

# ECOCIDE AS THE FIFTH CORE CRIME IN THE ROME STATUTE

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I. INTRODUCTION . . . . .	435
II. THE MENS REA STANDARD . . . . .	436
III. THE DAMAGE THRESHOLD . . . . .	439
IV. IS THE ICC FIT TO TRIAL ECOCIDE . . . . .	440
V. LIABILITY OF CORPORATIONS . . . . .	442
VI. CONCLUSION . . . . .	445

## I. INTRODUCTION

The legal concept of ecocide in the context of international criminal law is quite a recent development. The first serious attempt at a proposal for a definition of ecocide as a crime came from Polly Higgins, a British lawyer. In April 2010, Higgins submitted a proposal to amend the Rome Statute by adding ecocide as the fifth core crime.<sup>1</sup> Higgins defined ecocide as “*the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.*”<sup>2</sup>

However, in recent years the definition has evolved. In 2021, the Independent Expert Panel for the Legal Definition of Ecocide, convened by the Stop Ecocide International Foundation, developed a new definition of ecocide.<sup>3</sup> The objective of the Panel was to establish a definition that could serve as the basis for an amendment to the Rome Statute. The Panel consisted of twelve lawyers with diverse backgrounds and expertise

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1. Juliette Jowit, *British campaigner urges UN to accept ‘ecocide’ as international crime*, THE GUARDIAN (Apr. 9, 2010), <https://www.theguardian.com/environment/2010/apr/09/ecocide-crime-genocide-un-environmental-damage>.

2. POLLY HIGGINS, *EARTH IS OUR BUSINESS: CHANGING THE RULES OF THE GAME* 3 (2012).

3. STOP ECOCIDE FOUNDATION, *INDEPENDENT EXPERT PANEL FOR THE LEGAL DEFINITION OF ECOCIDE: COMMENTARY AND CORE TEXT 2* (2021).

in criminal, environmental, and climate law.<sup>4</sup> The Panel provides the following definition for ecocide:

1. For the purpose of this Statute, “ecocide” means unlawful or wanton acts committed with the knowledge that there is substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts
2. For the purpose of paragraph 1:
  - a. Wanton means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
  - b. “Severe” means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;
  - c. “Widespread” means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;
  - d. “Long-term” means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;
  - e. “Environment” means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.<sup>5</sup>

Throughout this commentary, this definition will be analyzed and used to discuss the fitness of “ecocide” as a crime in the context of international criminal law and the Rome Statute. A remarkable difference between the definition developed by Higgins and the definition developed by the Panel is that Higgins’ definition seems to be one based on strict liability, which is not the case with the definition of the Panel.

## II. THE MENS REA STANDARD

A potential issue with the definition created by the Panel is the mens rea of the crime. On the one hand, the Panel

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4. *See id.* at 4 (providing the background of each of the twelve lawyers).

5. *Id.* at 5.

broadens the standard mens rea of Article 30(3) of the Rome Statute. However, on the other hand, the Panel adds an additional standard regarding the mens rea, which might result in a very high, almost impossible-to-reach, standard. The mens rea of the crime of ecocide, as proposed by the Panel, consists of two levels.

First, the perpetrator must commit the crime with the “knowledge that there is a substantial likelihood of severe and widespread or long-term damage to the environment.”<sup>6</sup> This mens rea requirement deviates from the default mens rea requirement of Article 30(3) of the Rome Statute. The default mens rea requirement requires that the perpetrator committed the crime with “intent and knowledge,” knowledge meaning that the perpetrator is aware that the prohibited consequences will occur in the ordinary course of events.<sup>7</sup> The mens rea standard in the proposal of the Panel is one of recklessness or *dolus eventualis*.<sup>8</sup> Currently, *dolus eventualis* is also used in the Rome Statute in exceptional cases, more specifically in the context of child soldiers and superior responsibility.<sup>9</sup> This lower standard is necessary considering that perpetrators do not have the intent to destroy nature; the destruction of nature is often a secondary result of an action. Nevertheless, a potential issue with this broad approach to mens rea is that States will be reluctant to accept it. After all, it is speculated that many States at the Rome Conference were uncomfortable with *dolus eventualis* as the mens rea standard.<sup>10</sup> A broad ap-

6. *Id.*

7. Rome Statute of the International Criminal Court art. 30(3), Jul. 17, 1998, 2187 U.N.T.S. 3 [hereinafter *Rome Statute*].

8. STOP ECOCIDE FOUNDATION, *supra* note 3, at 11; Anastacia Greene, *Mens Rea and the Proposed Legal Definition of Ecocide*, VÖLKERRECHTSBLOG (July 7, 2021), <https://voelkerrechtsblog.org/mens-rea-and-the-proposed-legal-definition-of-ecocide/>.

9. Greene, *supra* note 8; Kevin Jon Heller, *Skeptical Thoughts on the Proposed Crime of “Ecocide” (That Isn’t)*, OPINIOJURIS (June 23, 2021), <https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/>.

10. See Sarah Finnin, *Mental Elements Under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, 61 INT’L & COMP. L.Q. 325, 345 (2012) (discussing the speculations of various commentators); Roger S. Clark, *Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court’s First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings*, 19 CRIM. L.F. 519, 525 (2008).

proach to mens rea would make the States uncomfortable as important individuals in these States will be more exposed to criminal prosecution and liability under the Rome Statute. Professor Kevin Jon Heller of the University of Copenhagen points out that the inclusion of the term “knowledge” by the Panel in their definition might serve the purpose of creating the impression that the mens rea in ecocide aligns with the mens rea of Article 30(3) of the Rome Statute.<sup>11</sup>

Second, the perpetrator must act with “wanton.” Wanton is further defined as acting “with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated.”<sup>12</sup> The main issue, as well as critique, regarding this element is that it seems to defeat the purpose of introducing the *dolus eventualis* standard through the first mens rea requirement.<sup>13</sup> The introduction of this second requirement makes it almost impossible to prove that the perpetrator acted with the necessary mens rea.

Indeed, the prosecution needs to prove that the perpetrator knew or had to know that their actions would cause excessive damage to nature in relation to the anticipated social and economic benefits.<sup>14</sup> Providing such proof would be particularly difficult in situations where the perpetrator received a permit from the government after carrying out an environmental impact assessment.<sup>15</sup> Christina Voigt, a member of the Panel, responded to this critique from Heller by clarifying that this requirement only applies to lawful acts. Voigt States that in such a situation, “disregard of excessiveness of the damage is the ‘criminalizing’ factor.”<sup>16</sup> However, the distinction between

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11. Heller, *supra* note 9.

12. STOP ECOCIDE FOUNDATION, *supra* note 3, at 5.

13. Heller, *supra* note 9; Michael Karnavas, *Ecocide: Environmental Crime of Crimes of Ill-Conceived Concept!* OPINIOJURIS (July 29, 2021), <http://opiniojuris.org/2021/07/29/ecocide-environmental-crime-of-crimes-or-ill-conceived-concept/>; Kai Ambos, *Protecting the Environment through International Criminal Law?* EJIL:TALK! (June 29, 2021), <https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/>.

14. See Heller, Karnavas, Ambos, *supra* note 13.

15. See Heller, *supra* note 9 (providing a hypothetical of a damaging, yet approved, project).

16. Christina Voigt (@ChristinaVoigt2), TWITTER (June 24, 2021, 07:22 AM), <https://twitter.com/ChristinaVoigt2/status/1408022656234971137>.

lawful and unlawful actions does not really solve the issue when States provide permits for damaging actions.<sup>17</sup>

Heller proposed two alternative definitions of ecocide. In the relevant proposed definition that included an anthropocentric safety valve, Heller replaces the “wanton” requirement with pure negligence regarding the cost/benefit analysis.<sup>18</sup> However, the main issue with this definition is that the mens rea requirement is even lower than the definition proposed by the Panel. It is highly unlikely that States would accept such a low standard. After all, recklessness was already considered an unacceptably low standard during the Rome Conference.<sup>19</sup>

Thus, from this discussion, it becomes apparent that it is difficult to find a balance concerning the mens rea requirement of ecocide. On the one hand, the standard must not be put too high as this would limit the effectiveness of ecocide. Requiring an intent to commit ecocide would render ecocide impractical as the perpetrators of ecocide do not act with the purpose to destroy nature. This destruction is a mere by-product. On the other hand, a low mens rea standard would impede support from States. The standard proposed by the Panel tries to look for the golden mean. However, some problems remain, especially regarding the “wanton” requirement.

### III. THE DAMAGE THRESHOLD

Another potential issue of the proposed definition concerns the use of the terms “severe,” “widespread,” and “long-term damage.” The Panel states that they borrowed these terms from Article 8(2)(b)(iv) of the Rome Statute, dealing with the damage under Articles 35 and 55 of Additional Protocol I.<sup>20</sup> However, the definition proposed by the Panel differs from these provisions in two ways. Firstly, the proposed definition adopts these terms in a context outside of an armed conflict. Secondly, the Panel uses the terms in a cumulative and

17. Karnavas, *supra* note 13.

18. Heller, *supra* note 9.

19. Clark, *supra* note 10, at 529.

20. STOP ECOCIDE FOUNDATION, *supra* note 3, at 12; Rome Statute, *supra* note 7, art. 8(2)(b)(iv); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 35(3), 55, Jan. 23, 1979, 1125 U.N.T.S. 3.

alternative way, while in the Rome Statute, these terms are solely cumulative. Indeed, in the proposal of the Panel, the “severe” requirement must always be present, and the “wide-spread” and “long-term damage” are alternatives. A potential issue is that these terms, when used in the context of articles 35 and 55 of the Additional Protocol I, are interpreted narrowly.<sup>21</sup> One of the main reasons for this narrow scope is the cumulative character of these three conditions in the context of International Humanitarian Law.<sup>22</sup> However, in the proposed definition, the requirements are no longer entirely cumulative but are partially cumulative and alternative. Hence, there are less requirements that need to be fulfilled compared to the cumulative use of these terms in articles 35 and 44 of the Additional Protocol. Furthermore, the context of these requirements in the proposed definition is also somewhat different compared to Article 8(2)(b)(iv) of the Rome Statute as used in a situation of armed conflict. Hence, it is uncertain whether the existing interpretation of these requirements is also applicable here.

Another issue regarding the damage threshold relates to the scientific nature of these requirements, and whether the ICC is the appropriate forum to tackle such complex scientific questions.

#### IV. IS THE ICC FIT TO TRIAL ECOCIDE

As briefly mentioned in the previous section, another, more fundamental, problem concerns whether the ICC is the right court to deal with questions of ecocide. More specifically, the question is whether the ICC judges can appropriately assess the complex scientific evidence, such as the consequences of certain ecosystem changes regarding climate change, that has to be provided to prove that the environmental damage meets the requirements discussed in the previous section.<sup>23</sup> A quick look at the profiles of the judges of the ICC shows that

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21. Jérôme de Hemptinne, *Ecocide: an Ambiguous Crime?*, EJIL:TALK! (Aug. 29, 2022), <https://www.ejiltalk.org/ecocide-an-ambiguous-crime/>; Michael Bothe et al., *International law protecting the environment during armed conflict: gaps and opportunities*, 92 INT'L REV. OF THE RED CROSS 569, 575-6 (2010).

22. Bothe, *supra* note 21.

23. See Karnavas, *supra* note 13 (discussing this difficulty for ICC judges).

their main specialization is in criminal law.<sup>24</sup> Moreover, the ICC document introducing the judges and their backgrounds does not mention environmental law once.<sup>25</sup> This creates a situation in which ICC judges will likely have to rely on experts to understand environmental matters. Determining whether actions can cause severe and widespread or long-term damage to the environment requires that the judges can understand complicated scientific information about complex environmental issues.

Additionally, there is the problem that the ICC is overburdened with many crimes under its jurisdiction and has a limited capacity.<sup>26</sup> Indeed, the ICC has a limited budget and is constantly confronted with capacity problems.<sup>27</sup> Consequently, the ICC has thus far only trialed 31 cases throughout its history.<sup>28</sup> These issues would potentially result in a situation where only a limited number of ecocide cases are brought to the ICC. After all, it would not be surprising if the ICC mainly focuses on cases that fall traditionally under its jurisdiction.

Another relevant issue is whether it is possible to adopt “ecocide” as the fifth core crime in time for it to fulfill its role. One of the Panel members stated that it could take somewhere between five and fifty years for the Statute to include ecocide as a crime.<sup>29</sup> A substantial number of States would have to agree on the definition, which will be a great political and diplomatic challenge.<sup>30</sup> Developing States may have ques-

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24. See The Judges of the Court, INT’L CRIM. COURT (2021), <https://www.icc-cpi.int/sites/default/files/Publications/JudgesENG.pdf> (providing the backgrounds of each ICC judge).

25. *Id.*

26. Darryl Robinson, *Your Guide to Ecocide: Part 1*, OPINIOJURIS (July 16, 2021), <http://opiniojuris.org/2021/07/16/your-guide-to-ecocide-part-1/>.

27. Asad Kiyani, *Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity*, 14(4) J. OF INT’L CRIM. JUST. 939, 945-6 (2016).

28. *About the Court*, INT’L CRIM. COURT, <https://www.icc-cpi.int/about/the-court#:~:text=headquarters%3A%20The%20Hague%2C%20the%20Netherlands.&text=there%20have%20thus%20far%20been,have%20issued%2038%20arrest%20warrants> (last visited Nov. 7, 2022).

29. Duitsland in Nederland, *The legal concept of Ecocide*, YOUTUBE (June 25, 2021), <https://www.youtube.com/watch?v=CHYTmfwDUGI>.

30. Donna Minha, *The Proposed Definition of the Crime of Ecocide: An Important Step Forward, but can Our Planet Wait?*, EJIL:TALK! (July 1, 2021), <https://www.ejiltalk.org/the-proposed-definition-of-the-crime-of-ecocide-an-important-step-forward-but-can-our-planet-wait/>.

tions on how to balance this crime with their industrial development. However, the environmental crisis is happening and will most likely be determined by what happens in the coming years. Hence, a slow adoption would mean that adopting the crime does not help to tackle the most urgent environmental situation.

## V. LIABILITY OF CORPORATIONS

Another problem is that the ICC has no personal jurisdiction over corporations. This is especially problematic as corporations are potentially some of the main perpetrators of the crime of ecocide. However, the Stop Ecocide Foundation seems to argue that the ICC could hold individuals within a corporation, such as the CEO or financier, responsible for the acts causing the ecocide liable to criminal prosecution.<sup>31</sup> Hence, for the ICC to hold these individuals criminally liable, it is necessary to attribute the actions of the corporations to these individuals. There are several ways to attribute the actions of a corporation to an individual within that corporation.

The first potential form of individual criminal responsibility is indirect responsibility under Article 25(3)(a) of the Statute.<sup>32</sup> In several cases, the ICC confirmed that it is possible for a leader of an organization to be criminally liable under the Statute if this individual uses this organization to commit the crime.<sup>33</sup> However, it is unlikely that this reasoning is applicable in the context of a corporation. After all, the ICC applies a high standard of mens rea in this context, as the individual needs to act with the necessary intent and knowledge under

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31. See Making Ecocide a Crime, STOP ECOCIDE INT'L, <https://www.stopecocide.earth/making-ecocide-a-crime> (last visited Nov. 5, 2022) (stating that no CEO or financier wants to be in the same way as a war criminal).

32. Rome Statute, *supra* note 7, art. 25(3)(a); Panagiota Kotzamani, *Corporate Criminality and Individual Criminal Responsibility in International Law: Removing the Hurdles from the International Criminal Court's Approach to Perpetration through Control of a Collective Entity*, 20(6) INT'L CRIM. L. REV. 1108, 1132 (2020); Vrishank Singhania, *The Proposed Crime of Ecocide – Ignoring the Question of Liability*, OPINIOJURIS (Feb. 16, 2022), <https://opiniojuris.org/2022/02/16/the-proposed-crime-of-ecocide-ignoring-the-question-of-liability/>.

33. Prosecutor v. Ongwen, ICC-02/04-01/15, Judgment, ¶ 2786-88 (Feb. 4, 2021); Prosecutor v. Katanga, ICC-01/04-01/07, Judgment, ¶ 1405 (March 7, 2014).

Article 30 of the Statute.<sup>34</sup> As explained earlier, it is unlikely that a person will intentionally engage in ecocide. It could be argued based on the proposal of the Panel that the mens rea standard would also be lowered in this context. However, the proposal does not clarify this. Moreover, the hierarchical structure of the militia in the cases where the Court discussed the indirect responsibility based on control over organizations is much tighter than the hierarchical structure of corporations, especially multinational corporations.<sup>35</sup>

The second form of individual criminal responsibility is based on Article 25(3)(c) of the Rome Statute, aiding and abetting.<sup>36</sup> Similar to indirect responsibility, the ICC applies a high mens rea standard for this form of liability under the Statute.<sup>37</sup> Therefore, it is also unlikely that the ICC could hold an individual in a corporation criminally liable in the context of ecocide based on Article 25(3)(c) of the Rome Statute.

Lastly, the most promising basis to hold an individual in a corporation liable is superior responsibility.<sup>38</sup> Article 28(b) of the Statute provides that the ICC can hold a superior criminally responsible for crimes committed by its subordinates under their effective authority and control.<sup>39</sup> Additionally, the ICC can also hold the superior criminally responsible if they fail to exercise authority and control over their subordinates and this loss of controls or authority leads to the manifestation of the crimes.<sup>40</sup> A first interest aspect concerning this form of individual criminal responsibility is the control element. The superior needs to have effective control over the subordinates.<sup>41</sup> The approach to effective control for civilian superiors, such as leading figures in a corporation, is different than the approach used regarding military superiors. Effective control by civilian superiors is present when, through their position, they have a duty to report when crimes are committed

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34. Prosecutor v. Ongwen, *supra* note 32, ¶ 2782.

35. Panagiota, *supra* note 32, at 1113.

36. Singhania, *supra* note 32.

37. See Prosecutor v. Bemba, ICC-01/05-01/08 A, Judgement, ¶¶ 95-97 (June 8, 2018) (“the mental element of murder as a war crime requires proof beyond reasonable doubt”).

38. Singhania, *supra* note 32.

39. Rome Statute, *supra* note 7, art. 28(b).

40. *Id.*

41. Rome Statute, *supra* note 7, art. 28(b)(ii).

and that these reports will trigger an investigation or disciplinary sanctions.<sup>42</sup>

Furthermore, the prosecution needs to prove several elements to establish superior criminal responsibility regarding a civilian superior. One of these elements is the mens rea element, which requires that the civilian superiors knew of the crimes or consciously disregarded information indicating that their subordinates committed crimes or were about to commit crimes that fall under the jurisdiction of the ICC.<sup>43</sup> This requirement is much higher compared to superiors in a military context.<sup>44</sup> It is unclear how this would influence the mens rea approach used in the proposal. However, it is possible that this higher threshold in this context might also influence the approach to mens rea regarding ecocide in this context. The activity also needs to fall within the effective control or responsibility of the superior, mentioned above.<sup>45</sup> Furthermore, the prosecution has to prove that the superior failed to take the necessary measures to prevent the crimes from happening or failed to submit the matter to competent authorities.<sup>46</sup> There also needs to be a causal link between the commission of the crime and the failure of the superior.<sup>47</sup> Some may argue that the complex hierarchies and compartmentalization within corporations make it more difficult.<sup>48</sup> It will be crucial that the hierarchical structure of the corporation is clearly identifiable. After all, this would allow the court to identify which person in the company was responsible to oversee the activities that led to the commission of ecocide and whether this person had access to the necessary information to prevent the commission or submit the matter to the authorities. Nevertheless, superior responsibility seems to be the most realistic option to prose-

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42. *Modes of Liability: Superior Responsibility*, INT'L CRIM. L. SERV. 15-16 (2018), <https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-10-superior-responsibility.pdf>.

43. Hans Vest, *Business Leader and the Modes of Individual Criminal Responsibility under International Law*, 8 J. OF INT'L CRIM. JUST. 851, 870 (2010); Jamie Allan Williamson, *Some considerations on command responsibility and criminal liability*, 90 INT'L REV. OF THE RED CROSS 303, 309 (2008).

44. *Modes of Liability*, *supra* note 42, at 18.

45. *Id.* at 17.

46. *Id.*

47. *Id.* at 18.

48. See Singhanian, *supra* note 32 (stating "the CEO is shielded by layers of hierarchies, and often through separate legal entities").

cute corporations indirectly. However, a corporate entity, as such, will still escape prosecution, and corporations may adapt their structure to avoid high-ranked individuals within the company from falling within the scope of superior responsibility.

## VI. CONCLUSION

The definition of ecocide proposed by the Expert Panel incited much debate in the international criminal law community. The comments touched on many topics, including the mens rea standard, the damage threshold, the appropriateness of the ICC as the court and the liability of corporations. Another recurring critique was regarding the anthropocentric nature of the definition. However, as stated by Robinson, the focus on this issue seems to be an “overstated dichotomy” as this is not really the point of the whole discussion.<sup>49</sup> After all, letting anthropocentric elements out of the definition may make the theoretical basis of the definition sounder, as ecocide is an inherently ecocentric concept. However, it may also make the definition less practical as it does not reflect the current state of international criminal law and environmental law, and this could, in turn, make States reluctant to accept ecocide. Hence, this topic was not further discussed in this commentary. Different authors came up with different alternative solutions: creating a separate convention,<sup>50</sup> creating a different definition,<sup>51</sup> or trying to make use of the existing crimes.<sup>52</sup> Despite the criticisms, which in many ways were justified, this definition does seem to be a step in the right direction. On the one hand, it shows that it is not easy to incorporate ecocide into the Rome Statute, but on the other hand, it did make the international law community think. Nevertheless, it seems practically impossible that the Panel’s definition will make it into the Rome Statute in this form. The definition does, however, provide a strong basis for creating a better version in the future.

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49. Darryl Robinson, *Your Guide to Ecocide: Part 2*, OPINIOJURIS (July 16, 2021), <http://opiniojuris.org/2021/07/16/your-guide-to-ecocide-part-2-the-hard-part/>.

50. Robinson, *supra* note 26.

51. Minha, *supra* note 30.

52. Heller, *supra* note 9.