

## Towards an International Crime of Ecocide

By Daniel Bertram

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On 9 September 2024, the Pacific Island States of Vanuatu, Samoa and Fiji jointly submitted a proposal to amend the Statute of the International Criminal Court ('ICC') to the United Nations ('UN') Secretary-General. The proposal urges the inclusion of a new, independent crime of "ecocide" under Articles 5 and 8 of the Statute, with the aim of protecting a group of interests that has so far received little attention within the dominant humanitarian paradigm of international criminal justice: the natural environment.<sup>1</sup> This policy brief places the recent proposal within the wider ecocide debate, highlighting its historical evolution, definitional conundrums, procedural pathways, and political stakes.

### 1. The Emergence of Ecocide

Vanuatu's pioneering initiative marks an inflection point in the long-standing quest to inject international criminal law ('ICL') with environmental sensibilities. Ever since Arthur Galston coined the term 'ecocide' in the early 1970s to voice his objections to the military use of defoliating herbicides in Vietnam,<sup>2</sup> the concept has waxed and waned in legal discussions. Galston's advocacy ultimately led to the prohibition of military acts that cause "widespread, long-term, and severe damage" in the 1977 Additional Protocol I to the Geneva Conventions and the 1976 Environmental Modification Convention.<sup>3</sup> This prohibition gradually hardened into the environmental war crime contained within Article 8(2)(b)(iv) of the ICC Statute.<sup>4</sup> Long ignored in practice for its

high prosecutorial thresholds,<sup>5</sup> this provision has recently gained new traction in the context of environmental warfare in the conflict between Russia and Ukraine.<sup>6</sup>

Another strand of ecocide advocacy has focused on broadening the concept of genocide so as to include environmental concerns. In 1985, the Whitaker Report of the UN Sub-Commission on the Promotion and Protection of Human Rights explicitly considered pathways to this effect.<sup>7</sup> More recent studies by social scientists have highlighted the close ties between the destruction of human populations and damage of the natural environment upon which such populations rely, in particular in the case of Indigenous communities.<sup>8</sup> Such arguments have had little impact on legal practice or diplomatic discussions, however.

Similarly, recent years have seen increased efforts to prosecute environmental damage within the context of crimes against humanity. Encouraged by the ICC Office of the Prosecutor's ('OTP') 2016 Policy Paper on Case Selection and Prioritisation,<sup>9</sup> a flurry of communications have been filed under Article 15 of the Rome Statute. These communications have alleged the commission of crimes against humanity (including, *inter alia*, extermination, persecution and other inhumane acts) in the context of environmental destruction and violence against

<sup>1</sup> See Stop Ecocide International, "Mass Destruction of Nature Reaches International Criminal Court (ICC) as Pacific Island States Propose Recognition of 'Ecocide' as International Crime", Press Release, 9 September 2024. The full proposal was not publicly available at the time of publication, but is on file with the author.

<sup>2</sup> David Zierler, *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment*, University of Georgia Press, 2011.

<sup>3</sup> See Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Article 35(3) (<https://www.legal-tools.org/doc/d9328a/>): "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment". This prohibition is further operationalized in Article 55. See also Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques, 10 December 1976, Article I(1) (<https://www.legal-tools.org/doc/151f0b/>): "Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, longlasting or severe effects as the means of destruction, damage or injury to any other State Party".

<sup>4</sup> ICC Statute, 17 July 1998, Article 8(2)(b)(iv) (<https://www.legal-tools.org/doc/7b9af9/>): "For the purposes of this Statute, 'war crimes' means [...] [i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".

<sup>5</sup> Jessica Lawrence and Kevin Jon Heller, "The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime", in *Georgetown International Environmental Law Review*, 2007, vol. 20, no. 1, pp. 61–95.

<sup>6</sup> Shah Maruf, "Environmental Damage in Ukraine as Environmental War Crime under the Rome Statute: The Kakhovka Dam Breach in Context", in *Journal of International Criminal Justice*, 2024, vol. 22, no. 1, pp. 99–126.

<sup>7</sup> Benjamin Whitaker, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, UN Doc. E/CN.4/Sub.2/1985/6, 2 July 1985, p. 17 (<https://www.legal-tools.org/doc/99c00c/>):

Some members of the Sub-Commission have however proposed that the definition of genocide should be broadened to include cultural genocide or 'ethnocide', and also 'ecocide': adverse alterations, often irreparable, to the environment – for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest – which threaten the existence of entire populations, whether deliberately or with criminal negligence. [...] Further consideration should be given to this question, including if there is no consensus, the possibility of formulating an optional protocol.

<sup>8</sup> See, for example, Tim Lindgren, "Ecocide, Genocide and the Disregard of Alternative Life-Systems", in *International Journal of Human Rights*, 2018, vol. 22, no. 4, pp. 525–549.

<sup>9</sup> ICC-OTP, "Policy Paper on Case Selection and Prioritisation", 15 September 2016 (<https://www.legal-tools.org/doc/182205/>). In paragraph 40, the OTP states that its assessment of gravity includes "crimes committed by means of, or resulting in, the destruction of the environment or of protected objects", while paragraph 41 promises that "the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land".

Indigenous populations.<sup>10</sup> Earlier this year, the OTP announced that it was elaborating a new policy to address environmental crimes within the ICC Statute.<sup>11</sup> While this is a promising sign that the Prosecutor is taking environmental harm seriously, such efforts continue to be hampered by legal constraints flowing from ICL's persistent humanitarian ethos.

Considering the difficulties of accommodating environmental damage within existing legal structures, activists and scholars alike have long advocated the codification of an independent international crime against the environment. As early as 1973, Falk tabled a comprehensive draft ecocide convention.<sup>12</sup> In the 1990s, the International Law Commission ('ILC') considered including a crime of "wilful and severe damage to the environment" in its Draft Code of Crimes against the Peace and Security of Mankind,<sup>13</sup> but ultimately decided to remove the article in question – despite scholarly pleas to the contrary.<sup>14</sup> From 2010 onwards, the late Scottish barrister Polly Higgins began to popularize the idea of ecocide as the 'missing' fifth crime of the ICC Statute.<sup>15</sup> Though initially received with scepticism among international lawyers, her advocacy attracted public attention and sparked a transnational campaign, the Stop Ecocide movement.<sup>16</sup>

In recent years, this campaign has made important strides in pushing for a new international crime. At the general debate of the 18th Session of the ICC Assembly of States Parties ('ASP') in 2019, Vanuatu's Ambassador John Licht first introduced the concept to the multilateral community.<sup>17</sup> In 2020, at the request of a group of Swedish parliamentarians, the Stop Ecocide Foundation convened an Independent Expert Panel ('IEP'), co-chaired by the Senegalese prosecutor Dior Fall Sow and British barrister Philippe Sands KC, to draw up a comprehensive definition of the putative crime. Comprising scholars and experts from both environmental and criminal backgrounds, the IEP ultimately concluded its work in June 2021, defining ecocide as "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts".<sup>18</sup>

The IEP definition has since sparked intense academic dialogue, diplomatic interest, and legislative activity. In February 2024, Belgium became the first country to transpose the international definition in its national penal code.<sup>19</sup> Only two months later, the European Union

('EU') adopted a thoroughly expanded and enhanced version of its 2008 Environmental Crimes Directive.<sup>20</sup> Other countries such as France, Chile and Colombia have similarly strengthened their environmental criminal laws in recent years, and a host of legislative bills are currently pending in Mexico, Peru, the Netherlands, Scotland and elsewhere. The IEP's work is also mirrored in Vanuatu's amendment request, and has thus established itself as a key reference point in current legal debates.

## 2. Conceptual and Definitional Questions

The general case for criminalizing environmental destruction at the international level is well-established. In light of recent evidence on declining biodiversity, accelerating climate change, and ubiquitous pollution,<sup>21</sup> there is no doubt that certain types of environmental misconduct cause immense human and non-human suffering, are of the gravest concern to the international community, and violate a host of internationally recognized legal interests, not least the human right to a clean, healthy and sustainable environment endorsed by the UN General Assembly in July 2022.<sup>22</sup> In other words, ecocide arguably satisfies the requirements of different criminalization theories such as the harm principle and the *Rechtsgütertheorie*, as well as the ICC Statute's narrow focus on the "most serious crimes of concern to the international community as a whole".<sup>23</sup>

Criminalization theory is only one part of the equation, though – it only confirms that ecocide *could* be legitimately criminalized as a matter of general principle, not whether and why it *should* be. From a legal point of view, the crime's rationale must also adhere to one or multiple theories of punishment. In addition to classical models of retribution as well as specific and general deterrence, scholars such as Hamilton argue that ecocide's primary function is expressive in nature, that is, it lies in the message it would send to private and public decision-makers.<sup>24</sup>

The high hopes placed in the criminalization of ecocide have coloured off on definitional questions, where the desire to enshrine a high level of environmental ambition has led to tensions with the intrinsic constraints of ICL as a tool of last resort. A key issue in this regard concerns ecocide's legal wrongfulness. As Robinson explains,<sup>25</sup> simply criminalizing the infliction of "severe and either widespread or long-term damage" without any further qualification would likely capture a wide array of routine conduct (such as taking an intercontinental flight), and thus expose well-meaning and law-abiding citizens to international criminal liability. Ecocidal harm is deeply embedded in our current economic and political structures of production and consumption – and ICL would be a disproportionate and ineffective instrument to spearhead wider economic and social transformation. This means that some further threshold must be set to separate internationally criminal behaviour from the mere manifestation of severe and widespread or long-

March 2024.

<sup>10</sup> See, for example, AllRise, "Communication under Article 15 of the Rome Statute of the International Criminal Court Regarding the Commission of Crimes Against Humanity Against Environmental Dependents and Defendants in the Brazilian Legal Amazon From January 2019 to Present, Perpetrated by Brazilian President Jair Messias Bolsonaro and Principal Actors of His Former or Current Administration", 12 October 2021 (<https://www.legal-tools.org/doc/030a97if/>).

<sup>11</sup> ICC-OTP, "The Office of the Prosecutor Launches Public Consultation on a New Policy Initiative to Advance Accountability for Environmental Crimes Under the Rome Statute", Statement, 16 February 2024 (<https://www.legal-tools.org/doc/cqf4s6ac/>).

<sup>12</sup> Richard Falk, "Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals", in *Bulletin of Peace Proposals*, 1973, vol. 4, no. 1, pp. 80–96.

<sup>13</sup> ILC member Christian Tomuschat prepared an extensive brief on environmental crimes ahead of the ILC's 48th Session, see Document on Crimes Against the Environment, Prepared by Mr. Christian Tomuschat, Member of the Commission, UN Doc. ILC(XLVIII)/DC/CRD.3, 27 March 1996 (<https://www.legal-tools.org/doc/17db65/>).

<sup>14</sup> Mark Allan Gray, "The International Crime of Ecocide", in *California Western International Law Journal*, 1996, vol. 26, no. 2, pp. 215–271.

<sup>15</sup> Polly Higgins, *Eradicating Ecocide*, Shephard-Walwyn, London, 2010.

<sup>16</sup> See the web site of Stop Ecocide International.

<sup>17</sup> For Vanuatu's full statement, see Statement by H.E. John H. Licht, Ambassador of the Republic of Vanuatu to the European Union, 18th Session of the ICC ASP, 2–7 December 2019 (<https://www.legal-tools.org/doc/uqwj4qhw/>). Licht's comments were later echoed by the representatives of Bangladesh and the Maldives.

<sup>18</sup> Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text*, June 2021 (<https://www.legal-tools.org/doc/gnplfe/>).

<sup>19</sup> For an assessment of the Belgian law and a comparison with the EU Directive, see Daniel Bertram, "Ecocide à la Bruxelloise", in *Verfassungsblog*, 9

<sup>20</sup> Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the Protection of the Environment through Criminal Law and Replacing Directives 2008/99/EC and 2009/123/EC, 11 April 2024, no. 2024/1203 (<https://www.legal-tools.org/doc/4li2f6rt/>). For a scholarly assessment of the revised Directive, see Michael Faure, "The EU Environmental Crime Directive 2024: A Revolution in EU Environmental Criminal Law?", in *Journal of Environmental Law*, 2024, vol. 36, no. 3.

<sup>21</sup> Katherine Richardson *et al.*, "Earth Beyond Six of Nine Planetary Boundaries", in *Science*, 2023, vol. 9, no. 37.

<sup>22</sup> UN General Assembly, The Human Right to a Clean, Healthy and Sustainable Environment, UN Doc. A/76/L.75, 26 July 2022 (<https://www.legal-tools.org/doc/z617hzja/>).

<sup>23</sup> See, for example, Frédéric Mégret, "The Problem of an International Criminal Law of the Environment", in *Columbia Journal of Environmental Law*, 2011, vol. 36, pp. 195–258; Rosemary Mwanza, "Enhancing Accountability for Environmental Damage Under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity", in *Melbourne Journal of International Law*, 2018, vol. 19, no. 2, pp. 586–613.

<sup>24</sup> Rebecca Hamilton, "Criminalizing Ecocide", American University, Washington College of Law, August 2024. On the underpinnings of expressivist theories of punishment, see Carsten Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice*, Oxford University Press, 2020.

<sup>25</sup> Darryl Robinson, "Ecocide – Puzzles and Possibilities", in *Journal of International Criminal Justice*, 2022, vol. 20, no. 2, pp. 313–347.

term damage.

Cognizant of this issue, the IEP definition introduced a two-pronged, disjunctive wrongfulness test. In order for ecocidal acts to attract international criminal liability, they must be either “unlawful” or “wanton”. The first criterion, unlawfulness, is relatively uncontroversial in that it simply makes ecocide contingent on the violations of established legal norms and obligations. In other words, if an activity was lawful, it would not qualify as ecocide. Since international environmental law arguably contains very few unequivocal prohibitions, however, ‘unlawfulness’ might only cover a relatively small number of environmentally harmful activities. As such, it risks ignoring even the most atrocious ecocidal activities to the extent that they are in line with existing international legal obligations. To capture a wider class of ‘awful but lawful’ acts, then, the IEP moulded an alternative criterion of ‘wantonness’ as “reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated”.

This latter criterion, too, has been criticized from various sides. Commentators such as Minkova,<sup>26</sup> Hamilton<sup>27</sup> or Heller,<sup>28</sup> on the one hand, have alleged that the provision introduces anthropocentric concerns through the backdoor and sends the fatal signal that even the most outrageous acts of environmental destruction are acceptable as long as they generate sufficient benefit to humans. As such, it fails to reflect the intricate connection between human flourishing and environmental well-being and thus undermines the crime’s message. Moreover, proving that a perpetrator was aware that the damage would be “excessive” would likely be difficult to prove.<sup>29</sup> On the other hand, some observers have taken issue with the notion of criminal judges balancing environmental costs against human benefits *ex post facto*. This open standard devolves considerable discretion to unelected judges and clashes with the *lex certa* principle, which demands that criminal prohibitions be sufficiently clear *ex ante*.<sup>30</sup>

For this reason, it is unsurprising that both the Belgian ecocide provision and the EU Directive require unlawfulness as a precondition for criminal liability. However, they define unlawfulness in relation to the wealth of administrative regulations in domestic or EU law, which is significantly broader than international law in this respect. Moreover, the EU Directive further contains an open clause that requalifies nominally law-abiding conduct as unlawful if a legal license was obtained by fraud, extortion, coercion or was otherwise in breach of “substantive legal requirements”.<sup>31</sup> The latter solution would also be thinkable at the international level, allowing ecocide to evolve dynamically with international environmental legal doctrines that clarify what counts as unlawful.

Besides the wrongfulness threshold, other outstanding definitional issues concern the *mens rea* threshold – for which the IEP proposed “knowledge that there is a substantial likelihood” – as well as relevant modes of liability. Though currently less discussed, such questions crucially shape the likelihood of prosecution, and could thus be pivotal to the crime’s deterrent effect.<sup>32</sup> Additionally, and so far sidelined by most debates on the topic, there is an urgent need to rethink the remedies currently available in ICL to repair and restore environmental harm.<sup>33</sup>

<sup>26</sup> Liana Georgieva Minkova, “The Fifth International Crime: Reflections on the Definition of ‘Ecocide’”, in *Journal of Genocide Research*, 2023, vol. 25, no. 1, pp. 62–83.

<sup>27</sup> Hamilton, 2024, see *supra* note 24.

<sup>28</sup> Kevin Jon Heller, “Skeptical Thoughts on the Proposed Crime of “Ecocide” (That Isn’t)”, in *Opinio Juris*, 23 June 2021.

<sup>29</sup> See, for example, Robert Bray *et al.*, “ELI Report on Ecocide: Model Rules for an EU Directive and a Council Decision”, European Law Institute, 20 February 2023, p. 28 (<https://www.legal-tools.org/doc/6t4fn4w6/>).

<sup>30</sup> Robinson, 2022, p. 341, see *supra* note 25.

<sup>31</sup> On the implications of this formulation, see Faure, 2024, *supra* note 20.

<sup>32</sup> Vrishank Singhania, “The Proposed Crime of Ecocide – Ignoring the Question of Liability”, in *Opinio Juris*, 16 February 2022.

<sup>33</sup> Mutoy Mubiala, “Mass Deforestation as an Alarming Form of Ecocide: Adopting Transitional Justice Measures to Complement Criminalization”, Policy Brief Series No. 139 (2022), Torkel Opsahl Academic EPublisher (‘TOAEP’), Brussels, 2022 (<https://www.toaep.org/pbs-pdf/151-mubiala/>).

In sum, while there are substantial open queries and doubts regarding ecocide’s scope, none of these are insurmountable with sufficient legal imagination and political resolve.

### 3. The Road to Codification

What are the next steps for the ecocide proposal? With their submission to the UN Secretary-General, Vanuatu, Fiji and Samoa triggered the ICC Statute’s amendment procedure as set out in Article 121. The UN Secretary-General will circulate the proposal text to all ICC States Parties, who will vote (by simple majority) no sooner than three months after notification (that is, at the 24th Session of the ASP in 2025) on whether to take up the proposal. If this vote is successful, formal negotiations can begin, though States Parties are free to already start deliberations informally earlier than that, of course.

Drawing on the experiences with the crime of aggression, the ASP at its 8th Session in 2009 decided to establish a dedicated Working Group on Amendments (‘WGA’) to streamline and facilitate the procedure set out in Article 121.<sup>34</sup> According to its terms of reference,<sup>35</sup> the WGA discusses amendment proposals and formulates recommendations to the Assembly on whether to take up and eventually adopt a given proposal. In doing so, particular weight should be given to “whether the crime can be characterized as one of the most serious crimes of concern to the international community as a whole and whether the crime is based on an existing prohibition under international law”.

In line with this practice, the ecocide proposal would thus be handled by the WGA and its newly-appointed chair Ambassador Juan José Quintana (Colombia), rather than by the ASP plenary. Previous successful amendment proposals by Belgium<sup>36</sup> and Switzerland<sup>37</sup> adopted in 2017 and 2019, respectively, have shown that the WGA can serve as an effective forum to foster constructive dialogue. However, both proposals concerned relatively minor amendments to Article 8 and were understood to codify existing customary law. The ecocide proposal differs in terms of scope and ambition.

Considering these circumstances, some voices have called for the establishment of a special working group as an alternative to the WGA.<sup>38</sup> The precedent for this measure is the Special Working Group on Aggression, which was created at the 1st Session of the ASP in 2002.<sup>39</sup> Over the following years, the Special Working Group hashed out a widely accepted definition of the crime of aggression, which was finally adopted by consensus at the Kampala Review Conference in 2010.<sup>40</sup> While the creation of a special working group could lead to more focused discussions, it could also sidetrack the issue within the ASP and thus slow or halt its development.<sup>41</sup> Once the work in the WGA or a special working group is completed, the draft text would be forwarded to the ASP, which could either decide to endorse the amendment at one of its regular sessions, convene a special session, or even hold a dedi-

<sup>34</sup> ICC ASP, Resolution ICC-ASP/8/Res.6, Review Conference, 26 November 2009 (<https://www.legal-tools.org/doc/bf0e8c/>).

<sup>35</sup> ICC ASP, Resolution ICC-ASP/11/Res.8, Strengthening the International Criminal Court and the Assembly of States Parties, 21 November 2012, Annex II (<https://www.legal-tools.org/doc/d09f58/>).

<sup>36</sup> ICC ASP, Resolution ICC-ASP/16/Res.4, Amendments to article 8 of the Rome Statute of the International Criminal Court, 14 December 2017 (<https://www.legal-tools.org/doc/14ceb3/>).

<sup>37</sup> ICC ASP, Resolution ICC-ASP/18/Res.5, Amendments to article 8 of the Rome Statute of the International Criminal Court, 6 December 2019 (<https://www.legal-tools.org/doc/m5rfks/>).

<sup>38</sup> Coalition for International Criminal Justice (‘CICJ’), “ICC States Parties Should Establish a Special Working Group on Ecocide”, CICJ Statement No. 4, 10 December 2023 (<https://www.legal-tools.org/doc/j4kgwo/>).

<sup>39</sup> ICC ASP, Resolution ICC-ASP/1/Res.1, Continuity of work in respect of the crime of aggression, 9 September 2002 (<https://www.legal-tools.org/doc/7ecd13/>).

<sup>40</sup> ICC ASP, Resolution RC/Res.6, The crime of aggression, 11 June 2010 (<https://www.legal-tools.org/doc/0d027b/>).

<sup>41</sup> For a closer assessment of the lessons that could be gauged from the experience with the crime of aggression, see Shirleen Chin, “Lessons Learned from the Adoption of the Crime of Aggression: Ecocide to Charter Its Own Path”, The Promise Institute for Human Rights, University of California Los Angeles, 2023.



cated review conference. In either case, the amendment would require the support of two-thirds of States Parties (a minimum of 83 out of 125 current States Parties) in order to be adopted. Moreover, amendments to Articles 5, 6, 7, or 8 – as is the case with the ecocide proposal – only apply to those States Parties (that is, their nationals and territory) who choose to ratify the amendment after its adoption.

While most attention is currently dedicated to the ICC Statute amendment proposals, it bears mentioning that there are other viable codification pathways. One alternative would be to push for the inclusion of one or multiple environmental provisions in the to-be-negotiated crimes against humanity convention. Another option would entail working on a separate treaty outside the ICC Statute system, either at global or regional levels. An example of the latter is the Council of Europe's revised convention on the protection of the environment through criminal law, which is currently in advanced drafting stages.<sup>42</sup> These instruments could fruitfully complement discussions at the ASP level and bolster the development of innovative legal solutions beyond the confines of the ICC.<sup>43</sup>

#### 4. A Matter of Justice

The ecocide proposal must be understood in the context of long-standing calls for international law to safeguard environmental and climate justice. It is no coincidence that three small Pacific Island States were the main diplomatic drivers behind this idea in 2024. Though environmental degradation is an existential threat for billions of people, it is particularly pressing for those in vulnerable geographic, economic or social positions. Criminalizing ecocide arguably could play a role – next to other processes, such as the negotiations under the UN Framework Convention on Climate Change regime, or the pending Advisory Opinion from the International Court of Justice ('ICJ') on the Obligations of States in respect of Climate Change<sup>44</sup> – in advancing accountability for some forms of environmental misconduct.<sup>45</sup> While international criminalization is a blunt tool, an *ultima ratio* measure, and although its precise impacts on behaviour are difficult to foretell, there is a strong deontological case in favour of recognizing acts of reckless environmental destruction for what they are: an unacceptable incursion on the public good that merits public sanction.

The decisive element going forward is the international community's willingness to act upon the ecocide proposal with resolve and determination. While the diplomatic initiative has so far been confined to Vanuatu, Samoa, Fiji and, more recently, the Democratic Republic of Congo ('DRC'),<sup>46</sup> a special role in the ensuing discussions falls on States

<sup>42</sup> See "Committee of experts on the protection of the environment through Criminal Law (PC-ENV)" (available on the Council of Europe's web site).

<sup>43</sup> For the idea of a 'model law', see Darryl Robinson, "The Ecocide Wave is Already Here: National Momentum and the Value of a Model Law", in *Just Security*, 23 February 2023.

<sup>44</sup> ICJ, *Obligations of States in Respect of Climate Change*, Request for Advisory Opinion, 12 April 2023 (<https://www.legal-tools.org/doc/aeardlu1/>). For more information on the advisory opinion, consult the case-page "Obligations of States in respect of Climate Change" on the ICJ's web site.

<sup>45</sup> On the need to think beyond the criminalization of ecocide, see Joshua Castellino, "Entrenched Structural Discrimination and the Environment: Recovery-Based International Law Response to Colonial Crime", Policy Brief Series No. 140 (2022), TOAEP, Brussels, 2022 (<https://www.toaep.org/pbs-pdf/140-castellino/>).

<sup>46</sup> The DRC's Minister of the Environment Ève Bazaiba gave a statement to this effect at the margins of the 2024 UN Biodiversity Conference in Cali, Colombia, see "DRC Joins Pacific Island Nations in Call for an International Crime Of Ecocide" (available on the Stop Ecocide International's web site).

Parties such as Belgium, Canada, Germany, Japan, the Netherlands, Norway and the United Kingdom. Not only have these countries been staunch political and financial supporters of the ICC. Among the States Parties, they are also disproportionately responsible for the ecological predicaments afflicting the planet, basing much of their current wealth on historical and ongoing processes of resource extraction. It is in partial recognition of this special responsibility that these governments have been important allies to small island nations in discussions over loss and damage under the international climate regime. In a similar vein, progress on the ecocide proposal requires building North–South alliances that bundle the material and diplomatic leverage of industrial nations with the moral force of voices from the frontlines of environmental change.<sup>47</sup>

Beyond States, the engagement of civil society is vital to keep up the momentum and provide input into future deliberations. So far, only a small number of the organizations operating within the international criminal advocacy realm have shown an interest in the ecocide proposal. To diversify the voices participating in this critical discussion, a deeper engagement with the topic among different civil society actors – particularly those directly affected by acts of environmental destruction – is indispensable. This also implies that the ASP and the Coalition for the International Criminal Court should consider additional and non-bureaucratic avenues to facilitate observer access to the ASP sessions.

Finally, a new scholarly ethos is needed to think critically and creatively through the conundrums that ecocide engenders. So far, much literature has either adopted a promotional tone that downplays the principled considerations sketched above, or has simply dismissed the entire project as substantively flawed and politically unrealistic. There are valid concerns and disagreements about the crime's purported rationale, definition and operationalization. Academics, in their capacity as public intellectuals and advisors to state departments and civil society organizations, are uniquely equipped to respond to these concerns in a constructive manner that takes both the demands for environmental justice and the structural constraints of ICL seriously.

There is no question that ecocide's criminalization presents thorny legal and political challenges. It is high time for decision-makers in government, civil society and academia to confront these challenges head-on and reflect in earnest on the role of international criminal justice amidst the ecological and social upheavals heralded by the Anthropocene. Only then can the ICC Statute inch ever-closer to the promise enshrined in its Preamble: delivering justice "for the sake of present and future generations".

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<sup>47</sup> For a similar argument, see Mutoy Mubiala, "Climate Change and Mass Deforestation in the Congo Basin", Policy Brief Series No. 127 (2022), TOAEP, Brussels, 2022 (<https://www.toaep.org/pbs-pdf/127-mubiala/>).



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