FEATURE

Ecocide, the Anthropocene, and the International Criminal Court

Adam Branch and Liana Minkova

Long-standing efforts by international lawyers and environmental activists have sought to outlaw environmental harm during wartime, from the "devastation" targeted by the Nuremberg principles, to the defoliation programs during the Vietnam War, to the dumping of oil during the first Gulf War. In recent decades, spurred on by new ecological awareness and activism, these efforts have expanded to criminalizing environmental damage during peacetime as well.[1] Amid this broader endeavor have been attempts to endow grave environmental damage with the legal significance it is seen to deserve by establishing "ecocide" as an international crime. Proposals have included Richard Falk's 1973 International Convention on the Crime of Ecocide and the recent work of Polly Higgins.[2] Attempts to include ecocide or severe environmental damage during peacetime in the Draft Code of Crimes against the Peace and Security of Mankind in the 1990s were unsuccessful, however, and ecocide was largely absent from the post–Cold War discussions around the ad hoc tribunals and the International Criminal Court (ICC).[3]

Today, these initiatives have been reinvigorated thanks to the efforts of Stop Ecocide International, founded in 2017 by Polly Higgins and Jojo Mehta, to amend the Rome Statute of the International Criminal Court so as to include the crime of ecocide.[4] In June 2021, the Independent Expert Panel (IEP) established by the Stop Ecocide Foundation released a draft definition of ecocide,

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defining it 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."[5]

The backdrop to this proposed amendment is twofold. First, there is unprecedented attention today to environmental harm on a global scale, mobilized especially by narratives of climate crisis, mass extinction, and the evocative proposal of a new geological epoch, the Anthropocene, in which human activity is having an unprecedented impact upon the Earth system and producing a new era of planetary environmental disruption and uncertainty. While the debate over environmental damage in international criminal law has mostly concerned local or regional harm, if ecocide is to be criminalized at the ICC today, global climate change would need to be foremost among, in the words of the Rome Statute, "the most serious crimes of concern to the international community as a whole,"[6] and come within its ambit. To meet the challenge of the current moment, ICC ecocide prosecutions would need to go beyond the local and regional and take the new global climatic context and its associated moral sensibilities into account or else risk irrelevance. The IEP begins its report by recognizing the dire reality it must address, declaring that "humanity stands at a crossroads. The scientific evidence points to the conclusion that the emission of greenhouse gases and the destruction of ecosystems at current rates will have catastrophic consequences for our common environment. . . . [I]nternational law has a role to play in transforming our relationship with the natural world, shifting that relationship from one of harm to one of harmony."[7] As legal scholar Frédéric Mégret writes, environmental crimes are "global crimes par excellence" because they "pose a threat to the existence of global communal life."[8] This imperative was dramatized when members of the environmental activist group Extinction Rebellion occupied the ICC building in The Hague in 2019, demanding that the parties to the Rome Statute recognize ecocide as an international crime.[9] The ICC is held up as the natural location from which to prosecute these global crimes, a global court being called upon to protect and bring justice for our common planet, responding to the call of a humanity brought together by the existential threat it faces today.

Second, ecocide is being proposed not from a position of naivete, but rather at the conclusion of two decades of the ICC's operation, replete with effusive celebration and relentless critique. The proposal for a new crime must recognize the ICC's record and grapple with the hard lessons learned about the possibilities and limitations of the ICC, and international criminal law generally, to bring

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justice. Indeed, for several years now, declarations of the ICC's "crisis" have been heard,[10] which could be exacerbated by incorporating an untested new crime. Maintaining legalist blinders by insisting on the absolute independence of the law from political or social pressures, a tendency often characterizing the ICC's response to external criticism, is no longer an option if the proposal for ecocide is to be credible and its formalization is to contribute to global justice and not just to the expansion of the institutions of international criminal law.

In this article, we explore questions about the IEP's formulation of ecocide as part of the Rome Statute. The challenges of translating environmental harm into international criminal law have been the focus of intense debate and have taken on new dimensions amid global climatic disruption and with the hindsight of twenty years of ICC trials. Some of these challenges reflect problems inherent to subjecting any socially complex form of violence to individual criminal responsibility at an international tribunal but are intensified by the turn to the environment amid the Anthropocene. Others are specific to the attempt to criminalize environmental harm, as the effort to legally formalize the natural realm—in particular on a planetary scale—introduces a new array of uncertainties and dilemmas for the pursuit of justice through law. The IEP's proposed amendment offers—explicitly or implicitly—at least partial answers to these challenges; however, we argue, those answers are often inadequate, and adopting the proposed Rome Statute amendment would risk rendering ecocide prosecutions ineffective or even risk producing perverse outcomes for the environment and people alike. Ultimately, this risk is rooted in two sources: the exacting, elaborate, and, to the nonexpert, often-opaque internal processes of international criminal law itself; and the disjuncture between ecocide's claim to universality and the ecological complexity and social plurality characterizing the global present. Our argument goes beyond the IEP's specific proposal to conclude that this risk may characterize not just the IEP's proposal but perhaps also any effort to prosecute ecocide internationally in the age of the Anthropocene.

Intending Ecocide?

Environmental harm in wartime can be the unintended result of military activity or it can be part of military strategy, such as through scorched earth tactics, deforestation, poisoning groundwater, or using the environment as a weapon of war.[11] But "extending the protection of the environment . . . beyond times of armed

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conflict to times of peace,"[12] as the IEP proposes to do, brings with it a fundamental difficulty: Actions that cause environmental harm outside of war rarely have that harm as their primary objective;[13] moreover, environmental harm is often not a guaranteed outcome of an action but rather a risk associated with that action, which may not be foreseen at all. Environmental damage is thus most often a side effect of actions undertaken for economic, social, or political reasons, and so it is the lack of a clear link between intention, action, and harmful outcome that tends to characterize peacetime environmental damage. This immediately presents a major question for international criminal law: If individuals do not intend, or even know, that their actions will cause environmental harm, how can they be prosecuted for what they did not intend or know with certainty would happen? This section argues that, although punishing unintended or incidental environmental damage can be viable in domestic penal systems, incorporating such a proposal into international criminal law will face dramatic challenges, calling into question whether ecocide can be effectively prosecuted internationally.

The problem of intention and knowledge is at the center of debates around criminalizing environmental harm because individual criminal responsibility requires proof not only of a criminal act having occurred but also of the culpability of the actor's mental predisposition, what is known as "mens rea." As a general rule, the Rome Statute requires that a crime be committed with "intent and knowledge" in order to attract liability.[14] Since perpetrators of ecocide are unlikely to intend to harm the environment, however, the element of volition will rarely be established. The IEP and other proponents of the criminalization of ecocide have therefore focused instead on the actor's knowledge (or lack thereof) of an act's environmentally harmful consequences as the basis for mens rea. The question thus becomes the level of knowledge required in order for an act resulting in environmental harm to constitute an international crime.

Existing ICC practice generally requires evidence that the individual accused was "virtually certain" that their actions would result in the commission of crimes.[15] In the proposed ecocide amendment, however, accused persons do not need to be certain that their actions would lead to environmental harm. Instead, ecocide in the IEP's definition concerns "acts committed with knowledge that there is a substantial likelihood" of environmental harm. The IEP justifies these lower requirements by explaining that the "certainty" standard was "too narrow," replacing it with a standard based upon risk assessment in which the

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individual accused must have acted with "reckless disregard" for the known likely consequences of their actions.[16] But the IEP does not lower its requirements so far as to embrace a negligence standard (which would convict actors who *should have* known that their actions would result in ecocide) or a strict/absolute liability standard (which would convict *without concern for* what the actor knew or should have known), despite earlier proposed definitions of ecocide taking this approach: for instance, Mark Allan Gray suggested both recklessness and negligence as applicable standards,[17] while the Eradicating Ecocide project went further to propose strict liability.[18] The IEP thus treads a middle ground, restricting prosecutions to individuals whose knowledge of possible grave environmental damage and their reckless disregard thereof can be proven, but expanding prosecutions beyond the need for "virtual certainty" that damage would occur.

The result is that the ecocide mens rea standard could prove to be both too high and too low, posing a dilemma for the ecocide project. From the perspective of environmental protection, the IEP's proposed mens rea standard may pose an unjustified hurdle to the prosecution of environmental harm. Legal commentators have cautioned about the difficulties of finding proof that a person has been "consciously aware" of the environmental consequences of their actions,[19] while the reckless disregard standard may create adverse incentives, favoring policies declared "green" regardless of their actual impact. Even if an action damages the environment, suspects could claim that they *thought* that would not be the case because they had taken mitigating or compensatory actions such as tree planting, or because they were pursuing conservation in a highly complex context. Simply making the claim that an act was believed to be environmentally beneficial—such as is the case with "green grabbing" of land or resources or "greenwashing" by corporations—may be enough to avoid criminal responsibility.

By contrast, from an ICC perspective, the IEP's proposed mens rea criteria may be seen as so permissive as to be incompatible with the court's interpretation of its own legal rules and to infringe unacceptably on the rights of defendants. This is because the ICC is mandated to prosecute those "most responsible" for "grave" international crimes that threaten the "well-being of the world." Given the massive stigma that ICC prosecutions entail, and the importance of following legal procedure meticulously for the sake of a trial's legitimacy, there has been an insistence inside and outside the court on the need to give primacy to the interests of defendants. Some ICC judges have expressed a preference for a narrow reading of the term "culpable act," even if it comes at the price of "the acquittal of persons who

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may actually be guilty,"[20] while the "liberal critique" of international criminal law[21] has impugned cases where international tribunals have appeared to lower the requirements for attributing criminal conduct to an individual in order to offer greater protection or compensation to victims and "end impunity" at the expense of the defendant's right to a fair trial. Consequently, even if ecocide's translation into the Rome Statute with lower mens rea requirements is achieved, in practice it might face significant barriers to enforcement within the ICC itself if the judges decide to interpret the legal text in a restrictive manner, as they have already done with some of the legal rules concerning criminal responsibility.[22]

The IEP justifies its permissive interpretation of culpability by invoking international environmental law, a field where lower mens rea requirements are familiar: for instance, the precautionary principle has been developed in order to enable legal remedy even in cases where there is uncertainty about the existence of risk.[23] However, the transfer of international environmental law principles into international criminal law is by no means unproblematic. International environmental law principles were developed within the regime of state responsibility, not the individualized responsibility of international criminal law; moreover, international environmental law has very different sanctions, such as ceasing the harmful act or providing reparations, rather than imprisonment. And while recklessness is familiar from domestic criminal law systems, it cannot be easily scaled up to the international: "Risk" is subject to different national standards, different normative frameworks, and fundamental disagreement on, say, balancing high-probability/low-impact against low-probability/high-impact outcomes.[24] While these may be resolvable within domestic criminal law,[25] such resolution cannot be assumed internationally. Criminalizing reckless ecocide at the ICC, in the absence of clearly defined international standards of environmental risk, will create uncertainties about the boundary between "culpable" and "nonculpable" acts. And, even though previous international tribunals have occasionally employed the recklessness standard, from early on in the negotiation process the ICC's Rome Statute drafters rejected that standard in almost all situations.[26]

Tension between the interests of victims, championed by the human rights and humanitarian norms within the field, and the rights of defendants, fundamental to the liberal criminal justice system, is not new, having even been termed the "identity crisis" of international criminal law.[27] The integration of international environmental law norms into ICL could further deepen this crisis by expanding the boundaries of personal culpability and thus drawing the censure of the "liberal

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critique." It would also replace human victims with a vague concept of "nature," the "interests" of which are subject to intense contestation. If the IEP's definition is put into practice, the resulting controversies could adversely impact the effort to end massive environmental harm: on the one hand raising doubt about whether the accused deserved such harsh punishment while, on the other, creating an incentive for judges to refrain from relying on controversial provisions. It could also intensify the ICC's legitimacy challenges, as ecocide acquittals may be condemned as cases of legal technicalities obstructing the punishment of those responsible for grave environmental harm, while convictions are accused of amounting to arbitrary enforcement.

Determining Environmental Harm

The debate around ecocide and mens rea is generally premised upon a commonsense assumption: that the environmental consequences of specific acts can be known and their risk of producing major harm can be accurately and objectively assessed, whether by defendants, judges, or experts. This assumption, however, is called into question in the very situations where the ICC will be tasked with intervening, and it is thrown off almost entirely by the environmental complexity of the Anthropocene. Instances can, of course, be found where easily discerned environmental harm will clearly result from a specific action: a CEO ordering the clear-cutting of trees to sell the timber or open up pasture may not raise particular difficulties in terms of human cause and the immediate environmental effect—namely, deforestation. Indeed, if ecocide is criminalized in the Rome Statute, there may be a strong incentive for the prosecutor to focus on clearly delimited cases in order to achieve successful outcomes. However, a small-scale approach to environmental harm would be precluded by the IEP's definition of ecocide as leading to "either widespread or long-term damage to the environment."[28] Moreover, the ICC's stated objective is to prosecute the "most serious crimes of concern to the international community as a whole" that have not been or cannot be effectively dealt with by national courts.[29] The IEP, as noted, frames its vision of ecocide in vast, momentous terms, as do many activists mobilizing for the criminalization of ecocide. If the court wants to fulfill the ethical and political demands that will inevitably be made of it in today's era of global climate disruption and environmental catastrophe, the acts prosecuted as ecocide will necessarily be deeply embedded in large-scale, even planetary, ecological processes

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and systems. The ICC could face a legitimacy crisis from the outset if it chooses to pursue localized and easily established cases of harm instead of those that its statute, the IEP, and some legal scholars signal as being within its proper purview and that many environmental activists will demand.

If the ICC does choose to pursue a more ambitious ecocide agenda, however, the challenges will multiply. Once spatially or temporally expansive ecological systems are at stake, discerning relations between specific human actions and specific environmental impacts—between a criminal act and a harmful outcome—with the precision required by international criminal trials can be extremely difficult. A glance at environmental studies can help illuminate this challenge. While the image of nature having an ideal equilibrium state, or a "balance," where human disturbance represents a harmful deviation from or degradation of that natural equilibrium, continues to have broad currency in popular and activist portrayals of the environment, it has long been surpassed in ecology.[30] Instead, the complexity of ecological systems is now recognized,[31] involving frequent disturbance, no single equilibrium, and systems that are in constant interaction and characterized by nonlinear dynamics and interactions with human activity, while scale mismatches mean that the ecological impact of an act could vary significantly at different temporal and spatial scales. While the local, short-term impact of clear-cutting a forest may be obvious (deforestation), the wider spatial impact of that act on, say, insect populations, hydrological cycles, weather patterns, or nearby ecosystems may be much less certain. Also uncertain may be the long-term temporal impact, which depends greatly on what happens to the land after cutting takes place and on the new forms of disturbance that will shape successional dynamics. Discerning the cause of any given harmful environmental change can be equally fraught: Is a drought the product of local changes to the hydrological cycle brought on by deforestation, is it caused by global climate change, or is it just natural variability? What does it mean to do justice for such an episode of environmental harm if local communities blame national elites for deforestation, while international prosecutors look to the global emitters of greenhouse gasses?[32]

Once scaled up to the global level in the age of the Anthropocene, problems intensify as processes such as mass extinctions, the impact of increasing temperatures, changing precipitation patterns, and rising sea levels come under consideration. The IEP states that it "draws upon scientific recognition of the interactions that make up the 'environment,'"[33] citing an article that introduces contemporary Earth system science and invokes the Anthropocene as

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"an exceptionally powerful unifying concept."[34] The IEP's turn to Earth system science and the Anthropocene is puzzling. An understanding of the environment based upon Earth system science is arguably incompatible with international criminal law, given the radical uncertainty and unpredictability of the physical processes that comprise its picture of the Earth, defined by now-familiar concepts such as tipping points, feedback loops, and other nonlinear processes.[35] The intricate coupling of Earth systems, including social systems, in the Anthropocene means that the consequences of any action may reverberate unpredictably across scales and across ecological and social realms, rendering the attribution of specific consequences to specific actions perhaps impossible for the purposes of a criminal trial.

Even where attribution studies can convincingly link particular events—such as a drought or flood—to anthropogenic global climate change, that climate change is the product of hugely complex social-natural planetary processes and decades or centuries of human activity, all entwined with historically determined local vulnerability. Although broad trends, along with large-scale causal relations, can sometimes be established with great certainty—as the Intergovernmental Panel on Climate Change has come to do with global warming and anthropogenic greenhouse gas emissions[36]—those trends will not have clear implications for "anticipated" outcomes relevant to a trial nor for the attribution of individual criminal responsibility, given their large temporal or spatial scales. For instance, the fact that atmospheric CO_2 levels are about 130 ppm higher today than preindustrial levels, and the fact that there has been just over a one-degree-Celsius rise in global temperature, does not mean that another 130-ppm increase in CO_2 levels will lead to another one-degree increase, nor that each additional ppm in the past was responsible for a 1/130-degree rise, let alone that a person, company, or country contributing 1-ppm atmospheric CO_2 is responsible for 1/130 of the harm caused by global warming. Again, these uncertainties are most apparent when dealing with planetary processes, but they may characterize any ecological scale large enough to be subject to international ecocide prosecutions.

While growing awareness of the rapidity and disruptiveness of global environmental change has driven the urgency around ecocide, the irony is that the "scientific evidence" invoked by the IEP does not translate easily into the legal evidence needed for a trial; rather, it bears challenging implications for whether ecocide can be effectively criminalized at all. Indeed, the ICC itself has placed increasing emphasis on the importance of evidence clearly linking the crime to

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the defendant, to the point where ICC judges have acquitted defendants due to their dissatisfaction with the evidence even when acquittal carries a high reputational cost,[37] as was seen in the Gbagbo and Blé Goudé case.[38] Given the challenge of linking cause and effect on broad geographical or temporal scales, ecocide cases are likely to entail even greater obstacles to the ICC prosecution's task of presenting evidence to the satisfaction of the court.

Thus, the IEP's proposal that ecocide comprises "acts committed with knowledge that there is a substantial likelihood" of causing "severe" environmental damage[39] appears the most difficult to apply in the very cases that the ICC would be most concerned with—namely, the gravest, widespread, and perhaps even global, forms of environmental harm. Indeed, even if the mens rea requirements for ecocide were lowered to employ a negligence or a strict/absolute liability standard as mentioned above, the epistemic limitations of the Anthropocene may still obstruct successful prosecutions: for, just as the defendant may be subjectively unable to have knowledge of the likelihood of environmental harm, the court would be under equally difficult epistemological conditions in determining what the defendant should have known, what a "reasonable observer" could have objectively known, or even in factually determining what environmental consequences resulted from any specific action.[40]

The ecological complexity that ecocide prosecutions will be faced with is compounded by social complexity. There is a dilemma inherent to international criminal law: the forms of violence of greatest global concern, because they are necessarily part of larger complex social, political, and institutional processes—genocide, war crimes, crimes against humanity, aggression, and now ecocide—are precisely those that are the most difficult to attribute to specific individuals through clear links between their actions and harm.[41] The IEP proposal relies upon individual criminal responsibility, a choice that Polly Higgins and Stop Ecocide have argued for because of its deterrent potential.[42] Others, however, recognizing the difficulties, have sought to go beyond individual responsibility to adapt the ICC's liability provisions to the social complexity of ecocide. Although absent from the IEP's proposal, earlier definitions and some recent commentaries have proposed revising the Rome Statute to include corporate criminal responsibility.[43] The appeal of the ICC pursuing ecocide prosecutions against corporations rather than placing all responsibility on a few individuals is undeniable, but in practice accomplishing this would require substantial, perhaps impossible, changes in the ICC's operation. It would require yet another amendment to the

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Rome Statute, an amendment that would be subject to significant disagreement and that would predictably meet significant resistance, in addition to raising familiar challenges of intention and knowledge that complicate corporate prosecutions.[44] Furthermore, the prosecution of corporations by the ICC requires endowing its Office of the Prosecutor with the resources to carry out investigations and arrests without having to resort to government support. However, the last two decades have shown that governments have remained generally unwilling to provide such cooperation where they do not stand to gain tangible political benefit, further compromising the pursuit of justice for ecocide.

Problems of Nature in the Anthropocene

The epistemic problems around determining relations between human—especially individual human—cause and environmental effect are just one facet of the broader indeterminacy of the environment in the Anthropocene. Today's debates around ecocide generally tend to take for granted that there is agreement on what "the environment" is and what it means to harm it. In its commentary, the IEP admits a certain mutability of understandings of the concept of the environment, explaining that it considered leaving the environment undefined but ultimately "decided to adopt a different approach," taking into account that criminal law requires clarity and specificity. But the definition it arrived at is neither clear nor specific, with the environment identified as "the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space." To support this all-inclusive definition, the panel cites Steffen and colleagues' article "The Emergence and Evolution of Earth System Science"[45]—but Earth system science offers little guidance on what it means to "harm the environment," eschewing, as it does, a pristine, original planet and recognizing the dynamic interrelations and transformations of planetary systems, social and natural.

Earth system science is of course not alone in questioning the romantic image of nature as having an authentic essence, defined by harmony and balance, in which harm is equated with human corruption and degradation of that pristine state. This romantic image continues to have a powerful hold on popular views of nature, but it has been dismantled not only by developments in ecological science but also by work in environmental history, archaeology, anthropology, and human ecology. Such work has demonstrated that human activity has long shaped environments in multifarious ways, often even those environments

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deemed "pristine."[46] That is, the anthropogenic character of our landscapes and planet is not new, a fact being emphasized dramatically in the Anthropocene: "'Pristine' landscapes simply do not exist and, in most cases, have not existed for millennia."[47] As one historian asks about the ethical consequences of recent trends in ecological thought, "What, after all, did the phrase 'environmental damage' mean when there was so much natural upheaval and unpredictability all around?"[48] The romantic image has also been dismantled by studies of what might be called "the social construction of nature," which refers to the ways that understandings of nature or the environment vary widely over space and time, or may even resist clear definition within scientific settings.[49] Indigenous scholars have argued for alternative ways of knowing, relating to, and valuing the nonhuman world, going beyond modern science's often-mechanistic and reductivist understanding of nature, one that is a product of a particular history and whose universality is suspect.[50] Any judgment as to what it means to harm nature necessarily bears a particular image of what nature "should be," and thus a judgment about the value of different ideas of nature and the ways of life built around those ideas. Since ecocide as defined by the IEP specifically involves widespread or long-term environmental harm, international prosecution may be expected to bring into conflict different ideas of nature and causes of environmental changes, and the contrasting visions among diverse local communities, states, development agencies, environmental activists and organizations, capitalist investors, international organizations, as well as of the judges, lawyers, defendants, victims, and witnesses involved in the trial.

Human difference can also pose a challenge to attempts to introduce objective scientific criteria to ground the determination of environmental harm. Proposals have been made, for instance, to invoke the violation of "planetary boundaries" as comprising ecocide.[51] However, planetary boundaries are not defined by the planet itself but rather represent the boundaries that delineate what has been called the "safe operating space for humanity,"[52] the boundaries that cannot be breached if the planet is to stay within the "Holocene envelope of [environmental] variability"[53] that has been the world-ecological precondition for organized human life. Planetary boundaries do not help to define what it means to harm the environment; rather, they can help us understand what it means to change the environment in ways that harm humans at vast, planetary scales of little use to criminal law. Planetary boundaries thus smuggle anthropocentrism back into what is supposed to be the first truly ecocentric crime by defining harm to nature

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as anthropogenic ecological change that harms humans; this raises the familiar question of which humans' experience of harm is considered grave enough to warrant an ecocide trial and which humans' harm is outside the scope of legal remedy.

Concepts such as degradation or biodiversity, other candidates for the objective determination of ecocide, are also subject to social contestation. Controversies abound over how to measure forest degradation, for instance, above-ground woody biomass, the diversity of tree species, the Normalized Difference Vegetation Index, or the provision of ecosystem services. Even if scientific agreement is reached, degradation is always a "perceptual term,"[54] subject to broad, contrasting ideas of what comprises a "degraded" landscape or forest.[55] The "invention" of the concept of "biodiversity" has similarly been interrogated.[56] To return to the clear-cutting example, it may be less obviously a case of environmental harm if it is carried out by smallholder farmers who then introduce sustainable agroforestry practices, or if the forest grows back even denser after a few decades, or if species diversity is increased through subsequent human activity. Questions about nature arise everywhere because they are ultimately questions about humans: which humans' visions of nature, values about the environment, and understandings of any particular environmental change will take precedence. Further problems are raised by more speculative aspects of the Anthropocene discourse: if the Anthropocene presents a call to recognize nonhuman agency, how do we differentiate between the agency and the responsibility of humans and the agency and the responsibility of nonhumans for devastating environmental transformations?[57] Problems of agency are not new for the ICC, as seen with the controversies over "victim-perpetrators"—persons who commit atrocities after having themselves been subjected to atrocities in their past, challenging the black-and-white narrative of "guilt" and "innocence" in international criminal law[58]—problems that are intensified with the turn to ecocide.

To paraphrase Mike Hulme, we disagree about ecocide because we disagree about so much else,[59] and so the Anthropocene may not lead to a unified global humanity, a coherent "conscience of mankind" demanding the enforcement of a new global crime in defense of our common planet. Rather, planetary change, in particular of the climate, may lead to fragmentation into different "climate globalities," or different understandings of the planet and justice among different communities and individuals, as ecological and social complexity and plurality mark limits to knowledge and the ability to shape the Earth, whether through science or through law.[60] When these uncertainties are inserted into—and

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answered by—international criminal trials for ecocide, the results can be dangerous. By criminalizing and punishing specific environmental changes, specific visions of the environment and society are valued, and the people expressing those visions are valued and their ways of life legitimated, while other visions and associated ways of life are devalued, perhaps even sacrificed to the growth of international criminal justice.[61] Conflicts, for instance, between indigenous communities, state development planners, and international conservation agencies over displacements for green energy projects or the forceful establishment of protected areas have led to militarized conservation, criminalization of pastoralists or subsistence farmers, and population expulsions.[62] If these conflicts become subject to international criminalization in order to protect a particular view of nature, this could introduce an unpredictable and unaccountable element of violent enforcement by states or international actors into these controversies, with uncertain and disruptive consequences.

Balancing Environment and Society

Beyond these problems of knowledge in the Anthropocene, another major challenge arises for the ecocide project from the fact that peacetime environmental harm may be the consequence of a wide range of human activity, much of which may be considered socially or economically beneficial or even essential. Recognizing this, the IEP observes that "there are activities that are legal, socially beneficial and responsibly operated to minimize impacts that nonetheless cause (or are likely to cause) severe and either widespread or long-term damage to the environment." And so, "mindful that socially beneficial acts, such as housing developments and transport links" can cause damage, and not wanting to criminalize these socially beneficial acts, the IEP introduces a caveat: ecocide includes only "unlawful" or, because much environmental damage results from presently lawful activities, "wanton" acts, where "'wanton' means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated."[63]

By introducing this human-oriented qualification—which some critics have argued should have no place in the first "ecocentric" crime[64]—the IEP opens the thorny question of how to judge whether the environmental harm associated with any specific anthropogenic environmental change is "clearly excessive" to its "anticipated" social and economic benefits. At one point, the IEP seems to try to

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contain the scope for disagreement by bringing environmental damage into the framework of collateral military damage. As the panel writes, "The term 'wanton' is familiar in international criminal law," citing Article 8(2)(a)(iv) Rome Statute: "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." This description appears to seek to translate a humanitarian law principle into the environmental sphere, and, instead of criminalizing military operations whose civilian harm is disproportionate to any legitimate military objective, seeks to criminalize any action whose environmental harm is disproportionate to its social or economic benefit. But translating wantonness from the military into the socioeconomic is not easy. The acts being judged in the military realm are those whose inherent human destructiveness has gone beyond what is justified by military necessity, whereas in ecocide, it is socially beneficial actions that are being criminalized for their incidental environmental harm in a context where socioeconomic "necessity" has no firm meaning.[65] Perhaps recognizing this, the IEP does not develop the parallel with the principle of proportionality in humanitarian law but instead invokes the idea of "balancing" derived from "environmental law principles, which balance social and economic benefits with environmental harms."[66]

This idea of social-environmental balancing, based upon a society-nature dichotomy, only opens up new sets of questions, especially in the Anthropocene. Any decision regarding the proper balance between socioeconomic benefit and environmental harm will rely upon an implicit understanding of the appropriate relationship between humans and nature, the value of different models of economic development, and the past and future trajectory of human society—all issues on which disagreement among individuals or communities can be absolute. For instance, it may appear to some environmentalists that the IEP, in effectively justifying some severe and widespread forms of environmental damage for economic gain, has implicitly assumed the necessity of a high-modernist, or even extractivist and capitalist, model of economic development and growth, when it is precisely this model that should be held responsible for ecocide. Other tendencies in environmental thought may go further and deem industrial modernity itself to be a massive crime against nature, which renders talk of "balancing" meaningless.[67] Ecofeminism provides another approach for determining which economic and social activities are justified and determining where environmental harm and associated human suffering should be sought.[68] Others, however, may see the intensified exploitation of natural resources as

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necessary to prevent the human suffering that would come about from widespread energy scarcity, or may see the radical human transformation of nature, such as through geoengineering, not as harmful but as the path to the flourishing of humans and nature together.[69]

The problem of *whose* environmental harms and *whose* social benefits—or whose visions of those things—are being balanced cannot be avoided when dealing with the kind of large-scale environmental and social processes on which ecocide is focused. How would local social harm be assessed against global environmental benefit? For instance, plantation forestry may improve global CO_2 levels but at the cost of displacing indigenous communities and destroying peopled landscapes. How would local social benefit be balanced against global environmental harm—such as with the proposal from some less developed countries that they be allowed to pursue fossil fuel–driven industrialization in order to catch up to more developed countries? Or, how would benefit to the present generation be balanced against harm to future generations, which raises complex ethical and economic debates? Even if one vision is agreed upon, the multiscalar environmental and social impacts of human action in the Anthropocene have become complex and uncertain enough so as to throw into doubt whether the idea of "anticipated" socioeconomic benefits can have meaning at all when dealing with long-term or widespread ecological processes.

The IEP seeks to answer these questions by invoking "the concept of sustainable development," which it equates in broad terms with a "balancing of environmental harms against social and economic benefits."[70] This concept, it implies, will provide the grounding for judgments of the proper balance between nature and society. However, the particular understanding of sustainable development that appears to inform the IEP's statement—in which sustainability means negotiating an inherent conflict between development and nature by balancing inevitable environmental damage against the need for activities bringing about economic gain—is a strange choice, being only one somewhat outdated understanding of sustainable development, a concept subject to decades of intense debate, formulation, revision, and critique.[71] Indeed, sustainable development is not an answer, but a starting point for further questions. For instance, if the IEP's concept of sustainable development as balancing developmental benefits against environmental harm is replaced by the model proposed by the "Brundtland Report," in which sustainable development "meets the needs of the present without compromising the ability of future generations to meet their own needs" so as to ensure greater equity amid "a new era of

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economic growth,"[72] this would criminalize a very different set of actions with impacts on future generations; or, if the idea of a necessary trade-off between the economy and the environment is replaced by the idea of their mutual support, as in "green capitalism" or ecomodernism, then the idea of "balancing" itself may be inapplicable.[73] The most authoritative recent statement on sustainable development, the UN's Sustainable Development Goals, only adds to the uncertainty by including seventeen goals, each with up to a dozen or more specific targets.

Perhaps it is more useful to conceive of sustainable development as a realm of debate and dissensus in which diverse and contrasting ecological, economic, and social and cultural values can come together for negotiation and contestation through multilayered political and social processes. What sustainable development is *not* is a firm basis for deciding what represents "unimaginable atrocities that deeply shock the conscience of humanity" and for carrying out international criminal prosecutions of individuals that involve decades-long prison sentences, massive stigma, and narratives of good and evil, atrocity and victimhood, and humanity and inhumanity that echo throughout international law and politics. If put into practice at the ICC, any ecocide judgment will, implicitly or explicitly, rely upon and thus endorse specific models of development and ideas about economic growth, capitalism, extractivism, and the relative value (or lack of value) of different lives, communities, ecosystems, and ways of life.

A glance at the ICC's track record signals a significant danger: The decisions according to which some environmental understandings, values, and relationships are upheld and enforced, and some are devalued, may align with existing structures of global political and economic power instead of challenging those structures. The result could be that ICC interventions remove authority on development, society, and the environment from specific political communities and instead invest them in an unaccountable global institution, operating according to impenetrable legal rules and procedures, coming to decisions on events of global importance that may contrast starkly with local ethical or historical perceptions—a possibility that resonates with the critique long made of the ICC's often counterproductive and unaccountable interventions into ongoing conflicts or peace and justice processes.[74]

From the Enemy of Humanity . . .

The past two decades of ICC trials have been characterized by a widely criticized tendency for the court to produce reductive narratives about the causes, dynamics,

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and perpetrators of mass atrocities. These narratives result from the core premise of international criminal justice—namely, the liberal emphasis on individual agency—together with the selective enforcement of international criminal justice against persons without powerful political backing. While ICL is built upon the concept of individual criminal responsibility, this methodological individualism effectively results in the excessive stigmatization of a few individuals, portrayed as power hungry, greedy, or simply evil.[75] Meanwhile, many other participants or bystanders directly or indirectly involved in mass atrocities are released from responsibility for violence with the goal that "the guilt *of the few* would not be shifted to the innocent."[76] Against the inhumane individual perpetrator, international criminal justice puts forth a global humanity unified in its condemnation of "radical evil,"[77] a humanity whose conscience is shocked by unimaginable atrocities. The result is that those accused of international crimes—even before the trial begins—are stigmatized as the enemy of humanity,[78] as the court signals that it is dealing with the most notorious criminals and fulfilling its mandate to end impunity for mass atrocities.[79]

However, the ICC's excessive stigmatization of a few individuals in the courtroom as the embodiment of "radical evil" can decontextualize and depoliticize global violence.[80] Specifically, the concept of individual criminal responsibility has obfuscated the role of structural factors such as colonialism, neoliberal economic policies, and global capitalism in enabling mass atrocities.[81] Critical scholars have suggested that by focusing on the conduct of a few individuals, ICL has simultaneously legitimized other forms of physical and economic violence that have been "routinized" by the dominant international order.[82] The exclusive focus on the radical evil of the few "enem[ies] of mankind"[83] also absolves the rest of the world of responsibility for contributing to that violence, creating the sense that the many state and nonstate actors not subject to prosecution, as well as "ordinary" persons who contribute to or benefit from the social or economic structures producing atrocities, have nothing to do with the kind of harm perpetrated exclusively by these inhuman wrongdoers.[84]

In practice, the ICC's stigmatization of individuals has largely followed lines of political power. Many observers have argued that the ICC's Office of the Prosecutor has aligned itself with the interests of powerful Western actors and cooperative African states to obtain enforcement power for investigations and arrests.[85] In investigations in which a government has "self-referred" a situation on its territory, such as those in Uganda and the Democratic Republic of the

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Congo, the prosecutor has tended to charge members of rebel movements or political opposition, essentially empowering governments against their opponents. The cases in which the prosecution has tried to go after sitting political leaders have been unsuccessful. As of October 2022, most suspects that have faced proceedings at the ICC for cases concerning core international crimes have been either members of insurgent organizations or deposed state officials who lack the backing of African states or Western powers.[86]

Another widely debated aspect of the ICC's practice to date is that, apart from the three arrest warrants issued in June 2022 concerning the situation in Georgia,[87] all other ICC suspects remain nationals of African countries—which critics argue also reflects international relations of power.[88] Regardless of the reasons for this near-exclusive focus on Africa, the result has been a very specific image of the perpetrator of mass atrocity, the enemy of humanity, constructed and perpetuated by the ICC, according to which perpetrators are part of authoritarian states or rebel organizations in the Global South as well as being nonwhite, male, strong, and capable of inhuman savagery.[89] Meanwhile, the involvement of the West and other global powers in creating the conditions for and contributing to mass atrocity remains invisible. The political consequences of these narratives can be dangerous, as legitimacy is granted to the use of military force by select African governments, such as Uganda, against political opposition or even in neighboring countries in the name of targeting enemies of humanity, thus unintentionally lending support to authoritarianism and militarization.[90] Such legal legitimacy can also be deployed by interventionist Western powers, as happened in Libya and Central Africa, paving the way for further Western interference in African affairs.

. . . to the Enemy of Nature

If the environment becomes subject to international criminalization at the ICC, we might expect the political dangers discussed above to be reproduced, and possibly intensified, as violence is justified against not just enemies of humanity but also enemies of nature. The IEP's proposed amendment and commentary refrain from specifying any particular kind of environmental harm or perpetrator as being a primary target for ecocide prosecutions. Perhaps the most popular images promoted by environmental and climate justice activists include prosecutions of high-ranking officers in companies operating in industrialized countries,[91] or

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officials at transnational companies destructively extracting natural resources in the Global South. Also common are images of political leaders who authorize or benefit from environmentally harmful projects, such as members of authoritarian regimes engaged in land grabbing and resource looting, or politicians in democratic countries who support highly risky industries. These images have led some commentators to express hope that, with ecocide prosecutions, the ICC might finally escape accusations of double standards and bring a sense of justice to those states that have "long felt targeted" by the court; for instance, by prosecuting environmental destruction committed in Africa by Western corporations instead of targeting only African actors.[92]

Unfortunately, this appears unlikely to happen in practice. The first problem is the severe geographical restriction of the court's jurisdiction over the crime of ecocide. Even if the crime of ecocide is adopted as an amendment to the Rome Statute, the court will not have jurisdiction over crimes committed by an ICC state party's nationals or committed on its territory unless that state adopts the ecocide amendment.[93] This not only significantly limits the scope of jurisdiction but also puts in question the prosecution of member states' corporations operating abroad. UN Security Council referrals, which avoid this requirement, are even more unlikely to target environmental destruction caused by large transnational corporations in developing countries, given many of those corporations' links to the Permanent Five members. Similarly, the ICC's limited temporal jurisdiction and the principle of nonretroactivity preclude investigations into the environmental footprint of those countries that have already industrialized and instead shifts international attention toward those countries that might be currently undertaking development in a manner deemed to be environmentally unsustainable. It will effectively mean that the entire global history of environmental harm is to be excluded from justice.

Second, there is no guarantee that in practice the ICC's environmental prosecutions could avoid reproducing the political double standard seen in existing trials. The ICC will face the same pressures to align itself with states in order to gather information, secure suspects, and avoid provoking major political opposition from the powerful, which would steer it away from Western actors. The deprioritization of the investigation into alleged acts committed by British troops in Iraq and by U.S. armed forces in Afghanistan offers a sobering lesson.[94] In 2021, after almost two decades of calls for prosecutions of the invading forces, the prosecutor opened an investigation, only to focus it instead on crimes allegedly committed by the

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Taliban and the Islamic State – Khorasan Province.[95] This suggests that even if the ICC investigates ecocide committed on the territory of a developing nation with the involvement of a foreign corporation, the investigations might still focus on local political and business leaders rather than foreign corporate actors. This would further reinforce the narrative that the richer, more developed states do not, de facto, fall under the ICC's jurisdiction, nor are they responsible for global environmental harm.

Third, prosecution of ecocide could provide international legitimation for the enforcement of specific political agendas in the name of punishing or preventing harm against nature. Just as the ICC has supported authoritarian and militarized tendencies in some states, especially through self-referrals, so too may ecocide prosecutions—or even just their threat—be used by states to silence opposition to controversial conservation or climate mitigation projects, enabling "eco-authoritarianism." Conversely, invocations of ecocide could be used to delegitimize state-led developmentalism in the Global South, much like "conservation" was used by Western states and environmental organizations in post-independence Africa when global sustainability was invoked to disqualify national development and undermine African sovereignty.[96] What development means in the era of climate change is of course the subject of vast political debate and international negotiation, such as around the concept of common-but-differentiated responsibilities, or nationally determined contributions. These debates and political processes should not be subject to the possibility of unpredictable criminalization and enforcement by an unaccountable international court. Even more perniciously, ecocide prosecutions could help legitimize forms of green interventionism, as Western actors, perhaps using their militaries, intervene in the name of rescuing the environment, even leading to a "green responsibility to protect." This would fit within the history of Western imperial and neocolonial global conservation policies that have harmed communities in the Global South in the name of protecting nature, a process taking on new intensity today with climate change mitigation projects. To update Carl Schmitt's quote as it applies to ecocide, perhaps "He who invokes *nature* wants to cheat."

Inevitably politically selective trials and punishment of a few individuals for large-scale environmental violence could end up translating familiar ICC narratives into the environmental sphere with their reductive, and even harmful, images of responsibility and remedy. Ecocide may be made to appear as occurring only in poor, underdeveloped countries, driven by the greed of rapacious state actors,

rogue business leaders, or insurgents looking to benefit themselves or their regimes of repression. Unsustainability and ecological crisis would be blamed on local drivers and causes internal to the Global South, as global political and economic factors are ignored. As defendants are selected based upon the strategic legal and political calculations of the ICC prosecution, all but the few actors who are prosecuted and punished could be effectively absolved, and the ICC's justice may look nothing like what those suffering grave environmental harm understand justice to mean.

Trials of individual perpetrators can create a "myth of collective innocence," obscuring the role that ordinary people can play in systemic crime, either actively, by contributing with small-scale acts, or passively by doing nothing to stop or prevent harm.[97] Individualized responsibility for climate change can obscure the responsibility, for instance, of consumerist economic systems dependent upon extraction of cheap resources and labor, in which many are implicated. Trials can preempt long-standing global debates around climate justice and declare the responsibility of corporations, states, the fossil fuel industry, or Western society writ large to be outside of the court's scope. If the court's Africa focus is maintained, it could create an image of the West as the savior not of a victimized African humanity, but of a victimized African nature, saving Africa from itself for the sake of the planet.

Just as a vague concept of "humanity" has been instrumentalized by powerful actors to pursue political agendas in the name of international criminal law enforcement, so too may an equally ill-defined concept of "nature" be deployed. It would no longer be the *hostis humani generis*, or enemy of all humanity, that is to be punished through force but instead become the *hostis naturae generis*, the enemy of all nature. With ecocide, violence would be justified in the name of rescuing the planet and humanity itself from an existential threat, amid an unprecedented universal crisis, further releasing that violence from limitation.

Ecocide and Political Possibility

As the ICC passes its twentieth year of operation, the controversy around its record has led some in the international criminal justice field to call for expectations to be lowered and managed regarding the ICC's ability to serve global justice.[98] If the criminalization of ecocide proceeds further, we may see similar calls in recognition of the fundamental difficulties presented by mens rea

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requirements, determination of risk, balancing human and environmental interests, modes of liability, and even the definition of the environment itself. But whether expectations *can* be managed when the declared objective is the survival of the planet and humanity is not obvious. Others have sought to reduce the pressure upon the ICC by framing international criminal trials as only one part of broader political efforts around ending massive environmental harm of international concern;[99] however, it is not clear that ICC trials would be a useful tool since they may be too unwieldy in their operation and absolute in their judgment to be simply one strategy among many. Indeed, the ICC's involvement in wider conflict resolution or transitional justice processes has shown its interventions to have an overbearing impact on those processes, cutting off possibilities, imposing nonnegotiable conditions, and enforcing its own historical narratives of violence at the expense of alternatives.[100] Another approach has been to support the nationalization of international law, reflecting a widespread sentiment that "while international criminal justice . . . is here to stay, the future of (much of) ICL indeed appears domestic."[101] Thus, perhaps the international effort could catalyze the criminalization of ecocide in domestic legal regimes in ways that better embed the legal anti-ecocide project within potentially accountable political processes and actual political communities. However, it could also reproduce the dangers and dilemmas of ecocide prosecutions at the national level as well as open the way for foreign interference through the invocation of extraterritorial jurisdiction. Finally, still others have sought to rescue the ecocide project by arguing that, even without actual ecocide trials and convictions, the international criminalization of grave environmental harm itself would have important expressive or symbolic value.[102] But, as described earlier, even criminalization without enforcement can express misleading or dangerous messages to the international audience: validating certain forms of development and silencing alternative ideas, incentivizing "greenwashing" of corporate activities, creating a biased image of the *hostis naturae generis*, and perhaps even being invoked to justify violence.

Despite these dangers, however, the expressivist position is based upon a compelling moral and political recognition: that the very process of bringing ecocide into international consideration, of declaring that the ongoing and mounting devastation of environments locally and globally is inherently unacceptable, is crucially important in a contemporary political moment marked by political leaders publicly rationalizing large-scale environmental sacrifice and even extermination.[103] It is also important at a moment when many of these same political

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forces are seeking to dismantle international institutions and law. In this context, there is significant weight to the argument that the moral-political commitment behind the effort to criminalize ecocide should not be abandoned, and neither should those international institutions that are struggling against today's omnicidal forces. This leads back to the basic question of whether ecocide can be criminalized in such a way as to enable it to counter the impunity with which environmental devastation is being carried out without exacerbating environmental crises and without becoming a tool of liberal imperialism, the War on Terror, or political cynicism and self-interest. This would require a more fundamental rethinking of the logic of international law, a logic that seeks to rationalize, decontextualize, and bracket social and environmental problems into manageable forms, proclaiming its isolation from social context, a logic whose problems have shown themselves clearly at the ICC and that is particularly unsustainable in the age of the Anthropocene.[104] If we do not rethink international law as a system but instead continue to focus on the technical redrafting of legal provisions, and if we do not consider how international legal institutions might derive their power from and be accountable to those facing the brunt of climatic disruption and environmental devastation, the dangers of this new universalist political project may simply be too significant to warrant the sustained political energies that it would demand.

Notes

[1] Sébastien Jodoin and Marie-Claire Cordonier Segger, eds., *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge, U.K.: Cambridge University Press, 2013). See, in particular, the chapter by Matthew Gillett, "Environmental Damage and International Criminal Law," pp. 73–99.

[2] An early scholarly work on ecocide is Richard A. Falk, "Environmental Warfare and Ecocide—Facts, Appraisal, and Proposal," *Bulletin of Peace Proposals* 4, no. 1 (1973), pp. 80–96. See also Mark Allan Gray, "The International Crime of Ecocide," *California Western International Law Journal* 26, no. 2 (Spring 1996), pp. 215–72; and Anja Gauger, Mai Pouye Rabatel-Fernel, Louise Kulbicki, Damien Short, and Polly Higgins, *The Ecocide Project: Ecocide Is the Missing 5th Crime against Peace* (London: Human Rights Consortium, 2012), pp. 8–10, sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf.

[3] Gauger et al., *The Ecocide Project*, p. 10. The Draft Code and the Rome Statute ended up incorporating only a restricted notion of wartime environmental destruction.

[4] Polly Higgins, "Seeding Intrinsic Values: How a Law of Ecocide Will Shift Our Consciousness," *Cadmus* 1, no. 5 (October 2012), pp. 9–10. See also Matthew Gillett, *Prosecuting Environmental Harm before the International Criminal Court* (Cambridge, U.K.: Cambridge University Press, 2022), pp. 348–50.

[5] Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text* (Amsterdam: Stop Ecocide Foundation, June 2021), p. 5, www.stopecocide.earth/legal-definition.

[6] Preamble, Rome Statute of the International Criminal Court, July 17, 1998.

[7] Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide*, p. 2.

[8] Frédéric Mégret, "The Case for a General International Crime against the Environment," in Jodoin and Segger, *Sustainable Development, International Criminal Justice, and Treaty Implementation*, ch. 4.

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[9] Extinction Rebellion, "Extinction Rebellion Occupation of The International Criminal Court," April 16, 2019, extinctionrebellion.nl/extinction-rebellion-occupation-of-the-international-criminal-court/.
[10] Mark Ellis, "The Latest Crisis of the ICC: The Acquittal of Laurent Gbagbo," OpinioJuris, March 28, 2019, opiniojuris.org/2019/03/28/the-latest-crisis-of-the-icc-the-acquittal-of-laurent-gbagbo/; and "The ICC Must Become a Champion of Justice over Abuse of Power," Amnesty International, February 23, 2018, www.amnesty.org/en/latest/news/2018/02/the-icc-must-become-a-champion-of-justice-over-abuse-of-power/.
[11] Examples include the use of Agent Orange during the Vietnam War and the dumping of large quantities of oil into the Persian Gulf off Kuwait's coast during the Gulf War. For commentary on the link between ecocide and war, see Falk, "Environmental Warfare and Ecocide."
[12] Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide*, p. 7.
[13] For a discussion of environmental violence as a form of genocide, which could occur outside of situations of armed conflict strictly defined, and the issue of intentionality, see "Genocide-Ecocide Nexus," special issue, *Journal of Genocide Research* 23, no. 2 (2021).
[14] Article 30, Rome Statute of the International Criminal Court.
[15] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Prosecutor v. Jean-Pierre Bemba Gombo), Decision, ICC-01/05-01/08-424, Pre-Trial Chamber II, www.icc-cpi.int/court-record/icc-01/05-01/08-424, para. 362 (June 15, 2009).
[16] Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide*, p. 11. Specifically, the IEP's definition proposes the criminalization of acts that might not be "unlawful" but have nevertheless been committed "with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated." Ibid., p. 5.
[17] Gray, "The International Crime of Ecocide," p. 216. See also Gillett, *Prosecuting Environmental Harm before the International Criminal Court*, pp. 340–41, 348.
[18] Eradicating Ecocide, "Closing the Door to Dangerous Industrial Activity: A Concept Paper for Governments to Implement Emergency Measures" (2012), p. 13, www.aph.gov.au/DocumentStore.ashx?id=14b03e25-353d-4564-8823-0da2ce0ebb07&subId=251311.
[19] Kevin Jon Heller, "The Crime of Ecocide in Action," OpinioJuris, June 28, 2021, emphasis omitted, opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action/.
[20] Separate Opinion of Judge Van den Wyngaert and Judge Morrison (Prosecutor v. Jean-Pierre Bemba Gombo), Opinion, ICC-01/05-01/08-3636-Anx2, Appeals Chamber, www.icc-cpi.int/court-record/icc-01/05-01/08-3636-anx2, para. 5 (June 8, 2018).
[21] The term "liberal critique" was coined by Darryl Robinson in "A Cosmopolitan Liberal Account of International Criminal Law," *Leiden Journal of International Law* 26, no. 1 (March 2013), pp. 127–53, at p. 128.
[22] Liana Minkova, *Responsibility on Trial: Liability Standards in International Criminal Law* (Cambridge, U.K.: Cambridge University Press, 2023), ch. 6.
[23] Principle 15 of the Rio Declaration provides that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." United Nations General Assembly, Principle 15, "Rio Declaration on Environment and Development," A/CONF.151/26 (Vol. 1), June 3–14, 1992.
[24] Mike Hulme, *Why We Disagree about Climate Change: Understanding Controversy, Inaction and Opportunity* (Cambridge, U.K.: Cambridge University Press, 2010).
[25] For a commentary on the mens rea standards below intention used in domestic penal systems, see Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), pp. 40–45.
[26] Per Saland, "International Criminal Law Principles," in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), pp. 189–216, 205.
[27] Darryl Robinson, "The Identity Crisis of International Criminal Law," *Leiden Journal of International Law* 21, no. 4 (December 2008), pp. 925–63.
[28] Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide*, p. 5.
[29] Preamble, Rome Statute of the International Criminal Court.
[30] John C. Kricher, *The Balance of Nature: Ecology's Enduring Myth* (Princeton, N.J.: Princeton University Press, 2009).
[31] Donald Worster, *Nature's Economy: A History of Ecological Ideas*, 2nd ed. (Cambridge, U.K.: Cambridge University Press, 1998).
[32] Adam Branch, "From Disaster to Devastation: Drought as War in Northern Uganda," in "Disasters in Conflict Areas," special issue, *Disasters* 42, iss. S2 (October 2018), pp. S306–27, at S306–7.

[33] Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide*, p. 11.
[34] Will Steffen, Katherine Richardson, Johan Rockström, Hans Joachim Schellnhuber, Opha Pauline Dube, Sébastien Dutreuil, Timothy M. Lenton, and Jane Lubchenco, "The Emergence and Evolution of Earth System Science," *Nature Reviews: Earth & Environment* 1, no. 1 (2020), pp. 54–63, at p. 59.
[35] John A. Dearing, Bulent Acma, S. Bub, Frank M. Chambers, Xu Chen, J. Cooper, Darren Crook, et al., "Social-Ecological Systems in the Anthropocene: The Need for Integrating Social and Biophysical Records at Regional Scales," *Anthropocene Review* 2, no. 3 (2015), pp. 220–46.
[36] Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis; Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, ed. Valérie Masson-Delmotte, Panmao Zhai, Anna Pirani, Sarah L. Connors, Clotilde Péan, Yang Chen, Leah Goldfarb, et al. (Cambridge, U.K.: Cambridge University Press, 2021).
[37] Nancy Amoury Combs, "Grave Crimes and Weak Evidence: A Fact-Finding Evolution in International Criminal Law," *Harvard International Law Journal* 58, no. 1 (Winter 2017), pp. 47–125.
[38] Reasons of Judge Geoffrey Henderson (Prosecutor v. Laurent Gbagbo and Charles Blé Goudé), Decision, ICC-02/11-01/15-1263-AnxB-Red, Trial Chamber I, www.icc-cpi.int/court-record/ icc-02/11-01/15-1263-anxb-red, paras. 36, 42–43, 85 (July 16, 2019).
[39] Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide*, p. 5.
[40] For a helpful discussion of the broader ways that "the new intersections between epistemology and ethics in the Anthropocene create novel moral challenges," see Jeremy J. Schmidt, Peter G. Brown, and Christopher J. Orr, "Ethics in the Anthropocene: A Research Agenda," *Anthropocene Review* 3, no. 3 (2016), pp. 188–200.
[41] Gerry Simpson, "Crime, Structure, Harm," in Jodoin and Segger, *Sustainable Development, International Criminal Justice, and Treaty Implementation*, p. 46. See also Harmen van der Wilt, André Nollkaemper, M. M. Dolman, and Jann K. Kleffner, *System Criminality in International Law* (Cambridge, U.K.: Cambridge University Press, 2009).
[42] Higgins, "Seeding Intrinsic Values," p. 10.
[43] Vrishank Singhania, "The Proposed Crime of Ecocide—Ignoring the Question of Liability," OpinioJuris, February 16, 2022, opiniojuris.org/2022/02/16/the-proposed-crime-of-ecocide-ignoring-the-question-of-liability/; and Fien Schreurs, "Revisiting the Possibility of Corporate Criminal Responsibility in International Criminal Law: Amending Article 25 of the Rome Statute to Include Legal Entities within the Jurisdiction of the ICC" (Research Paper DCL 7066, Faculty of Law, University of Ottawa, August 15, 2020), papers.ssrn.com/sol3/papers.cfm?abstract_id=3700432. For an earlier proposal to rely on corporate criminal responsibility for environmental harm, see Mark A. Drumbl, "Waging War against the World: The Need to Move from War Crimes to Environmental Crimes," *Fordham International Law Journal* 22, no. 1 (1998), p. 144. Some earlier definitions have recognized that the perpetrators of ecocide include a broad range of legal persons, from transnational corporations to multinational development banks sponsoring environmentally destructive "megaprojects." See Gray, "The International Crime of Ecocide," p. 222.
[44] Caleb H. Wheeler, "Re-examining Corporate Liability at the International Criminal Court through the Lens of the Article 15 Communication against Chiquita Brands International," *Melbourne Journal of International Law* 19, no. 1 (July 2018), pp. 369–88.
[45] Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide*, pp. 11, 5, 11.
[46] William Cronon, ed., *Uncommon Ground: Rethinking the Human Place in Nature* (New York: Norton, 1996); and Susanna B. Hecht, Kathleen D. Morrison, and Christine Padoch, *The Social Lives of Forests: Past, Present, and Future of Woodland Resurgence* (Chicago: University of Chicago Press, 2014).
[47] Nicole L. Boivin, et al., "Ecological consequences of human niche construction: Examining long-term anthropogenic shaping of global species distributions," *Proceedings of the National Academy of Sciences of the United States of America* 113, no. 23 (2016), pp. 6388–96.
[48] Worster, *Nature's Economy*, p. 413.
[49] See, for instance, Marianne Elisabeth Lien and John Law, "'Emergent Aliens': On Salmon, Nature, and Their Enactment," *Ethnos* 76, no. 1 (2011), pp. 65–87.
[50] For an introduction, see Amitav Ghosh, *The Nutmeg's Curse: Parables for a Planet in Crisis* (Chicago: University of Chicago Press, 2021).
[51] The End Ecocide on Earth initiative declares that "ecocides are impacting on all areas of the global commons . . . [and] crossing planetary boundaries." "Ecocide Potential Examples," End Ecocide on Earth, www.endecocide.org/en/ecocideexamples/.
[52] Will Steffen, Katherine Richardson, Johan Rockström, Sarah E. Cornell, Ingo Fetzer, Elena M. Bennett, Reinette Biggs, et al., "Planetary Boundaries: Guiding Human Development on a Changing Planet," *Science* 347, no. 6223 (January 2015), p. 736; and Johan Rockström, Will Steffen, Kevin Noone, Åsa

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Abstract: The recent proposal by the Independent Expert Panel of the Stop Ecocide initiative to include the crime of ecocide in the International Criminal Court's Rome Statute has raised expectations for preventing and remedying severe environmental harm through international prosecution. As alluring as this image is, we argue that ecocide prosecutions may be the most difficult, perhaps even impossible, in precisely the cases that the ICC would need to be concerned with; namely, the gravest global incidents of environmental harm, including those associated with planetary climate change. We explore a series of questions about the panel's formulation of ecocide that resonate with longer debates around criminalizing environmental harm but take on new dimensions amid the Anthropocene and after twenty years of ICC trials. Ecocide must contend with the hard lessons learned concerning the ICC's limitations in realizing justice in a fraught international political context and also with fundamental challenges to knowledge and legitimacy arising from the uncertainty and dynamic socioenvironmental context of the Anthropocene. The proposed amendment, if adopted, risks ineffective prosecutions or even perverse outcomes for the environment itself. This risk, however, may characterize any effort to prosecute ecocide internationally in the Anthropocene unless the terms of international criminal law are fundamentally rethought.

Keywords: ecocide, International Criminal Court, Anthropocene, climate change, sustainable development, international criminal law, global justice, climate justice