

Ricerche giuridiche
Collana diretta da A. Celotto, F. Liguori, L. Zoppoli

**CLIMATE CHANGE,
HUMAN RIGHTS
AND INTERNATIONAL MIGRATION**

**CAMBIAMENTO CLIMATICO,
DIRITTI UMANI
E MIGRAZIONI INTERNAZIONALI**

Editors/Curatori:

**Fabio Amato, Viola Carofalo,
Adele Del Guercio, Anna Fazzini,
Valentina Grado, Emma Imparato,
Anna Liguori**

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Ricerche giuridiche

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ANNA FAZZINI*

ECOCIDE AS AN INTERNATIONAL CRIME: SOME REFLECTIONS

SUMMARY: 1. Introduction. – 2. The international crime of ecocide: a brief *excursus*. – 3. The 2024 request of Vanuatu, Samoa and Fiji and the 2021 International Expert Panel's definition of ecocide: main legal issues at stake. – 3.1 The requirement of unlawful conduct. – 3.2 The *mens rea* of ecocide: the *dolus eventualis* standard. – 4. Conclusions.

1. Introduction

On 9 September 2024, Vanuatu, with co-sponsorship from Fiji and Samoa, submitted a proposed amendment to the Rome Statute calling for the inclusion of ecocide as an international crime¹. Prior to that, Vanuatu had already submitted a similar amendment proposal in 2019². The event, welcomed with great interest by commentators³, has reignited attention on the long-running debate over the criminalisation of ecocide⁴. The proposal of the Island States follows decades of legal

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¹ See the proposal at the following link: <https://ecojurisprudence.org/wp-content/uploads/2024/11/Vanuatu-Proposal-Rome-Statute.pdf>.

² See at the following link: https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/GD.VAN.2.12.pdf.

³ See, *inter alia*, D. BERTRAM, *Should Ecocide be an International Crime? It's Time for States to Decide*, in "Ejil:Talk!", September 12, 2024, <https://www.ejiltalk.org/should-ecocide-be-an-international-crime-its-time-for-states-to-decide/>; D. ROBINSON, *Ecocide: A Call to Discuss Some Hard Conundrums*, in "Ejil:Talk!", November 28, 2024 <https://www.ejiltalk.org/ecocide-a-call-to-discuss-some-hard-conundrums/>; R. SHARMA, *Ecocide as the Fifth International Crime: Is the Rome Statute Compatible with Ecocide?*, in "Völkerrechtsblog", January 16, 2025, <https://voelkerrechtsblog.org/ecocide-as-the-fifth-international-crime/>.

⁴ For a more exhaustive discussion on the proposals of ecocide criminalisation, see, among others, A. GAUGER, M. P. RABATEL-FERNEL, L. KULBICKI, D. SHORT, P.

discussion on the issue, as well as more recent and significant developments of national legislation⁵. In the context of growing awareness of the negative effects of climate emergency and environmental degradation, criminal law is increasingly seen as a useful tool to counteract environmental devastation. As a matter of fact, in recent years, several draft laws on ecocide have been submitted to national parliaments⁶; and, within the European context, the recent EU “Directive on the protection of the environment through criminal law” of 2024⁷ has condemned conduct comparable to ecocide.

The definition of ecocide that inspired these proposals aligns with the one proposed by Vanuatu, Fiji and Samoa in their amendment request; namely, the definition of ecocide developed by the International Expert Panel (IEP) in 2021⁸, which has since gained political and legal traction.

The key point of the proposal is the recognition of ecocide as an *independent* crime, according to which ecocide would become the fifth

HIGGINS, *Ecocide is the missing 5th Crime Against Peace*, Human Rights Consortium, London, 2013; A. GREENE, *The campaign to make ecocide an international crime: quixotic quest or moral imperative?*, in “Fordham Environmental Law Review”, 2019, p. 1; E. FRONZA, *Sancire senza sanzionare? Problemi e prospettive del nuovo crimine internazionale di ecicidio*, in “La legislazione penale”, 2021, p. 1; A. VALLINI, *Ecicidio: un giudice penale internazionale per i “crimini contro la terra?”*, in “Legislazione penale”, 17 marzo 2021, p. 1; V. MOLTENI, *La lunga strada della criminalizzazione dell'ecicidio: questioni giuridiche e dinamiche di effettività normativa e sociale*, in “Diritto Penale Contemporaneo”, 4/2021; More recently, F. VALENCIA ARIAS, A.K. REINEFELD, *50 Years of the Proposed Crime of Ecocide: Challenges Regarding its Definition and Possible Answers*, in “International Criminal Law Review”, 2024, p. 1.

⁵ D. BERTRAM, *Should Ecocide be an International Crime?*, cit.

⁶ For an overview of the laws and proposed laws to criminalise ecocide at a national level, see the following link: <https://ecocidelaw.com/existing-ecocide-laws/>. The latter will also be addressed in the following section of this article.

⁷ Directive 2024/1203 of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, of 11 April 2024, <https://eur-lex.europa.eu/eli/dir/2024/1203/oj>.

⁸ Independent Expert Panel for the Legal Definition of Ecocide. Commentary and Core Text, June 2021, <https://it.stopecocide.earth/legal-definition>.

international crime under ICC jurisdiction. There are essentially two main arguments underlying this choice⁹.

The first relates to the need to overcome the limitations imposed by Article 8(2)(b)(iv) of the Rome Statute, which recognises environmental damage as a war crime. More specifically, this provision applies to military attacks launched in the knowledge that they 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”¹⁰. This rule is clearly limiting, since the majority of severe environmental destructions occur in peacetime. Moreover, as will be discussed later, it sets overly stringent requirements that are ill-suited to addressing the current cases of environmental devastation.

Secondly, the proposal for an independent crime was formulated because the other existing crime categories, (genocide, Art. 6; crimes against humanity, Art. 7; crime of aggression, Art. 8 bis), were deemed unsuitable to include “purely” environmental damage¹¹. Given the inherently anthropocentric character of the Rome Statute, these three crimes require some form of “human harm”: genocide, which includes “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”¹²; crimes against humanity, consisting in “acts when committed as part of a widespread or systematic attack directed against any civilian population”¹³; the crime of aggression, which means “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State”¹⁴. According to the IEP and as clarified by Vanuatu¹⁵, in the de-

⁹ As highlighted in Vanuatu's amendment proposal, which incorporates the arguments developed by the IEP (see footnotes 1 and 8 for the respective documents); on this point see also the reflections of C. Voigt, who was part of the IEP: C. VOIGT, “*Ecocide*” as an international crime: Personal reflections on options and choices, in “Ejil:Talk!”, July 2021, <https://www.ejiltalk.org/ecocide-as-an-international-crime-personal-reflections-on-options-and-choices/>.

¹⁰ *Rome Statute of the International Criminal Court*, art. 8(2)(b)(iv).

¹¹ C. VOIGT, “*Ecocide*” as an international crime, cit.

¹² *Rome Statute of the International Criminal Court*, art. 6.

¹³ *Ivi*, art. 7.

¹⁴ *Ivi*, art. 8bis.

termination of ecocide, the impact on humans, although considered, should not be *an exclusive condition*. The proposed criminalisation of ecocide, in fact, goes in the direction of including damage to the environment *per se*, adopting a more, but not exclusive, ecocentric approach¹⁶.

After presenting a historical overview of the debate over the criminalisation of ecocide, this article will examine the proposed definition of ecocide, highlighting some of the more debated aspects, particularly those related to the unlawfulness of conduct and the “mental element”. Finally, it will offer some reflections on the usefulness and importance of recognising ecocide as a crime, in the face of the global emergency imposed by climate change and environmental degradation.

2. *The international crime of ecocide: a brief excursus*

The term “ecocide” was coined in the early 1970s by bioethicist Arthur W. Galston to denounce the environmental damage caused in the Vietnam War by the US military, particularly through the use of the chemical weapon “Agent Orange” and other herbicides in “Operation Ranch Hand”¹⁷.

Subsequently, Galston’s call for an international agreement to ban ecocide¹⁸ was echoed in institutional contexts. In particular, it was brought to the attention of the United Nations (UN) Conference on the Human Environment, which was held in Stockholm in 1972, once again to denounce the environmental impact of the Vietnamese con-

¹⁵ See the Vanuatu proposal (footnote 1).

¹⁶ C. VOIGT, “*Ecocide*” as an international crime, cit.; the reason why this is not an entirely eco-centric proposal will be discussed in paragraph 4.1.

¹⁷ D. 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.

¹⁸ Professor Galston made a plea at the Conference on War and National Responsibility in Washington, DC, in 1970, see New York Times, 26 February 1970, <https://www.nytimes.com/1970/02/26/archives/and-a-plea-to-ban-ecocide.html>.

flict¹⁹. The issue was further discussed at the People's Summit, a side event to the conference, where the Working Group "on the Law against Genocide and Ecocide" was formed²⁰. The latter drafted a proposal for an International Convention on the Crime of Ecocide, which was later submitted to the UN in 1973. Professor Falk, a member of the Working Group, was one of the first to formally outline a definition for "ecocide"²¹. In this context, it is worth noting that Article 1 of the abovementioned draft Convention defined ecocide, "committed *in time of peace as well as in time of war*, as a crime under international law". Hence, the concept of ecocide was understood here to be separate from the context of war. However, the notion retained a strong anthropocentric connotation, while remaining closely linked to the crime of genocide. In this framework, ecocide was to be understood as a specific case of genocide, occurring when the destruction of a population was caused by ecological devastation²². The subsequent work of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which was tasked with veri-

¹⁹ It was Swedish Prime Minister Olof Palme who described the events of the Vietnam War as "ecocide"; see Prime Minister's Statement of 6 June 1972, <https://olofpalme.arbark.se/en/documents-in-various-languages/>.

²⁰ See A. GREENE, *The Campaign to Make Ecocide an International Crime*, cit., p. 11.

²¹ See R.A. FALK, *Environmental Warfare and Ecocide: Facts, Appraisal and Proposals*, in "Belgian Review of International Law", 1973, pp. 1-27; the text of the International Convention on the Crime of Ecocide can be found at the end of Falk's contribution. The definition of ecocide, listed in Article 2 of the draft convention, reads: "ecocide means any of the following acts committed with intent to disrupt or destroy, in whole or in part, a human ecosystem: a) the use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other; b) the use of chemical herbicides to defoliate and deforest natural forests for military purposes; c) the use of bombs and artillery in such quantity, density, or size as to impair the quality of soil or the enhance the prospect of diseases dangerous to human beings, animals, or crops; d) the use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes; e) the use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war; f) the forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives".

²² See V. MOLTENI, *La lunga strada della criminalizzazione dell'ecicidio*, cit., p. 209 ff.

fying the effectiveness of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, also pointed in this direction. In other words, the Sub-Commission considered the possibility of considering ecocide as an international crime similar to genocide. The study published by the Sub-Commission in 1978²³ was later updated by that of Special Rapporteur Whitaker in 1985²⁴. However, the proposal eventually failed, and despite the attention given to the issue, ecocide was not recognised as a crime²⁵.

During the preparatory work for the Rome Statute, important steps forward were taken. Specifically, in the draft elaborated by the International Law Commission in 1991, the “Draft Code of Crimes Against the Peace and Security of Mankind” included an autonomous crime under Art. 26, which condemned “Wilful and Severe Damage to the Environment”²⁶. Notably, this draft reflected a more ecocentric interpretation of the notion, focusing on the environment as the object of the damage without considering the effects on the individual²⁷. However, in view of the final vote on the draft by the UN General Assembly in 1996, the proposal did not gain sufficient political support

²³ N. RUHASHYANKIKO, *Study of the question of the prevention and punishment of the crime of genocide*, Geneva, UN 1978, <https://digitallibrary.un.org/record/663583?v=pdf&ln=fr#files>.

²⁴ B. WHITAKER, 1985, *Review of further developments in fields with which the Sub-Commission has been concerned. Revised and updated report on the question of the prevention and punishment of the crime of genocide*, Geneva, UN 1985, <https://digitallibrary.un.org/record/108352?v=pdf>.

²⁵ Probably because juxtaposing the two concepts would have impaired the effectiveness of the Convention against Genocide, see V. MOLTENI, *La lunga strada della criminalizzazione dell'ecicidio*, cit., p. 210; For a more detailed discussion on the genocide-ecocide nexus and the possibility of considering the latter as a mode of implementation of genocide, see the scholarly work published by M. CROOK, D. SHORT: *Marx, Lemkin and the genocide-ecocide nexus*, in “International Journal of Human Rights”, 2014, p. 298; L. NATALI, R. WHITE, *The ecocide-genocide nexus: a green criminology per spective*, in “Rassegna Italiana di Criminologia”, 2019, p. 186.

²⁶ See *Yearbook of the International Law Commission* 1991, Volume II, Part Two, UN New York and Geneva 1994, A/CN.4/SER.A/1991/Add.I (Part 2), p. 79 ff.

²⁷ V. MOLTENI, *La lunga strada della criminalizzazione dell'ecicidio*, cit., p. 210.

and Article 26 was ultimately expunged from the final text²⁸. Thus, as anticipated²⁹, the Rome Statute, which was adopted in 1998, explicitly considers the natural environment only in the context of Article 8(2)(b)(iv), which addresses environmental war crimes.

Renewed interest in the issue arose following the proposal to amend the Rome Statute by introducing the crime of ecocide as the fifth international crime, put forward by activist and lawyer Polly Higgins in 2010³⁰. Higgins defined ecocide 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”³¹. As a result, Higgins' proposal was intended to qualify ecocide as a strict liability offence, which was judged by many to be irreconcilable with the Rome Statute³². Nonetheless, Higgins' work has sparked significant new activism over the last decade, as several civil society initiatives³³ have been established, most notably the creation of “Stop

²⁸ The possibility of considering ecocide as an autonomous crime was not actually taken into consideration in the discussion and the Commission was only invited to reflect on the possibility of examining the question in the context of war crimes or crimes against humanity (*Ibidem*). As Professor Christian Tomuschat argued, it is possible that concerns about the impact of nuclear tests and the risks associated with atomic energy influenced this decision, so that the relevance of environmental damage was limited to the context of war (C. Tomuschat, (1996). *Crimes Against the Environment*, in “Environmental Policy and Law”, Vol. 26, 6, 1996, p. 242).

²⁹ See the introduction to this article.

³⁰ See P. HIGGINS, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet*, Shephard-Walwyn (Publishers) Ltd, London, 2010; Her arguments were then further developed in *Earth is our Business. Changing the Rules of the Game*, Shephard-Walwyn (Publishers) Ltd, London, 2012; P. HIGGINS, D. SHORT, N. SOUTH, *Protecting the planet: a proposal for a law of ecocide*, in “Crime Law and Social Change”, Vol. 59, No. 1, 2013, p. 251.

³¹ P. HIGGINS, *Earth is our Business. Changing the Rules of the Game*, cit., Chapter 1.

³² D. BERTRAM, *Should Ecocide be an International Crime?*, cit.

³³ By way of example, the End Ecocide on Earth movement was established in 2012 with the aim of supporting the recognition of ecocide by the European Parliament; in 2016, the movement drafted a document to encourage the Member States of the Rome Statute to call for the introduction of the crime of ecocide, <https://www.endecocide.org/en/amending-the-rome-statute/>.

Ecocide International” in 2017³⁴. The “Stop Ecocide” Foundation, in particular, was the commissioning body of the Independent Expert Group on the legal definition of ecocide, which completed its work in 2021³⁵.

Within the institutional context, developments at the European regional level are also remarkable. As anticipated³⁶, the recent approval of “Directive 2024/1203 of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC”, issued on 11 April 2024, is also worthy of note. The Directive condemns conduct comparable to ecocide. In particular, art. 3 specifies that such conduct constitutes “qualified” offences (i.e., more severe and therefore deserving of harsher punishment) if it causes (a) the destruction of, or widespread and substantial damage, which is either irreversible or long-lasting, to an ecosystem of considerable size or environmental value or a habitat within a protected site, or (b) widespread and substantial damage, which is either irreversible or long-lasting, to the quality of air, soil or water. The approval of the directive comes, *inter alia*, as a result of several previous initiatives at the European level³⁷ as well as important developments at the national level. In this respect, France in

³⁴ See the website: <https://it.stopecocide.earth/>.

³⁵ See footnote no. 8.

³⁶ See footnote no. 7.

³⁷ In 2021, with Resolution 2020/2208(INI)[1], the European Parliament called for the introduction of the crime of ecocide under the Rome Statute. Subsequently, with Resolution 2020/2027(INI), it called on the Commission to consider the relevance of ecocide for EU legislation and diplomacy, including the recognition of the notion as an international crime. In December 2021, the European Commission presented a “Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC⁶⁵”, which states that “where an environmental crime causes substantial and irreversible or lasting damage to an entire ecosystem, this should constitute an aggravating circumstance due to its seriousness, including in cases comparable to ecocide”; see *Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC*, p. 24, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0851; On this point V. MOLTENI, *La lunga strada della criminalizzazione dell'ecicidio*, cit.

2021, with Law No. 021-1104 on “Climate Change and Resilience”³⁸, and Belgium in 2022, with a penal reform³⁹, have already introduced criminal sanctions for large-scale environmental damage. These two countries, the only ones in the European context to have adopted such reforms so far, have joined the numerous States in Latin America and West Asia that are progressively reforming their criminal justice systems to criminalise ecocide or comparable conduct⁴⁰.

3. The 2024 request of Vanuatu, Samoa and Fiji and the 2021 International Expert Panel's definition of ecocide: main legal issues at stake

As specified in a press release by Stop Ecocide⁴¹, the amendment proposal put forward by the Pacific Island States is essentially based on the work of the 2021 IEP. Likewise, the definition of ecocide submitted for the ICC's attention is the one developed by the IEP, according to which:

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 acts⁴²

³⁸ See Law 2021-1104 of 22 August 2021 on fighting climate change and strengthening resilience to its effects.

³⁹ For more details, see D. BERTRAM, *Ecocide à la Bruxelloise*, in “Verfassungsblog”, 09 March 2024, <https://verfassungsblog.de/ecocide-a-la-bruxelloise/>.

⁴⁰ In addition to Vietnam, which was the first State to codify ecocide in its domestic law in 1990, these include: Russia, Georgia, Armenia, Ukraine, Belarus, Kazakhstan, Kyrgyzstan, Moldavia, Tajikistan, Uzbekistan, Chile, Ecuador. See the list of Countries here: <https://ecocidelaw.com/existing-ecocide-laws/>.

⁴¹ See the press release *Mass destruction of nature reaches International Criminal Court (ICC) as Pacific Island states propose recognition of “ecocide” as international crime*, 9 September, on the website <https://www.stopecocide.earth/>.

⁴² Independent Expert Panel for the Legal Definition of Ecocide. Commentary and Core Text June 2021, <https://it.stopecocide.earth/legal-definition>.

Hence, the proposal aims to include ecocide as a fifth international crime under a new provision, Art. 8 ter. The study prepared by the IEP defines the terms of the definition as follows⁴³:

- a. "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
- b. "Severe" means 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;
- c. "Widespread" means 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;
- d. "Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;
- e. "Environment" means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.

With regard to the material element of ecocide, it is worth noting that the acts falling within the scope of the rule are not specified. As a matter of fact, providing a list of acts was considered too limiting, if not also risky, due to the possibility that it could implicitly "justify" acts that were not explicitly included in the list⁴⁴. The definition, on the other hand, seems to be more flexible and abstract, aiming to cover a wide range of possible *unlawful* or *wanton* acts capable of causing environmental damage qualified as "serious and widespread" or "serious and long-term". Two disjunctive thresholds are here identified, which are in contrast to the conjunctive threshold provided for environmental damage in the context of war crimes under Art. 8(2)(b)(iv)⁴⁵. This implies that, while the requirement of seriousness is

⁴³ *Ibidem*.

⁴⁴ C. VOIGT, "Ecocide" as an international crime, cit.

⁴⁵ *Ibidem*; according to art. 8(2)(b)(iv) of the Rome Statute, the acts condemned include attacks launched with the knowledge that they will cause "widespread, long-

always necessary, the presence of a spatial (“widespread”) or temporal (“long-term”) dimension of the damage – and not necessarily both – is considered sufficient⁴⁶. It is therefore understandable that a less rigorous threshold has been taken into consideration for the definition of ecocide, one more suited to the specific challenges posed by environmental destruction. However, in the opinion of some⁴⁷, the IEP’s wording fails in any case to adequately lower the threshold for determining damage, while still maintaining a high standard of proof.

A “novelty” is the introduction of the definition of “environment” (in para e) borrowed from earth science and adapted to the legal context (the environment not being a legally defined concept in international law⁴⁸). The influence of an ecosystem approach also emerges in the definitions of “severe”, “widespread” and “long-term”, where emphasis is placed on the “elements” of the environment (para b), their interconnectedness (para c), and the concepts of resilience and irreversible damage (para d).

This article, however, focuses on the two aspects of the definition that have been most debated. These are the so-called “unlawfulness requirement”⁴⁹, namely, the inclusion in the definition only of those acts considered unlawful in international or national law; and the question of the *mens rea* of ecocide. Despite a general appreciation for the work of the IEP⁵⁰, the choices made on these aspects have been criti-

term *and* severe damage to the natural environment”; the formulation proposed by the IEP, on the other hand, is more in line with the use in the *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* (ENMOD), where the thresholds are completely disjunctive.

⁴⁶ C. VOIGT, “Ecocide” as an international crime, cit.

⁴⁷ R. SHARMA, *Ecocide as the Fifth International Crime*, cit.

⁴⁸ With the exception of the statement by the International Court of Justice in its advisory opinion on the *legality of the threat or use of nuclear weapons*, see C. VOIGT, “Ecocide” as an international crime, cit.

⁴⁹ On this issue see D. ROBINSON, *Ecocide: Puzzles and Possibilities*, in “Journal of International Criminal Justice”, No. 2, Vol. 20, 2022, pp. 313–347.

⁵⁰ For critical positions regarding the possibility of criminalising ecocide, see instead E. CUSATO, E. JONES, *The ‘imbroglio’ of ecocide: A political economic analysis*, in “Leiden Journal of International Law”, 37, 2024, p. 42–61.

cised in the doctrine, often for being conservative and unambitious⁵¹. As will be argued below, they reflect the need to propose a pragmatic and realistic definition, which does not overturn established legal concepts on the subject and can garner as much political support as possible.

3.1 *The requirement of unlawful conduct*

An important issue regarding ecocide relates to the fact that, unlike other recognised international crimes, much of the conduct causing environmental damage is not, if not only partially, prohibited by international or national law. From this perspective, it becomes complex to address those acts that are considered lawful but can still cause severe, widespread, or long-lasting environmental damage.

In this regard, the definition proposed by the IEP does not embrace an “impact only” criterion⁵², which would criminalise any act causing a given environmental damage. Rather, it envisages a “requirement of unlawfulness”, effectively capturing only the most irresponsible conduct, in line with the ICC's mandate to prosecute “the most serious crimes of international concern”⁵³, but also for reasons of clarity, legitimacy and legal effectiveness⁵⁴. To develop a definition of ecocide that would be both effective and accepted by the community of States Parties to the Statute, the IEP distinguished between unlawful and lawful acts that cause environmental devastation.

The definition of ecocide includes “unlawful or wanton acts”, where “wanton” refers to a “reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated”. When these thresholds are met, the definition unequivocally encompasses wrongful acts. For lawful acts, on the other hand, the decisive element for their criminalisation was determined to

⁵¹ K. J. HELLER, *Skeptical Thoughts on the Proposed Crime of “Ecocide” (That Isn’t)*, in “OpinioJuris”, 2021, <https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/>.

⁵² D. Robinson frames the argument in these terms, see D. ROBINSON, *Ecocide: A Call to Discuss Some Hard Conundrums*, cit.

⁵³ As established by art. 1 of the Rome Statute.

⁵⁴ C. VOIGT, “*Ecocide*” as an international crime, cit.

be the “voluntariness” of the act, linked to an additional threshold of unjustifiability⁵⁵; namely excessive disproportionality in relation to the social and economic benefits that the act would cause. A proportionality test is hence introduced, similar to the one applied for environmental damage in the context of war crimes. In this respect, under Article 8 (2) (b) (iv), it is required that the perpetrator is subjectively aware that an attack will cause excessive collateral damage to the natural environment “in relation to the concrete and direct overall military advantage anticipated”.

While the next section addresses the mental element of the crime, this one highlights the consequences of introducing the unlawfulness requirement in the definition of ecocide. Specifically, the proposal acknowledges that certain acts may cause significant harm to the environment but cannot be criminalised if justified by economic and social development considerations.

The position adopted by the IEP has attracted considerable criticism. Several authors have argued for a more progressive proposal that would criminalise all serious damage to the environment without exception⁵⁶. This formulation has also been criticised for its anthropocentric perspective⁵⁷. In particular, if the IEP’s work proposes to criminalise certain categories of damage, including damage to the environment *per se*⁵⁸, irrespective of the effects on human life, it ultimately falls short of elaborating a fully autonomous and ecocentric proposal. In fact, it risks justifying some of those environmentally harmful con-

⁵⁵ *Ibidem*.

⁵⁶ K.J. HELLER, *Ecocide and Anthropocentric Cost-Benefit Analysis*, in “OpinioJuris”, 2021, <http://opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/>; K.J. HELLER, *Fiddling (With Ecocide) While Rome (and Everywhere Else) Burns*, in “Völkerrechtsblog”, 2022, <https://voelkerrechtsblog.org/fiddling-with-ecocide-while-rome-and-everywhere-else-burns/>; L. G. MINKOVA, *The Fifth International Crime: Reflections on the Definition of “Ecocide”*, in “Journal of Genocide Research”, No. 1, Vol 25, 2021, pp. 62–83; F. VALENCIA ARIAS, A.K. REINEFELD, *50 Years of the Proposed Crime of Ecocide*, cit.

⁵⁷ C. MCCAY, *The Criminalisation of Environmental Damage in International Law through the Introduction of Ecocide*, in “Trinity College Law Review”, Vol 27, 2024, p.35.

⁵⁸ C. VOIGT, “Ecocide” as an international crime, cit.

ducts that serve individual interests. However, as argued by other authors⁵⁹, an “impact-only” criterion would be untenable, as some high-impact human activities are necessary for the functioning of society. While these activities should certainly be regulated with respect to environmental sustainability, they require mechanisms other than criminal law, which should remain the last resort. International criminal law imposes even stricter requirements and criteria than national criminal law, since it focuses on the most serious violations of widely recognised norms. Against this background, the international crime of ecocide would take the form of «a narrow crime with high stigma»⁶⁰, which would justify the IEP's caution.

3.2 *The mens rea of ecocide: the dolus eventualis standard*

With regard to the *mens rea* requirement, the IEP opted for a notion of the mental element as “knowledge of a substantial likelihood of environmental damage”⁶¹. This particular formulation is undoubtedly influenced by Article 30 of the Rome Statute, while also diverging from it in key aspects. As is well known, this provision generally regulates the subjective element of international crime, stating in paragraph 1 that the material elements of the crime must be committed with *intent and knowledge*. Article 30(2) further specifies that:

[...] a person has intent where:

- a. In relation to conduct, that person means to engage in the conduct;
- b. In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

⁵⁹ D. ROBINSON, *Ecocide: A Call to Discuss Some Hard Conundrums*, cit.

⁶⁰ *Ibidem*.

⁶¹ For a more exhaustive discussion on the issue of *mens rea* in ecocide, see A. GREENE, *Mens Rea and the Proposed Legal Definition of Ecocide*, in “Voelkerrechtsblog”, 2021, <https://voelkerrechtsblog.org/mens-rea-and-the-proposed-legal-definition-of-ecocide>; I. BIENFAIT, *Unpacking the Mens Rea of Ecocide: Can the ICC Adopt a Lower Fault Standard for Crimes Against the Environment?*, in “Criminal Law Forum”, No. 3, Vol.35, 2024 pp. 1-41.

Analysing Art. 30(2)(b), we note that the first part of the subparagraph (“means to cause that consequence”) describes a form of *direct intent*, whereas the second part (“aware that it will occur in the ordinary course of events”) refers to a more *oblique* form of intent, in which the consequences of the act are not desired but foreseen by the perpetrator as a kind of “virtual certainty”⁶².

For our purposes, it is this second part of sub-para. “b” that warrants closer examination. In the case of ecocide, it is highly unlikely that the perpetrators act with the deliberate intention of causing environmental damage. As a result, the debate on its legal configuration has generally focused on the perpetrator’s awareness of the harmful consequences of their conduct⁶³. Therefore, the key issue is knowledge, and – even more so – the *degree of knowledge* required for an act causing environmental damage to constitute an international crime.

In regard to the aforementioned interpretation of Art. 30(2)(b), most international criminal doctrine agrees that the rule encompasses both *dolus directus* and *indirectus* (terms used in civil law systems to define forms of “direct” and “oblique intent”). Some authors, however, argue that it may also include *dolus eventualis* (or recklessness)⁶⁴. The latter differs from “dolus indirectus” in that «the foreseen probability of the consequence resulting from the action is lower than prac-

⁶² J. VAN DER VYVER, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, in “University of Miami International & Comparative Law Review”, Vol. 12, 2004, p. 57.

⁶³ A. BRANCH A, L. MINKOVA, *Ecocide, the Anthropocene, and the International Criminal Court*, in “Ethics & International Affairs”, 37(1), 2023, p. 51.

⁶⁴ On this point see, *inter alia*, A. ESER, *Mental Elements - Mistake of Fact and Mistake of Law*, in A. CASSESE, P. GAETA, J. JONES (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford, 2002; F. MANTOVANI, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer*, in “Journal of International Criminal Justice”, n. 1, 2003, p. 32, *contra* G. WERLE, F. JESSBERGER, ‘Unless otherwise Provided’: Art. 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law, in “Journal of International Criminal Justice”, 2005, p. 51.

tical certainty»⁶⁵. In other words, if in the case of “*dolus indirectus*” the occurrence of the consequence resulting from an action is considered «practically or virtually certain», with “*dolus eventualis*” there is only «a possibility or risk of its occurrence»⁶⁶.

Upon closer examination, the definition of ecocide proposed by the IEP seems to contemplate precisely this latter notion of the mental element, i.e., a standard of “recklessness and *dolus eventualis*”. From this perspective, the IEP justifies the introduction of a lower cognitive threshold by stating that the “virtual certainty” standard was “too stringent”. Instead, it replaces it with a standard based on risk assessment, wherein the accused individual must have acted with *reckless disregard* for the probable consequences of their actions⁶⁷.

However, the IEP could have considered even lower thresholds, which have also been considered in the doctrine: the *negligence standard* (which would condemn perpetrators who should have known that their actions would result in ecocide) or even a *strict liability standard* (which disregards the question of *mens rea*)⁶⁸.

In reality, the proposed solution accounts for a middle ground that has not escaped criticism.

First, the specific wording used has been criticised by some as unclear in identifying the subjective elements of ecocide⁶⁹. In this respect, it has been pointed out that if the identified standard is “*dolus eventualis*”, a more suitable formulation should have been adopted. The

⁶⁵ M. MILANOVIC, *Intelligence Sharing in Multinational Military Operations and Complicity under International Law*, in “International Law Studies”, Vol. 97, 2021, pp. 1295-1296.

⁶⁶ *Ibidem*.

⁶⁷ Independent Expert Panel for the Legal Definition of Ecocide. Commentary and Core Text, cit, p. 11.

⁶⁸ On this point A. BRANCH A, L. MINKOVA, *Ecocide, the Anthropocene*, cit., pp. 54-55. Among the authors who have supported the idea of ecocide as a crime of strict liability, see: M. A. GRAY, *The International Crime of Ecocide*, in “California Western International Law Journal”, 1996, pp. 215-271; P. HIGGINS, D. Short, N. South, *Protecting the planet: a proposal for a law of ecocide*, cit.; R. MWANZA, *Enhancing accountability for environmental damage under international law: ecocide as a legal fulfilment of ecological integrity*, in “Melbourne Journal of International Law”, 2018, pp. 586-613.

⁶⁹ K. J. HELLER, *Skeptical Thoughts on the Proposed Crime of “Ecocide” (That Isn’t)*, cit.

phrase “knowledge that there is a substantial likelihood” has been deemed problematic, as the term “knowledge” could indicate a higher cognitive threshold than recklessness, creating potential confusion⁷⁰.

Secondly, the authors argue that, from an environmental protection perspective, the proposed *mens rea* standard might be insufficient, as it risks failing to cover prevailing environmental offences⁷¹. For example, in the case of “greenwashing” or “green grabbing” policies, even when the conduct is severely damaging the environment, the suspects could claim that their actions were intended to be beneficial to the environment and that they did not foresee the disastrous consequences. However, from the ICC's point of view, the proposed standard could be considered too flexible, and thus not compatible with the Rome Statute, which aims to prosecute the “major perpetrators” of serious international crimes. In this regard, it is likely that the ICC would favour a restrictive and strict interpretation of the text in any case.

Additionally, there are evidentiary obstacles posed by such a definition, given that the debate not only concerns the level of required knowledge, but also to the object of the knowledge itself. It is here important to recall that in the definition, “wanton” means reckless disregard for damage that would be clearly excessive in relation to the anticipated social and economic benefits. Therefore, it is not enough for the perpetrator to know that there is a substantial likelihood that their acts will cause “serious and widespread or long-term damage to the environment”. They must also be aware that the damage will clearly be excessive compared to the anticipated social and economic benefits. Critics argue that proving such awareness on the part of the perpetrator would be considerably complex⁷².

Overall, it is clear that, even with regard to the definition of the subjective element, the IEP has attempted to develop a cautious and

⁷⁰ *Ibidem*. The author also suggests alternative proposals to the IEP definition that configure ecocide as a crime of strict liability or contemplating the standard of negligence as a subjective element.

⁷¹ A. BRANCH A, L. MINKOVA, *Ecocide, the Anthropocene*, cit.

⁷² K. J. HELLER, *Skeptical Thoughts on the Proposed Crime of “Ecocide” (That Isn’t)*, cit.

realistic proposal, striking a difficult balance between the competing interests at stake⁷³.

4. *Conclusions*

The reflections presented so far highlight several key points in the debate over the inclusion of ecocide among international crimes, a discussion that has been ongoing for nearly fifty years. The uncertainties surrounding its definition relate to the difficulties of typifying the phenomenon, which does not easily fit within the scope of the Rome Statute, designed to prosecute the most serious crimes committed to the detriment of humanity. In addition to the difficulties in defining the material element of ecocide and those of *mens rea*, by extension, there are challenges relating to the evidentiary ascertainment of the crime in court⁷⁴. The Rome Statute requires a high standard of proof for crimes, making it difficult to prosecute ecocide, especially when it involves long-term and large-scale damage. Moreover, among the potential weaknesses of considering ecocide as an international crime, the doctrine mentions the ICC's lack of technical-scientific specialisation in environmental matters⁷⁵. This would entail either the need for adequate training or the use of external consultants. Other limitations include the ICC's jurisdiction⁷⁶, which only covers conduct occurring in a State, or by nationals of a State party to the Rome Statute (or States that have accepted the Court's jurisdiction)⁷⁷. Furthermore, the jurisdiction of the ICC is limited to natural persons, whereas environmental crimes are often associated with corporate entities⁷⁸. In this light,

⁷³ C. VOIGT, "Ecocide" as an international crime, cit.

⁷⁴ K. J. HELLER, *Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)*, cit.

⁷⁵ V. MOLTENI, *La lunga strada della criminalizzazione dell'ecicidio*, cit., pp. 214-215.

⁷⁶ *Ibidem*.

⁷⁷ Rome Statute, Art. 12 (2).

⁷⁸ For a more comprehensive discussion, see D. MINHA, *The possibility of prosecuting corporations for climate crimes before the International Criminal Court: all roads lead to the Rome Statute?*, in "Michigan Journal of International Law", pp. 491-539; J.

the concerns of those who⁷⁹ believe that ecocide is incompatible with the Rome Statute, and that strengthening domestic criminal law in this sense would be preferable, are understandable.

However, in our opinion, there are additional arguments in favour of recognising ecocide as an international crime. Firstly, the definition proposed by the IEP, on which the Island States' amendment proposal is based, appears to strike a good balance between the various concerns expressed by the doctrine. In any case, further discussion of the various options are both encouraged and desirable in order to refine a definition of ecocide that is clear and universally accepted. Secondly, the introduction of ecocide as an international crime would represent a significant breakthrough and a strong signal from the international community that strives to prosecute environmental crimes. This would align with recent developments in national and European legislation, as mentioned above. Furthermore, the international context in which the proposed amendment fits cannot be overlooked. The proposal is part of an international mobilisation marked by growing awareness of the adverse effects of climate change and global degradation of ecosystems, animal species and humans⁸⁰. As a matter of fact, on Vanuatu's initiative, an advisory opinion has been requested from the International Court of Justice (ICJ) regarding States' human rights obligations

APARAC, *ICL and Environmental Protection Symposium: International Criminal Law as a Tool for Corporate Responsibility for Environmental Crimes (Part I)*, in "OpinioJuris", 2020, <https://opiniojuris.org/2020/06/04/icl-and-environmental-protection-symposium-international-criminal-law-as-a-tool-for-corporate-responsibility-for-environmental-crimes-part-i/>; J. APARAC, *A Missed Opportunity for Accountability? Corporate Responsibility and the Draft Definition of Ecocide*, in "Völkerrechtsblog", 2021, <https://voelkerrechtsblog.org/a-missed-opportunity-for-accountability/>

⁷⁹ R. SHARMA, *Ecocide as the Fifth International Crime: Is the Rome Statute Compatible with Ecocide?*, cit.

⁸⁰ Regarding the interconnection between climate change and ecocide, see H. G. VAN DER WILT, *Climate Change as the Ultimate Form of Ecocide: Are Producers and Consumers 'Partners in Crime'?*, Amsterdam Law School Legal Studies Research Paper No. 2023-05, 2023; M. POURNARA, F. PROEDROU, *Exploring Representations of Climate Change as Ecocide: Implications For Climate Policy*, in "Climate Policy", 2024, pp. 1–14; C. G. GONZALEZ, *Racial Capitalism, Climate Change, and Ecocide*, in "Wisconsin International Law Journal", 4/2024, pp. 479-519.

in the environmental and climate context⁸¹. The long-awaited opinion will complement the one already issued by the International Tribunal of the Sea (ITLOS)⁸² and the soon-to-be-issued opinion of the Inter-American Court of Human Rights⁸³. As part of these joint efforts, important developments are also taking place in the area of climate strategic litigation, against States and companies, at national and international level⁸⁴, with notable climate cases brought before the European Court of Human Rights⁸⁵.

The question, therefore, is whether the time is also ripe for the development of international criminal law on this matter⁸⁶.

⁸¹ *Request for Advisory Opinion transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023, Obligations of States in Respect Of Climate Change*; see in this volume M. WEWERINKE-SINGH, *The Advisory Proceedings on Climate Change Before the International Court of Justice*.

⁸² INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS), *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, 12 December 2022; See in this volume G. CATALDI, *Brevi note sul Parere del Tribunale internazionale per il diritto del mare in tema di cambiamenti climatici nel contesto delle decisioni giudiziarie in materia ambientale*.

⁸³ INTERNATIONAL COURT OF JUSTICE (ICJ), *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*, 9 January 2023; see M. FERIA-TINTA, *An advisory opinion on climate emergency and human rights before the Inter-American Court of Human Rights*, in “Questions of International Law”, 2023, <https://www.qil-qdi.org/an-advisory-opinion-on-climate-emergency-and-human-rights-before-the-inter-american-court-of-human-rights/>.

⁸⁴ For an overview, see in this volume A. SAVARESI, *Human Rights and Climate Change Litigation: A Reassessment*.

⁸⁵ EUROPEAN COURT OF HUMAN RIGHTS [GC], Judgment of 9 April 2024, Application no. 53600/20, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*; Decision of April 2024, Application no. 39371/2, *Duarte Agostinho and Others v. Portugal and 32 Others*; Decision of April 2024, Application no. 7189/21, *Carême v. France*; for more see the debate between VerfBlog and the Sabin Center for Climate Change Law (Columbia University), available at <https://verfassungsblog.de/category/debates/the-transformation-of-european-climate-litigation/>; see also in this volume A. LIGUORI, *The Duarte case before the European Court of Human Rights: Some observations on the notion of jurisdiction*.

⁸⁶ The issue was widely addressed in a recent side event at the twenty-third session of the Assembly of States Parties (ASP23) of the International Criminal Court (ICC), held in The Hague from 2 to 7 December 2024. The event, entitled “A Fifth Crime of

In our opinion, beyond the possibility of prosecuting certain conduct, particularly the most severe and irresponsible ones, the importance of introducing the crime of ecocide should be assessed from a broader perspective than the international-criminal law context. It is clear that criminal law, especially international criminal law, cannot be seen as the “panacea of all evils”, and it is probably not the most adequate tool to offer solutions to the climate and environmental emergency. However, a reform of the Rome Statute in this sense, alongside other instruments of international and national law, would have several positive consequences: it would foster debate on the most appropriate solutions to climate change and environmental degradation; it would increase the international community's awareness of these issues; and it would contribute to the spread of a more ecocentric perspective. More importantly, it would also lead to a *duty of care* on States Parties, achieving an overall positive impact on actions aimed at preventing environmental damage⁸⁷. We therefore join the community of academics and civil society who have supported the proposed amendment from the Island States. In particular, we echo the words of by Prof. Philippe Sands KC, Co-chair of the Independent Expert Panel for the Legal Definition of Ecocide, when he states that:

There is a manifest gap in the Statute of the ICC, and Ecocide is now firmly on the agenda, a vital and necessary moment for an effective international law. This development reflects a growing recognition that severe environmental destruction deserves the same legal accountability as other grave international crimes that focus on the human. I urge member States to support this initiative, to recognise that the Rome Statute as drafted cannot adequately address environmental harms, and that this is a moment of generational change, one that is

Ecocide: Opening Considerations”, addressed the following topics: general rationale and timing; human rights implications; relationship with parallel legal initiatives; support from civil society; youth perspective from the Global South; and considerations on the definition, <https://www.stopecocide.earth/events/a-fifth-crime-of-ecocide-opening-considerations>.

⁸⁷ See V. MOLteni, *La lunga strada della criminalizzazione dell'ecicidio*, cit., pp. 215-216.

needed to safeguard our environment and signal to coming generations that the world is truly serious about doing so⁸⁸.

⁸⁸ <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>.