

## SEI Comments on the OTP proposal of a policy on Environmental Crime

### Introduction

Stop Ecocide International (SEI) was positively encouraged by the Office of the Prosecutor of the International Criminal Court's recent statement announcing a public consultation on how the Court can use existing Rome Statute provisions to better address environmental harm. As severe environmental destruction and climate change pose ever greater threats to our world, increasingly recognised within international law, the Office's statement is timely and welcomed.

Effective environmental protection requires cooperation between domestic, regional and international courts to enforce standards that can deter the severest harms to nature. The International Criminal Court is well positioned to be able to play a key role in this, offering already existing elements which are highly relevant to addressing severe environmental damage (importance of victim testimony, restorative approach to justice and broad expert networks to draw upon).

The Rome Statute currently lists four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. Environmental destruction - frequently severe, widespread and/or long-term - is a common, even a core component of armed conflict<sup>1</sup>. However, there have also been many examples of the *intentional* manipulation of the environment by warring parties, in which the environment becomes a weapon of war. This devastation is often excused by military necessity in ways it wouldn't be if the casualties were human.

Meanwhile, environmental crime outwith the context of war is already an industry as lucrative as drug-trafficking, but this is not just a matter of illicit financial flows. It is increasingly recognised that severe environmental destruction, with consequences that can span multiple species and generations, constitutes a most serious threat to the peace and security of humankind. Environmental harms also play a key and under-appreciated role in the climate crisis, posing complex governance challenges and necessitating effective tools to ensure enforceable protections for people *and* nature.

However in the context of a multi-jurisdictional trend of poorly enforced environmental laws, reckless treatment of the environment in the course of both military and peacetime economic activity continues to face impunity.

While Stop Ecocide International welcomes ICC Prosecutor Karim Khan's expressed intention to formulate a policy paper on the best use of existing Rome Statute provisions in this regard, we stress that the Statute as it stands is substantively inadequate to address the full range of acts severely threatening

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<sup>1</sup> It has also been noted that the risk of armed conflict is increased by environmental degradation. For example, in 2016, the United Nations Environment Assembly adopted resolution UNEP/EA.2/Res.15, which recognizes "the role of healthy ecosystems and sustainably managed resources in reducing the risk of armed conflict," taking as established and making explicit the relationship between damaged ecosystems and armed conflict.

nature and climate in times of peace as well as conflict (whether or not involving direct harm to humans).

We would stress two key arguments before highlighting how recognition of ecocide could usefully fill the resulting gaps:

- 1) **The Rome Statute covers principally those harms with direct impact on people and property;**
- 2) **Where the Statute explicitly addresses environmental harm it is only during wartime and with an exceptionally high threshold.**

We highlight that while environmental damage commonly does create harm to humans, the requirement of human harm being present as a condition for bringing consideration of environmental elements of crimes significantly restricts their operability, both in protecting the environment and protecting humans. This is not least because very significant harms may be perpetrated upon elements of the environment without **immediate** harm to humans but with horrific long-term effects that will be very harmful indeed to local, regional or even global populations of multiple species including humans, constituting thereby crimes of most serious concern to the international community as a whole.

We further highlight that the Rome Statute's existing provision on environmental crime in the context of war has unduly high thresholds and hence inoperability. It is well understood that Article 8(2)(b)(iv) does not provide an effective deterrent, only applying in the context of leadership decisions in international armed conflict:

**A.8(2)(b)(iv):** *Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or 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.*

This provision requires an attack in the knowledge that the attack **will** cause the requisite harm. The thresholds are thereafter not defined and it is very difficult to prove a person had knowledge their actions would definitely cause such damage. Even if this threshold is met, there is a further balancing act: the damage must be clearly excessive in relation to the military benefit anticipated. There is no fixed agreement on what excessive damage would be in this context, and such an assessment would seem to refer back to the perspective of the perpetrator. Under current international standards and attitudes, environmental damage is generally understood to be secondary to military benefit anyway. The result is that this provision, which has in fact never been used, constitutes an impossibly high legal standard and is thus unworkable in practice.

## **Ecocide as a Fifth Crime in the Rome Statute**

A crime to protect the environment in peacetime as well as conflict is of fundamental importance, not only to cover the inadequacies of existing law, but also to promote a shift in mindset in both contexts to reflect an understanding of the severity of the danger posed by grave environmental harms.

A positive legislative trend indicates that recognition of ecocide as a serious crime is being increasingly well received amongst States. The inclusion of such a crime under the Rome Statute would see enforceable environmental protection in domestic, regional and international courts according to the principle of complementarity, ensuring both cooperative action on threats to climate, and enforceable parameters to prevent impunity for the most serious actions against nature, on earth and in outer space. Procedurally therefore, as well as substantively, ecocide is well suited to inclusion under the Statute, strengthening the complementary role of the court as originally intended.

Like other Rome Statute crimes, ecocide law has a strong history.<sup>2</sup> The crime has been subject to numerous academic<sup>3</sup>, legislative<sup>4</sup> and International<sup>5</sup> proposals, even being included in early drafts of the Statute. It has wide-ranging support across multiple sectors and jurisdictions and holds relevance to a variety of overlapping legal, political, social, cultural and economic issues in the international community.

The most authoritative definition of ecocide, drawing upon existing international law,<sup>6</sup> defines the crime 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.”*<sup>7</sup>

This definition, proposed in June 2021 by an Independent Expert Panel (IEP) convened by our charitable Foundation, explicitly builds upon the framework regulating military ecocide, including the Rome Statute itself as detailed above. Borrowing, *inter alia*, from ENMOD and Protocol 1 of the Geneva Convention as well as the Rome Statute itself, to constitute a crime of ecocide according to the IEP text, impact(s) must be *“severe and either widespread or long-term”*: widespread being defined as *“damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings”*; long-term as *“damage which is irreversible or which cannot*

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<sup>2</sup> Consider the following statement by Prime Minister Olof Palme in the Plenary Meeting (UN Conference on the Environment, Stockholm (1972).): ‘[t]he air we breathe is not the property of any one nation – we share it. The big oceans are not divided by national frontiers – they are our common property .... In the field of human environment there is no individual future, neither for humans nor for nations. Our future is common. We must share it together. We must shape it together...’

<sup>3</sup> N. Ruhashyankiko, ‘Study of the Question of the Prevention and Punishment of the Crime of Genocide’ (31st Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/416 (1978).

<sup>4</sup> <https://www.stopecocide.earth/leading-states>

<sup>5</sup> C. Bassiouni, ‘The History of the Draft Code of Crimes Against the Peace and Security of Mankind’, Israel Law Review, Vol. 27, No. 1-2 (1993).

<sup>6</sup> United Nations Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (‘ENMOD Convention’), 1108 UNTS 151 (1976), Geneva Convention Additional Protocol I Relative to the Protection of Victims of International Armed Conflicts 6 U.S.T. 3316, 75 U.N.T.S. 135 (1949), Articles 35 and 55, Rome Statute (1998) Article 8.2.b.iv.

<sup>7</sup> Independent Expert Panel for the Legal Definition of Ecocide (2021); see <https://ecocidelaw.com/definition/#definition>

*be redressed through natural recovery within a reasonable period of time*"; and severe as "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"<sup>8</sup>. In any event, the "knowledge of substantial likelihood" will be met where it is **evident** that the damage is likely to be irreversible and carry long-term effects, or is unable to be redressed in a reasonable period of time. The second threshold set out in the text, that such actions or omissions must be "unlawful or wanton", ensures that legitimate actions causing damage to the environment, for example in pursuit of development, are not criminalised unless the damage caused is disproportionately severe.

This definition of the crime consistently emerges as the most authoritative and legally robust, able to substantively and procedurally account for the reality<sup>9</sup>, i.e. the range, of severe environmental damage and consequent environmental and human rights violations. The definition is proving capable of well reflecting other environmental laws and principles catering to common and civil law legal systems<sup>10</sup>; as well as providing a genuine opportunity for international collaboration on regulating environmental damage.<sup>11</sup>

It has been noted that environmental problems are (1) complex, involving complex dense networks of physical, biological and social causation; (2) technical: understanding often demands a high degree of scientific and/or social sophistication, and (3) surrounded by uncertainty: in many cases it may be impossible to fully and reliably predict outcomes.<sup>12</sup> Consequently, the existing sectoral division of environmental offences in multiple jurisdictions as well as internationally is not reflective of the complexity of interrelationships. Due to substantive, procedural and regulatory fragmentation, a large proportion of harmful environmental interactions are therefore hidden from the laws that are intended to prevent them. The ongoing and far-reaching implications of the environmental and climate crisis further affirm this: existing environmental laws are manifestly inadequate to the scale and nature of the threat.

It is therefore essential to propose comprehensive and inclusive legal measures that can apply to a variety of actors and environmental contexts. Such measures should avoid the risk of becoming outdated: they should ensure that deterrence and prevention of the worst environmental harms will continue to be justiciable and enforceable into the future. The IEP text achieves this by focusing on severity of outcome rather than prohibiting specific behaviours. This is of crucial importance for the continued relevance of international criminal law to the safety of humanity in a world of ongoing

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<sup>8</sup> Ibid, Commentary.

<sup>9</sup> It is implicitly considered here that, by contrast, existing environmental laws (domestic, regional and international) are currently inadequate and often poorly enforced.

<sup>10</sup> The IEP definition contains elements of both legal systems. So long as certain definitional criteria are met in practice, ecocide law can be adapted to fit both systems' structural requirements.

<sup>11</sup> It is also implicitly considered that effective collective action on environmental protection requires transboundary cooperation.

<sup>12</sup> W.F. Lafferty, J. Meadowcroft, 'Democracy and the environment: congruence and conflict – preliminary reflections' in: Lafferty, W.M., Meadowcroft, J. (eds.), 'Democracy and the Environment, Problems and Prospects', Edward Elgar, Cheltenham/Brookfield, (1996), p.4.

conflict, rapidly advancing technology and the global threat posed by ecological collapse.

Finally, to ensure all aspects of the environment, including its interlinkages and interconnections, are included, the IEP text defines "environment" on the basis of earth-system science, based on the five main spheres of the earth (biosphere, cryosphere, lithosphere, hydrosphere and atmosphere).<sup>13</sup>

The qualitative nature of the definition ensures that any actions, whether committed intentionally or through reckless disregard for consequences, of a kind that directly or indirectly expose the environment in its various components to an immediate risk of substantial degeneration, endangering the safety of the planet and the survival of humankind, are caught by the scope of the crime.

During the ASP of December 2019, Vanuatu proposed that all Member States should seriously consider the adoption of ecocide as the fifth crime against peace in the Rome Statute. Since then, the topic of ecocide law has been gaining traction worldwide, with discussion now on public record at parliamentary and/or government level in dozens of countries. Belgium's recently adopted penal code includes the recognition of ecocide as a national (federal) and international-level crime, its drafting guided by the IEP definition.<sup>14</sup> The Inter-Parliamentary Union<sup>15</sup> has supported recognition of ecocide in the Rome Statute, as has the European Parliament<sup>16</sup>, the Council of Europe<sup>17</sup>, and the Organisation for Security and Co-operation in Europe<sup>18</sup>. Youth<sup>19</sup>, faith<sup>20</sup> and investment<sup>21</sup> networks have all recommended it too.

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<sup>13</sup> IEP Commentary; C. Voigt, 'Ecocide as an international crime: Personal reflections on options and choices', EJIL:Talk!, (2021), available at: <https://www.ejiltalk.org/ecocide-as-an-international-crime-personal-reflections-on-options-and-choices/#:~:text=The%20architectural%20choice%20fell%20therefore,our%20current%20state%20of%20knowledge> (last accessed 03/02/23).

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<https://www.stopecocide.earth/2024/belgium-becomes-first-european-country-to-recognise-ecocide-as-international-level-crime>

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<https://www.stopecocide.earth/press-releases-summary/-led-by-belgium-parliamentarians-worldwide-support-ecocide-law>

<sup>16</sup> [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0041\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0041_EN.html)

<sup>17</sup> Parliamentary Assembly, 'The Council of Europe should take the lead on preventing environmental damage during armed conflict', (2023), (online), available at: <https://pace.coe.int/en/news/8959/the-council-of-europe-should-take-the-lead-on-preventing-environmental-damage-during-armed-conflict>

<sup>18</sup>

<https://www.stopecocide.earth/breaking-news-2023/worlds-largest-intergovernmental-security-organisation-calls-for-international-ecocide-law>

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<https://www.stopecocide.earth/new-breaking-news-summary/stockholm50-youth-task-force-demands-ecocide-law>

<sup>20</sup> <https://www.faithforecodelaw.earth/>

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<https://www.stopecocide.earth/breaking-news-22/international-corporate-governance-network-reiterates-call-to-governments>

Ecocide - in substance if not in name - was included within early drafts of the Rome Statute. It is worth reflecting critically upon what may have been different in our world today - the multiple pollution disasters, climate change exacerbation and threats to biodiversity that could have been averted - if it had in fact been included in the final treaty signed in 1998. We consider this public consultation a golden opportunity for the Office of the Prosecutor to: acknowledge the need and demand for recognition of ecocide in international criminal law; to acknowledge the gravity of environmental crimes, the extent to which they threaten the peace, security and wellbeing of the world; and to recommend negotiation of a fifth international crime of ecocide, creating enforceable environmental protections for people **and** nature, on earth and in space, for present and future generations.