The definitional dilemma – The quest for a definition of "ecocide" and "international environmental crimes"

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The field of international environmental criminality presents a very pressing threat on the global level. It, for example, encompasses harm toward wildlife, transboundary pollution and even harm toward indigenous people. Although, these examples represent only a fraction of potential environmental crimes on the international level. Despite its significance, international law still lacks a refined solution to this threat.

The terms in question: "ecocide" and "international environmental crimes", have been given many suggested definitions, but no single definition exists that has been agreed upon by the international community of States. Despite their importance as the central anchor of international environmental criminality, they stand without a clear definition and offer a wide legal grey area.

This article will highlight the dilemma that results from the lack of a clear definition of "international environmental crimes" and "ecocide".

Keywords: international environmental crime, ecocide, environmental criminal law, criminalisation, environmental harm, International Criminal Court, definition

Introduction

In June 2021, a new definition was proposed for the term "ecocide", following its recognition as the fifth crime under the Rome Statute (for the definition, see the *Ecocide* section below).[1] An International Expert Panel ("IEP")[2] delivered the most refined and usable working definition for the term "ecocide". The definition was significant because it, e.g. 1. emanated from several earlier proposals for a precise and agreeable definition for "ecocide" under the Rome Statute and 2. resuscitated the discussion on the penalisation of environmental harm through potentially criminal acts on the international level. Around 50 years ago, in 1970, the term "ecocide" was first coined by biologist Arthur Galston. He introduced the phrase whilst discussing the use of Agent Orange during the Vietnam War as a means of warfare during a conference on War and National Responsibility in the United States.[3] In a more official setting, in 1972, the term was used by Swedish Prime Minister Olof Palme. In his speech, while opening the United Nations

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[1] Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, (06 June 2021) <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf> accessed 8 July 2021.

[2] The IEP consists of Jojo Mehta, Phillipe Sands QC, Dior Fall Sow, Kate Mackintosh, Richard J Rogers, Valerie Cabanes, Pablo Fajardo, Syeda Rizwana Hasan, Charles C Jalloh, Rodrigo Lledo, Tuiloma Neroni Slade, Alex Whiting and Christina Voigt. It was convened by the Stop Ecocide Foundation.

[3] As quoted in Anja Gauger et. al. *The Ecocide Project – Ecocide is the missing 5th Crime Against Peace* Human Rights Consortium (2012) at 5.

Stockholm Conference on the Human Environment, Palme explicitly referred to the Vietnam War, respectively the use of the aforementioned Agent Orange as "ecocide".[4] This conference had a considerable influence on the development of international environmental law, but the idea of "ecocide" – mentioned by Palme – was not taken up. Yet the concept of ecocide was out in the world. After the birth of the term ecocide, several definitions were suggested by academics and institutions over the following decades.[5] These definitions were accompanied by the suggestion that the problem of environmental harm could potentially be tackled by recognising such harm as a criminal act under international law: An act punishable as an international crime before the International Criminal Court (ICC).[6] Though, at the time of writing, the Community of States has not yet agreed on one of these propositions for ecocide (or another interpretation of that sort).

The term "international environmental crime" shares a similar history to its closely related legal "cousin", "ecocide". At first sight, the phrase "international environmental crime" refers to a much broader and more general concept in the area of international crime than ecocide. The word-triptych is imbalanced in its interpretation. Some see it only as a collective and general term for all (potential) environmental crimes with international aspects. In contrast, others attach more gravity to the word and the underlying crimes.[7] The bottom line is that the term "international environmental crime" remains undefined internationally.

Thus, both terms in question lack an internationally agreed-upon definition, which creates hurdles in their legal application and the development of a much-needed international environmental criminal law. The following text will look at:

1. The importance of a definition in criminal law;
2. Examples of suggested definitions of "ecocide" and "international environmental crime";
3. And the dilemma that follows from the missed opportunity to agree on a definition by drawing on the importance of a definition in criminal law, including international criminal law.

The importance of a definition in criminal law

The term "definition" generally means to "*create an exact description of the nature, scope and meaning of a certain term*".[8] Thus, a definition of a word or term gives a working basis for the usage and application of the word or phrase. Figuratively speaking, a definition is comparable to labelling a box and storing only the relevant objects inside the box. Once this particular box is opened, only the relevant and relating objects should be found in there. Thus, the

[4] Tord Björk, *The emergence of popular participation in world politics: United Nations Conference on Human Environment 1972*, Department of Political Science, University of Stockholm (1996), <http://www.folkrorelser.org/johannesburg/stockholm72.pdf> at 15, last accessed 30 November 2021.
[5] See paragraph "*ecocide*" for examples and further references.
[6] Rome Statute of the International Criminal Court (last amended 2010), entered into force July 1 2002 17 July 1998, Rome Statute (UN General Assembly); for further insight on the International Criminal Court see for example
[7] Christian Nellemann et. al., *The Rise of Environmental Crime: A Growing Threat To Natural Resources Peace, Development And Security*, UNEP, Nairobi (2016) at 7; David Krott, *The International Court for the Environment - Could the International Court for the Environment offer a solution for the problem of international environmental crimes?*, in Regina Paulose (ed), *Green Crimes and International Criminal Law*, Vernon Press (2021).
[8] "*Definition*" Oxford Dictionary <www.oxforddictionaries.com>.

establishment of a definition creates a "box" for words or phrases (respectively the requirements set by the definition) containing all the aspects of the term it shall describe and interpret. Whenever the term is needed, the box can be opened, showing all the necessary elements and, therefore, the "true" meaning of the term.[9] These definitions are vital throughout the legal profession, including criminal law. Clear, precise and distinct definitions outline the elements of a crime and whether a certain crime has been committed (or not). A criminal law without that would result in an arbitrary "Wild-West type" of justice system without any similarities with a functioning state of the law of today's standards. This would favour an arbitrary justice system. With the assistance of definitions, it can, for example, determine what specific human, corporate, or state conduct meets the standard of criminality and what falls outside the criminal justice system's scope of criminal law. The criminal justice system depends on clear definitions to fulfil its purpose of providing justice. However, definitions should not constrain prosecutors and judges in the application of the criminal provisions. Thus, they have to be not too strict to allow to apply, e.g. to new forms of crimes and in the environmental crime sector for new forms of grave harm towards nature. Nevertheless, for laws to work on a fair and equitable basis, there is a need for a specific and equal application. To achieve this, linear and equivalent application definitions are the primary solution. They often mark the starting point for a whole legal perspective.

For example, to determine whether a perpetrator committed one of the various forms of theft (ranging from simple theft to armed burglaries into homes), the German Criminal Code (StGB) refers to approximately 50 different definitions (including ancillary definitions) that cover all the variations of theft.[10] These range from defining the term "thing" to defining a "specifically protected enclosure". All those definitions need to be of absolute precision to end at the right and just conclusion of a) theft was committed (or not) and b) what exact degree of theft is applicable in the specific case at hand. Both elements must be judged with the aid of definitions to reach a judgement strictly based on the law to issue a sanction.

In this context, the principle of legality – as a key principle in domestic criminal law and international law – dictates that the element of crimes are specific and that the *actus reus* and *mens rea* of legal provisions are outlined clearly and in great detail.[11] The principle of legality states that - in criminal law – only the law can define a crime and prescribe a specific sanction (*nullum crimen, nulla poena sine lege*). Furthermore, this principle demands that every law be determined specifically with precise wording and thus foreseeable for the potential perpetrator (*nullum crimen sine lege certa*).[12] Therefore, to determine the exact *actus reus* and *mens rea* of any crime, all the aspects of the definitions in the relevant jurisdiction have to be taken into account. This fundamental principle of legality forms the backbone of civil and common law criminal law. It cannot be upheld without a clear definition of the requirements of a criminal provision.

International criminal law and the Rome Statute

[9] Krott, *supra* note 6, at 158.
[10] See §§ 242-244a of the German Criminal Code (StGB).
[11] Damian Etone, *Addressing Environmental Harm in Conflicts within Africa: Scope for International Criminal Law?*, in Regina Paulose (ed), *Green Crimes and International Criminal Law*, Vernon Press (2021)) at 73.
[12] For a closer look onto the principle of legality see for example Daniel Gradinaru, *The Principle of Legality*, RAIS-Research Associsation for Interdisciplinary Studies (2018).

The ICC in The Hague is the leading legal institution adjudicating international crimes. One hundred twenty states founded the ICC by adopting the Rome Statute of the International Criminal Court on 17 July 1998 in Rome. It was the first instance where states decided to accept the jurisdiction over their nationals of a permanent international criminal court for prosecuting perpetrators of the most serious crimes within the territories of the treaty parties. This permanent international court was introduced to end impunity and bring justice for victims of globally relevant harmful conduct. To date, it remains the single competent judicial authority on the international level to prosecute individuals for acts recognised as international crimes.

In international criminal law, the significance of definitions can be observed in the Rome Statute, specifically the detailed definitions of the four existing international crimes. The Statutes Articles 6 to 8*bis* describe the specific punishable acts of:

(i) genocide;
(ii) crimes against humanity;
(iii) war crimes; and
(iv) the crime of aggression

each in great detail.[13] The Articles each contain a catalogue outlining the punishable conducts.[14] In addition, Article 9 of the Rome Statute and the elements of crimes as an additional document to the Rome Statute offer a further interpretation to "assist the court in the interpretation and application of Articles 6 to 8 *bis*".[15]

Another example of the fundamental importance of a definition in international criminal law can be found in the history of the ICC. The Rome Statute was signed in 1998, creating the ICC; however, the crime of aggression was a point of controversy among the signing states. The nature and definition of the fourth crime of the Rome Statute was left out because the States could not agree on a precise interpretation and thus a definition. An agreement was finally reached in 2010, prior to the Review Conference of the State parties in Kampala in 2010, when the crime of aggression was included in the Rome Statute.[16] This development underlines the importance of both: (i) an agreed definition among (in this case) the State parties to the Rome Statute to have a working basis for enforcing criminal sanctions and (ii) finding a common denominator among different States to establish the parameters of an international crime.

Comparison with the position under national law

Reaching an agreement on a definition at the international level is more complicated than at the national level. Domestic definitions that might exist, e.g. the term "environmental crime", cannot simply be transferred to the international level. Most national definitions are interpreted by reference to the direct violation of domestic environmental laws. An ecological crime could be "*every conduct harming the environment that is specifically prohibited by the law*".[17] Thus, the definition is always dependent on the environmental criminal legislation within the national law. This definition cannot be copied at the international level, as a domestic definition or an

[13] See art. 6-8*bis* in Rome Statute of the International Criminal Court (last amended 2010), entered into force July 1 2002 17 July 1998, Rome Statute (UN General Assembly).
[14] *Id.*
[15] *Id.*, art. 9(1).
[16] Review Conference on the Rome Statute of the International Criminal Court – Official Records, Kampala (2010).
[17] See for example in Paul Krell, *Umweltstrafrecht* (1st ed. Verlagsgruppe Hüthig Jehle Rehm 2017) 3; Duncan Brack, *Combatting International Environmental Crime*, Global Environmental Change 143 (2002).

interpretation by, e.g. the German criminal code (or any criminal code) is not a valid reference point for international law.

In contrast to the above-mentioned German approach, some States have introduced their specific ecocide laws, such as provisions outlawing not only particular acts but all acts of an excessively harming nature. This includes, for example, countries such as Ukraine (since 2001) and Vietnam (since 1990). France and Belgium are also on the path to a national ecocide law (proposed in 2020, respectively, 2022).[18] To give one example: Article 441 of the Ukraine Criminal Code – named ecocide – sets out that:

> "*mass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster shall be punishable by imprisonment for a term of eight to fifteen years*".[19]

This Ukrainian provision is quite broad in its scope. Next to "*mass destruction of flora and fauna*" or the "*poisoning of air or water*", it sanctions all other conducts that may result in "*environmental disaster*". "*Environmental disaster*" has a more limited definition. It refers to: "*occurrences that have a severely detrimental effect on specific ecosystems*."[20] Also interesting in this regard is that the provision does not contain a reference to humans. It does not link the harm of the targeted conducts to direct human suffering. The provision is thus not anthropogenic like most provisions criminalising environmental damage, but it takes an ecocentric approach.

These national approaches can help set an example for an international definition. They pose as a form of role model for an internationally agreed definition. The international community can borrow the understanding and definition of environmental harm in criminal law. Through the variety of ecological crime interpretations and ecocide, the international community has a wide array to choose from. Those above only refer to introducing an ecocide provision *per se*, not to a potential application and enforcement. As outlined above, the national applications of an ecocide law are neither applicable nor copiable at the international level.

General application of a definition

In the area of environmental harm, the potential for criminal conduct is very wide, ranging from: e.g. wildlife-related misconduct; to the mishandling of waste; to illegally extracting natural resources.[21] It might even include harm to indigenous nations and future generations.[22] In the case of "ecocide" and "international environmental crime", the definitions should incorporate the variety of potential acts and conduct and the whole complexity of the topic area, including the wide range of stakeholders involved; the multi-jurisdictional and cross-border impact (respectively the global reach) of harm to the environment; the many drivers of the potential criminal conduct; the impact on the environment as well as on humans; and the

[18] See art. 441 of the Criminal Code of the Ukraine, art. 342 of the Penal Code Vietnam or art. 231-3 and 296 of the French Climate and Resiliance Act.
[19] See art. 441 of the Criminal Code of the Ukraine.
[20] See <https://www.encyclopedia.com/environment/energy-government-and-defense-magazines/environmental-disasters> accessed 9 August 2022.
[21] See for a good overview of the potential criminal areas Christian Nellemann and others, *The Rise of Environmental Crime: A Growing Threat To Natural Resources Peace, Development And Security*, UNEP, Nairobi (2016).
[22] See in terms of future generations: Zane Dangor, *Endign Corporate Impunity: Options to Amend the Rome Statute to include Crimes Against Present and Future Generations (CPFG*), The Resolution Journal, vol. 2, Environmental Crimes 2020 Conference Papers (2020).

entanglement with other areas of organised transnational crimes. All the different aspects and facets of the international environment should be considered to formulate a definition that can be applied to enforce sanctions following criminal activity relating to ecocide or an international environmental crime.[23] The application of criminal sanctions can bring along a benefit to the environment. Sanctions have (1) a deterrent effect and (2) may enable the international community to better address and reverse the harm through countermeasures. Thus, in the realm of environmental harm, sanctions act as a deterrent to prevent harm from occurring, which makes the relevant players less likely to cause harm in the first place. Financial penalties or reversing action may ease the redemption of environmental harm resulting from potentially criminal conduct.

The importance of a definition in general criminal law has been outlined above; the following paragraphs discuss the question of a definition within the intersection of international criminal law and international environmental law.

Ecocide – Historical context

As outlined in the introduction, the term "ecocide" dates back to the 1970s. In 1973, the Convention on the Crime of Ecocide was drafted.[24] Following that, the development of the crime of ecocide fell behind, being left out of the jurisdiction of the ICC. Today, the term "ecocide" (or "geocide")[25] receives growing attention and has become popular among the public. This can be observed across countries, continents, scholars and countries in recent years. 2021 saw rising ecocide-activism and the suggestion of the establishment of an IEP regarding the introduction of Article 8 *ter* of the Rome Statute, a fact that underlines that relevant players recognise the importance of a healthy, natural environment and a functioning ecosystem of the whole Earth. This may be attributed to the discussions on climate change/global warming and the negative environmental consequences. The UN Climate Change Conference 2021 in Glasgow (COP26) again underlined the importance of a changing global climate (and the environmental threats resulting from this change). The efforts taken there, for example, regarding the "forest agreement",[26] point in a good direction. Even though COP26 focused on the problem of the changing climate, the discussion on climate protection has also sparked (or re-sparked) debate on general environmental protection. This connection between broad environmental and climate protection can be viewed in the Declaration on Forests and Land Use to emphasise the role of all forests and their biodiversity signed at the COP26.[27] Overall, the negative impacts that human activity is causing to the ecosystems can no longer be ignored and discounted as minor issues. This means that acts committed (or that fail to be committed) harming the climate and environment should no longer be overlooked by international criminal law. In the light of these discussions on environmental protection, "ecocide" shall represent the most heinous environmentally harmful acts committed by humans thinkable under one "roof".[28]

[23] Michael J Lynch and Paul B Stretesky *Green Criminology* (Oxford University Press, Oxford, 2012) at 3.
[24] Richard A Falk, *Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals,* In: Marek Thee (ed.), Bulletin of Peace Proposals, Vol. 1. Universitersforlaget, Oslo, Bergen, Tromsö (1973) at.80–96.
[25] See e.g. Lynn Berat, *Defending the right to a healthy environment: toward a crime of genocide in international law,* Boston University International Law Journal 327 (1993).
[26] Glasgow Leaders' Declaration on Forests and Land Use <> accessed 29 November 2021.
[27] *Id.*
[28] See e.g. Polly Higgins, *Eradicating ecocide: Laws and governance to prevent the destruction of our planet* 2nd edition, Shepheard-Walwyn (Publishers) Ltd (2015).

The commonality of ecocide in terminology with genocide

At first glance, the commonality in terminology between genocide and ecocide is obvious. Both terms originate from the Latin word for killing ("caedere"). Then either the ancient Greek word for an ethnic group ("genos" – genocide) or environment ("oikos" – ecocide) is added. Some oppose the connection between mere environmental harm and the "crime of crimes" genocide. This is due to the outstanding position genocide is taking in the ranks of the existing international crimes.[29] The comparison and similarity in terminology are not justified, according to e.g. Heller.[30] Still, recognising a crime of "ecocide" would neither dilute nor remove the definition and gravity that the crime of genocide encompasses. On the contrary, both crimes represent the most severe criminal activities: one for unspeakable harm directed towards a particular human group (genocide) and one for great harm directed towards a specific part of the natural environment (ecocide). The crime of ecocide is not created to downgrade or supersede genocide but to make its new domain of international law to protect the environment through the powers of international criminal law. Thus, the similarity of both terms does not undermine their weight but instead multiplies their importance mutually. The genocide definition states:

> "*any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*".[31]

Thus, it aims primarily at human suffering. It is a solely anthropogenic provision that criminalises the cruel handling of national, ethnic, racial or religious groups of people. The proposed ecocide provision is of ecocentric nature. The IEP centres their ecocide provision around "*severe and widespread or long-term damage to the environment*".[32] Thus, genocide and ecocide protect different legal matters. Both areas are worth of strong protection via international lawful means and, therefore, deserve legal cover through specified provisions.

The questions of the similarities in terminology between "ecocide" and "genocide" under the Rome Statute leads to the fact that most of the proposed definitions of the term present ecocide as a new fifth crime under the Rome Statute (alongside genocide, crimes against humanity, war crimes and the crime of aggression under Article 5 of the Rome Statute). Despite the close connection in terminology, "genocide" and "ecocide" are not directly comparable from a legal perspective because they both cover different areas of harm in their *actus reus*, and the particular *mens rea* of genocide does not apply to ecocide. In case one does not accept that environmental damage deserves protection via its specific international criminal provision, it

[29] See e.g. Kai Ambos, *Protecting the Environment through International Criminal Law?*, EJIL:Talk, 29 June 2021 < https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/> accessed 24 November 2021.
[30] *Id*; Kevin Jon Heller, *Skeptical Thoughts on the Proposed Crime of Ecocide (That Isn't)*, Opinio Iuris, 23 June 2021 < http://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/> accessed 21 November 2021.
[31] Rome Statute, *supra* note 12, art. 6.
[32] Independent Expert Panel for the Legal Definition of Ecocide, *supra* note 1.

has to be kept in mind that ecocide might already be a form of genocide.[33] Damage to the environment already poses an existential threat to humankind. This proximity of human harm and environmental harm can be observed in the treatment of indigenous nations around the globe, especially in the Amazon. Drawing on the abovementioned definition of genocide definition, it can, for example, be argued that the handling of indigenous nations in the Amazon deliberately brings harm to the conditions of life of indigenous nations, calculated to bring about their physical destruction in whole or in part. Thus, intentionally destroying the home of indigenous people might constitute genocide. However, the crime of ecocide in its entirety seems closer to the Rome Statute provision of a crime against humanity than the genocide provision.[34] The Rome Statute defines crimes against humanity, among other things, as:

> *"[acts] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".*[35]

Primarily the specific *mens rea* of genocide does not need to be fulfilled here. Of particular interest within this provision is Article 7(1)(k) of the Rome Statute. This sub-provision states that crimes against humanity under the ICC regime are also:

> *(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."*

This allows room for other acts of similar grave character that cause great suffering to humans. Environmental harm leads to human harm via, for example, loss of livelihood or increased health risks. Thus, without denouncing the links between ecocide and genocide, the context of the crime of ecocide suits the context of crimes against humanity more directly. It fits better in the scope and aim of this criminal provision. This classification of international environmental crimes under Article 7 of the Rome Statute would also dodge the controversy between the ranks of environmental harm and human harm under the genocide provision, Article 6 of the Rome Statute. The other mentioned crimes of the Rome Statute – war crimes and the crime of aggression – are only applicable in specific conflicts. War crimes and the crime of aggression only present exceptional areas of potentially criminal harm. Either in the immediate context of an armed conflict, war or environmental matters as a means of aggression. Both indeed allow for ecological damage to be included in their provisions, but their focus is narrower than crimes against humanity.

Legal framework

The principal reason to introduce a new crime of "ecocide" is to create a new domain of international environmental criminality. However, it would not create an entirely new international criminal legal regime. The crime of "ecocide" would fall within the existing framework of international criminal law. Accordingly, the crime of "ecocide" would get a seat at the tableau of the four Rome Statute crimes and raise their numbers to five Rome Statute crimes. This would mark an important step for ecocide, being listed alongside the current core crimes of international criminal law. The symbolic effect should not be underestimated here. Even though this path to make ecocide a provision under the Rome Statute might be tough politically, there is a legal mechanism to amend the Rome Statute, including new developments, using Articles 121 and 122 of the Rome Statute, which allows explicitly for amendments.[36]

[33] See e.g. Lauren J Eichler, *Ecocide is Genocide: Decolonializing the Definition of Genocide*, (2020) 14(2) GSP 104.
[34] Heller, *supra* note 26.
[35] See Rome Statute, *supra* note 12, art. 7.
[36] See Rome Statute, *supra* note 12, art. 121, 122.

Potential amendments need to be proposed, adopted and ratified. An ecocide provision would require a qualified modification, as it would fall under a revision of Articles 5, 6, 7, and 8 of the Rome Statute according to Article 121(5) of the Rome Statute.[37] Amendments to these provisions laying out the four core crimes only enter into force for state parties that have ratified the specific amendment.[38] The ratified amendment enters into force only for the state party that has ratified it.[39] Thus, the legal threshold is relatively low, but the political threshold, on the other hand, is very high. Thus, an amendment is possible yet very complicated.

Turning to the definition, the latest proposal of the IEP (referred to in the introduction) defines ecocide as:

> "*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*".[40]

The structure of the definition is based on and follows the general format of the Rome Statutes crimes: it sets out a broad definition in the first paragraph, followed by an overview of the specific elements of the general definition.[41] In turn, this is followed by an explanation of the main components in detail (e.g. "*wanton*", "*unlawful*", "*but especially severe*", "*widespread*", "*long-term*", and "*environment*").

Although the structure is inspired by Article 7 of the Rome Statute (*crimes against humanity*), the content draws mainly on the existing ecocentric crime within the jurisdiction of the ICC – Article 8(2)(b)(iv) of the Rome Statute, which relates to war crimes. Under this provision, "*intentionally launching an attack in the knowledge that [it] will cause*", among other things, "*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*" is punishable.[42] The limitation of this provision from an environmental perspective is thus that the attack has to occur within an international armed conflict. Furthermore, the application of the ecocentric war crime is limited by the high threshold that is created by the terms "*widespread, long-term and severe*", as well as the hurdle within the *mens rea* that the damage has to be "*excessive in relation to the concrete and direct overall military advantage anticipated*". Other war crimes are recognised in armed conflicts, not of an international character, e.g. violence to life and person.[43] This limitation is dealt with in the new IEP ecocide proposal in "Article 8*ter* of the Rome Statute", which extends the reach to any unlawful or wanton act with specific environmental harm in times of peace.[44] This again reflects the commonalities above of ecocide and genocide. The application of the definition of genocide can also occur in the context of a peaceful situation.

Of course, extending the scope of criminal sanctions for environmental harm to times of peace is not the only change the IEP suggested. The second-most significant aspect of the proposal was to reduce the threshold of damage caused by the ecocide to two limbs such that

[37] Rome Statute, *supra* note 12, art. 121(5).
[38] *Id.*
[39] *Id.*
[40] Independent Expert Panel for the Legal Definition of Ecocide, *supra* note 1.
[41] This structure is also used in art. 7 of the Rome Statute introducing Crimes Against Humanity; Ambos, *supra* note 25.
[42] See Rome Statute, *supra* note 12, art. 8(2)(b)(iv).
[43] *Id.*
[44] Ambos, *supra* note 25.

damage is "severe" and either "widespread" or "long-term" in the alternative.[45] The existing Article 8(2)(b)(iv) of the Rome statute has three limbs "severe and widespread *and* long-term" damage.[46] The IEP draws on the existing interpretations of such terms in long-standing international agreements:

Example 1, "*severe*" is interpreted consistently with the 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques ("ENMOD") as:

> "*serious or significant disruption or harm to human life, natural and economic resources or other assets*".[47]

However, the IEP amended this ENMOD definition by adding the word "*cultural*".[48] Some of the existing interpretations of such terms were considered insufficient in cases of environmental harm, respectively ecocide.

Example 2, "*long-term*" is interpreted under ENMOD as a "*period of several months or a season*",[49] but under the First Additional Protocol to the Geneva Conventions (API) from 1971, a long-term period is far longer and interpreted as a period of decades.[50] This difference presents a massive gap between both interpretations. Those differences never played a role, as the provisions were never formally applied in practice. Still, it shows the wide range of variations possible. Neither arrangement would be suitable for an ecocide provision. In the case of environmental harm, the appropriate time frame can often only be decided on a case-by-case decision. This would potentially ensure that no harm would fail to be considered ecocide by virtue of not being suitably long in the term. In this instance, the IEP has proposed a new interpretation of the long-term:

> "*irreversible damage or that cannot be redressed through natural recovery within a reasonable period of time*"

to cater for the variability of environmental harm.[51]

The approach taken by the IEP underlines the philosophical and ethical trend away from a solely anthropogenic approach toward a more ecocentric path. The anthropocentric view distinguishes between humans on the one side and the natural environmental ecosystem on the other side. Anthropocentrism thus sees humanity as superior to all other living and non-living entities in the world (human-centred approach).[52] Ecocentrism centres on the environment, and nature, promoting equality between human and non-human species (species-centred).[53] This trend toward ecocentric methods can also be observed in the legal context (e.g. greening through

[45] *Id.*
[46] See Rome Statute, *supra* note 12, art. 8(2)(b)(iv); Independent Expert Panel for the Legal Definition of Ecocide, *supra* note 1.
[47] Ambos, *supra* note 25.
[48] Independent Expert Panel for the Legal Definition of Ecocide, *supra* note 1.
[49] The ENMOD Convention speaks of long-lasting, which is to be equatable with long-term; Convention on the prohibition of military or any other hostile use of environmental modification techniques (ENMOD), New York, UNTS 1108, 151 (entered into force 5 October 1978).
[50] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, (opened for signature June 8 1977, entered into force 7 December 1978).
[51] Independent Expert Panel for the Legal Definition of Ecocide, *supra* note 1.
[52] Rob White, *Environmental crime in global context: exploring the theoretical and empirical complexities*, 16(3) Current Issues in Criminal Justice 271 (2005) at 274.
[53] *Id.*

judgements on the domestic level, granting rights to natural entities)[54] and in other societal areas (e.g. change in food consumption, rising environmental activism). The human-nature balance is questioned and valued now more than in previous times. This trend has influenced the most recent ecocide definition.

However, the ecocentric view is subject to criticism. One critique raised by Kai Ambos relates to the inconsistency in the use of an ecocentric pathway.[55] The provision is open to a cost-benefit analysis in case of "legal" environmental damage, which – according to Ambos – reintroduces the reign of anthropocentrism through the back door.[56] This criticism may be justified - an ecocidal provision should not allow for an anthropogenic "softening" mechanism with the potential to dilute the application of the provision in practice. Under a proper ecocide provision, any act that harms the natural environment significantly should be penalised. An adjusted definition might read:

> "*ecocide" means acts committed with the awareness that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts*".[57]

There are two further considerations regarding the potential for ecocide to be recognised as an international crime, one a benefit and the other a drawback:

1. Benefit - ecocide might be a tool to create a more just handling of the natural environment on an international and transnational level. Many activists, academics and countries are focussing their hopes on an ecocide provision to solve – or at least help–some global environmental harm issues.[58] Thus, an ecocide provision might serve as a cornerstone in the quest for a more environmentally sustainable human-nature balance. If practical, criminalising ecocide should act as a deterrent (negative prevention) and a general preventative effect supporting a new approach to the environment-humanity relationship (positive prevention).[59]

2. Drawback - criminalising ecocide may be seen as an act of symbolism and fails to influence how humanity is treating the natural environment. This is due to (i) the drafting of the provision itself, e.g. issues with the suggested *mens rea*;[60] and (ii) the lack of application much fewer prosecutions under the existing ecocentric international crime, Article 8(2)(b)(iv) of the Rome Statute. Both are valid points. Even a symbolic crime of ecocide under international law would carry weight in relation to symbolism. This point is affirmed by Heller, who advocates for individual criminal responsibility throughout the globe for knowing environmental

[54] As an example in this regard is the decision of the German Constitutional Court to reject the new German Climate Protection Law of 2019 due to insufficient measures in 2021 based on German Basic Law (see BverfGE, *Decision from 24 March 2021* – 1 BvR 2656/18); Te Awa Zupua (Whanganui River Claims Settlement) Act of 2017, No 17 (2017).
[55] Ambos, *supra* note 25.
[56] *Id;* Heller, *supra* note 26.
[57] Heller, *supra* note 26.
[58] See for example: For activists <https://www.stopecocide.earth/>; for countries Government of Vanuatu, General Debate of the 18th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, (2019); for academcis see the call of the aforementioned IEP.
[59] Ambos, *supra* note 25.
[60] For a deeper look on the issues with the definition of the IEP see Ambos (*supra* note 25) or Heller (*supra* note 26).

destruction.[61] Ultimately, the success of an ecocide provision can only be judged once enacted and once there has been time for prosecutions to be bought under it.

A lack of agreement as to a definition of "ecocide" creates a legal vacuum for potentially criminal conduct to continue to cause serious harm to the environment on a global or international basis".

International environmental crime

Compared to the somewhat "fancy" and illustrious term of ecocide, the term "international environmental crime" is less widely used and commented upon. It refers to a more fundamental approach to international environmental criminality/harm. The phrase does not have the linguistic firepower of the loaded term "ecocide". It does not enter into a validity dispute with the term genocide. "International environmental crime" is often only used as a collective or umbrella term,[62] without the actual need for a clear definition. That means that environmental crime, in general, is often understood as:

> "*a collective term to describe illegal activities harming the environment and aimed at benefitting individuals or groups or companies from the exploitation of, damage to, trade in, or theft of natural resources, including serious crimes and transnational organised crime*".[63]

When treating environmental crime as a collective term, it can be subsumed under established and acknowledged laws governing other areas of serious crimes. General conduct causing or indirectly facilitating environmental harm can be linked to a broad frame of established crimes. This includes financial crimes, forgery, financing of terrorism or direct acts of violence towards journalists, activists or indigenous people.[64] Although, this particular approach of using existing criminal provisions overlooks the individual threat posed by potential environmental harm. The other "associated" crimes focus on a different threat. Lately, the environmental aspect of the harm is completely disregarded or, in the best case scenario, only seen as an aggravating factor. Therefore, the author submits that it is wise to know the term "international environmental crime" as a phrase with an existing tangible interpretation. Where ecocide might be compared to the crime of genocide on an etymological level, international environmental crimes are potentially more comparable to crimes against humanity. Therefore, the term might read better as "crimes against the environment" to delineate from a mere general term. The discussion above on the potential dilution of "genocide" through the implementation of "ecocide" could be mirrored by the comparison of crimes against humanity in Article 7 of the Rome Statute and a potential "crime against the environment". The introduction of a "crime against the environment" would thus not undermine the status of the crimes listed in Article 7 of the Rome Statute. It can be debated whether Article 7 of the Rome Statute already bears the potential to

[61] Heller, *supra* note 26.
[62] Christian Nellemann et. al., *The Rise of Environmental Crime: A Growing Threat To Natural Resources Peace, Development And Security*, UNEP, Nairobi (2016) at 7.
[63] Axel Luttenberger and Lidija Runko Luttenberger, 'Challenges In Regulating Environmental Crimes' (7th International Marine Science Conference, 7th International Marine Science Conference, Solin, Croatia, 2017), at 214.
[64] Nellemann, *supra* note 50, at 26.

take on transnational/global environmental harm. This was implied by a Policy Paper by the Office of the Prosecutor of the ICC.[65]

To present a fully developed definition of the term, a non-exhaustive but precise catalogue of potential criminal actions would be needed to be drafted. This would need to be similar to the current four international crimes under the Rome Statute.[66] An additional explanation, such as the "elements of crimes" to the Rome Statute, would be beneficial to further the understanding and interpretation of the definition and to support the correct usage of the criminal provision. But before these elements are developed, the term itself needs parameters. Some areas of international crime have developed as the main areas under an umbrella term. This specifically refers to the four Rome Statute crimes. At the same time, others eke, e.g. international drug trade or piracy, out a niche existence. According to the existing general perception of the terms in question, the primary international environmental crimes consist of illegal logging; illegal fishing; and illicit trade in wildlife, ODS and waste.[67] This description of the term not only refers to the direct circumvention of environmental legislation but already sets out some areas of focus and concern. Following the EU Commission's interpretation, "environmental crimes" consist of illegal emission or discharge of substances into the air, water or soil; trade in wildlife; trade in ozone-depleting substances; and shipment or dumping waste.[68] These five areas are commonly used to describe the area of international environmental crime in general. However, the EU's interpretation does not represent the true extent of international environmental crimes. Illegal trade of gold, minerals, charcoal or oil, environmental harm during warfare, climate-related misconduct, illegal land grabs, shark finning,[69] trade in genetically engineered plants, biopiracy, and some white-collar crimes might also be subsumed under the term international environmental crime.[70] Environmental crime, in general, is broadly described as "threat finance" from the exploitation of natural resources such as minerals, oil, timber, charcoal, marine resources, financial crimes in natural resources, laundering, tax fraud and illegal trade in hazardous waste and chemicals, as well as the environmental impacts of illicit exploitation and extraction of natural resources.[71] Due to the lack of definitions, the borders between the different types of environmental crime are sometimes unclear.[72] These interpretations and descriptions (i.e. listing the potential areas of

[65] Office of the Prosecutor of the International Criminal Court, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016).
[66] See for example Rome Statute, *supra* note 12, art. 7(I)(a-k), where crimes against humanity are enlisted as for example (c) enslavement or (f) Torture.
[67] Duncan Brack, *The Growth and Control of International Environmental Crime*, 112 Environmental Health Perspectives 80 (2004) at 80.
[68] EU Commission, 'Combating Environmental Crime' <https://ec.europa.eu/environment/legal/crime/> accessed 23 September 2021.
[69] Shark finning refers to the practice of removing a shark's fins from the body for separate sales. The term is more prominently used to describe the practice when a shark's fins are removed to sell and the rest of the dead body is discarded at sea (see Australian Fisheries Management Authority, 'Shark finning' (2021) <https://www.afma.gov.au/resources/educational/shark-finning-frequently-asked-questions> accessed 29 October 2021).
[70] Steven Freeland, *Addressing the intentional destruction of the environment during warfare under the Rome Statute of the International Criminal Court* (Teilw zugl.: Maastricht, Univ. Diss. Series Supranational criminal law vol 18, Intersentia 2015) 5; Nellemann, *supra* note 50, at. 17; Duncan Brack, Combatting International Environmental Crime, Global Environmental Change 143 (2002) at 143.
[71] Nellemann, *supra* note 50, at. 17.
[72] *Id.*

criminal harm to the environment) are not specific enough to support the launch of a criminal investigation and fail to outline the relevance of environmental damage as criminal behaviour.

As with ecocide, there is no shortage of suggested definitions, but whereas the ecocide definitions all display some similarities, the proposals here have a broader spectrum. They range from a mere reference that international environmental crimes are all:

"*conducts outlawed by international environmental agreements*" or

"*illegal conducts harming the environment on the international level*"

to more specific definitions emphasising the different status of the term. One such definition reads, for example:

> "*An international environmental crime is an intended, reckless or negligent precipitated act causing harm or potential harm with a possible international significance for nature as the basis of life for humankind and all other species on Earth affecting the human community across state borders*."[73]

This suggested definition includes all the main components of the phrase: (i) the international element, (ii) the environmental element, and (iii) the reference to a crime. The definition introduces the criminal facet and clarifies that environmental harm (and potential environmental harm) shall be subject to criminal sanctioning.[74] Then the environmental aspect is listed, explaining that the natural environment is a vital part of human existence as a tribute to an anthropogenic view. Also, a threshold is introduced, but the hurdle is not as high as the threshold to constitute the crime of ecocide. Here only environmental harm with the potential of international significance would be considered an international environmental crime.[75] This approach seeks to be broad enough to honour the phrase's value as a collective term but specific enough to directly target environmental crimes on the international level.[76]

Similar to the lack of a precise definition of "ecocide", the lack of an advanced definition of "international environmental crimes" creates a legal vacuum for potentially criminal conduct to continue to harm the environment on a global or international basis (without the ecocide-gravity barrier).

The definitional dilemma in international environmental criminality

The word "dilemma" has similar origins to "genocide" and "ecocide" via Greek routes. A dilemma refers to a "*situation that is problematic because a difficult choice has to be made between two or more alternatives, especially with some alternatives that are in times undesirable*".[77] The situation surrounding environmentally harmful acts with international implications that might be categorised as crimes sit right at such a crossroads of difficult choices. The primary issue lies within the definitions of "ecocide" and "international environmental crime". There are different alternatives in almost every step of the potential definition. In drafting a definition, many choices have to be made between various options relating to complex issues: E.g. 1. The choice between an anthropogenic approach versus a more ecocentric approach or, e.g. 2. Options around the level to set the threshold. Therefore, it

[73] Krott, *supra* note 6, at 173.
[74] *Id*.
[75] *Id*.
[76] *Id.*
[77] "*Dilemma*" Oxford Dictionary <www.oxforddictionaries.com>.

is submitted that a "definitional dilemma" exists around the terms "ecocide" and "international environmental crimes".

As mentioned above, this dilemma unfolds on multiple levels. One of the most central issues is the previous question of an anthropogenic or ecocentric approach. The decision here has to be made between two opposing views: the anthropogenic view focuses on humanity and the ecocentric approach centres on the natural environment. The IEP suggested definition of "ecocide" is accompanied by detailed reasoning. The IEP take an ecocentric approach with a backdoor for human concern.[78] This "potential backdoor" is once more a signal for the dilemma in terms of an ecocide definition. These anthropogenic references can also be found in suggested definitions for international environmental crimes.[79] Thus, this dilemma between anthropocentrism and ecocentrism continues.

Not only do the definitions for "ecocide" and "international environmental crimes" come with difficult choices, but the interaction among the terms also remains unsolved. Where does an "international environmental crime" turn into "ecocide" and vice versa? When discussing a definition of "ecocide" and "international environmental crimes", the nexus between both terms should be kept in mind. Both crimes target certain conduct harmful to the natural environment. Ecocide would represent the most heinous of all international environmental crimes. Nonetheless, a clear distinction between ecocide on the one side and transnational environmental crime on the other is impossible due to the lack of definitions for both terms. That leaves open a vast grey area for potential criminal conduct. This problem is not the primary dilemma and should remain subject to further investigation.

To draft a working definition that meets unanimous international agreement is quite unlikely due to different world views and different political agendas among the community of States. Thus, a potential solution might be to adopt an "opt-in approach", similar to that used for the crime of aggression in the Rome Statute. Of course, this would not reflect the best outcome. Still, it would be a significant step forward to finding a definition that is at least partly accepted and agreed-upon internationally. Definitions on the international stage are based on compromises between opposing views creating a workable term. One limitation to this approach is that the crime of aggression and the potential crime of ecocide/international environmental crime are not comparable. The crime of aggression was already set out in the Rome Statute; only its exact outline was left out for further discussion and negotiation. The "ecocide" or "international environmental crime" definitions would be complete, which makes the negotiations even more complicated.

The result of these many choices in establishing a settled definition is a dilemma at multiple stages. This definitional dilemma represents a missed opportunity to further international criminal justice and expands the reach of international criminal law to achieve global environmental justice.

Conclusion

Transnational/global environmental harm committed via potentially criminal acts urgently needs a solution on the international level. The problem of transnational/global ecological

[78] See in Ambos, *supra* note 25.
[79] See in Krott, *supra* note 6, at 173.

degradation simply cannot be solved within the borders and restrictions of domestic laws.[80] The fact that neither the term "ecocide" nor the term "international environmental crime" has an agreed definition among the international community of states hinders this crucial development. This not only holds back the advancement of international environmental criminal law but also further contributes to the derogation of the natural environment on a global scale.

Although no agreement could be reached among the international community of States, the terms "ecocide" and "international environmental crimes" are understood at a basic level: both refer to grave harm to the natural environment committed by humans. Developed further, both terms refer to conduct that harms the natural environment with the potential to be criminalised. Ecocide is the most serious of international environmental crimes. International environmental crimes form the remaining body of crimes that harm the environment but do not reach the threshold of ecocide. Whilst this description is an insufficient basis for criminal enforcement or a legal judgement, it is the first step towards a definition. The road towards a fully developed definition for both terms still presents as long and bumpy, but it exists and has been paved since Galston coined the term in the 1970s. The length and bumps in the road are mostly made up of political discrepancies between the States (which include: different views on the introduction of such an environmental crime in the first place; the elements of the definitions; or the general importance of nature as an asset worth protecting). One key to reaching the end of this road might be the introduction of either (i) the crime of ecocide under a newly adopted definition – may be in the form of Article 8*ter* of the Rome Statute as suggested by the IEP referred to above.[81] Despite the existing (and comprehensible) doubts about the applicability and the enforcement of such a criminal provision, the symbolic power of such an act should not be underestimated. In the light of the changing perception of the human-nature relationship, it should at least be given a chance, or (ii) the development of existing provisions through case law.[82] All current crimes under the Rome Statute present environmental links in some way. Notably, Article 7 of the Rome Statute might be a starting point for "crimes against the environment" in the light of "crimes against humanity". Therefore, a more practical approach might be to develop case law with an environmental influence under the current regime.[83] From a definitional point of view, the dilemma needs to be solved either way, as the same questions would arise in the light of, for example, the application of Article 7 of the Rome Statute on environmental harm.

Consequently, internationally agreed definitions of the two terms in question can only be achieved by "breathing life" into the terms (and their specific components/requirements) by applying them regularly along the lines of their common understanding. In conclusion, despite the magnitude and timeliness of the problem of international environmental harm through potentially criminal acts, the search for a unified definition of ecocide and international environmental crimes remains unresolved. This leaves the global community of States amidst a dilemma in terms of the development of "ecocide" and "international environmental crimes".

[80] David Krott, *Criminalisation as Stronghold against Worldwide Environmental Harm*, The Resolution Journal, vol. 2, Environmental Crimes 2020 Conference Papers (2020), at 17.
[81] Independent Expert Panel for the Legal Definition of Ecocide, *supra* note 1.
[82] Ambos, *supra* note 25.
[83] *Id.*

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