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INTERNATIONAL LEGAL THEORY

The 'imbroglio' of ecocide: A political economic analysis

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Abstract

In this article we adopt a political economic lens to analyse the revival of the concept of ecocide in present international legal scholarship and practice. The current campaign to codify the crime of ecocide under international criminal law represents the epitome of a problem-solving approach, which conceives of the law as external to society and as a corrective to its evils. Yet, a large body of critical literature has drawn attention to the constitutive role of international law and to the problems with its depoliticized approach when it comes to tackling global injustices. We build upon this diverse scholarship to illuminate how the technical, acontextual, and ahistorical legal debate on the codification of ecocide ends up normalizing the violent structures of extractive capitalism and its hierarchies. Further, we situate the proposed crime within the wider context of how international law regulates and constitutes the natural world. Drawing on critiques of sustainable development and of business and human rights discourse, we argue that the 'imbroglio' of ecocide, in its current legal definition, lies in presenting ecological preservation *and* devastation as simultaneously legitimate aims. The article ultimately raises the question of the role of international law in progressive political agendas, a question that could not be more pressing in times of entangled socio-ecological-economic disruptions.

Keywords: ecocide; international law; Marxist critique; political economy; sustainable development

1. Introduction

In June 2021, the Independent Expert Panel (IEP) for the Legal Definition of Ecocide, a civil society initiative, put forward a definition of ecocide, calling for state parties to the International Criminal Court (ICC) to adopt the definition and incorporate the novel crime into the Rome Statute.[1] Supporters of the initiative have argued that the proposed Article 8*ter* represents the

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[1]The Independent Expert Panel (IEP) was convened in late 2020 by the Stop Ecocide Foundation. It included 12 members with backgrounds in environmental, climate, and criminal law. The definition of ecocide presented by the IEP in June 2021 reads as follows: 'ecocide means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts'. See the IEP Commentary and Core Texts, available at static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf (IEP Commentary).

'culmination of years of progress on pushing legal imagination to contemplate the crime of ecocide' and it comes at a time when state support for the recognition of international criminalization of environmental destruction has increased.[2] A large number of countries, both in the Global North and South, have expressed support for the idea of adding a new crime of ecocide to the international legal framework.[3] While we understand the sense of urgency and frustration following decades of inaction behind the calls for more forceful responses to the ecological 'crisis', this article questions the broader implications of codifying ecocide in international law adopting a political economic analysis. The faith in the capacity of international criminal law (ICL) to 'contribute to a change of consciousness, in support of a new direction, one that enhances the protection of the environment and supports a more collaborative and effective legal framework for our common future on a shared planet'[4] deserves, we argue, further scrutiny especially given the crisis of legitimacy and mounting critiques levelled against the ICL project.[5] Faced with declining support from their constituencies, the incorporation of a 'new' crime of ecocide could give new purpose to these institutions.[6] Indeed, a more sceptical reader could see in the debate on the codification of ecocide in the ICC Statute (and on the creation of a special tribunal to address the war against Ukraine) efforts to reinvigorate the project, to make it 'fashionable' again.[7] The broader objective of this contribution is thereby to start a reflective conversation on the turn to coercive tools, in this case ICL, as means of 'protecting' nature – a debate that we hope will be further expanded and continued well beyond the life of this article.[8]

The IEP's definition of the crime of ecocide has attracted sizeable attention in international law and scholarship. Commentators have pointed out the possibilities, as well as the shortcomings of the proposed definition, notably concerning the mental element of the crime,[9] the distinction

[2]M. Shinde, 'The New Legal Definition of "Ecocide" Could Be a Gamechanger for the Environmental Movement', *Climatetracker.org*, 25 June 2021, available at climatetracker.org/new-legal-definition-ecocide-gamechanger-environment/.

[3]During the 18th session of the Assembly of State Parties to the Rome Statute, the Republic of Vanuatu called climate change and environmental destruction 'the greatest threat to human rights in the Pacific' and expressed support for the idea of criminalizing ecocide. See Statement by H. E. John H. Licht, General Debate of the 18th Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court, 2–7 December 2019, available at asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.VAN.2.12.pdf. The European Union parliament has also urged member states to support the recognition of ecocide as a fifth crime at the ICC. See 'European Parliament Urges Support for Making Ecocide an International Crime', *Stop Ecocide*, 21 January 2021, available at www.stopecocide.earth/press-releases-summary/european-parliament-urges-support-for-making-ecocide-an-international-crime. On 28 March 2023, the European Parliament agreed a text for the new Environmental Crimes Directive ('Draft Directive') which prohibits environmental damage in terms almost identical to the Independent Expert Panel proposal for the definition of the crime. See European Parliament, Report on the Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment Through Criminal Law and Replacing Directive 2008/99/EC, 28 March 2023, available at www.europarl.europa.eu/doceo/document/A-9-2023-0087_EN.html.

[4]See IEP Commentary, *supra* note 1.

[5]For a recent 'diagnosis of the state of the field', in the author's own words, see S. Vasiliev, 'The Crises and Critiques of International Criminal Justice', in K. J. Heller et al. (eds.), *The Oxford Handbook of International Criminal Law* (2020), 626.

[6]We thank one of the reviewers for drawing our attention to this point.

[7]This expression is borrowed from G. Baars, 'Making ICL History: On the Need to Move Beyond Pre-Fab Critiques of ICL', in C. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (2014), 196.

[8]For a multi-disciplinary critical examination of the role of policing institutions in the production of inequality, ecological degradation, climate catastrophe, and violence, see A. Dunlap and A. Brock (eds.), *Enforcing Ecocide: Power, Policing and Planetary Militarization* (2022).

[9]See, e.g., L. Minkova, 'The Fifth International Crime, Reflections on the Definition of "Ecocide"', (2023) 25 *Journal of Genocide Research* 62; A. Greene, 'Mens Rea and the Proposed Legal Definition of Ecocide', *Völkerrechtsblog*, 7 July 2021; K. Ambos, 'Protecting the Environment through International Criminal Law?', *EJIL:Talk!*, 29 June 2021, available at www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/; M. Karnavas, 'Ecocide: Environmental Crime of Crimes or Ill-Conveived Concept?', *Opinio Juris*, 29 July 2021, available at opiniojuris.org/2021/07/29/ecocide-environmental-crime-of-crimes-or-ill-conceived-concept/.

between lawful and unlawful acts that harm the environment,[10] and the inherent 'anthropocentric' nature of Article 8*ter* (particularly, in relation to the 'wanton' nature of the conduct).[11] As such, the majority of present debates take an 'internal' perspective on ICL,[12] often starting from the premise that the codification of an international crime proscribing ecocide would be a good – although imperfect – solution to address the current ecological crisis.[13]

Our analysis acknowledges, but also departs from, the doctrinal limitations of the IEP's definition of ecocide, focusing instead on situating the 'new' crime within the broader discipline and practice of international law. This article is thereby written in reaction to two trends and discursive strategies that we have noticed within dominant legal approaches to ecocide. The first is the prevalent and conventional argument in favour of expanding the reach of the law (in this case, ICL) to tackle the ecological catastrophe. The second is the lack of attention to the interactions (and possible tensions) between different sub-fields of international law when it comes to questions of global environmental governance.

Reflecting on the first issue, efforts to codify the crime of ecocide and to expand the reach of international law over environmental injustices represent the epitome of a problem-solving approach, which conceives of law as external to society and as a corrective to its evils. This reinforces the view that international law is only relevant if it can contribute to accountability – read 'punishment' – or the constraining of action.[14] Thinking in these terms about the law is reductive. International law enables and facilitates as much as it constrains. Further, the law is not 'an objective force that exists out "there", impacting neutrally on society, economy and polity, but is in "here", both constituting and constituted by social, economic and political forces'.[15]

In understanding international law as embedded in the 'fine materiality of everyday life',[16] we build upon a thriving body of scholarship that works to expose the interrelation of law and global political economic dynamics.[17] This literature has drawn attention to the role of international law in producing and distributing wealth and resources, thereby illuminating the law's complicities

[10]K. J. Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)', *Opinio Juris*, 23 June 2021, available at opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/; see Karnavas, *supra* note 9.

[11]See, e.g., Heller, ibid.; see Minkova, *supra* note 9.

[12]But see D. Robinson, 'Your Guide to Ecocide – Part 2: The Hard Part', *Opinio Juris*, 16 July 2021, available at opiniojuris.org/2021/07/16/your-guide-to-ecocide-part-2-the-hard-part/, questioning how to align the international crime of ecocide with environmental law. These ideas are further elaborated in D. Robinson, 'Ecocide: Puzzles and Possibilities', (2022) 20 *Journal of International Criminal Justice* 313. See also C. Krakow, 'Legally Defining Ecocide: Implications for Addressing Environmental Racism and Prioritizing Human Health in International Law', *Opinio Juris*, 17 March 2021, available at opiniojuris.org/2021/03/17/legally-defining-ecocide-implications-for-addressing-environmental-racism-and-prioritizing-human-health-in-international-law/, arguing that 'international criminal law is flawed, but it is one tool available in the fight against environmental injustice'.

[13]For an insightful, interdisciplinary, and critical analysis of the codification of ecocide in the ICC Statute, which calls attention to ICL's anthropocentric ontology and builds upon a de-centred approach, drawing on Bruno Latour's post-humanist philosophy, see M. Kooijman, 'From Anthropos to Oikos in International Criminal Law: A Critical-Theoretical Exploration of Ecocide as an "Ecocentric" Amendment to the Rome Statute', (2023) 52 *Netherland Yearbook of International Law* 101.

[14]J. Klabbers, 'The Love of Crisis', in M. M. Mbengue and J. D'Aspremont (eds.), *Crises Narratives in International Law* (2022), 8.

[15]A. C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (2010), at 6.

[16]M. Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–78* (2007), 339.

[17]See, e.g., A. Chadwick, *Law and the Political Economy of Hunger* (2019); S. Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary', (2019) 30 EJIL 573; A. Saab, 'An International Law Approach to Food Regime Theory', (2018) 31 LJIL 251; H. Zeffert, 'The Lake Home: International Law and the Global Land Grab', (2018) 8 *Asian Journal of International Law* 432; D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (2018); A. Orford, 'Food Security, Free Trade and the Battle for the State', (2015) 11 *Journal of International Law and International Relations* 1; M. Fakhri, *Sugar and the Making of International Trade Law* (2014).

with the structural injustices of modern capitalism.[18] While arguably not always engaging with the discipline of political economy adequately,[19] this literature seeks to overcome the artificial separation between law (public and private), economic life, and political contestation by paying attention to historic and systemic tendencies.[20] In doing so, scholars build upon a variety of critical legal approaches, such as post/decolonial, feminist, and Marxist critiques of international law – the latter having seen a renaissance in the last two decades.[21] Some of these analyses have outlined how, despite their emancipatory aims, ICL and human rights law are tools for political economic governance, determining the boundaries of who has access to resources, knowledge, life opportunities, and who does not.[22] Along the same lines, in this article, we employ a political economic approach to illustrate how the technical, acontextual, and ahistorical frames that permeate mainstream legal debates on ecocide work to narrow down conceptualizations of what justice is and can be, while obscuring the complicity of the law in co-producing a world of multiple, entangled crises.[23] The political economic approach we adopt to analyse the proposed crime of ecocide therefore draws on the literature referenced above, seeking to unpack the interrelations between international law and political economy, including the role both play in the organization of power and the distribution of resources.

Our second concern is the lack of attention to the interactions (and possible tensions) between different sub-fields of international law when it comes to questions of global environmental governance.[24] To our best knowledge, no scholar has analysed the turn to ICL to protect nature from a broader disciplinary perspective. As such, debates in other sub-fields of international law have rarely featured into discussions on the proposal to codify ecocide.[25] In this article we therefore seek to fill this gap through our shared sense that silos thinking is not only unhelpful but can actually be counterproductive when dealing with ecological collapse. As historians and critical scholars have shown, the separation of humanity and nature is the product of European modernist thinking, which paved the way for domination, appropriation, and efforts to master the non-human world through reason.[26] Present international law, fragmented into specialized sub-fields

[18]J. Haskell and A. Rasulov, 'International Law and the Turn to Political Economy', (2018) 31 LJIL 243. See also, more recently, N. Tzouvala, 'International Law and (the Critique of) Political Economy', (2022) 121 *South Atlantic Quarterly* 297.

[19]For a critique of the lack of 'serious' engagement with political economic theories on the part of international law scholars see R. Bachand, 'Taking Political Economy Seriously: Grundriss for a Marxist Analysis of International Law', in P. O'Connell and U. Özsu, *Research Handbook on Law and Marxism* (2021), 356.

[20]See, e.g., Chadwick, *supra* note 17; R. Parfitt, *The Process of International Legal Production: Inequality, Historiography, Resistance* (2019); N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (2020); D. R. Quiroga-Villamarín, 'Beyond Texts? Towards a Material Turn in the Theory and History of International Law', (2021) 23 *Journal of the History of International Law* 466.

[21]See, e.g., S. Marks (ed.), *International Law on the Left: Re-Examining Marxist Legacies* (2008); S. Marks, 'False Contingency', (2009) 62 *Current Legal Problems* 1; R. Knox, 'Marxism, International Law, and Political Strategy', (2009) 22 LJIL 413; B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2017); U. Özsu, 'Grabbing Land Legally—A Marxist Analysis', (2019) 32 LJIL 215.

[22]See, e.g., S. Marks, 'Human Rights and Root Causes', (2011) 74 *Modern Law Review* 57; T. Krever, 'Ending Impunity? Eliding Political Economy in International Criminal Law', in J. Haskell and U. Mattei (eds.), *Research Handbook on Political Economy and Law* (2015); M. Mutua, *Human Rights Standards: Hegemony, Law, and Politics* (2016); R. Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (2018); C. Schwöbel-Patel, 'The "Ideal" Victim of International Criminal Law', (2018) 29 EJIL 703; J. Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (2019).

[23]J. Moore, *Capitalism in the Web of Life: Ecology and the Accumulation of Capital* (2015).

[24]As Koskenniemi, among others, has highlighted, the fragmentation of international law, that is, the increasing separation of ever more specialized and distinct spheres of international law from one another, is problematic, working in a way that ensures that conversations between different fields of international law are not always heard. See, e.g., M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', (2007) 70 *Modern Law Review* 1.

[25]See, as an exception, Robinson, *supra* note 12, discussing the problems with aligning ICL and international environmental law.

[26]A. Quijano, 'Coloniality and Modernity/Rationality', (2007) 21 *Cultural Studies* 168, at 171; D. Chakrabarty, 'The Climate of History: Four Theses', (2009) 35 *Critical Inquiry* 197; V. Argyrou, *The Logic of Environmentalism: Anthropology, Ecology and Postcoloniality* (2005); A. Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity"', (2015) 26 *Law and Critique* 225.

and technocratic institutions, is part of the same modernist project.[27] In times of entangled 'crises', raising inequalities, and violence, the normative implications of separating the rules and institutions governing humanity, ecology, and the economy deserve more attention. Thus, this article moves from a different starting point to much of the literature analysing ecocide so far, situating the movement to criminalize environmental protection within broader theoretical trends within international law. It draws on critical ICL scholarship alongside examples from international environmental law, business and human rights and ongoing debates on the regulation of deep-sea mining. In doing so, this article intends to contribute to existing debates by both providing a generalist international legal analysis of ecocide and by situating calls for a 'new' crime of ecocide within the political economic structure of international law.

We begin, in Section 2, by locating efforts to codify ecocide within wider debates on the political economy of ICL. We argue that an approach that takes material conditions seriously helps us see what is made visible and what becomes invisible by criminalizing environmental destruction. Through a focus on the spectacular,[28] ICL marginalizes the 'slow violence'[29] of extractivism, neocolonialism, and their racial and gender hierarchies. Related to this is the critique of ICL as a depoliticizing and ahistorical tool to manage the entangled socio-ecological 'crises' of modernity. Situating ecocide within the history of American imperialism and the politics of the Vietnam War helps make visible the tension between earlier calls to preserve nature and today's technocratic response based on simple criminality/legality binaries. This allows us to contest ICL's progress narrative and its promise to offer a 'solution' to a meta-problem, which in its complexity, cannot just be fixed, nor delimited to a sub-field of practice – and arguably not even to a 'discipline'.

In Section 3, we situate efforts to codify the 'new' crime of ecocide within the broader framework of international law and environmental governance. Together with Natarajan and Khoday, we contend that nature should not be confined to a disciplinary specialization because 'humanity's relationship with nature has been central to making international law'.[30] As noted, while existing reflections on ecocide have emanated largely from within the ICL community, in this section we argue that to understand the dangerous work (or the 'imbroglio') of a new crime of ecocide, we need to locate the trend towards the criminalization of environmental destruction within general discussions on how international law frames the relationship between economic development and environmental protection. Here we build upon the critical literature on sustainable development while drawing on examples from deep-sea mining regulation and business and human rights to show that the codification of ecocide reproduces a similar rationale: it seeks to reconcile ecological preservation and devastation while failing to challenge the violent structures of extractive capitalism and its racialized, classed, and gendered hierarchies.[31]

In engaging critically with efforts to codify ecocide in the ICC Statute, we recognize that the concept has been also used by social movements in more emancipatory and subversive ways, for instance through efforts like the Monsanto Tribunal.[32] These articulations of ecocide 'from below' frame ecological and social justice as interdependent and mutually reinforcing, and a central theme has been the link between ecological destruction and its destructive impacts on humans

[27]See Koskenniemi, *supra* note 24; J. Haskell, 'The Traditions of Modernity within International Law and Governance: Christianity, Liberalism and Marxism', (2015) 6 *Social Justice Law Review* 29.

[28]See, e.g., C. Schwöbel-Patel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood', (2016) 4(2) *London Review of International Law* 247. See further references and discussion in Section 3.

[29]This term is taken from R. Nixon, *Slow Violence and the Environmentalism of the Poor* (2011).

[30]U. Natarajan and K. Khoday, 'Locating Nature: Making and Unmaking International Law', (2014) 27 LJIL 573.

[31]See also A. Dunlap, 'The Politics of Ecocide, Genocide and Megaprojects: Interrogating Natural Resource Extraction, Identity and the Normalization of Erasure', (2021) 23(2) *Journal of Genocide Research* 212; M. Crook and D. Short, 'Marx, Lemkin and the Genocide–Ecocide Nexus', (2014) 18(3) *International Journal of Human Rights* 298.

[32]See International Monsanto Tribunal, available at en.monsantotribunal.org/.

whose existence is dependent on functional ecosystems (notably, Indigenous communities).[33] According to these radical views, an international crime of ecocide can:

> . . . formulate a vital starting-point for larger processes of decolonisation by both delivering a counterhegemonic legal logic that may reach structural and systemic drivers of violence, and by enabling decolonial narratives of justice to utilise international law as another tool against the institutions and structures of power that legitimise ecocide.[34]

While recognizing the instrumental value that the concept of ecocide may have in advancing the political struggles of marginalized and subaltern groups, in this article, we interrogate the capacity of the international legal system to challenge (and dismantle) the complex structures of power that legitimize acts of ecocide. Further, we commence a reflection (that certainly deserves to be continued) on what happens when emancipatory projects supported by grass-roots social movement begin to be taken up and, in turn, co-opted by international institutions or experts speaking on behalf of the international community.[35] Our analysis is thereby not an attack on the vitally important work that has been done by many civil society and local actors on ecocide. Rather, it is an invitation to ponder on the effects that the codification of ecocide in international law may produce, including on the political struggle for environmental, racial, indigenous, and gender justice.[36]

2. Codifying ecocide as an international crime: The political economy of (in)visibility

Over the past few decades, ICL has become a dominant frame for defining issues of global justice, often accompanied by a faith in the many qualities of international prosecution, from deterrence and 'ending impunity', to redress for victims, peacebuilding, and even reconciliation.[37] Yet, in more recent years, a body of critical scholarship has emerged that highlights how the advancement and use of ICL often narrows the field of possible response to mass violence, delegitimizing alternative approaches[38] and privileging a view of justice that dwells heavily in the symbolic order.[39] In reaction to the often abstract and romanticized views that permeate this field, critical scholars have started to foreground the material conditions and political economic interests that underpin the project and the practice of ICL.[40] In so doing, recent research has shown how global justice actors have embraced a commodified,[41] or marketized[42] version of justice.[43]

One defining feature of this model of justice is the emphasis on the most visible and sensational forms of atrocities to capture the audience's attention, together with the employment of marketing

[33]P. Higgins, D. Short and N. South, 'Protecting the Planet: A Proposal for a Law Ecocide', (2013) 59 *Crime, Law, and Social Change* 251.

[34]T. Lindgren, 'Ecocide, Genocide and the Disregard of Alternative Life-Systems', (2018) 22(4) *International Journal of Human Rights* 525.

[35]B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003).

[36]See Knox, *supra* note 21.

[37]B. Sanders, 'The Expressive Turn of International Criminal Justice: A Field in Search of Meaning', (2019) 32 LJIL 851.

[38]S. Nouwen and W. Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', (2015) 13 *Journal of International Criminal Justice* 157, at 160–2.

[39]K. Clarke, *Fictions of Justice: The International Criminal Court and the Challenges of Legal Pluralism in Sub-Saharan Africa* (2009).

[40]This is part of a broader trend within the field of international law. See notes 20 and 21, *supra*.

[41]S. Kendall 'Commodifying Global Justice: Economies of Accountability at the International Criminal Court', (2015) 13(1) *Journal of International Criminal Justice* 113.

[42]S. Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (2021).

[43]See Baars arguing that this history even goes back as far as the Nuremburg and Tokyo Tribunals, where moves were made to conceal economic interests while liberalizing reforms were made. See G. Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Economy* (2019), at 133–238.

strategies to 'sell' the ICL project, through documentaries, exhibitions or promotional materials.[44] This development, which should be understood, according to Schwöbel-Patel, as part of the emergence of the attention economy and branding practices, has two constitutive functions. On the one side, it serves an ordering function, 'introducing hierarchies of what is worthy of attention'. On the other, it promotes a simplified understanding of events, upholding binary understandings of 'good' and 'evil'.[45]

The concept of marketized or commodified global justice is helpful to understand current efforts to incorporate the crime of ecocide into the Rome Statute. Not only has Stop Ecocide International, the NGO behind the movement to make ecocide an international crime, run a proper advertising campaign to promote the project,[46] but the very choice of the word 'ecocide' indicates the desire for attention that characterizes ICL practices. Illuminating is the following statement made by Sands, one of the IEP members, during an interview with *Al Jazeera*:

> Interestingly if you call it an "environmental crime against humanity" no one cares but if you call it "ecocide" people sit up and say "oh yes that is very important". We have done some polling about this in the context of the expert panel. We are taking Lemkin's *magical word* and giving it the machinery articulated by Lauterpacht.[47]

No doubt, the choice of words matters for ICL, as certain words have the capacity to trigger specific emotional reactions.[48] As put by Schwöbel-Patel, when '[t]he cause is framed as spectacle ... the response must be spectacular too'.[49]

Thinking about the spectacles justice is useful to see how power operates through spectacle and law.[50] Clarke has compellingly argued that spectacles of justice operate to 'reinforce the apparent power of the rule of law to affirm guilt or innocence and to individualize the violence of many and redirect it onto one individual'.[51] Further, Clarke continues, 'these spectacles work together with spectacular capitalism to produce an economy of appearances, that is, the way economies work through different spectacles to camouflage particular economic processes'.[52] In short, as other critical legal scholars have also argued, spectacles of criminal justice, including international criminal trials, through their focus on individual perpetrators and specific *episodes* of injustices, work to displace the harder social, political, and economic questions at play.[53] ICL trials thereby distort the search for the 'truth' about past atrocities (despite the 'truth' often being seen as a justification for these international trials in the first place).[54] In particular, the turn to ICL creates the illusion that, by punishing a few bad actors, centuries of oppression based on race, class, and

[44]These marketing practices are not unique to the field of international criminal law, but form part of a broader commodification of values such as accountability and humanitarianism. See Kendall, *supra* note 41, at 125.

[45]See Schwöbel-Patel, *supra* note 42, at 17.

[46]Stop Ecocide International, Breaking News and Press Releases, available at www.stopecocide.earth/press-releases.

[47]M. Swart, Interview with Philippe Sands, '"The Revolution Does Not Happen Overnight": Philippe Sands on Ecocide and its Links to Nuremberg', *Al Jazeera*, 29 June 2021, available at liberties.aljazeera.com/en/the-revolution-does-not-happen-overnight-aj-speaks-to-philippe-sands-on-ecocide-and-a-life-in-environmental-lawyering/.

[48]K. M. Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (2019).

[49]See Schwöbel-Patel, *supra* note 42, at 173.

[50]K. M. Clarke, 'The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord', (2011) 18 *Indiana Journal of Global Legal Studies* 7. On how ICL and trials construct the 'ideal' perpetrator and thus set the boundaries of what 'human' and 'inhuman' is, see S. Stolk, 'A Sophisticated Beast? On the Construction of an "Ideal" Perpetrator in the Opening Statements of International Criminal Trials', (2018) 29 EJIL 677; S. Stolk, *The Opening Statement of the Prosecution in International Criminal Trials: A Solemn Tale of Horror* (2021); K. M. Clarke, 'Refiguring the Perpetrator: Culpability, History and International Criminal Law's Impunity Gap', (2015) 19 *International Journal of Human Rights* 592.

[51]See Clarke (2011), ibid., at 13.

[52]Ibid.

[53]See, e.g., Krever, *supra* note 22; T. Krever, 'International Criminal Law: An Ideology Critique', (2013) 26(3) LJIL 701.

[54]M. Koskenniemi, 'Between Impunity and Show Trials', (2002) 6 *Max Planck Yearbook of United Nations Law* 1, at 13–14.

gender can be addressed, thus relieving pressure on the state (and the international community) to attend to the structural issues of distribution that, in many instances, played a key role in fostering violence and conflict in the first place.[55]

When applied to ecological issues, the limitations of an approach that prioritizes the 'extraordinary' over the 'everyday',[56] and 'episodic' over the 'structural'[57] is even more acute. While the implications of thinking about the spectacles of international criminal law are broader, let us consider for a moment the definition of ecocide put forward by the IEP:

> For the purpose of this Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.[58]

Clearly, by using terms such as 'severe', 'widespread', and 'long-term', the emphasis here is on the most visible and sensational forms of ecological harms that can be attributed to an individual acting with 'knowledge'. Nixon's concept of 'slow violence' is helpful to reflect, *a contrario*, on what we may call the political economy of (in)visibily. By 'slow violence', Nixon indicates forms of violence associated with climate change, deforestation, toxic dumping, and the environmental aftermath of war, that take place gradually and often invisibly.[59] The violence associated with these phenomena, he contends, is 'neither spectacular nor instantaneous, but rather incremental and accretive, its calamitous repercussions playing out across a range of temporal scales'.[60] Nixon observes that the casualties of slow violence are 'most likely not to be seen, not to be counted' as they take years or decades to occur.[61] He adds that the 'insidious workings of slow violence derive largely from the unequal attention given to spectacular and unspectacular time'.[62]

As a legal field built around the liberal notions of individual agency, intention, quantifiable harms, and their proximate cause, ICL appears of limited value when it comes to providing meaningful responses to diffuse, unspectacular, ordinary environmental violence.[63] By punishing a handful individuals for 'severe and either widespread or long-term' environmental damage, ICL would leave unscrutinized the routine workings of prevailing economic structures – one can think of land degradation, resource dispossession, toxic pollution caused by extractivist projects in different parts of the Global South – and, therefore, perversely ends up legitimizing them. This, of course, brings to the fore the role of transnational corporations, which will be further addressed in Section 4.

Moreover, contemporary appeals to mobilize ICL in response to pressing environmental issues risks obscuring, and thus normalizing, inequalities that are tied to deeply-rooted injustices, including the disproportionate ecological burden that is and has long been experienced by racially marginalized communities in the Global South.[64] After all, as scholars have shown, colonialism was about the exploitation of people and their natural resources.[65] Environmental justice

[55]K. Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights', (2015) 100 *Cornell Law Review* 1069, 1126; A. Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism', (1999) 10(4) EJIL 679.

[56]H. Charlesworth, 'International Law: A Discipline of Crisis', (2002) 65 *Modern Law Review* 377.

[57]The difference between 'episodic' and 'structural' is taken from U. Baxi, 'Towards a Climate Change Justice Theory?', (2016) 7 *Journal of Human Rights and the Environment* 7, 13.

[58]See IEP Commentary, *supra* note 1.

[59]See Nixon, *supra* note 29.

[60]Ibid., at 2.

[61]Ibid., at 13.

[62]Ibid., at 6.

[63]See, e.g., E. Cusato, *The Ecology of War and Peace: Marginalising Slow and Structural Violence* (2021).

[64]See Report of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E. Tenday Achiume, Ecological Crisis, Climate Justice and Racial Justice, UN Doc. No. A/77/549 (25 October 2022), and examples discussed therein.

[65]See Grear, *supra* note 26; A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005).

movements and scholars have long called attention to how pollution and environmental destruction affect the poor and ethnically marginalized segments of the society in unequal ways[66] or, to put it differently, have reminded us 'that people's experiences of "nature" are shaped by their experiences of social, economic, and political inequalities'.[67] Over the years, theories and practices of environmental justice have taken an international dimension and become a critical framework to challenge North-South environmental relations, the legacy of colonialism and exploitation, and to emphasize how 'issues of ecology are often interlinked with questions of human rights, ethnicity and distributive justice'.[68] One can think of the North's ecological debt to the South for centuries of colonial expansion and military interventions, or for the accumulation of greenhouse gases in the atmosphere, at least since the industrial revolution.[69]

The criminalization of 'severe and either widespread or long-term damage to the environment', as proposed in the current definition of ecocide, moves from the assumption that it is possible to separate today's responsibility for the most severe forms of environmental destruction from their historical and material conditions. Through its focus on the most visible environmental externalities, the proposed definition of ecocide masks the mundane neo(colonial) practices of resource extraction and land grabs by transnational corporate actors (often headquartered in the Global North).[70]

It is thus important to situate the proposed new crime of ecocide within the histories and continuation of colonial practices, as these practices are intimately tied to different environmental injustices. This is even more important given that critical legal scholars have shown how the ICL project has not only been silent on colonial power dynamics but has actually reproduced colonial and racial legacies[71] by reinforcing problematic assumptions about the Global South as a place of disorder, backwardness, and lawlessness needing external interventions, including in the form of international criminal trials ending the local 'culture of impunity'.[72] While it may be too early to say, the dangers of employing the same 'civilizing' discourse in relation to the entangled socio-ecological crises are not to be taken lightly. Although, according to its supporters, 'a law of ecocide on the horizon will therefore signal the end of corporate immunity – and begin to redirect business and finance away from seriously harmful practices',[73] a few questions come to mind. Will the codification of ecocide be just a 'signal' (i.e., be a marketing device) or will it help address the responsibility of transnational corporations for the exploitation and dispossession inflicted upon

[66]U. Natarajan, 'Environmental Justice in the Global South', in S. Atapattu, C. Gonzalez and S. Seck (eds.), *The Cambridge Handbook of Environmental Justice and Sustainable Development* (2021), 39; People of Color Environmental Leadership Summit, 'Principles of Environmental Justice', 24–27 October 1991, Washington, D.C., available at www.ejnet.org/ej/principles.html.

[67]J. Sze, 'Gender and Environmental Justice', in S. MacGregor (ed.), *Routledge Handbook of Gender and Environment* (2017), 159, at159.

[68]See K. Mickelson, 'Critical Approaches', in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (2008), at 287. See also S. Alam, et al. (eds.), *International Environmental Law and the Global South* (2015), at 13; Atapattu, Gonzalez and Seck, *supra* note 66.

[69]J. Dehm and S. Mason-Case, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present', in B. Mayer and A. Zahar (eds.), *Debating Climate Law* (2021), 170; S. Humphreys, 'Climate Justice: The Claim of the Past', (2014) 5 *Journal of Human Rights and the Environment* 134, 147.

[70]See generally J. Carmin and J. Agyeman (eds.), *Environmental Inequalities Beyond Borders: Local Perspectives on Global Injustices* (2011). For example, it is well documented that land grabbing by transnational corporations for large-scale biofuel production or by financially wealthy but resource poor states for their domestic food security often occurs in some of the poorest regions of the world, notably Asia and Africa, perpetuating 'scarcity' of critical resources in those regions.

[71]J. Reynolds and S. Xavier, 'The Dark Corners of the World: TWAIL and International Criminal Justice', (2016) 14 *Journal of International Criminal Justice* 959. C. Gevers, 'Africa and International Criminal Law', in Heller et al., *supra* note 5, 154.

[72]It is apposite to recall here Mutua's metaphor of the savage, victim, and saviour. See M. Mutua, 'Savages, Victims, Saviors: The Metaphor of Human Rights', (2001) 42(1) *Harvard International Law Journal* 201. See also V. Nesiah, 'Placing International Law: White Spaces on a Map', (2003) 16 LJIL 1.

[73]Stop Ecocide International, 'Making Ecocide a Crime', available at www.stopecocide.earth/making-ecocide-a-crime.

the poorest communities? Will 'weak' states in the Global South, once again, be blamed for their failure to regulate such actors and protect their populations' environmental rights?

A familiar response to these critiques, and one which has been used to dismiss critical scholarship in ICL more broadly, is that the incorporation of the crime of ecocide into the ICC Statute is just one (imperfect) 'tool' to provide some forms of accountability for environmental harms.[74] Indeed, even the most enthusiastic supporters of the ICL project nowadays tend to recognize the defects of the system.[75] A few commentators have taken a more prudent stand and acknowledged the internal limitations of ICL in addressing the structural dimensions of the ecological crisis.[76] Yet, often associated with this response to criticism is the insistence that the work of the ICC is law and not politics.[77] While this presumption has been subject to multiple critiques by scholars in critical legal studies[78] and critical international law alike,[79] the separation between the 'political' and the 'legal' is arguably enacted by mainstream international criminal lawyers.[80]

In order to illuminate – and thus contest – the politics involved in criminalizing ecological harm,[81] it may be useful to take a few steps back and briefly look at the origins of the term 'ecocide'. Paying attention to the original invocations of 'ecocide', we suggest, tells a completely different story of the interplay of law, politics, and economy in matters of global environmental justice.[82]

The concept of ecocide appears to have been first used in 1970 by Arthur Galston, an American biologist, to characterize the 'willful, permanent destruction of environments in which people can live in a manner of their choosing'.[83] At the *War Crimes and the American Conscience* conference, held in 1970, Galston condemned the US Operation Ranch Hand in Vietnam and asked the international community, through the United Nations, to come together against ecocide, just as the world did after the Second World War against genocide and crimes against humanity.[84] Galston's usage of the term should be understood as part of the strong antiwar activist movement that drew attention to the commission of war crimes in Vietnam. Falk subsequently developed this set of ideas and framed them in legal terms in his 1973 publication, *Environmental Warfare, Facts, Appraisal and Proposals*. In it, Falk called for the drafting of new instruments, namely an International Convention on the Crime of Ecocide and a Draft Protocol on Environmental Warfare. He argued that such normative agenda had gained momentum and that:

[74]As put by Simpson, '[i]n the face of an endless critique of international criminal law as imperial, or selective, or individualistic, or culturally tone-deaf, the critic of the critics can respond simply by saying that the project serves to reduce human suffering or improve the human condition in some fairly basic ways'. G. Simpson, 'The Next Hundred Years', in Heller et al., *supra* note 5, at 842.

[75]Ibid.

[76]See Robinson, *supra* note 12.

[77]S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', (2010) 21 EJIL 941.

[78]See, e.g., R. Mangabeira Unger 'The Critical Legal Studies Movement', (1983) 96 *Harvard Law Review* 561; D. Kennedy, *A Critique of Adjudication: fin de siècle* (1998); D. Kennedy, 'Law and the Political Economy of the World', (2013) 26 LJIL 7.

[79]See generally, A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003); M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006).

[80]See Schwöbel-Patel, *supra* note 42, at 3. See also Engle, *supra* note 55, at 1120–2.

[81]Following on the Marxist tradition, in this article we consider the 'political' and the 'economic' as two sides of the same coin. While the political is embedded within the economic, the economic can also be deployed politically. On this point, see Knox, *supra* note 21, at 422, 425.

[82]See further Cusato, *supra* note 63.

[83]D. Zierler, *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists who Changed the Way we Think about the Environment* (2011), at 19.

[84]B. Leebaw 'Scorched Earth: Environmental War Crimes and International Justice', (2014) 12 *Perspectives on Politics* 770, 777.

> [t]he Indochina context, *given the public outrage over the desecration of the land* at a time of rising environmental consciousness, creates a target of opportunity comparable to Nuremberg. Surely it is no exaggeration to consider the forests and plantations treated by Agent Orange as an *Auschwitz for environmental values*, certainly not from the perspective of such a distinct environmental species as the mangrove tree or nipa palm. And just as the Genocide Convention came along to formalize part of what has already been condemned and punished at Nuremberg, so an Ecocide Convention could help carry forward into the future a legal condemnation of environmental warfare in Indochina.[85]

ICL commentators tend to underline the continuity between early calls to address the human and ecological impacts of 'environmental warfare' in Vietnam and contemporary efforts to codify the crime of 'ecocide'. As such, they see in the proposed Article 8*ter* the 'culmination of years of progress on pushing legal imagination to contemplate the crime of ecocide'.[86] There are, however, palpable differences between the two types of engagement with the criminality of ecological destruction. One could argue that they move from entirely different assumptions about violence, nature-human relationship, and the role of international legal arguments.

As pointed out by Modirzadeh in her comparison of the Vietnam war era and contemporary War on Terror scholarships, there has been a seismic shift in less than two generations in 'tone, approach, mood, force of feeling, and, ultimately, connection with the reader'.[87] When one reads Falk's analysis of the deleterious effects of US environmental warfare in Vietnam, his writing communicates 'angst, shame, anger, poignancy, a visceral sense of the stakes, and it creates an appreciation on the part of the reader for why this is all very personal for the author'.[88] Rather than adopting a 'view from nowhere',[89] his scholarship is imbued with the politics of the time; his examination of the laws of armed conflict cannot be separated from his strong opposition against the Vietnam war.[90] Context and background play a significant role in his discussion of international law proscribing or authorizing the different military techniques employed by the US in Vietnam, notably the massive use of chemical herbicides, such as the infamous Agent Orange. Ultimately, although Falk's work still displays some optimism about the capacity of international law to evolve in new directions to account for the damage inflicted upon the environment, its analysis is never a romanticized 'celebration of the law itself';[91] rather, it is a grounded and honest inquiry into the role of law and its real-world implications. Indeed, both Falk and Galston sought to challenge the traditional logic of the laws of armed conflict, in which nature was treated as enemy property to be destroyed in the pursuit of military objectives, and which failed to appreciate the interdependence of humans and the 'environment' before, during and after armed conflict.[92]

Present day legal and policy debates on ecocide often look 'out of time', tending to concentrate primarily on technical matters and less on the politics involved in regulating the 'environment'

[85]R. Falk, 'Environmental Warfare and Ecocide: Facts, Appraisal, and Proposals', (1973) 4 *Bulletin of Peace Proposals* 80, 84 (emphasis added).

[86]See note 2, *supra*.

[87]N. K. Modirzadeh, 'Cut These Words: Passion and International Law of War Scholarship', (2020) 61 *Harvard International Law Journal* 1, at 8.

[88]Ibid.

[89]G. Simpson, 'The Sentimental Life of International Law', (2015) 3 *London Review of International Law* 3, at 11.

[90]Another example of politicized engagement with the Vietnam War and US legal responsibility is the work of the so-called Russell Tribunal. See International War Crimes Tribunal, 'Aims and Objectives of the Tribunal', in J. Duffett (ed.), *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm, Copenhagen*, Bertrand Russell Peace Foundation (1968). See also E. Cusato, 'From Ecocide to Voluntary Remediation Projects: Legal Responses to "Environmental Warfare" in Vietnam and the Spectre of Colonialism', (2018) 19(2) *Melbourne Journal of International Law* 494.

[91]See Modirzadeh, *supra* note 87, at 30.

[92]See Leebaw, *supra* note 84, at 778. See also Cusato, *supra* note 63.

through ICL. Questions of inequality, coloniality, and discrimination associated with structural patterns of environmental degradation rarely feature in contemporary legalistic invocations of the term 'ecocide'. The historical and continued Eurocentric alliances of the discipline of international law, including the specific sub-field of ICL, which frames nature as commodity, object, or property to be exploited, frames which we outline in more detail in the following section, are never acknowledged.[93] The use of abstract language and hypotheticals adds a sense of disconnection and distance with the daily struggles of communities in the Global South, which experience the worst effects of the unfolding ecological 'crisis'. As such, the concept of ecocide, voided of its critical and subversive edge, becomes nothing more than a marketing tool to promote a particular vision of global justice.[94]

While we do not argue for a revival of affective style advocacy against ecocide, as during the Vietnam War, what we do suggest is that paying attention to the de-politicizing properties of dominant uptakes of ecocide enables us to problematize the tendency of the field to develop progress narratives that erase the material interests underpinning the criminalization of ecological harm.[95] The framing of the discussion as apolitical elides the impact of economic dynamics on 'underdeveloped' regions that are exploited for their natural resources and allows for a response based on simple criminality/legality binaries.[96] As Tallgren presciently argued, ICL becomes a project:

> to naturalise, to exclude from the political battle, certain phenomena which are in fact the preconditions for the maintenance of the existing governance; by the North, by wealthy states, by wealthy individuals, by strong states, by strong individuals, by men, especially white men, and so forth.[97]

The next section will further expand upon this point and turn to Marxist and other critiques of international law to consider how the codification of ecocide operates as a governance tool to silence the structural economic conditions that enabled (and enable) the current ecological breakdown. In doing so, it will build upon debates in other sub-fields of international law, namely international environmental law, the law of the sea, and business and human rights, drawing attention to some biases (and 'oxymorons') implicit in the proposed definition of ecocide.

3. The attempt to reconcile economic development and environmental protection through the codification of ecocide

The previous section examined how the logic of marketization has permeated ICL, highlighting the depoliticizing effects this logic produces on responses to deeply-rooted injustices – in particular, ecological injustices. The problem is, of course, not unique to ICL. As noted above, there is a rich intellectual tradition in international law showing how the field is permeated with

[93]See, e.g., I. Porras, 'Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations', (2014) 27 LJIL 641.

[94]Similarly, Usha Natarajan, writing in relation to the idea of environmental justice, argues that 'disciplines such as international law, which are conservative in nature and useful to the powerful, can hollow out revolutionary ideas to become insipid and depoliticised shells.' See Natarajan, *supra* note 66, at 57.

[95]For a similar point, drawing attention to the 'green progress narrative' underpinning calls to codify ecocide, see Kooijman, *supra* note 13. She aptly argues that 'central to this linear narrative is that the law is failing due to its anthropocentric focus and should therefore move to a more ecocentric approach through the criminalisation of ecocide'. Ibid., at 104.

[96]See Clarke, *supra* note 50.

[97]I. Tallgren, 'The Sensibility and Sense of International Criminal Law', (2002) 13 EJIL 561, 594–5.

and structured by capitalist ideologies, identifying these structures as central in creating and perpetuating global inequalities:[98] so much so that Chimni has argued that today's global political economy should be deemed a form of 'global imperialism'.[99] Considering how international law defines and regulates nature is necessary in order to analyse in more details how a crime of ecocide may operate within and as part of the wider political economic structure of international law.

In discussing the relationship between nature and capital, Marxist international lawyers have showed that international law is structured around wealth accumulation, noting that this accumulation depends upon 'the exploitation and dispossession inflicted upon domestic working classes and colonial territories'.[100] As Marx himself noted, the dominant mode of labour is the central knot that mediates our relationship with nature.[101] Thus, the way we structure, contextualize, and execute the labour which supplies both the material existence and excessive wealth of human societies decides how we shape 'social metabolism'.[102] The latter term indicates the 'process by which peoples take nutrient matter and energy from their environments, digest, and give back in return'.[103] This means:

> that human production or appropriation of wealth is mutually constituted by social relations and the contents and constraints of natural conditions ... [including that these natural conditions] are ... affected by human agency according to the particular forms of social interaction or social relations ... imposed on nature.[104]

Marxist and other critical legal scholars have showed that these (unequal) interactions and relations are legally constituted.[105]

A central element that is exposed when looking at the way capitalism operates through and in international law, is the deeply *material* nature of the law and how the law situates the particular (white male) human in hierarchical priority over the non-human environment. These hierarchical patterns evoke what Moore calls 'the Capitalocene'. In *Capitalism in the Web of Life*, Moore illustrates how capitalism perpetuates, and is dependent upon, the society-nature dichotomy. Moore writes that 'capitalism does not *have* an ecological regime; it *is* an ecological regime'.[106] Moore understands capitalism as implicated in conceptualizing nature as a 'cheap' resource for generating profit, as well as divisions in class, gender, and race. Likewise, Haraway has pointed out the hierarchical ordering within the category of the 'human' and described capitalism's role in the objectification of the environment and the non-human animal for profit.[107]

Critical legal scholars have explored how law, colonialism, and the capitalist domination of nature and non-human beings have long been intertwined: rapid industrialization under colonialism worked in assemblage with racism and other imposed hierarchies to ensure that

[98]See, e.g., Tzouvala, *supra* note 20; A. Orford, 'Theorizing Free Trade', in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016), 701; S. Marks, *The Riddle of all Constitutions* (2003), 61; see Parfitt, *supra* note 20; O'Connell and Özsu, *supra* note 19.

[99]B. S. Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century', (2012) 14(1) *Oregon Review of International Law* 17; B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', (2004) 15 EJIL 1.

[100]See Tzouvala, *supra* note 20, at 21. See also R. Knox, 'Marxist Approaches to International Law', in Orford and Hoffmann, *supra* note 98, at 306; Özsu, *supra* note 21.

[101]For an illuminating analysis of Karl Marx's approach to and engagement with ecological issues see Crook and Short, *supra* note 31.

[102]See Lindgren, *supra* note 34.

[103]A. Salleh, 'From Metabolic Rift to "Metabolic Value": Reflections on Environmental Sociology and the Alternative Globalization Movement', (2010) 23(2) *Organization & Environment* 205, 206, as cited by Lindgren,ibid.

[104]See Crook and Short, *supra* note 31, at 300.

[105]See, e.g., the work by Marks, Özsu and Knox cited in note 21, *supra*.

[106]J. Moore, *Capitalism in the Web of Life* (2015), 158 (emphasis in the original).

[107]D. Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (2016), 47–51.

Europe made a profit at the expense of peoples *and* their environments.[108] Adding another layer of analysis, Gonzalez uses the concept of 'racial capitalism' to think through the relationship between the law, environmental degradation, racial subordination, and the capitalist world economy.[109]

The problems of centring (certain) human, and particularly economic interests, in international law can be seen when examining one of the core principles of international environmental law: sustainable development.[110] This principle, described by Humphreys and Otomo as 'the über-principle' of international environmental law,[111] is made up of several components, including the general need to exploit resources in a manner that is 'sustainable', the necessity of preserving resources for future generations, the equitable use of resources between states, and the need to consider economic and development plans and objectives.[112] Originally a principle put partially in place to balance the economic differences between states, the balance between sustainability and economic and development objectives is supposed to be struck in a way that ensures that states, and especially states with stronger development needs, can continue to draw on their natural resources[113] (though the principle also has a longer and darker colonial history).[114] The principle purports that economic growth, human development, and environmental protection can coexist.[115] To put it differently, the mainstream version of the principle[116] seeks, in Escobar's words, to 'mediate' between nature and capital or ecology and economy.[117] But can ecological values and economic interests be reconciled? What purposes does this reconciliation serve? According to Escobar, this reconciliation is intended to give the impression that only minor corrections to the capitalist market economy need to be implemented in order to 'launch an era of environmentally sound development'.[118] By effectively managing natural resources and environmental externalities (particularly in the Global South) it becomes possible to continue with the current development model. At the end, Escobar poignantly concludes that it is economic growth that is 'sustained' by 'sustainable development', not the environment.[119]

It is nowadays becoming increasingly clear that sustainable development may be impossible while capitalistic economic growth remains embedded within the principle itself.[120] Similarly, contemporary discourses of 'green growth' or 'green economy' – and the adoption of market

[108]See, for example, A. Grear, 'Human Rights, Property and the Search for "Worlds Other"', (2012) 3(2) *Journal of Human Rights and the Environment* 173.

[109]C. G. Gonzalez, 'Racial Capitalism and the Anthropocene,' in Atapattu, Gonzalez and Seck, *supra* note 66, at 72. See also A. P. Harris, 'Toward a Law and Political Economy Approach to Environmental Justice,' in ibid., at 453.

[110]See generally, S. Boysen, *Die postkoloniale Konstellation: Natürliche Ressourcen und das Völkerrecht der Moderne* (2021), reviewed by I. Venzke, (2022) 33 EJIL 716.

[111]S. Humphreys and Y. Otomo, 'Theorizing International Environmental Law', in Orford and Hoffman, *supra* note 98, at 800.

[112]For a history of sustainable development see S. Atapattu, C. Gonzalez and S. Seck, 'Intersections of Environmental Justice and Sustainable Development: Framing the Issues,' in Atapattu, Gonzalez and Seck, *supra* note 66, at 3–9. Sustainable development was concretized recently through its use in the 2015 Paris Agreement to the UN Framework Convention on Climate Change (UNFCCC) and the 2017 Resolution of the UN General Assembly, 'Our Ocean, Our Future: Call to Action,' UN G.A. Res. No. 71/312, 6 July 2017.

[113]See R. Gordon, 'Unsustainable Development', in Alam et al., *supra* note 68, at 50–73.

[114]See Humphreys and Otomo, *supra* note 111, at 800, 816.

[115]J. C. Bernbach and F. Cheever, 'Sustainable Development and Its Discontents', (2015) 4(2) *Transnational Environmental Law* 247; J. Dehm, 'Environmental Justice Challenges to International Economic Ordering', (2022) 116 *AJIL Unbound* 101.

[116]For a different reading of sustainable development see *Gabcíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep. 7 (Separate Opinion, Vice-President Weeramantry), infusing into the jurisprudence of the International Court of Justice diverse cultural understandings of the principle.

[117]A. Escobar, 'Elements for a Post-Structuralist Political Ecology', (1996) 28(4) *Journal of Policy, Planning and Futures Studies* 325.

[118]Ibid., at 330.

[119]Ibid.

[120]See Gordon, *supra* note 113; Atapattu, Gonzalez and Seck, *supra* note 112, at 5; L. J. Kotzé and S. Adelman, 'Environmental Law and the Unsustainability of Sustainable Development: A Tale of Disenchantment and Hope', (2023) 34 *Law and Critique* 227.

solutions to environmental problems, notably climate change – illustrate the same dynamics and faith in capitalism to solve the problems it created. Yet, as scholars and social movements have pointed out, CDM, REDD+ and other carbon trading scheme supported by the climate change regime allow the rich to pay the poor to take environmentally responsible actions on their behalf so that the rich can maintain their high-consumerist, carbon-intensive lifestyles.[121]

This point brings to the fore another contradiction within the dominant sustainable development discourse. While sustainable development seeks, in part, to account for economic imbalances (many of which are the result of colonialism and the ways in which European powers profited, and continue to profit from, the extraction of resources from the places they once colonized) it does not speak specifically about Global North/South inequalities.[122] As Natarajan and Khoday note, while sustainable development seeks to challenge ideas of pure economic growth, it is seldom used 'to call for less development' on the part of those who have disproportionately enriched themselves.[123] Taking this argument further, they contend that the concept of sustainable development, in the end, ensures that the *status quo* remains, helping to 'naturalize and obfuscate the process whereby some people systemically under-develop others', resulting in the continued deepening of global inequalities.[124]

If we agree that international law has contributed to a specific understanding of 'nature' as resource to be appropriated and exploited to ensure continued economic growth, it is important to then situate current debates on ecocide within international law's histories and disciplinary trends. As noted through the above analysis of the principle of sustainable development, international environmental law has sought to place human economic development and environmental protection alongside one another, suggesting that these two spheres can coexist. While multiple scholars and social movements have challenged this position,[125] these insights rarely feature in contemporary international law debates on ecocide.[126] We argue that these perspectives are relevant and should be brought into conversation with current efforts to expand the reach of ICL over environmental destruction.

In doing so, we agree with Lindgren that:

> ecological destruction is a structurally reoccurring phenomenon embedded in the economic logics that buttress modern industrial societies ... [and] international law fails to address this destruction because it is based on an epistemological foundation which does not recognise the structural and institutional violence in acts of ecocide.[127]

But there is more to it. By reproducing an artificial distinction between the 'economy' and 'ecology', and threating those as separate 'spheres' with distinct rules and rationales,[128] international law is creating the conditions for ecocide to occur.

[121]See, e.g., J. Dehm, *Reconsidering REDD+: Authority, Power and Law in the Green Economy* (2021).

[122]See Escobar, *supra* note 117.

[123]See Natarajan and Khoday, *supra* note 30, at 589.

[124]Ibid.

[125]See, e.g., A. Escobar, 'Degrowth, Postdevelopment, and Transitions: A Preliminary Conversation', (2015) 10 *Sustainability Science* 451.

[126]One notable exception being Lindgren, *supra* note 34. See also T. Lindgren, 'Grounding Ecocide, Humanity, and International Law', in V. Chapaux, F. Mégret and U. Natarajan (eds.), *The Routledge Handbook of International Law and Anthropocentrism* (forthcoming). It is important to note that green criminologists, genocide scholars, and indigenous scholars have amply studied ecocide and shown how crimes against nature are linked to crimes against culture. See, e.g., D. Short, *Redefining Genocide: Settler Colonialism, Social Death, and Ecocide* (2016); D. Short and M. Crook (eds.), *The Genocide-Ecocide Nexus* (2022).

[127]See Lindgren, *supra* note 34, at 539. The author still supports the view that international law should and could address ecocide, if radically redesigned.

[128]See Humphreys and Otomo, *supra* note 111.

To further substantiate this critique, it is useful to go back to the definition of ecocide proposed by the IEP. This definition of ecocide introduces a distinction between 'unlawful' and 'wanton' acts which are likely to result in 'ecocide'.[129] While the meaning of 'unlawful' is intuitive, 'wanton' is defined as 'reckless disregard for damage which would be *clearly excessive* in relation to the social and economic benefits anticipated'.[130] A cost-benefit analysis is thus required for the act to be qualified as 'wanton'. But how to compare the 'anticipated' socio-economic utility and environmental harm? What is the reference point to assess the social and economic benefit? Or to put it differently, who is benefitting from it? And who is suffering for the 'disproportionate' environmental damage? Voigt, one of the authors of the definition, commented that the wantonness cost-benefit analysis applies only to lawful acts that involve a substantial likelihood of causing either widespread or long-term severe environmental damage. In other words, the requirement of reckless disregard for the disproportionate environmental damage (i.e., 'wanton') applies to lawful acts only. In this situation, disregard of excessiveness of the damage is the 'criminalizing' factor. The alternative would have been, according to Voigt, to capture illegal acts only[131] – which would have substantially limited the scope of the criminal provision.

Heller has criticized the distinction between lawful and unlawful acts resulting in ecocide, pointing out that it would likely require a problematic assessment of the 'legality' of the act under national law.[132] In his view, such distinction should have been avoided. Robinson, on the contrary, explains how the distinction between lawful and unlawful acts, which is common in international environmental law and domestic law, is not only legally sound, but justifiable given the complexities of 'modern life' and global supply chains. He offers some examples of activities (e.g., producing and distributing food, manufacturing computers, and other electronic devices) that may foreseeably cause widespread, long-term, and severe ecological harm and 'yet they may be socially valuable, environmentally responsible, legally, and ethically appropriate'.[133]

The scholarly debate on the distinction between 'lawful' and 'unlawful' and the definition of 'wanton' acts is particularly interesting for our purposes, as it underscores how international (criminal) law attempts to mediate between the need to 'protect' nature, on the one side, and to exploit and gain social and economic benefits from it, on the other. In this sense, by reproducing a similar rationale, the proposed definition of ecocide can be read very much in line with the existing normative values that underpin international environmental law, including the 'uber' principle of sustainable development.[134] As Humphreys and Otomo have noted, 'the destruction (exploitation/transformation) and "conservation" of nature turn out to be mutually constitutive processes'.[135] What they observe regarding IEL can apply to ICL as well, namely that 'this body of law can appear improbably elastic, providing a framework for the ongoing (if occasionally attenuated) destruction and commodification of natural phenomena in a language of care and protection'.[136]

To think about the tension between environmental protection and destruction/commodification as incorporated in the proposed definition of ecocide, many useful examples can be drawn on. One such example is the regulation of deep-sea mining (DSM). While several organizations, and

[129]See IEP Commentary, *supra* note 1.

[130]Ibid., at 5 (emphasis added).

[131]C. Voigt, *Twitter*, 24 June 2021, available at twitter.com/ChristinaVoigt2/status/1408022656234971137.

[132]K. J. Heller, 'Ecocide and Anthropocentric Cost-Benefit Analysis', *Opinio Juris*, 26 June 2021, available at opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/.

[133]See Robinson (2021), *supra* note 12.

[134]The IEP indeed refers to the principle of sustainable development as the reference to achieve a 'balancing of environmental harms against social and economic benefits'. See IEP Commentary, *supra* note 1.

[135]See Humphreys and Otomo, *supra* note 111, at 805.

[136]Ibid., at 819.

some states, have called for a moratorium on DSM,[137] arguing that the environmental impacts will be vast and are, due to the under-explored nature of this environment, still largely unknown,[138] discussions to draft a mining code, which will legally authorize DSM, are currently underway at the International Seabed Authority (ISA). This mining code is supposed to be drafted in the next few years, with the Republic of Nauru having triggered the two-year process for negotiations in June 2021 through its submission of an intention to mine to the ISA.[139] While debates on the mining code will likely have to be conducted well beyond the two-year period before an agreed draft will be submitted, despite controversies and discontent, DSM is on track to be legally authorized within the next decade.

DSM is an interesting example that can be used to think through the proposed definition of ecocide for two reasons. First, the fact that DSM is likely to be legally authorized in the near future is used by Stop Ecocide International as an example of why the 'new' crime is needed.[140] However, and second, this example actually allows us to explore further the limitations of the proposed definition and its focus on 'unlawful' and 'wanton' acts. DSM, if legally authorized through a mining code, would clearly not be unlawful. However, whether DSM would be a 'wanton' act, that is an act committed with, 'reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated',[141] very much depends on one's perspective. While, on the one hand, proponents of DSM argue that the metals and minerals to be mined will be essential for the 'green' transition (e.g., for making electric car batteries), others, primarily environmental movements and scientists, argue that the environmental destruction that will be caused to vast areas of the globe strongly outweighs justifications to mine.[142] Given the controversial nature of DSM and the political stakes involved in its regulation, would an international (criminal) judge be better placed to strike a balance between the potential social-economic gains of DSM with unknown biodiversity loss, habitat destruction, and high pollution risks?

[137]Organizations that have been key in calling for a moratorium include IUCN and the Deep-Sea Conservation Coalition (a coalition made up of over 100 non-government organizations). While President Macron of France has suggested his support for a moratorium, very few states have publicly called for a moratorium at the International Seabed Authority (including the French sate itself). States that have called for a moratorium are the Federated States of Micronesia, Fiji, Samoa, Chile, Vanuatu, and Palau.

[138]See Deep-Ocean Stewardship Initiative, 'Climate Change Considerations are Fundamental to Sustainable Management of Deep-Seabed Mining', Policy Brief, July 2019, available at www.dosi-project.org/wp-content/uploads/2015/08/040-DOSI-Climate-change-considerations-V4.pdf.pdf.

[139]This rule is found in a provision of the *1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea* (Part XI Agreement or the Agreement), which provides that upon the request of a party, the ISA shall complete the adoption of rules, regulations, and procedures necessary to facilitate the approval of plans of work for exploitation within two years of the request. The ISA now needs to finalize the relevant rules by mid-2023, although several states have begun to call for that period to be extended, including France, New Zealand, Chile, Spain, and Costa Rica. See Status of the draft regulations on exploitation of mineral resources in the Area and proposed road map for 2022 and 2023, Doc. No. ISBA/26/C/44 2021. For a more specific discussion on the two-year rule and its legal implications see C. Blanchard, 'Nauru and Deep-Sea Minerals Exploitation: A Legal Exploration of the 2-Year Rule', *The NCLOS Blog*, 17 September 2021, available at site.uit.no/nclos/2021/09/17/nauru-and-deep-sea-minerals-exploitation-a-legal-exploration-of-the-2-year-rule/; K. Willaert, 'Under Pressure: The Impact of Invoking the Two Year Rule within the Context of Deep Sea Mining in the Area', (2021) 36(3) *International Journal of Marine and Coastal Law* 505. P. Singh, 'What Are the Next Steps for the International Seabed Authority after the Invocation of the "Two-year Rule"? ', (2022) 37(1) *International Journal of Marine and Coastal Law* 152.

[140]Stop Ecocide International, 'What is Ecocide?', available at www.stopecocide.earth/what-is-ecocide.

[141]See IEP Commentary, *supra* note 1.

[142]This position is most strongly advocated for by the Deep-Sea Conservation Coalition. For a broader analysis of the relationship between capital accumulation and DSM, including the ways that capital was embedded into the drafting of the United Nations Convention on the Law of the Sea (with Part XI being the key legal document in place currently in relation to DSM), see Ranganathan, *supra* note 17. On how capitalism accumulation is embedded into Part XI, but also on how this can be potentially undone, see M. Tedeschini, 'Unclosure: The International Law of Seabed Mining and the Systemic Cycles of Capital Accumulation', (2022) 10(2) *London Review of International Law* 265.

A similar tendency to reconcile opposing values (the 'sacred' and the 'profane')[143] can be observed within the field of business and human rights. Current critiques of the business and human rights discourse are, in our view, helpful to reflect on the merits of the proposal to codify ecocide. One of the justifications for the codification of the crime of ecocide is that it will (at least in the intentions of the drafters) tackle both corporate and state accountability for the new crime, with the vast majority of the types of events that the proposed crime may capture, such as oil spills and severe water pollution, occurring at the hands of corporations. As known, the field of business and human rights seeks to promote the upholding of human rights by corporate actors. Scholars and practitioners in this field draw on instruments such as the UN Guiding Principles on Business and Human Rights – the international guidelines on preventing, addressing and remedying human rights abuses committed through business operations,[144] to call for corporations to respect human rights standards. Under the existing business and human rights framework, due diligence has emerged as the preferred tool to promote greater corporate accountability for human rights violations that may arise from business activities abroad. The standard is now incorporated into different instruments, notably the UN Guiding Principles, mentioned above,[145] and the OECD Guidelines for Multinational Enterprises.[146]

Despite the proliferation of these instruments, the question as to whether corporate human rights standards can achieve meaningful outcomes for the affected communities has been raised by critical scholars. Corporations still commit human rights abuses all over the world, often with impunity: from the mass pollution caused by oil companies to cost cutting at the Rana Plaza garment factory in Bangladesh which led to a fire and the subsequent death of 1,135 people in 2013.[147] Thus, while instruments like the UN Guiding Principles can be used to occasionally temper the worst of these human rights abuses, they do little more than temper. Counterintuitively, as put by Baars, such normative frames help legitimize the existence and actions of corporations, with corporations often using the language of human rights and corporate social responsibility to claim ethical credentials with largely limited real world impacts.[148]

A similar concern can be raised when thinking specifically about criminal law responses to corporate 'impunity'.[149] Considering the biases of dominant legal discourse and praxis, once placed within the broader political economic context,[150] criminal law efforts to 'hold corporations accountable' for their abuses are increasingly criticized in the literature.[151] Baars, for example, argues that the perverse effect of the availability of accountability mechanisms, including under criminal law, works to transform the relationship of responsibility for harm from a relationship between affected communities or society at large, to one between individual victims and the corporation. The consequence is that individuals affected by the particular excesses of capitalism

[143]See Humphreys and Otomo, *supra* note 111, at 820.

[144]UN Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. HR/PUB/11/04 (2011).

[145]Ibid., Principles 17–21.

[146]For a critical review of the concept of human rights due diligence in international and domestic law, and how it may result in cosmetic forms of compliance by business actors see I. Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance', (2019) 20(1) *Melbourne Journal of International Law* 221.

[147]See 'Rana Plaza Collapse: 38 Charged with Murder Over Garment Factory Disaster', *Guardian,* 18 July 2016, available at www.theguardian.com/world/2016/jul/18/rana-plaza-collapse-murder-charges-garment-factory.

[148]See G. Baars, *supra* note 43, at 2.

[149]We acknowledge that criminal law is a relatively new tool being used to address environmental harms at the domestic level, with public, administrative, and tort law having been used far more extensively until now. However, at the international level, given the absence of obligations directly binding corporate actors, ICL is one of the few areas where the possibility of individual corporate officials being prosecuted for environmental crimes is mostly discussed.

[150]See Krever, *supra* note 22.

[151]For a discussion and historically grounded critique of ICL's controversial approach to corporate crimes, see, e.g., G. Baars, 'Capitalism's Victor's Justice?: The Hidden Stories Behind the Prosecution of Industrialists Post-WWII', in K. J. Heller and G. Simpson (eds.), *The Hidden Histories of War Crimes Trials* (2013), 163; D. Lustig, *Veiled Power* (2019).

are constituted as victims who, in a legal relationship as formal equals with the corporation, can seek to negotiate the 'price' of the harm done to them, under the commodified responsibility relationship.[152] Such an understanding of justice as quantifiable in financial terms works to silence and render invisible alternative forms of justice that may, in fact, be less about money and more about human relationships to one another, their environments and the world they live in.[153] Further, Baars shows that the perverse effect of the availability of accountability mechanisms, including under criminal law means that legal efforts to make corporate actors accountable contribute to legitimize the 'normal' operation of the corporation. As such,

> a large chunk of critique of capitalism and grassroots anti-capitalist resistance [are transformed] into a struggle where capitalism's violence is reduced to "corporate wrongdoing" and where, once accountability mechanisms exist, the backlash is reversed and the corporation and thus capitalism are "fixed".[154]

In sum, whereas corporate accountability through criminal law may occasionally serve to restrain business involvement in most severe forms of abuses, it can only achieve cosmetic changes, while leaving most of corporate-driven environmental (and other) exploitation unchallenged.

The above critiques of the field of business and human rights, read alongside ongoing debates around the regulation and authorization of DSM, shed light on some contradictions inherent in the proposal to criminalize ecocide in the Rome Statute. First, as observed above, they illustrate how, by proscribing the most severe forms of environmental harms, ICL obscures the everyday functioning of the law and its role in the continued exploitation, commodification, and appropriation of the natural world, as well as in the reproduction of hierarchies between living beings. Second, similarly to the principle of sustainable development and the discourse on business and human rights, the proposed definition of the crime of ecocide attempts to reconcile conflicting values, values which quite simply, we suggest, are not reconcilable. In so doing, it frames both environmental protection and destruction as legitimate aims under the existing legal framework. Such a framework ultimately works to shore up the exploitation of the natural world, while shielding from responsibility those most implicated in its destruction.

4. Conclusion

The proposed definition of ecocide sits against the backdrop of an ever-increasing body of scholarship of 'anxiety' in Braidotti's terms,[155] in which the environmental 'crisis' looms large. This article is a plea to ensure that our attempts to address that 'crisis' (for a lack of better word) are not drafted in panic, prioritizing the use of terms that best capture the popular imagination. Rather, we suggest taking a step back and ensuring that attempts at mobilizing the law for socio-ecological gains are adequately thought through in a holistic way, so that legal arguments may be tactically deployed to advance the aims of progressive constituencies.[156] In this regard, we agree

[152]G. Baars, '"It's Not Me, It's the Corporation": The Value of Corporate Accountability in the Global Political Economy', (2016) 4(1) *London Review of International Law* 127.

[153]It is worth noting that, while a similar critique can be made of some of the jurisprudence on environmental harm that has emanated over the past decades from domestic uses of public, administrative, and tort law, these bodies of law have also, at times, engaged with understandings of justice beyond the more individualistic and financial frame. For example, the 2019 ruling of the Dutch Supreme Court in the case of the *State of The Netherlands v. Urgenda Foundation* found that the government has a legal duty to prevent dangerous climate change as part of its commitment to upholding the human rights of its citizens. See Supreme Court of the Netherlands, Civil Division, *State of The Netherlands v. Urgenda Foundation*, Judgment No. 19/00135, 20 December 2019.

[154]See Baars, *supra* note 152, at 133.

[155]R. Braidotti, 'A Theoretical Framework for the Critical Posthumanities', (2019) 36(6) *Theory, Culture, and Society* 31.

[156]See generally Knox, *supra* note 21.

with Klabbers that international lawyers' emphasis on accountability is a symptom of a moral and intellectual crisis. Klabbers argues that:

> the drive towards accountability is a manifestation of an urge to punish – a primitive urge dressed up in the respectable language of accountability, responsibility, or the unimpeachable desire to bring an end to the culture of impunity. The language is respectable, the urge less so.[157]

As a multitude of critical voices and social movements have compellingly pointed out, environmental and climate disruptions are the product of political economic choices that need to be radically rethought, including by recognizing the role of international law in facilitating multiple 'meltdowns'.[158] Yet, the move to codify ecocide and make it a 'fifth' international crime within the ICC Statute reproduces all the shortcomings of individualized, a historical, and a contextual responses to the unfolding ecological breakdown. Hence, a more critical engagement with the criminalization of environmental protection is needed from within the ICL community. However, it is furthermore clear that the proposed definition of ecocide also needs to be analysed within the wider framework of international law and how the latter not only regulates, but produces the 'environment' (and vice versa).[159] In this vein, we have suggested to situate the 'new' crime of ecocide within the broader political economic dynamics of international law. This is necessary, we have argued, because international law is deeply embedded in extractive capitalism, operating to uphold a particular vision of political economy that defines nature as a resource, object, or commodity to be appropriated, managed, or exploited.[160] We supported this position by drawing upon a variety of critical perspectives, notably on critiques of ICL's emphasis on the 'spectacular', of the principle of sustainable development, of business and human rights discourse, as well as ongoing debates on the legalization of DSM. Locating efforts to codify ecocide within those larger debates and historical trajectories, sheds light on the tensions and contradictions implicit in the turn to criminalization to preserve nature. An international crime of ecocide will not only be inserted into the existing normative framework but, as we have pointed out, the proposed definition, although adopting a language of care and protection, is already being constructed in a way that ensures that the same ordinary dynamics of appropriation and commodification of the natural world will likewise be upheld. Ultimately, as lawyers and scholars who feel strongly about environmental justice, this article is a *cri de coeur* to resist and seek to reverse the trend towards policing and criminalization, imagining more just presents (and futures) that take seriously our shared obligations to nature and other living beings.

[157]See Klabbers, *supra* note 14, at 13.

[158]J. Dehm, C. Gonzalez and U. Natarajan, 'Meltdown! International Law Praxis During Socio-Ecological Crises', *TWAILR: Dialogues*, 9 September 2021, available at twailr.com/meltdown-international-law-praxis-during-socio-ecological-crises/.

[159]See generally Natarajan and Khoday, *supra* note 30.

[160]See, e.g., Porras, *supra* note 93. See also Report of the UN Special Rapporteur, *supra* note 64.

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