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Criminalizing Ecocide

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CRIMINALIZING ECOCIDE

Rebecca J. Hamilton*

Amid widespread acknowledgment that we live on a planet in peril, the term "ecocide" packs a powerful rhetorical punch. Extant regulatory approaches to environmental protection feel insufficient in the face of the triple threat of climate change, pollution, and biodiversity loss. International criminal prosecution for ecocide, by contrast, promises to meet the moment, and a recent proposal to introduce ecocide into the canon of core international crimes is gaining traction. Assuming the push to criminalize ecocide continues to gain momentum, this Article argues that the primary (and perhaps, sole) benefit that international criminal law can offer in this context is its expressive power and, that being the case, it is vital to clarify exactly what the expressive message of ecocide should be. The recent burst of scholarly attention to the proposed ecocide definition has largely bypassed this normative groundwork. This Article calls for time to be invested in grappling with hard questions about what exactly the harm is that ecocide seeks to vindicate which, in turn, requires determining how best to conceptualize the relationship that humans have with the natural environment. The Article contends that if the proposed legal definition of ecocide is codified as an international crime, it risks being used to prosecute those who are already marginalized, while reinforcing the artificial (and damaging) conceptual separation of humans from nature that is already entrenched in international law. Nonetheless, there is a window of opportunity, currently open, to embed within the ecocide definition a position that understands humans as inseparable from nature, which would align ecocide's expressive message with long-standing Indigenous epistemologies, emerging human rights jurisprudence, and cutting-edge earth science. Time spent now on re-imagining the normative justification for ecocide's criminalization could put international criminal law in the rare position of being at the vanguard of a progressive movement to build a greener international law.

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Humans are inseparable from the natural world. Readers may dismiss this observation as too obvious to bother stating, let alone to begin a law journal article with. But for most people, absorbing the full implications of this observation takes a fair degree of cognitive effort. When you reach the end of this paragraph, take a moment to look at your surroundings.

You likely see a desk, or table, perhaps made from wood. That wood came from a tree; its branches once provided shelter for birds, its roots provided soil drainage. The device you are reading on is powered by a battery made with lithium, perhaps extracted from Bolivian salt flats by draining the water table below them. Once you start looking at your surroundings in this way, the impact our daily lives have on nature becomes readily apparent. While most people do not take time to think about everyday items through this lens, there are plenty of organizations devoted to making sophisticated assessments of exactly those costs.[1] But this kind of calculation – damage done to the environment in order to create social or economic benefits for humans, captures only a portion of the ways in which humans rely on nature. And, more fundamentally, it fails to fully absorb the reality that humans are inseparable from nature.

While you were noticing your desk, or computer, you were probably not paying attention to the fact that you were breathing air that was clean enough not to harm you. You were also unlikely to be thinking that your ability to concentrate required access to enough drinking water not to be dehydrated. And your concentration was assisted by the fact that you could count on ongoing access to food, grown in agricultural systems and supplied through trade routes premised on stable weather patterns. The reality of your existence within an ecosystem capable of sustaining human life was something that you probably remained oblivious to, even as you took time to observe your surroundings.

Criminalizing ecocide may bring less short-term environmental protection, and risk more harm to marginalized groups, than its proponents hope. Yet, the potential for the crime of ecocide to send a clear expressive message about the relationship humans have with our environment could nonetheless make the effort worthwhile. To say that humans are inseparable from the natural world is obvious, *and* is something that most people need to be reminded of. The core argument I advance in this article is that the normative justification for criminalizing ecocide must be tethered to this insight.

[1] *See, e.g.,* Zazala Quist, *Life Cycle Assessment (LCA) – Ecochain* (Jan. 18, 2024), https://ecochain.com/blog/life-cycle-assessment-lca-guide.

I. Introduction

In June 2024, the European Commission's Copernicus Climate Change Service released data showing that for the past 12 consecutive months, the Earth's global surface temperature had stayed at least 1.5 degrees Celsius above pre-Industrial levels.[2] "Our planet is trying to tell us something. But we don't seem to be listening" said UN Secretary General, António Guterres.[3] "The battle for 1.5 degrees will be won or lost in the 2020s ... 1.5 degrees is not a target. It is not a goal. It is a physical limit," he explained.[4]

International criminal law (ICL), seized with addressing "the most serious crimes of concern to the international community as a whole,"[5] has historically had nothing to say about climate change, and almost nothing to say about harm to the environment at all.[6] Recently though, intensifying concern over climate change has amplified efforts by activists pushing for international recognition of environmental crimes.[7] And international criminal lawyers have

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* Professor of Law, American University, Washington College of Law. I am indebted to the U.S. Fulbright Commission for my placement at the Islands and Small States Institute at L-Università ta' Malta on a Fulbright Award, which brought me into a community of extraordinary interdisciplinary climate scholars. This article also benefited immensely from engagement with colleagues at UCLA Law School where I was a Visiting Professor in the fall of 2023. And none of this would have been possible without the support of my colleagues at American University, Washington College of Law and, most especially, to David Hunter for his encouragement. Sincere thanks to Tendayi Achiume, Daniel Bertram, William Boyd, Jay Butler, Nancy Combs, Evan Criddle, Caroline Davidson, John Knox, Kate Mackintosh, Stefano Moncada, Darryl Robinson, Lauren Van Schilfgaarde and Dani Spizzichino, for their generous engagement with this work-in-progress. My gratitude also to Hannah Friedrich and Jenn Dowdy for stellar research assistance. All errors are my own.

[2] *Copernicus: June 2024 Marks 12th Month of Global Temperature Reaching 1.5°C Above Pre-Industrial*, Copernicus (June 4, 2024), https://climate.copernicus.eu/copernicus-june-2024-marks-12th-month-global-temperature-reaching-15degc-above-pre-industrial#:~:text=June%202024%20was%20warmer%20globally,high%20set%20in%20June%202023.

[3] António Guterres, Secretary-General's Special Address on Climate Action "A Moment of Truth" (June 5, 2024), https://www.un.org/sg/en/content/sg/speeches/2024-06-05/secretary-generals-special-address-climate-action-moment-of-truth%C2%A0.

[4] *Id.*

[5] Rome Statute of the International Criminal Court preamble, July 17, 1998, 2187 U.N.T.S. 90.

[6] In the context of armed conflict, environmental destruction can be prosecuted as a war crime. But this requires evidence of "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." Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90.

[7] *See, e.g.,* Polly Higgins et al., *Protecting the Planet: A Proposal for a Law of Ecocide*, 59 CRIME L. & SOC. CHANGE 251 (2013); ANJA GAUGER ET AL., THE ECOCIDE PROJECT: 'ECOCIDE IS THE MISSING FIFTH CRIME AGAINST PEACE' (2013); *see also* Mark Allan Gray, *The International Crime*

begun to explore what ICL can offer in the face of the triple threat of climate change, pollution, and biodiversity loss.[8] The result is a well-organized effort to introduce the crime of "ecocide" into the canon of core international crimes.

In June 2021, an Expert Panel convened by the Stop Ecocide Foundation proposed a legal definition of ecocide, and called for an amendment to the Rome Statute of the International Criminal Court (ICC) in order to make ecocide the "fifth international crime."[9] The Expert Panel defined ecocide as "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."[10] "Unlawful" takes its ordinary meaning. But "wanton" in this case is defined through a balancing test to mean "with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated."[11]

The proposal has already gained high-level endorsement from the newly appointed UN Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, who used his first report to recommend that the ICC "include an indictable offense of ecocide."[12] Without doubt, the term "ecocide" captures the public imagination in ways that existing

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of Ecocide, 26 CAL W. INT'L L. J. 215 (1996) (for an older conception of ecocide, focusing mainly on the actions of states); Richard A. Falk, *Environmental Welfare and Ecocide Facts, Appraisal and Proposals*, 9 REV. BDI 1 (1973) (for one of the earliest proposals on ecocide).

[8] *What is the Triple Planetary Crisis?*, U.N. CLIMATE CHANGE (Apr. 13, 2022), https://unfccc.int/blog/what-is-the-triple-planetary-crisis. As just one example of the engagement of international criminal lawyers, in 2016 the Office of the Prosecutor of the International Criminal Court (ICC) released a policy paper on case selection stating it would " give particular consideration to prosecuting Rome Statute crimes that are committed by means of; or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land" OTP, *Policy Paper on Case Selection and Prioritisation* (Sept. 15, 2016), https://www.icc-cpi.int/sites/default/files/20160915_OTP-Policy_Case-Selection_Eng.pdf.

[9] *The Legal Definition of Ecocide*, STOP ECOCIDE (June 2021), https://www.stopecocide.earth/legal-definition [hereinafter, Expert Panel Definition]. In 2020, The Promise Institute for Human Rights at UCLA Law School convened an expert workshop on the topic and developed a proposed definition. *The Crime of Ecocide*, THE PROMISE INST. FOR HUM. RTS. (2021), https://promiseinstitute.law.ucla.edu/project/the-crime-of-ecocide/.

[10] Expert Panel Definition, *supra* note 9.

[11] *Id.*

[12] Ian Fry (Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change), *Promotion and Protection of Human Rights in the Context of Climate Change Mitigation, Loss and Damage and Participation*, ¶ 90(f), U.N. Doc. A/77/226 (July 26, 2022).

regulatory approaches to environmental protection do not. Some countries have even begun to adopt the Panel's definition into their domestic laws, and legislators in six nations proposed or submitted ecocide bills to their parliaments in the summer of 2023 alone.[13]

In the short period since the Expert Panel released its report, there has been a flurry of scholarly attention to the proposed definition of ecocide. Commentary abounds on technical aspects of the proposed definition including its threshold for seriousness,[14] modes of liability,[15] actus reas,[16] and mens rea requirements.[17] Other scholarly interventions have focused on the political hurdles to achieving the amendment to the Rome Statute that would enable the ICC to prosecute ecocide, and the institutional capacity of the ICC to do so.[18]

This article takes a sizable step back from these discussions of legal and political feasibility to interrogate a set of more foundational questions: Assuming that the push toward criminalization continues to gain momentum, what exactly is the harm that should be criminalized by an ecocide prosecution? Which people, environments, and values should ecocide protect? And, crucially, what are the normative assumptions about the value of nature and its relationship to

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[13] *See* Monica Lennon, Proposed Ecocide Prevention (Scotland) Bill, Scottish Parliament (Nov. 8, 2023), https://www.parliament.scot/-/media/files/legislation/proposed-members-bills/consultation-document-final-version--(1).pdf (documenting the introduction of ecocide bills in Belgium, Brazil, The Netherlands, Italy, Mexico, Catalonia/Spain). *See also* Isabella Kaminski, *Growing Number of Countries Consider Making Ecocide a Crime*, THE GUARDIAN (Aug. 26, 2023, 1:00 AM), https://www.theguardian.com/environment/2023/aug/26/growing-number-of-countries-consider-making-ecocide-crime.

[14] *See, e.g.*, Ammar Bustami & Marie-Christine Hecken, *Perspectives for a New International Crime Against the Environment: International Criminal Responsibility for Environmental Degradation Under the Rome Statute*, 11 GEOTTTINGEN J. INT'L L. 145, 176-180 (2021).

[15] *See* Vrishank Singhania, *The Proposed Crime of Ecocide – Ignoring the Question of Liability*, OPINIO JURIS (Feb. 16, 2022), http://opiniojuris.org/2022/02/16/the-proposed-crime-of-ecocide-ignoring-the-question-of-liability/.

[16] *See* Matthew Gillett, *A Tale of Two Definitions: Fortifying Four Key Elements of the Proposed Crime of Ecocide (Part I),* OPINIO JURIS (June 20, 2023), https://opiniojuris.org/2023/06/20/a-tale-of-two-definitions-fortifying-four-key-elements-of-the-proposed-crime-of-ecocide-part-i/

[17] *See, e.g.*, Kevin Jon Heller, *Skeptical Thoughts on the Proposed Crime of Ecocide (That Isn't),* OPINIO JURIS (June 23, 2021), http://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/; Anastacia Greene, *The Campaign to Make Ecocide an International Crime: Quixotic Quest Or Moral Imperative*, 30 FORDHAM ENV'T L. REV. 1, 32-34 (2019); Daniel Bertram, *How to Forge an International Crime, in* AN INTERNATIONAL CRIME OF ECOCIDE: NEW PERSPECTIVES (Kate Mackintosh et al. eds., 2023), *available at* https://ecocidelaw.com/wp-content/uploads/2023/08/2-Bertram-How-to-forge-an-international-crime.pdf.

[18] *See, e.g.*, Patrick J. Keenan, *International Criminal Law and Climate Change*, 37 B.U. INT'L L.J. 89, 120-122 (2019); Greene, *supra* note 18, at 38-40 (2019).

human communities that underpin different views on which acts should be punished?

As a precursor to these questions, it is also crucial to understand what ICL, specifically, has to offer to those seeking to criminalize ecocide. There are, obviously, innumerable approaches to protecting the environment – administrative, economic, and educational, to name just a few. In a world of limited resources, those who seek to have ecocide codified as an international crime must be clear-eyed about exactly what ICL can (and cannot) do. This article argues that the only certain benefit that ICL delivers is its expressive power.[19] Thus, for as long as the effort to criminalize ecocide continues, it will be vital to clarify what the expressive message of ecocide's criminalization should be.

This article consciously situates ecocide not only within ICL but also within a rich body of literature outside ICL, in which ecological philosophers and ethicists have engaged at length with the normative questions arising from diverse efforts to protect the environment.[20] This environmental literature is vibrant with debates over the value of nature and its relationship to human communities. The outcome of these debates will be central to the discussion of what, exactly, the harm is that an ecocide prosecution should seek to vindicate.

To provide a brief sketch of the landscape, one can imagine a spectrum with anthropocentric concerns on one end, and ecocentric concerns on the other. The former sees humans as having inherent value and tends to see nature as a resource for human benefit. The latter sees nature as having inherent value and, at the extreme, views nature as something that needs protection from human incursion. Somewhere along the midpoint of the spectrum lies a position that the Expert Panel tried to align itself with, which views nature as having inherent value, but also understands that humans must use nature for our basic needs. Thus it seeks to protect the environment while also carving out space for humans to build cities, railroads, or dams.

Meanwhile, and consistent with the position of this article, the entire anthropocentric to ecocentric spectrum is critiqued by those who argue that neither anthropocentrism nor ecocentrism properly capture the holistic character of the relationship humans have with nature.[21] Both anthropocentrism

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[19] Whether this benefit, alone, is worth the effort, is a pressing question about which I harbor some doubt – but that is a topic for another article.
[20] *See infra Part* IV.
[21] *See infra* Part IV.

and ecocentrism assume that humans can be parsed out from nature (we can call this the "separability position"). Thus, if humans are separable from nature, as humans are in the Panel's definition, the harm done to a river by a dam's construction, for example, can be weighed against the social and economic benefits derived from the access that humans gain to a fresh water reservoir.

This is meaningfully different from a normative vision that sees humans as inseparable from nature. Under what we can label the "inseparability position," harm done to the river by the dam's construction necessarily *also* generates harm to humans (one can imagine, for example, changes to freshwater fish populations that local communities previously relied on or, more diffusely, changes to the carbon cycle that impact the climate in a way that harms disparate human communities), even as the dam brings the benefits of a fresh water reservoir.[22]

When starting from the inseparability position then, it will always be an incomplete assessment of the impact of environmental destruction to weigh harm to nature against benefit to humans; the calculation must instead be harm to nature *and* humans against benefit to humans. This seemingly subtle difference has an enormous impact on the way that we understand the relationship that humans have with nature, with important consequences for how we assess environmental destruction and, ultimately, ecocide. Jurisprudence in the field of human rights and the environment is increasingly adopting this inseparability position, which has long been central to a large number of different Indigenous epistemologies, and this article argues that this is the position that any definition of ecocide should embed.[23]

While the Expert Panel's definition assumes the separabilty of humans from nature by weighing harm to nature against benefits to humans, it is not too late to amend this aspect of their definition. Indeed bringing the definition in line with the view that humans are inseparable from nature would be perfectly consistent with what the Expert Panel itself pointed to in its proposed preambular language, which recognizes the endangerment of "natural *and* human systems" (italics mine) as a result of environmental destruction.[24]

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[22] For a useful layperson's summary of the complicated science behind assessing the various impacts of dam construction, *see* Petro Kotzé, *The World's Dams: Doing Major Harm but a Manageable Problem?*, MONGABAY (Apr. 21, 2022), https://news.mongabay.com/2022/04/the-worlds-dams-doing-major-harm-but-a-manageable-problem/.
[23] *See infra* Part IV.
[24] Expert Panel Definition, *supra* note 9.

Amid the clamorous debate among ICL scholars about criminalizing ecocide, this more basic interrogation of how to conceptualize the relationship humans have with nature - and then considering, from that starting point, what ecocide should actually criminalize in the context of what international criminalization can offer -- has been largely skimmed over.[25] Such justificatory work matters. In the words of Frédéric Mégret:

> The enterprise of upholding an international criminal order is not simply about invoking the law's authority in a world in which that authority is taken somewhat lightly … It is about blowing the law's sails with the gust of moral intuitions … so that it may navigate the rough seas of politics.[26]

At present, the push to criminalize ecocide is vested with an (often hidden) array of (sometimes conflicting) moral intuitions. Who are ecocide's victims, who are its perpetrators? While scholars have grappled with these all-important questions in other contexts,[27] proponents of ecocide have largely shied away from articulating a common ground.[28] The Stop Ecocide Foundation campaign website instead features "examples of activities that can lead to destruction and could potentially be addressed by an 'ecocide law'."[29]

The Expert Panel's definition enables this ambiguity. The term "wanton" is defined through a balancing test that is agnostic about where the line is drawn between criminal and non-criminal acts.[30] More or less behavior

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[25] For a forthcoming exception, *see* Eliana Cusato and Emily Jones, *The 'Imbroglio' of Ecocide: A Political Economic Analysis,* LEIDEN J. INT'L L. (*forthcoming*) (on file with author).

[26] Mégret was making the case for a normative theory of the crime of aggression, but the same rationale applies with equal force to the proposed crime of ecocide. Frédéric Mégret, *What is the Specific Evil of Aggression?, in* 2 THE CRIME OF AGGRESSION: A COMMENTARY 1398 (Claus Kreß & Stefan Barriga eds., 2016). Mégret's work on the normative basis for aggression spurred a thoughtful article by Tom Dannenbaum, from which this article draws inspiration. Tom Dannenbaum, *Why Have We Criminalized Aggressive War?*, 126 YALE L. J. 1242 (2017).

[27] On the importance of the figures of the victim and the perpetrator in ICL, see, respectively, Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood*, 76 LAW & CONTEMP. PROBS. 235 (2013); Sofia Stolk, *A Sophisticated Beast? On the Construction of an 'Ideal' Perpetrator in the Opening Statements of International Criminal Trials*, 29 EUR. J. INT'L L. 677 (2018).

[28] For an excellent recent essay noting this, *see* Daniel Bertram & George Hill, *Polar Bears and Gavels: Visual Advocacy in the Criminalization of Ecocide*, 00 J. INT'L CRIM. JUST. 1.

[29] *What is Ecocide?*, STOP ECOCIDE, https://www.stopecocide.earth/what-is-ecocide (last visited June 6, 2024).

[30] *See* Christina Voigt, *Ecocide as an International Crime: Personal Reflections on Options and Choices,* EJIL TALK! (July 3, 2021), https://www.ejiltalk.org/ecocide-as-an-international-crime-personal-reflections-on-options-and-choices/.

causing environmental damage will be criminalized as a function of how the balancing test, which weighs whether environmental damage is "clearly excessive" relative to social and economic benefit, is calibrated.[31]

Maintaining such ambiguity may be strategically useful in the short term to avoid alienating current and potential allies and nurturing a broad support base. Indigenous communities, farmers and business actors alike can find superficial agreement. This ambiguity, however, is likely to result in a deflated set of sails the moment that an international ecocide case is actually launched and the underlying conflicts between the views of different actors are surfaced.

Exposing the normative tensions that surround the question of ecocide illuminates the possibilities for a much richer and more granular debate than has yet been had over the effort to bring ecocide into the canon of core international crimes. As the Expert Panel's proposed definition continues to gain momentum, it is worth taking the time to fully consider what assumptions it embeds, what, exactly, it seeks to criminalize, and what the contours of a successful international prosecution of ecocide would be.

Part II of the article briefly describes the history of ecocide and the recent effort to bring it within the existing body of ICL. It raises the ecocentric concerns that many civil society activists bring to the effort to criminalize ecocide and introduces the balancing test that is integral to the Expert Panel's proposed ecocide definition. This test, which weighs environmental destruction against anticipated social and economic benefits, embeds within the proposed definition, the assumption that humans are separable from nature. This section then canvasses the Panel's justification for the inclusion of this balancing test and endorses the Panel's recognition that any workable definition of ecocide will need to factor in the reality that humans must take some acts of environmental destruction in order to secure our survival. This section nonetheless posits that the particular balancing test proposed by the Panel is not the only way to account for this reality.

Part III turns to the question of what the inclusion of ecocide within ICL can offer. It provides a brief description of the goals of ICL before assessing the proposed crime of ecocide against these goals. It concludes that while several of the goals of ICL are a poor fit with ecocide, international criminalization can offer immense expressive power. To the extent that expressivism is the key benefit that ICL can offer, however, this underscores the importance of

[31] *See infra* Part V.

clarifying the normative justification embedded in the proposed definition of ecocide, since this will determine exactly what harms should be condemned and thus generate the expressive message conveyed by ecocide's criminalization.

Part IV situates the effort to criminalize ecocide within the environmental literature, and the effort to grapple with how to understand the relationship between humans and nature. Drawing on current debates on the normative underpinnings of environmentalism, this Part describes a field that is in flux.[32] I trace throughout this section the concrete impact of embedding within the ecocide definition its current separability position with respect to the relationship humans have with nature, as compared to moving to an inseparability position. I conclude in favor of adopting the inseparability position. Doing so can help draw attention to the full range of harms that human communities suffer when natural systems are destroyed. Grounding ecocide in this inseparability position also creates more space to focus on the fact that the effects – positive and negative - of environmental degradation are not evenly distributed across different human communities. Indeed, the communities that are already the most marginalized in a given society are also the most likely to bear the most harmful consequences of environmental degradation.[33]

Part V grapples with counter-arguments to amending the balancing test to embed an inseparability position, including acknowledging the concerns about balancing tests of any kind in ICL. It then zooms out to consider the impact that an ecocide law, grounded upon a conceptualization of humans as inseparable from the natural world, could have on transforming international law writ-large.

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[32] I use the term "environmentalism" throughout this Article according to its ordinary meaning as defined in the Merriam Webster Dictionary: "Advocacy of the preservation, restoration, or improvement of the natural environment." *Environmentalism*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/environmentalism#:~:text=en%C2%B7%E2%80%8Bvi%C2%B7%E2%80%8Bron,of%20an%20individual%20or%20group.

[33] E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *Report on the Ecological Crisis, Climate Justice and Racial Justice*, U.N. Doc A/77/2990, at 3 (October 25, 2022) (describing how climate change disproportionately affects "those who face discrimination, exclusion and the conditions of systemic inequality due to their race, ethnicity and/or national origin."); *see also* David R. Boyd (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean and Sustainable Environment), *The right to a Clean, Healthy and Sustainable Environment: Non-Toxic Environment*, ¶¶ 21-28, U.N. Doc. A/HRC/49/53 (Jan. 12, 2022) (drawing the connection between groups that are already marginalized and the impact of residency in polluted areas, characterized as "sacrifice zones.")

Interrogation of the foundational questions raised in this article readily illuminate normative tensions that will play an enormous role in shaping both social understandings of the role humans have in the natural world, as well as any eventual international prosecution of ecocide. It raises the alarm on the risks of pushing ahead with a definition of ecocide that embeds an assumption that humans are separable from the natural world. There is instead, within reach, a powerful and urgently needed expressive message that an amended ecocide definition, based on the inseparability position, could send to the global population in the face of the existential environmental challenges we face.

II. Defining Ecocide

This Part provides a brief background on the history of the term ecocide, starting with its emergence in the context of U.S. actions during The Vietnam War, through to its recent incantation as a candidate for inclusion within ICL. It turns then to civil society's ecocentric conception of the term and the alignment between this and jurisprudence emerging from the Rights of Nature movement. Finally, it introduces the Expert Panel's proposed definition, focusing on the balancing test within it, the Panel's rationale for its inclusion, and the fact that it embeds the assumption that humans are separable from nature.

1. The genealogy of ecocide

The emergence of any new international crime does not take place in a vacuum. New crimes arise in a particular socio-political context that shapes understandings of why a set of behaviors, previously not subject to international criminal sanction, now merit criminalization.

With respect to ecocide, the concept has a history stretching back over fifty years. The term itself was coined by American scientist Arthur Galston in 1970 against the backdrop of the U.S. government's use of Agent Orange to deforest vast swathes of forest during the Vietnam War.[34] And the concept gained further notoriety when invoked by the Swedish Prime Minister, Olof Palme, at the opening of the 1972 UN Stockholm Conference on the Human

[34] For an engaging recounting of this history, *see* DAVID ZIERLER, THE INVENTION OF ECOCIDE: AGENT ORANGE, VIETNAM, AND THE SCIENTISTS WHO CHANGED THE WAY WE THINK ABOUT THE ENVIRONMENT (2011).

Environment, again in reference to the Vietnam War.[35] As a result, its initial conceptualization was limited to a wartime context and was focused on U.S. government action.

Yet a wartime limitation was not pre-ordained. Indeed throughout the mid-1980s – 1990s the International Law Commission, tasked with drafting a "Code of Offences against the Peace and Security of Mankind" (which formed part of the preparatory materials for what would ultimately become the Draft Statute for the International Criminal Court), considered the crime of ecocide decoupled from war. Article 26 of the Code at one point sought to criminalize the actions of any individual "who willfully causes or orders the causing of widespread, long-term and severe damage to the natural environment."[36] Following disputes between different States over whether or not to maintain the intentionality requirement in the definition, the entirety of Article 26 was removed by the time of the 1996 draft.[37]

Ultimately, ecocide never made it into the Rome Statute that criminalized genocide, war crimes, crimes against humanity and aggression at the ICC. Instead, accountability for environmental destruction was again returned to a wartime limitation, making an appearance in the context of the Rome Statute's war crimes provisions.[38]

Today's renewed interest in criminalizing ecocide began at a moment when the institutions of ICL – and in particular the ICC – were facing withering critiques for accepting and replicating the structural racism entrenched within the existing international order.[39] Against this backdrop, some proponents of ecocide's criminalization saw it as a way to begin to counter these deep-seated problems within ICL. As Kate Mackintosh and Lisa Oldring put it: "The inclusion of the crime of ecocide in the Rome Statute could increase the Court's relevance and improve its reputation, not least by helping it deal with the accusation that its investigations have skewed disproportionately towards

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35 GAUGER ET AL., *supra* note 7, at 5.

36 International Law Commission, DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (1991).

37 GAUGER ET AL., *supra* note 7, at 11 (2013) (noting that "[T]he exclusion of a crime addressing damage to the environment during peacetime was sudden. Documentation as to why this occurred is less well-recorded.").

38 *See* Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90.

39 *See, e.g.*, Randle DeFalco & Frédéric Mégret, *The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System*, 7 LONDON REV. INT'L L. 55 (2019).

Africa and the global south."[40]

Arguably the ICC's own actions, under the term of its latest prosecutor, Karim Khan, have already done the work of increasingly the Court's relevance, with arrest warrants now issued and pending for powerful leaders Russian President Vladimir Putin, and Israeli Prime Minister Benjamin Netanyahu, respectively.[41] Still, the question of whether ecocide would be used to prosecute similarly powerful actors, or would instead revert to the Court's more typical approach of pursuing less insulated political actors, remains an important one.

Prosecutorial discretion at the international level is notoriously capacious.[42] In the absence of clarity on why ecocide is being criminalized, there is every reason to fear a regression to business-as-usual preferences, skewed towards the interests of politically powerful actors, will fill the void.[43] Yet such an outcome is not inevitable. Clarity on exactly what harms ecocide prosecutions should condemn will inform the decision-making of an international prosecutor on which, of a range of possible cases, they should pursue.

2. Civil society's understanding of ecocide

As noted above, the concept of ecocide dates back to the 1970s. At that time, interest in the concept flowed from public outrage over the destruction of Vietnamese forest by the United States' use of the herbicide Agent Orange.[44]

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[40] Kate Mackintosh and Lisa Oldring, *Watch This Space: Momentum Toward an International Crime of Ecocide,* JUST SEC. (Dec. 5, 2022), https://www.justsecurity.org/84367/watch-this-space-momentum-toward-an-international-crime-of-ecocide/. *But see* notes 60-61 and accompanying text.

[41] *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine*, ICC (May 20, 2024), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.

[42] *See, e.g.*, Hector Olsolo, *The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?*, 3 INT'L CRIM. L. REV. 87, 143 (2003) (arguing for a set of "precise and binding" criteria for prosecutorial discretion to be introduced into the ICC's Rules of Evidence and Procedure); Philippa Webb, *The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice"*, 50 CRIM. L. Q. 305, 324 (2005) (arguing in favor of ex ante criteria to guide prosecutorial discretion); DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS (2014); Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 274-75 (2012) (describing ICC prosecution process); Rebecca J. Hamilton, *The ICC's Exit Problem*, 47 N.Y.U. J. INT'L L. & POL. 1, 26, 42 (2014) (noting ICC prosecutorial discretion applies to decisions about entering and exiting prosecution).

[43] *See generally* BOSCO, *supra* note 42.

[44] *See* Zierler, *supra* note 34.

But to understand the current push to bring ecocide within the remit of ICL, we must look to the context from within which this present effort has emerged.

In her 2010 book, *Eradicating Ecocide*, the modern-day champion of criminalizing ecocide, the late Polly Higgins, lamented that while World War II catalyzed the criminalization of behaviors that showed a lack of regard for humanity, the same revolution had yet to take place for the environment. "[W]hat of the well-being of *all* life - not just that of humanity…?" asked Higgins.[45]

The need to move away from an anthropocentric view of harm was central to Higgins' work and reverberates throughout the growing call from civil society groups to criminalize ecocide. These calls have accelerated in recent years, as the intensifying impacts of climate change reach more and more communities (including in the Global North), placing the human costs imposed by our destruction of natural systems into sharp relief. In 2021, a global citizens' assembly presented a declaration, "grounded in the importance of Nature having intrinsic values and rights" to the 2021 UN Climate Change Conference (COP 26), calling for the criminalization of ecocide.[46] A 2022 petition with over 600,000 signatures called on the European Parliament to "make harming the planet a crime" and recognize the crime of ecocide.[47]

In media and the arts, journalists and writers seem increasingly captivated by the promise of what ecocide's criminalization could offer an Earth in peril.[48] In the popular imagination, ecocide readily conjures the international prosecution of major fossil fuel companies like Shell or BP.[49] Quite apart from the fact that the ICC at least, has no jurisdiction to prosecute any corporation, *realpolitik* stacks the odds against such prosecutions.

Scholars and practitioners of international criminal law know there is a

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[45] POLLY HIGGINS, ERADICATING ECOCIDE 61 (2010).
[46] Global Assembly, *People's Declaration for the Sustainable Future of Planet Earth* (Dec. 18, 2021), https://globalassembly.org/declaration.
[47] E.U. Env't Crime Directive, *Open Letter to European Justice Ministers*, https://www.stopecocide.earth/eu-crime-directive-position-paper; *see also* https://act.wemove.eu/campaigns/oil-spill-deforestation?utm_campaign=post_2022-09-22.3459&utm_medium=twitter&utm_source=WeMove.EU
[48] *See, e.g.*, Mélissa Godin, *Lawyers are Working to Put 'Ecocide' on Par with War Crimes. Could an International Law Hold Major Polluters to Account?*, TIME (Feb. 19, 2021, 7:56 AM), https://time.com/5940759/ecocide-law-environment-destruction-icc. Ecocide even received its own episode in the recent Apple TV series, Extrapolations. *See Extrapolations: 2070 Ecocide* (Apple TV broadcast Apr. 21, 2023).
[49] *Id.*

sizeable mismatch between public expectations and the reality of what an overburdened, under-funded, and politically constrained international criminal legal system can deliver.[50] Indeed some of the lawyers who champion ecocide's criminalization harbor no illusions that international criminal prosecutions will make a meaningful dent in the climate emergency anytime soon.[51] And insights from critical scholarship, attuned to the impact of structural racism on criminal prosecutions, underscore the wisdom of approaching criminalization with a skeptical eye.[52] Not only might criminalizing ecocide do little to help the environment, it could also be weaponized against already marginalized people.[53]

Whether this risk materializes will depend on a host of decisions that will be shaped, to a significant degree, by an international prosecutor's understanding of what harms ecocide should vindicate, which in turn will both reflect and embed a particular normative view of the relationship humans have with nature.[54]

While generalizations are tricky, most civil society activists would characterize themselves as taking an ecocentric approach that strives to recognize nature's intrinsic value. Much contemporary activity in this ecocentric space is channeled through the so-called Rights of Nature (RoN) movement.[55]

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[50] *See generally* BOSCO, *supra* note 42.
[51] Confidential email exchange, June 15, 2023 (on file with author).
[52] DeFalco & Mégret, *supra* note 39, at 55.
[53] The history of efforts undertaken in the name of environmentalism resulting in harm to vulnerable human communities is, sadly, extensive. *See, e.g.*, José Francisco Calí Tzay (Special Rapporteur on the Rights of Indigenous Peoples), Protected Areas and Indigenous Peoples' Rights: The Obligation of States and International Organizations, ¶¶ 46-51, U.N. Doc. A/77/238 (July 19, 2022). (Indigenous people forcibly removed from or near UN World Heritage sites in locations spanning Thailand, Kenya, Nepal, Tanzania, Botswana, Namibia, Denmark, Greenland and Sweden).
[54] *See* JOSEPH RAZ, FROM NORMATIVITY TO RESPONSIBILITY 14 (2011) ("[Normative reasons] are normative in as much as by endowing an action with a point or purpose they guide decision and action, and form a basis for evaluation.").
[55] MIHNEA TĂNĂSESCU, UNDERSTANDING THE RIGHTS OF NATURE: A CRITICAL INTRODUCTION 151 (2022), https://library.oapen.org/viewer/web/viewer.html?file=/bitstream/handle/20.500.12657/53088/9783839454312.pdf?sequence=1&isAllowed=y ("The expression rights of nature is catchy and concise and therefore very amenable to travelling far and wide. But it also risks hiding orientations that are not centered around rights, yet use these selectively…"). The roots of the contemporary RoN movement in the United States go back to the 1970s, with Christopher D. Stone's seminal article, Should Trees Have Standing? Christopher D. Stone, *Should Trees Have Standing?-Toward Legal Rights For Natural Objects*, 45 S. CAL. L. REV. 450, 451-453 (1972). As Stone later recounted, he wrote the article as a provocation specifically timed to an environmental case before the U.S. Supreme Court, Sierra Club v. Morton. CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? LAW, MORALITY AND THE ENVIRONMENT xiii-

Recently, the RoN framework has started to gain traction in domestic jurisdictions around the world, with legal personhood granted to natural entities ranging from rivers, to glaciers and forests.[56] In Ecuador, the rights of nature even gained explicit constitutional protection.[57] These developments have been supplemented at the international level by various norm-building efforts - from a 1982 UN General Assembly resolution explicitly eschewing anthropocentrism ("[e]very form of life is unique, warranting respect *regardless of its worth to man*"),[58] to the 2014 creation of a people's tribunal, "to create a forum for people from all around the world to speak on behalf of nature."[59]

From this ecocentric position, ecocide should condemn acts committed with the knowledge that there is a substantial likelihood of causing severe and widespread/long-term harm to the environment, regardless of the economic and social benefits that those acts are expected to deliver to humans.

3. The balancing test in the proposed definition

Recall that the proposed definition of ecocide involves "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and widespread/long-term damage to the environment being caused by those acts."[60] On its face, the definition seems fully ecocentric, with no scope for balancing anthropocentric concerns – and thus satisfying to civil society groups looking to protect nature on the basis of its intrinsic value. The Expert Panel, however, decided temper this facial ecocentrism for pragmatic reasons. As Panel member Christina Voigt put it, "a definition adopting an exclusively ecocentric approach … could perhaps have given a stronger environmental

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xiv (3rd ed. 2010). In that 1972 case, involving a plan by the Walt Disney Corporation to build a massive ski resort in a glacial valley in the Sequoia National Forest, Justice Douglas drew on Stone's article to argue in dissent for "the conferral of standing upon environmental objects to sue for their own preservation." Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

[56] Granting legal personhood to Te Awa Tapua "an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements" Te Awa Tupua Act – Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14 (N.Z.).

[57] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR Oct. 20, 2008 (updated Jan. 31, 2011), arts. 71-74. For an introduction to the growing literature analyzing the impact of this constitutional development, *see* CRAIG M. KAUFFMAN & PAMELA L. MARTIN, TESTING ECUADOR'S RIGHTS OF NATURE: WHY SOME LAWSUITS SUCCEED AND OTHERS FAIL (2016).

[58] G.A. Res. 37/7, U.N. World Charter for Nature (Nov. 9, 1982).

[59] *About us and the History of the RoN Tribunals*, INT'L RTS. OF NATURE TRIBUNAL, https://www.rightsofnaturetribunal.org/about-us/ (last visited Jan. 18, 2024).

[60] Expert Panel Definition, *supra* note 9.

signal but might have been detrimental to the likelihood for *(sic)* being adopted."[61] Instead the Panel defined the term "wanton" in a way that introduces a proportionality assessment to account for the ways that humans can benefit from environmental destruction. Per the Panel's explanatory notes, wanton means "with reckless disregard for (environmental) damage which would be clearly excessive *in relation to the social and economic (human) benefits anticipated*."[62] (italics added).

This balancing test factors in the way that humans might benefit, economically and socially, from acts that harm the environment. It creates space for the reality that humans must undertake acts of environmental destruction in order to provide for our needs. And it acknowledges the equity concerns of less industrialized countries; for such countries to suddenly find deemed as criminal the kinds of actions that highly industrialized nations have routinely benefited from for decades, would certainly seem unjust. In sum, the Panel concluded, correctly, that humans do and must use nature. Without some level of environmental destruction, we would not have sewage systems or tap water, let alone computers. As such, a criminal definition without any safe harbor for many of the acts that cause environmental destruction would be unworkable and, ultimately, fail on both pragmatic and principled grounds.

As Panel expert Kate Mackintosh acknowledges, this means that "there might be acts which should not go ahead in the interests of the environment but which…don't meet this threshold [of criminalization]"[63] As seen in Graph 1 (below) there may be acts, lawful under existing domestic regimes, but committed with the knowledge that there is a substantial likelihood of causing severe and widespread/long-term damage to the environment, that are nonetheless not subject to international criminal liability. This is because the use of "wanton" in the definition works to spare from criminalization acts that do not reach the standard of being "clearly excessive" relative to the anticipated social and economic benefits to humans (i.e. acts falling to the right of the "wanton" vector in Graph 1).

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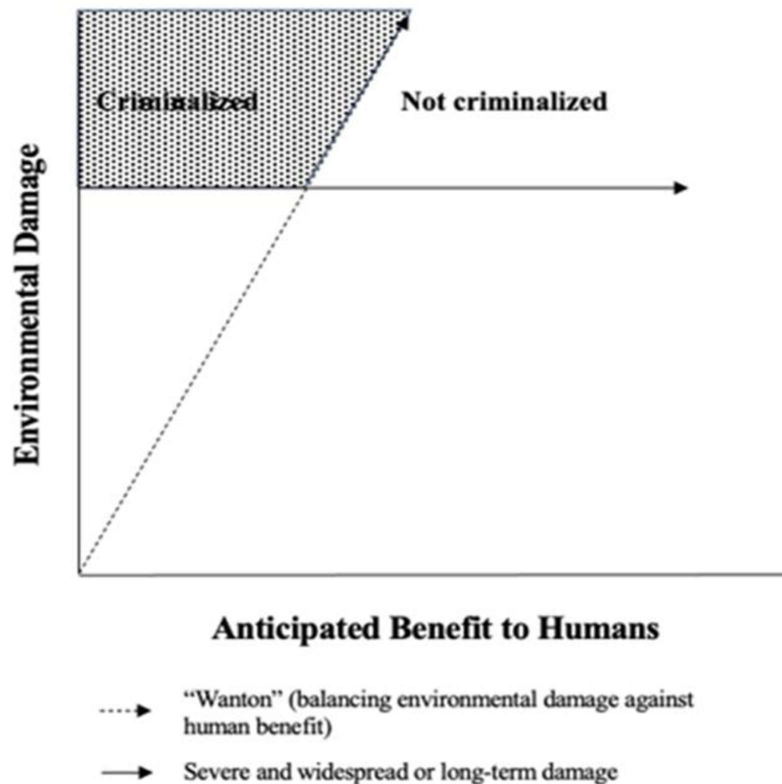
[61] Voigt, *supra* note 30. For a critique of this decision, *see* Elliot Winter, *Stop Ecocide International's Blueprint for Ecocide Is Compromised by Anthropocentrism: A New Architect Must Be Found*. 57 ISR. L. REV. 175 (2024).
[62] Expert Panel Definition, *supra* note 9.
[63] Columbia University, *Ecocide: A Discussion of Law and Ethics*, YouTube, 00:31 (Jan. 20, 2022, 12:00 PM), https://climate.law.columbia.edu/events/ecocide-discussion-law-and-ethics.

Graph 1



Darryl Robinson, one of the ICL scholars involved in the ecocide discussions has noted that such a balancing test is commonplace in IEL, which "simply does not have concrete and absolute 'prohibitions' on conduct."[64] This makes IEL distinctly different from ICL, whose provisions are generally structured around red line prohibitions that demarcate any given behavior as either criminal or not criminal.[65]

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[64] Darryl Robinson, *Ecocide – Puzzles and Possibilities*, 20 J. INT'L. CRIM. JUST. 313, 315 (2022).

[65] Exceptions to this general structure can be found in war crimes, derived from International Humanitarian Law, which frequently balances harms against "military necessity." Thus there are some war crimes that include a proportionality assessment, most relevant from an environmental perspective the crime codified under Art. 8 (2)(b)(iv) of the Rome Statute. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 ("Intentionally launching an attack in the knowledge that such attack will cause incidental loss

Those involved in developing the ecocide definition believed that any proposed definition of ecocide should not criminalize behavior that would be lawful under existing international environmental law. Or, as Mackintosh put it, "It would seem to be a complete non-starter to suggest an international crime that was not able to be in conversation in some way with the entire edifice of [environmental] regulation that's been built up."[66] To the extent one accepts this premise, then some kind of balancing test must be incorporated into the definition.[67]

The Panel's balancing test assesses human benefit weighed against (only) the environmental harms that flow from environmental destruction. It fails to recognize that environmental destruction of the kind ecocide seeks to criminalize also and necessarily entails harm to humans. The Panel's approach embeds the normative position that humans are separable from nature. Yet, as I advance in Part IV, this not the only way to account for the reality that humans must commit some level of environmental destruction in order to survive.

III. Ecocide and International Criminal Law

This part begins with a summary of contemporary legal scholarship regarding the primary purposes of ICL and the critiques raised about ICL's ability to deliver on these purposes. After canvassing claims regarding deterrence, retribution, authoritative truth-telling, reconciliation, and expressivism, the Part then assesses these purposes in relation to ecocide. It concludes that the primary (and perhaps, sole) benefit that ecocide proponents could derive from ecocide's inclusion as an international crime would be the expressive power of ICL to stigmatize behavior.

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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."). Still, such provisions are very much the exception that proves the rule.

[66] Columbia University, *Ecocide: A Discussion of Law and Ethics*, YouTube, 00:31 (Jan. 20, 2022, 12:00 PM), https://climate.law.columbia.edu/events/ecocide-discussion-law-and-ethics. With thanks to discussions with Nancy Combs on this point, I am not yet fully convinced that this assertion is necessarily true. One might view the turn to ICL as a rejection of IEL as a body of law that, whatever its other merits, has been unable to direct human behavior in a way that would have avoided the climate crisis we now find ourselves in.

[67] As described in Part IV, it is possible to create a safe harbor for the human use (and even destruction) of the environment that IEL accommodates, without adopting a balancing test that embeds the normative position that humans are separable from nature.

1. Purposes of International Criminal Law

Historically, much scholarship on the purposes of ICL has worked by analogy from the purposes of domestic criminal law.[68] As the field of ICL has developed, however, a small but growing body of scholarship has begun to look empirically at its impact on communities directly affected.[69] And at this point, it is possible to distill five purposes that are broadly agreed to animate the project of ICL.[70]

The first of these purposes is deterrence, both specific and general. Deterrence is obviously a mainstay of the rationales for domestic criminal punishment and in the early stages of modern ICL it was assumed that deterrence would operate in a similar way at the international level.[71] In the words of legendary ICL scholar, Cherif Bassiouni, "[t]he relevance of prosecution and other accountability measures to the pursuit of peace is that through their effective application they serve as deterren[ts], and thus prevent future victimization."[72] Yet the translation of assumptions about deterrence within a domestic criminal system to an international one can be problematic. Domestic deterrence theories rely on a tight and predictable link between the perpetration of crime and its punishment; would-be perpetrators must believe

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[68] *See generally* Elies Van Sliedregt, *Punishment and the Domestic Analogy: Why It Can and Cannot Work, in* WHY PUNISH PERPETRATORS OF MASS ATROCITIES?: PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW 81 (Florian Jeßberger & Julia Geneuss, eds., 2020) (surveying use of domestic analogies).

[69] *See, e.g.*, Diane Orentlicher, *Denial and Acknowledgment in Serbia, in* SOME KIND OF JUSTICE: THE ICTY'S IMPACT IN BOSNIA AND SERBIA 193, 194-95, 236-39 (2018).

[70] *See, e.g.*, Prosecutor v. Erdemovid, Case No. IT-96-22-T, Sentencing Judgment, 158 (Int'l Crim, Trib. for the Former Yugoslavia Nov. 29, 1996) (summarizing what it believed to be the United Nations Security Council's views on the objectives of the ICTY as "general prevention (or deterrence), reprobation, retribution (or 'just deserts'), as well as collective reconciliation . . . ")*.; see also* Sergey Vasiliev, *Punishment Rationales in International Criminal Jurisprudence: Two Readings of a Non-Question, in* WHY PUNISH PERPETRATORS OF MASS ATROCITIES? PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW 45, 58 (Florian Jeßberger & Julia Geneuss eds., 2020).

[71] *See, e.g.*, Gerard E. O'Connor, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court*, 27 HOFSTRA L. REV. 927, 974 (1999) ("[I]t is clear that numerous massacres occurred this century without an ICC in place. Therefore, a permanent ICC would likely have a deterrent effect . . . ."). *But see* David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 474 (1999) ("[T]he connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption.").

[72] M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 18 (1996).

they are likely to be prosecuted in order to be deterred.[73] While that connection may be overstated in domestic settings, it is certainly much more reliable domestically than it is in the international system where vanishingly few of those who perpetrate international crimes are ever prosecuted.[74]

Another goal often transferred by analogy from the domestic to the international criminal system is that of retribution. This is, however, a less commonly advanced justification for the pursuit of an international criminal trial, probably because the sheer scale of international crimes often dwarf any level of appropriately retributive punishment that the international human rights regime could tolerate.[75] As Hannah Arendt expressed it in relation to Adolf Eichmann's role in The Holocaust, "No punishment is severe enough."[76]

A further purpose of ICL is the opportunity to establish an accurate historical record.[77] This, in turn, is thought to serve as a bulwark against denialism and the risk of revisionist histories regarding who committed the crimes and what harms they caused.[78] Some have questioned whether the

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[73] *See, e.g.*, Charles R. Tittle, *Crime Rates and Legal Sanctions*, 16 SOC. PROBS. 409, 409-23 (1969); Frank Neubacher, *Criminology of International Crimes, in* WHY PUNISH PERPETRATORS OF MASS ATROCITIES? PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW 31 (Florian Jeßberger & Julia Geneuss eds., 2020) ("It is commonly agreed . . . that the certainty of punishment has a much greater effect than the severity of punishment . . . .").

[74] In its 22 years of operation, the ICC has only issued 52 arrest warrants. *See* ICC, icc-cpi.int (last visited Sept. 8, 2023). This is not a criticism of the ICC so much as a reflection of the very nature of international criminal prosecutions. "International crimes will typically involve multiple perpetrators and thousands or hundreds of thousands of victims. It is unavoidable that justice for international crimes will need to be selective." Silvia Fernández de Gurmendi, *The Practical Importance of Theories of Punishment, in* WHY PUNISH PERPETRATORS OF MASS ATROCITIES? PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW 16 (Florian Jeßberger & Julia Geneuss eds., 2020). Nonetheless, the largest empirical study of the deterrence question in relation to the ICC at least concluded that international criminal prosecutions "contributed to perceptions that impunity for egregious crimes against humanity is a diminishing option." H. Jo & B. Simmons, *Can the International Criminal Court Deter Atrocity?*, INT'L ORG. 70(3), 443,475 (2016).

[75] *See, e.g.*, Fernández de Gurmendi, *supra* note 74, at 19 ("[R]etributive justice is simply not enough for mass atrocities, which shatter entire societies . . . .").

[76] *See* Hannah Arendt & Karl Jaspers, Correspondence 1926-1969, at 54 (Lotte Kohler & Hans Saner eds., Robert Kimber & Rita Kimberm trans., 1992) (writing in regards to Eichmann, "No punishment is severe enough.").

[77] This truth-seeking function is explicitly catered for within the Rome Statute. *See* Rome Statute of the International Criminal Court art. 69(3), July 17, 1998, 2187 U.N.T.S. 90 ("The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.").

[78] *See, e.g.*, GARY BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 302-04 (2000); Robert I. Rotberg, *Deterring Mass Atrocity Crimes: The Cause of Our*

strictures of a courtroom process can support such a project, and suggest that non-adversarial settings such as truth commissions would be better suited for the task.[79] And, as with the goal of deterrence, the degree to which international criminal trials have in fact been able to serve this goal is subject to ongoing assessment.[80]

Related but distinct from the goal of establishing an accurate historical record is the idea that ICL can help foster reconciliation between victim and perpetrator communities.[81] Central to this is the idea that individualizing the assignment of guilt by prosecuting specific perpetrators will prevent victim communities from attributing the harm they have experienced to an entire group of people. In the words of former Nuremberg prosecutor, Hartley Shawcross, "[t]here can be no reconciliation unless individual guilt … replaces the pernicious theory of collective guilt…"[82] Still, others have argued that in cases where there have been mass crimes committed by massive numbers of perpetrators, such as the 1994 genocide in Rwanda, the individualization of criminal responsibility may in fact distort the historical record and ultimately undermine reconciliation.[83]

Finally, expressivism has gained steady adherents as a core purpose of ICL.[84] International trials, with the global media attention they attract, are

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Era, in MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES 1, 9 (Robert I. Rotberg ed., 2010).

[79] Mirjan Damaška, *What is the Point of International Criminal Justice*, 83 CHI.-KENT L. REV. 329, 338 (2008).

[80] Diane Orentlicher, *Denial and Acknowledgment in Serbia, in* SOME KIND OF JUTICE: THE ICTY'S IMPACT IN BOSNIA AND SERBIA 193, 256-58 (2018) (discussing the reasons why even when the ICTY credibly established a factual record, this did not stop denials).

[81] *See, e.g.*, Bassiouni, *supra* note 72, at 18-19 ("Accountability must be recognized as an indispensable component of peace and eventual reconciliation."). *But see* Fernández de Gurmendi, *sura* note 73, at 17-21 (discussing how challenging it is for international tribunals, dislocated from victim communities, to serve this role).

[82] Hartley Shawcross, *Let the Tribunal Do Its Job*, N.Y. TIMES, at A17 (May 22, 1996) (arguing in favor of the International Criminal Tribunal for the former Yugoslavia); *see also* Antonio Cassese, President of the Int'l Criminal Tribunal for the Former Yugoslavia, Address to the General Assembly of the United Nations (Nov. 14, 1994), http://www.un.org/icty/rapportan/genas-94.htm.

[83] As Mirjan Damaška points out, "The issue of the relationship between blaming a few individuals, on the one hand, and the post-conflict stabilization of a region and reconciliation of the affected populace, on the other, may be more complicated than often assumed. … it may be that the suppressed realization of collective moral responsibility creates sympathy for a few individuals singled out for prosecution, galvanizing large segments of society against externally imposed justice." Damaška, *supra* note 79, at 333.

[84] Barrie Sander, *The Expressive Turn of International Criminal Justice: A Field in Search of Meaning,* 32

particularly well suited for norm expression highlighting that the prosecuted behavior is widely condemned.[85] Expressivism signals solidarity with the victims and may also serve a general deterrence function, by stigmatizing certain behaviors to such a degree that would-be perpetrators do not even consider committing them. Unfortunately, the inherent selectivity of international criminal justice proceedings can undermine the strength of its expressive message.[86] And selectivity is unavoidable; there will never be enough human or financial resources to prosecute every international crime.

This reality directs attention to the role of prosecutorial discretion in deciding which of many viable cases to pursue, and ICL is replete with scholarship on the use of such discretion.[87] What is clear across the different lines of thought is that these discretionary judgements do not take place in a vacuum. Prosecutors select cases in the context of the geopolitical reality within which they operate.[88] And these decisions affect the expressive message sent by an international criminal prosecution. Looking at the line-up of cases over the ICC's first two decades of operation, one could conclude that the expressive message being sent was that if you were an African official, rebel leader, or warlord who perpetrated an international crime, you would face international prosecution.[89] Meanwhile, if you fell outside that demographic you could likely perpetrate with impunity.[90]

LEIDEN J. INT'L L. 851 (2019).

[85] Damatka, *supra* note 79, at 345; deGuzman, *supra* note 42, at 270 (describing expressivism as "the best justification for the ICC's work"); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law in* THE PHILOSOPHY OF INTERNATIONAL LAW (Samantha Besson & John Tasioulas eds., 2008); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39 (2007); Joel Feinberg, *The Expressive Function of Punishment, in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 98 (1970) (on the role of expressivism in domestic criminal law).

[86] Frank Neubacher, *supra* note 73.

[87] *See, e.g.*, Hector Olsolo, *The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?*, 3 INT'L CRIM. L. REV. 87, 143 (2003) (arguing for a set of "precise and binding" criteria for prosecutorial discretion to be introduced into the ICC's Rules of Evidence and Procedure); Philippa Webb, *The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice"* 50 CRIM. L.Q. 305, 324 (2005) (arguing in favor of ex ante criteria to guide prosecutorial discretion); BOSCO, *supra* note 42; deGuzman, *supra* note 42, at 274-75 (describing ICC prosecution process); Rebecca J. Hamilton, *The ICC's Exit Problem*, 47 N.Y.U. J. INT'L L. & POL. 1, 26, 42 (2014) (noting ICC prosecutorial discretion applies to decisions about entering and exiting prosecution).

[88] *See generally* BOSCO, *supra* note 42.

[89] *Defendants*, ICC, https://www.icc-cpi.int/defendants (last visited Sept. 8, 2023).

[90] *See generally* Rebecca J. Hamilton, *Africa, the Court, and the Council in* ELGAR COMPANION TO

This dynamic is seemingingly shifting now, as the Court navigates its third decade of operation with high-profile investigations ongoing outside of Africa, including in Ukraine and Gaza. These cases, however, are being pursued against the background the perceived anti-Africa bias of the Court, and the growing consternation among key parts of the Court's constituency that powerful actors were committing international crimes with impunity.[91] To the degree that shoring up the Court's legitimacy against such criticisms has had a role to play in the Prosecution's recent case selection decisions, the broader point remains true that the Prosecution pursues cases in the context of the geopolitical context in which it operates.

2. What can International Criminal Law Offer Ecocide?

Civil society activists seeking to make ecocide the fifth international crime alongside genocide, war crimes, crimes against humanity and aggression, claim that doing so will be "a simple, effective deterrent for those in positions of responsibility."[92] Yet, as scholars studying deterrence in ICL more generally have found, this may be less straightforward than ecocide proponents imagine.

It is impossible to say at this stage the frequency with which acts that would meet the proposed definition of ecocide are committed. What seems clear, though, is that no matter the exact number, the prosecution: perpetration ratio would be significantly lower than for domestic crimes.[93] It also seems

THE INTERNATIONAL CRIMINAL COURT 261 (deGuzman & Oosterveld eds., 2020) (discussing challenges of the ICC resulting from its "all-Africa" docket which has inspired a powerful critique of the ICC as anti-Africa). Arguably this dynamic is already shifting as the Court navigates its third decade of operation with high-profile investigations underway outside of Africa, including in Ukraine and Gaza. These cases, however, will take time to actually come to trial.

[91] *See, e.g.*, James A. Goldston, *Don't Let Gaza be Another Example of International Criminal Court Double Standards*, POLITICO (Oct. 26, 2023), https://www.politico.eu/article/dont-let-gaza-conflict-be-another-example-international-criminal-court-icc-double-standards-ukraine/; Rebecca Hamilton, *Where is the ICC Prosecutor? What ICC Prosecutor Khan Should Say About the Israel-Gaza Violence*, JUST SEC. (Oct. 11, 2023), https://www.justsecurity.org/89400/where-is-the-icc-prosecutor/.

[92] *How You Can Help*, STOP ECOCIDE, https://www.stopecocide.earth/become (last visited Sept. 8, 2023).

[93] In its 22 years of operation, the ICC has only issued 52 arrest warrants. *See* ICC, icc-cpi.int (last visited Sept. 8, 2023). This is not a criticism of the ICC so much as a reflection of the very nature of international criminal prosecutions. "International crimes will typically involve multiple perpetrators and thousands or hundreds of thousands of victims. It is unavoidable that justice for international crimes will need to be selective." Fernández de Gurmendi, *supra*

probable that the risk of prosecution would even be lower than for existing international crimes given that conflicts with visible mass human suffering are, in the short term at least, likely to attract greater prosecutorial resources than crimes perpetrated against the environment.[94] To the degree that effective deterrence demands a high risk of prosecution for those who perpetrate, the probable weakness of ecocide's prosecution: perpetration ratio means that its international criminalization is unlikely to be the deterrent that its proponents hope.

As noted, retribution is generally the weakest justification for the punishment of international crimes given the gravity of the harms and the limits of punishment. Much the same questions over whether it is possible to mete out proportional punishment for the gravest of international crimes would be transferred to the ecocide context. And arguably, calibrating the right amount of punishment for retributive purposes becomes even more complicated when the harm being accounted for includes a non-human dimension.[95]

Likewise, authoritative truth-telling would be at least as complex a goal to achieve through a trial for ecocide as it is for the existing international crimes. The constraints of a criminal trial marginalize historical context, structural explanations, and contributory actions that are not tightly connected to the individual perpetrator's commission of the charged crime.[96] One could imagine a trial over the destruction of thousands of acres of the tropical forest by cocoa

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note 74. Nonetheless, the largest empirical study of the deterrence question in relation to the ICC at least concluded that international criminal prosecutions "contributed to perceptions that impunity for egregious crimes against humanity is a diminishing option." H. Jo & B. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 Int'l Org. 443, 475 (2016).

[94] *See* RANDLE DE FALCO, INVISIBLE ATROCITIES: THE AESTHETIC BIAS OF INTERNATIONAL CRIMINAL JUSTICE (2022) (highlighting the systemic preference within international criminal law for the prosecution of crimes with immediate and visible human suffering).

[95] Ecuador's courts have grappled extensively with this concept. *Compare* Mauricio Guim & Michael A. Livermore, *Where Nature's Rights Go Wrong*, 107 VA. L. REV. 1347, 1408-12 (2021) (considering Ecuador's legal application of the Rights of Nature and critiquing its ability to consistently apply it in court), *with* KAUFFMAN & MARTIN, *supra* note 57, at 5-8 (analyzing several cases brought under the Rights of Nature movement in Ecuador and explaining potential reasons for the discrepencies in application). For an interesting parallel discussion of how the ICC could account for non-human harm in its reparations proceedings, *see* Rachel Killean, *From Ecocide to Eco-Sensitivity: 'Greening' Reparations at the International Criminal Court*, 25 THE INT'L J. OF HUM. RTS. 323 (2021).

[96] *See, e.g.*, Zinaida Miller, *Temporal Governance: The Times of Transitional Justice*, INT'L CRIM. L. REV. 1, 19 (2021); RANDLE DEFALCO, INVISIBLE ATROCITIES: THE AESTHETIC BIASES OF INTERNATIONAL CRIMINAL JUSTICE (2022); *see also,* ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR (2011).

farmers in Ghana or Côte D'Ivoire that produces a detailed record of their actions, yet never discusses the chocolate market in the Global North that drives the demand for cocoa.[97] Likewise, one could imagine the trial of a Congolese warlord over illegal logging of the Congo Basin rainforest that concludes without any recognition of the role that the colonial history of extractivism has played in the region.[98]

As discussed above, an international criminal trial is thought to facilitate reconciliation by individualizing the guilt of the perpetrator and thereby inoculating those he might be associated with from collective blame by victims. Discerning perpetrator and victim groups in the context of ecocide, however, is more complicated.[99] Here, the problem of ecocide's many potential contributory actions arises again. ICL's theory of reconciliation relies on marking out an individual perpetrator for criminal responsibility *in order to* shield others he is associated with from blame. Yet stigmatizing the associates of a perpetrator may be exactly what is needed in an ecocide context. Take, for example, the conviction of a C-suite officer in major fossil fuel corporation, where the individualization of guilt may generate inappropriate absolution for the corporation. Absent what is a highly unlikely reform to the Rome Statute, the ICC would not have jurisdiction to prosecute the corporation itself. Thus one can foresee a scenario in which a corporation fires any indicted leader, distances itself from the stigma of the criminal proceedings, and continues with its business relatively unscathed. In this way, ecocide would see the purported benefit of ICL - the individualization of guilt - turned on its head to exculpate the corporations that should bear the stigma of ecocide's criminalization.

Finally, expressivism is perhaps the one purpose of international criminal justice that translates easily to ecocide. International criminal prosecutions for ecocide would attract global media coverage and send the message that the knowing destruction of the environment is not the kind of harm that can be remedied with the payment of a fine or regulatory wrist slap.[100] This benefit, however, cannot escape the problems of selectivity and

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[97] *See, e.g.*, *Sweet Nothings*, MIGHTY EARTH (Nov. 2022), https://www.mightyearth.org/2022/02/14/major-chocolate-companies-failed-in-pledge-to-end-deforestation-comprehensive-new-study-shows/.
[98] *See generally* Achiume, *supra* note 33.
[99] For thought-provoking work on the victimology of environmental crimes, *see* Rob White, *Green Victimology and Non-Human Victims,* 24 INT'L REV. VICTIMOLOGY 239 (2018).
[100] *See Making Ecocide a Crime*, STOP ECOCIDE, https://www.stopecocide.earth/making-ecocide-a-crime ("Unlike suing and fining corporations (who simply budget for this possibility), making ecocide a crime creates an arrestable offence.").

prosecutorial discretion that plague ICL more generally.

One concern is that in selecting which perpetrators of ecocide to prosecute, international prosecutors will replicate the existing bias against perpetrators with comparatively little geopolitical power – for example, pursuing cases against African officials responsible for plundering their state's resources over cases involving environmental degradation for corporate profit by wealthy businessmen with U.S. passports.[101] Further complicating the issue of prosecutorial discretion in relation to ecocide is the choice of which sites of environmental destruction to prioritize. Drawing on scholarship in ecological aesthetics one can imagine attention being drawn towards the prosecutions of harm to natural environments that accord with visible beauty in the eyes of (politically powerful) humans, while discounting harm to natural environments that lack such aesthetic qualities.[102]

These complications notwithstanding, because the normative justification for extant international crimes is popularly understood to condemn the gravest forms of harm (to humans), part of the promise of an international prosecution for ecocide is that it would signal some equivalent level of moral condemnation when it comes to environmental harm.[103] This is exactly what civil society proponents of ecocide's criminalization seek.[104]

Nonetheless, expressivism is an area in which the normative ambiguities identified in Part II re-emerge. What, precisely, is the message that the proposed definition would convey about environmental destruction? Civil society proponents of ecocide understand ecocide to criminalize the "mass damage and

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[101] This geopolitical bias was at work in the first two decades of the ICC's operation, but it may shift in the future. It is also worth noting that domestic prosecutions of powerful corporate actors for environmental crimes are increasingly robust. *See, e.g.*, *Prosecution of Federal Pollution Crimes*, U.S. DEP'T OF JUST. (July 31, 2023), https://www.justice.gov/enrd/environmental-crime-victim-assistance/prosecution-federal-pollution-crimes. Nonetheless, for the purposes of the international crime of ecocide, the track record at the level of international criminal prosecutions provides the most meaningful baseline from which to anticipate what future international prosecutions would look like.

[102] *See generally* Emily Brady & Jonathan Prior, *Environmental Aesthetics: A Synthetic Review*, 2 PEOPLE & NATURE 254 (2020) (surveying the past fifty years of scholarship at the intersection of environmentalism and aesthetics); *see, e.g.,* Ernest Small, *In Defence of the World's Most Reviled Invertebrate 'Bugs'*, 20 BIODIVERSITY 168, 210–11 (2019) (discussing poor public image of insects despite their ecological value).

[103] *See, e.g.*, Liana Georgieva Minkova, *The Fifth International Crime: Reflections on the Definition of Ecocide* 25 J. GENOCIDE RESEARCH 62, 75 (2023) (discussing the stigmatizing role that ecocide would play in signaling what is and is not appropriate behavior).

[104] [Get cite for Daniel's dissertation]

destruction of ecosystems."[105] But the balancing test included in the proposed definition means that any such destruction not already unlawful under domestic law would be spared criminalization under the ecocide definition unless the harm it caused would be "clearly excessive" compared to the social and economic benefits gained by humans. The inclusion of a balancing test has been criticized as an affront to the very purpose of the exercise. As one critic put it, "Either we criminalize the knowing destruction of the environment or we don't. Either the environment exists to serve humans or it doesn't."[106] As is hopefully clear to readers at this point, such statements oversimplify the relationship humans have with the environment. Yet, if expressivism is the key benefit that ICL can offer ecocide, then it is vital to clarify what message the legal definition of ecocide sends. It is to this question of expressive message that the following Part turns.

IV: The Expressive Message of Ecocide

To re-cap: The preceding sections have identified the conflicting understandings in play regarding the harm that ecocide would criminalize, and argued that gaining clarity on this question is vital given that expressivism is the primary benefit that ICL can offer.

Those pushing for ecocide's criminalization from within civil society generally align themselves with an ecocentric perspective that seeks to protect nature on the basis of its intrinsic value, and hope that criminalizing the destruction of the environment could put harm to nature on par with harm to humans. The strong version of this position leaves no room for the possibility of a balancing test to accommodate the ways the humans destroy the environment for our own survival. By contrast, the Expert Panel draws on existing IEL to introduce a balancing test that creates space for acknowledging the instrumental value that flows to humans from certain activities that destroy the environment. While all major environmental agreements seek to secure technology transfers to less industrialized nations in order to help them "leap frog" over fossil fuel based economic growth, the balancing test accommodates the reality that such efforts are not immediately nor uniformly implemented.[107]

[105] *What is Ecocide?*, STOP ECOCIDE (June 2021), https://www.stopecocide.earth/what-is-ecocide.
[106] Heller, *supra* note 17.
[107] *See, e.g.,* United Nations Framework Convention on Climate Change art 4(3), *opened for*

In the following section I align myself with the Panel's view that a balancing test is an essential part of any ecocide definition, while also arguing that the particular balancing test that the Panel has proposed is deeply problematic and should be amended.

This section works to add a layer of nuance to the ecocide discussion, by moving from the question of nature's intrinsic vs. instrumental value, to the deeper conceptual question of the relationship that humans have with nature. It begins by looking at how extant IEL (and international law in general) assumes that humans are separable from nature. This assumption has been incorporated into the Panel's balancing test which, in turn, has been justified by the Panel as being necessary to account for the fact that vast swathes of human activity (essential, but also non-essential) involve environmental destruction. The Panel's balancing test, however, is not the only way to carve out a safe harbor for the environmental destruction that humans may need to take in order to both survive and thrive. This Part develops the argument that there is a better balancing test, embedding the position that humans are inseparable from nature, and that this amended version should replace the Panel's test and strengthen the expressive message of ecocide's criminalization.

1. Environmentalism and its discontents

As noted in Part II, international environmental law (IEL) contains few outright prohibitions, and instead works to balance environmental concerns against social and economic human needs. In the absence of a list of prohibited actions from IEL that they could import into a legal definition of ecocide, the Expert Panel instead proposed a balancing test, via the term "wanton," to incorporate the economic and social benefits to humans that IEL values.

Contemporary IEL practice is centered on the concept of sustainable development, popularly characterized as a way to ensure development "meets the needs of the present without compromising the ability of future generations to meet their own needs."[108] The concept of sustainable development under IEL

signature June 4, 1992, 1771 U.N.T.S. 107.

[108] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE ¶ 27 (1987); Usha Natarajan & Julia Dehm, *Locating Nature: Making and Unmaking International Law*, LEIDEN J. INT'L L., 573, 577 (2021) (describing sustainable development as "canonical for IEL since the 1992 Rio Earth Summit"). However, the concept was discussed in IEL, albeit without the same terminology, even earlier. *See, e.g.*, Report of the United Nations Conference on the Human Environment, ¶ 4, U.N. Doc. A/CONF.48/14/Rev.1 (1972). Less charitably, but perhaps not unfairly, LSE professor Stephen Humphreys describes sustainable development as "designed not primarily to prevent, but to secure, nature's continued

embeds the position that humans are separable from nature, even as it is grounded in an acknowledgement that humans must use nature to fulfil our needs.

This positionality is familiar to TWAIL scholars who have worked to highlight the role of colonialism in fostering and sustaining the separability of humans from nature.[109] As Carmen Gonzales writes, "Colonialism universalized European notions of nature as a commodity for human exploitation."[110] International law's assumption of the separability of humans from nature enabled resource extraction as the engine of colonization, and it continued to shape understandings of the relationship between humans and nature in the post-colonial era, including in decolonized states. "Sovereignty was conditioned … on a society's capacity to make productive use of nature to fulfil[l] an increasing variety of human desires."[111]

Sustainable development is also often positioned so as to preference a forward-looking vision of human activity over a vision that accounts for the historical role that (certain groups of) humans have played in relation to the environment.[112] Powerful states in the Global North have often tried to start the

(sustainable) despoliation in the service of the economy." Stephen Humphreys, *Climate Justice: The Claim of the Past*, 5 J. HUM. RTS. & ENV'T 134, 145 (2014). *See also* Jérémie Gilbert et al., *The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda, in* NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 2021 47 (Daniëlla Dam-de Jong & Fabian Amtenbring, eds. 2023) ("International law continues to understand the natural world primarily as a 'resource', yet to describe nature in this way presupposes an epistemological frame in which human appropriation and extraction is dominant.").

[109] *See, e.g.*, E. Tendayi Achiume (Special Rapporteur on Contemporary forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *Global extractivism and racial equality*, U.N. Doc. A/HRC/41/54 (May 14, 2019). For an authoritative introduction to TWAIL (Third World Approaches to International Law) scholarship more generally, *see* James Gaathi, *TWAIL: A Brief History of its Origins, Its Decentralized Network, and a Tentative Bibliography,* 3 TRADE L. & DEV. 26, 26 (2011) ("As a distinctive way of thinking about international law, TWAIL is a historically aware methodology - one that challenges the simplistic visions of an innocent third world and a colonizing and dominating first world."). *See also* ELIANA CUSATO, THE ECOLOGY OF WAR AND PEACE. MARGINALISING SLOW AND STRUCTURAL VIOLENCE IN INTERNATIONAL LAW (2021).

[110] Carmen Gonzalez, *Global Justice in the Anthropocene, in* ENVIRONMENTAL LAW AND GOVERNANCE FOR THE ANTHROPOCENE 219, 222 (Louis J. Kotzé ed., 2017).

[111] Natarajan & Dehm, *supra* note 108.

[112] *See, e.g.*, WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE ¶ 27-30 (1987) (providing an example of the way that "sustainable development" takes a forward-looking approach). *See generally,* S. PRIYA MORLEY ET AL, SETTING INSTITUTIONAL PRIORITIES ON CLIMATE REPARATIONS & RACIAL JUSTICE: LEARNING FROM SOCIAL MOVEMENTS (2023).

clock on environmental protection in the post-colonial era, in order to keep their contributions to environmental degradation throughout the colonial period out of the conversation.[113]

Global South countries have pushed back against this a-historicity under the rubric of Common but Differentiated Responsibility (CBDR).[114] CBDR recognizes that while Global North countries today are calling for environmental protection, they have already benefited from industrialization – and its associated, environmentally harmful, practices.[115] Thus, the argument goes, Global North nations have different responsibilities – in, for example, the resources they should contribute to global sustainable development, than do most nations in the Global South. This notion of differentiated responsibility therefore helps account for the environmental degradation that certain Global North countries caused during the colonial era.[116]

The concept of CBDR was formally adopted into the UN Framework Convention on Climate Change in 1992.[117] It was subsequently operationalized in the Kyoto Protocol, which placed differential obligations on "developed" versus "developing" nations with respect to reducing greenhouse gas emissions.[118] (On that very basis, the U.S. ultimately withdrew from the Protocol.[119]) And CBDR was been carried forward into the Paris Climate

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[113] *See, e.g.*, ARAM ZIAI, DEVELOPMENT DISCOURSE AND GLOBAL HISTORY 30-33, 70-80 (2016).
[114] For background on the choice of the term "Majority World" – reflecting the geographic reality of where the majority of the global population actually live, over the outdated "Third World" or more common "Global South," *see* Shahidul Alam, *Majority World: Challenging the West's Rhetoric of Democracy*, 34 AMERASIA J., 88 (2008).
[115] Gerd Michelsen et al., *Sustainable Development – Background and Context, in* SUSTAINABILITY SCIENCE 5, 8-9 (Harald Heinrichs et al. eds., 2016).
[116] Duncan French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*, 49 INT'L & COMP. L. Q. 35, 36-37 (2000).
[117] United Nations Framework Convention on Climate Change art. 3, *opened for signature* June 4, 1992, 1771 U.N.T.S. 107 (1992). Although, as Christopher Stone pointed out, the concept of CBDR predates the 20th century conversations in treaty law. *See* Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 9 AM. J. INT'L L. 276, 278 (2004).
[118] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Feb. 16, 2005, 2303 U.N.T.S., Annex I.
[119] Julian Borger, *Bush Kills Global Warming Treaty*, THE GUARDIAN (Mar. 29, 2001, 3:28 AM), https://www.theguardian.com/environment/2001/mar/29/globalwarming.usnews; *see also* Letter from President George W. Bush to Senators Hagel, Helms, Craig, and Roberts (March 13, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010314.html (" I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy.").

Agreement.[120]

As is evident from the fraught discussions over CBDR, debates over how best to protect the environment in light of human needs are nested within the existing global structure with its associated history and power dynamics. IEL is constructed through (and in turn, replicates) existing normative assumptions - and power relations – within international law writ large.

2. Calibrating the balance

As the Panel's commentary explains, their definition "draws upon environmental law principles, which balance social and economic benefits with environmental harms through the concept of sustainable development." Ecocide, when proceeding from this starting point, only criminalizes environmental destruction when the harm it causes the environment would be "clearly excessive" compared to the anticipated social and economic benefits gained by humans. Thus the otherwise lawful felling of an entire rainforest could be saved from criminalization if the cleared land was necessary for a housing and development project that would lift, say, an estimated three million people out of poverty, provided the person conducting the balancing test concluded that the rainforest's destruction was not "clearly excessive" relative to the social and economic benefits from the three million person poverty reduction.

As written, the balancing test is agnostic about *where* the line is drawn between criminal and non-criminal acts that are taken in the knowledge they are substantially likely to cause severe and widespread/long-term damage to the environment.[121] More or less behavior causing environmental damage will be criminalized as a function of how that balancing test is calibrated. And if ecocide comes into ICL then that calibration will be undertaken by international criminal prosecutors in the first instance (deciding which cases to bring) and then international criminal judges (in deciding whether the cases presented to them should proceed to trial). Their decisions will, in turn, be informed not only by the normative concerns of ICL but also of environmentalism more generally. And, as noted above, the normative justifications for environmental protections

[120] *See* Paris Agreement to the United Nations Framework Convention on Climate Change arts. 2(2), 4(3)(19), Dec. 12, 2015, T.I.A.S. No. 16-104.
[121] Indeed the Expert Panel was intentional in its decision not to draw this boundary between criminal and non-criminal acts itself for fear that this could be used to justify behavior that, while still harmful to the environment, nonetheless fell outside the scope of international criminalization. *See* Voigt, *supra* note 30.

are themselves subject to contestation.

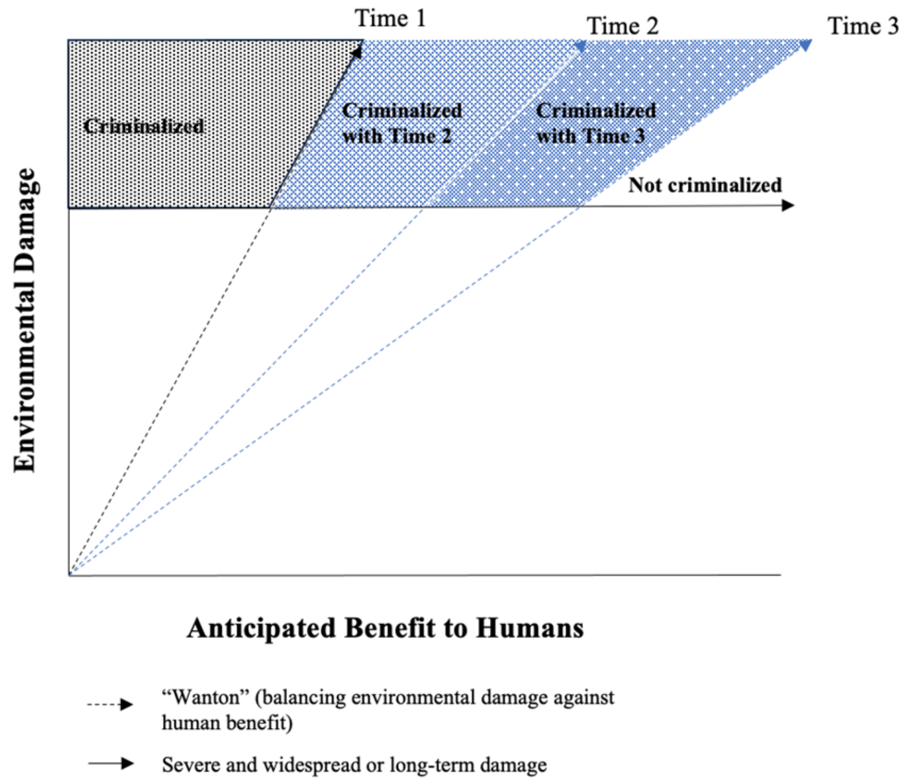
The valuation of social and economic benefits to humans that is key to mainstream IEL, and reflected in the Panel's balancing test, can be contrasted with competing strands of environmental thought that take an ecocentric position, reflected in other parts of the Panel's definition, and that focus on nature's intrinsic value, independent of the benefit it offers humans.[122] This ecocentric assumption underpins the understanding of many civil society proponents of ecocide who believe that ecocide should criminalize harm to the environment as a *per se* harm.

The significance of these normative debates for the question of what ecocide will actually criminalize can be more readily appreciated in visual form. The more that social and economic benefits to humans take precedence over ecocentric concerns, the less activity will be subject to criminalization (i.e. fall on the left hand side of the "wanton" line in Graph 1). The inverse obviously follows: prioritizing ecocentric concerns over human benefits results in more behavior being criminalized.

If, over time, increasingly more weight is given to ecocentric concerns, then the balancing test delineated by the "wanton" vector will flatten (see Time 2 on Graph 2). At the extreme, one could imagine a balancing test calibrated such that the overwhelming majority of otherwise lawful acts committed with knowledge that there is a substantial likelihood of causing severe and widespread/long-term damage to the environment would be criminalized (see Time 3 on Graph 2).

[122] Alessandro Pelizzon & Aidan Ricketts, *Beyond Anthropocentrism and Back Again: From Ontological to Normative Anthropocentrism*, 18 AUSTRALASIAN J. NAT. RES. L. & POL. 105, 107-109 (2015).

Graph 2



As should be clear from even the cursory account in the preceding sections, the normative basis for environmental protection is in flux. The least radical way in which this could play out is inside the existing framework of IEL (and indeed of international law in general) which not only places significant value on the social and economic benefits humans derive from nature, but also sees humans as separable from nature. Retaining this separability position as its starting point, one could imagine a shift toward ecocentricity, with increasing quantities of the natural environment protected by humans from human incursion. The proposed definition of ecocide would be able to account for this shift, with the balancing test recalibrated such that the wanton vector on Graph 2 continues to flatten over time.

In more concrete terms, as an international prosecutor considered whether to bring charges over our hypothetical felling of a rainforest, this would

mean that rather than development benefits to an estimated three million people being enough to spare the felling from criminalization, the prosecutor might deem the rainforest's destruction "clearly excessive" up until the point that, say, ten million people were lifted out of poverty.

3. Embracing the Inseparability of Humans from Nature

The social and economic concerns of mainstream IEL and the ecocentric tendencies of civil society activists are typically viewed antagonistically towards each other. Yet pitting one against the other risks painting a caricature of what are multilayered discussions within the environmental literature.[123] The burgeoning discipline of new ecology and associated fields of research, for example, seek to transcend debates between anthropocentrism and ecocentrism, instead emphasizing that humans are endogenous to nature.[124] From this vantage point, laws that rely on humanity being separate from nature (be they laws in favor of protecting nature or in favor of preserving the ability of humans to derive social and economic benefits from nature) are both normatively unsatisfactory and scientifically suspect.[125] Moreover, scholars and practitioners working in this space emphasize the way that efforts to separate out nature for "protection from" humans has often meant the displacement of those, often Indigenous, communities who live closest to nature, and understand it best.[126]

Emerging jurisprudence on human rights and the environment features a growing awareness of the inseparability of humans from the natural environment.[127] A 2017 Advisory Opinion from the Inter-American Court on

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[123] Jonathan Baert Wiener, *Beyond the Balance of Nature*, 7 DUKE ENV'T L. & POL'Y F. 1 (1996) (canvassing four different approaches to the question of the relationship between humans and nature).

[124] There is a wealth of literature challenging the idea that nature can or should be separated out from human interactions. *See, e.g.*, DANIEL B. BOTKIN, DISCORDANT HARMONIES 194 (1990) (concluding that there is no part of Earth or Nature which is untouched by humans); Joanne Vining et al., *The Distinction Between Humans and Nature: Human Perceptions of Connectedness to Nature and Elements of the Natural and Unnatural*, 15 HUM. ECOLOGY REV. 1, 1 (2008) (discussing that scientific and technological developments enabled humans to "transform nature into the pristine gardens"); *see generally* HUGH RAFFLES, IN AMAZONIA: A NATURAL HISTORY (2002) (conducting a case study of the Amazon and explaining how humans shape natural environments which appear to be pristine).

[125] *See* Pelizzon & Ricketts*, supra* note 122, at 105–124.

[126] *See, e.g.*, THOMAS WORSDELL ET AL., RIGHTS AND RESOURCES INITIATIVE: RIGHTS-BASED CONSERVATION: THE PATH TO PRESERVING THE EARTH'S BIOLOGICAL AND CULTURAL DIVERSITY? (2020); John H. Knox, Fortress Conservation (*forthcoming*).

[127] The Environment and Human Rights (State Obligations in Relation to the Protection and Guarantee of the Rights to Life and Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights),

Human Rights, recognized the right to a healthy environment as implicit within the human rights recognized in the Charter of the Organization of American States.[128] In the words of the Court, "a healthy environment is a fundamental right for the existence of humankind."[129] Similarly, in April 2024, the European Court of Human Rights, in *Klimaseniorinnen v. Switzerland*, a landmark climate case, concluded that "environmental degradation has created, and is capable of creating, serious and potentially irreversible adverse effects on the enjoyment of human rights."[130]

Normative foundations for this holistic understanding of the relationship that humans have with nature are also being advanced by the U.N. Special Rapporteur on Human Rights and the Environment. [131] And the latest report of the Intergovernmental Panel on Climate Change specifically acknowledged the role of Indigenous knowledge in the realization of the inseparability position:

> The Indigenous responsibility-based outlook stems from a cultural paradigm that understands that it is human beings who must learn to live with the land. This way of thinking instils in its adherents an inherent awareness that the other-than human realm is capable of existing and thriving without humans. Thus, it is for our own sake (as humans) that we learn to live according to certain ever-shifting parameters, requiring us to remain acutely attuned to our physical

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Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, (Nov. 15, 2017). *See also The Strasbourg Principles of International Environmental Human Rights Law*, 13 J. HUM. RTS. & ENV'T 195 (2022); John H. Knox, *Preliminary Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 19, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012). For another recent example of such integration infusing law-making efforts, *see* Kunming-Montreal Global Biodiversity Framework, Conference of the Parties to the Convention on Biological Diversity, CBD/COP/DEC/15/4 (Dec. 2022).

[128] The Environment and Human Rights (State Obligations in Relation to the Protection and Guarantee of the Rights to Life and Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, (Nov. 15, 2017)

[129] *Id.* at ¶ 59.

[130] Klimaseniorinnen v. Switzerland, App. No. 53600/20, ¶ 431 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206.

[131] David Boyd & Stephanie Keene (U.N Special Rapporteur on Human Rights and the Environment), *Rights-Based Approaches to Conversing Biodiversity: Equitable, Effective, Imperative,* 4 (2021), https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/policy-briefing-1.pdf.

surroundings."[132]

This understanding of humans as inseparable from nature can seem obvious, and yet has not typically been reflected in the discourse over nature. Indeed, the critical insight of recent work by Usha Natarajan and Julia Dehm is that the transformation from a universalist logic of humans using nature to serve our needs, to a universalist call for humans to protect nature *qua* nature, share a common understanding of humans as separable from nature.[133]

For our purposes, what matters is to appreciate that the wanton balancing test within the proposed ecocide definition embeds the orthodox IEL view of humans as separable from nature. Moreover, this separability position would remain intact even if, over time, an increased weighting towards ecocentric concerns flattens the vector to criminalize acts committed with the knowledge that there is a substantial likelihood of causing severe and widespread/long-term harm to the environment, even when they are expected to bring immense human benefit (i.e. Time 3 on Graph 2).

By contrast, a more progressive evolution in the normative justification for ecocide would involve abandoning the separability position altogether. As noted above, the inseparability position has long been recognized by Indigenous cultures in a variety of ways that are specific to their particular locales. [134] But major climatic events and growing concern over the collapse in biodiversity are now awakening non-indigenous communities to this reality as well. As just one indication of how quickly the normative landscape of environmentalism is shifting, this acknowledgement of inseparability is already appearing from unexpected quarters in the broader public conversation. A speech by Pope Francis in October 2023, as just a recent example, is so specific in terms of reconceptualizing the position of humans in the natural world that it merits direct quotation:

> [W]e are part of nature, included in it and thus in constant interaction with it […] a healthy ecology is also the result of

[132] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY (H.-O. Pörtner et al. eds., 2022).
[133] Natarajan & Dehm, *supra* note 108.
[134] *See, e.g.*, KAUFFMAN & MARTIN, *supra* note 57, at 2 (2016) (acknowledging the specificity of different Indigenous traditions, but also noting that "[a] common thread uniting these various traditions is the need to see humans as part of Nature, rather than separate and apart."). For an accessible and beautiful read on these concepts, *see* ROBIN WALL KIMMERER, BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHINGS OF PLANTS (2013).

> interaction between human beings and the environment, as occurs in the indigenous cultures … The great present-day problem is that the technocratic paradigm has destroyed that healthy and harmonious relationship. In any event, the indispensable need to move beyond that paradigm, so damaging and destructive, will not be found in a denial of the human being, but include the interaction of natural systems with social systems. (*internal quotation marks omitted)*[135]

Advances in Western sciences around Earth Systems support this recognition of the inseparability position. Humans are inherently dependent upon the Earth, and the Earth's capacity to sustain human life is partly dependent upon and vulnerable to human behavior (action and inaction).[136] Human behavior, particularly after such heavy industrialization in the late 20th century, has had a direct impact on the Earth, which in turn impacts humanity's continued existence.[137] Scientific research and mitigation efforts must grapple with the reality of such interconnections.

One leading approach engages the methodology of planetary boundaries, through which scientists measure a certain threshold of environmental harm in relation to the human habitability of earth.[138] The threshold is set within a buffer zone to allow for human adaptation via policy and behavioral change prior to reaching a boundary that goes beyond "a safe operating space for humanity."[139] (To date, six of the nine planetary boundaries had been crossed.[140]) This planetary boundary approach has gained momentum since its inception in 2009, largely because it addresses the symbiotic relationship that humans have with nature.[141]

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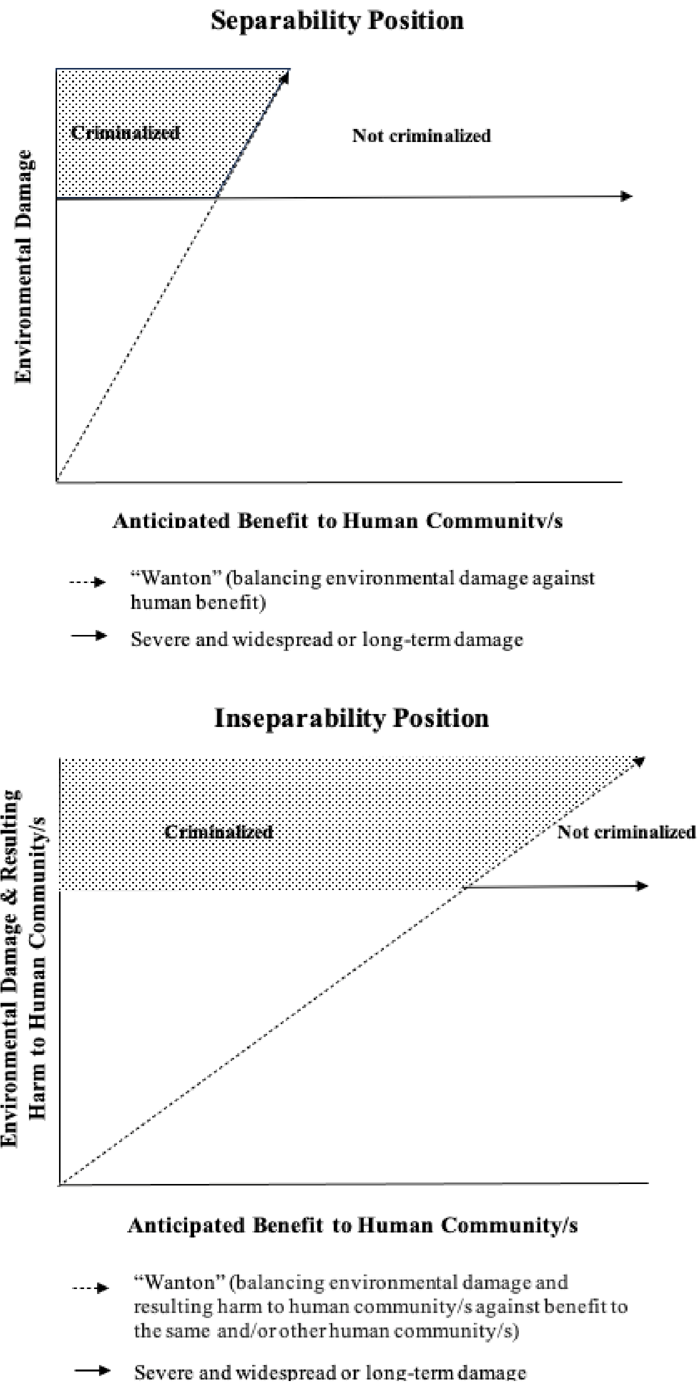
[135] Pope Francis, Apostolic Exhortation: Laudate Deum (Oct. 4, 2023).
[136] *The Human-Earth Relationship: Past, Present, and Future, in* CLIMATE CHANGE: GLOBAL RISKS, CHALLENGES, AND DECISIONS 472, 472 (Katherine Richardson et al., eds 2011); Will Steffen et al., *Planetary Boundaries: Guiding Human Development on a Changing Planet*, 347 SCIENCE 736, 738 (2015).
[137] *The Human-Earth Relationship: Past, Present, and Future, supra* note 136, at 480.
[138] Will Steffen et al., *supra* note 136, at 737.
[139] *Id.*
[140] Katherine Richardson et al., *Earth Beyond Six of Nine Planetary Boundaries*, 9 SCI. ADVANCES 1, 1 (2023).
[141] *See generally* Johan Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, 14 ECOLOGY & SOC'Y 32 (2009) (proposing nine planetary boundary conditions within the Earth System, of which the deconstruction would result in a hostile environment for human existence). *But see, e.g.*, Frank Biermann & Rakhyun E. Kim, *The Boundaries of the Planetary Boundary Framework: A Critical Appraisal of Approaches to Define a "Safe Operating Space"*

What this means for the definition of ecocide, is that should society continue to embrace this conceptualization of humans as inseparable from nature, then humans will have to appear, explicitly, on both sides of any balancing test that weighs the harms and benefits of environmental destruction. Per the inseparability position visualized at the bottom of Graph 3 below, a view of humans as indivisible from nature means any severe and widespread/long-term damage to the environment will necessarily also entail harm to humans, forcing both these harms to be weighed against any social and economic benefits to humans.

for Humanity, 45 ANN. REV. ENV'T & RES. 497, 501, 513-514 (2020) (critiquing the framework and its implementation, though not disagreeing with the assertion that humans and Earth share a dependent relationship in which human activities harm the Earth System).

Graph 3



The inevitable result of a balancing test that places humans on both sides of the equation is that the wantonness vector will flatten more quickly as compared to a definition that adopts the separability position (Graph 1, now replicated at the top of Graph 3). The increased harms of the y-axis can only be balanced out by comparatively greater benefits on the x-axis, thus pushing the vector flat.

Admittedly, the outcome in terms of the (increasingly large) quantity of anticipated human benefit required before acts committed in the knowledge that they are substantially likely to cause severe and widespread/long-term damage to the environment will be spared criminalization, could eventually be the same under either test. As seen previously in Graph 2, ecocentric concerns could push the vector flat over time, even while retaining the separability position. In other words, the different balancing tests, represented in the separability as compared to inseparability positions in Graph 3, can ultimately reach similar, or even the same outcomes in terms of where the threshold for criminalized acts lies. Yet each embeds a very different normative justification for that result. If one accepts that the core benefit derived from making ecocide an international crime is to harness the expressive power of ICL, then these differences in normative justifications matter immensely, since they represent different expressive messages.

The separability conception of ecocide conveys the message that the interests of humans and the interests of nature are distinct and therefore tradeable against each other. In other words, it is perfectly plausible for there to be severe and widespread/long-term damage to the environment that does not harm human interests either at all, or on net because it is compensated for by benefits to humans. An amended approach, represented by the inseparability conception at the bottom of Graph 3, instead conveys the message that humans are inseparable from nature, such that any severe and widespread/long-term damage to the environment entails harm to some human community/s, notwithstanding the fact that the damage may also be accompanied by benefits to (the same or different) human community/s.[142]

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[142] I have considered but ultimately rejected - at least as a theoretical matter, the possibility that no amount of human benefit could ever be greater than the human costs that flow from severe and widespread/long-term damage to the environment. In practical terms it seems likely that any environmental damage that meets the severe and widespread/long-term threshold would also produce a net cost to humans, but I do not feel confident that this likelihood covers every conceivable scenario and certainly the future may produce difficult cases where assessments of the cost to benefit ratio is deeply contested. Already one can

In addition to the expressive benefits from adopting a balancing test that embeds the inseparability position, there are also equity interests that flow from an amended test. In fleshing these out, it is instructive to turn to the discipline of political ecology. In *Understanding the Rights of Nature*, political ecologist Mihnea Tănăsescu draws attention to the political processes and power relations through which humans construct and define nature.[143] Political ecologists like Tănăsescu understand that what may traditionally be considered "natural" is also cultural and social.[144] Power dynamics and social mechanisms affect the environment and environmental issues are interconnected with human discourse.[145] Society and nature have an interdependent relationship which is constantly in flux depending on various factors, including local and global economic, cultural, political, and other power dynamics.[146] Thus the epistemic basis of political ecology allows researchers to expose ways in which human social and political structures impact, and are impacted by, the environment.[147]

The latest wave of theorization from within political ecology imagines a *lex fernanda* that transcends the anthropocentric v. ecocentric debate entirely and, in so doing, creates space for integrating intersectional justice claims related to indigeneity, race, class, gender, and other identities that are readily papered over in the existing conversation. Discussions of the impact of humans (as a monolith) on nature (as a monolith) mask a more particularized reality: "[A] select number of people, and the processes of accumulation that they have set

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consider, for example, the environmental (and I would emphasize) human devastation caused by cobalt mining in the Katanga region of the Democratic Republic of Congo to secure the raw materials essential to the batteries of electric vehicles that promise to move entire transportation sectors off fossil fuel dependency. *See* SIDDHARTH KARA, COBALT RED: HOW THE BLOOD OF THE CONGO POWERS OUR LIVES (2023).

[143] Tănăsescu, *supra* note 55.

[144] Arturo Escobar, *Whose Knowledge, Whose Nature? Biodiversity, Conservation, and the Political Ecology of Social Movements*, 5 J. POL. ECOLOGY 53 (1998); *see also* THE HUMAN RELATIONSHIP TO NATURE: THE LIMIT OF REASON, THE BASIS OF VALUE, AND THE CRISIS OF ENVIRONMENTAL ETHICS 152, 257-58 (2016).

[145] Susan Paulson et al., *Locating the Political Ecology: An Introduction*, 62 HUMAN ORG. 205, 208-11 (2003); *see generally* Arturo Escobar, *supra* note 144, at 60-64, 74-76 (1998) (describing the ways in which cultural politics influence the debates surrounding biodiversity and the environment).

[146] Susan Paulson et al., *supra* note 145; PIERS BLAIKIE & HAROLD BROOKFIELD, LAND DEGRADATION AND SOCIETY 17 (1987).

[147] Susan Paulson et al., *supra* note 145, at 212-13 (2003); *see also* A. Fiona Mackenzie, *"A Farm is Like a Child Who Cannot be Left Unguarded": Gender, Land, and Labor in Central Province, Kenya* 26 INST. DEVELOPMENTAL STUDS. BULL. 17, 17, 22-23 (1995) (finding that the exercise of power in gendered struggles influenced land control and use in Kenya).

in motion, have altered the planet for everyone."[148]

The Panel's balancing test (represented at the top of Graph 3) forces a weighing of human benefit against environmental harm. But it does not force any consideration of *what* environments are harmed and *which* humans benefit (from those environments remaining intact, or from the destructive activities). Instead, it risks assuming an equivalence within these groupings of "humans" and "nature" that are not present in the real world.

Unless the inequalities distributed along the lines of race and gender, for example, are specifically acknowledged and accounted for then we can expect that the existing power dynamics and biases present in international law more generally will be incorporated, unacknowledged, into the balancing test.[149] This would mean, for example, an implicit bias toward valuing benefits to those humans that are already advantaged by existing power structures (often white, male, and property owning) while implicitly discounting benefits to those who are the most marginalized (often Indigenous communities and others on the periphery of access to political and economic capital).[150]

Of course, having human communities on both sides of the ledger of harm versus benefit in the face of environmental destruction, does not guarantee that the different positionality of those communities will be acknowledged. The pervasiveness of assumptions about human interchangeability remain ever present.[151] But on balance, it seems more likely that having to weigh one set of anthropocentric concerns (harm to particular human community/s as a consequence of environmental destruction) against another (benefit to the same or different human community/s as a consequence of environmental

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[148] Tănăsescu, *supra* note 55.
[149] *See generally* Karin Mickelson, *Critical Approaches in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 262, 285 (Daniel Bodansky et al. eds., 2008) (on the problems of the comparative dearth of criticism IEL has received even from critical international law scholars).
[150] Kate Mackintosh and Lisa Oldring do a fantastic job of fleshing out these inequalities in a forthcoming chapter. *See The Crime of Ecocide Through Humans Rights in* ECOCIDE: CRIMINALISING HARM AGAINST THE ENVIRONMENT (Burgers et al. eds.) (*forthcoming*) (on file with author). However they do not connect these issues to the more foundational point advanced in this article on the need to embrace the inseparability of humans from nature as a starting point, and thus miss the consequential impact that adopting this assumption would have on the likelihood of a prosecutor being able to use the human rights lens they rightly advocate in favor of. In other words, the amended definition proposed in this article would help with the implementation of the approach they propose.
[151] *See generally* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 3 (Kimberlé Williams Crenshaw et al. eds., 2019).

destruction), is likely to generate a more specific set of questions (exactly what kind of harms to which humans? and exactly what kind of benefits to which other humans?) than would be surfaced through a balancing test that weighs humans as a monolithic category on one side of the ledger, and nature as a monolithic category on the other.

V. Amending the Definition

The previous Part presented two possible scenarios moving forward. One scenario sees the Panel's balancing test move in an increasingly ecocentric direction while leaving unquestioned the separability position that it embeds. The other abandons this construction in favor an amended balancing test that sees humans as inseparable from the natural world. I argued in favor of this latter approach for two reasons. First, the inseparability of humans from nature reflects both long-standing Indigenous epistemologies as well as cutting-edge Earth science, emerging human rights jurisprudence, and growing social understanding. Second, adopting the inseparability position is more likely to surface the full range of ways in which human communities benefit from the natural systems that are being destroyed, to render visible the power differentials (along the lines of race, ethnicity, gender, and class) between the particular human community/s who benefit as compared to those who are harmed by environmental destruction and, as a result, to compel the legal system to account for how it treats those differences in determining whether a particular act causing environmental destruction falls inside the bounds of criminality.

Over the year-long process of developing my position in favor of amending the balancing test to embed the inseparability position, the primary critique I have encountered is the one that aligns with the position of many civil society activists; namely that including any balancing test undermines the goal of creating a crime that will protect nature for its intrinsic value. Hopefully readers at this point will be convinced that a criminal definition of ecocide will need some kind of safe harbor to account for the fact that all humans must use nature in order to survive, and that less industrialized countries in particular will have equity interests in the acknowledgment of this reality. Criminalizing all severe and/or widespread damage to the environment would task criminal law with the impossible burden of a radical and instantaneous re-imagining of what human existence on earth looks like. (For what it is worth, I believe such a radical re-imagining is desperately needed. However, to put this task upon ICL given the limitations fleshed out above, or to expect humans to re-order our way of life

overnight, is a recipe for failure.) The following grapples with the remaining counter-arguments that I have encountered. One is that my concerns about harm to human communities from environmental destruction can be accounted for without amending the Panel's balancing test; the other is that the definition should not include any balancing test, not for the same reasons (already canvassed above) that civil society activists oppose a balancing test, but because failing to specify prohibited conduct within the definition will bring ICL into conflict with the principle of legality.[152] After addressing these counter-arguments, the article reflects on the stakes of the ecocide definition for the future of international law, and for the habitability of our planet.

1. Counter-Arguments

a. The existing balancing test can be read to include harm to humans

One line of opposition to amending the balancing test to embed the view that humans are inseparable from nature, is that such an amendment is unnecessary. The existing balancing test can, without alteration, be read to assume that any severe and widespread/long-term damage to the environment will also harm humans, and there is nothing to stop prosecutors factoring human harm into their assessment of severe and widespread/long-term damage to the environment. There are two bases for this claim; the first comes from the preamble to the proposed definition, and the other draws on the practice of environmental economists.

In the Panel's proposed definition, they recommend including the following preambular language: "Concerned that the environment is daily threatened by severe destruction and deterioration, gravely endangering natural *and human* systems worldwide" (italics added).[153] As a result, one can argue that the Panel intended for harm to human systems to be accounted for within their definition of ecocide. In other words, there is no need to amend the language of the definition since prosecutors will read in the drafters' intent to account for harm to human systems by reference to the preambular language.

In addition, independent of the preambular language, those who conduct balancing tests as part of their regular work in the environmental space routinely account for harm to human communities as part of their assessment of the anticipated costs of a proposed development project. Environmental

[152] *See* Jason N.E. Varuhas, *The Principle of Legality*, 79 CAMBRIDGE L. J. 578, 578–79 (2020) (explaining that the principle of legality requires specificity in statutory language to prevail against norms).
[153] Expert Panel Definition, *supra* note 9.

Impact Assessments (EIAs) are the bread and butter of environmental economists and for this professional community the inclusion of projected harm to human communities as a result of the anticipated environmental damage caused by a proposed project is simply assumed.[154]

The Panel may well have intended for harm to human communities to be factored into the assessment of damage to the environment under their proposed balancing test and/or have assumed that the norms of practice among environmental economists would carry over to the practice of prosecuting ecocide. However, even if that was the Panel's intention, there are compelling reasons not to leave the requirement to account for harm to human communities unspecified in ecocide's definition.

International criminal lawyers tasked with conducting a balancing test cannot be assumed to absorb the norms of environmental economists – or any other group of professionals. Indeed, far from absorbing a practice that would require them to "read in" an additional requirement that is not spelled out in the statutory language, international criminal lawyers are more likely to actively avoid importing anything into the definition that is not already explicit in the text.

All lawyers have a keen eye for statutory language, but criminal lawyers in particular are trained to be concerned with the principle of legality given the importance of the rights of the accused in any criminal proceeding.[155] Indeed, if anything is to be assumed about how international criminal lawyers will conduct a balancing test, it must surely be that they will avoid reading in anything that is not specified and, to the extent there is any doubt, will interpret the text in the light most favorable to the accused.[156] This, of course, would augur in favor of keeping any additional harm resulting from the defendant's actions out of the balancing test. In sum, if the drafters want

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[154] *See* Richard K. Morgan, *Environmental Impact Assessment: The State of the Art*, 30 IMPACT ASSESSMENT & PROJECT APPRAISAL 5, 7–8 (2012) (discussing the different aspects of EIAs, all of which are human-centric in assessing impact).

[155] *See* Varuhas, *supra* note 152, at 579; *see also Nuremberg, Tokyo, and Other Postwar Cases, in* KENNETH N. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 67, 73-79 (James Crawford & John S. Bell eds., 2009) (discussing the international discourse regarding the principle of legality in the Nuremberg proceedings following World War II).

[156] United States v. Davis, 139 S. Ct. 2319, 2333 (2019); Achour v. France, App. No. 67335/01, ¶ 41 (Mar. 29, 2006), https://hudoc.echr.coe.int/?i=001-72927 ("[O]ffences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.").

prosecutors to account for harm to human communities from environmental destruction, it must be specified in the definition itself.

b. Balancing tests cause legality problems for ICL

The salience of the principle of legality for ICL reappears in relation to another line of opposition to amending the balancing test, which is that balancing tests are a bad idea for ICL in general. Balancing tests, as opposed to specified criminal acts, fail to give potential violators notice of what behavior is criminal.

The leading proponent of this critique is Dr. Matthew Gillet, who wrote a book on environmental harm under international criminal law in 2022.[157] Opposing the inclusion of any balancing test whatsoever, Gillett proposes an ecocide definition that specifies the particular acts that would be criminalized under the definition including, for example "damaging or destroying ecosystems or wild animal habitats."[158]

Concerns about the principle of legality are well taken. No matter how comprehensively the harms or benefits to be accounted for in a balancing test are articulated, there will still be a significant element of discretion in how a prosecutor weighs those interests.[159] With no way of knowing how prosecutors will exercise that discretion, potential wrongdoers are left without useful guidance on how to conform their behavior avoid sanction. Still, in seeking to cabin one form of prosecutorial discretion, the proposal to replace a balancing test with a list of prohibited acts inadvertently creates an even bigger discretion problem.

As discussed above, international prosecutors investigate only a fraction of international crimes committed. They do not – and never will – have the resources to pursue all allegations. Moreover pursuing all allegations would undermine the role of international criminal prosecutions, which is to serve as a backstop or supplement to domestic prosecutions, not a substitute for them.[160]

Presenting a list of prohibited actions gives the appearance of reducing the problem of legality. And, if it were the case that most instances falling within

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157 MATTHEW GILLETT, PROSECUTING ENVIRONMENTAL HARM BEFORE THE INTERNATIONAL CRIMINAL COURT (2022).
158 *Id.* at 438–50.
159 *See infra* Part II (1).
160 *See* Paul Seils, *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor, in* 2 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE, 989 (Carsten Stahn & Mohamed M. El Zeidy eds.,) 2011.

the list of prohibited actions were actually prosecuted, or if only a few instances were prosecuted but every act on the list described inherently criminal activity, then the list could serve a useful guide for what behavior to avoid. However, the core challenge of ecocide is that so much of the behavior that one might put on a list of prohibited acts, encompasses vast swathes of human activity. Building a major sewage system, for instance, involves "damaging or destroying ecosystems" just as readily as logging an old growth forest does. The selection of which of the many potential cases to pursue is left entirely in the hands of the prosecutor. The list of prohibited actions approach then does not actually manage to overcome the problem of legality, so much as to give the superficial appearance of doing so. In practice, it still fails to provide potential wrongdoers with any way of determining in advance what behavior will avoid sanction.

Ultimately, there is no way of getting around the problem that humans do and, for the imaginable future at least, will undertake activity that harms the environment; any effort to define ecocide must contend with this reality. Both a balancing test approach and a list of prohibited actions approach leave it to a prosecutor's discretion to determine which of many potential acts of environmental destruction that humans undertake should, in practice, be prosecuted. As compared to leaving it to prosecutorial discretion to select acts from an over-inclusive list, a sufficiently rigorous balancing test at least pushes a prosecutor to grapple more transparently with the dilemma and acknowledge the trade-offs involved.

2. Implementing the balancing test

Even if one agrees, in principle, that a balancing test is the least-bad option available for bringing ecocide into the realm of ICL and further agrees in principle with this article's argument that any balancing test should embed the inseparability of humans from nature, the practice of developing a case using an amended balancing test remains fiendishly complex.

As addressed above, the balancing test for ecocide is drawn from IEL where such balancing work is commonplace. By contrast, balancing tests are extremely rare in ICL. One could imagine international prosecutors being given the resources to bring consultants with expertise in conducting environmental balancing tests into their case teams. Yet this remains an imperfect solution.

Typically, EIAs balance the anticipated harms versus benefits of a future project in order to advise on whether a project should go forward and/or what

changes would need to be made before it can proceed.[161] The Panel's definition of ecocide carries this same prospective lens to the benefits side of the equation ("the social and economic benefits *anticipated*"). This accounts for the possibility that an act of environmental destruction is halted – by the advent of a prosecution or otherwise – in advance of any benefits actually being delivered on. And it keeps this side of the balancing test squarely within the skill set of environmental professionals who routinely look at the anticipated benefits of a project when developing an EIA. The picture differs, however, when it comes to the harm side of the equation.

In theory, the harm side of the equation could be prospective also. Indeed the Expert Panel intended for ecocide to be prosecuted in advance of any environmental destruction actually occurring. But inchoate crimes are challenging to prosecute and with no shortage of cases where severe and widespread/long-term damage to the environment has already occurred, it seems virtually certain that prosecutors will be assessing harm retrospectively. This is something that those who work on EIAs have much less experience with. Of course, interviewing victims and gathering evidence of harm is standard practice for international criminal lawyers. Yet, short of scrutinizing the decisions of military commanders in relation to alleged war crimes that violate the proportionality requirements of the laws of war, prosecutors are not generally tasked with considering how the harms they document are weighed against the potential benefits that other individuals or groups of people can have been expected to receive. Thus, even after bringing in environmental expertise, ecocide prosecutions will require international prosecutors to undertake new practices that will take time to develop, routinize, and legitimate.

3. Ecocide as a normative battleground

The dominance of Western states in shaping a field of international law is not unique to IEL - indeed it is pervasive across all parts of international law.[162] If past is prologue, then one would expect that powerful states will continue to have an outsized role in defining the normative underpinnings of international law, and will continue to uphold the status quo unless or until such

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[161] *EIA: What? Why? When?*, INT'L INST. FOR SUSTAINABLE DEV., https://www.iisd.org/learning/eia/eia-essentials/what-why-when/ (last visited Apr. 19, 2024).
[162] *See, e.g.*, ANTONY ANGHIE, Imperialism, Sovereignty and the Making of International Law (2005); ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017).

time as events generate a change in their perceived or actual interests. This portends a contested future for the proposed definition of ecocide.

Powerful states and economically powerful corporations, supported by states that are seeking to replicate the successes of industrialization, have a vested interest in regulating behavior on the basis of a view that sees humans as separable from nature. Such a view enables development through environmental destruction to continue to be justified on the basis of human benefit. Retaining the separability viewpoint means that the human harm that inevitably accompanies environmental destruction can be kept out of sight.

The Panel's balancing test, which is premised on this separability position, risks both undervaluing the continuous and long-term benefits that humans gain from healthy and functioning ecosystems, and rendering invisible the less proximate harms that flow from environmental destruction. Functioning ecosystems are the foundation on which human communities and systems are built.[163] The costs that ecosystem collapses pose to food chains, agricultural systems, water quality, hydrological cycles, local temperature regulation, coastal erosion and flooding are only recently achieving mainstream recognition; and our understanding of these is still evolving. Failure to explicitly include these less immediately visible human harms from the calculus of ecocide would lock in a definition that embeds a regressive view of scientific knowledge, dismisses Indigenous epistemologies, works against emerging human rights jurisprudence, and slows evolving social and moral understandings of the inseparability of humans from nature.

Over time, the states that have already benefited from industrialization may, pushed by climate activists and in the face of major climate events reaching their populations, move in an ecocentric direction. But, as addressed above this can happen with the separability position remaining intact. Such a scenario accords perfectly well with the proposed definition of ecocide and its current balancing test (see the upper portion of Graph 3). Furthermore, the current balancing test can readily subsume existing power dynamics to render visible the benefits of environmental destruction to certain current and proximate human communities, without forcing consideration of the harms to marginalized

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[163] The persistent erasure of the value humans derive from a functional ecosystem has spurred efforts to remedy the problem by pricing the contribution of "ecosystem services." *See generally Ecosystems Services Research*, EPA, https://www.epa.gov/eco-research/ecosystem-services-research#:~:text=Ecosystem%20goods%20and%20services%20produce,and%20often%20taken%20for%20granted (Oct. 31, 2023). *But see* M. Schröter et al., *Ecosystem Services as a Contested Concept: A Synthesis of Critique and Counter-Arguments*, 7 CONSERVATION LETTERS 514 (2014).

and/or geographically or temporally distant human communities.

There is no reason to imagine that those who support the status quo will move for change of their own accord. Yet consideration of ecocide, perhaps more than any other issue, presents the possibility (indeed, probability) of externally-forced reassessment. There is a future, marked by catastrophic climate events and major human and non-human suffering, in which humanity is so visibly inseparable from the natural environment that it makes no longer makes sense to prioritize harms to one over harms to the other. Should this be the case then one would hope that an internationally codified crime of ecocide would express this normativity by embedding within its definition an understanding of the inseparability of humans from nature.

4. Conclusion

International law, like other areas of law, is intertwined with the historical, social, and political environment from which it has arisen. And as these material factors shift, so too does the construction of the law. Environmental degradation is upending all aspects of life on our planet. It would be surprising, and deeply disappointing, if international law did not evolve to reflect this changing reality. If ecocide embeds a position that sees humans as separable from nature it slows this transformative process. Indeed, failure to have hard conversations about the normative foundations of ecocide now risks the criminalization project proceeding with a definition that sets in stone assumptions that undermine the ultimate goals of those seeking ecocide's criminalization.

This trajectory, however, is not inevitable. Ecocide could instead embed a normative vision grounded upon the inseparability of humans from nature. In the most optimistic accounting this reconceptualization could filter out into society more generally. In so doing, this re-imagining could align international law with longstanding Indigenous epistemologies, emerging human rights jurisprudence and public discourse, as well as the latest in Earth science. Humans *are* inseparable from nature. It is not too late for an international crime of ecocide to reflect this reality.