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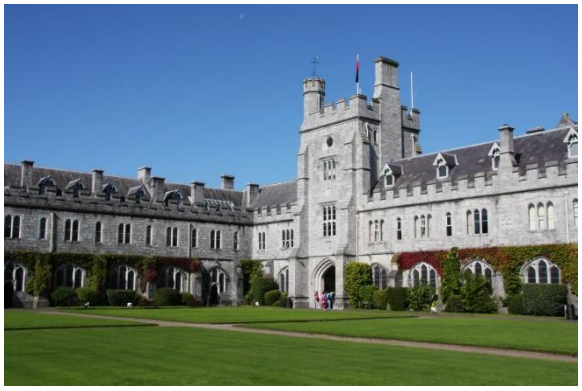

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Ecocide and International Criminal Court Procedural Issues: Additional Amendments to the 'Stop Ecocide Foundation' Proposal

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ECOCIDE AND INTERNATIONAL CRIMINAL COURT PROCEDURAL ISSUES: ADDITIONAL AMENDMENTS TO THE 'STOP ECOCIDE FOUNDATION' PROPOSAL

Giovanni Chiarini*

Abstract:

The crime of "ecocide" has been discussed for almost 50 years, and it is still an issue to be considered. Starting as scientific and biological debates, ecocide arguments became foremost political and then juridical. Recently, in 2021, the 'Stop Ecocide Foundation' proposed to add ecocide as a new crime to the ICC Rome Statute (hereinafter "RS"), recommending amendments regarding substantive law and the structure of the crime of ecocide. This paper does not argue against this proposal. On the contrary, it puts forward an integrative proposal, focused on the procedural issues, suggesting seven macro-amendments, namely:

1) Jurisdiction *ratione temporis* and the withdrawal process, amending articles 127 and 121 RS;

2) The 'deferral of investigation or prosecution' power of the renewal by the UN Security Council should not be authorised more than once, amending Article 16 bis RS;

3) The introduction of Aggravated Ecocide, and its Aggravating Circumstances, namely those actions or omissions which have a 'substantial impact on greenhouse gas emissions and/or climate change', amending Article 8 ter RS draft and rule 145 of Rules of Procedure and Evidence (hereinafter, "RPE");

4) The exercise of jurisdiction, in case of aggravated ecocide, on the basis of UN environmental authorities' reports, such as the reports of the Intergovernmental Panel on Climate Change (IPCC), Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment, amending articles 13 and 15 RS;

5) Changing the standard of proof in cases of aggravated ecocide from "reasonable basis" to proceed (and to believe) to a "sufficient basis," amending articles 15, 18 and 53 RS and Regulations 27 and 29 of the Regulation of the Prosecutor;

6) Regarding issues of admissibility, introducing a rebuttable presumption of both "gravity" and "interests of justice" in cases of aggravated ecocide, amending articles 17 and 19 RS and Regulations 29 and 31 bis of the Regulation of the Prosecutor; and

7) The exclusion to the so-called proceedings on an admission of guilt in cases of aggravated ecocide, amending articles 64 and 65 RS and Rule 139 of RPE.

Key words: ecocide, International Criminal Court, Rome Statute, Rules of Procedure and Evidence

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A. INTRODUCTION – A 50-YEAR HISTORY OF ECOCIDE: BETWEEN POLITICS, WAR AND SCIENCE

Ecocide can be considered as a neologism, derived from the Greek *oikos* (house, home) and the Latin *caedere* (destroy, kill), which essentially means the wilful destruction of the environment. Contrary to what we generally tend to believe, its history is not so recent. The creation of this term – taking his cue from the UN Convention on Against Genocide – is commonly attributable to Dr Arthur W. Galston, an American botanist and bioethicist, who was Director of the Division of Biological Sciences at Yale University.

Professor Galston described the appalling effects of the powerful defoliant 'Agent Orange', so-called for the orange stripe painted around the steel drums that contained it. During the Vietnam War, American troops released an estimated 20 million gallons of the chemical herbicide to destroy crops and expose Viet Cong positions and routes of movement in the vast forests and territories of both Vietnam and Cambodia.[2] In 1969, in his Official Statement to the U.S. Congress hearings, he observed that about 4 million acres of Vietnam were sprayed with about 100 million pounds of assorted herbicides, including other agents such as 'Agent White' and 'Agent Blue': approximately an area the size of the State of Massachusetts.[3] Galston expressly noted that the warfare usage of these chemicals, and especially of 'Agent Orange,' was eliminating "one of the most important ecological niches for the completion of the life cycle of certain shellfish and migratory fish."[4] These revelations led President Richard Nixon to order a halt to its use.[5]

Later, in 1970, during the 'Conference on War and National Responsibility' in Washington, Galston proposed a "plea to ban ecocide,"[6] also considered as "a new international agreement to ban ecocide."[7] Even though Galston's words on the Vietnam War are now history, the neologism and his enlightening tripartition of the above-described damage are still pertinent: "One is ecological damage; the second would be inadvertent agricultural damage, and the third involves direct damage to people."[8] His pioneering view constituted a breakthrough in the affirmation of the concept of ecocide. In the following years, various scientists dedicated their studies to this field, including jurists, and a part of the political community were drawn to the issue.

In 1972, at the UN Stockholm Conference on the Human Environment, the Swedish Prime Minister Olof Palme explicitly talked about ecocide in his keynote address, with specific attention paid to the Vietnam War, stating that:[9]

> "The air we breathe is not the property of any one nation – we share it. The big oceans are not divided by national frontiers – they are our common property […]. In the field of human environment there

[2] See YaleNews, In memoriam: Arthur Galston, plant biologist, fought use of Agent Orange, July 18 (2008), available at: https://news.yale.edu/2008/07/18/memoriam-arthur-galston-plant-biologist-fought-use-agent-orange

[3] Arthur W. Galston, 'Statement of Dr Arthur W. Galston, Professor of Biology and Lecturer in Forestry, Yale University' (1970), in 'Chemical-Biological Warfare: U.S. Policies and International Effects. Hearings Before The Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs. House of Representatives. Ninety-First Congress. First Session. November 18,20; December 2,9, 18 and 19, 1969.' U.S. Government Printing Office (1970), 107.

[4] Arthur W. Galston, supra note 2, 108.

[5] YaleNews, supra note 1.

[6] New York Times, 26 February 1970, available at https://www.nytimes.com/1970/02/26/archives/and-a-plea-to-ban-ecocide.html

[7] Barry Weisberg, "Ecocide in Indochina" (1970) Canfield Press.

[8] Arthur W. Galston, supra note 2, 108.

[9] Peder Karlsson, "Olof Palme and Ecocide Law" (2016) End Ecocide, available – together with the original video – at: https://endecocide.se/uncategorized/olof-palme-and-ecocide-law/

> is no individual future, neither for humans nor for nations. Our future is common. We must share it together. We must shape it together. [...] The immense destruction brought about by indiscriminate bombing, by large scale use of bulldozers and pesticides is an outrage sometimes described as ecocide, which requires urgent international attention. It is shocking that only preliminary discussions of this matter have been possible so far in the United Nations and at the conferences of the International Committee of the Red Cross, where it has been taken up by my country and others. We fear that the active use of these methods is coupled by a passive resistance to discuss them."

The Stockholm Conference – which was a result of the so-called "Swedish Initiative"[10] – is considered the "birth of the green generation,"[11] as well as a ground-breaking achievement since this was "the first time that the issue of pollution crossing borders was addressed."[12] Moreover, not only Olof Palme denounced the Vietnam War in human and environmental terms, but also other heads of state, including Indira Gandhi from India, the leader of the Chinese delegation Tang Ke, and delegates from Iceland, Tanzania, Romania, Algeria, and Libya.[13] Without any shadow of doubt, this gathering invigorated environmental movements all over the world,[14] and was a trailblazer for subsequent environmental international negotiations.[15]

However, neither the Stockholm Declaration[16] nor the Official Report of the Conference[17] expressly mentioned the crime of ecocide. Nevertheless, it was wisely observed by Professor John H.E. Fried that although not legally defined, the question was:

> "Not whether 'ecocide' is forbidden by international law under the term 'ecocide.' In a purely formalistic sense, the world legal order has, because of the very enormity and novelty of the phenomenon, not yet included in its vocabulary. But to conclude from this that, therefore, the phenomena which it describes are beyond the pale of international law, or are therefore legal, would be as impermissible as to claim that Hitler's extermination camps were not illegal because the name of genocide was at that time not part of international law."[18]

The first juridical approach, advanced soon after the conclusion of the Stockholm Conference, is to be found in the proposal of Professor Richard Anderson Falk.

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[10] Eric Paglia, "The Swedish initiative and the 1972 Stockholm Conference: the decisive role of science diplomacy in the emergence of global environmental governance" (2021) 8:2 Humanities and Social Sciences Communications, 1-10.

[11] Richard Black, "Stockholm, Birth of the Green Generation," BBC (4 June 2012), available at: https://www.bbc.com/news/science-environment-18315205

[12] Peder Karlsson (2016).

[13] Tord Bjork, "The Emergence of Popular Participation in World Politics: United Nations Conference on Human Environment 1972" (1996) Department of Political Science, University of Stockholm, 20, available at: http://www.folkrorelser.org/johannesburg/stockholm72.pdf

[14] See, Peter Willets, "From Stockholm to Rio and beyond: the impact of the environmental movement on the United Nations consultative arrangements for NGOs" (1996) 22 Review of International Studies, 57-80.

[15] See, Tony Brenton, "The Greening of Machiavelli" (1994) Earthscan and Royal Institute of International Affairs, London. For the other negotiations, see, for example: United Nations Conference on Environment and Development (1992); General Assembly Special Session on the Environment (1997); World Summit on Sustainable Development (2002); UN Conference on Sustainable Development (2012); UN Sustainable Development Summit (2015).

[16] United Nations, "Declaration of the United Nations Conference on the Human Environment", A/CONF.48/14/Rev.1, June 16 (1972), New York, available at: https://www.un.org/en/conferences/environment/stockholm1972

[17] United Nations, "Report of the United Nations Conference on the Human Environment. Stockholm, 5-16 June 1972." A/CONF.48/14/Rev.1, June 16 (1972), New York, English version available at: https://daccess-ods.un.org/TMP/1118788.27214241.html

[18] John H.E. Fried, "War by Ecocide: some legal observations" (1972) 4:1 Bulletin of Peace Proposals (1973), 43-44, 43.

1. The Law is Coming: 1973 Richard A. Falk's International Convention on the Crime of Ecocide

In 1973, starting from the environmental warfare in Indochina, Professor Falk urged the political and legal community to "designate as a distinct crime those cumulative war effects that do not merely disrupt, but substantially and irreversibly destroy a distinct ecosystem."[19] In order to take steps to strengthen and clarify international law as well as to stop and rectify the ecological devastation of the former Indochina, Falk proposed an 'International Convention on the Crime of Ecocide,' together with other draft instruments, such as the 'Draft Protocol on Environmental Warfare' and the 'Draft People's Petition of Redress on Ecocide and Environmental Warfare addressed to Governments and to the United Nations.'[20] For Falk, the variety of weapons including bombs, napalm, herbicides, and poisonous gases used principally and extensively by the United States in the course of waging war in Indochina caused extensive ecological and long-term damages.[21]

In Article 2 of the Falk's Convention, "ecocide" was so formulated:[22]

> […] 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.

In Article 3 he proposed that not only ecocide shall be punishable, but also: the conspiracy to commit ecocide; direct and public incitement to ecocide; attempts to commit ecocide; and complicity in ecocide. Regarding the sanctions to be imposed, Article 4 stated that whoever committed ecocide or related crimes shall be punished, at least to the extent of being removed for a period of years from any position of leadership or public trust. Moreover, it was highlighted that constitutionally responsible rulers, public officials, military commanders, or private individuals may all be charged with and convicted of the crimes associated with ecocide as set forth in Article 3. Falk proposed the establishment, by the United Nations, of a Commission for the Investigation of Ecocide, composed of fifteen experts on international law and assisted by a staff conversant with ecology, with the principal tasks to investigate allegations of ecocide and with a particular procedure, well-described in Article 5. Article 6 of the draft required the contracting parties to enact the necessary legislation and to provide effective penalties for persons guilty of ecocide or any of the related crimes, and Article 8 highlighted that ecocide shall not be considered as a political crime for the purpose of extradition and obligated States to pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force. It was not clear who should have tried the defendants, since Article 7 left the door open to both possibilities: by a competent tribunal of the State in the territory of where the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties that shall have accepted its jurisdiction. Moreover, Article 10 inserted a special jurisdiction of the

[19] Richard A. Falk, "Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals", (1973) 4:1 Bulletin of Peace Proposals, 80-96, 91.
[20] Ibid.
[21] Ibid, Annex 4.
[22] Ibid, Annex 1.

International Court of Justice at the request of any of the parties to a dispute between the parties relating to the interpretation, application, or fulfilment to the Convention.

In part B of the Convention, entitled 'Resolution relating to the study by the International Law Commission of the question of an international criminal jurisdiction,' the question raised was on the desirability and possibility of having persons charged with ecocide tried by a competent international tribunal. It was proposed that the UN General Assembly would invite the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with ecocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions. Lastly, it was proposed that the General Assembly would request the International Law Commission in carrying out this task to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice. This latter formulation is not clear, but probably the aim was to induce States to accept the Convention, regardless of determining at that stage whether or not to establish a special international tribunal, or conversely to create a criminal chamber within the International Court of Justice.

For Falk, recognising that the world was living in a period of increasing danger of ecological collapse, acknowledging that humans have the power to consciously or unconsciously inflict irreparable damage to the environment in both times of war and peace was the first aim of the Convention; while procedural matters were relegated to subsequent stages of developing a new international legal regime. However, he was convinced – and expressively wrote in the Preamble – that the pursuit of ecological quality requires international guidelines and procedures for cooperation and enforcement.[23]

Falk's proposals were far-reaching and comprehensive, but how did the international community react to his planned Convention?

2. The Tough Time of Politics: The 1978 and 1985 UN Special Rapporteurs' Studies to Introduce Ecocide into the 1948 Genocide Convention

Five years after Falk's draft, in 1978, the UN Special Rapporteur on the Prevention and Punishment of the Crime of Genocide, Nicodème Ruhashyankiko, prepared a 'Study of the Question of the Prevention and Punishment of the Crime of Genocide,'[24] which was presented to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. In his report, Ruhashyankiko discussed the crime of ecocide as "an international crime similar to genocide," on the basis of the Falk proposal.[25] The document underlined both support and resistance by States in the discussions of the previous years. In 1973, the government of Romania advanced a proposal to adopt supplementary conventions or the revision to the 1948 Genocide Convention,[26] and the Holy See stated in 1972 that "serious consideration should be given to the matter of those acts which might be called 'cultural genocide' or 'ethnocide' or 'ecocide.'"[27] Poland observed that the international measures adopted to date concerning the prevention and punishment of the crime of genocide did not prove effective, and therefore a new Convention should be sought.[28] Moreover, the view of the UN

[23] Ibid.

[24] Nicodème Ruhashyankiko, UN Special Rapporteur on Prevention and Punishment of the Crime of Genocide, 'Study of the question of the prevention and punishment of the crime of genocide' (1978) E/CN.4/Sub.2/416, available at: https://digitallibrary.un.org/record/663583

[25] Ibid, paras. 462-464.

[26] Information and views communicated by the Government of Romania on 26 February 1973, in Nicodème Ruhashyankiko (1978), para. 465, fn 59.

[27] Information and views communicated by the Holy See on 18 September 1972, in Nicodème Ruhashyankiko (1978), para. 450, fn 36.

[28] Information and views communicated by the Government of Poland on 26 April 1973, in Nicodème Ruhashyankiko (1978), para. 426, fn 9.

Sub-Commission was that any interference with the natural surroundings or the environment in which ethnic groups lived was in effect a form of ethnic genocide because "such interference could prevent the people involved from following their own traditional way of life."[29]

Other governments observed, more generally, that the 1948 Convention should not be revised. The government of the Union of Soviet Socialist Republics stated that "as far as proposals for revising this Convention or concluding a new one is concerned, given that only a third of the Members of the United Nations are parties to the 1948 Convention, there does not appear to be any great urgency about the matter. Attention should mainly be concentrated, it would seem, on measures which would encourage more States to become parties to the existing Convention."[30] Similar views were expressed by the governments of both the Ukrainian and Byelorussian Soviet Socialist Republic.[31]

For Italy, "the existing international measures concerning genocide seem to be sufficiently effective, provided that all Member States accede to them and fulfil their commitments,"[32] and for Austria "the effectiveness of existing international measures concerning genocide and of the provisions of the Convention of 1948 is rather limited considering that various kinds of genocidal actions continue to be perpetrated in various parts of the world," so "steps to strengthen existing legal instruments should be given priority."[33] The limited effectiveness of the existing law was also highlighted by other States such as Rwanda, Congo, Oman,[34] underlining that "as long as an international criminal court has not been established, the Convention of 1948 will only have a limited scope."[35] Finland highlighted that "From the point of view of criminal law, however, some of these concepts suggested so far to be taken into consideration in this respect may be somewhat too vague to be accurately defined as criminal acts. As much as they are to be deplored, they may be better combated by other means."[36]

The position of the United Kingdom was probably the clearest: "In the absence of any impartial assessment of allegations that genocide has been committed, it is impossible to comment on the effectiveness of the existing international measures for dealing with such situations. The possibility of taking further international action would appear to be a question which should be considered at a time when the existing international measures and machinery have been tested in practice. Until such time, the question of further international action must remain academic."[37] Meanwhile, regarding ecocide, the UK Government noted that "the term

[29] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/Cir.4/Sub.2/SR,658, p. 53. See, similarly, E/CF.4/Sub.2/SR.658, p.55, and E7CN.4/Sub,2/SR.659, p. 65, as mentioned in Nicodème Ruhashyankiko (1978), para. 467, fn 60.

[30] Information and views communicated by the Government of the Union of Soviet Socialist Republics on 22 March 1973, in Nicodème Ruhashyankiko (1978), para. 420, fn 1.

[31] Information and views communicated by the Government of the Ukrainian Soviet Socialist Republic on 23 April 1973 and by the Government of the Byelorussian Soviet Socialist Republic on 27 May 1973, in Nicodème Ruhashyankiko (1978), para. 420, fn 2-3.

[32] Information and views communicated by the Government of Italy on 30 May 1973, in Nicodème Ruhashyankiko (1978), para. 421, fn 4.

[33] Information and views communicated by the Government of Austria on 14 May 1973, in Nicodème Ruhashyankiko (1978) para 422, fn 5.

[34] Information and views communicated by the Government of Rwanda on 17 January 1973, by Congo on 14 May 1973, by Oman on 8 April 1974, in in Nicodème Ruhashyankiko (1978) para 428-430, fn 11-13.

[35] Information and views communicated by the Government of Congo on 14 May 1973, in Nicodème Ruhashyankiko (1978), 428-430.

[36] Information and views communicated by the Government of Finland on 25 January 1973, in Nicodème Ruhashyankiko (1978), para 452, fn. 41.

[37] Information and views communicated by the Government of the United Kingdom of Great Britain and Northern Ireland on 18 July 1973, in Nicodème Ruhashyankiko (1978), para. 424, fn 7.

has been used in certain debates for the purposes of political propaganda and it would be inappropriate to attempt to make provisions in an international Convention for dealing with matters of this kind."[38]

Nicodème Ruhashyankiko proposed also – at paragraph (b) of his study – the inclusion of ecocide as a war crime,[39] but without success either. As can be seen from the above summary, the political discussions on ecocide in the late 1970s were far from being easy.

The next step is to be found in 1985, in a revised and updated shorter report of the subsequent UN Special Rapporteur, Benjamin Whitaker,[40] a British barrister and Labour Party politician. In article 29(3), entitled 'Cultural genocide, ethnocide and ecocide' it was highlighted that 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 should be criminalised.[41] Whitaker observed that the main victims of such actions are Indigenous Populations,[42] but this notion of ecocide was far from the one that we know nowadays. He also highlighted the different definitions and understandings of ecocide and said that further consideration should be given to this question.[43]

Neither of the Ruhashyankiko or Whitaker proposals were developed further by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Indeed, in the subsequent 38th session report, dated 5-30 August 1985,[44] ecocide is just mentioned a few times but without either a dedicated chapter nor a dedicated paragraph. Space was found for ecocide only in the chapters dedicated to 'Other matters.'[45] It was simply summarised that at the previous 36th meeting it was suggested that a fifth operative paragraph should be added which would read: "5. Recommends to the Commission on Human Rights to authorize the Sub-Commission to request its Special Rapporteur, Mr. Benjamin Whitaker, to study the notions of 'cultural genocide', 'ethnocide' and 'ecocide' and to submit his report to the Sub-Commission at its fortieth session."[46] Moreover, in Annex IX Mr. Deschenes – a Canadian Quebec Superior Court judge – said that, at the time of consideration of Mr. Whitaker's report, members had discussed the advisability, indeed the necessity, of studying the ecocide question. If the debate was to be recorded faithfully, those matters should be mentioned in the report, for example by inserting after paragraph 11 a new paragraph that would read: "The questions of cultural genocide, ethnocide and ecocide were also raised, and the view was expressed that they deserved to be studied further."[47] This was challenged by other attendee. Mr. Chowdhury – from Bangladesh – said that the report should specify unambiguously whether "one" member, "some" members or "several" members of the Sub-Commission had raised the questions of cultural genocide, ethnocide and ecocide. Chowdhury argued that the formulation of words being proposed implied that the proposal had come from the Sub-Commission as a whole, when it had in actual fact been the view of only a few of the

[38] United Kingdom, supra note 36, para. 468, fn. 61.
[39] Nicodème Ruhashyankiko (1978), paras. 470-478.
[40]Benjamin Whitaker, UN Special Rapporteur on Prevention and Punishment of the Crime of Genocide, 'Revised and updated report on the question of the prevention and punishment of the crime of genocide' (1985) E/CN.4/Sub.2/1985/6, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G85/123/55/PDF/G8512355.pdf?OpenElement
[41] Ibid, para. 33.
[42] Ibid. See the Final Report submitted by the Special Rapporteur José R. Martinez Cobo, 'Study of the Problem of Discrimination against Indigenous Populations", E/CN.4/Sub.2/1983/21/Add.8 (1983), available at: https://www.un.org/esa/socdev/unpfii/documents/MCS_xxi_xxii_e.pdf
[43] Benjamin Whitaker (1985) para 33.
[44] UN Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 38th session, Geneva, 5-30 August (1985) E/CN.4/Sub.2/1985/57, available at: https://digitallibrary.un.org/record/116304
[45] Ibid, paras. 51-73.
[46] Ibid, para. 62.
[47] Ibid, Annex IX, para. 47.

members.[48] The Russian delegate, Mr. Tchikvadze, put an end to the debates, saying that it was impossible to include retrospectively in a report something which had not taken place during the work, and if the Sub-Commission decided to include all of the proposals already made, and more particularly the proposal by Mr. Deschênes, he would be obliged in turn to propose an amendment.[49]

Following contentious exchanges such as these, the inclusion of a crime of ecocide in the Genocide Convention was ultimately not adopted or pursued further by the Sub-Commission.

3. Between Politics and Law: The International Law Commission and the Tortuous Road to the 1996 Draft Code of Crimes Against Peace and Security of Mankind

The International Law Commission (ILC) – the successor of the 'Committee on the Progressive Development of International Law and its Codification', established by Resolution 94(I)[50] – is a creation of the United Nations by virtue of General Assembly Resolution 174(II) of 21st November 1948. It held its first session in New York in 1949.[51] The Commission was created as a subsidiary organ of the General Assembly, especially connected with its Sixth (Legal) Committee.[52] The prime objective of the Commission, as indicated in Article 1(1) of its Statute, is "the promotion of the progressive development of international law and its codification," and to undertake the mandate of the Assembly, under Article 13(1)(a) of the UN Charter to "initiate studies and make recommendations for the purpose of […] encouraging the progressive development of international law and its codification." Since its establishment more than 70 years ago, the number of States in the world has almost tripled, and it has recently been observed that "today, the Commission faces numerous challenges that are different from those that existed at the time when the Commission was established."[53]

Soon after its establishment in 1949, the ILC was charged with preparing the so-called "Draft Code of Offences Against the Peace and Security of Mankind." Indeed, in Resolution 95(I)[54] sponsored by the United States, the United Nations directed the ILC to: (a) formulate the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal; and (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above. Following the words of U.S. President Truman, contained in a letter to Justice Biddle – the US judge on the Nuremberg Tribunal – the code aims the reaffirmation of "the principles of the Nuremberg Charter in the context of a general codification of offenses against the peace and security of mankind."[55]

[48] Ibid, Annex IX, para. 52.
[49] Ibid, Annex IX, paras. 54-55.
[50] See Cherif Bassiouni, "The History of the Draft Code of Crimes Against the Peace and Security of Mankind" (1993) 27:1-2 Israel Law Review, 247.
[51] For the Reports of the ICL, see UN-iLibrary, available at: https://www.un-ilibrary.org/content/periodicals/2521621x
[52] See Sompong Sucharitkul, "The Role of the International Law Commission in the Decade of International Law" (1990) 3:15 Leiden Journal of International Law, 18; Luke T. Lee, "The International Law Commission Re-examined" (1965) 59:3 The American Journal of International Law, 545.
[53] Danae Azaria, "The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making", in United Nations (eds) "Seventy Years of the International Law Commission. Drawing a Balance for the Future" (2020) Brill, 172.
[54] See "Affirmation of the Principles of International Law Recognized by The Charter of The Nürnberg Tribunal, General Assembly Resolution 95(I)" (2008) UN Audiovisual Library of International Law, available at: https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf
[55] "The United States and the United Nations. Report by the President to the Congress for the year 1946." (1947) United States Government Printing Office, Washington, 20.

A first draft code was submitted by Rapporteur Jean Spiropoulos in 1950,[56] but it was never formally approved.[57] More than 30 years later, on 10th December 1981, the General Assembly adopted Resolution 36/106 by which it requested the Commission to resume its work on the draft Code. It has been observed that "the period between 1984 and 1996 proved to be pivotal"[58] because "during this time there had been extensive engagement in the ILC about the inclusion of a law regarding extensive environmental damage in the Code."[59]

Indeed, in 1984, the ILC considered inserting into the 'list of acts to be classified as offences against the peace and security of mankind'[60] the 'acts causing serious damage to the environment' and considering those as international crimes. Moreover, the qualification of these acts as 'crimes against humanity' was discussed. It was observed that:

> "The question arises whether it should not in some cases be made a crime against humanity. Some members thought not. However, the Commission considered that, although just any damage to the environment could not constitute a crime against humanity, the development of technology and the considerable harm it sometimes did – for example, to the atmosphere and to water – might lead to certain kinds of damage to the human environment being regarded as crimes against humanity. It was pointed out that there were conventions prohibiting certain tests which could harm the environment. Although those conventions were primarily concerned with military tests, the essential reason for the prohibition seemed to have been the damage done to the environment. This applied in particular to the treaties prohibiting nuclear weapons in the atmosphere, in outer space, on the seabed and the ocean floor and in the subsoil thereof."[61]

Furthermore, in the 1984 ILC Report the environment itself acquired a global consideration. It was pointed out that many of the world's gravest environmental problems could not be reduced to simple equations, relating a measurable loss or injury within the territory or control of one State to an identified physical consequence of an activity within the territory or control of another State.[62]

In 1986 there was a subsequent debate regarding the concept of 'serious damage to the environment.' According to article 19(3)(d) of the draft articles on State responsibility, "a serious breach of an international

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[56] Benjamin Ferencz, "The Draft Code of Offences Against the Peace and Security of Mankind" (1981) 75:3 The American Journal of International Law, 674. See UN Doc. A/CN. 4/25 (1950), available at: https://legal.un.org/ilc/documentation/english/a_cn4_25.pdf

[57] For a procedural history, see Antonio Cassese, "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal General Assembly resolution 95 (I)" (2009) UN Audiovisual Library of International Law, available at: https://legal.un.org/avl/ha/ga_95-I/ga_95-I.html

[58] Anja Gauger, Mai Pouye Rabatel-Fernel, Louise Kulbicki, Damien Short and Polly Higgins, "Ecocide is the missing 5th Crime Against Peace" (2012) Human Rights Consortium, School of Advanced Study, University of London, 9. Of Polly Higgins, see also *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of our Planet* (Shepheard-Walwyn Publishers Ltd, 2010); "Earth is our Business: Changing the Rules of the Game" (Shepheard-Walwyn Publishers Ltd., 2012). For the Higgins proposal, Polly Higgins, Damien Short, Nigel South, "Protecting the planet: a proposal for a law of ecocide" (2013) 59 Crime, Law and Social Change, 251-266.

[59] Ibid, 9.

[60] Report of the International Law Commission on the work of its thirty-sixth session, 7 May – 27 July 1984, Official Records of the General Assembly, Thirty-ninth session, Supplement No. 10, A/39/10, Extract from the Yearbook of the International Law Commission (1984) II (2), 11.

[61] Report of the International Law Commission on the work of its thirty-sixth session, 7 May – 27 July 1984, Official Records of the General Assembly, Thirty-ninth session, Supplement No. 10, A/39/10, Extract from the Yearbook of the International Law Commission (1984) II (2), 16.

[62] Report of the International Law Commission on the work of its thirty-sixth session, 7 May – 27 July 1984, Official Records of the General Assembly, Thirty-ninth session, Supplement No. 10, A/39/10, Extract from the Yearbook of the International Law Commission (1984) II (2), 76.

obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas"[63] is an international crime against humanity. It was also highlighted that "[i]t is not necessary to emphasize the growing importance of environmental problems today. The need to protect the environment would justify the inclusion of a specific provision in the draft code."[64] In the same year, the Special Rapporteur suggested complementing the list of crimes against humanity with a provision making breaches of rules for the protection of the environment a punishable act. He proposed the draft of article 12 (Acts constituting crimes against humanity) in his fourth report: "The following constitute crimes against humanity: [...] 4. Any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment."[65]

The Special Rapporteur therefore submitted new proposals at the forty-first session of the Commission in 1989. Starting from the formulation he had previously used, he now suggested that in draft article 14 (Crimes against humanity), which appears in his seventh report, crimes affecting the environment should be couched in the following terms: "The following constitute crimes against humanity: [...] 6. Any serious and intentional harm to a vital human asset, such as the human environment."[66]

Following further discussions, Article 26 of the text adopted on first reading in 1991 provides: "An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced." In the commentary to draft article 26 (Wilful and severe damage to the environment), it was stated that the draft provision had borrowed most of its elements from article 55 of Additional Protocol I to the Geneva Conventions of 12 August 1949, but that its scope *ratione materiae* was larger in that it applied also in times of peace outside an armed conflict.[67] It was highlighted that this latter draft article applies when three elements are involved: firstly, there should be damage to "the natural environment"; secondly, "widespread, long-term and severe damage," and thirdly, the damage must be caused "wilfully."[68] It was also observed that the words "natural environment" should be taken broadly to cover the environment of the human race and where the human race develops, as well as areas the preservation of which is of fundamental importance in protecting the environment, and the seas, the atmosphere, climate, forests and other plant cover, fauna, flora and other biological elements.[69] Numerous observations were received from governments.[70] This first manifestation of "ecocide," despite its different name, was considered as one of the issues that required particular attention before the text could be finalised. The issue was whether causing damage to the environment should be included in the draft Code. Therefore, at its forty-seventh session, in 1995, the Commission decided to establish a working group that would meet at the beginning of the forty-eighth session to examine the possibility of covering in the draft Code of Crimes against the peace and security of mankind the issue of wilful and severe damage to the environment. The 'document on crimes against the environment,' dated 27th March 1996, prepared by Mr. Christian Tomuschat, summarised all the issues discussed.[71] It was wisely observed that:

[63] Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/398 (1986), 61.
[64] Ibid, 61.
[65] Yearbook of the International Law Commission (1986) II (1), A/CN.4/SER.A/1986/Add.l (Part 1) 86.
[66] Yearbook of the International Law Commission (1989) II (1), A/CN.4/SER.A/1989/Add.l (Part 1) 85.
[67] Yearbook of the International Law Commission (1991) II (2) A/CN.4/SER.A/1991/Add.l (Part 2), 107.
[68] Ibid.
[69] Ibid.
[70] In Document on crimes against the environment, prepared by Mr. Christian Tomuschat, member of the Commission, DOCUMENT ILC(XLVIII)/DC/CRD.3, see the observations of: Australia, Austria, Belgium, Brazil at p.18; Greece, Netherlands, Nordic Countries, Paraguay, Poland, United Kingdom, U.S.A., Uruguay at p.19.
[71] Document on crimes against the environment, prepared by Mr. Christian Tomuschat, member of the Commission, DOCUMENT ILC(XLVIII)/DC/CRD.3, available at: https://legal.un.org/ilc/documentation/english/ilc_xlviii_dc_crd3.pdf

> "Since Nuremberg, it is the guiding idea of such responsibility that it is brought into being directly by virtue of international law, independently of any rules set forth by national law-making bodies. This basic principle was also expressed by the Commission in article 2 of the 1991 draft Code. National law can under no circumstances justify inflicting grave damage on the environment. […] Draft article 26, as adopted by the Commission on first reading, rests on the premise that certain actions, in as much as they target the foundations of human society, must be deemed to be unlawful per se, without having to be prohibited by specific norms. Indeed, international environmental law does not yet constitute a comprehensive edifice dealing with all possible acts that threaten or destroy environmental goods or interests. Making responsibility under the draft Code dependent on the existence of specific environmental norms would therefore create the risk of leaving widely gaping lacunae in the intended scope of draft article 26."[72]

As Polly Higgins and other scholars have highlighted, "despite this document, none of his recommendations were followed up,"[73] and the result was that the Drafting Committee was notified only to draft the far smaller remit of environmental damage in the context of war crimes, and not in the context of crimes against humanity.[74] It was noted in the thirteenth report by the Special Rapporteur Mr. Doudou Thiam, that the "draft articles on colonial domination […] and wilful and severe damage to the environment were equally unpopular"[75] and were strongly opposed.

Indeed, on 5th July 1996 – at its forty-eighth session held from 6 May to 26 July 1996[76] – the work of the Commission resulted in its adoption of the 'Draft Code of Crimes against the Peace and Security of Mankind'[77] and neither the crime of ecocide nor the article 26 draft found their room. In other words, Article 26 "was removed completely, and somewhat mysteriously, from the Code."[78]

In the 1996 final draft code, submitted to the General Assembly, the Article 20 entitled 'War Crimes' mentions the environment only in its paragraph (g):

> Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale:
> […]

[72] Ibid, 25. Additionally, it was stated that "this conclusion is buttressed by the results of the XVth Congress of International Penal Law held in Rio de Janeiro, Brazil, from 4 to 10 September 1994. In paragraph 21 of the concluding resolution, the International Association of Penal Law recommends that so-called "core crimes", those of the utmost gravity, should not be made dependent on a breach of other rules than the relevant provisions of criminal codes."

[73] Anja Gauger, Mai Pouye Rabatel-Fernel, Louise Kulbicki, Damien Short and Polly Higgins, "Ecocide is the missing 5th Crime Against Peace" (2012) Human Rights Consortium, School of Advanced Study, University of London, 10.

[74] Ibid.

[75] Thirteenth report on the draft code of crimes against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/466, 35.

[76] See ILC Forty-eighth Session (1996), available at: https://legal.un.org/ilc/sessions/48/

[77] See 'Draft Code of Crimes against the Peace and Security of Mankind' (1996). Text adopted by the International Law Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 50). The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1996, vol. II (Part Two). Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf See, also, Martin C. Ortega, "The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind" (1997) 1 Max Planck Yearbook of United Nations Law, 283; Jean Allain and John R.W.D. Jones, "A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind" (1997) 1 European Journal of International Law, 100.

[78] Gauger et al, supra note 73, 11.

(g) necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.

4. The Road to the 1998 Rome Statute

At its forty-ninth session – in 1994 – the General Assembly, under the item entitled "Report of the International Law Commission on the work of its forty-sixth session,"[79] decided to establish an ad hoc committee to review the major issues arising from the draft statute for an international criminal court prepared by the Commission, and to consider arrangements for the convening of an international conference of plenipotentiaries to conclude a convention on the establishment of such a court.[80] At its fiftieth session, the General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court.[81] In 1998, the Assembly held a diplomatic conference of plenipotentiaries during which it adopted the Rome Statute of the ICC and "resolution F" of the Final Act of the Conference, which established the Preparatory Commission[82] for the International Criminal Court. The Assembly continued its consideration of the item from its fifty-second to fifty-seventh sessions.[83]

It is important to highlight that the Rome Statute – namely, the International Criminal Court's founding treaty, adopted on 17th July 1998 and which entered into force four years later, on 1st July 2002[84] – mentions the environment only within the context of War Crimes. Its article 8(2)(b)(4), entitled "War Crimes," provides that:

> 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
> 2. For the purpose of this Statute, "war crimes" means:
> […]
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
> […]
> (iv) Intentionally 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;

[79] Resolution 49/53, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/767/77/PDF/N9576777.pdf?OpenElement. See also, General Assembly of the United Nations, Report of the International Criminal Court, Background, available at: https://www.un.org/en/ga/62/plenary/icc/bkg.shtml

[80] See Philippe Kirsch, John T. Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process" (1999) 93:1 The American Journal of International Law, 2.

[81] Resolution 50/46, available at: https://daccess-ods.un.org/TMP/1091018.61715317.html

[82] See Christine Byron, David Turns, Colin Warbrick and Dominic McGoldrick, 'The Preparatory Commission for the International Criminal Court' (2001) 50:2 The International and Comparative Law Quarterly, 420; Philippe Kirsch, Valerie Oosterveld, "The Preparatory Commission For the International Criminal Court" (2001) 25:3 Fordham International Law Journal, 563; Richard Dicker, "Issues Facing the International Criminal Court's Preparatory Commission" (1999) 32:3 Cornell International Law Journal, 471.

[83] Resolutions 52/160, 53/105, 54/105, 55/155, 56/85 and 57/23.

[84] See M. Cherif Bassiouni and William A. Schabas (eds.) "The Legislative History of the International Criminal Court" (2016) vol. I.

It has been observed that Article 8 is "the first 'eco-centric' crime recognised by the international community".[85] But although "the inclusion of a provision in the Rome Statute that recognizes the environment, per se, as an object of international protection is praiseworthy,"[86] the limitation to the international armed conflict was not sufficient. Moreover, it was stated that "limiting such criminalization to 'war crimes' makes no sense, because serious environmental damage takes place, primarily, during times of peace,"[87] and the necessity to "go beyond military conflict"[88] since the "correlation between environmental degradation and human rights"[89] is internationally acknowledged.

Juridically speaking, this crime could be prosecuted only if it satisfies three elements: 1) the *actus reus* must be widespread, severe and causing long-term environmental damage; 2) *actus reus* cannot have been committed as a part of concrete or direct military advantage; and 3) *mens rea* must be intentional.[90]

Following this brief overview of the development of the crime of ecocide in international law, this Working Paper will not focus more on these substantive issues, since it is primarily intended to provide a deeper analysis of the procedural changes to the Rome Statute and the Rules of Procedure and Evidence which are required to underpin any proposed amendment to the list of crimes found in the Rome Statute.

B. THE 'OPEN CLAUSE' OF THE 2021 PROPOSAL TO AMEND THE ROME STATUTE

In late 2020 the Stop Ecocide Foundation convened an 'Independent Expert Panel for the Legal Definition of Ecocide,' composed of twelve eminent lawyers with a balance of backgrounds and expertise in criminal, environmental and climate law.[91] To add ecocide as a new crime to the ICC Rome Statute, the Panel recommended the following amendments:

> **Addition of a preambular paragraph 2 bis**
> Concerned that the environment is daily threatened by severe destruction and deterioration, gravely endangering natural and human systems worldwide,

[85] Ryan Gilman, "Expanding Environmental Justice after War: The Need for Universal Jurisdiction over Environmental War Crimes" (2011) 22:3 Colorado Journal of International Environmental Law and Policy, 447-471, 453.
[86] Aurelie Lopez, "Criminal Liability for Environmental Damage Occurring in Times of Non- International Armed Conflict: Rights and Remedies" (2007) 18:2 Fordham Environmental Law Review, 231-271, 232. See also Matthew Gillett, "Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict." In Carsten Stahn, Jens Iverson, and Jennifer S. Easterday (eds) "Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices" (2017) 220.
[87] Mohadmmed Saif-Alden Wattad, "The Rome Statue and Captain Planet: What Lies Between 'Climate Against Humanity' and the 'Natural Environment?" (2009) 19:2, 265-285, 268. See, also, Sailesh Mehta, Prisca Merz, "Ecocide – a new crime against peace?" (2015) 17(I) Environmental Law Review, 3-7.
[88] Mark A. Drumbl, "Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes" (1998) 22:1, 122-153, 151.
[89] Aurelie Lopez, "The Protection of Environmentally-Displaced Persons in International Law" (2007) 37:2 Environmental Law, 365-409, 407.
[90] Symposium, "The International Response to the Environmental Impacts of War: Afternoon Panel Accountability and Liability: Legal Tools Available to the International Community" (2005) 17 Georgetown Environmental Law Review, 616, 624, mentioned in Payal Patel, "Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper expand the Court's Mandate to Prosecuting Environmental Crimes?" (2016) 14:2 Loyola University Chicago International Law Review, 175-197, 178, fn 21-24.
[91] Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text (2021), available at: https://www.stopecocide.earth/expert-drafting-panel.

Addition to Article 5(1)
(e) The crime of ecocide.

Addition of Article 8 ter
Article 8 ter Ecocide
1. For the purpose of this Statute, "ecocide" means 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.
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.

The Panel itself clarified in the introduction that the proposed definition "might serve as the basis of consideration for an amendment to the Rome Statute." Moreover, they humbly highlight that "consequential amendments may also be required for other provisions of the Rome Statute, such as Article 9, and to the ICC Rules of Procedure and Evidence, and the Elements of Crimes."[92] This 'open clause' means that the experts were conscious that their text may be integrated with other additional amendment proposals.

C. THE MAIN PROCEDURAL AMENDMENTS TO PUT FORWARD A STRONGER AND PRACTICAL CONCEPT OF ECOCIDE

Due to this 'open clause,' in this paper I will not comment on either the proposed definition of ecocide or the proposed addition of articles 5(1), 8 ter and preambular paragraph 2 bis. On the contrary, I will put forward additional amendments to the ICC legal framework, regarding procedural issues, in order to integrate it and fill the purely procedural gaps of the 2021 legal definition, enforcing a practical concept of ecocide.

I am aware that these proposed amendments may require further development depending on any changes to the core Article 8 ter proposal. However, they are submitted to serve as the basis subsequent procedural debates regarding the introduction of the international crime of ecocide in the Rome Statute.

The following amendment proposal is divided in seven parts:

1) Jurisdiction *ratione temporis* and the withdrawal process, amending articles 127 and 121 of the Rome Statute (hereinafter, "RS").
2) The 'deferral of investigation or prosecution' power of the renewal by the UN Security Council should not be authorised more than once, amending Article 16 bis RS.

[92] Ibid.

3) The introduction of Aggravated Ecocide, and its Aggravating Circumstances, namely those actions or omissions which have a 'substantial impact on greenhouse gas emissions and/or climate change,' amending Article 8 ter RS draft and rule 145 of Rules of Procedure and Evidence (hereinafter, "RPE").
4) The exercise of jurisdiction, in case of aggravated ecocide, on the basis of UN environmental authorities' reports, such as the reports of the Intergovernmental Panel on Climate Change (IPCC), the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change or the Special Rapporteur on Human Rights and the Environment, amending articles 13 and 15 RS.
5) Changing the standard of proof in cases of aggravated ecocide: from "reasonable basis" to proceed (and to believe) to a "sufficient basis," amending articles 15, 18 and 53 RS and Regulations 27 and 29 of the Regulation of the Prosecutor.
6) Regarding issues of admissibility, introducing a rebuttable presumption of both "gravity" and "interests of justice" in cases of aggravated ecocide, amending articles 17 and 19 RS and Regulations 29 and 31 bis of the Regulation of the Prosecutor.
7) The exclusion to the so-called proceedings on an admission of guilt in cases of aggravated ecocide, amending articles 64 and 65 RS and Rule 139 of RPE.

Whilst the first two amendments (1-2) refer to the ordinary crime of ecocide, namely Article 8 ter as proposed by the Stop Ecocide Foundation, the other five (3-7) examine aggravating factors specific to the crime of ecocide, and analyse issues which affect the balance between the rights of the accused and the administration of justice.

1. Jurisdiction *Ratione Temporis* and Withdrawal Process

The ICC's jurisdiction, in respect to the basic principles of criminal procedure, has "four different facets":[93] i) jurisdiction *ratione materiae* (subject-matter jurisdiction) set out in article 5 of the Rome Statute;[94] ii) jurisdiction *ratione personae* (jurisdiction over persons) specified by articles 12 and 26;[95] iii) jurisdiction *ratione loci* (territorial jurisdiction) pursuant to articles 12 and 13(b);[96] and iv) jurisdiction *ratione temporis* (temporal jurisdiction), defined by articles 11 and 127 RS.

Jurisdiction *ratione materiae* has already been implicitly solved in the Stop Ecocide Foundation proposal, with the introduction of both Article 5(1)(e) and 8 ter, and jurisdiction *ratione loci* as well as *ratione temporis* are not included – at least for now – in this additional proposal.

Jurisdiction *ratione temporis* deserves more attention.[97] Regarding the crime of ecocide, considering the long-term article 8 ter requirement, which means damage which is irreversible, or which cannot be redressed

[93] ICC Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, paras. 21–22, available at: https://www.icc-cpi.int/CourtRecords/CR2007_01307.PDF. See also, David Scheffer, "The International Criminal Court: The Challenge of Jurisdiction" (1999) 93 Proceedings of the Annual Meeting (American Society of International Law), 68-72.

[94] See Andreas Zimmermann, "Article 5", in Otto Triffterer and Kai Ambos, "The Rome Statute of International Criminal Court. A Commentary" (3rd ed. Hart 2015) 111; Alan Nissel, "Continuing Crimes in the Rome Statute" (2004) 25:3 Michigan Journal of International Law 653.

[95] See Micaela Frulli, "Jurisdiction ratione personae", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), "The Rome Statute of the International Criminal Court: A Commentary" (OUP 2002) 532.

[96] See Michail Vagias, "The Territorial Jurisdiction of the International Criminal Court" (CUP 2014).

[97] For a general introduction, see Stéphane Bourgon, "Jurisdiction ratione temporis", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), "The Rome Statute of the International Criminal Court: A Commentary" (OUP 2002) 543;

through natural recovery within a reasonable period of time, the attention falls on the jurisdiction *ratione temporis* and to the withdrawal process. Pursuant to article 11 RS, ICC has jurisdiction only with respect to crimes committed after the entry into force of the Statute. If a State becomes a Party to the Rome Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State, unless that State has made a declaration under article 12, paragraph 3. This – the principle of non-retroactivity – is an indispensable rule which prohibits the application of law to events that took place before the law was introduced.[98] It is recognised by the Universal Declaration of Human Rights[99] which prohibits criminal convictions for any conduct which did not constitute a crime under national or international law at the time when it was committed. It is also recognised in the International Covenant for Civil and Political Rights,[100] and the European Convention of Human Rights which provides that no one can be guilty of a criminal offence on the basis of any act or omission which did not constitute an offence at the time.[101]

Hence, this current proposal shall not change the non-retroactivity rule. Instead, what is required is an amendment of Article 127 RS. Indeed, Article 127 provides the possibility for a State Party to withdraw from the Rome Statute by a written notification addressed to the UN Secretary-General. In this case, the withdrawal shall take effect one year after the date of receipt of the notification (unless the notification specifies a later date). Paragraph 2 of this norm underlines that a State shall not be discharged, by reason of its withdrawal, from the obligations arising from the Statute while it was a Party, including any financial obligations which may have accrued. Moreover, the withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Nonetheless, the 1-year limit appears to be inadequate for a crime such as ecocide. Since the environment – namely the Earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space – are the preconditions for all life, and the formulation of Article 8 ter requires "severe and either widespread or long-term damage to the environment," the withdrawal procedures require careful consideration. Very serious adverse changes, disruption or harm to any element of the environment, beyond a limited geographic area, which crosses state boundaries, or is suffered by an entire ecosystem, species or a large number of human beings, and which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time, necessitates special procedural considerations within the Rome Statute.

For the reasons above, I would propose to amend Article 127 RS, inserting a paragraph 1bis:

Julien Cazala, "Compétence ratione temporis", in Julian Fernandez and Xavier Pacreau (eds.), "Statut de Rome de la Cour pénale internationale. Commentaire article par article" (2012) 567, Editions A. Pedone.

[98] See Yarik Kryvoi and Shaun Matos, "Non-Retroactivity as a General Principle of Law" (2021) 17:1 Utrecht Law Review, 46–58; Talita de Souza Dias, "The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations. An Appraisal of the Existing Solutions to an Under-discussed Problem" (2018) 16 Journal of International Criminal Justice, 65-89.

[99] Universal Declaration of Human Rights, 12 December 1948, G.A. Res. 217A, Article 11(2).

[100] International Covenant on Civil and Political Rights, 16 December 1966, Article 15(1).

[101] European Convention on Human Rights, Article 7.

Article 127. Withdrawal.
1. […]
1 bis. In the case of Article 8 ter (ecocide), the withdrawal shall take effect five years after the date of receipt of the notification, unless the notification specifies a later date.
2. […]

A 5-year limit could reinforce the effectiveness of the crime of ecocide, and would represent a compromise between the State's right to withdraw and the environmental protection exigence, as well as providing an element of both crime prevention and repression.

This amendment should be coordinated together with an amendment of Article 121 RS. Paragraph 6 of this latter norm provides that if an amendment has been accepted by seven-eighths of States Parties, any State Party which has not accepted the amendment may withdraw from the Statute with immediate effect, notwithstanding Article 127(1), but subject to Article 127(2), by giving notice no later than one year after the entry into force of such amendment.

Therefore, I would propose to amend Article 121, inserting a paragraph 6 bis:

Article 121. Amendments.
[…]
6 bis. The paragraph 6 provisions – namely the State's right to withdraw from the Statute with immediate effect, notwithstanding article 127(1), but subject to article 127(2), by giving notice no later than one year after the entry into force of such amendment – are not valid if the Court has already authorised an investigation for the crime of ecocide (Article 8 ter) into the territory or actions of the State who asked to withdraw.
[…]

2. Deferral of Investigation or Prosecution: Reducing the Power of Renewal Request by the UN Security Council

Due to the global and transboundary consequences of the crime of ecocide, I would put forward an Article 16 bis, in order to reduce the UN Security Council's deferral powers contained in Article 16. Indeed, this latter norm provides that no investigation or prosecution may be commenced or proceeded with under the Rome Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the UN Charter, has requested the Court to that effect. As per the current wording of Article 16, a request for deferral may be renewed by the Council under the same conditions. In my proposal I suggest a limit to the renovation of the renewal request to not more than one time.

Article 16 bis would consist of 1 paragraph and it could be entitled "Deferral of investigation or prosecution of the crime of ecocide." I would propose as follows:

Article 16 bis. Deferral of investigation or prosecution of the crime of ecocide.

If the investigation or prosecution concerns the crime of Article 8 ter (ecocide), the renewal request under Article 16 by the UN Security Council cannot be renewed more than one time.

3. Aggravated Ecocide, and its Aggravating Circumstance of 'Substantial Impact on Greenhouse Gas Emissions or Climate Change'

The previous two amendments involve the "ordinary" crime of ecocide, namely that proposed by Article 8 ter of the Stop Ecocide Foundation proposal. However, certain actions or omissions by a State Party may result in global impacts, in particular those which wilfully contribute to excessive greenhouse gas emissions or climate change.[102] In these specific and limited circumstances, I propose the concept of 'aggravated ecocide' in recognition of the long-lasting and cross-border harms such wilful actions or omissions will create. However, reflecting the more serious charges and penalties which a charge of aggravated ecocide would encompass, there needs to be a correspondingly comprehensive consideration of the procedural amendments which are required in the interests of justice to the accused and to the victims, which may constitute all living beings on the Earth.

Thereby, I would suggest amending the Stop Ecocide Foundation draft of Article 8 ter RS, inserting a paragraph 3:

> ***Article 8 ter Ecocide***
> ***[…]***
> ***3: Ecocide shall be considered aggravated if, as a result of wilful action or omission, it has, or has had,* a *substantial impact on greenhouse gas emissions or climate change.***

Subsequently, I would propose to insert a paragraph 2(b)(vii) into Rule 145 RPE:

> ***Rule 145. Determination of sentence.***
> ***[…]***
> ***2 (b)(vii) In case of Article 8 ter paragraph 3 (aggravated ecocide), if, as a result of wilful action or omission, the crime has, or has had, a substantial impact on greenhouse gas emissions or climate change.***

As I will explain in the next paragraph, this 'substantial impact' on greenhouse gas emissions or climate change which characterises aggravated ecocide, will require to be proved by authoritative evidence, and could be deduced by UN environmental authorities' reports, such as the reports of the Intergovernmental Panel on Climate Change (IPCC), the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change or the Special Rapporteur on Human Rights and the Environment.

4. The Exercise of Jurisdiction, in case of Aggravated Ecocide, on the Basis of UN Environmental Authorities' Reports

Since determining the commission of the crime of ecocide or aggravated ecocide is primarily determined by science, I would propose a special exercise of jurisdiction based on UN environmental authorities' reports, such as the reports of the Intergovernmental Panel on Climate Change (IPCC), the Special Rapporteur on the

[102] Potential examples of such acts or omissions might include: undertaking or permitting massive deforestation, or excessive and on-going release of greenhouse gas emissions without meaningful actions aimed at reducing such emissions in the short- to medium term, as long as their impact on greenhouse gas emissions or climate change is supported by scientific evidence.

Promotion and Protection of Human Rights in the context of Climate Change,[103] or the Special Rapporteur on Human Rights and the Environment.

The IPCC is the UN body for assessing the science related to climate change. It is an organisation of governments that are members of the UN or World Meteorological Organization (WMO)[104] and it currently has 195 members. It was established in 1988[105] by the WMO and the UN Environment Programme (UNEP).[106] Its' objective is, essentially, to provide governments at all levels with scientific information that they can use to develop climate policies. As observed in the IPCC official website:[107]

> "Thousands of people from all over the world contribute to the work of the IPCC. For the assessment reports, IPCC scientists volunteer their time to assess the thousands of scientific papers published each year to provide a comprehensive summary of what is known about the drivers of climate change, its impacts and future risks, and how adaptation and mitigation can reduce those risks. An open and transparent review by experts and governments around the world is an essential part of the IPCC process, to ensure an objective and complete assessment and to reflect a diverse range of views and expertise. Through its assessments, the IPCC identifies the strength of scientific agreement in different areas and indicates where further research is needed. The IPCC does not conduct its own research. […] Representatives of IPCC member governments meet one or more times a year in Plenary Sessions of the Panel. They elect a Bureau of scientists for the duration of an assessment cycle. Governments and Observer Organizations nominate, and Bureau members select experts to prepare IPCC reports. They are supported by the IPCC Secretariat and the Technical Support Units of the Working Groups and Task Force."

In the recent 'Working Group I contribution to the Sixth Assessment Report of the IPCC,' published on 9th August 2021[108] – the first instalment of the IPCC's Sixth Assessment Report AR6, which will be completed in 2022 –, consisting of almost 4,000 pages, scientists highlighted "changes in the Earth's climate in every region and across the whole climate system" and "many of the changes observed in the climate are unprecedented in thousands, if not hundreds of thousands of years, and some of the changes already set in motion – such as continued sea level rise – are irreversible over hundreds to thousands of years."[109]

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[103] See: Human Rights Council Resolution, A/HRC/RES/48/14, 13 October 2021, available at: https://www.actu-environnement.com/media/pdf/news-38372-resolution-onu-rapporteur-impacts-changement-climatique-droits-homme.pdf

[104] The WMO was established by the Convention of the World Meteorological Organization, signed 11 October 1947 and ratified on 23 March 1950, available at: https://treaties.un.org/pages/showDetails.aspx?objid=0800000280157e8e

[105] Res. 4 (EC-XL) – Intergovernmental Panel On Climate Change (1988), available at: https://www.ipcc.ch/site/assets/uploads/2019/02/WMO_resolution4_on_IPCC_1988.pdf

[106] The United Nations Environmental Programme (UNEP) was founded in June 1972 as a result of the Stockholm Conference on the Human Environment. The UNEP is the coordinating body for the United Nations' environmental activities. The 1972 Resolution is available at: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/270/27/IMG/NR027027.pdf?OpenElement

[107] IPCC Website, "About the IPCC" and "Structure of the IPCC", respectively available at: https://www.ipcc.ch/about/ and https://www.ipcc.ch/about/structure/

[108] "IPCC, 2021: Summary for Policymakers", in Masson-Delmotte, V., P. Zhai, A. Pirani, S. L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M. I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T. K. Maycock, T. Waterfield, O. Yelekçi, R. Yu and B. Zhou (eds.) "Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change Cambridge University Press. In Press. Available at: https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf The document is subject to final copy-editing. For a criminological perspective, Rob White, "Criminological Perspectives on Climate Change, Violence and Ecocide" (2017) 3 Current Climate Change Reports, 243-251.

[109] IPCC Website, "Climate change widespread, rapid, and intensifying," available at: https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/

Even though the crime of ecocide is not only related to the impacts of climate change, the aggravated form of ecocide is specifically focused on greenhouse gas emissions and the harmful impacts of climate change. Therefore, the weight placed on scientific evidence that underlie this iteration of the crime must be taken into consideration. Reflecting the extensive and authoritative nature of the IPCC reporting procedures, it is reasonable to place a specific focus on these reports when considering the investigation and prosecution for the crime of aggravated ecocide. However, the IPCC reports can and should be supplemented by more country-specific information which might be provided by other UN environmental experts, such as those in the UN Environment Programme or the UN human rights mechanisms, including the newly created position of Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change and the established Special Rapporteur on Human Rights and the Environment.[110]

Thereby I would suggest the amendment of Articles 13 and 15 RS.

An addition of paragraph (e) into Article 13, as follows:

> ***Article 13. Exercise of jurisdiction.***
> ***The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:***
> ***[…]***
> ***(e) The Prosecutor has good reason to believe that the crime of Article 8 ter paragraph 3 (aggravated ecocide) appears to have been committed.***

An addition of paragraph 1 bis into Article 15:

> ***Article 15. Prosecutor.***
> *1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court*
> ***1 bis. Information on the crime of Article 8 ter paragraph 3 (aggravated ecocide) can be deduced by the UN environmental authorities' reports. These reports constitute a reasonable basis of information on the crime of ecocide.***

These modifications aim to bond the discretionary power and the "political" role of the ICC prosecutor, and not reduce the defendants' guarantees.

5. The Preliminary Examination and Investigation Requirements: A Brief Account

It is important to note from the outset that a preliminary examination is not an investigation,[111] although both phases could be considered as "inherently connected."[112] A preliminary examination is a legalistic

[110] Of note, the Special Rapporteur on Human Rights and the Environment submits an annual report to the UN Human Rights Council, as mandated by UN HRC Resolution 37/8. See: Annual thematic reports of the Special Rapporteur on human rights and the environment, https://www.ohchr.org/en/issues/environment/srenvironment/pages/annualreports.aspx See also, for example: 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2018), https://digitallibrary.un.org/record/1639368

[111] See Morten Bergsmo, Jelene Pejic and Dan Zhu, "Article 15", in Kai Ambos & Otto Triffterer (eds), "The Rome Statute of the International Criminal Court. A Commentary" (C. H. Beck-Hart-Nomos 2015), 730.

[112] Carsten Stahn, "From Preliminary Examination to Investigation: Rethinking the Connection", in Xabier Agirre, Morten Bergsmo, Simon De Smet and Carsten Stahn (eds), "Quality Control in Criminal Investigation" (TOAEP 2020), 38.

process,[113] that "serves as a bridge between the documentation of human rights violations and criminal investigation,"[114] but which is also wrapped by "magic, mystery and mayhem."[115] It has been defined as an "amorphous status,"[116] a kind of "pre-investigative process,"[117] or – as stated by the OTP itself – a "pre-investigative phase,"[118] and a "core activity"[119] of the Office of the Prosecutor. At the preliminary examination stage, as highlighted in the OTP's Policy Paper on Preliminary Examination,[120] the OTP "does not enjoy investigative powers, other than for the purpose of receiving testimony at the seat of the Court and cannot invoke the forms of cooperation specified in Part 9 of the Statute from States." A preliminary examination may be initiated by the OTP taking into account any information on crimes within the jurisdiction of the Court. As indicated in an OTP Policy, the Office of the Prosecutor may receive information on crimes from multiple sources: "a) information sent by individuals or groups, States, intergovernmental or non-governmental organisations; (b) a referral from a State Party or the Security Council; or (c) a declaration accepting the exercise of jurisdiction by the Court pursuant to article 12(3) lodged by a State which is not a Party to the Statute."[121] But such communications do not automatically lead to the start of an investigation.

Hence, a preliminary examination is essentially a phase of evaluation of the information available in order to understand if there is a "reasonable basis" to proceed with an investigation. Although the Prosecutor has a formal "legal duty"[122] to proceed, in essence their role is based on discretion. There is no temporal limit for the preliminary examination, and the Prosecutor must continue the examination "until the information provides clarity on whether or not a reasonable basis for an investigation exists."[123]

To initiate an investigation, the Prosecutor needs to submit to the Pre-Trial Chamber a request for authorisation together with any supporting material collected.[124] Pursuant to Articles 15(3) and 53(1), the standard proof for requesting this authorisation is a "reasonable basis." If, and only if, the OTP assesses a

[113] Matilde E. Gawronski, "The Legalistic Function of Preliminary Examinations: Quality Control as a Two-Way Street", in Morten Bergsmo and Carsten Stahn (eds), "Quality Control in Preliminary Examination", vol 1 (TOAEP 2018), 179, 222.
[114] Carsten Stahn, 'Damned If You Do, Damned If You Don't. Challenges and Critiques of Preliminary Examinations at the ICC' (2017) 15 Journal of International Criminal Justice 416.
[115] Carsten Stahn, Morten Bergsmo and Chan Icarus, "On the Magic, Mystery and Mayhem of Preliminary Examinations", in Bergsmo and Stahn, supra note 113, 1, 32.
[116] Gregory S. Gordon, "Reconceptualizing the Birth of the International Criminal Case: Creating an Office of the Examining Magistrate", in Bergsmo and Stahn, supra note 113, 255.
[117] Sara Wharton and Rosemary Grey, "The Full Picture: Preliminary Examinations at the International Criminal Court'"(2018) 56 Canadian Yearbook of International Law 3.
[118] ICC Office of the Prosecutor, 'Annex to the 'Paper on Some Policy Issues before the Office of the Prosecutor: Referrals and Communications' (2003) 4.
[119] ICC Office of the Prosecutor, 'OTP Strategic Plan 2016-2018' (2018), para. 55.
[120] ICC Office of the Prosecutor, 'Policy Paper on Preliminary Examination' (2013), para.85. Available at: www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf. For the Policy Paper on case selection, see Ricardo Pereira, "After the ICC Office Of The Prosecutor's 2016 Policy Paper On Case Selection And Prioritisation: Towards An International Crime Of Ecocide?" (2020) 31 Criminal Law Forum, 179-224
[121] OTP, Policy Paper (2013), para.4, available at: https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf.
[122] Ibid, para. 2; See also: Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation (ICC-01/13), Pre-Trial Chamber I (16 July 2015), para.13. Available at: www.icc-cpi.int/CourtRecords/CR2015_13139.PDF
[123] Ibid, para.90. For a critical approach, see: Anni Pues, 'Towards the "Golden Hour"? A Critical Exploration of the Length of Preliminary Examinations' (2017) 15 Journal of International Criminal Justice, 436.
[124] On the Pre-Trial Chamber powers, see: Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014', paras.7-8. Available at: www.icc-cpi.int/CourtRecords/CR2014_07766.PDF. Furthermore, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya (31 March 2010), para. 21. Available at: www.icc-cpi.int/pages/record.aspx?uri=1051647.

situation as necessitating the more formal preliminary examination, the OTP follows a so-called "statutory-based approach."[125] This requires the OTP to ascertain and affirm the following fundamental requirements for triggering the examination: the four-facets jurisdiction; admissibility (comports with "complementarity" and "gravity"); and the "interests of justice." In practice this means that the path from initial communication to preliminary examination to formal investigation is divided into four phases:[126]

- **Phase 1:** the initial assessment of all information related to potential crimes within the Court's jurisdiction implicated by any communication is submitted pursuant to Article 15 in order to analyse and verify the gravity of the alleged crime and filter out information on crimes that are outside the jurisdiction of the Court or a *ne bis in idem.*[127]
- **Phase 2:** the formal commencement of a preliminary examination. This focuses on the "preconditions to the exercise of jurisdiction" contained in Article 12. It is an assessment of the crimes allegedly committed, with a view to identifying potential cases falling within the jurisdiction of the ICC.
- **Phase 3:** Assessing the admissibility of potential cases in terms of "complementarity" and "gravity" pursuant to Article 17.
- **Phase 4:** Consideration of whether the "interests of justice" – a quasi-juridical and malleable concept contained in Article 53(1)(c) – necessitate the request to initiate a formal investigation.[128]

But is this legal framework suitable for the crime of ecocide? Here, I would suggest amending the norms on standard of proof, interest of justice, and complementarity.

a. Changing the Standard of Proof in Cases of Aggravated Ecocide: From "Reasonable Basis" to Proceed (and to Believe) to the "Sufficient Basis"

Regarding the standard of proof, they are all predetermined by statutory law, and there are four in the ICC legal framework, namely: (1) a "reasonable basis to proceed" for the preliminary examination and the "reasonable basis to believe" for the investigative phase (arts. 15 and 53 RS); (2) a "reasonable ground to believe" (art. 58 RS) for the warrant of arrest; (3) the "substantial grounds to believe" (art. 61 RS) for the confirmation of the charges; and (4) the "beyond reasonable doubt" (art. 66 RS) for the judgment phase.

As set out below, I would propose to switch from the "reasonable basis to proceed" to a "sufficient basis to proceed," with an addition into paragraphs 3, 4 and 6 of Article 15, paragraph 1 of Article 18 and paragraph 1 of Article 53, of the following statement: *"– or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide) – ."* As well as an amendment of paragraph 1(a) of Article 53, from the "reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed" to the "sufficient basis."

[125] OTP, supra note 121, para. 77.
[126] Ibid, paras. 78-92.
[127] See Amy Khojasteh, "The Pre-Preliminary Examination Stage: Theory and Practice of the OTP's Phase 1 Activities", in Bergsmo and Stahn, supra note 113, 223-256.
[128] On the interests of justice, see: Maria Varaki, "Revisiting the "Interests of Justice" Policy Paper" (2017) 15 Journal of International Criminal Justice 455, 470; Bartłomiej Krzan, "International Criminal Court Facing the Peace vs. Justice Dilemma" (2016) 2 International Comparative Jurisprudence 81, 88; Talita De Souza Dias, "Interests of Justice": Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court' (2017) 30 Leiden Journal of International Law 731, 751. For the jurisprudence, see: Appeals Chamber, "Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan" (5 March 2021) paras. 35-42, available at: www.legal-tools.org/doc/x7kl12/pdf. See also: Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire" (15 November 2011), paras. 207-212, available at: www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/11-14-Corr

In making any such determinations, UN environmental authorities' reports, such as the IPCC, the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment can form sufficient basis.

Article 15. Prosecutor.

[…]

3. If the Prosecutor concludes that there is a reasonable basis to proceed ***– or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide) –*** *with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence****. UN environmental authorities' reports, such as the IPCC, the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment can form sufficient basis.***

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed ***– or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide) –*** *with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.* ***UN environmental authorities' reports, such as the IPCC, the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment can form sufficient basis.***

[…]

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis ***– or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide) –*** *for an investigation, he or she shall inform those who provided the information […].* ***UN environmental authorities' reports, such as the IPCC, the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment can form sufficient basis.***

Article 18. Preliminary rulings regarding admissibility.

1. When a situation has been referred to the Court pursuant to article 13(a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation ***– or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide) –****, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. […].* ***UN environmental authorities' reports, such as the IPCC, the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment can form sufficient basis.***

Article 53. Initiation of an investigation.

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis ***– or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide) –*** *to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:*

(a) The information available to the Prosecutor provides a reasonable basis ***– or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide)*** *– to believe that a crime within the jurisdiction of the Court has been or is being committed;*

[…]

> *If the Prosecutor determines that there is no reasonable basis to proceed* ***– or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide) –*** *and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.*
> ***UN environmental authorities' reports, such as the IPCC, the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment can form sufficient basis.***

To ensure the rights of the accused are appropriately protected, I do not consider it necessary to introduce other changes in the standard of proof. Also, as noted earlier, these modifications aim to bond the discretionary power of the ICC Prosecutor and not reduce the defendants' guarantees.

Therefore, an additional amendment to the Regulation 27 of the Regulation of the Prosecutor (hereinafter "RTP") should be put forward, inserting a paragraph (d), as well as inserting paragraph 3 bis into Regulation 29, as follows:

> ***Regulation 27. Conduct of preliminary examination.***
> *In the examination of information on crimes pursuant to article 15, paragraphs 1 and 2, the Office shall make a preliminary distinction between:*
> *[…]*
> ***(d) Information based on UN environmental authorities' reports, such as the IPCC, Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment.***
>
> ***Regulation 29. Initiation of an investigation or prosecution.***
> *[…]*
> *3. Based on the report, the Prosecutor shall determine whether there is a reasonable basis to proceed with an investigation.*
> ***3 bis. In case of Article 8 ter paragraph 3 (aggravated ecocide), sufficient basis is enough to proceed.***

b. Issues of Admissibility: Introducing a Presumption of Both "Gravity" and "Interests of Justice" in cases of Aggravated Ecocide

As indicated in Article 53(1)(b) of the Statute (applied via Rule 48 of the Rules of Procedure and Evidence), in determining whether there is a "reasonable basis to proceed" to an investigation the Prosecutor shall consider whether "the case is or would be admissible under article 17." The admissibility considerations set out in Article 17 of the Rome Statute are: "gravity" pursuant to Article 17(1)(d), "complementarity" pursuant to Article 17(1)(a)-(c) and interests of justice contained in Article 53(1)(c).

The "gravity" assessment[129] is an evaluation of the following criteria: A) Scale of the crimes; B) Nature of the crimes; C) Manner of commission; and D) Impact.[130]

The "complementarity" is contained in paragraph 10 of the Rome Statute Preamble, as well as in Articles 1 and 17(1)(a)-(c). This principle is a cornerstone in the Rome Statute,[131] and seems to permeate its entire structure and is central to the intended role of the Court.[132] Pursuant to the Rome Statute, ICC jurisdiction is never primary, but always only complementary to national criminal jurisdiction. Consequently, pursuant to Article 17, a case before the ICC is inadmissible whenever: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; or (c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20(3). This latter is essentially the *ne bis in idem* provision of the Rome Statute. Following the ICC case-law, in considering whether a case is inadmissible under Article 17(1)(a) and (b) of the Statute, the initial questions to ask are: (1) whether there are ongoing investigations or prosecutions; or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second half of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. For the ICC, "to do otherwise would be to put the cart before the horse."[133] It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to Article 17(1)(d) of the Statute.

The "interests of justice," as noted earlier, are a quasi-juridical and malleable concept contained in Article 53(1)(c) – necessitate the request to initiate a formal investigation.

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[129] On the gravity, see Susana SaCouto and Katherine Cleary, "The Gravity Threshold of the International Criminal Court" (2007) 3(5) American University International Law Review 807, 854; Margaret M. deGuzman, "How Serious are International Crimes? The Gravity Problem in International Criminal Law" (2012) 51(18) Columbia Journal of Transnational Law 17, 68; Margaret M. deGuzman, "Gravity and the Legitimacy of the International Criminal Court" (2008) 32(5) Fordham International Law Journal 1400, 1465; Ghazia Popalzai and Hiba Thobani, "The Complexities of the Gravity Threshold in the International Criminal Court: A Practical Necessity or an Insidious Pitfall?" (2017) 20(1) Max Planck Yearbook of United Nations Law Online 150, 169.

[130] For an example of the gravity assesment in the ICC, see Giovanni Chiarini, "Human Rights vs Complementarity: the Iraq war, the UK, & the International Criminal Court" (2021) 14 CCJHR Working Paper Series, 7.

[131] Jann K. Kleffner, "Complementarity in the Rome Statute and National Criminal Jurisdictions" (OUP 2008) 3. See also, Carsten Stahn, "Complementarity: a Tale of Two Notions" (2007) 19 Criminal Law Forum 89.

[132] See Fausto Pocar, Magali Maystre, "The Principle of Complementarity: A Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction?" in Morten Bergsmo (eds) "Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes" (TOAEP 2010) 247, 301; Gregory S. Gordon, "Complementarity and Alternative Justice" (2009) 88 Oregon Law Review 101, 182; Linda E. Carter, "The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem" (2010) 8(1) Santa Clara Journal of International Law 165, 198; Carsten Stahn, "Taking Complementarity Seriously", in Carsten Stahn and Mohamed M. El Zeidy (eds), "The International Criminal Court and Complementarity: From Theory to Practice" (CUP 2011) 233, 282; Kevin Jon Heller, "A Sentence-Based Theory of Complementarity" (2012) 53(1) Harvard International Law Journal 86, 132.

[133] Situation in The Democratic Republic of the Congo, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC Appeals Chamber (25 September 2009) para.78. Available at: www.legal-tools.org/doc/ba82b5/pdf/

Since the formulation of Article 8 ter clearly requires that the damage must be "severe," "widespread" and with "long-term" consequences, I would suggest amending in order to introduce a rebuttable presumption of "gravity" and "interests of justice" in case of ecocide, with an addition to a paragraph 1(e) to Article 17, and 1(d) to Article 53, as follows:

> **Article 17. Issues of admissibility.**
> *1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:*
> *[…]*
> *(d) The case is not of sufficient gravity to justify further action by the Court.*
> ***(e) When the case is related to Article 8 ter paragraph 3 (aggravated ecocide), there will be a rebuttable presumption that the gravity and interests of justice requirements are satisfied.***
>
> ***Article 53. Initiation of an investigation.***
> *1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:*
> *[…]*
> *(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.*
> ***(d) When the case is related to Article 8 ter paragraph 3 (aggravated ecocide), there will be a rebuttable presumption that the gravity and interests of justice requirements are satisfied.***

Moreover, these amendments should be coordinated with amending Regulations 29 of the Regulation of the Prosecutor with the addition of paragraph 2 bis, and inserting a new Regulation 31 bis, namely:

> ***Regulation 29. Initiation of an investigation or prosecution.***
> ***[…]***
> *2. In order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact.*
> ***2 bis. When the case is related to Article 8 ter paragraph 3 (aggravated ecocide), there will be a rebuttable presumption that the gravity requirement has been satisfied***
> *3. […]*
>
> ***Regulation 31 bis. Exception from Regulation 30 in case of Article 8 ter paragraph 3.***
> ***When the case is related to Article 8 ter paragraph 3 (aggravated ecocide), the provisions contained in Regulation 30 (Decision not to proceed in the interests of justice) shall not be applied, since there will be a rebuttable presumption that the interests of justice requirement has been satisfied.***

6. The Exclusion to the So-Called Proceedings on an Admission of Guilt in cases of Aggravated Ecocide

Negotiated justice in international criminal law has been analysed by academics and practitioners on many occasions. For example, it has been observed that "plea bargaining is seen to dilute the moral message that international courts aim to send – that the international community is outraged and will bring to justice those

responsible for the crimes committed."[134] In the ICYT, Judge Schomburg, in his dissenting opinion, compared charge bargains to "*de facto* granting partial amnesty/impunity by the Prosecutor" and criticised them as "conflicting with the Tribunals' mission to avoid impunity, to establish the truth, and to promote peace and reconciliation."[135]

Since aggravated ecocide is a global crime with global effect, I would suggest excluding the accused of the crime of ecocide to the right to activate the so-called proceedings on an admission of guilt.[136] I would suggest amending Article 64, with an additional paragraph 8(a-bis), a change into paragraph 1 of Article 65 and a paragraph (3) into Rule 139 of Rules of Procedure and Evidence.

> ***Article 64. Functions and powers of the Trial Chamber.***
> *8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty*
> ***8. (a-bis) The opportunity to make an admission of guilt in accordance with article 65 provided in the previous paragraph (8)(a) is excluded in the case of crime of Article 8 ter paragraph 3 (aggravated ecocide).***
>
> ***Article 65 Proceedings on an admission of guilt.***
> *1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a) –* ***with the exception provided in article 64, paragraph 8 (a-bis), namely the exclusion of the accused of crime of Article 8 ter paragraph 3 (aggravated ecocide), from the Article 65 proceedings –,*** *the Trial Chamber shall determine whether:*
> *[…]*
>
> ***Rule 139. Decision on admission of guilt.***
> *[…]*
> *2. The Trial Chamber shall then make its decision on the admission of guilt and shall give reasons for this decision, which shall be placed on the record.*
> ***3. Pursuant to Articles 64 (8)(a-bis) and 65 (1) of the Rome Statute, the Trial Chamber shall automatically reject any proposal on the admission of guilt submitted by an accused of the crime of Article 8 ter paragraph 3 (aggravated ecocide).***

D. CONCLUSION – MAKING THE CRIME OF ECOCIDE MORE CONCRETE THROUGH SPECIAL PROCEDURAL CHECKS AND BALANCES

In my humble opinion, the interconnected above-described amendments could strengthen the 2021 Proposal launched by the Stop Ecocide Foundation.

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[134] J. I. Turner, "Plea Bargaining", in Linda Carter and Fausto Pocar (eds.), "International Criminal Procedure. The interface of Civil Law and Common Law Legal Systems" (Edward Edgar Publishing 2013) 56. See also: Ralph Henham, "The Ethics Of Plea Bargaining In International Criminal Trials" (2005) 26 Liverpool Law Review, 210.

[135] Prosecutor v. Deronjić, Case No. IT-02-61-S, Sentencing Judgement, Dissenting Opinion of Judge Schomburg, § 11 (ICTY Mar. 30, 2004) 6-7, mentioned in J. I. Turner, "Plea Bargaining and International Criminal Justice" (2017) 48 The University of the Pacific Law Review, 229.

[136] For a comment on the first proceedings on an admission of guilt in the ICC, see Giovanni Chiarini, "Negotiated Justice in the ICC: Following the Al Mahdi case, a Proposal to Enforce the Rights of the Accused" (2021) PKI Global Justice Journal.

I am aware that the suggestions I put forward in this paper are perfectible. Furthermore, they are just a drop in the ICC procedural ocean. As a mere example, separate reasoning should be made on both issues of admissibility in terms of complementarity and to the role of the victims of ecocide as well as the Trust Fund for Victims.

Regardless, let me hope that these reflections may provide a starting point on procedural debates as well as an integration into the initial proposal, in order to reinforce and advocate for the introduction of the crime of ecocide into the Rome Statute. To ensure the effectiveness of the investigation and prosecution of this new crime within the Statute, there needs to be a concrete delineation of the procedural checks and balances within the ICC legal framework, with the aim to make ecocide – and aggravated ecocide – become special crimes with a special procedure.