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Understanding Environmental Crimes Under International Law

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Environment: From An Anthropocentric To An Ecocentric

Perspective

In recent years, the legal discourse surrounding environmental protection has undergone a significant paradigm shift from a predominantly anthropocentric viewpoint, prioritizing human benefits, to an ecocentric perspective that recognizes the intrinsic value of nature itself. This transformation, with its global impacts, reflects crises of climate change, loss of biodiversity, and resource depletion. It also demonstrates an increasing global awareness of the environment's pivotal role not just as a backdrop for human activity but as a fundamental entity whose well-being is essential for the sustained existence of all life forms.

Once a marginal field of legal practice, environmental law has expanded into a domain of crucial importance at international, regional, and national levels. It now comprises a comprehensive array of statutes, regulations, and case law that aims not only to mitigate the damage caused by human actions but also increasingly acknowledges the intrinsic value of preserving the environment.

Now, more than ever, the legal community actively navigates the emerging legal landscape, prioritizing the sustainability of natural ecosystems and the importance of climate change's causes and consequences. Three international tribunals have provided judgments and advisory opinions on how climate change has affected human rights: the International Court of Justice,¹ the International Tribunal for the Law of the Sea,² and the Inter-American Court of Human Rights.³ This article will explore two additional significant perspectives regarding environmental protection.

The Origin Of The Term 'Ecocide'

The universal legal vocabulary is filled with terms that precisely define criminal offenses related to violent behavior against life (e.g. homicide, genocide). But what about when nature is the victim? How should one proceed in the face of deliberate and massive ecosystem destruction within that territory, potentially fatal to living species, including humans and animals? While environmental damage is already a crime in most countries, varying in severity upon conviction, there is a growing consensus on the need to broaden the legal scope to include more severe environmental crimes, even in wartime: ecocide.

The term "ecocide" was not conceived in contemporary discourse; its origins can be traced back several years to describe the environmental devastation in Vietnam caused by the US military's use of "Agent Orange."⁴ In 1970, the *New York Times* used it for the first time in the article "...A Plea to Ban 'Ecocide'". In 1973, Professor Richard Falk authored the first article on ecocide in legal history, proposing a treaty to outlaw it. It is fair to say he is the father of ecocide as an international legal concept.⁵

The term "ecocide" is composed of two words: the prefix "eco-", which has its roots in the ancient Greek word "oikos" and the Latin word "oeco", both meaning "home", "habitat", "environment", and the suffix "-cide", which derives from the Latin verb "caedere", meaning "to kill".

There are few countries with domestic ecocide laws⁶ and comprehensive strategies essential for addressing the significant challenges posed by environmental degradation. The new Mexican bill looks to criminalize "any unlawful or wanton act committed with the knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment".⁷ If passed, anyone found guilty of ecocide could be jailed for up to 15 years and fined as much as 1,500 pesos (USD 70) per day.⁸ Last February, Belgium's Federal Parliament approved a completely renewed Penal Code, which—for the first time in Europe—includes recognition of the crime of ecocide at national and international levels.⁹

The Fifth Core Crime of the Rome Statute of the International Criminal Court The campaign to classify ecocide as an international crime was predominantly led by Polly Higgins, a British lawyer and activist who passed away in 2019. In 2010, Higgins advocated the United Nations International Law Commission to recognize ecocide, defined as "*the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished*".¹⁰ Following Higgins' death, the non-governmental organization she founded, Stop Ecocide International,¹¹ continued to campaign for ecocide legislation and convened a working group to draft a definition.

In June 2021, the Independent Expert Panel for the Legal Definition of Ecocide ("IEP") defined ecocide as the "*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.*" The objective of the IEP was to establish a definition that could serve as the basis for an amendment to the Rome Statute of the International Criminal Court ("Rome Statute"), ¹² and in the future, ecocide could be listed alongside genocide as an international crime.

The Rome Statute enumerates four core crimes: genocide, crimes against humanity, war crimes, and crimes of aggression. ¹³ The proposal to establish the new article 8-bis for ecocide as a fifth international crime is seen as introducing, according to the IEP, a novel and effective legal instrument to safeguard and preserve the environment of our shared planet.

Currently, only one provision in the Rome Statute explicitly criminalizes environmental damage. Article 8(2)(b)(iv) prohibits the intentional launching of an attack in the knowledge that such attack would cause "*widespread, long-term and severe damage to the natural environment*" [disproportionate attacks] and that would be excessive to the military advantage anticipated. Moreover, this restrictive article applies only to international armed conflicts, constituting a significant limitation given that so much environmental damage occurs outside of international armed conflicts and during peacetime. Until 2023, this crime was never prosecuted. ¹⁴

Does international criminal law require ecocide to be recognized as a crime per se?

Ecocide, the destruction of the environment, is a concept that should be considered a crime. However, its definition is not straightforward, presenting a complex set of challenges. The term "ecocide" echoes "genocide", suggesting an intent to eliminate specific groups, which is reflected in the requirements for a protected group and specific intent. Yet, the definition of ecocide lacks this "group-like" aspect, and more significantly, the *mens rea* of ecocide is much lower than the specific intent. ¹⁵

This definition of the crime of ecocide is characterized by inherent ambiguity owing to a variety of factors. Regarding the actus reus, ecocide uses a hybrid conjunctive/disjunctive test ("severe and either widespread or long-term damage to the environment"), while Article 8(2)(b)(iv) is strictly conjunctive ("*widespread, long-term and severe damage to the natural environment*").

On the one hand, a benefit of criminalizing environmental damage at an international level is derived from the relative independence and impartiality of the International Criminal Court (ICC).

Corporations causing and benefiting from environmental damage could exert political influence at a national level. As noted in an interesting academic analysis, "*domestic courts can be hampered by corruption and political interests. Ecocide cases will undoubtedly tend to involve powerful government officials, or corporate leaders, who likely have considerable influence to intimidate, sway or suppress prosecutions.*" ¹⁶

On the other hand, the ICC is subject to inherent constraints in its operational capacities. Criticisms commonly levied against the prosecution mechanisms of the ICC, such as bureaucratic inefficiencies and the challenges stemming from the most influential countries that are not signatories to the Rome Statute, are equally pertinent when considering the prosecution of ecocide.

However, on September 9, 2024, Vanuatu, Fiji and Samoa jointly submitted a proposal to amend the Rome Statute of the International Criminal Court to the UN Secretary-General and the Working Group on Amendments of the Assembly of States Parties (ASP). The three Pacific Island States call upon the international community to add a new crime to the canon of internationally outlawed atrocities – the crime of "ecocide". The issue would be contingent upon a favorable vote from a two-thirds majority of the ICC Assembly of States Parties. ¹⁷

Moreover, on December 18, 2024, the ICC prosecutor initiated a second round of consultations on the Draft Policy on Environmental Crimes under the Rome Statute. The policy aims to establish a systematic approach to addressing such crimes, enhancing transparency and supporting national authorities. Grounded in the Rome Statute and international law, it draws on ICC jurisprudence to

in the Rome Statute and international law, it draws on ICC jurisprudence to clarify its framework. Launched in February 2024, the initiative has already incorporated feedback from over 80 submissions, with this new round seeking further input. The ICC prosecutor highlighted the critical role of the environment in human life and the need for a robust framework to address crimes like those seen in Darfur. ¹⁸

The Landmark Case: Climate Change and Human Rights

For completeness, mentioning a historic ruling for the climate is necessary. On March 29, 2023, around 2,000 women above the age of 64, a part of KlimaSeniorinnen Schweiz (Senior Women for Climate Protection Switzerland), filed a case against Switzerland in the European Court of Human Rights (ECtHR) – that became the first climate complaint. On April 9, 2024, the Grand Chamber of ECtHR established an important legal precedent. The European Convention on Human Rights (ECHR) does not expressly recognize a right to a healthy environment. However, the ECtHR determined that Switzerland did not fulfill its "positive obligations" under the ECHR concerning climate change, citing a violation of Article 8, the right to respect for private and family life, and Article 6(1), the right to a fair trial within their country. ¹⁹ Still, it did not recognize a violation of Article 2, about the right to life.

The ECtHR's ruling carries profound implications. Switzerland should take more significant action to reduce emissions, including updating its 2030 emission reduction targets to align with the Paris Agreement's goal of limiting global warming to 1.5°C. Additionally, it was noted that the legal action by the applicant association was dismissed by an administrative authority and subsequently by the national courts due to inadequate considerations, with no further legal recourse available under Swiss law. The ECtHR ordered Switzerland to compensate the association €80,000 within three months. ²⁰

This ruling is of immense significance, marking a pivotal moment in legal history. It is the first time the ECtHR has recognized the enforceability of the right to a climate in the context of human rights, a stance also already taken by the Inter-American Court of Human Rights. ²¹

Conclusion

These developments in international law herald a future in which legal mechanisms could not only prevent environmental degradation but also enforce the accountability essential for ensuring the sustainability of our planet for future generations.

Endnotes

¹ *Obligations of States in Respect of Climate Change*, ICJ, <https://www.icj-cij.org/case/187>.

² *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (Dec. 12, 2022), <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisoryopinion-submitted-by-the-commission-of-small-island-states-onclimate-change-and-international-law-request-for-advisory-opinionsubmitted-to-the-tribunal/>

³ *Advisory Opinions*, INTER-AMERICAN COURT OF HUMAN RIGHTS, https://www.corteidh.or.cr/opiniones_consultivas.cfm?lang=en

⁴ *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* (Washington Academies Press, 1994), <https://www.ncbi.nlm.nih.gov/books/NBK236347>; David Zierler, *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment* (University of Georgia Press, 2011).

⁵ Richard A. Falk, *Environmental Warfare and Ecocide—Facts, Appraisal and Proposals*, 4 BULLETIN OF PEACE PROPOSAL (1973), <https://journals.sagepub.com/doi/abs/10.1177/096701067300400105>

⁶ The countries with domestic ecocide laws are France (2021), Georgia (1999), Armenia (2003), Ukraine (2001), Belarus (1999), Ecuador (2008; 2014), Kazakhstan (1997), Kyrgyzstan (1997), Moldova (2002), Russia (1996), Tajikistan (1998), Uzbekistan (1994), Vietnam (1990).

⁷ Isabella Kaminski, *Growing number of countries consider making ecocide a crime*, GUARDIAN, Aug. 26, 2023, <https://www.theguardian.com/environment/2023/aug/26/growing-number-ofcountries-consider-making-ecocide-crime>.

⁸ *Id.*

⁹ Maithé Chini, *Belgium becomes first in EU to recognize ecocide as international crime*, THE BRUSSELS TIME, Feb. 23, 2024, <https://www.brusselstimes.com/937229/belgium-becomes-first-in-eu-torecognise-ecocide-as-international-crime-tbtb>

¹⁰ Polly Higgings, *EARTH IS OUR BUSINESS: CHANGING THE RULES OF THE GAME* (2012).

¹¹ Stop Ecocide International (SEI) was co-founded in 2017 by pioneering barrister

Polly Higgins and current Executive Director Jojo Mehta. See

<https://www.stopecocide.earth/>

¹² Rome Statute of the International Criminal Court (July 17, 1998), 2187 U.N.T.S. 3.

¹³ *Id.* at Arts. 6-8-*bis*.

¹⁴ Ukraine recently opened two criminal procedures against Russia. The first for having blown up the Nova Kakhovka dam (30 meters in height and two kilometres in length) on the Dnipro River. Its collapse on June 6 led to 230 square miles of territory flooding. The second is causing the deaths of thousands of dolphins in the Black Sea.

¹⁵ 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/>

¹⁶ Anastacia Greene, 'The Campaign to Make Ecocide an International Crime: Quixotic Quest Or Moral Imperative' (2019) 30 FORDHAM ENVTL L REV 1, 45 (2019).

¹⁷ *Mass destruction of nature reaches International Criminal Court as Pacific island states propose recognition of "ecocide" as international crime*, STOP ECOCIDE INTERNATIONAL, <https://www.stopecocide.earth/2024/mass-destruction-of-nature-reaches-international-criminal-court-icc-as-pacific-island-states-propose-recognition-of-ecocide-as-international-crime>; Daniel Bertram, *Should Ecocide be an International Crime? It's Time for States to Decide*, EJIL:Talk! (Sept. 12, 2024), <https://www.ejiltalk.org/should-ecocide-be-an-international-crime-its-time-for-states-to-decide>.

¹⁸ *ICC Office of the Prosecutor launches second public consultation on a policy initiative to advance accountability for environmental crimes under the Rome Statute*, ICC (Dec. 18, 2024), <https://www.icc-cpi.int/news/icc-office-prosecutor-launches-second-public-consultation-policy-initiative-advance>.

¹⁹ *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, Application no. 53600/20, ¶¶292, 316 (ECtHR, April 9, 2024), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22001-233206%22%5D%7D>.

²⁰ *Id.*, ¶650.

²¹ On January 9, 2023, Chile and Colombia signed a joint request to the Inter-American Court of Human Rights to clarify State obligations in the context of the climate emergency.



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