Secondly, environmental criminal prosecution can be especially effective in cases where environmental damage occurs as a result of a calculated cost-benefit analysis. In such situations, individuals or organizations weigh the potential gains against the risks of prosecution and penalties. If there is a reasonable likelihood of being prosecuted and if the applicable sanctions are robust, the prospect of criminal charges can serve as a powerful deterrent.

Furthermore, international criminal law is seen as a valuable tool for protecting the environment because it has the potential to deter ecologically harmful conduct more effectively than civil or administrative measures. (Becker, G. S. 1968) This deterrence factor becomes particularly significant when environmental harm results from a deliberate calculation of costs and benefits.

It is reasonable to argue for the incorporation of a new environmental crime within the realm of ICL. Establishing a globally institutionalized and coordinated system for prosecuting environmental offenses would yield more favorable outcomes compared to the current fragmented approach that relies on individual countries' legal systems. At the very least, criminal prosecution could motivate nations to align their domestic laws with international environmental obligations, surpassing sporadic efforts at regional alignment.

The definition of what constitutes an international crime is being disputed. The Preamble to the Statute, which established the ICC, it declares that its goal is to tackle "grave crimes" that endanger people's safety, security, and world peace as well as "atrocities that deeply shock the conscience of humanity." (Gray, M. A. 1995) Certain elements must be satisfied, according to legal expert Tomuschat, for an act to be classified as an international crime. First, it must be of great gravity, and second, it must have a disruptive influence on essential parts of human civilization. When a crime fits these characteristics, it becomes a matter of global concern and can be prosecuted at the international level. (M.-C. 2021) As mentioned earlier, some instances of environmental devastation can have severe consequences on the welfare of both current and future generations of humans. (Hecken, 2021) However, not all environmental offenses may fit this description, there are certainly cases where the impacts are similar or even more severe. This is particularly evident when environmental degradation reaches a point of no return and has significant long-term negative effects on future generations.

4. Approaches to Holistic Environmental Protection within the Framework of International Criminal Law

Considering the arguments mentioned earlier, an international environmental crime must encompass harm to the environment during both wartime and peacetime, moving away from a solely human-centered perspective. Additionally, it should possess a certain level of severity, both objectively and subjectively, to be recognized as a matter of international concern. Numerous ideas have been put forward regarding the comprehensive safeguarding of the environment within the framework of ICL. To provide a brief overview of these proposals, the article will then offer some insights and assessments regarding the concept of an ecocide crime.

I. Existing Proposals for a New Crime Against the Environment

Several demands have been made for the incorporation of an international environmental crime in the original draft Article 26 of the Draft Code of Crimes. Specifically, there has been considerable interest in Poly Higgins' suggestion to the ILC in 2010 to establish a fifth fundamental crime known as "ecocide." (Bustami, 2021) This proposal defines ecocide as the "*extensive damage to, destruction of, or loss of ecosystems within a specific area, whether caused by human actions or other factors, to the extent that it significantly reduces the peaceful enjoyment of that territory by its inhabitants*". (Higgins, P. 2012) Other proposals with similar objectives may vary only in their specific details or naming conventions. (Bustami, A., & Hecken, M.-C. 2021)

These proposals all share a significant commonality in that they depart from a sole focus on protecting human interests and instead adopt a perspective that incorporates elements of ecocentrism. This shift is particularly evident in the concept of ecocide, which reorients international criminal law away from its traditional emphasis on safeguarding human welfare and introduces a genuine commitment to environmental preservation. Unlike conventional approaches that only consider the impacts on human populations, ecocide explicitly encompasses the well-being of non-human life forms. Furthermore, it acknowledges the deep interdependence between human beings and the ecosystems in which they

exist, albeit in a more abstract sense. Importantly, these proposals also broaden the scope of environmental accountability, extending it beyond times of armed conflict to encompass periods of peace as well.

Higgins' proposal aims to restrict the scope of prosecution under international criminal law to the most serious offenses. To do this, it establishes a severity threshold, which indicates that major loss, damage, or destruction must be linked to widespread, long-lasting, or severe repercussions in order to be regarded an international crime. Various approaches to defining ecocide also include similar seriousness limitations, although they may vary in their specific definitions.

However, when it comes to the mens rea test, which refers to the mental aspect or purpose necessary for a person to be found criminally accountable, these methods differ significantly. While most suggestions agree that they wish to shift away from the strong mens rea criterion inherent in Article 6 of international law's definition of genocide, there is ongoing debate about what would be an appropriate standard for ecocide.

Similarly, there is controversy regarding who could be considered potential perpetrators of ecocide, and this issue remains a point of contention among various proposals and legal experts.

II. Analysis of a Proposed New Law: Ecocide as a Criminal Offense

The insertion of a new international crime called ecocide must adhere to specific criteria in order to be considered on the same level as other core international crimes. However, these criteria should not be overly restrictive, particularly in comparison to Article 8(2)(b)(iv), to ensure that it effectively contributes to environmental protection.

Numerous complex issues necessitate a thorough analysis. These include determining the severity threshold for the crime, defining the necessary mental state (mens rea) requirement, establishing a comprehensive list of punishable actions, identifying possible perpetrators, defining its connection with other international crimes, and addressing issues related to evidence and causation. It is not within the extent of this article to comprehensively cover all these concerns. Nevertheless, we will briefly discuss the general structure and requirements of the crime, secondly, a detailed examination of the seriousness threshold for ecocide,

lastly its mens rea requirement.

1. Structure and Requirements of the Crime

To align with the structure of the other four underlying crimes of ICL, ecocide should adopt a similar framework. This would entail comprising an initial section, referred to as the "chapeau," which covers various aspects of the crime. (Jodoin, S., & Segger, M.-C. C. 2013) This chapeau would encompass information about potential perpetrators, the level of seriousness needed to trigger prosecution, and a mention of the essential causal connection. (Mistura, A. 2018) In addition to the chapeau, there should be a detailed list of specific actions that could be subject to punishment. This enumerative catalogue would encompass a range of potentially punishable behaviours.

The article proposes the following definition for "ecocide," which draws inspiration from previous suggestions:

"Ecocide" refers to "any actions or failures to act, whether occurring during peacetime or in times of conflict, that result in or are likely to result in extensive and long-lasting harm to the environment".

Following this introductory definition, the article suggests a specific list of actions that could be punishable under the concept of ecocide. This list takes inspiration from the structure of crimes against humanity and does not rely on individual countries (Curcio Lamas, A. 2017) domestic laws or specific prohibitions in international environmental law. Instead, it looks to international environmental treaties like the Basel Convention and CITES, (Shestak, V., & Porsunkinova, G. 2022) to establish a common understanding of what actions should be considered violations of international environmental obligations.

The suggested list of punishable acts would clearly define the elements of the crime (*actus reus*) and could include actions such as environmental pollution, hazardous waste disposal, systematic deforestation, the illegal trade in endangered species, and nuclear testing. To ensure that the list remains relevant and adaptable to evolving environmental standards, the article proposes a flexible and open-ended provision at the end of the list, similar to Article 7(1)(k). (Haenen, I. 2013) For instance, this provision could state, *"other actions or failures to act of a related nature that lead to long-lasting, or severe and widespread harm to the environment."* This would allow for the inclusion of new environmentally harmful actions as they emerge in the future.

2. Threshold for Ecocide

Opponents of the concept of a crime of ecocide often raise concerns about the potential for an overwhelming influx of frivolous lawsuits if such a crime were to be included in international law. They argue that the scope of ecocide is so broad that it needs to be limited to only the most severe international offenses to be reasonable. Furthermore, for ecocide to be on par with existing international crimes, the crimes it punishes should meet a certain level of seriousness.

To address these concerns, this paper proposes specific definitions for the criteria that would establish this threshold of seriousness, drawing from existing proposals. These criteria are essential to ensure that the crime of ecocide remains focused on the gravest violations of international law. The paper will then explore the interconnectedness of these criteria to create a coherent framework for determining the seriousness of ecocide.

A) Threshold of Seriousness from Existing Proposals

In the context of ecocide, the idea of a "threshold of seriousness" serves a similar purpose to the criteria used to define war crimes and crimes against humanity. Essentially, it is a crucial element in establishing an international crime of ecocide, (Jodoin, S., & Segger, M.-C. C. 2013) ensuring that only environmentally damaging actions with significant global consequences are considered criminal. (Gray, M. A. 1995)

Various proposals agree that the crimes being prosecuted must surpass a certain level of seriousness. However, the specific criteria for this threshold vary among different proponents. For instance:

Higgins relies on the principles outlined in the prevailing ecocentric war crime of Article 8(2)(b)(iv) and the suggestions of the ILC. She necessitates that the effects of ecocide must be widespread, long-lasting, or severe. Importantly, she replaces the original requirement of all three elements being met

with an "alternative or" approach, making her proposal broader in scope.

Mégret also adopts the alternative approach and introduces the idea of "irreversibility" as part of the seriousness threshold.

Rauxloh considers both geographical and temporal elements when assessing the severity threshold, emphasizing the scale of damage and the longevity of environmental harm.

McLaughlin focuses on geographical and severity aspects, emphasizing the importance of large-scale or serious environmental damage.

Gray's proposal aligns with Higgins but needs severe destruction in any case. He also places geographical and temporal qualifications in an alternative relationship.

While there is consensus on the need for a threshold of seriousness in defining ecocide as an international crime, different legal scholars and proposals have slightly different criteria for determining when environmental damage crosses that threshold. Some emphasize the scale, duration, and severity of harm, while others introduce additional factors like irreversibility into the equation.

B) Defining the Criteria for Establishing a Threshold

It is logically consistent to base the criteria on established principles of international criminal law. As a result, it is reasonable to use the trio of characteristics: widespread, long-term, and severe when discussing the creation of a new international crime related to ecocide. While it is essential to have scientific evidence supporting these criteria, (Fletcher, L. E. 2015) the initial point for codifying ecocide should be as follows:

The term "severe" should be understood in relation to the extent of the damage caused and the number of species and people ultimately impacted. (Higgins, P. 2010) Unlike Article 8(2)(b)(iv), (Michael, C. R., Command, U. A., & College, G. S. 2019) which focuses solely on effects on humans, this new crime has an ecocentric nature. Therefore, it concerns the severity of damage to both human and non-human entities, including elements of the ecosystem or biodiversity itself, as indicated by the proposed acts constituting the crime.

"Widespread", this criterion indicates a specified geographical scope of environmental harm. (Gray, M. A. 1995) To meet the general requirement for international criminalization, there are three possible ways to define "widespread": First, it could be met by damage that crosses national borders. Second, it could apply when the harm affects global common areas. (Randelzhofer, A., & Tomuschat, C. 1999) However, since modern international law doesn't always demand a transboundary element, ecocide does not have to be transboundary or global if the impacted area is sufficiently significant on its own. Third, as indicated in the perspective of Article 8(2)(b)(iv), the reference of "several hundred square kilometres" might be used to demonstrate a non-transboundary but nevertheless broad extent of harm. (Higgins, P. 2010)

Finally, in a debated context, the term "long-term damage" introduces a time-related aspect to a certain threshold. It pertains to the enduring effects of harm to the environment, which is evident in various proposed definitions for the crime of ecocide. (Gray, M. A. 1995) This concept can be related to the understanding of Article 55 of Additional Protocol I (AP I). (Paton, P. D. 1996) When we discuss "long-term damage," it should be interpreted as effects that persist for many years, rather than just a few

months. Although this definition doesn't explicitly require that the damage be irreversible, it's possible to consider irreversible damage as a specific case of long-term damage. In other words, damage that cannot be undone due to the challenges or even the impossibility of reversing its consequences. This concept brings environmental concerns into focus, particularly regarding the impacts on future generations. Environmental damage frequently has long-term effects, and this fact highlights how crucial it is to protect the environment for the sake of future generations.(Mégret, F. 2011)

C) The Three Threshold Criteria's Interrelationship

After defining the meanings of 'long-term', 'widespread', and 'severe', and how they relate to each other, understanding whether they must all occur together or separately is crucial. Article 8(2)(b)(iv) mandates that all three characteristics of destruction must be present cumulatively.(Sari, A., & Tinkler, K. 2019) However, this stringent requirement has been criticized for its restrictiveness, potentially rendering the new crime practically irrelevant. While it's essential to set clear and limiting criteria for damage to restrict prosecution, these criteria should strike a delicate balance to account for various situations and consequences, taking into consideration different levels of geographical scopes, temporal effects, and harm.(McLaughlin, R. 2000)

Hence, it is recommended that, in any scenario, the harm must reach a significant level of severity to surpass a specified minimum threshold, which could otherwise be dealt with at the national level. Additionally, this harm should be either enduring or widespread, though not essentially both. The rationale behind this differentiation is that severe harm is a necessary condition for international criminal prosecution but not a sufficient one on its own. Even if the injury is not of a long-lasting character, it qualifies as a crime of international significance and requires punishment when it goes beyond a certain geographic region. On the other hand, serious injury that has long-term effects on ecosystems and future generations is considered to be of worldwide concern due to its temporal gravity, independent of its geographic scope.

3. Mens rea Requirement

The mens rea component, which establishes the mental state necessary for criminal behaviour, is a point of contention in defining ecocide. Various proposals exist regarding this element, ranging from requiring "objective recklessness" (Werle, G., & Jessberger, F. 2005) to "desire or knowledge with substantial certainty,"(Mwanza, R. 2018) or even suggesting strict liability.(Higgins, P., Short, D., & South, N. 2013) Under all circumstances, someone would be criminally responsible for ecocide if they caused it with knowledge and intent, as defined in Article 30. However deliberate acts causing environmental harm are uncommon, the primary context for this crime likely involves unintended environmental damage resulting from actions aimed at different goals, such as economic objectives.(Bustami, A., & Hecken, M.-C. 2021)

To address these scenarios and establish criminal liability, it is firstly recommended that, to establish an extensive mens rea requirement for ecocide. Secondly, establish appropriate rules for presenting evidence. Thirdly, beyond what is outlined in Article 30. Lastly, it is suggested not to adopt less stringent mens rea standards than *dolus eventualis*.

5. Conclusion

The Rome Statute of the ICC focuses on prosecuting the most serious international crimes like

genocide, crimes against humanity, war crimes, and aggression, but it does not explicitly include environmental crimes. Despite some efforts by the OTP to address environmental issues, few cases have been prioritized for prosecution. This paper argues for a more comprehensive approach to environmental protection within international criminal law, potentially introducing a new category of crime called "ecocide." Historically, international criminal law began considering environmental offenses in the 1970s, especially in response to environmental harm during the Vietnam War. ILC once proposed making intentional damage to the environment an international crime but faced opposition, leading to limited recognition of environmental concerns in the Statute, mainly related to wartime situations. In international armed conflicts, there are provisions criminalizing intentional attacks causing severe and disproportionate environmental damage, but they are challenging to apply. Peacetime environmental protection lacks explicit provisions in ICL, but aspects of safeguarding the environment can be inferred from crimes like crime against humanity and genocide, albeit with strict criteria. The paper suggests that international criminal law should treat environmental harm consistently during war and peace, considering the ongoing environmental degradation caused by economic interests. It advocates for a shift from human-centric to ecocentric perspectives, recognizing the intrinsic value of the environment and its interconnectedness with human rights. To address environmental offenses comprehensively, the concept of ecocide has gained traction. Various proposals for ecocide define severity thresholds, geographical scope, and temporal longevity as criteria for the crime. There is debate about the mens rea requirement, with proposed standards ranging from "objective recklessness" to "intent and knowledge." In conclusion, the paper highlights the need for careful consideration of severity thresholds and mens rea requirements to establish ecocide as an international crime. Defining ecocide in this way represents a significant shift toward prioritizing environmental preservation and acknowledging the interconnectedness of human and non-human life on Earth.

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