

Indian Journal of Law and Jurisprudence

CRIMINALISING ECOCIDE: PEACE-TIME ECOCIDE AND STATE RESPONSIBILITY

by

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ABSTRACT

This paper examines the definition of ecocide, offers criticism on the definitions proposed and compares the proposed definition of the crime to the existing provision criminalizing war-time ecocide. It analyses the practicalities i.e., the incidence of liability and the incidence of reparations, if ecocide were to be considered as an international crime under the Rome Statute. The incidence of liability of peace-time ecocide will be evaluated under three circumstances: where private corporations carry out ecocidal acts in violation of domestic law, where private corporations carry out ecocidal acts under State sanction and where ecocidal acts are perpetrated by the State or any of its instrumentalities.

Key words: Accountability, Ecocide, Incidence, Liability, Reparations

1. INTRODUCTION

The push for the criminalization of ecocide began as early as the 1970s.¹ Article 26 of the draft Rome Statute of the International Criminal Court recognized ‘acts causing serious damage to the

¹ Coined by Aurthur W. Galstone to describe the destruction caused by the use of pesticide Agent Orange during the Vietnam War. See, Heather Alberro, *Ecocide: A Step Towards Inter-species Justice*, THE CONVERSATION, June 30, 2021 <https://theconversation.com/ecocide-why-establishing-a-new-international-crime-would-be-a-step-towards-inter-species-justice-162059>

environment’ as a crime against peace in addition to the genocide, crimes against humanity, war crimes and crimes of aggression, but was removed from the final Statute.²The Rome Statute as it exists currently, considers the launch of attacks with the knowledge and intention that it would cause severe, long-term and widespread damage to the environment, as a war crime.³ However, ecocidal acts perpetrated by States and Corporations alike during peace – time, is neither recognized nor penalized by the Rome Statute.⁴The inclusion of ecocide as a fifth international crime against peace under the Rome Statute could have three positive outcomes- the first, it would operate as a strong declaration of the international community’s intolerance towards state-sanctioned environmental degradation and further the shift of environmental jurisprudence towards ecocentrism⁵, second, it would increase accountability of States and corporations for environmentally harmful acts by imposing an obligation upon them to abstain from undertaking ecocidal activities⁶, third, the responsibility arising out of the breach of environmental obligations could act as a deterrent to Individuals within corporations, Corporations and States, thereby taking a preventative rather than a reactionary approach to environmental protection⁷.

2. DEFINING ECOCIDE

The term Ecocide was coined in the 1970s by Aurther W Galston at the Washington Conference, to describe and protest the US's use of the herbicide ‘Agent Orange’ in the Vietnam War, to defoliate jungles and farmland, the effects of which persist to this day .⁸ To him, such use of biological agents in warfare caused the ‘willful and permanent destruction of the natural environment which would ultimately gravely affect the animals and human beings life,

² Rachel Killean, *Prosecuting Environmental Crimes at the International Criminal Court – Is a Crime of Ecocide Necessary*, THE GUARDIAN, June 22, 2021 <https://www.theguardian.com/environment/2021/jun/22/legal-experts-worldwide-draw-up-historic-definition-of-ecocide>

³ Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 1, 2002.

⁴ Polly Higgins, *Protecting the Planet: A Proposal for a law of Ecocide*, 59 CRIME L.SOC.CHANGE 143, 150 (2013).

⁵ Michael Karnava, *Ecocide : Environmental Crime of Crimes or Ill Conceived Concept*, OPINIO JURIS July 29, 2021 <http://opiniojuris.org/2021/07/29/ecocide-environmental-crime-of-crimes-or-ill-conceived-concept/>.

⁶ Claudia Tam, *Why Ecocide Should be an International Crime*, EARTH.ORG, Dec.30, 2020 <https://earth.org/ecocide-should-be-a-crime-in-international-law/>

⁷ Marcoss A. Orellana, *Criminal Punishment for Environmental Damage : Individual and State Responsibility at cross roads*, 17 GEO. INTL. ENVTL.L.REV. 673, 695 (2005).

⁸ Amy Hay, *The Origins of Ecocide*, THE RACHEL CARSON CENTRE, April 3, 2021. https://seeingthewoods.org/2013/04/03/the-origins-of-ecocide/#_edn2

transcending boundaries⁹; he thus linked this kind of environmental destruction to genocide , stating that such reckless and wilfull large-scale destruction of the natural environment was akin to the extermination of persons of a specific race and therefore like genocide, must be condemned and banned.¹⁰ Subsequently in 1973, Richard A. Falk in his Draft Ecocide Convention, 1973 envisaged ecocidal acts to be those intended to destroy, disrupt or cause irreparable harm to the ecosystem.¹¹ Elucidating on this idea, Lynn Berat in 1993 used the term geocide in place of ecocide, '*the literal killing of the Earth, to be the ecological counterpart of genocide*' since it involved the '*intentional destruction of the ecosystem*' by killing different species of plants and animals or making their physical environmnet inhabitable, preventing their multiplication thereby driving them into extinction.¹² Galston, Berat took an ecocentric approach to defining ecocide, but they contemplated ecocide as a crime arising out of war and conflict without considering the fact that the large-scale destruction of ecosystems could also arise out of peace-time activities. In Article I of his Draft Ecocide Convention¹³ Falk does recognise that ecocide would be considered a crime irrespective of whether it arose out of war-time or peace-time activities, but in Article II¹⁴ which lists ecocidal acts, only lists activities carried out during conflict.

Mark Allen Gray in his 1995 publication added legal dimensions to the definition of ecocide, proposing that large scale environmental destruction should also be considered one one of the core international crimes. He drew a distinction between environmental damage and ecocide asserting

⁹ David Zierler, *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment* (Athens, GA: University of Georgia Press, 2011),

¹⁰ Amy Hay, *The Origins of Ecocide*, THE RACHEL CARSON CENTRE, April 3, 2021.
https://seeingthewoods.org/2013/04/03/the-origins-of-ecocide/#_edn2

¹¹ Richard A Falk, *Environmental Warfare and Ecocide Facts, Appraisal and Proposals*, 12 PRINCETON L.REV., 26, 29 (1973).

¹² Lynn Berat, *Defending the right to a healthy environment: toward a crime of geocide in international law*, 6 BOSTON UNI, INTN'L L.J. 327, 328(1993).

¹³ The Contracting Parties confirm that ecocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

¹⁴ In the present Convention, ecocide means any of the following acts committed with intent to disrupt or destroy, in whole or in part, a human ecosystem :

- a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
- b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
- c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of soil or the enhance the prospect of diseases dangerous to human beings, animals, or crops;
- d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;
- e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
- f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.

that just like how murder and genocide are not similar crimes because of the sheer scale and gravity of the two wrongful acts, all instances of environmental damage also cannot be considered as ecocide. According to him three requirements needed to be met for an act or omission to qualify as ecocidal; the reckless or negligent act must have, first, effected a vast geographical area bringing about economic and social costs, causing destruction of habitats, species and humans, the devastation being to such a degree that the damage caused is irreversible; second, the damage must have international character, that is the damage should have affected the ecosystems of more than one State or is of such nature that it threatens the environment of the global community and requires international cooperation for its management; third, the damage must be wasteful that is the resultant social costs outweigh the expected benefits.¹⁵ This definition marked a shift from the consideration of ecocide as a crime of intent to one, for which criminal liability could be attached on the basis foreseeability of damage and strict liability.

Polly Higgins, perhaps the most prominent advocate for the inclusion of ecocide as a fifth international crime, in her proposal to the United Nations in 2011 defined ecocidal acts as those intentional, negligent or reckless acts or omissions which cause or permit to be caused extensive damage, destruction or loss of ecosystems to such an extent that such damage severely diminishes the peaceful enjoyment of that territory by its inhabitants.¹⁶ Higgins's definition is however, has an anthropocentric tint, for the basis of qualification of environmental damage to ecocide is the fact that the damage leaves the environment hostile to inhabitants and not the irreparable damage to the environment itself, which means that even if irreparable damage has been caused to the environment it would not be considered as the crime of ecocide, if it does not also harm inhabitants of the region.

In June 2021, an Independent Expert Panel for the Legal Definition of Ecocide instituted by the Stop Ecocide Foundation, published a proposal for the amendment of, and the inclusion of a fifth international crime of Ecocide to, the Rome Statute of the International Criminal Court.¹⁷ According to the definition envisaged in the proposal, two essentials need to be met for the crime

¹⁵ Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L. L.J., 215, 218(1996).

¹⁶ Polly Higgins, Damien Short, *Protecting the Planet: A proposal for a law of ecocide*, 59 CRIME L.,SOC.CHANGE, 23, 26 (2013).

¹⁷ Tarini Mehta, *Exploring the Crime of Ecocide*, OPINIO JURIS, Sept.25,2020
<http://opiniojuris.org/2020/09/25/symposium-exploring-the-crime-of-ecocide-accountability-for-environmental-destruction-ecocide-in-national-and-international-law-part-ii-the-way-forward/>.

of ecocide to arise – firstly, the act must be unlawful or wanton and secondly, the unlawful or wanton act must be such, that there is a likelihood that such act would result in ‘*severe and either widespread or long – term damage to the environment*’.¹⁸ Mere knowledge that an act is likely to cause severe damage is sufficient to impose culpability, the intention and material result of such an act is immaterial considerations as per the proposal.¹⁹ The failing of this definition is the fact that it is built on the flawed premise that it is only unlawful acts carried out by corporations or individuals which could have ecocidal effects. It then does not envisage, state-sanctioned activities or lawful activities carried out within the standards set by States, which causes large scale exploitation of natural resources, destruction of ecosystems and environmental devastation. Additionally the definition of ‘wanton’²⁰ acts within the proposed definition of ecocide, creates space for a cost-benefit analysis of environmental damage, implying that if the socio-economic benefits of an act or omission which has caused long-term and widespread environmental damage is greater than the social cost of the damage caused, then such an act is not ‘wanton’ and therefore will not be considered as the crime of ecocide despite the effects on the environment. One of the main objectives of pushing for a separate crime of ecocide, instead of including the crime within the ambit of crimes against humanity or war crimes, was to rid the crime of ecocide of the anthropocentric character it would develop under the existing crimes under the Rome Statute. However, the Independent Expert Panel, while asserting the need to shift the approach to environmental crimes to an ecocentric approach, hypocritically, creates a definition which is clearly anthropocentric in nature, defeating the entire purpose of advocating for a separate crime. A more apt definition for ecocide would have been one which is on a similar vein as Grey’s definition ‘*any act or omission which causes or permits to be caused*

3. ADAPTING EXISTING LEGAL FRAMEWORK FOR ECOLOGICAL CRIMES

The 2021 proposal made by the Independent Expert Panel was met with a significant amount of criticism, on both, the conceptual framework contemplated under the proposal which has briefly been outlined in the previous section, and the necessity of the need to fashion a new and separate

¹⁸ Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, STOP ECOCIDE FOUNDATION (June 22, 2021) <https://www.stopecocide.earth/expert-drafting-panel>.

¹⁹ *Id.*

²⁰ “Wanton” means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;

stand-alone core crime. Critics of the proposal opine that it would be more efficient to simply develop on the core-crimes which have an environmental ingredient, through case law, given the long and technical process involved in making an amendment and adding a new core crime to the Rome Statute of the International Criminal Court.²¹ They also state that while the proposers firmly believe that the introduction of ecocide as a core crime could have a deterrent effect, there is little or almost no empirical data supporting such a claim.²² The cost of making an addition exceeds the benefit of including ecocide as a crime under the Rome Statute, that is, if any additional benefits could be achieved above those which are possible to be achieved by the implementation of the existing framework for punishing ecological crimes. The analysis of merit in these lines of dissent necessitates an examination of the existing legal framework which the Critics believe can be adapted to criminalise ecocide; these include: The International Law Commission's Draft on the Responsibility of States for Internationally Wrongful Acts coupled with International Environmental Law, International Humanitarian Law and the four core-crime under Rome Statute of the International Court of Justice.

3.1. State Responsibility

Acts or omissions of a State which lead to a breach in international obligations gives rise to an internationally wrongful act.²³ All internationally wrongful acts or omissions creates a responsibility upon the State in breach upon the injured State.²⁴ Every State has an erga omnes obligation under international environmental law, to protect the environment and prevent environmentally harmful acts and therefore, any act which causes severe long-term or widespread and irreparable environmental damage, would be considered as an internationally wrongful act, thereby making the State causing such ecocidal effects liable towards the injured State.

3.1.1. Obligations under International Environmental Law

International Environmental law has evolved general principles for environmental protection; under these principles, though States exercise sovereignty over natural resources of 'commons'

²¹ Kai Ambos, *Protecting the Environment through International Criminal Law*, EJIL Jun.29,2021.

https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2

²² Kevin Jon Heller, *Skeptical Thoughts on the Proposed Crime of Ecocide*, OPINIOJURIS, Jun. 21, 2021.

<https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/>

²³ Art.2, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12, 2001, G.A. A/56/49.

²⁴ Art.1, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12, 2001, G.A. A/56/49.

within their jurisdiction to employ the natural resources for the common good of the people²⁵, such sovereignty is not absolute²⁶ and is subject to the duty to not to cause harm to the environment of other States. The principle of Preventive Action also imposes upon states the duty to prevent any activity which could cause permanent or irreversible damage to the environment.²⁷ The 1992 Rio Declaration enshrines the principle of sovereignty and responsibility and states that while ‘*states have the right to exploit natural resources*’ for the purpose of national development, they also have an obligation to ensure that such exercise of sovereign authority over ‘*natural resources does not cause damage to the environment of the other States or to areas beyond the limits of national jurisdiction*’ ie, the common heritage of mankind which includes the seabed, the ocean floor and the subsoil of the High Seas.²⁸ Principle 21 of the Stockholm Declaration imposes a similar duty upon States which has been declared as customary international law²⁹ and makes protection of global commons and the environment an obligation erga omnes.³⁰ This contention is supported by decisions of the International Court of Justice in the Trail Smelter case and the Corfu Channel case in which the Court opined that the States have a responsibility to protect other States from activities of individuals within its territory which are injurious to the rights of other State.³¹ It is therefore undeniable that there exists an obligation upon all States towards the international community to protect the environment and prevent any action which could cause environmental harm, damage or degradation.

3.1.2. Obligations under International Humanitarian Law

International Humanitarian Law establishes the rules of international and non-international armed conflicts. The International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court recognised that the obligation of States to ensure that

²⁵ The Public Trust Principle.

²⁶ In the Trail Smelter case (United States v. Canada), it was opined that States do not have the right use or permit the use of natural resources in such a manner that it causes injury to the property, territory or persons of another State.

²⁷ Max Valverde Soto, *General principle of International Environmental law*, 3 ILSA J.INT’L COMP.L 193, 196 (1996).

²⁸ Art. 136, Convention on the Law of the Sea, Dec.10,1982, 1833 U.N.T.S 397.

²⁹ G.A. Res. 2996, U.N. GAOR, 27th Sess., Supp. No. 30, at 42, U.N. Doc. A/8730 (1972).

³⁰ Mark Allen Gray, *The International Crime of Ecocide*, 26 CAL. W. INT’L L.J. 215 ,235 (1996).

³¹ LB Sohn, *From the Hills of Tennessee to Forest of Brazil: A Short History of international Environmental Law* (1991).

activities carried out within their jurisdiction does not cause environmental damage to other States or common heritage of mankind is part of the corpus of international environmental law.³² The court realised the devastating impacts the use of nuclear weapons could have on the environment, flora and fauna and ecosystems of a territory which could not be confined in space or time.³³ The Court also held that States should take into account environmental effects when determining what acts are proportionate and necessary to achieve military objectives. The Geneva Conventions lays down permitted methods of warfare based on the principles of distinction, proportionality and military necessity and prohibits acts or tactics which causes unnecessary suffering and superfluous injury.³⁴ Article 35(3) and Article 55 (1) of the Additional Protocol I of 1977 imposes an obligation upon belligerent States to abstain from using any methods or means of warfare which '*are intended or expected to cause damage to the natural environment*'.³⁵ It imposes a duty of care upon the Parties to a conflict '*to protect the natural environment against widespread, long-term and severe damage*'. Article 35 also prohibits the employment of methods which cause damage to crops, farmlands and water sources which are essential for the survival of civilians.³⁶ The Conventional Weapons Convention, 1980 prohibits the consideration of forests as a military objective and the Chemical Weapons Convention, imposes a duty on every State to abstain from the development, stockpiling, manufacture, production or transfer of chemical weapons and prohibits the use of herbicides in warfare considering the extensive damage caused as a result of the use of Agent Orange in the Vietnam War³⁷. The Convention on the prohibition of Military or Any Other Hostile Use of Environmental Modification techniques or the ENMOD Convention imposes a duty upon states to not encourage or engage in the hostile use of environmental modifications techniques as a means of damage or destruction to any other State, which have widespread, long-lasting or sever effects on the natural processes and composition of the structure of the Earth.³⁸

3.2. The Rome Statute of the International Criminal Court

³² Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226.

³³ *Id.*

³⁴ YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (Cambridge University Press, 1st Ed.) (2004).

³⁵ Art.55, Additional Protocol I of ICRC Geneva Convention (I), Oct. 21, 1950, 75 UNTS 287.

³⁶ Art.35, Additional Protocol I of ICRC Geneva Convention (I), Oct. 21, 1950, 75 UNTS 287.

³⁷ Supra note. 14 at 216.

³⁸ Supra note 14 at 178.

The Rome Statute recognises four core crimes - genocide, war crimes, crimes against humanity and crimes of aggression. Article 26 of ILC's Draft Code of Crimes Against the Peace and Security of Mankind, the forerunner to the Rome Statute, had for the first time recognised the 'acts causing serious damage to the environment or 'wilful and severe damage to the environment' as an international crime.³⁹ However, the international community could not arrive at a consensus regarding whether the crime should have been one of intent or not. Therefore, in 1996 it was removed from the Draft Code as a separate crime and was added within the ambit of a war crime under Article 8 (2)(b)(iv), attributing criminal liability to long-term, severe and widespread environmental damage, caused due to acts carried out exclusively during war-time. The crime of ecocide contemplated under the proposal may also be brought within the ambit of crimes against humanity under Article 7, however, to prosecute acts causing environmental harm under this provision would require proof that environmental damage caused is also resulting in the murder, extermination, enslavement, torture or disappearance of people ie, there is a necessary element of a human suffering due to environmental degradation.

However, the war crime envisaged under the Rome Statute is different from the proposed crime of ecocide on two counts: the first, is the mens rea element and the second is the essentials for the constitution of the crime. Under Article 8(2)(b)(iv) of the Rome Statute, the act must be intentional and it must be done with the knowledge that it will have a specified effect on the environment. The Rome Statute embodies crimes of Intent. Under Article 30 of the Statute, criminal liability falls upon persons who have committed acts or omissions with knowledge and intent ie, the person must mean to engage in a wrongful act and must mean to cause the consequence or is aware that specific consequences will arise out of the action/omission in ordinary course of events and engages in wrongful acts despite this knowledge- thereby imposing a very high standard of mens rea for the attraction of criminal liability.⁴⁰ However, the proposal of the Independent Expert Committee, contemplates the crime of ecocide to have a much lower mens rea requirement of 'dolus eventualis' given the nature of the crime of ecocide.⁴¹ This means that a perpetrator of ecocide cannot claim that he did not intend to cause the harm that resulted, this is no defence for the crime of ecocide; if the act or omissions carried out is such that a reasonable man of ordinary prudence would have foreseen that certain consequences are likely to result in the ordinary course of events and despite this knowledge continues to carry out the act or omission, then such person is considered to have the mens rea to commit the alleged wrongful act. The rationale behind such a low standard of mens rea set for the crime of ecocide is that very rarely is environmental destruction intended, it is collateral damage. An industrialist does not expel untreated wastes into a waterbody in order to pollute it or damage the ecosystem, it is usually done because it is more

³⁹ Polly Higgins, Damien Short, *Protecting the Planet: A proposal for a law of ecocide*, 59 CRIME L., SOC. CHANGE, 23, 26 (2013).

⁴⁰ Art.30, Rome Statute of the International Criminal Court, July 17, 1998.

⁴¹ Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, STOP ECOCIDE FOUNDATION (June 22, 2021) <https://www.stopecocide.earth/expert-drafting-panel>.

cost-effective than treating the effluents. If ecocide were made a crime of intent, it would be easy for perpetrators to side-step the offence on the ground that there was no intention. All that the crime requires is the foresight that the expulsion of untreated wastes into a water body could cause destruction of the ecosystem.

The second point of difference is the kind of effect that the two crimes envisage to attract culpability - the war crime requires the effect of the attack to be '*widespread, long-term and causing severe damage to the natural environment*' while the proposal contemplates the effect to be severe and either long-term or widespread damage to the environment, it does not require both elements of scale to be satisfied to constitute the crime of ecocide while the Rome Statute provides a very narrow definition of what could be considered as an environmental crime. The author therefore does not agree that the Rome Statute as it exists today, is sufficient to prosecute a crime contemplated to be ecocide without creating a separate stand-alone crime under the Rome Statute.

The inclusion of Ecocide as a separate crime under the Rome Statute would have three positive outcomes -the first, it would operate as a strong declaration of the international community's intolerance towards state-sanctioned environmental degradation and further the shift of environmental jurisprudence towards ecocentrism⁴². Second, due to the fact that the International Criminal Court exercises jurisdiction over individuals ie natural persons, who either commit or cause to be committed or permit or authorise wrongful acts, it imposes a duty of care upon individuals, like CEOs of corporations, municipal regulatory bodies and the State from engaging in environmentally harmful acts, thereby increasing accountability.⁴³ The lower mens rea element in the proposal for the crime of ecocide could also prevent States and individuals from side-stepping liability by claiming the absence of intent, the responsibility arising out of the breach of environmental obligations could act as a deterrent to Individuals within corporations, Corporations and States, thereby taking a preventative rather than a reactionary approach to environmental protection. The contention of the author is that perhaps, a separate stand-alone crime is not absolutely pertinent to mitigate the problem of ecocide resulting from state-sanctioned human activity, a convention like the 1973 Ecocide Convention created by Richard Falk, coupled with the ILC's Articles on responsibility of States for Internationally Wrongful Acts could be sufficient legal machinery to combat the problem of ecocide.

4. PEACE-TIME ECOCIDE : FIXING LIABILITY AND COMPUTING REPARATIONS

⁴² Michael Karnava, *Ecocide : Environmental Crime of Crimes or Ill Conceived Concept*, OPINIO JURIS July 29, 2021 <http://opiniojuris.org/2021/07/29/ecocide-environmental-crime-of-crimes-or-ill-conceived-concept/>.

⁴³ Claudia Tam, *Why Ecocide Should be an International Crime*, EARTH.ORG, Dec.30, 2020 <https://earth.org/ecocide-should-be-a-crime-in-international-law/>

Historically, perhaps the most stark and cited example of ecocide has been the use of the herbicide Agent Orange in the Vietnam War, which has resulted in the crime contemplated as ecocide, to arise exclusively during the time of conflict. This however, does not stand true under current circumstances. Severe, long-term and widespread damage to the environment can be caused even in times of peace as a result of human activity; corporations and the State being perhaps the greatest culprits of peace-time ecocide.

When Garrett Hardin in 1968 wrote that private ownership of commons i.e., natural resources is the solution to prevent the ‘Tragedy of Commons’, he did not take into consideration Corporations and their neocolonial extractivist models of functioning which relies on the exploitation and plunder of natural resources for the attainment of their singular objective- the maximisation of profits, without any consideration for the planetary boundaries and the finiteness of the natural environment. The Alberta Tar Sands Extraction Projects, nuclear power plant explosions of gas leaks caused due to negligence (the Bhopal Gas Leak Tragedy), the extraction of oil by Shell from the Niger Delta causing frequent oil spills into the Delta, causing pollution and destruction of ecosystems, the destruction of large tracts of tropical forests for the cultivation of palm Oil in Indonesia, causing the extinction of several plant and animal species indigenous to Indonesian forests, mining projects in South America creating dead zones, Coca Cola’s exploitation of groundwater sources in Plachimada district of Kerala leading to continuous droughts in the region are all more contemporary examples of ecocide.⁴⁴ The commonality in all of these instances is that, Corporations originating from one State sets up branches in another State, where production activities are carried out and these activities which cause long-term irreparable damage are often State sanctioned acts i.e., these corporations function under the licenses and permits provided by the Government of States in carrying out their activities. These are therefore state permitted acts of ecocide.

It has already been previously established that the duty to protect and preserve the global environment, the common heritage of mankind and to prevent acts/omissions which cause destruction of the environment of another State is an obligation, erga omnes. Each State owes a duty of care towards another State to not engage in activities that harm the global commons and the breach of such duty of care, as it has been previously established, makes the violating State responsible for the harm caused due to such breach towards the injured State. Three circumstances can be fashioned against which the State Responsibility for wrongful acts can be analysed: where private corporations carry out ecocidal acts in violation of domestic law, where private corporations carry out ecocidal acts under State sanction and where ecocidal acts are perpetrated by the State or any of its instrumentalities.

The creation of a Convention on Ecocide is pertinent to impose obligations on the State, corporations and individuals to abstain from doing or permitting to be done acts or omissions

⁴⁴ Boris Zetlier, *Examples of Ecocide*, STOP ECOCIDE FOUNDATION, Jun.21, 2020. <https://www.endecocide.org/en/examples-of-ecocide/>.

which is likely to cause substantial long-term or widespread severe damage to the natural environment in such a way that the effects of it spills across international borders. The rationale behind requiring a separate ecocide convention is the fact that international environmental law is majorly anthropocentric, in the sense that it permits a number of potentially environmentally degrading activities in scales that are sure to cause damage in the name of sustainable development. International Environmental Law requires overhaul, but such analysis is not within the scope of this paper.

Once such a convention is formulated, the liability in case of ecocidal acts under the three circumstances listed above is straight forward. Under ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, the conduct of, a State organ including any person or entity which is provided status of an instrumentality under the domestic law⁴⁵, any person or entity which is not an organ of the State but is empowered by Statute to exercise governmental authority⁴⁶, a person or group of persons acting under the instruction, direction or control of the state is considered to be conduct of the State.⁴⁷ Therefore a breach of obligation by any of these entities would be deemed to be a wrongful act attracting State Responsibility. Claims that the act or omission which caused breach of an international obligation is legitimate under domestic law is not maintainable.⁴⁸ Therefore, where a corporation carries out its activities in accordance with the domestic law, but still carries out an act/omission which is in breach of international obligation, state responsibility with respect to the breach still arises. Where an act or omission is carried out by the State, or due to the omission of a duty of a statutory regulatory authority, it would still be considered as a breach of international obligation. Where a company carries out an act or omission which causes ecocidal impacts- if it is confined within the territory of the State, the corporation would be held liable, and where it spills across the international borders, the domestic courts of the injured State or where the domestic courts are unwilling to try the case, then an international ad-hoc tribunal or the ICC would determine liability of both the State and the individual corporation represented by its Head.

Internationally wrongful acts bring about state responsibility which entails legal consequences.

⁴⁹The State responsible for breach is under the obligation to arrest the continuation of the act or omission and provide safeguards and assurance regarding its non-repetition⁵⁰ and shall also be

⁴⁵ Art.4, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12,2001 UNGA A/56/49.

⁴⁶ Art.5, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12,2001 UNGA A/56/49.

⁴⁷ Article 8, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12,2001 UNGA A/56/49.

⁴⁸ Article 3, Article 32 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12,2001 UNGA A/56/49.

⁴⁹ Article 28, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12,2001 UNGA A/56/49.

⁵⁰ Article 30, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12,2001 UNGA A/56/49.

under the obligation to provide reparations for the injury material and moral caused due to the wrongful act.⁵¹ Reparation can be in the form of restitution⁵², compensation,⁵³ satisfaction⁵⁴ or interest⁵⁵ or singly or in combination.⁵⁶ Under Article 75 of the Rome Statute reparations can be allowed only to natural persons individually or collectively who have incurred harm or injury directly or indirectly, this system of reparation is therefore anthropocentric and contemplates only material harm and is not geared towards the ecocentric nature of the crime of ecocide.⁵⁷

The crime of ecocide poses a strange problem when it comes to deciding the structure of reparations and the computation of compensation. Where an ecocidal act has caused large scale environmental harm, either restitution or compensation calculated on the basis of the degree of harm done can be allowed. However, ecocide in most cases cause irreparable harm or injury, in such cases reparations have the function of not rehabilitating the victim but punishing or causing deterrence of the perpetrator in order to ensure that the act or omission is not repeated again. In some cases, reparations are transformative ie, the compensation allowed by the Courts for the damage caused to the environment is invested in removing structural inequality and empowering and building capacity of the local communities and grassroots to resist encroachment upon their land.⁵⁸ However, the problem arises when the harm or injury is not yet material. The crime of ecocide entails the commission of acts or omissions which is *likely* to cause substantial and severe either widespread or long-term environmental harm, which implies that the doing of such an act itself, even if it has not had such effects, is considered as the crime of ecocide. This attachment of criminality before harm materialises is an attempt to shift to a preventative rather than reactionary approach towards environmental protection. Under such a circumstance also, the function of reparations is punitive, therefore, the court can require the ceasing of such activity and also order such amount of compensation as is necessary to prevent the repetition and if such an act is carried out by a corporation, its licenses and permits for functioning can be revoked, to prevent further attempts at carrying out the same acts.

⁵¹ Article 31, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12,2001 UNGA A/56/49.

⁵² Article 35, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12,2001 UNGA A/56/49.

⁵³ Article 36 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12,2001 UNGA A/56/49.

⁵⁴ Article 37, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12,2001 UNGA A/56/49.

⁵⁵ Article 38, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12,2001 UNGA A/56/49.

⁵⁶ Article 34, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Dec.12,2001 UNGA A/56/49.

⁵⁷ Patrick Hendry, *A Worthwhile Challenge to the ICC Reparation System*, VOLKERRECHTS, July.8, 2021 <https://voelkerrechtsblog.org/repairing-ecocide/>

⁵⁸ Rachel Killian, *From Ecocide to Eco-sensitivity: Greening Reparations at the International Criminal Court*, 25 INT'L J. HUMAN RIGHTS 323 , 345 (2020).

CONCLUSION

The objective of changes in international and domestic law with respect to the environment must be directed towards changing the perspective with regard to the relationship between human beings and the natural environment. The law currently is structured in such a way that the environment is only provided instrumental and not intrinsic value, thereby making the environment a commodity or a resource to be exploited. The push for the criminalisation of ecocide is a push in the right direction for it intends to criminalise the destruction of the environment independent of the resultant harm on human beings. The existing legal framework with a few tweaks can be fashioned to embody the crime of ecocide.