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Ecocide and Animals: extracting a framework for discussion from the work of Polly Higgins, Damien Short and Nigel South

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Ecocide and Animals: extracting a framework for discussion from the work of Polly Higgins, Damien Short and Nigel South'

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"There was a moment in recent years when a law to prevent mass damage or destruction affecting the environment had a name and was very nearly adopted at an international level to be embraced both in peace-time and war-time."²

The name of the law mentioned in the above quote is ecocide. This dialogue paper attempts to capture the discussion on ecocide and its relevance to animal law that took place during a SCELG discussion group

session focused on an article by Polly Higgins, Damien Short and Nigel South entitled '*Protecting the planet: a proposal for a law of ecocide*'.³ In their article, Higgins, Short and South set out an interesting history of the law of ecocide and its institutional history.⁴ They also place ecocide in its wider legal context and clearly explain what ecocide is, why a law of ecocide is needed and what the law of ecocide hopes to achieve.

This dialogue will summarise Higgins, Short and South's work before discussing the issues it raises for animals. Polly Higgins sadly died in 2019 but she has left behind a body of work and a stream of advocacy arguing for a crime of ecocide, which is now being taken forward by Jojo Mehta and the Stop Ecocide campaign and discussed in a growing list of countries including Vanuatu, France,⁵ and more recently also Belgium,⁶ which committed at the international level to 'research and take diplomatic initiatives aimed at halting the crime of ecocide, which is to say the conscious destruction of ecosystems'.⁷ Individuals are also pressuring governments to take further steps for the recognition of a crime of ecocide, from Greta Thunberg⁸ to the Pope⁹ as well as many non-governmental organisations.

What is Ecocide?

Whilst the definition of ecocide is still being defined,¹⁰ a starting point is the definition set out by Higgins et al.,

(A)s extensive damage, destruction or loss of ecosystem(s), whether by human agency or by other [natural] causes, to such an extent that peaceful

¹ A version of this discussion paper was given at the Conference on Animal Law, Ethics and Policy 2019 hosted by LJMU Law School and The UK Centre for Animal Law (A-LAW). See Debbie Legge and Simon Brooman, 'Reflecting on 25 Years of Teaching Animal Law: Is it Time for an International Crime of Animal Ecocide?' (2020) 41 Liverpool Law Review 201–218. Also, it formed part of the bite size lecture by Dr Debbie Legge on Ecocide and Protection of Animal Habitats part of the second series on Animals, Social Justice and Interconnectedness, by A-LAW on 16 November 2020.

² Polly Higgins, Damien Short, Nigel South, 'Protecting the planet: a proposal for a law of ecocide' (2013) 59(3) Crime Law Social Change 264

³ Ibid 251.

⁴ Ibid 256–262.

⁵ Jonathan Watts, 'Polly Higgins, lawyer who fought for recognition of 'ecocide', dies aged 50' *The Guardian*, (London, 22nd April 2019).

⁶ "Criminal law to the rescue" (*Stop Ecocide*, 1 October 2020) <<https://www.stopecocide.earth/press-releases->

[summary/belgium-pledges-diplomatic-action-to-halt-ecocide-crime](https://www.stopecocide.earth/press-releases-summary/belgium-pledges-diplomatic-action-to-halt-ecocide-crime)> accessed 13 April 2021.

⁷ Paul Magnette and Alexander De Croo, 'Rapport des formateurs / Verslag van de formateurs' (30 September 2020), 78, para 5 <<https://bx1.be/wp-content/uploads/2020/09/20200930-Rapport-des-formateurs-.pdf>> accessed 13 April 2021.

⁸ 'Greta gives prize money to Stop Ecocide' (*The Ecologist*, 24 July 2020) <<https://theecologist.org/2020/jul/24/greta-gives-prize-money-stop-ecocide>> accessed 13 April 2021.

⁹ Wesley J Smith, 'Pope supports classifying 'Ecocide' as an international crime', (*National Review*, 17 September 2020) <<https://www.nationalreview.com/corner/pope-supports-classifying-ecocide-as-an-international-crime/>> accessed 13 April 2021.

¹⁰ Owen Bowcott, 'International lawyers draft plan to criminalise ecosystem destruction' (*The Guardian*, 30 November 2020) <<https://www.theguardian.com/law/2020/nov/30/international-lawyers-draft-plan-to-criminalise-ecosystem-destruction>> accessed 13 April 2021.

enjoyment by the inhabitants of that territory has been severely diminished.¹¹

Through this definition, Higgins identifies two types of ecocide: human caused (“ascertainable”) and nature caused (“non-ascertainable”). Non-ascertainable ecocide includes ‘consequence or potential consequence, where there is destruction, damage or loss to the territory *per se*, but without specific identification of cause as being that which has been created by specific human activity.’ Examples of this would include, *inter alia*, hurricanes and volcanic eruptions,¹² whereas ascertainable ecocide includes ‘consequence or potential consequence, where there is destruction, damage or loss to the territory, and liability of the legal person(s) can be determined.’ Examples of ascertainable ecocide include the destruction of the Amazonian rainforest and polluted waters. Prosecuting a crime of ecocide will, however, require the identification of responsible actors who caused the damage in question. The central idea here is that ecocide ‘targets harms created by human actions or omissions.’¹³ Nevertheless, considering the ample evidence that exists in respect of the impact of human activities on the Earth’s ecosystem, certain natural disasters can be closely associated with human activities, thereby potentially extending the responsibility of individuals to more diverse natural disasters such as floods caused by deforestation or ‘natural’ disasters arising from climate change.

The proposal to internationalise Ecocide as a crime

Whilst several countries have incorporated a crime of ecocide into their penal codes, there is a pressing need for an international crime of ecocide. Criminalising ecocide at the international level is necessary because, whilst some international and domestic legal responses to the challenges set out above have

been developed, the, ‘system of governance is weak and dependent upon models of deregulation and voluntary compliance.’¹⁴ Issues of regulatory capture and trivialisation also abound.¹⁵ Because of this, a more rigorous and effective legal tool is required. Such a tool could come in the form of an international crime of ecocide set out under the Treaty of Rome and enforced by the International Criminal Court (ICC).

The ICC was set up under the Rome Statute 1998 which was ratified by 60 states in 2002. The ICC ‘investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression.’¹⁶ Investigations under the ICC can be made under Article 13 of the Rome Statute in three ways; referral of a situation by a state party (Article 14), by the Security Council or the Prosecutor (Article 15): (*proprio motu*).

The Rome Statute could and moreover should be amended to include an international crime of ecocide. The legal process for amending the Rome Statute¹⁷ is, in brief, that any state which has ratified the Rome Statute of the International Criminal Court (ICC)¹⁸ may propose an amendment. A majority of those present and voting at the next annual assembly of the ICC then need to agree that the amendment can be considered. Adoption into the Rome Statute requires at least a 2/3 majority of State Parties in favour of the amendment.

Polly Higgins proposed an international law of ecocide to the UN International Law Commission in 2010. This was not the first call for such a crime to be created. In 1970 Professor Galston proposed an international agreement to ban ecocide at the Conference on War and National Responsibility¹⁹ and in 1973 Richard Falk²⁰ prepared a draft International Convention on the Crime of Ecocide as part of a review eval-

¹¹ Higgins et al (n 2) 257.

¹² Polly Higgins, ‘Eradicating Ecocide: Exposing the corporate and political practices destroying the planet and proposing the laws needed to eradicate ecocide (Shepherd-Walwyn Publishers 2016), 63.

¹³ Anastacia Greene, ‘The campaign to make ecocide an international crime: Quixotic Quest or Moral imperative?’ (2019) 30(1) Fordham Environmental law review, 4 <<https://ir.lawnet.fordham.edu/elr/vol30/iss3/1/>> accessed 13 April 2021.

¹⁴ Higgins et al (n 2) 254.

¹⁵ Ibid 254.

¹⁶ ‘About’ (International Criminal Court) <<https://www.icc-cpi.int/about>> accessed 13 April 2021.

¹⁷ ‘Making Ecocide a Crime’ (*Stop Ecocide*)

<<https://www.stopecocide.earth/making-ecocide-a-crime>> accessed 13 April 2021.

¹⁸ Rome Statute for the international criminal court (17th July 1998) 2187 UNTS 3 <<https://legal.un.org/icc/statute/rome.htm>> accessed 13 April 2021. The treaty serves as the ICC’s guiding legal instrument, which is elaborated in such other legal texts as the Elements of Crimes, Rules of Procedure and Evidence and more.

¹⁹ Higgins et al (n 2) 256.

²⁰ Ibid 257. Originally, the proposal to codify a crime of ecocide in international law was made by Richard Falk as

uating the effectiveness of the Genocide Convention.²¹ Whilst there is limited liability for ecological destruction during war time, a draft International Convention on the Crime of Ecocide would have extended this to peacetime but was not put to the vote.²² There are now growing calls for ecocide to become the fifth crime against peace.²³ To this extent, a drafting panel co-chaired by international lawyers Philippe Sands QC and Dior Fall Sow has recently been created in order to define ecocide as a potential international crime alongside war crimes, genocide and crimes against humanity. Its preparatory work was launched in November 2020 and is expected to set a draft definition of ecocide within the next few months.²⁴

Jojo Mehta outlines several key advantages in using the Rome Statute to institute an international crime of ecocide:

First, it provides for a relatively faster process than creating a completely new international convention on ecocide. Additionally, member states under the Rome Statute have equal voting powers. There is no veto, even from more influential countries, and ecocide can be pushed forward by vulnerable countries as any state can propose an amendment. Indeed, we can see this in action with respect to the Republic of Maldives and Vanuatu which in 2019 called the court to consider amending its Statute to include a crime of ecocide.²⁵ Finally, once the amendment is adopted and ratified by member states, the latter will have to incorporate the new crime into their domestic legislation. This will help create more coherence in the law across borders, which is essential for a crime that is largely transboundary.²⁶

a reaction to the military operations carried out by the US with Agent Orange in the Vietnam War. See Richard A Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals' (1973) 4 Bulletin of Peace Proposals 80.

²¹ Higgins et al (n 2) 259.

²² Higgins et al (n 2) set out in some detail the history of this decision.

²³ Rome Statute (n 18).

²⁴ 'Top international lawyers to draft definition of "Ecocide" 75 years after Crimes Against Humanity and Genocide coined at Nuremberg' (*Stop Ecocide*) <<https://www.stopecocide.earth/expert-drafting-panel>> accessed 14 April 2021.

²⁵ 'Sovereign states call on ICC to seriously consider ecocide crime' (*Stop Ecocide*, 19 December 2019) <<https://www.stopecocide.earth/newsletter-summary/sovereign-states-call-on-icc-to-seriously-consider-ecocide-crime>> accessed 13 April 2021.

Why is ecocide of relevance for animals?

The article by Higgins et al provides examples of environmental harm and crime. The main harms identified are water and air pollution, deforestation and spoiling of the land, and crimes and harms against animals/non-human species. Whilst the first three obviously have impacts on animals/non-human species, the impacts listed under this heading include the 'abuse, mistreatment or death of animals' which can be caused by war, catastrophe, oil spills, deforestation, medical experiments, farming, clearance of land for development, water and air pollution, soil erosion, climate change, wildlife trafficking, and biodiversity.²⁷

These harms highlight the interdependence of environmental destruction and animals lives and welfare. A recent example is the wildfires in Australia, which led to the death and injury of millions of animals, as visually represented by koalas in need of rescue.²⁸ Perhaps the most cited interaction between environmental destruction and animals is the effect of animal agriculture. Farm animals are victims of climate change as they are often killed in floods or heatwaves. However, animal agriculture is also a contributing factor to climate change through clearing of land for both the animals and their food.²⁹

Another prominent and well-known effect of environmental destruction on animals is the impact of plastic and other pollution on sea life.³⁰ More generally, it can also be said that the loss of habitat and ecosystems, as well as worsening the impact of climate change, has a profound impact on animals due to a loss of food. While outside the scope of this dialogue, this poses difficult questions such as whether to preserve individual species in zoos and other institutions

²⁶ See presentation by Jojo Mehta on the Launch of Ecocide law Finland: 'Ecocide -Lakialoite Esittelyssä Ja Allekirjoitettavana' (*Helinä Rautavaaran Museo*) <<http://helinamuseo.fi/ecocide-lakialoite/>> accessed 13 April 2021.

²⁷ Higgins et al (n 2) 254.

²⁸ Lisa Cox, 'Expert panel says 113 species need urgent attention after Australia's bush fires' (*The Guardian*, 11 February 2020) <<https://www.theguardian.com/australia-news/2020/feb/11/expert-panel-says-113-species-need-urgent-attention-after-australias-bushfires>> accessed 26 May 2020.

²⁹ James Cameron and Suzy Amis Cameron, 'Animal agriculture is choking the Earth and making us sick. We must act now' (*The Guardian*, 4 December 2017).

³⁰ Dani Ellenby, 'The five: species affected by plastic pollution' (*The Guardian*, 4 August 2019) <<https://www.theguardian.com/environment/2019/aug/04/five-species-affected-by-plastic-pollution>> accessed 13 April 2021.

(where animals can still be vulnerable to severe weather events) or to protect the habitats.³¹

The benefits of an international crime of ecocide

While there are international laws which aim to protect wildlife, they are often focused on one habitat or species and do not reflect the interconnectedness of the issues outlined above. In addition, while the procedure engaged before the ICC focuses on the responsibility of individuals (and not States or corporations), prosecuting an international crime of ecocide helps to impose greater responsibility on the private sector as well as national governments by making decision makers or 'any senior person who perpetrated ecocide within the course of State, corporate or any other entity's activity'³² accountable for their actions or omissions with possible arrest, prosecution and imprisonment. This would no doubt ensure that private companies consider the financial as well as other consequences of harmful environmental practices.³³

Higgins et al. suggest that environmental crimes and harms need to be 'responded to through both formal and informal means of resolution and restoration underpinned by an internationally applicable framework'.³⁴ Higgins et al. argue that formal means of resolution should place responsibility on persons, not legal entities. So, preventing ecocide would be the responsibility of all actors, including business as well as governments, thus ensuring any harmful business practice, financing or investment could be brought to an end.³⁵ Other authors have also suggested the adoption of a regime that reflects the responsibility of corporations, which, it can be argued, are the main perpetrators of environmental damage.³⁶

Focusing on the responsibility of individuals has essential advantages. Indeed, as highlighted by Jojo Mehta, using the ICC to prosecute a crime of ecocide

can target decision makers such as business CEOs and government ministers directly. In respect of the former, they would not be able to hide behind the corporate veil any longer and who would face the consequences of their decisions via criminal procedures, which also adds a high level of shame. Multinational corporations often include in their budget a possible reparation of environmental damages and the costs of lawsuits and 'if that expense is outweighed by profit, the pollution can still be worthwhile'.³⁷ Criminal liability could mitigate against business utilising such a crude cost-benefit analysis based solely upon consideration of financial costs.³⁸

Conceptually, the proposal for an international law prohibiting ecocide would be centred on restorative justice.³⁹ It would be based on 'mutual engagement and shared learning' and so would focus on a 'duty to remedy the harm caused' rather than 'punishment of the perpetrator'.⁴⁰ For Higgins et al, the importance of this lies in the fact that an international crime of ecocide would be part of wider calls for legal and political change to protect the earth. The creation of an international crime of ecocide would also produce a deterrent effect. Punishment would be a last resort. The idea behind a combination of the stick of the crime of ecocide with the carrot of restorative justice is to change behaviour so that the law encourages preventative behaviour to stop damage rather than being reactive, with prosecution after the event when the damage has already been done.⁴¹ Normatively, this idea sits well with the ICC and is already reflected in the work of the ICC in that,

The Court is participating in a global fight to end impunity, and through international criminal justice, the Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again.⁴²

The importance of this in respect of both the environment and animals can be seen in relation to the concern that, 'deep water oil operations, combined with the loosening of Obama-era rules', in the USA could

³¹ Andrew North, 'The tragedy of Tbilisi zoo – what happened next?' (*The Guardian*, 8 July 2015) <<https://www.theguardian.com/world/2015/jul/08/the-tragedy-of-tbilisi-zoo-what-happened-next-georgian-capital>> accessed 13 April 2021.

³² Greene (n 13) 3.

³³ Kalyeena Makortof, 'Call to make climate risk reports mandatory for 480 FTSE firms, say investors' (*The Guardian*, 19 October 2020) <<https://www.theguardian.com/environment/2020/oct/19/call-climate-risk-reports-mandatory-ftse-listed-firms>> accessed 13 April 2021.

³⁴ Higgins et al (n 2) 252.

³⁵ Ibid.

³⁶ Laurent Neyret (dir), *Des écocrimes à l'écocide, le droit pénal au secours de l'environnement*, (Bruylant 2015) 308

³⁷ Greene (n 13) 31.

³⁸ Mehta (n 25).

³⁹ Higgins et al (n 2) 255. Liz Rivers, 'Shareholder return - a Nuremberg defence - Ecocide and Restorative Justice' (2012) 24(1) *Environmental Law and Management* 17.

⁴⁰ Higgins et al (n 2) 255 citing Higgins (n 12) 143.

⁴¹ Ibid 263.

⁴² 'About' (n 16).

lead to a repeat of the deep water spill that 'devastated marine life'.⁴³ Even if actors in the USA cannot be prosecuted under the ICC as it is not a signatory to the Rome Statute, other relevant countries are. Accordingly, the activities of Royal Dutch Shell in sub-Saharan Africa could constitute the crime of ecocide and thereby help to ensure that regulatory roll back and problematic company practices would not lead to these sorts of devastating events: they would be prevented rather than being mitigated after the event.

For actors in countries such as the USA, which, as stated above, is not a signatory to the Rome Statute, creation of the international crime of ecocide could still provide a moral justification that such practices are illegal, thereby encouraging behavioural change. This is because when considering certain actions as a crime, we draw a 'moral red line' and can 'shift the cultural mindset as well as the legal reality'.⁴⁴ This can, in the case of ecocide, impose stronger considerations of environmental protections and obligations when issuing permits or authorisations of activities particularly harmful to the environment. In the current globalised world, this moral red line can still exercise a relative influence on non-signatory countries or activities of individuals from these countries. Indeed, the fact that the US, Russia or China have not ratified the Rome Statute, does not mean that American, Russian or Chinese individuals cannot be prosecuted before the court. The ICC can exercise its competence over nationals of one of the States parties or when the *crime was committed on the territory of a State Party*, for crimes of genocide, crimes against humanity and war crimes.⁴⁵ In other words, applied to the crime of ecocide, a national from a non-State party can still be prosecuted if they conduct, organise or operate activities on the territory of a State party. This can have a considerable influence, notably on multinationals.

An international crime of ecocide can sit alongside national laws to protect animals and wildlife, it can be used to provide a template for national laws. The Rome Statute defines the jurisdiction of the ICC as "complementary" to national criminal jurisdictions. But ultimately it sits above national law to provide a supranational criminal offence to provide deterrence, restoration and ultimately punishment.

Is the ICC the right court to use?

The ICC has enforced the Rome Statute in several cases.⁴⁶ However there are several arguments to be raised about the effectiveness of the Court⁴⁷ and specifically in relation to prosecuting a crime of ecocide. Greene sets out several issues, including the historic basis for the court being centred on human rights that were already in existence and just brought under the umbrella of the International Criminal Court.⁴⁸ She questions whether the ICC has the knowledge or expertise to deal with ecocide and whether including a crime of ecocide may diminish the core crimes of war crimes, crimes against humanity, crimes against peace (aggression), and the crime of genocide. She also considers the jurisdictional issue set out above that the USA, Russia, China, and India have not signed the Rome Statute.⁴⁹ Greene also argues that the proposal has feasibility issues. Criticisms have also been made of the functioning of the ICC, particularly for its focus on African cases.⁵⁰ Greene sets out several examples of alternatives to a law on ecocide including: making it a transnational crime, or enforceable in domestic courts, or including it under the auspices of the International Court of Justice or finally, to enforce protections under human rights law. Some of

⁴³ Emily Holden 'deepwater-horizon-10-years-later-could-it-happen-again' (*The Guardian*, 20 April 2020) <<https://www.theguardian.com/environment/2020/apr/20/deepwater-horizon-10-years-later-could-it-happen-again>> accessed 13 April 2021.

⁴⁴ See Mehta (n 25).

⁴⁵ 'International Criminal Court' (*International Criminal Court*) <<https://ijrcenter.org/international-criminal-law/international-criminal-court/#:~:text=The%20ICC%20has%20the%20competence,involvement%20submits%20a%20declaration%20authorizing>> accessed 13 April 2021.

⁴⁶ "There have thus far been 28 cases before the Court, with some cases having more than one suspect. ICC judges have issued 35 arrest warrants. Thanks to cooperation from States, 17 people have been detained in the

ICC detention centre and have appeared before the Court. 14 people remain at large. Charges have been dropped against 3 people due to their deaths. ICC judges have also issued 9 summonses to appear. The judges have issued 8 convictions and 4 acquittals. See <https://www.icc-cpi.int/about>.

⁴⁷ Rita Mutyaba, 'An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court's Objective in Securing Suspects in its Ongoing Investigations and Prosecutions' (2013) 12(5) *International Criminal Law Review* 937–962.

⁴⁸ Greene (n 13) 1-48.

⁴⁹ Ibid 32-49.

⁵⁰ Tim Lindgren, 'Ecocide, genocide and the disregard of alternative life-systems' (2018) 22(4) *The International Journal of Human Rights* 525, 540.

these and other mechanisms have been used successfully in environmental litigation.⁵¹

It may well be that an international law on ecocide to sidestep the issues of *mens rea* and causation inherent in the Rome Statute could be developed as a new crime under an International Environmental Court with the necessary expertise and a focus on restorative justice which again may not sit as well with the crimes already prosecuted under the Rome Treaty. An International Environmental Court could bring the necessary expertise 'to bear on complex and technical matters that are often unfamiliar when introduced and processed through the traditional courts'.⁵² An International Environmental Court could also be opened to different actors, for example, to develop the possibility of prosecuting corporations. However, the development of an International Environmental Court may suffer from the same issues as set out above, in terms of jurisdiction and feasibility,⁵³ so working with what is already there through the ICC and Rome Statute may be the best way forward. Whatever court deals with an international crime of ecocide, there are some conceptual issues still to be resolved of causation and intention. These are discussed more fully below.

Causation

Ecocide is usually not caused by one event, but rather through a series of actions or omissions and interactions between the different elements of the Earth system. Yet it is essential to demonstrate that the perpetrator of the alleged crime 'have caused severe, widespread, long-term harm to the environment.' It could hence in certain circumstances (like climate change, destruction of coral reefs etc.), 'be very difficult to establish that any one act caused environmental damage for purposes of criminal liability'.⁵⁴

For example, could cumulative damage add up to an overall significant damage and, therefore, qualify as ecocide? Who has caused the ecocide? For example, there are concerns that '(t)hose living in less developed countries often have no other choice but to farm cattle or grow products that result in deforestation. It could be the only way to feed their families or earn a living.' Whilst '(t)he **demand for products** that cause ecosystem harm, such as deforestation, often comes from richer countries. This includes pressure for products like cheap beef and soya'.⁵⁵ If ecocide is an international crime this could promote collective responsibility and accountability in terms of a deterrent and could help to draw attention to the interconnectedness of our actions. A collective consciousness would strengthen obligations of assistance and prevention.⁵⁶ The collective consciousness would be particularly important in cases of shared biodiversity and migratory species, as small disturbances in different countries can have dramatic cumulative effects on an entire species. If we are all to blame for the systemic causes of ecocide then it will help us to change our behaviour. The prosecution of ecocide could then be used for the most devastating events that could be said to be caused by identifiable persons.

Intention

It is suggested by Higgins et al. that the international crime of ecocide be one of strict liability.⁵⁷ Intention has long been integrated into criminal law based on the maxim *actus non facit reum, nisi mens sit rea* (an act is not necessarily a guilty act unless the accused has the necessary state of mind required for that offence).⁵⁸

The Rome Statute of the ICC follows this line by stating that 'unless otherwise provided, a person shall be criminally responsible and liable for punishment for a

⁵¹ See Brooman and Legge (n 1) and United Nations. 2017. Report: M Burger, J Gundlach, A Kreilhuber, L Ognibene, A Kariuki and A Gachie, 'The status of climate change litigation: A global review' (United Nations Environment Programme 2017) <<https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence=1&isAllowed=y>> accessed 13 April 2021.

⁵² Higgins et al (n 2) 263.

⁵³ Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press 2014).

⁵⁴ See Alessandra Mistura, 'Is There Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case

Selection and Prioritization on the Current Legal Framework' (2018) 43 Columbia Journal of Environmental Law 181, 191 and 201. See also Greene (n 13) 34-5.

⁵⁵ Ellen McHale, 'What is ecocide' (*Kew Royal Botanic Gardens*, 15 October 2020) <<https://www.kew.org/read-and-watch/what-is-ecocide>> accessed 13 April 2021.

⁵⁶ Higgins et al (n 2) 263.

⁵⁷ Higgins et al (n2) 262.

⁵⁸ Jonathan Law and Elisabeth A Martin, *A Dictionary of Law* (7th ed, Oxford University Press 2009): most criminal offences require (1) an *actus reus* (conduct external to the defendant's thoughts and intentions) and (2) a *mens rea* (a specific state of mind on the part of the accused).

crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge'.⁵⁹ The integration of the exception 'unless otherwise provided', could provide for a way out of the need for intention for a crime of ecocide.⁶⁰ The contested nature of its inclusion in former discussions on the issue is set out by Higgins et al.⁶¹

None of the countries that recognise a crime of ecocide in their domestic legislation impose 'a test of intent'.⁶² This is because 'most corporate ecocide is not intended'.⁶³ Requiring intention for the prosecution of a crime of ecocide would empty the notion of its meaning and permit perpetrators to hide behind 'the defence 'I did not know''.⁶⁴ Instances of ecocide are not examples of an intention to destroy the Earth. Rather, ecocide is typically the by-product of efforts to improve economic growth. Thus, requiring intention to prosecute ecocide would permit existing damage to continue. Foregoing the requirement of intention could strengthen the protection of endangered species by deeming defences of ignorance about endangered status or other economic justifications to be irrelevant.

Recognising legal precedent from domestic law and aiming for enforceability would require that the definition of an international crime of ecocide includes unintentional consequences and actions committed unconsciously. If ecocide is 'a crime of strict liability'⁶⁵ in order to improve accountability in environmental law⁶⁶ then it is essential to preserve the exceptional character of the crime of ecocide. Hence, the damage caused needs to be significant enough to call for serious prosecution. This significance could be defined through its widespread and long-lasting effect as well as its severity (defined as 'serious or significant disruption or harm to human life, natural and economic

resources or other assets').⁶⁷ Indeed, not all instances of environmental damage qualify as ecocide. To this extent, there should be a distinction made between wild and domestic animals. In case of crimes against wild animals, the disappearance of an entire species by massive killing or killing or endangered species could be considered as an ecocide, even if the primary intention was not to kill these species (as for instance in the case of destruction of forest for palm trees plantation killing the habitat of Orangutan) whereas welfare issues in relation to domestic or farmed animals would not be included.⁶⁸

Conclusion

Since publication of Higgins et al.'s article, the issues set out above have been debated with increasing urgency due to the ever more visible impacts of climate change on our ecosystems and weather. Climate change impacts animals in a myriad of ways, as set out above. An international crime of ecocide may help us frame the debate as we move forward. The need asserted by Higgins et al. for a restorative and preventative law, reflects the argument that at present in many countries law focuses on human interests over the natural world.⁶⁹ This forms part of a wider discussion of what law is and what it ought to be.⁷⁰ It could help us to focus our minds on the changes needed to protect our planet through the development of the law by moving away from its current anthropocentric⁷¹ approach to the natural world, and so encompass the protection of wild animals as significant actors both within ecosystems and in their own right.⁷²

⁵⁹ Rome Statute (n 18), art 30.

⁶⁰ Johan D Van der Vyver, 'The international Criminal Court and the concept of Mens Rea in international criminal law' (2004) 12(1) University of Miami International and Comparative Law Review 57, 66.

⁶¹ Higgins et al (n 2) 260.

⁶² Ibid 262

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ International Committee of the Red Cross, '1976 Convention on the Prohibition of Military or any hostile use of Environmental Modification Techniques – Factsheet' (2003) <<https://www.icrc.org/en/document/1976-convention-prohibition-military-or-any-hostile-use-environmental-modification>> accessed 13 April 2021.

⁶⁸ Brooman and Legge (n 1).

⁶⁹ Higgins et al (n 2) 256.

⁷⁰ See Fritjof Capra and Ugo Mattei, *The sociology of Law – Toward a legal system in Tune with Nature and Community*, (Berrett-Koehler Publishers Inc 2015) 197. Also for calls for an earth jurisprudence and wild law see Cormac Cullinan, *Wild law: a manifesto for earth justice* (2nd ed, Chelsea Green 2011). Also, on Earth Law, see for example 'What is Earth Law?' (*Earth Law Alliance*) <https://earthlawyers.org/earth-law/> accessed 13 April 2021.

⁷¹ Payal Patel, 'Expanding Past genocide, crimes against humanity and war crimes: can an ICC policy paper expand the court's mandate to prosecuting environmental crimes?' (2016) 14(2) Loyola University Chicago International Law Review 175.

⁷² Higgins et al (n 2), 256 citing Cormac Cullinan, 'Earth jurisprudence: from colonization to participation' in Worldwatch Institute (ed) *State of the world 2010: Transforming Cultures: From Consumerism to Sustainability* (Worldwatch Institute 2010) 15. See also, Cullinan (n 69) and Brooman and Legge (n 1).



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Strathclyde Centre for Environmental Law & Governance

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- G Medici Colombo and L Wegener, 'The Value of Climate Change-Impacted Litigation: An Alternative Perspective on the Phenomenon of 'Climate Change Litigation'', SCELG Working Paper 12/2019
- E Robb, 'Making Democracy Great Again: An Exploration of Democratic Values in Climate Change Litigation', SCELG Working Paper 11/2018

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- Annaig Nicol, Catherine Hall, Hayley-Bo Dorrian-Bak, Iona McEntee, Meet Kaur, Patricia Berlouis, Rebecca Ljungberg, and Thomas Paxton, 'A Review of the Legal Protections for Scottish Semi-Ancient and Ancient Woodland', SCELG Policy Brief 17/2021
- Mika Schroder, 'Governments fail to meet the Aichi Biodiversity Targets – do they have a pathway towards “transformative change”?', SCELG Policy Brief 16/2020

SCELG Dialogues

- K McKenzie and F Sindico, 'Climate Change Litigation: Recent Trends, the Global South, Human Rights and Rights of Nature', SCELG Dialogue 11/2020
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