

# Should the Rome Statute Include the Crime of Ecocide?

Written by Ari Bilotta

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ARI BILOTTA, AUG 28 2019

This essay will explore why it is necessary to amend the Rome Statute to include the crime of 'Ecocide' in order to combat climate change. In doing so, a definition of ecocide as well as the history of drafting the Rome Statute will be briefly explained. The focus here will be primarily looking at why ecocide did not enter the finalised Rome Statute. This will be followed by a critical discussion of why ecocide should be added to the Rome Statute, comparing the Vietnam War as a case study against climate change, all of which will include a discussion as to the feasibility of this plan.

### What is Ecocide?

The origin of ecocide as a concept is relatively modern. It stemmed from the use of the term by scientists during the Vietnam War to describe and denounce the environmental destruction and potential human health catastrophe arising from the herbicidal warfare waged by the United States military during the war.[1] The term's very first use is attributed to Professor Arthur W. Galston speaking at the Conference on War and National Responsibility.[2]

Despite its use over the last four decades, ecocide is yet to be given a concrete legal definition.[3] Thus for the purposes of this essay, the definition, or rather approximation of ecocide is best taken from Professor Galston, who stated; "it denotes various measures of devastation and destruction which have in common that they aim at damaging or destroying the ecology of geographic areas to the detriment of human life, animal life, and plant life." [4] It should be noted, however, that there is no consensus on the definition of ecocide.[5] Part of the difficulty in defining the term comes from how reasonable it would be to make trying the crime a reality. Another definition given of ecocide is "a planned effort to eliminate all or part of an ecosystem." [6] This definition clearly draws from the definition of genocide, involving the "destruction of a group, in whole or in part." [7] Though ambitious, this definition is too broad in its scope. Destroying an ecosystem, be it in whole or in part, is a definition irreconcilable with the free reign humans have over the planet and our tendencies towards altering our environments. Furthermore, ecocide is not limited to the actions of states. Corporations are equally capable of perpetrating ecocide. This is in part due to the fact that the current parameters that businesses operate in internationally has allowed for the destruction of the planet.[8]

### Ecocide and the Rome Statute

The Rome Statute is the international treaty setting out the main functions of the International Criminal Court (ICC). The goal of the ICC is to investigate and try individuals who have perpetrated, or are responsible for the most serious crimes of international concern.[9] Currently, the ICC can hear cases involving four categories of crimes. Those are Genocide, Crimes Against Humanity, War Crimes, and the recently added Crime of Aggression.[10] A permanent court set up to hear the most grave crimes imaginable is no mean feat. Nevertheless, as the planet faces environmental calamity, and the Earth sees the greatest ever extinction event, the need for ecocide to fall within the ambit of the ICC is increasingly vital. Still, it is clear that the idea of ecocide as a crime predates the ICC by several decades. Ecocide's omission from the Rome Statute was not a simple oversight. However, reasons as to why it was not included into the Rome Statute are unclear. In the early drafting of the Rome Statute, ecocide appeared as a Crime Against Peace, and was supported by all participants bar the United States, the United Kingdom, and the Netherlands. Strangely, ecocide was removed from the draft convention without any record of why.[11]

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However, there is one reference to environmental crime in the Rome statute, appearing in Article 8(2)(b)(iv).[12] This is a very limited crime against the environment, and thus does not encapsulate the crime of ecocide, making it redundant. Article 8(2)(b)(iv) is largely inadequate to prosecute ecological crimes for two reasons. First, all Article 8 crimes relate to war crimes.[13] This means that only crimes committed against the environment in the context of an international armed conflict could be prosecuted at the ICC. The other main limitation of the article is in the wording. "Widespread, long-term and severe" is a cumulative definition that requires all elements to be met in order to ensure successful prosecution. This is a high threshold not likely met by most environmental damage, even that which occurs in war.[14]

The ICC does still serve a function in preventing environmental destruction. The ICC operates in a complimentary fashion. This means that it mostly hears cases referred to it by states related to the crime in need of investigation or the United Nations Security Council. To this end, the Court also offers resources to states looking to investigate and prosecute crimes relating to the illegal exploitation of natural resources or land grabs domestically.[15] So clearly there is an impetus amongst parts of the Court to combat environmental degradation.

One of the biggest problems conceptually with adding ecocide to the Rome Statute is how the International Criminal Court operates. The Court serves to prosecute individuals. With an emphasis on individual criminal responsibility, crimes of ecocide will need to be attributed to individual persons (or joint criminal enterprises) in order to go to trial.[16] Though this is not outside the realm of possibility, it is still a major obstacle. For example, the Court, as it stands is yet to prosecute the director of any corporation for a crime. This is because the ICC mostly lacks the means to prosecute individual members of corporations due to a diffusion of responsibility that exists in corporations.[17] Therefore, in order for ecocide to become an operative part of international criminal law, substantial changes would need to be made to other aspects of the Court's functions.

## Why Ecocide Should Be Added to the Rome Statute

The main reason why ecocide should be added to the Rome Statute is that it could help curtail the progression of climate change. As it currently stands, the Paris Agreement sets out that the planet needs to reduce global temperature increase to 1.5 degrees centigrade above pre-industrial levels in order to reduce the risks of climate change.[18] Despite the urgency of the issue, this aim is a long way off being met. Current predictions forecast a global temperature rise of 5 degrees, nowhere near the targets of the Paris Agreement.

As previously noted, ecocide has been recognised as a crime against peace. This is partly because it is, in essence, a crime which describes a war fought by humanity against the environments enjoyed by all creatures.[19] Including ecocide in the Rome Statute would exemplify the type of action needed to combat climate change. Much like ending impunity for crimes against peace, action on climate change requires action by world leaders in a way that sees the creation of a feeling of common purpose and a redistribution of global power.[20]

The addition of ecocide to the Rome Statute with the aim of aiding in the global fight against climate change will also help serve as a preventative measure against additional crimes relevant to the ICC's jurisdiction occurring. Therefore, it is worthwhile considering the effects of climate change, and what that means for creating an environment in which other internationalised crimes are committed.

The most dramatic effect of climate change is that the rising global temperature through the trapping of carbon dioxide in the atmosphere means that sea levels will rise around the planet. What this means is that huge parts of low-lying coastal areas of the Earth will become uninhabitable.[21] This will create mass migration, which could lead to crimes of forced migration and other crimes against human dignity occurring in the context of extensive human migration. Additionally, the shifting of maritime boundaries due to sea level rise will likely lead to conflict as states scramble to protect and compete for resources.[22]

Climate Change will also bring about new challenges to states as 'Climate Wars' begin to emerge as the situation of the planet becomes drier.[23] It seems reasonable to assume that states may take actions that fit within the definition of ecocide as these wars unfold. This can be seen already with the damming of the Nile which crosses several state

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borders.[24] It can also be seen how resource scarcity caused by climate change has also exacerbated conflict in Darfur, Sudan.[25]

The existence of crimes, and punishment for them is generally considered as a deterrent to crimes. For large swathes of human history little concern has been given to the environment, and few laws if any are broken when ecosystems or parts of them are destroyed. By introducing ecocide as a crime, there will be a clear line in the sand which actors cannot cross when it comes to altering the environment.

## What Does Ecocide Look Like?

Humans, like other species, deplete resources and alter their environment. However, there are often severe, and often unseen consequences of this that negatively impact the global climate.[26] Because of this, it is not sustainable for humanity to maintain the unchecked, wanton destruction of ecosystems that has occurred in the past, and continues around the globe. As such, it is important to regulate the most egregious and senseless destructions of ecosystems with a crime and punishment to match the nature of the offence. This is where ecocide has a role to play.

Similar to the concept of genocide that emerged in the 1930's and 1940's, ecocide can have direct and indirect forms.[27] A person may directly go out into the environment and wreak havoc, causing immense damage. Likewise, it may happen indirectly. Members of a state or corporation could incite, or create an atmosphere in which ecocide would inevitably happen. The latter, though presumably harder to prove, would be how ecocide would appear in the world today in relation to climate change.

Given that it was the event that first brought the concept of ecocide into existence, the Vietnam War should be discussed to explore what ecocide can look like. The first example of ecocide in a modern context can be taken from the Vietnam War through Operation Ranch Hand and Operation Flyswatter.[28] During the Vietnam War, the United States used defoliants such as Agent Orange to eradicate undergrowth in order to expose the Vietnamese they were fighting against so that the US military could more easily wage a conventional war against them.[29] These tactics did not simply remove vegetation, however, their use brought about an environmental shift in parts of Vietnam, ruining the very environment that plants, animals, and humans needed to survive.[30]

At present, when we consider climate change and how this relates to ecocide, it is not practicable to look at global temperature rise, and then search to find those criminally responsible for this impending ecological disaster. Instead, ecocide would serve to investigate and prosecute particular attacks on the environment. Ecocide is a clear response to causes of climate change, like how through the 21<sup>st</sup> century parts of the Amazon Rainforest will turn into savannah.[31] Further, the damage caused may be irreversible as global temperatures reach a tipping point from which there is not possibility of reduction.[32]

Extinction rates are also 1,000 times higher than what they have been in the past.[33] Mass extinctions, though devastating cannot be attributed to any one individual. However, certain human actions in this mass extinction event could be attributed to an individual who committed ecocide. Unchecked deforestation, and the burning of peat could be seen as examples.

## Conclusion

The Paris agreement was hailed as being a "major leap for mankind." [34] This essay has shown that a necessary next step in combatting climate change is the addition of ecocide to the Rome Statute. By doing so, this will sure up a lasting commitment to combatting climate change. Ensuring that polluters will never again be able to act the way they currently do. This is in keeping with the overarching goal of international criminal law to see the end of impunity for the most egregious crimes.

The push for ecocide to be added to the Rome Statute has undoubtedly been set back with the passing of Polly Higgins, one of the most prominent academics working in the field, in April of 2019. It is the hope of the author that her work is not in vein, and that instead her ambition and tenacity may inspire many more international lawyers to

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continue the quest for ecocide to be added to the Rome Statute.

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[10] Rome Statute, 1998, Articles 6-8*bis*.

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[12] Rome Statute, Article 8(2)(b)(iv) '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'.

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Written by: Ari Bilotta  
Written at: La Trobe University  
Written for: Ben Habib  
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