ECOCIDE: A CRITICAL AND CONSTRUCTIVE APPROACH TO ESTABLISHING A FIFTH CRIME AGAINST PEACE

Clara Ellenbeck*

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* Clara Ellenbeck, J.D. Candidate at the University of Bonn, would like to thank their family for their unwavering support. The author is also especially grateful to Professor Stuckenberg, whose insightful criticisms greatly helped refine and polish this article.

ABSTRACT

Current legal frameworks fail to adequately criminalize international environmental destruction, necessitating a clearly defined international crime against the environment. While the Stop Ecocide Foundation's proposed Article 8ter aims to establish "ecocide" as such a crime, its formulation remains flawed. This essay is both critical and constructive: it not only analyzes the limitations of Article 8ter but also seeks to resolve them by developing and proposing a new crime of ecocide.

I. INTRODUCTION

Can anything be done against environmental destruction? This is a current, fundamental question of concern in environmental law.[1] Environmental destruction encompasses acts such as the destruction of ecosystems, deforestation, water pollution, and the extinction of species.[2] These are all acts which—in theory—would fall within the scope of the International Criminal Court ("ICC"): as the Preamble of the Rome Statute ("RS") states, the ICC has jurisdiction over the "most serious crimes of concern to the international community," which endanger "present and future generations."[3] Although environmental damage is an issue of global concern, there is no provision within the RS that prohibits the destruction of the environment as such.

Consequently, in June of 2021, the Independent Expert Panel ("IEP") of the Stop Ecocide Foundation presented a draft text for the crime "ecocide" under "Article 8*ter*"[4] with the aim of establishing a crime against the environment as the fifth crime against peace.[5] While this proposal represents an important milestone in the recognition of environmental protection, Article 8*ter* remains a work in progress. As this essay will demonstrate, Article 8*ter* is subject to several limitations which severely impact its compatibility with international criminal law. In particular, the material elements are vague, its proportionality test counterproductive, and the mental elements concerningly broad.

The first section will provide an overview of the current status of "ecocide," specifically whether there is already sufficient protection against environmental damage on an international level, considering human rights,

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1 Anastacia Greene, *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?*, 30 FORDHAM ENV'T L. REV. 1, 1 (2019).

2 Rose Bentley, *Types, causes and effects of environmental degradation*, 9 AFR. J. GEOGRAPHY AND REG'L PLAN. 1, 1 (2022).

3 Rome Statute of the International Criminal Court Preamble, July 17, 1998, 2187 UNTS 90.

4 *Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text*, STOP ECOCIDE FOUND. (2021), https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/se+foundation+commentary+and+core+text+revised+(1).pdf.

5 *Id.*

humanitarian, environmental, and international criminal law itself. The second section constitutes the core of this paper, as it will analyze the benefits and limitations of Article 8*ter*, considering the perspectives of legal scholars and already existing provisions in international environmental law. Conclusively, this paper will present its own definition of ecocide.

II. CONTEXTUALIZATION OF ECOCIDE AND CURRENT LEGAL PROVISIONS

The problematic nature of "ecocide" already becomes apparent when attempting to define it: to date, there is no consensus on the legal definition of the term. Unlike genocide or war crimes, ecocide has not settled into a final form, making it seem more like a concept rather than a crime. Recourse can be sought from the literary origin of the term, which consists of the two elements eco, meaning "home" or "environment" (oikos in Greek) and cide, meaning "killing" (caedo in Latin).[6] Thus, the literal translation of ecocide is the killing or destruction of the environment. The following chapter will assess whether the existing international framework provides sufficient protection of the environment.

A. International Human Rights Law

International human rights treaties, most of which were drafted before environmental protection came under the focus of global attention, do not explicitly protect the environment on their own. In fact, the first internationally recognized human rights document—the 1948 Universal Declaration of Human Rights ("UDHR")[7]—contains no mention of the environment.

The International Covenant on Economic, Social, and Cultural Rights ("ICESCR") [8] and the International Covenant on Civil and Political Rights ("ICCPR")[9] are two treaty bodies that could be used to address environmental damage.

Article 11(1) of the ICESCR states that everyone has the right to an "adequate standard of living for himself and his family, including … continuous improvement of living conditions."[10] Article 12(1) and (2) of the ICESCR address environmental harm more directly, as they provide the right to the "highest attainable standard of physical and mental health," and calls on State Parties to take

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6 Markus Wagner, *Ökozid vor dem Internationalen Strafgerichtshof?* [*Ecocide Before the International Criminal Court?*], 6-7 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSWISSENSCHAFT [J. FOR INT'L CRIM. JUST.] 477, 480 (2022).

7 G.A Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

8 International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

9 International Covenant on Civil and Political Right, *adopted* Dec. 19, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 [hereinafter ICCPR].

10 ICESCR, *supra* note 8, art. 11(1).

steps to improve "all aspects of environmental and industrial hygiene."[11] These provisions could be used to address the environment. Moreover, the Human Rights Committee has acknowledged that environmental degradation and climate change pose a threat to the right to life.[12] Unlike the ICESCR, the ICCPR does not contain any provision that directly addresses the environment.

Moreover, the 1989 Convention on the Rights of the Child ("CRC")[13] and the 2006 Declaration of the Rights of Indigenous Peoples ("DRIP")[14] recognize environmental concerns, as they both protect vulnerable groups that are particularly defenseless to environmental harm.

Article 24(2)(c) of the CRC refers to "the dangers and risks of environmental pollution," and Article 29(1) of the CRC provides that the "education of the child shall be directed to … the development of respect for the natural environment."[15] Additionally, Article 29 of the DRIP states that "Indigenous Peoples have the right to the conservation and protection of the environment."[16] Most recently, in 2021 a resolution by the UN Human Rights Council was the first to explicitly recognize the environment as a stand-alone human right, declaring that a "safe, clean, healthy and sustainable environment is a universal human right."[17]

Although human rights may offer some protection to the environment, their role will ultimately remain limited. While the CRC and DRIP do explicitly refer to the environment, these conventions primarily protect vulnerable groups, and thus, contextually could not be used to address the environment on its own. In contrast, the ICESCR could be used to implicitly address environmental damage, however, its practical use will ultimately remain limited due to the lack of a strict substantive obligation. Article 2(1) of the ICESCR describes the nature of the obligations undertaken by State Parties, stating that States must "take steps" for the progressive realization of a right.[18] "Taking steps" merely expresses a minimal sense of urgency. In contrast, the language used within Article 2(1) of the CRC and ICCPR is far more compulsory, requiring states to "ensure" the rights.[19] Considering that environmental damage is already a disregarded concern for many States, an environmental human right that lacks a strict, urgent obligation for its implementation will likely only have limited practical use. Similarly, the 2021 Human Rights Council Resolution is non-binding on states and is thus only

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11 ICESCR, *supra* note 8, art. 12(1), (2)(b).

12 Hum. Rts. Comm., General Comment No. 36 Article 6: Right to Life, para. 62, U.N. Doc. CCPR/C/GC/R.36 (Sept. 3, 2019).

13 Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

14 G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

15 CRC, *supra* note 13, art. 24(2)(c), 29(1)(e).

16 G.A. Res. 61/295, *supra* note 14, art. 29.

17 Hum. Rts. Council Res. 48/13, U.N. Doc. A/HRC/RES/48/13, at 1–2 (Oct. 8, 2021).

18 ICESCR, *supra* note 8, art. 2(1).

19 CRC, *supra* note 13, art. 2(1); ICCPR, *supra* note 9, art. 2(1).

declarative.[20] Consequently, human rights offer little protection to the environment. As its name already implies, they are human rights and not environmental rights.

B. International Environmental Law

International environmental law is the traditional legal instrument used to protect the environment on an international scale. Multilateral environmental agreements ("MEAs") are the fundamental sources of international environmental law. MEAs are agreements among multiple governments, intended to be legally binding, with the primary purpose of preventing or managing environmental harm.[21] Some of the most notable agreements in terms of state party membership and issues of global reach include the Stockholm Convention on Persistent Organic Pollutants, [22] the Convention on Biological Diversity, [23] the UN Framework Convention on Climate Change,[24] and the Vienna Convention for the Protection of the Ozone Layer.[25]

In contrast to human rights, MEAs offer more protection to the environment because they explicitly equip the environment with its own set of rights. While human rights are inherent to natural persons, a significant limitation of MEAs is that they do not address individuals, but rather they address states. For example, if a country exceeds its production limits, it is not evident which individual producer will be held liable.[26]

Moreover, MEAs have little enforcement power. Although intended to have this ability, in actuality, most MEAs are non-binding in nature.[27] Similar to human rights, the language used by MEAs is not prohibitive and is often imprecise. For example, Article 14(1) of the Biological Diversity Convention requires States to "introduce appropriate procedures" and to assess projects with "a view" to

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[20] Megan Donald, *Human Rights and the Environment*, GENEVA ACAD. 32 (Dec. 2022), https://www.geneva-academy.ch/joomlatools-files/docman-files/briefing%2021_web.pdf.

[21] Ronald B. Mitchell, *International Environmental Agreements: A Survey of Their Features, Formation, and Effects*, 28 ANN. REV. OF ENV'T & RES. 429, 432 (2003); Ronald B. Mitchell et al., *What We Know (and Could Know) About International Environmental Agreements*, 20 GLOB. ENV'T POL. 103, 104 (2020).

[22] Stockholm Convention on Persistent Organic Pollutants, *adopted* May 22, 2001, 2256 U.N.T.S. 119.

[23] Convention on Biological Diversity, *adopted* Jun. 5, 1992, 1760 U.N.T.S. 79.

[24] United Nations Framework Convention on Climate Change, *adopted* May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

[25] Vienna Convention for the Protection of the Ozone Layer, *adopted* Mar. 22, 1985, T.I.A.S. No. 11097, 1513 U.N.T.S. 293 [hereinafter VCPOL].

[26] Darryl Robinson, *Ecocide—Puzzles and Possibilities*, 20 J. INT'L CRIM. JUST. 313, 326 (2022).

[27] DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 210-215 (7th ed. 2019); Natalia Escobar-Pemberthy & Maria Ivanova, *Implementation of Multilateral Environmental Agreements: Rationale and Design of the Environmental Conventions Index*, 12 SUSTAINABILITY 2, 24 (2020).

minimize harm.[28] The definition of "appropriate" procedures is unclear. Moreover, linguistically, "a view" means "with a hope,"[29] and thus sounds more like a voluntary suggestion, rather than a binding, mandatory obligation. Hence, international environmental law often does not provide clear, prohibited conduct.[30]

More problematically, MEAs lack global uniformity and are heavily reliant on state willingness. Firstly, there is no universal agreement that protects the environment as a whole. The current agreements are limited to very specific damage, such as the destruction of ozone layers,[31] climate change,[32] or endangered species.[33] This fragmented approach limits comprehensive protection, as states can selectively join agreements that impose minimal political or economic costs. For instance, the USA has not signed[34] the Basel Convention[35] on waste reduction, despite being one of the biggest producers of plastic waste.[36] Thus, although a unanimous environmental agreement would have an important expressive function, as long as state sovereignty is intact, international environmental governance will always be impeded by the will of nations, or the lack thereof.

C. International Humanitarian Law

International humanitarian law, or *jus in bello*, is the law governing armed conflict. International humanitarian law has developed conventions that specifically address environmental damage. The relevant provisions include Article 1(1) of the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ("ENMOD-Convention")[37] and Article 35(3) and 55(1) of the 1977 Additional Protocol I to the Geneva Conventions

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28 HUNTER, SALZMAN & ZAELKE, *supra* note 27, at 210–215; Escobar-Pemberthy & Ivanova, *supra* note 27, at 24.

29 *With a view to*, COLLINSDICTIONARY.COM, https://www.collinsdictionary.com/dictionary/english/with-a-view-to (last visited Feb. 22, 2025).

30 Robinson, *supra* note 26, at 326.

31 VCPOL, *supra* note 25.

32 UNFCCC, *supra* note 24.

33 Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

34 Escobar-Pemberthy & Ivanova, *supra* note 27, at 14.

35 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes and their Disposal, *adopted* Mar. 22, 1989, S. TREATY DOC. NO. 102-5, 1673 U.N.T.S. 126.

36 Bruna Alves, *Municipal Waste Generation Worldwide as of 2022, by Select Country*, STATISTA (Jan. 22, 2025), https://www.statista.com/statistics/916749/global-generation-of-municipal-solid-waste-by-country.

37 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques art. 1, ¶1, *adopted* Dec. 10, 1976, 31 U.S.T. 333, 108 U.N.T.S. 151 [hereinafter ENMOD].

("API"). [38] These provisions also heavily influenced the drafting of Article 8(2)(b)(iv) of the RS and the proposed Article 8*ter*.[39]

The ENMOD-Convention was a cornerstone in environmental protection, as it was the first convention that exclusively prohibited environmental damage, regardless of human interests.[40] Moreover, the ENMOD-Convention was the first to use the terms "widespread," "long-lasting," and "severe."[41] These terms have a pedigree in multiple sources, including the API, Article 8(2)(b)(iv) of the RS, and the IEP's proposed crime of ecocide. Hence, the ENMOD-Convention provided the foundation for establishing an impact threshold for environmental damage.[42] Article 1(1) of the ENMOD-Convention prohibits State Parties from "engaging in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."[43]

With regard to Articles 35(3) and 55(1) API, Article 35(3) API provides: "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."[44] While Article 33(3) API is strictly ecocentric in nature, Article 55(1) of the API is rather anthropocentrically oriented, prohibiting the "use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."[45]

Although these conventions are of great relevance to environmental protection, both conventions are subject to several limitations that impact their practical effectiveness. Most obviously, these provisions are categorically limited to armed conflicts. This is a major practical impediment when considering that most environmental damage occurs during peacetime. Moreover, the scope of the ENMOD-Convention is significantly narrow, as it regulates solely the misuse of the modified environment as a weapon.[46] While the scope of the API is less narrow, as it protects the environment against the use of any (conventional) weapon, the API establishes a very restrictive impact threshold. In particular, the term "long-lasting"

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38 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 35, ¶ 3, art. 55, ¶ 1, *adopted* Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

39 Robinson, *supra* note 26, at 327; Liana Georgieva Minkova, *The Fifth International Crime: Reflections on the Definition of "Ecocide"*, 25 J. GENOCIDE RSCH. 62, 66 (2023).

40 Jessica Lawrence & Kevin Jon Heller, *The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute*, 20 GEORGETOWN INT'L ENV'T L. REV. 61, 66 (2007).

41 Minkova, *supra* note 39, at 66.

42 *See* Robinson, supra note 26, at 327; Minkova, *supra* note 39, at 66.

43 ENMOD, *supra* note 37, art. 1, ¶ 1.

44 Protocol I, *supra* note 38, art. 35, ¶ 3.

45 Protocol I, *supra* note 38, art. 55, ¶ 1; Minkova, *supra* note 39, at 67.

46 SILJA VÖNEKY, LIMITING THE MISUSE OF THE ENVIRONMENT DURING PEACETIME AND WAR–THE ENMOD CONVENTION, FREIBURGER INFORMATIONSPAPIERE ZUM VÖLKERRECHT UND ÖFFENTLICHEN RECHT 13 (2020), https://uni-freiburg.de/jura-ioeffr2/wp-content/uploads/sites/163/fip-2020_05_voeneky_enmod-convention_final.pdf.

is interpreted absurdly high, as it requires damage to be expected to last for several decades.[47]

Although these provisions were an important milestone in international law, their practical relevance will always be limited to armed conflicts and are subsequently insufficient in providing environmental protection.

D. Customary International Law

Customary international law is defined as a "general practice accepted as law" and requires a virtually uniform and extensive State practice, accepted to be legally binding (*opinio iuris*).[48]

The most firmly established customary rule that protects the environment outside of armed conflicts is the obligation of States to prevent the causation of significant transboundary harm to another State by any human activity, dubbed the "no-harm-rule".[49] This duty was first recognized by the Island of Palmas[50] and Trail Smelter[51] cases and was ultimately affirmed by the International Court of Justice ("ICJ") as being part of customary international law.[52]

Nonetheless, the no-harm-rule provides an insufficient legal basis to protect the environment. Firstly, the no-harm-rule has little to no practical impact. The prevention of transboundary harm allegedly reflects State practice; however, in reality, there is little support for this theory in the actual behavior of States.[53] As rightly noted by Bodanksy, considering that pollutants constantly travel through air, rivers, or oceans across international borders, transboundary environmental harm seems much more like the rule than the exception.[54] Thus, aside from the question of whether this rule can even reflect customary law, it can undoubtedly be said that it offers no substantial protection to the environment.

Hence, it can be argued that the no-harm rule is solely declarative, which is ultimately reaffirmed when analyzing its underlying objective elements. The no-

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47 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Draft Protocol I*, ¶ 27, U.N. Doc. CDDH/215/Rev.1 (Apr. 18, 1975); Lawrence & Heller, *supra* note 40, at 73; Wagner, *supra* note 6, at 485.

48 North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. ¶ 77 (Feb. 20); MALCOLM N. SHAW, INTERNATIONAL LAW 62 (9th ed. 2021).

49 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29; *Report of the International Law Commission on the Work of Its 53rd Session*, [2001] 2 Y.B. Int'l L. Comm'n 148, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

50 Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 839 (1928).

51 Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1938 & 1941).

52 Legality of the Threat or Use of Nuclear Weapons, *supra* note 49, ¶ 29.

53 Daniel Bodansky, *Customary (and Not so Customary) International Environmental Law,* 3 IND. J. OF GLOB. LEGAL STUD. 105, 112 (1995).

54 *Id.* at 111.

harm-rule entails a number of substantial uncertainties,[55] as the exact meaning and severity of the term "harm" remains unspecified: whether the environmental harm is "significant" must be assessed on a "case-by-case basis, considering criteria like the duration, extent, and the type of damage."[56] This definition is rather vague. Moreover, since the no-harm rule only encompasses harm that crosses borders (i.e. "transboundary harm"), releasing pollution that destroys an entire ecosystem or an entire species within a country would fall short.[57] Therefore, the no-harm rule does not offer adequate protection for the environment.

The no-harm rule's limitations raise the question of whether existing treaties, such as MEAs, or domestic laws could reflect customary law. One could consider MEAs as being reflective of customary law, since these agreements have a large-scale State party membership, and hence generally demonstrate extensive State practice.[58] Nonetheless, these agreements likely do not demonstrate *uniform* state practice; as noted earlier, since MEAs vary in their protected environmental values, ranging from the destruction of ozone layers[59] to climate change,[60] the existing rules contain significant differences in the key elements of their definitions.

Domestic laws also prove to be inefficient, considering that merely ten States[61] have incorporated the crime of ecocide into their national constitutions and can thus hardly be considered "extensive" state practice.

Consequently, the existing initiatives only confirm that State practice of environmental governance is impeded by fragmentation and gaps in the law. While the no-harm rule does reflect customary international law, it offers insufficient protection of the environment.

E. International Criminal Law

International criminal law has jurisdiction over four international crimes: (1) crimes against humanity, (2) war crimes, (3) the crime of genocide, and (4) the crime of aggression.[62] The primary advantage of international criminal law is that—

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55 MARTE JERVAN, THE PROHIBITION OF TRANSBOUNDARY ENVIRONMENTAL HARM. AN ANALYSIS OF THE CONTRIBUTION OF THE INTERNATIONAL COURT OF JUSTICE TO THE DEVELOPMENT OF THE NO-HARM RULE, PLURICOURTS 113 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486421.

56 *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries*, U.N. 152 (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf; Int'l Law Comm'n, Rep. of the International Law Commission on the Work of Its Fifty-Third Session, ¶ 4, U.N. Doc. A/56/10, at 388 (2001).

57 Robinson, *supra* note 26, at 327.

58 Escobar-Pemberthy & Ivanova, *supra* note 27, at 24.

59 VCPOL, *supra* note 25.

60 UNFCCC, *supra* note 24.

61 Armenia Criminal Code, Art. 394; Belarus Criminal Code, Art. 131; Georgia Criminal Code, Art. 409; Kazakhstan Criminal Code, Art. 161; Kyrgyzstan Criminal Code, Art. 374; Moldova Criminal Code, Art. 136; Russian Federation Criminal Code, Art. 358; Tajikistan Criminal Code, Art. 400; Ukraine Criminal Code, Art. 441; Vietnam Criminal Code, Art. 422.

62 Rome Statute of the International Criminal Court, *supra* note 3, at art. 5.

with the exception of war crimes—it is applicable during peacetime.[63] Nonetheless, the applicability of these crimes to environmental damage is significantly limited, since the four core crimes are anthropocentric in nature. This is seen in the fact that during the preparation of a Draft Code for the ICC, the International Law Commission ("ILC") attempted to include the "crime of willful and severe damage to the environment,"[64] which could have established the basis for an international crime of ecocide. Ultimately, however, this proposal was not retained. The fact that the ILC has already attempted, yet failed, to criminalize ecocide, illustrates that the Drafters of the RS explicitly refrained from punishing environmental damage as a stand-alone crime.

With regard to genocide, the main provision that could be relevant to environmental harm is Article 6(c) RS: "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[65] This approach was undertaken by the ICC in the Situation in Darfur when the Court found reasonable grounds to believe that Omar Al-Bashir committed crimes under Article 6(b) RS after destroying and polluting water pumps that victim populations relied on for their survival.[66] Hence, the environment is not protected as such, but merely in so far as its destruction affects humans. Additionally, the mental elements of Article 6 RS require a specific intent of exterminating an ethnic group.[67] Since environmental damage is rarely committed with direct intent, this mental threshold is too high for environmental harm.

Defining international environmental damage as a crime against humanity under Article 7 RS could prove more promising when considering that crimes against humanity only require "knowledge." In particular, the crimes against humanity of forcible transfer (Article 7(1)(d) RS), extermination (Article 7(1)(b) RS), and other inhumane acts (Article 7(1)(k) RS) could encompass aspects of environmental harm.[68] Nonetheless, the chapeau of Article 7(1) RS limits crimes against humanity solely to "attacks against a civilian population," and thus, similar to genocide, crimes against humanity could only ever address environmental damage incidentally.[69]

The crime of aggression under Article 8bis RS refers to the use of armed force by one State against another State.[70] Hence, the scope of Article 8bis RS will

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63 Matthew Gillett, *Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict*, *in* ENV'T PROT. AND TRANSITIONS FROM CONFLICT TO PEACE 220, 225–227 (Carsten Stahn et al. eds., 2017).

64 Int'l L. Comm'n, Rep. of the International Law Commission on the Work of Its 43rd Session, U.N. Doc. A/46/10, at 107 (1991); CARSTEN STAHN, A CRITICAL INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 109 (2019).

65 Gillett, *supra* note 63, at 225.

66 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Case No. ICC-02/05-01/09-94, Second Decision on the Prosecution's Application for a Warrant of Arrest, ¶¶ 32–37 (July 12, 2010), https://www.icc-cpi.int/sites/default/files/courtrecords/cr2010_04826.pdf; Minkova, *supra* note 39, at 63.

67 Gillett, *supra* note 63, at 226.

68 *Id.*

69 Rome Statute of the International Criminal Court, *supra* note 3, at art. 7.

70 *Id.* at art. 8 *bis* ¶ 2.

be strictly limited to environmental degradation within the context of military attacks, and thus likewise provides insufficient protection of the environment. When looking at the applicability of war crimes to environmental harm, the most directly relevant provision is Article 8(2)(b)(iv) RS.[71] Article 8(2)(b)(iv) RS is the only ecocentric provision in the RS and can be committed by "intentionally launching an attack in the knowledge that such an attack will cause … 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."[72] Yet, the environmental protection provided by this Article has many limitations. Firstly, it focuses only on wartime situations. Secondly, Article 8(2)(b)(iv) RS has an extremely high threshold, since it only protects the environment if the perpetrator knows that the environmental damage would be "clearly excessive" in relation to the anticipated military advantage. This is a highly demanding cognitive threshold for any prosecutor to prove.[73]

Conclusively, the preceding analysis shows that the core crimes within the RS are anthropocentrically oriented and thus generally incapable of encompassing environmental harm as such. The only ecocentric provision—Article 8(2)(b)(iv) RS—is only applicable during armed conflicts and even then, only shows a subsidiary recognition of the need to protect the environment. Therefore, it is asserted that in peacetime, only crimes against humanity—in particular under Article 7(1)(b) or (k) RS—could address environmental harm.[74]

F. The Inadequacy of Current Legal Protections

The above research indicates that there is no recognition of the crime of ecocide at an international level. Therefore, the most effective solution would be the establishment of a distinct, fifth core crime addressing environmental harm. International criminal law entails the highest legal sanctions available to society and conveys a very strong stigma. This enforcement machinery would be a strong tool to ensure the protection of the environment.

Nonetheless, there are also substantial disadvantages to presenting environmental cases before the ICC. The biographies of the current ICC judges do not mention environmental law once: the judges are experts in criminal or humanitarian law, not environmental law.[75] Moreover, to date, the ICC has only trialed thirty-one cases.[76] Thus, the ICC could only handle very few ecocide cases.

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71 Gillett, *supra* note 63, at 228.

72 Greene, *supra* note 1, at 18; Lawrence & Heller, *supra* note 40, at 71.

73 Gillett, *supra* note 63, at 227–29.

74 *Id.*

75 INT'L CRIM. CT., THE JUDGES OF THE COURT, https://www.icc-cpi.int/sites/default/files/publications/judgeseng.pdf; Oscar Van den Heede, *Ecocide as the Fifth Core Crime in the Rome Statute*, 55 N.Y.U. J. INT'L L. & POL. 435, 441 (2022).

76 INT'L CRIM. CT., ABOUT THE COURT, https://www.icc-cpi.int/about/the-court; Van den Heede, *supra* note 75, at 435.

Additionally, the ICC is also subject to jurisdictional limitations. Firstly, the territorial jurisdiction of the ICC is limited solely to signatory countries.[77] Some of the biggest polluters—United States, Russia, China, and India—have not signed onto the RS.[78] Moreover, while corporations are often the major perpetrators of ecocide during peacetime, pursuant to Article 25(1) RS, the personal jurisdiction of the ICC is limited to "natural persons".[79] In theory, Article 28(b) RS could allow for civilian superiors—such as directors or CEOs—to be charged; however, this provision has never been used for that purpose.[80]

These territorial and personal jurisdictional limitations raise the question, of whether the ICC is even the right forum to tackle environmental crimes. Rather than criminalizing ecocide from the "top-down," national laws could criminalize ecocide from the "ground up."[81] Opposed to international criminal law, national laws can have immediate effects and are also able to directly punish corporations. Nonetheless, the main argument against criminalizing ecocide at the national level is that environmental damage frequently transcends national borders, making it an international concern.[82] Hence, the most powerful solution would be to establish a separate, fifth-core crime.

III. INCORPORATING ECOCIDE AS THE 5TH INTERNATIONAL CRIME UNDER THE ROME STATUE: CRITICAL ANALYSIS OF THE "STOP ECOCIDE" PROPOSAL

The following section will critically analyze the objective and subjective components of the IEP's Article 8*ter* and its applicability within the RS, considering the already existing provisions on environmental damage, as well as other proposals and perspectives by academics and legal professionals.

Article 8*ter*(1) is the general provision, whereby Article 8*ter*(2) specifies the key elements of the definition. Article 8*ter* defines ecocide as follows: "For the purpose of this Statute, 'ecocide' means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."[83]

A. Material Elements

As a pre-condition, Article 8*ter* (2) can only be applied to "unlawful" or "wanton" acts.[84]

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77 Greene, *supra* note 1, at 40.

78 *Id.*

79 Rome Statute of the International Criminal Court, *supra* note 3, at art. 25 ("The Court shall have jurisdiction over natural persons pursuant to this Statute.").

80 *Id.* at 41.

81 *Id.* at 46.

82 Robinson, *supra* note 26, at 317.

83 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 5.

84 *Id.* at 10.

1. "Unlawful"

Although Article 8*ter*(2) does not specify when an act can be considered "unlawful," the Commentary clarifies that the determining factor should be whether there has been a breach of national or international law.[85]

Strategically, relying on national law is less intrusive on State sovereignty than international law and would thus be more acceptable to states.[86] Nonetheless, referring to national law would misunderstand the normative principles underlying international criminal law, namely that individual responsibility arises directly under international criminal law as such.[87] This is also reflected in Article 21(1)(c) RS, which explicitly states that the Court shall only refer to national law as ultima ratio.[88] Moreover, referring to national law would also be in conflict with the normative reasons underlying the crime of ecocide itself. As pointed out by Bock, the sole purpose of creating a crime of ecocide is to create a uniform, universally applicable crime; relying solely on a breach of national law would counter-run this very purpose since the criteria of unlawfulness would vary from country to country.[89] In any event, relying on a breach of national law would practically render ecocide obsolete, as most environmentally harmful acts are generally lawful at a national level, or are even committed by the government itself.[90]

Consequently, international law would generally be a more suitable tool and would be in line with the current core crimes (such as war crimes), which are likewise based on illegality under international law.[91] Nonetheless, in the specific context of environmental damage, relying on a breach of international law seems more like a circular argument than a practically useful idea. The primary issue is that international environmental law currently lacks an internationally applicable framework [see section B, p. 5–7]. Thus, the proposal is essentially suggesting relying on the issue that it is attempting to resolve, namely the non-existence of international environmental law. Another idea would be to refer to international customary law; this however would not be a suitable tool either, considering that the very few customary rules that do exist, are either increasingly vague or do not apply to individual conduct [see section B, p. 9–11]. Hence, neither national nor international law is a suitable criterion.

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85 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 10.

86 Robinson, *supra* note 26, at 339.

87 This follows from the *argumentum e contrario* of Article 21(1)(c) of the Rome Statute, according to which the Court may only refer to national law as a last resort for determining general principles of law. Rome Statute of the International Criminal Court, *supra* note 3, at art. 25.

88 Wagner, *supra* note 6, at 482.

89 Stefanie Bock, *Ökozid – ein neues völkerstrafrechtliches Kernverbrechen?* [*Ecocide – a new core crime under international criminal law?*], 54 ZEITSCHRIFT FÜR RECHTSPOLITIK [J. FOR LEGAL POL'Y] 187, 188 (2021) (Ger.); *see also* Robinson, *supra* note 26, at 339.

90 Kevin Jon Heller, *Ecocide and Anthropocentric Cost-Benefit Analysis*, OPINIO JURIS (June 26, 2021), http://opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/.

91 Robinson, *supra* note 26, at 338.

2. "Wanton"

With regard to the second alternative, according to Article 8*ter*(2), acts can be considered "wanton," if they have been committed with "reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated."[92] The criteria consists both of an objective and subjective component: objectively, a balancing test between the socio-economic benefits and the environmental harm, which subjectively, the perpetrator must have disproportionately recklessly disregarded.[93] From the term "anticipated," it can inferred that the relevant time point is before the commission of the crime ex ante.[94]

This proportionality assessment mirrors Article 8(2)(b)(iv) RS, which requires the perpetrator to have known that the damage would be clearly excessive in relation to the military advantage anticipated.[95] Transferring the proportionality principle of Article 8(2)(b)(iv) RS to the crime of ecocide is problematic in so far as it disregards the contextually opposed ramifications of both provisions. As Schmitt has pointed out, whereas fairly reliable data is available on the effect of collateral damage (destruction of property, deaths), it is not as readily available with regard to environmental damage.[96]

While it is already inherently difficult to foresee environmental damage as such, foreseeing the socio-economic benefits is almost impossible. Environmentally damaging, yet socially valuable acts, in particular medical and scientific developments, are largely dependent on trial and error; whether the socio-economic benefits outweigh the environmental damage, will likely only become apparent once the damage has already been done.[97] These external circumstances, would however be irrelevant for the proposed definition: the text uses the expression "social and economic benefits anticipated," not "social and economic benefits reasonably anticipated."[98] Hence, the definition is purely subjective and does not consider external, objective circumstances such as incomplete information or urgency.[99]

Even more problematically, the perpetrator must have "recklessly disregarded" that the damage would be "clearly excessive".[100] In contrast, Article

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92 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 10.

93 *Id.*

94 Wagner, *supra* note 6, at 485; with regard to war crimes, *see* Lawrence & Heller*, supra* note 40, at 73-75.

95 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 10.

96 Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict,* 22 YALE J. INT'L L. 36, 59 (1997); *see also* Michael N. Schmitt*, War and the Environment: Fault Lines in the Prescriptive Landscape*, 37 ARCHIV DES VÖLKERRECHTS 25, 56 (1999) (Ger.).

97 Lawrence & Heller, *supra* note 40, at 70.

98 Within the context of Article 8(2)(b)(iv) Rome Statute, see *id.* at 81.

99 Within the context of Article 8 RS, see ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 299 (2d ed. Cambridge Univ. Press 2010).

100 Kevin Jon Heller, *Skeptical Thoughts on the Proposed Crime of Ecocide That Isn't*, OPINIO JURIS (June 23, 2021), https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/.

8(2)(b(iv) RS requires actual knowledge.[101] The problematic nature of this element has been illustrated by Wagner.[102] If an individual uses a new pesticide, which causes an unforeseeable and significantly greater harm than initially anticipated, then "wanton" criteria would be fulfilled since he (recklessly) disregarded that the damage would be excessive to the anticipated benefits.[103] The fact that there was a lack of available information to take into regard in the first place would be irrelevant.

Therefore, the wantonness element is purely subjective and relies heavily on value judgments. The General Introduction of the Elements of Crimes explicitly states that "it is not necessary that the perpetrator personally completed a particular value judgment, unless otherwise provided."[104] The "clearly excessive" requirement within Article 8(2)(b)(iv) RS is the only otherwise indicated value judgment in the Rome Statute.[105] This implicitly shows that value judgments are rightly so strongly disfavored[106] in international criminal law, as they are unobjective, and their assessment will always be made on the basis of good faith. By limiting the definition to the "social and economic benefits anticipated," and not to "social and economic benefits reasonably anticipated," whether a perpetrator acts "wanton" will depend on the honesty of his claimed advantage and not its reasonableness.[107] Thus, a perpetrator's alleged ex ante value judgment might ultimately be nothing more than a lie invented ex post: perpetrators could simply claim that they only caused the environmental damage because they had anticipated social and economic benefits.

Consequently, a possible solution to this purely subjective approach would be to make the element objective, which could be done by amending "wanton" to read: "damage which would be clearly excessive in relation to the social and economic benefits that could be reasonably anticipated."[108] The Court would hence have to make an objective evaluation based on the information available to the perpetrator at the time. Nonetheless, the court would still ultimately be conducting the assessment ex post facto with the benefit of hindsight, and thus it is questionable whether a retrospective analysis of events—even by the Court—can ever be objective. Moreover, this approach would also trigger substantive issues of fairness: when one country engages in large-scale mining, the environmental damage can be localized to that country, while the other countries benefit from the resources extracted. Opposing interests can also occur territorially: if industrial waste pollutes a river's water quality, some individuals living near the water might prioritize their

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101 Rome Statute of the International Criminal Court, *supra* note 3, at art. 8.

102 Wagner, *supra* note 6, at 484.

103 *Id.*

104 INT'L CRIM. CT., ELEMENTS OF CRIMES, 1, ¶ 4 (2013), https://www.icc-cpi.int/sites/default/files/publications/elements-of-crimes.pdf.

105 Lawrence & Heller, *supra* note 40, at 83.

106 Kai Ambos, *Remarks on the General Part of International Criminal Law,* 4 J. INT'L CRIM. JUST. 660, 670 (2006); Danuta Palarczyk, *Ecocide Before the International Criminal Court: Simplicity is better than Elaborate Embellishment*, 32 CRIM. L. F. 147, 154 (2023).

107 Within the context of Article 8(2)(b)(iv) RS, *see* Lawrence & Heller, *supra* note 40, at 81.

108 For a similar approach, *see* Lawrence & Heller, *supra* note 40, at 75–77.

health, whilst others might prioritize the economic benefits brought by the factory. This illustrates that the proportionality assessment is purely subjective and unpredictable, as it can vary based on individual values and societal priorities.

Most importantly, conceptually, the proportionality assessment counter-runs the sole purpose of ecocide, namely to protect the environment regardless of human effects and benefits.[109] As Higgins has stated herself: "In reality, corporations simply deal with these [environmental] measures by making any breach, and the consequence thereof, a part of the profit and loss account of its operations."[110] Thus, if environmental damage is often the result of a cold-blooded cost-benefit analysis,[111] then it would be contradictory to allow this as a justification.

Consequently, it is asserted that the wantonness element is to be removed. With the exception of war crimes, no other crime within the RS includes a balancing test.[112] The crimes within the jurisdiction of the ICC are so severe, that any balancing is superfluous because the harm is always inappropriate and unjustified. Thus, the best solution would be to adopt an impact threshold so high that balancing or other caveats would be rendered unnecessary.[113]

3. "Acts"

The commentary of Article 8*ter* specifies that the term "acts" encompasses both single as well as cumulative acts or omissions.[114] A liability for omissions is unique in international criminal law. During the preparation of a Draft Code for the ICC, the Drafters did include a general provision that was intended to prohibit omissions.[115] Ultimately, however, this provision was not retained. The only provision within the RS that currently establishes liability for omissions is Article 28 RS.[116] While Article 28(a) RS is only applicable to military leaders, Article 28(b)

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109 Kai Ambos, *Protecting the Environment through International Criminal Law*, EJIL: TALK! (June 29, 2021), https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/.

110 POLLY HIGGINS, ERADICATING ECOCIDE: LAWS AND GOVERNANCE TO STOP THE DESTRUCTION OF THE PLANET XV (2d ed. Shepheard-Walwyn 2015).

111 Greene, *supra* note 1, at 31.

112 Lawrence & Heller, *supra* note 40, at 90.

113 *See* Robinson, *supra* note 26, at 338.

114 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 10.

115 Committee of Experts, Draft Statute for an International Criminal Court – Alternative to the ILC-Draft (Siracusa Draft), Siracusa/Freiburg (July 1995); Shashishkala Gurpur and Aakarsh Banyal, *Revisiting Omission Liability at the ICC in the Wake of Evolving Weapons Technology*, OPINIO JURIS (Feb. 11, 2021), https://opiniojuris.org/2021/02/11/revisiting-omission-liability-at-the-icc-in-the-wake-of-evolving-weapons-technology/.

116 Rachel Killean & Damien Short, *A Critical Review of the Law of Ecocide*, 1, 7 (Oct. 18, 2023) (unpublished manuscript) (on file with Social Sciences Research Network), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4605681.

RS focuses on the responsibility of civilian superiors.[117] According to Article 28(b) RS, civilian superiors are responsible for crimes committed by subordinates if they are "under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates."[118] Pursuant to Article 28(b)(ii) and (iii) RS, the material elements require that, first, the crimes concerned activities that were within the "effective responsibility and control of the superior" and that "the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."[119]

Applying the elements within Article 28(b) RS to the crime of ecocide would not be completely far-fetched, when considering that environmental damage is often committed by superior leaders, such as CEOs of large corporations.[120] Thus, Article 28(b) RS and the crime of ecocide are contextually similar, as they are generally subject to a similar group of perpetrators.

Moreover, this analogy would be of significant practical relevance. Despite the access to regulations and guidelines, individuals will often omit to take necessary measures to prevent environmental damage.

For example, the BP Deepwater Horizon Oil Spill was the result of a series of omissions, including inadequate maintenance of safety equipment and failure to conduct proper safety tests.[121] Similarly, the Rio Doce Dam Collapse caused a massive release of mining waste into the environment, due to a failure to properly monitor and maintain the dam's stability.[122] Therefore, it is imperative that the crime of ecocide entails omission liability.

Considering that Article 28(b) RS already establishes omissions liability, the requirements for omissions liability under Article 8*ter* could likewise be based on Article 28(b) RS. Subsequently, this paper argues that an individual is liable for environmental damage caused by omissions if that person: "failed to take all necessary and reasonable measures within his or her power to prevent or repress the environmental damage, despite having had effective responsibility and control over the activities that resulted in the environmental damage."

Furthermore, the IEP does not provide any examples of the prohibited underlying conduct, which is problematic given the newness of international environmental law. Providing clear guidance on prohibited acts is crucial for accountability. For instance, the ENMOD and the proposals by the UCLA Promise

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117 Volker Nerlich, *Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?*, 5 J. INT'L CRIM. JUST., 665, 668 (2007).

118 Rome Statute of the International Criminal Court, *supra* note 3, at art. 28.

119 *Id.* at art. 28 ¶ b(ii)-(iii).

120 Greene, *supra* note 1, at 27, 41.

121 Suzanne Goldenberg, *Gulf oil spill: firms ignored warning signs before blast, inquiry hears*, THE GUARDIAN (May 12, 2010), https://www.theguardian.com/environment/2010/may/12/deepwater-gulf-oil-spill-hearing.

122 Caio Borges & Tchenna Fernandes Maso, *The collapse of the River Doce Dam*, 25 SUR INT'L J. ON HUM. RTS. 71, 73 (2017).

Institute[123] include detailed lists of ecocide-related acts, such as the destruction of habitats and illegal waste trafficking, with residual clauses for other similar acts.[124] A similar approach has been undertaken by Gillett.[125] These lists help clarify ecocide while aligning with existing crimes under the Rome Statute, enhancing legal precision and acceptance.

4. "Substantial likelihood"

The definition further requires that there is a "substantial likelihood" of environmental damage.[126] Hence, the IEP formulates ecocide not on the basis of actually causing harm to the environment, but merely as an endangerment offence.[127] This approach aligns with international environmental law's precautionary principle, which enables those confronted with a lack of full scientific certainty to take actions that err on the side of precaution rather than increasing risk.[128]

Pursuant to the Commentary, the IEP argues that both genocide and war crimes are rooted in endangerment.[129] However, this analogy is misplaced.[130] When looking closer at genocide under Article 6 RS, it becomes evident that genocide is not solely based on endangerment. Article 6(a)(1) Elements of Crimes does in fact require the conduct, the killing of one or more persons, to actually occur.[131] It is solely the consequence, the destruction of a specific group, that is rooted in endangerment: under Article 6(a)(3) Elements of Crimes it is sufficient that the perpetrator intended its destruction, whilst an actual causation is not required.[132] Consequently, genocide does, in fact, require a certain materialization of harm; the

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123 The Promise Institute for Human Rights (UCLA) Group of Experts, *Proposed Definition of Ecocide* (2021), https://www.ecocidelaw.com/wp-content/uploads/2022/02/proposed-definition-of-ecocide-promise-group-april-9-2021-final.pdf.

124 ICRC, *Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques: Understandings*, INT'L COMM. RED CROSS (Sept. 1976), https://ihl-databases.icrc.org/en/ihl-treaties/enmod-1976/understandings; The Promise Institute for Human Rights (UCLA) Group of Experts, *Proposed Definition of Ecocide* (2021), https://www.ecocidelaw.com/wp-content/uploads/2022/02/proposed-definition-of-ecocide-promise-group- april-9-2021-final.pdf.

125 Matthew Gillet, *Dr. Matthew Gillet's Proposed Definition of Ecocide*, OPINIO JURIS, https://www.opiniojuris.org/wp-content/uploads/dr-matthew-gilletts-proposed-definition-of-ecocide.pdf.

126 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 12.

127 *Id.*

128 Danuta Palarczyk, *Ecocide Before the International Criminal Court: Simplicity is better than Elaborate Embellishment*, 32 CRIM. L. F. 147, 160 (2023).

129 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 12.

130 Matthew Gillett, *A Tale of Two Definitions: Fortifying Four Key Elements of the Proposed Crime of Ecocide – Part I.,* OPINIO JURIS (June 20, 2023), https://opinionjuris.org/2023/06/20/a-tale-of-two-definitions-fortifying-four-key-elements-of-the-proposed-crime-of-ecocide-part-i/.

131 INT'L CRIM. CT., ELEMENTS OF CRIMES, *supra* note 104; Gillett, *supra* note 130.

132 *Id.*

IEP's formulation of ecocide contains no such requirement, nor any specific intent to harm the environment.[133]

Whilst Article 8(2)(b)(iv) RS is indeed solely an endangerment crime, subjecting ecocide to the contextual ramifications of a war crime is inherently problematic. To begin with, Article 8(2)(b)(iv) RS is subject to several limitations that the proposed crime of ecocide does not have, namely being restricted to international armed conflicts and requiring the widespread, long-term, and severe criteria to be fulfilled cumulatively.[134] Hence, Article 8 (2)(b)(iv) RS is structurally dissimilar to the proposed crime of ecocide, as it is subject to numerous additional restrictions that counterbalance the endangerment approach.[135] Thus, analogizing the endangerment approach of Article 8(2)(b)(iv) RS to the crime of ecocide proves particularly problematic, as it attempts to combine the contextually opposed paradigms of war crimes to a crime that is supposed to apply in peacetime.

Although an endangerment approach would broaden the scope of environmental protection and would prevent the materialization of harm, thereby avoiding the issue of having to prove causation,[136] it would uncritically expand the scope of ecocide.[137] The precautionary principle finds its origin in international environmental law, not criminal law. Requiring a result ensures that ecocide will only encompass the most serious instances of environmental harm. In any event, as pointed out by Gillett, if an environmental attack is initiated, but the harm fails to materialize, the endangerment of the environment could still be indirectly punished as an attempt under Article 25(3) RS.[138] Consequently, the endangerment approach is to be rejected.

5. "Severe" and Either "widespread" or "long-term" Damage to the "Environment"

The IEP's proposed material elements consist of the terms "severe," "widespread," and "long-term," which refer to the gravity and the geographical and temporal impact of the attack.[139] This impact threshold has been widely used in various sources, namely the ENMOD-Convention, API I, Article 8(2)(b)(iv) RS, and the ILC Draft Code of Crimes.[140]

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133 Gillett, *supra* note 130.

134 Heller, *supra* note 100.

135 *Id.*

136 ANTONY DUFF & TATJANA HÖRNLE, *Crimes of Endangerment, in* 2 CORE CONCEPTS IN CRIMINAL LAW AND CRIMINAL JUSTICE 132 (Kai Ambos et al. eds., Cambridge Univ. Press 2022).

137 Gillett, *supra* note 130.

138 *Id.*

139 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at ¶ 2.

140 ENMOD-Convention art. 1 ¶ 1, Dec. 10, 1976, 108 U.N.T.S. 151; International Committee of the Red Cross*, supra* note 38*;* Rome Statute of the International Criminal Court, *supra* note 3, at art. 8 ¶(2)(b)(iv); *Draft Code of Crimes against the Peace and Security of Mankind*, 1991 Y.B. Int'l L. Comm'n 2, UN Doc. A/46/10, at 85.

a. "Long-Term"

The IEP defines "long-term" as "damage which is irreversible, or which cannot be redressed through natural recovery within a reasonable period of time."[141]

The first alternative is a suitable tool to encompass damage, which immediately causes irreversible harm to the environment (e.g. an explosion causing the immediate destruction of an ecosystem).

The second alternative, however, is sufficiently vague, as the IEP does not specify what a "reasonable" period of time is. Recourse can be sought from ENMOD-Convention and the API, which have developed precise temporal criteria.

Pursuant to the Understandings relating to Article I of the ENMOD-Convention, damage is "long-term" if it lasts for "a period of months, or approximately a season."[142] This can however merely be considered short-term and is arguably too low to amount to cases of severe environmental damage. On the other side of the spectrum, a time period of decades—as required by the API—is undoubtedly too high; nonetheless, contrary to the ENMOD-Convention, the API does not actually require decades to elapse but merely requires the act to be "expected" to cause long-term damage.[143] This approach would be a suitable tool to encompass acts with a delayed material result. Although the crime of ecocide itself is to require a material result, this may prove to be challenging within the specific context of the long-term criteria, since it takes a significant amount of time to thoroughly assess long-term consequences.

In particular, the harmful effects of environmental damage may not necessarily be felt or manifest themselves for a significant time period after the commission of the crime.[144] As an example, climate change caused by greenhouse gas emissions will only manifest itself decades later.[145] Since the prosecution cannot wait for the time period to elapse, the requirement of expected long-term damage would overcome the problem of having to await a material result. Thus, although the crime of ecocide itself is to require a material result, it may be argued that at least subsidiarily the "long-term" criteria must include an element of prognosis/endangerment to encompass acts with a delayed material result. A possible approach would be to rely on scientific data to predict whether the act is expected to cause irreversible damage; the "long-term" criteria could read as follows: "damage which is irreversible, or which, owing to the scientific

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141 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 9.

142 ICRC, *supra* note 124.

143 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, U.N. Doc. CDDH/215/Rev.1 (1974–1977), at 120.

144 U.N. Secretary-General, *Report on the Protection of the Environment in Times of Armed Conflict*, ¶ 34, U.N. Doc. A/48/269 (July 29, 1993) (as noted by the Secretary-General of the United Nations "it is not easy to know in advance exactly what the scope and duration of some environmentally damaging acts will be.").

145 Owen Mulhern, *The Time Lag of Climate Change*, EARTH.ORG, https://earth.org/data_visualization/the-time-lag-of-climate-change/earth.org (Aug. 27, 2020) ("We will experience the full effect of today's emissions in 10 to 20 years time.").

knowledge, is expected to have irreversible effects." In contrast to the API's definition, this approach includes the term "scientific knowledge." Additionally, the term "decades" has been substituted for "irreversible effects," to align with the terminology used by the IEP.

On the other hand, this prognosis approach may prove to be incompatible with situations in which the environmental damage turns out to be less severe than anticipated. With regard to the Gulf War, the initial scientific findings were detrimental: an irreversible increase in global warming; in actuality, the oil fires did not have any long-term effect on global warming.[146] The inherent scientific uncertainty in predicting the temporal extent of environmental damage could lead to a convicted "ecocidáre" serving a decade-long prison sentence, only for it to turn out years later that the anticipated damage actually never occurred.[147] Thus, neither the ENMOD-Convention, the API, nor the scientific prognosis are suitable tools to measure the temporal damage.

Looking more closely at the IEP's proposal, what can be considered a "reasonable" period of time? Rather than setting a rigid time frame of months or decades, it might be more suited to assess the temporal impact holistically, based on its impact on the inhabitants of the ecosystem as such.[148]

The first alternative of "irreversible" damage will encompass acts where nature cannot heal itself. Thus, the second alternative must encompass acts where the damage can be reversed over time yet still pertains for a period long enough to reach a certain severity. Hence, to develop a suitable time frame, examples of reversible damage and their temporal impact need to be assessed.

For example, deforestation of tropical forests is not irreversible in the strict sense, since forests can re-grow and recover.[149] Nonetheless, the immediate effect will still be degraded air quality, which can, in turn, negatively impact human health, insect populations, and animal habitats. Similarly, polluted water will eventually recover, given the self-purification ability of natural water systems.[150] However, until the water has returned to its original form, marine species will be severely harmed. Both the example of degraded air quality as well as polluted water can be defined as acts that harm the living conditions of an ecosystem's inhabitants. This is a suitable tool to assess longevity: if the living conditions of the inhabitants of an ecosystem are harmed, then there will always be long-term negative effects

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146 Jesica E. Seacor, *Environmental Terrorism: Lessons from the Oil Fires of Kuwait*, 10 AM. U. INT'L L. REV. 481, 503 (1994); Lawrence & Heller, *supra* note 40, at 80.

147 Tara Weinstein noted regarding the Gulf War that initial reports "were extraordinary—devastated ecosystems and farmlands, degraded air quality, and polluted water," although the actual effects were far less harmful. Tara Weinstein, *Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?*, 17 GEO. INT'L ENV'T L. REV., 697, 708 (2005); Lawrence & Heller, *supra* note 40, at 75.

148 For a similar approach, *see* Polly Higgins et al., *Protecting the planet: A proposal for a law of ecocide*, 59 CRIME L. & SOCIAL CHANGE J. 251, 257 (2013) ("Peaceful enjoyment by the inhabitants of that territory has been severely diminished.").

149 Lourens Poorter et al., *Multidimensional tropical forest recovery*, 374 SCIENCE 1370, 1370 (2021).

150 SCI. DIRECT, *Self-Purification,* J. ENV'T MGMT. (2021), https://www.sciencedirect.com/topics/earth-and-planetary-sciences/self-purification.

on the environment (i.e., degraded air quality will lead to a reduction in insect populations and hence a change in the ecosystem). Moreover, this approach would also solve the vagueness of the IEP's "reasonable" period of time. Consequently, this paper argues that the criteria of long-term should be defined as the following: "damage which is irreversible, or where its natural recovery pertains for a time period which causes severe harm to the living conditions of an ecosystem's inhabitants."

b. "Widespread"

The IEP defines "widespread" as "damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings."[151] The widespread criteria is well developed, as it strictly distinguishes between the geographic conception (square kilometers), the customary principle of transboundary harm (crossing state borders), and a mixed eco/anthropocentric element (damage to an ecosystem or species).[152]

The first element, "extending beyond a limited geographic area," however, suffers from vagueness, as the IEP fails to define the exact size of a "limited" geographic area.[153] Pursuant to the Commentary, the IEP justifies this broad definition with the fact that both the ENMOD-Convention and the API—requiring either hundreds or thousands of square kilometers, respectively—set a threshold that risks being too high, as they would exclude acts of environmental damage that affect people in a single city.[154] As rightly noted by Wagner, how does that constitute an international crime?[155] An international crime, as its name implies, must either be (geographically speaking) international, or—in the case of intrastate crimes—must still be so severe as to be of concern to the international community as a whole.[156] These requirements are already sufficiently addressed by the IEP's other two remaining elements of "crossing state boundaries" and "damage to an ecosystem, species, or humans."

Considering that the first alternative of "extending beyond a limited geographic area" is not only vague but also undermines the normative reason for ecocide as being an international crime, this paper suggests that the first alternative is to be removed, whilst the second and third are to be kept unchanged. Consequently, damage can be considered "widespread" if it "crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings."

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151 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 9.

152 Robinson, *supra* note 26, at 328.

153 Kristin Jones, *The Beginning of the End of Ecocide: Amending the Rome Statute to Include the Crime of Ecocide* 18 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4082212.https://ssrn.com/abstract=4082212; Wagner, *supra* note 6, at 485.

154 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 9.

155 Wagner, *supra* note 6, at 485.

156 Rome Statute of the International Criminal Court, *supra* note 3, at art. 1.

c. "Severe"

The Panel defines "severe" as "damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources."[157] This definition is merely an enumeration of adjectives and provides no clarity about what can be considered "very serious" damage. Quite aside from its vagueness, it is questionable whether it is even necessary to include the term "severe" at all.

It can be argued severity should not constitute an independent objective element as such but is much rather dependent on the temporal and geographic impact: damage which is widespread and long-term will logically always be severe (argumentum a fortiori)[158] (e.g. long-term damage + widespread damage = severe damage). Therefore, it is not necessary to include "severe" damage as a separate objective element, as severity is already the implicit result of long-term and widespread damage.

In any event, if cases of ecocide would be brought before the ICC, the severity assessment would be carried out prima facie by the Office of the Prosecution, considering that the RS imposes a gravity threshold on the admissibility of cases.[159] Pursuant to Article 17(1)(d) RS, the Court shall determine that a case is inadmissible where the "case is not of sufficient gravity to justify further action by the Court."[160]

Nonetheless, completely eradicating the term "severe" would be a radical change, considering that severity is almost always a requirement in international (environmental) law.[161] Removing the term could also negatively impact the adoption of the crime since states may opine that omitting severity would contradict the premise that ecocide is limited to the most severe environmental harm. Thus, although the term "severe"—as it is currently defined by the IEP—is solely declaratory, without any field of application, and will likely be included due to mere legal history, States will be more likely to incline in favor of the severity assessment.

Moreover, the criteria that are currently used by the Prosecution to assess gravity are centered on the anthropocentric core crimes and will thus likely be incompatible with environmental crimes; in analyzing gravity, the Prosecution generally considers, inter alia, "the number of persons killed" or "the extent of the damage caused by the crimes, in particular the bodily or psychological harm."[162]

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157 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 8.

158 Georg Bitter & Tilman Rauhut, *Grundzüge zivilrechtlicher Methodik – Schlüssel zu einer gelungenen Fallbearbeitung* [*Basics of civil law methodology – the key to successful case processing*], 49 Juristische Schulung 289, 297 (2009) (Ger.).

159 Rome Statute of the International Criminal Court, *supra* note 3, at art. 17.

160 *Id.*

161 For example, Article I(1) ENMOD-Convention, Article 8(2)(b)(iv) RS, Articles 35(1) and 55(1) API I, Article 8(2)(b)(iv) RS and Article 26 ILC Draft Code of Crimes.

162 Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, ¶¶ 35–39 (Sep. 15, 2016), https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf; Susana SáCouto & Katherine A. Cleary, *The Gravity Threshold of the International Criminal Court,* 23 AM. J. INT'L L. 807, 824 (2008).

While the Prosecution did state that it would consider crimes involving "the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land,"[163] they did not specify which concrete factors would be applied in assessing their severity.

A possible idea to define the term "severe" would be to assess the severity based on its similarity to other forms of environmental damage that have previously been considered "severe." A similar approach can be found under Article 7(1)(k) fn. 30 EoC, according to which other inhumane acts must be of a similar nature and gravity to the other acts enumerated in Article 7 RS.[164] Some of the enumerated acts under Article 7(1) RS include, inter alia, forcible transfer of a population, rape, torture, and enforced disappearance of persons.[165] Hence, Article 7(1)(k) RS encompasses diverse values, such as liberty, health, and human dignity.

Similarly, ecocide aims at protecting a wide range of interests and values, namely ecosystems, animal species, and humans. Thus, an analogy to Article 7(1)(k) RS is possible, since both ecocide as well as other inhumane acts are structurally similar: they are both subject to a broad range of protected goods. Thus, a suitable approach to assessing severity is to evaluate whether the case at hand is of a similar nature and gravity to other acts of severe environmental damage. This idea might at least be a small step towards giving the term, which currently is a mere label, a more descriptive function.

6. Cumulative or Alternative

Having arrived at a possible approach for the material requirements, the next issue is whether these elements have to be fulfilled cumulatively or alternatively. The API, Article 8(2)(b)(iv) RS, and the ILC Draft Code of Crimes all use the terms cumulatively: the harm must be severe, widespread, and long-term.[166] In contrast, the ENMOD-Convention uses the terms alternatively: the harm has to be either severe, widespread, or long-term, and hence, fewer requirements have to be fulfilled.[167] The IEP's proposal uses a hybrid alternative-cumulative approach: the harm must be severe and either widespread or long-term.

For principled and strategic reasons, the harm must definitely be severe [see section C, p. 31–32]; this avoids the objection, that omitting severity would contradict the proposition that international criminal law only sanctions the most

163 Office of the Prosecutor, *supra* note 162, ¶ 41.

164 INT'L CRIM. CT., ELEMENTS OF CRIMES, *supra* note 104, at art. 7, ¶ 1(k).

165 Rome Statute of the International Criminal Court, *supra* note 3, at art. 7.

166 Int'l Comm. of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 35, ¶ 3, art. 55, ¶ 1, Jun. 8, 1977, 1125 U.N.T.S. 3; Rome Statute of the International Criminal Court, *supra* note 3, at art. 8; Int'l L. Comm. Draft Code of Crimes against the Peace and Security of Mankind, II Y.B. 2, at 77, U.N. Doc. A/46/10.

167 ENMOD-Convention, art. 1, ¶ 1, Dec. 10, 1976, 108 U.N.T.S. 151.

"serious" crimes.[168] Hence, this leaves the question of whether the remaining "long-term" and "widespread" criteria have to be fulfilled cumulatively or alternatively.

Apart from the "severe" element, which must always be present, the IEP aligns with the alternative approach used by the ENMOD-Convention.[169] Nonetheless, it should be noted that the scope of the ENMOD-Convention is per se very narrow, as it is limited solely to the deliberate use of environmental modification techniques and is even then only applicable in the context of an internationally armed conflict.[170] Therefore, the scope and practical relevance of the ENMOD-Convention is already very limited, which justifies the need for less requirements.[171] The IEP's definition of ecocide is not subject to any of the ENMOD-Conventions restrictions yet applies the same alternative approach. Without opting for a cumulative approach, or restricting the scope of the crime as such, the IEP's current proposal would be setting an absurdly overbroad threshold.

In light of the aforementioned definition established by this paper, it is asserted that a cumulative approach should be applied. The primary concern brought forward by the IEP is that a cumulative approach would be too restrictive, as it would arguably exclude acts that are severe and long-term but not widespread; or, vice versa, are severe and widespread, but not necessarily long-term.[172] This problem is only of relevance if the terms "widespread" and "long-term" are defined as two inherently different concepts. This is the case with the definitions used by the API: if an act damages an ecosystem, and the effects cover several thousand square kilometers but are expected to only last for 5 years, the damage would be "widespread," but not "long-term," since the damage did not last for "several decades."[173]

Applying the same scenario, the definitions of "long-term" and "widespread" brought forward by this paper would tackle these shortcomings: if an act damages an ecosystem (widespread), then its natural recovery will also likely pertain for a time period which causes severe harm to the living conditions of its inhabitants (long-term). Opposed to the API, both elements are encompassed, since the proposed definition does not measure the long-term impact based on decades.

The same constellation can be applied conversely: if an act damages an ecosystem, and the effects are expected to last for several decades, then the damage would be "long-term" under both the API, as well the definition brought forward by this paper. However, if the ecosystem only covered an area of fifty square kilometers, then under the API, the damage would not be "widespread," as it did not extend over "thousands" of square kilometers.[174] In contrast, the suggested definition would fulfill the second alternative of the "widespread" element, since damage to an ecosystem will likely always be suffered by the species that live within it.

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168 Robinson, *supra* note 26, at 328.
169 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 8.
170 Vöneky, *supra* note 46, at 13.
171 *Id.*
172 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 9.
173 *See* Lawrence & Heller, *supra* note 40, at 74.
174 *Id.*

These scenarios illustrate that it is not the cumulative approach as such, but generally the underlying definition of the objective elements itself, that narrow the scope of the crime. The terms "long-term" and "widespread"—as they are defined by this paper—both share common characteristics, particularly the second alternative of the long-term element ("where its natural recovery pertains for a time period which causes severe harm to the living conditions of an ecosystem's inhabitants") is similar to the second alternative of the widespread element ("or is suffered by an entire ecosystem or species or a large number of human being"). Considering that both criteria share mutually inclusive characteristics, it is highly likely both will be fulfilled automatically. Since an alternative approach would over-broaden the scope of ecocide and would be inconsistent with past formulations in international environmental law, the cumulative approach is to be adopted.

B. Mental Elements

1. Preliminary Considerations

According to Article 30(2)(b) RS, a person bears criminal responsibility if he at least has knowledge, which refers to the "awareness that a circumstance exists or will occur in the ordinary course of events."[175] In contrast, the IEP proposed a significantly lower cognitive threshold, in the fear that Article 30 RS was too narrow and would not capture a sufficiently broad scope of conduct.[176] Hence, the proposal stipulates that the mental element is fulfilled, when there is "knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment."[177]

Whilst Article 30(2)(b) RS directly connects the term "knowledge" to "awareness," the IEP uses these terms as two distinct concepts: the Commentary refers to "awareness," whereas Article 8*ter* itself speaks of "knowledge."[178] The even more crucial ambiguity concern is that the proposal defines knowledge as "recklessness" or "dolus eventualis."[179] By using the term knowledge, but actually implying "recklessness" and "dolus eventualis," the IEP is attempting to introduce a lower cognitive threshold through the backdoor of their own definition.[180]

The following section will critically analyze, which subjective threshold is the most suitable tool.

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175 Rome Statute of the International Criminal Court, *supra* note 3, at art. 30.

176 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 11.

177 *Id.* at 5.

178 *Id.* at 5 (defining "knowledge"); *Id*. at 11 (defining "awareness").

179 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 11; s*ee also* Minkova, *supra* note 39, at 81; Heller, *supra* note 100.

180 Ambos*, supra* note 109; Heller, *supra* note 100.

2. Strict Liability

a. Normative and Practical Impediments

There are several scholars that argue in favor of a crime based on a diminished fault standard.[181] Since most cases of environmental damage are not the result of a deliberate act by an autonomous individual, but much rather a reckless, profit-driven act by large corporations, Gray argues that a strict liability standard would force companies to preemptively address potentially environmentally damaging acts and would thereby encourage preventative measures.[182] Despite the fact that many of the defendants in such cases will be "corporations rather than individuals" due to the principle of individual criminal responsibility pursuant to Article 25 RS, the ICC Prosecutor is unable to charge corporations themselves.[183] If companies don't have to fear criminal liability in the first place, why would they care to preemptively implement precautionary measures?

The second argument brought forward is that a lowered mens rea standard—where the defendant need not have any blameworthy state—could make a significant difference in the ICC's reach concerning environmental harm.[184] From a strategic standpoint, this would arguably be the opposite. Without any culpable subjective threshold, the prosecution would be overflooded with ecocides. Even with the very restrictive crimes under its current jurisdiction, the ICC is already overburdened and has a limited capacity; the prosecution is severely understaffed and operates on a minimal budget.[185] Therefore, implementing a strict liability approach raises significant practicality concerns, as expanding the ICC's reach could over-swamp its operations, ultimately causing a collapse of its institutional framework. This would not broaden but limit the ICC's reach concerning environmental harm.

A strict liability approach would not just be a major practical impediment, but it would also disregard the historical background and the normative reasons underlying International Criminal Law. This can be seen in the fact that Article

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181 *E.g.*, Mark Allan Grey, *The International* Crime *of Ecocide,* 26 CAL. W. INT'L L. J. 215, 215 (1995); Arthur H. Westing, *Proscription of Ecocide: Arms Control and the Environment,* 4 VIETNAM WAR AND INT'L LAW 283, 285 (1976); *Eradicating Ecocide, Closing the Door to Dangerous Industrial Activity: A Concept Paper for Governments to Implement Emergency Measures* 13 (2012), https://www.aph.gov.au/documentstore.ashx?id=14b03e25-353d-4564-8823-0da2ce0ebb07&subid=251311; Palarczyk, *supra* note 106, at 168.

182 Grey, *supra* note 181, at 222; Westing, *supra* note 181.

183 G. R. Sullivan, *Strict Liability for Criminal Offences in England and Wales Following Incorporation Into English Law of the European Convention on Human Rights*, *in* APPRAISING STRICT LIABILITY 195, 196 (Andrew P. Simester ed., Oxford Univ. Press 2005); Palarczyk, *supra* note 106, at 171.

184 Palarczyk, *supra* note 106, at 168.

185 Assemb. of State Parties, *Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report*, ICC-ASP/19/16, ¶ 178 (Sept. 30, 2020) ("The Investigation Division is the most severely under-resourced Division, having 87 less full-time staff than estimated to provide the basic needs of the Division.").

33f(1) of the Siracusa Draft Statute,[186] which greatly influenced the establishment of the RS, explicitly stated that "criminal responsibility under this Statute cannot be based on strict liability."[187] As pointed out by Ambos, this notion was ultimately reaffirmed at the Rome Conference, as the Drafters refrained from incorporating a strict liability approach into the RS.[188] Hence, the drafting history of the Rome Statute both explicitly and implicitly shows that international criminal law dissociates itself from the notions of strict liability.

b. An Alternative Approach

Nonetheless, completely eradicating a diminished fault standard may arguably exclude too many cases, considering that environmental damage often constitutes a disregarded risk. Since the RS already utilizes universally agreed-upon terms, a possible idea would be to examine whether the Rome Statute includes strict liability. The only provision within the RS that significantly deviates from the high general standard of "knowledge" is Article 28 RS.[189] Considering that the material elements of the proposed omissions liability is likewise based on Article 28(b) RS, a possible approach would be to additionally include the mental elements of Article 28(b) RS.

The mental element under Article 28(b) RS is fulfilled if the civilian superior either "knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes" (i.e. "knew or had reason to know.").[190]

The advantage of this mental element is that it is already established in international law and does not hinge on domestic terminology. Moreover, this mens rea standard would not just provide a foundation for omissions liability but would also offer an effective middle ground between the low threshold of strict liability and the rather restrictive requirement of "knowledge."

The IEP's strict liability approach of "recklessness" is purely subjective, as it requires neither awareness nor imputes knowledge based on objective facts.[191] The IEP's suggested strict liability approach generally focuses on risks that a person is not factually aware of but should have been aware of. In contrast, the "reason to know" standard is significantly more objective, as it does not capture acts that

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186 Members of the Comm. of Experts on the Int'l Crim. Ct., *Draft Statute for the International Criminal Court,* art. 18–22, U.N. Doc. A/CONF.183/2/Add.1, at 45–48 (July 1998).

187 *Id.* at 35.

188 Kai Ambos, *General Principles of Criminal Law in the Rome Statute,* 10 CRIM. L. F. 1, 20-1 (1999); *contra* Gerhard Werle & Florian Jeberger, *Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law,* 3 J. INT'L CRIM. JUST. 35, 52 (2005).

189 Anastacia Greene, *Mens Rea and the Proposed Legal Definition of Ecocide*, VÖLKERRECHTSBLOG (July 7, 2021), https:// voelkerrechtsblog.org/mens-rea-and-the-proposed-legal-definition-of-ecocide/; Minkova, *supra* note 39, at 80.

190 Rome Statute of the International Criminal Court, *supra* note 3, at art. 28.

191 Minkova, *supra* note 39, at 81; Heller, *supra* note 100.

should have been known, but which could have been known.[192] Hence, this paper argues, that the crime of ecocide should include a mens rea standard of "reason to know," which would apply to both acts and omissions. Consequently, it is asserted that one of the mental elements of ecocide is fulfilled if "the perpetrator consciously disregarded information which clearly indicated a high risk of environmental damage."

3. Intent

At the opposite end of the spectrum, some scholars argue in favor of direct intent.[193] Nonetheless, direct intent would undoubtedly set the cognitive threshold too high. Perpetrators of ecocide rarely act with the primary purpose of damaging the environment; the destruction of nature is generally merely a side effect, resulting from the direct goal of making a profit.[194] Since the environmental damage will generally constitute an indirect consequence of the offense, a mens rea standard of "knowledge" (i.e. indirect intent) would provide a middle ground between direct intent and negligence and would hence be more suited.

4. Knowledge

The question is, what degree of knowledge is necessary to establish the mens rea? The IEP requires knowledge of a "substantial likelihood" of environmental harm.[195] In contrast, Article 30 of the RS defines knowledge as the "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[196] Moreover, ICC jurisprudence generally requires evidence that the accused acted with "virtual certainty" that their actions would result in the commission of the crime.[197] Both the mens rea standard of the "substantial likelihood" and "virtual certainty" essentially require the accused to preemptively foresee the probability of his actions. While the standard of "substantial likelihood" is considerably vague and can be interpreted to require the mere awareness of a low risk, the standard of "virtual certainty" is impossible to reach. In the context of environmental damage, which in itself is already inherently difficult to predict, it

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192 For a critical approach, see Ambos*, supra* note 109, at 19.

193 Peter Stoett, *Ecocide as a Global Governance Issue: Between Transnational Environmental Crime and Environmental Justice,* LOYAL SUSTAINABILITY RSCH. CTR. 7 (2014); Richard Falk*, Environmental Warfare and Ecocide - Facts, Appraisal, and Proposals,* 4 BULL. OF PEACE PROPOSALS 80, 89 (1973).

194 *See generally* Higgins, *supra* note 148, at 251–66; Greene, *supra* note 1, at 33.

195 *Independent Expert Panel for the Legal Definition of Ecocide*, *supra* note 4, at 7.

196 Rome Statute of the International Criminal Court, *supra* note 3, at art. 30.

197 Prosecutor v. Jean-Pierre Bemba Gombo, ICC 01/05–01/08, Decision Pursuant to Article 61(7)(a) and (b), ¶ 362 (Jun. 15, 2009), https://www.icc-cpi.int/court-record/icc-01/05-01/08-424; Prosecutor v. Germain Katanga, ICC-01/04-01/07-3436-tENG, Judgment, ¶ 776 (Apr. 20, 2015), https://www.icc-cpi.int/court-record/icc-01/04-01/07-3436-teng.

can thus be argued that the mens rea should not be based on the degree of an anticipated probability but on the actual, factual knowledge of the damage itself.

Rather than applying subjective terms such as "likelihood" or "certainty," the imputation of knowledge should be established based on purely objective terms. Therefore, a suitable approach could be to apply the already existing mens rea standard under Article 30(2)(b) RS and hence to define knowledge as: "awareness that a consequence would occur in the ordinary course of events."

IV. A PROPOSED FRAMEWORK

In light of the preceding analysis, this paper proposes that a suitable definition of ecocide could be:

1. Ecocide is any act or omission that causes widespread, long-term, and severe damage to the environment, committed either with knowledge or reason to know.

2. For the purpose of paragraph 1:

a). "Omission" refers to a person's failure to take all necessary and reasonable measures within his or her power to prevent or repress the environmental damage, despite having had effective responsibility and control over the activities that resulted in the environmental damage.

b). "Widespread" refers to crosses state boundaries or is suffered by an entire ecosystem or species or a large number of human beings.

c). "Long-term" refers to damage that is irreversible, or where its natural recovery pertains for a time period that causes severe harm to the living conditions of an ecosystem's inhabitants.

d). "Severe" refers to damage that is of a similar nature and gravity to the following acts, inter alia:

aa). destroying or damaging ecosystems or wild animal habitats;

bb). destroying or damaging natural heritage;

cc). trafficking or dumping hazardous substances;

dd). releasing, emitting, or introducing harmful quantities of substances or energy into the air, water, or soil;

ee). causing or contributing to the large-scale emissions of greenhouse gases or the destruction of greenhouse gas sinks or reservoirs.

e). "Environment" refers to the earth, its biosphere, cryosphere, lithosphere, hydrosphere, and atmosphere, as well as outer space.

f). "Knowledge" refers to the awareness that a consequence would occur in the ordinary course of events.

g). "Reason to know" refers to consciously disregarding information which clearly indicated a high risk of environmental damage.