

# Ecocide and the End of the Anthropocene:

## An Ecocentric Critique of the (Failed) Developments of an International Crime of Ecocide

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ICD Brief 28

August 2022

**ABSTRACT**

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Modern international law was primarily designed to legitimise the domination and subordination of non-dominant humans, non-human animals, and ecosystems, to a certain type of human being – Western white civilised men. Scholars criticise the present stage of international law as too anthropocentric, hindering its capacity to criminalise ecocide. I argue this notion of anthropocentrism is rooted in a Eurocentric conception of the *anthropos*. Accordingly, an ecocentric approach on criminalising ecocide is of fundamental importance to address all forms of injustice, both inter- and intra-species related. While provisions on genocide and crimes against humanity might bring charges for ecocide, although none explicitly criminalises severe environmental damage, this is insufficient from an ecocentric lens to ensure effective prevention and prosecution of many forms of ecocide. This paper concludes that the Anthropocene discourse must be changed to acknowledge and address the roots of the current socio-environmental crisis. In an international legal system rooted in a Eurocentric-anthropocentric conception of the world, criminalising ecocide — during times of peace and times of war — will be unlikely to result in the prosecution of various, yet crucial, forms of ecocide. Beyond ecocide, redefining various areas of international law in an ecocentric manner is needed for systemic change.

*Keywords:* ecocide; Anthropocene; ecocentrism; anthropocentrism; Rome Statute; international criminal law; severe environmental damage

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Clémentine is a young French scholar and professional in socio-environmental justice and sustainability, a field she approaches in a trans-disciplinary and intersectional manner. Originally from France, she graduated in 2020 from the University of Amsterdam with a BSc (honours) in Politics, Psychology, Law, and Economics (PPLE) and a major in law. She is now finishing an MSc in Governance of Sustainability at Leiden University. Her interests include, among others, the intersection between environmentalism and criminology, human and non-human rights, climate change and social inequality, eco-feminism and post-anthropocentrism, inter-species relationships, as well as food systems sustainability.

## **ACKNOWLEDGEMENTS**

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This paper was originally written as my final BSc thesis in July 2020 but was thoroughly edited and adjusted for the Asser Institute's International Crimes Database (ICD) in the first half of 2022.

I owe this piece to:

- My BSc thesis supervisors, Mrs. Nwamaka Okany and Dr. Carola Westermeier, who helped me create the first version of this work when the COVID-19 pandemic first started;
- All the academic and artistic souls who inspired me for the past 24 years;
- Professor Kevin Jon Heller for his support on this paper, along with being an incredible mentor and one of my main academic inspirations;
- My dearest grandmother for cheering me up during the editing process;
- Dr. Christophe Paulussen, Ms. Maxine van Ekelenburg, and Mr. Nashab Parvez who assisted me during the last editing stages of this Brief prior to publication.

Any mistakes remain my own.

*"Humankind has not woven the web of life. We are but one thread within it. Whatever we do to the web, we do to ourselves. All things are bound together. All things connect."*

Chief Seattle, Suquamish and Duwamish chief

**LIST OF ABBREVIATIONS**

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AP I	Additional Protocol I
CAH	Crime(s) Against Humanity
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
GHG	Greenhouse Gas
IAC	International Armed Conflict
ICC	International Criminal Court
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
IEP	Independent Expert Panel on the Legal Definition of Ecocide
MIL	Modern International Law
SDGs	Sustainable Development Goals
SED	Severe Environmental Damage
UN	United Nations

## INTRODUCTION

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In June 2020, the French Citizens' Convention on Climate<sup>1</sup> called for a referendum to criminalise 'ecocide', which has generally been understood as the act of causing severe environmental damage (SED), under French law. The French President of the Republic, Emmanuel Macron, initially reacted to this proposal as follows: "We must ensure that [ecocide] is included under international law, so that leaders who are responsible before their people to protect the *natural patrimony* and who deliberately fail in doing so, should be held accountable for their misdeeds before the International Criminal Court."<sup>2</sup> Macron's reaction reflects two problematic elements, which will be addressed in this ICD Brief. Firstly, ecocide is barely criminalised under international criminal law (ICL), which is why Macron suggested a (stronger) criminalisation of ecocide under the jurisdiction of the International Criminal Court (ICC). Criminalising ecocide has been the subject of academic and international debates since the 1970s.<sup>3</sup> Propositions ranged from introducing ecocide as an element of war crimes, genocide, or crimes against humanity (CAH) to recognising it as an autonomous offense under the framework of ICL. However, as this ICD Brief investigates, forms of ecocide may be charged by the ICC, but the current jurisdiction of the ICC remains substantially limited to prosecute these forms.

Another issue is the definition of 'ecocide', which has proved challenging. Macron's response to the French Citizens' Convention on Climate reflects one of the struggles the international community faces to address SED, attributed in scholarship to a prevailing 'anthropocentric' bias in international law — the idea that nature should be protected because it is of instrumental value to human beings.<sup>4</sup> Macron refers to the need to protect the 'natural patrimony' as a reason to criminalise ecocide. This suggests nature needs to be protected as an *asset* distinct from and owned by humans, which reflects an anthropocentric approach. As opposed to anthropocentrism, ecocentrism suggests nature, encompassing together human and non-human entities, should be protected and respected because it has intrinsic value.<sup>5</sup> Contextualising 'ecocide' in the anthropocentric *v.* ecocentric discussion is especially relevant in the context of the so-called 'Anthropocene', increasingly regarded as the new geological epoch during which humanity seems to have a dominant influence over the environment.

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<sup>1</sup> Convention Citoyenne pour le Climat, [Les Propositions de la Convention Citoyenne pour le Climat](#) (Conseil Économique, Social, et Environnemental, 2020). This Convention, convened by the French government, gathered 150 citizens randomly selected to discuss measures to curb greenhouse gas (GHG) emissions by 40% by 2030.

<sup>2</sup> Emmanuel Macron, French President of the Republic, [Discours Lors de La Convention Citoyenne pour Le Climat](#) (France 24, 2020), 40:39-41:55.

<sup>3</sup> From former Sweden's Prime Minister, Olof Palme, in 1972 to the Independent Expert Drafting Panel in 2021. Also see: Olof Palme, [Statement by Prime Minister Olof Palme in the Plenary Meeting](#) (1972); Independent Expert Panel for the Legal Definition of Ecocide (IEP), [Commentary and Core Text](#) (Stop Ecocide Foundation 2021).

<sup>4</sup> Katherine V. Kortenkamp and Colleen F. Moore, [Ecocentrism and Anthropocentrism: Moral Reasoning About Ecological Commons Dilemmas](#) (2001) 21(3) Journal of Environmental Psychology 261.

<sup>5</sup> *Ibid.*

This ICD Brief addresses to what extent ecocide is a structurally rooted phenomenon in the Anthropocene and how this limits the development of ICL towards a stronger criminalisation of ecocide, using an ecocentric and interdisciplinary lens. It provides an alternative to the growing body of literature that tends to investigate the Anthropocene and ecocide as two separate concepts, either from a legal or political perspective.

Unless otherwise provided, or when addressing a specific approach to ecocide, I refer to ecocide as the “extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished,”<sup>6</sup> without any intent or knowledge requirement. Moreover, when using the term ecocide, I insist on either a structural normalisation of SED or on SED as a type of crime, whereas when talking about SED, I simply address a type of conduct.

## I. CONCEPTUALISING ECOCIDE IN THE ANTHROPOCENE

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Ecocide, as a factual and legal concept, and the Anthropocene are intertwined in that they both address SED caused by certain human activities deemed dangerous within the limits of the nine planetary boundaries.<sup>7</sup> Six have already exceeded the safe operating space for humanity, such as “human-induced” climate change or biosphere integrity.<sup>8</sup> Crossing only one of these boundaries can severely jeopardise ecosystem services on which all life depends.

Proposals on when the Anthropocene began range from the early spread of agriculture and deforestation (from  $\approx$  6000-7500 BC), to the mid-20<sup>th</sup> century “Great-Acceleration” of industrialisation and population growth.<sup>9</sup> These times all suggest that specific human activities, such as agriculture, extensive deforestation, and industrialisation have caused SED. This presumes ecocide has been a ‘normal’ course of conduct throughout the last centuries, if not millennia, in the Anthropocene.

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<sup>6</sup> Polly Higgins, Damian Short and Nigel South, [Protecting the Planet: A Proposal for a Law of Ecocide](#) (2013) 59(3) *Crime, Law and Social Change* 251.

<sup>7</sup> Planetary boundaries are: climate change, erosion of biodiversity, disturbance of biogeochemical cycles of nitrogen and phosphorus, land system change, ocean acidification, freshwater consumption and the global hydrological cycle, stratospheric ozone depletion, atmospheric aerosol loading, chemical pollution and the introduction of new entities in the atmosphere. See Convention Citoyenne pour le Climat (footnote 1); Kübra Kalkandelen, & Darren O’Byrne, [On Ecocide: Toward a Conceptual Framework](#) (2017) 18(3) *Distinktion: Journal of Social Theory* 333; Malayna Raftopoulos and Joanna Morley, [Ecocide in the Amazon: The Contested Politics of Environmental Rights in Brazil](#) (2020) 24(10) *The International Journal of Human Rights* 1, 4; Rockström *et al.*, [A Safe Operating Space for Humanity](#) (2009) 461 *Nature* 472; Tim Lindgren, [Ecocide, Genocide and the Disregard of Alternative Life-Systems](#) (2018) 22(4) *The International Journal of Human Rights* 525.

<sup>8</sup> Linn Persson, [Outside the Safe Operating Space of the Planetary Boundary for Novel Entities](#) (2022) 56(3) *Environmental Science and Technology* 1510; Wang-Erlandsson *et al.*, [A Planetary Boundary for Green Water](#) (2022) *Nature Reviews Earth and Environment*; Waters *et al.*, [The Anthropocene is Functionally and Stratigraphically Distinct from the Holocene](#) (2016) 351(6269) *Science*.

<sup>9</sup> D. Zohari, [The Origin and Early Spread of Agriculture in the Old World](#) (1986) 16 *Developments in Agricultural and Managed Forest* 3; Paul J. Crutzen, [Geology of Mankind](#) (2002) 415 *Nature* 23; Waters *et al.* (footnote 8); William F. Ruddiman, [The Anthropogenic Greenhouse Era Began Thousands of Years Ago](#) (2003) 61(3), *Climatic Change* 261.

However, limiting the causality of ecocide to such activities and accepting it as a normal course of conduct fails to address the depth of the issue. The question is not and should not be whether ecocide has been and remains a 'normal' course of conduct, but instead, it is and should be: what explains why ecocide has been and remains a *normalised* course of conduct in the "Anthropocene"?

By identifying the human species as a geological driver of this crisis, Anthropocene discourses hinder the structural factors bringing about SED and, by extension, ecocide. The first structural factor, from a neo-Marxist ecology perspective, can be attributed to the overwhelming evidence that 'anthropogenic' greenhouse gas (GHG) emissions, key drivers of climate change, are associated with environmentally damaging activities serving so-called economic development within an international capitalist system, such as intensive fossil fuel burning and intensive agriculture.<sup>10</sup> However, not all of humanity is equally nor willingly involved in such activities, nor does all of humanity share equally the wealth accumulated under capitalism.<sup>11</sup> Hence present-day SED, or ecocide, is not an inevitable consequence of human nature but results from environmentally damaging activities which both serve and sustain a capitalist logic. By capitalist logic, I adhere to Lindgren's understanding of an ecologically unsustainable logic encompassing all modern societies devoted to infinite economic growth, accumulation, and consumption on a planet with finite 'resources'.<sup>12</sup>

Secondly, the dominant Anthropocene discourse is problematic in fallaciously portraying humans, as a species, along with industrialisation, urbanisation, or population growth, as drivers of SED. This does not mean industrialisation and other human activities do not have any severe impact on the environment. But to correctly understand what drives ecocide, one should address a deeper epistemological and ontological issue: the dualistic opposition between human and nature.

The dominant Anthropocene narrative considers the *Homo sapiens* (human) species as the driver of the present socio-environmental crisis since the late 18<sup>th</sup> century, with James Watt's invention of the steam engine in 1782 marking the beginning of English capitalism.<sup>13</sup> This narrative combines the 'human species' and 'capitalism' together as if capitalism's logic was biologically part of human nature, which took a filthy turn beginning in the 18<sup>th</sup> century. Furthermore, it omits to identify earlier beginnings of capitalism, which Moore identifies around the mid-15<sup>th</sup> century with the English and Dutch agricultural revolutions, along with Columbus' conquest of the Americas.<sup>14</sup> This historical inaccuracy obscures an ontological understanding of a turning point in humanity's perception of itself within nature.

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<sup>10</sup> Lindgren (footnote 7) 529; Vishwas Satgar, [The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives](#) (Wits University Press, 2018).

<sup>11</sup> Ibid; Jason W. Moore, [The Capitalocene, Part I: On the Nature and Origins of our Ecological Crisis](#) (2017) 44(3) *Journal of Peasant Studies* 594.

<sup>12</sup> Lindgren (footnote 7) 529.

<sup>13</sup> Anna Gear, *Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene 'Humanity'* (2015) 26(3) *Law and Critique* 226; Crutzen (footnote 9); Moore (footnote 11) 602.

<sup>14</sup> Moore (footnote 11) 596.

The origins of a perceived distinction between *humanity* and *nature* can be traced back to the beginnings of rationalism in Greek culture around the 6<sup>th</sup> century BC — with *nature* perceived as everything on Earth other than humans and their creations, which not only could but should be conquered.<sup>15</sup> The *human/nature* dualism was reinforced during the 15<sup>th</sup> and 16<sup>th</sup> century as a premise to a capitalist logic in order to justify controlling and destroying *nature*, which resulted in the principle that “we [humans] inhabit something called *Society*, and act upon something called *Nature*.”<sup>16</sup> Accordingly, capitalism may do with *nature* what it pleases since *nature* is external to *humanity* and may be fragmented, quantified, and rationalised for the purpose of endless economic growth<sup>17</sup> — supposedly benefitting all of humanity. Separation from the rest of nature turned into a self-evident reality,<sup>18</sup> normalising that entities considered part of *humanity* could treat cheaply, own, or destroy (human and non-human) entities considered part of *nature*, as *humanity* was constructed as and deemed distinct and superior to *nature*.

This ‘self-evident reality’ is reflected in the Anthropocene discourse and their responses. By identifying human beings and societies as drivers of environmental damage, the Anthropocene discourse reproduces a flawed understanding of human beings and societies as acting upon *nature*, and not as existing within nature.<sup>19</sup> This suggests Anthropocene discourse has internalised the *human/nature* dualism in identifying *nature* as a passive entity distinct from *humanity* which, after being conquered, should be protected. However, the framing of the issue affects the response. Responses to the Anthropocene are indeed focused on rethinking how to change human (individual) behaviours and societies so that it causes less harm upon/to nature within the limits of an institutionalised capitalist logic, instead of rethinking core assumptions concerning humans’ positionality within nature and responding accordingly. This is reflected through, for instance, the United Nations’ Agenda 2030, described as a plan for “people, planet, and prosperity” — suggesting people and planet are two distinct ontological entities whose common interest can be found through the Sustainable Development Goals (SDGs), encouraging public and private investments for economic development that align with such SDGs.<sup>20</sup>

The beginnings of capitalism which structurally reinforced the perceived divide between *humans* and *nature* were accompanied by the development of Modern International Law (MIL) in Europe — a necessary condition of capitalism’s subsequent global spread. The next sub-section

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<sup>15</sup> Edmund P. Russell, ‘Speaking of Annihilation: Mobilizing for War Against Human and Insect Enemies, 1914-1945’ (1996) 82(4) *The Journal of American History* 1505, 1513; Val Plumwood, *Feminism and the Mastery of Nature* (first published 1993, Routledge 2003).

<sup>16</sup> Moore (footnote 11) 600. Emphasis added.

<sup>17</sup> Moore (footnote 11) 601.

<sup>18</sup> Moore (footnote 11) 603.

<sup>19</sup> Moore (footnote 11) 600.

<sup>20</sup> United Nations General Assembly Res., Follow-up and Review of the 2030 Agenda for Sustainable Development at the Global Level [A/RES/70/1](#) (21 October 2015); United Nations, [Scientists Call for Urgent, Targeted Action to Avoid Reversing the Development Gains of Recent Decade](#) (2019).

investigates how the legal-epistemological structure of MIL is rooted in the Western political thought of “the oppositional account of reason and the associated master account of human identity and denigration of nature,”<sup>21</sup> evolving into a so-called anthropocentric international legal system valuing some life-systems over others.<sup>22</sup>

## II. FROM THE HUMAN/NATURE DUALISM TO ANTHROPOCENTRISM IN MODERN INTERNATIONAL LAW

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In the 17<sup>th</sup> and 18<sup>th</sup> century, alongside the law of nations, a distinct principle in the emergence of MIL was the notion of individuals’ natural rights, especially concerning property.<sup>23</sup> Grotius, known as a key pioneer of MIL and for revolutionising natural rights thinking, argued that “all free subjects are born inheritable as to their land” and that all things correspond to a common stock for all mankind, inheritors of one general patrimony.<sup>24</sup> Similarly, on natural property rights, Locke’s (1689) most influential contribution provided: “Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person. This nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his.”<sup>25</sup>

The notion of ‘natural property rights’ itself and the perception of ‘man’ as superior to (and hence distinct from) earth and ‘all inferior creatures’ suggest that the question of whether ‘man’ was entitled to own nature<sup>26</sup> and to treat it as an asset was hardly a point of discussion in the doctrine establishing MIL. It was instead accepted as a natural right stemming from natural law – the idea that the rules governing the relationship between states were determined by God or by the natural order, not by states themselves. The question was rather who among human beings were considered (free) ‘men’ and, by extension, which elements of *nature* they were entitled to possess under which conditions. Discussions of what it meant to be ‘human’ under MIL intensified during the 15<sup>th</sup> and 16<sup>th</sup> century concerning the status of indigenous populations in the ‘New World’, when determining the lawfulness of Spanish colonists’ actions against the natives.<sup>27</sup> The perceived meaning of what it meant to be human was essential to determining whether certain practices were lawful and, by extension, that those who were not perceived as *human* were classified as inferior and could be lawfully subordinated to those who were. With respect to natives, they were eventually considered *human*. However, discussions persisted concerning the extent to which they had “achieved perceived criteria

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<sup>21</sup> Plumwood (footnote 15) 72.

<sup>22</sup> Lindgren (footnote 7).

<sup>23</sup> John M. Kelly, *A Short History of Western Legal Theory* (Oxford University Press 1992) 227.

<sup>24</sup> Kelly (footnote 23) 229.

<sup>25</sup> As cited in Kelly (footnote 23) 231.

<sup>26</sup> Reminder: “Nature” in italics refers to a (Western) constructed version of nature, which then could both include non-humans but humans which had been naturalised. Same applies to “human(ity)” in italics.

<sup>27</sup> Anders Henriksen, *International Law* (Oxford University Press 2017) 4; Kelly (footnote 23) 189-201.

of humanity” – such as rationality and receptiveness to Christianity,<sup>28</sup> which justified subordinating them after all.

In the 19<sup>th</sup> and 20<sup>th</sup> century, this deliberation on what it meant to be human evolved into the Western narrative of civilisation, cornerstone of MIL.<sup>29</sup> A ‘civilised’ human was one who emancipated himself from his animal condition through his rational mind,<sup>30</sup> reflected in one’s affirmation to dominate nature within and outside oneself.<sup>31</sup> Societies and peoples who were not seen as emancipated from nature, based on Western civilisation standards, were deemed irrational and savage, hence classified as ‘uncivilised’ and ‘less than human’.<sup>32</sup> White men were considered the superior ‘species’ due to meeting the criteria of humanity they had set for themselves,<sup>33</sup> which served white supremacists (e.g. Gobineau) to establish a hierarchy of races, animalising the ones considered the “lowest race in the scale of humanity.”<sup>34</sup> This also entitled ‘civilised’ humans to dominate those considered ‘uncivilised’ through processes of colonisation. The closer to *nature* an entity was perceived, the more this entity was gradually deprived of its *humanity* and therefore of legal protection. The further from *nature*, the more one was considered human and enjoyed further legal protection. Thus, the epistemological foundation of MIL was only designed to protect ‘humans’ and *de facto* legitimised the subordination of the perceived non-human or ‘less than human’.

MIL nowadays still reflects this narrative, which scholars refer to as ‘anthropocentric’<sup>35</sup> — the negation of non-human organisms’ intrinsic value rooted in the dualistic opposition of *humanity* and *nature*, where — as mentioned — the latter is constructed as passive and distinct from *humanity*, which ought to be conquered and otherwise protected only when its destruction seemingly threatens *humanity’s* well-being. However, Gear argues ‘anthropocentrism’ only challenges the imposition of human hierarchies upon non-human animals and ecosystems (inter-species hierarchies), even though human hierarchies have been constructed by white men (hence not all of humanity) who have also imposed such hierarchies upon human beings (intra-species hierarchies).<sup>36</sup> Hence, the notion of ‘anthropocentrism’ shares a common basis with Anthropocene discourse in blaming humanity as a *species*, by reason of its biological condition, for the socio-environmental crisis and thus overlooks intra-species hierarchies.<sup>37</sup> Anthropocentrism is therefore rooted in a Eurocentric definition of the

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<sup>28</sup> Erika Cudworth and Stephen Hobden, [Civilisation and Domination of the Animal](#) (2014) 42(3) *Millenium* 746, 751.

<sup>29</sup> *Ibid* 746.

<sup>30</sup> Gender neutral language omitted here to be consistent with the views explained.

<sup>31</sup> *Ibid* 758; Lindgren (footnote 7) 539.

<sup>32</sup> Cudworth, Hobden (footnote 28) 748.

<sup>33</sup> *Ibid* 752.

<sup>34</sup> *Ibid*.

<sup>35</sup> For instance, Joshua J. Bruckerohoff, [Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights](#) (2007) 86 *Texas Law Review* 615; Maneesha Deckha, [Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability under a Property Paradigm](#) (2012) 50(4) *Alberta Law Review* 783; Koprina *et al.*, [Anthropocentrism: More than Just a Misunderstood Problem](#) (2018) 31(1) *Journal of Agricultural and Environmental Ethics* 115.

<sup>36</sup> Gear (footnote 13) 231.

<sup>37</sup> *Ibid*.

*anthropos*, and one should instead refer to ‘Eurocentric-anthropocentrism’ when referring to anthropocentric biases in international institutions.

All elements considered, inter-species discrimination has been used to justify and thus preceded intra-species hierarchies, whereas these are ultimately interconnected. Accordingly, addressing intra-species injustice first might not resolve inter-species injustice, as it would disregard the root cause of the problem. However, addressing inter-species injustice first, or on an equal basis, would address the roots of intra-species injustice – the *human/nature* dualism — and would more likely result into tackling intra-species injustice as well. This is why ecocentric scholars, who understand *all* natural entities (including human beings) should be given legal protection because of their intrinsic value, advance ‘non-anthropocentrism’ to address socio-environmental injustice.<sup>38</sup> As humans are part of nature, failing to fundamentally respect and legally protect non-human life-systems inevitably jeopardises human-life as well — beyond visible direct causation between the damages inflicted on non-humans upon humans. Hence, focusing on inter-species injustice through ecocentrism in MIL allows for the protection of all life-systems, including human.

To summarise, ecocide has been *normalised* as part of human nature by the discourse of the Anthropocene, whereas it is a structurally rooted phenomenon embedded in an institutionalised capitalist logic and in MIL, both of which not only protected but encouraged ecocide based on a flawed epistemological premise distinguishing *humanity* and *nature*. MIL has thus far only protected *human* life, addressing environmental protection only when doing so benefits (what it constructs as) *humanity*. Given ecocide is structurally rooted in the dominant legal-epistemological and economic logic, ICL doctrine has not fully escaped from (Eurocentric-)anthropocentrism. The following investigates how anthropocentrism and ecocentrism influenced discussions on criminalising ecocide internationally.

### III. HISTORICAL DISCUSSIONS AND DEVELOPMENTS ON CRIMINALISING ECOCIDE

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This section will briefly expand upon the historical discussions and developments of the term ‘ecocide’. ‘Ecocide’ emerged during the Cold War in the 1970s because of environmental warfare,<sup>39</sup> “brought about by indiscriminate bombing, by large scale use of bulldozers and herbicides” during the Vietnam War.<sup>40</sup> Prior to Higgins’ proposal of a crime of ecocide in 2010, the history of the development of a crime of ecocide was marked by: (1) Richard Falk who, in 1973, provided a definition of ecocide,

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<sup>38</sup> See footnote 35; Also see: Frances Quinn, Jérémy Castéra and Pierre Clément, [Teachers’ Conceptions of the Environment: Anthropocentrism, Non-Anthropocentrism, Anthropomorphism and the Place of Nature](#) (2016) 22(6) Environmental Education Research 893.

<sup>39</sup> Agent Orange attacks (1962-1971) being the most common example to illustrate ecocide as a war crime.

<sup>40</sup> Palme (footnote 3); The term was coined by Professor Galston in 1970 but was popularised by Palme at the 1972 United Nations Stockholm Conference on the Human Environment.

limited to acts related to military purposes;<sup>41</sup> (2) The Sub-Commission on Prevention of Discrimination and Protection of Minorities<sup>42</sup> which, between 1978 and 1985,<sup>43</sup> investigated the relationship between cultural genocide and ecocide, when it examined the Genocide Convention's effectiveness — which precluded cultural genocide;<sup>44</sup> (3) Article 26 of the Draft Code of Offences against the Peace and Security of Mankind, which condemned wilfully causing or ordering “the causing of widespread, long-term and severe damage to the natural environment” — as the “safeguarding and preservation of the human environment” was of fundamental interest to the international community.<sup>45</sup> However, none of these discussions resulted in an agreed upon definition of ecocide and a subsequent explicit consideration of ecocide as an international crime under e.g. the Rome Statute in 1998. Only damage to the ‘natural environment’ independently of harm caused to humans was included as a war crime under Article 8(2)(b)(iv).<sup>46</sup> Discussions surrounding the definition of ecocide during that period reflect an evolution towards understanding humans’ inter-relatedness to non-human nature — and therefore seeing humans as part of nature, as it sees SED can jeopardise human life, both in wartime and peacetime. However, the visible impact SED has on (some) human beings dominated most discussions, and thus strongly leaned towards (Eurocentric-)anthropocentrism.<sup>47</sup>

In 2010 British lawyer and activist, Polly Higgins, submitted a request to the International Law Commission to amend the Rome Statute to include ‘ecocide’ as its own offense, both in wartime and peacetime, defined as: “The extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.”<sup>48</sup> Higgins’ definition of ecocide is a strict liability crime,<sup>49</sup> which would impose an absolute duty to prevent ecocide. While the Rome Statute

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<sup>41</sup> Richard A. Falk, [Environmental Welfare and Ecocide Facts, Appraisal and Proposals](#) (1973) 9(1) Rev. BDI, Annex 1, Art. II, 21. This included, for instance, the use of weapons of mass destruction or the use of chemical herbicides to defoliate forests.

<sup>42</sup> This Sub-Commission was the previous body of the current Sub-Commission on the Promotion and Protection of Human Rights. Its main functions were to undertake studies and make recommendations on human rights issues and the prevention of discrimination of any kind.

<sup>43</sup> UN ESCOR, 31<sup>st</sup> Sess., Sub-Commission on Prevention of Discrimination and Protection of Minorities. [U.N. Doc. E/CN.4/Sub.2/416](#) (4 July 1978) 124-130; UN ESCOR, 38<sup>th</sup> Sess., Sub-Commission on Prevention of Discrimination and Protection of Minorities. [U.N. Doc. E/CN.4/Sub.2/1985/6](#). (2 July 1985), 17; U.N. ESCOR, 38<sup>th</sup> Sess., Sub-Commission on Prevention of Discrimination and Protection of Minorities. [U.N. Doc. E/CN.4/Sub.2/416](#) (4 November 1985).

<sup>44</sup> Except for the transfer of children of a protected group to another group, see Genocide Convention, art. II.

<sup>45</sup> Summary Records of the meetings of the 43rd Session (1991) 2 Yearbook International Law Commission, U.N. Doc. 29 [A/CN.4/SER.A/1991/Add.1](#) (Part 2) 107.

<sup>46</sup> UN General Assembly [Rome Statute of the International Criminal Court](#) (‘Rome Statute’) (adopted on 17 July 1998, entered into force on 1 July 2002, last amended 2010) ISBN No. 92-9227-227-6, art. 5, 6, 7.

<sup>47</sup> Also see: Summary Records of the meetings of the 48<sup>th</sup> Session (1996) 1 Y.B. Int’l L. Comm’n, U.N. Doc. [A/CN.4/SER.A/1996](#) 8-10.

<sup>48</sup> Higgins *et al.* (footnote 6) 257.

<sup>49</sup> Anastacia Greene, The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative? (2019) 30(3) Fordham Environmental Law Review 1, 3.

does not recognise corporations as subjects, corporate conduct here could be prosecuted if criminal responsibility could be attributed to natural persons.<sup>50</sup>

Higgins' definition condemns SED independently of damage to human populations, as "inhabitants" means human and non-human living organisms, making ecocide a crime against all life, not just human life.<sup>51</sup> The seriousness for ecocide shall be established if impact(s) is/are either (1) widespread, (2) long-term or (3) severe.<sup>52</sup> The fact that only one of these elements needs to be met, in addition to the strict liability nature of the proposed crime, and its framing leaning towards ecocentrism, would have provided the ICC with the jurisdiction to deter and otherwise, sanction many forms of ecocide. The proposal did not result in an amendment of the Rome Statute, but Higgins' work revived discussions surrounding ecocide since the 2010s.<sup>53</sup>

In June 2021, the Independent Expert Panel for the Legal Definition of Ecocide ('IEP') proposed amendments to add 'ecocide' as a new crime to the Rome Statute.<sup>54</sup> The Panel first suggested an addition of a preambular paragraph 2 bis to the Statute: "Concerned that the environment is daily threatened by severe destruction and deterioration, gravely endangering natural and human systems worldwide." Although this again suggests an understanding of humans' interrelatedness to the non-human, it juxtaposes the 'natural' and 'human' systems as two distinct entities. The IEP further proposed to add a fifth paragraph to Article 5(1) of the Statute to list the crime of ecocide, to be introduced as Article 8 ter of the Statute, defined as:

"[U]nlawful 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."<sup>55</sup>

Even if "defining the 'environment' (or 'natural environment'), has proved to be challenging for international law,"<sup>56</sup> with no agreed upon definition, the IEP provided one because criminal law requires clarity and specificity.<sup>57</sup> It defined the environment as "the earth, its biosphere, cryosphere,

<sup>50</sup> Rome Statute (footnote 46) art. 25(1); Polly Higgins, *Eradicating Ecocide* (Shepherd-Walwyn 2010).

<sup>51</sup> Polly Higgins, *Earth is Our Business: Changing the Rules of the Game* (Shepherd-Walwyn 2012) 24.

<sup>52</sup> Criteria inspired by Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), UNODA, 31st Sess. ENMOD. [U.N. Doc. A/31/27](#) Annex; Higgins (footnote 50); Further details about the widespread, long-term, and severe elements addressed in Part IV.

<sup>53</sup> See for instance Greene (footnote 49); Laurent Neyret, [Draft Convention against Ecocide](#), in *From Ecocrimes to Ecocide. Protecting the Environment through Criminal Law* (Cambridge Centre for Environment, Energy & Natural Resource Governance 2017) 35; Kevin Jon Heller, [Skeptical Thoughts on the Proposed Crime of "Ecocide" \(That Isn't\)](#) (Opinio Juris, 23 June 2021).

<sup>54</sup> IEP (footnote 3).

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.* 11.

<sup>57</sup> *Ibid.* 5, 11.

lithosphere, hydrosphere and atmosphere, as well as outer space.”<sup>58</sup> This relates to the definition of the environment implicitly provided under the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) — drafted in 1976, when motivations to criminalise ecocide were anthropocentric — which defines environmental modification techniques as “any technique for changing (...) the dynamic, composition or structure of the earth, including the biota, lithosphere, hydrosphere and atmosphere, or of outer space.”<sup>59</sup> The IEP’s definition is broad enough to ensure the five main spheres on Earth are protected, without requiring humans to be harmed to trigger liability.<sup>60</sup> Including the “biosphere” recognises that the (‘natural’) environment encompasses biotic and abiotic factors which interact in complex ways.<sup>61</sup> However, the scientific taxonomy relating to Earth spheres seemingly distinguishes the biosphere — and its living organisms — from the anthroposphere (also called ‘technosphere’).<sup>62</sup> This resembles the Commentary of the International Committee of the Red Cross on Article 35(3) of the 1977 Additional Protocol (I) (AP I) to the Geneva Conventions (‘Commentary’),<sup>63</sup> which condemns damage to the ‘natural environment’ through any methods of warfare, defined in the Commentary as “a system of inextricable interrelations between living organisms and their inanimate environment.”<sup>64</sup> However, the Commentary distinguishes the ‘natural environment’ from the ‘human environment’, as well as ‘civilian populations’ from ‘living organisms’.<sup>65</sup> Therefore, both instances suggest the human environment/civilians are distinct from nature and living organisms of life (or the ‘natural environment’), repeating the problematic *human/nature* dualism.

Wanton here means “with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated.”<sup>66</sup> The IEP introduced it as a proportionality test, aligned with environmental law principles, as it balances “environmental harms against social and economic benefits, which is expressed in the principle of sustainable development.”<sup>67</sup> However, as

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<sup>58</sup> Ibid 11.

<sup>59</sup> ENMOD (footnote 52) art. II.

<sup>60</sup> IEP (footnote 3) 11; Will Steffen *et al.*, [The Emergence and Evolution of Earth System Science](#) (2020) 1 Nature Reviews Earth & Environment 54.

<sup>61</sup> However, this is not entirely clear whether ‘biosphere’ here solely refers to areas on Earth where life exists, or if it signifies these areas together with their living organisms — two of the possible interpretations of the biosphere.

<sup>62</sup> Steffen *et al.* (footnote 60); Jan Zalasiewicz *et al.*, [Scale and Diversity of the Physical Technosphere: A Geological Perspective](#) (2016) 4(1) The Anthropocene Review 9; Arnim Kuhn and Thomas Heckeley, [Anthroposphere](#) In: Speth P., Christoph M., and Dieckrüger B. (eds) *Impacts of Global Change on the Hydrological Cycle in West and Northwest Africa* (Springer, Berlin, Heidelberg 2010); Erle C. Ellis, [Ecology in an Anthropogenic Biosphere](#) (2015) 85(3) *Essa Centennial Papers* 287; Robert H. Whittaker, Gene E. Liken, [The Biosphere and Man](#). In: Lieth H., and Whittaker R.H. (eds) *Primary Productivity of the Biosphere* (Springer 1975) 14 *Ecological Studies (Analysis and Synthesis)* 305.

<sup>63</sup> ICRC, [1987 Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949](#) (‘ICRC Commentary’) ¶1451; ICRC [Protocols Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts](#) (Protocol I, adopted on 8 June 1977) (‘AP I’) 1125 UNTS 3, art. 35, ¶3.

<sup>64</sup> Ibid.

<sup>65</sup> ICRC Commentary (footnote 63).

<sup>66</sup> IEP (footnote 3) 5.

<sup>67</sup> IEP (footnote 3) 10.

established earlier, the Anthropocene discourse has internalised the *human/nature* dualism which is reflected through the SDGs' — arguably for capitalist ends. The IEP even acknowledges that such socially beneficial acts can cause SED.<sup>68</sup> Yet, as argued, restricting the framing of environmental protection to the extent that it supposedly benefits — a constructed vision of — *humanity* is detrimental to both inter- and intra-species justice. This definition thus legitimises SED to the extent that it benefits short-term socio-economic development whereas, from an ecocentric approach, the cost of legitimising SED within the limits of Eurocentric-anthropocentric interests will result in long-term human destruction. Moreover, such socio-economic development is arguably led by, and primarily beneficial to, the actors who would be concerned by and subject to prosecution for 'ecocide'.

The 'wanton' element further complicates the *mens rea* of the crime, which Heller argues is confusing.<sup>69</sup> Among other reasons,<sup>70</sup> it would be difficult for the Office of the Prosecutor of the ICC to prove the *mens rea* of the crime, as the 'wanton' element adds that the perpetrator must not only know that their acts would result in "severe and either widespread or long-term damage to the environment," but also be aware that the damage of their actions would be "clearly excessive in relation to the social and economic benefits anticipated."<sup>71</sup>

The hybrid conjunctive test of "severe and either widespread or long-term" to qualify acts as 'ecocide' may also result in various types of 'ecocides' not being prosecuted — e.g. those which are only severe but not widespread nor long-term. The IEP also defined these elements, currently undefined in the Rome Statute. From an ecocentric approach, the definitions of severe and widespread are problematic. The IEP defines severe as "damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources."<sup>72</sup> 'Natural resources' are considered distinct from 'human life', thus once again depicting all of (non-human) nature as a category distinct from human beings who can use it as an asset ('resources'). This conflicts with an ecocentric approach. Moreover, widespread means "damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings."<sup>73</sup> The latter seemingly implies humans are not considered part of an ecosystem, nor considered part of "species" — even though humans are a primate animal species.<sup>74</sup> We should however note that this element, through the conjunctions 'or', does not necessarily require humans to directly suffer damage of widespread SED, leaning towards a more ecocentric approach. Consequently, while an ecocentric shift in defining ecocide was visible under Higgins' definition, the IEP recycled previous definitions and anthropocentric

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<sup>68</sup> Ibid.

<sup>69</sup> Heller (footnote 53).

<sup>70</sup> Ibid.

<sup>71</sup> Ibid; IEP (footnote 3) 5.

<sup>72</sup> IEP (footnote 3) 8.

<sup>73</sup> IEP (footnote 3) 8.

<sup>74</sup> Colin Groves, [The What, Why and How of Primate Taxonomy](#) (2004) 25(5) International Journal of Primatology 1105.

approaches to criminalising SED — which would not only preclude numerous instances of SED from being deterred and prosecuted, but also render it almost impossible for the ICC to establish liability.

#### IV. ECOCIDE IN THE ROME STATUTE

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To further contextualise the implications of ecocentrism and anthropocentrism to criminalise SED internationally, the following briefly analyses the extent to which SED can be prosecuted under the current jurisdiction of the ICC. When answers cannot be found in the Rome Statute or the Elements of Crimes, the analysis relies on other sources of international law.

##### 1. Article 8(2)(b)(iv): The First Ecocentric Environmental War Crime?

The Rome Statute makes it a war crime to:

Intentionally launch an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>75</sup>

This is the only provision in the Rome Statute specifically referring to damage to the ‘natural environment’ as part of its constituent elements. The test is whether death, injury or damage to a civilian object or to the ‘natural environment’ is “clearly excessive in relation to the concrete and direct military advantage anticipated”<sup>76</sup> — a balancing approach, resembling the IEP’s approach to social and economic benefits weighed against environmental damage. The conjunction ‘or’ suggests human injury is not required to trigger liability for damaging the (non-human) natural environment,<sup>77</sup> making Article 8(2)(b)(iv) *a priori* the first ecocentric war crime.

However, Article 8(2)(b)(iv) of the Rome Statute and AP I’s Article 35 are similar.<sup>78</sup> AP I’s Commentary condemns damage to the ‘natural environment’ through any methods of warfare. As argued, AP I’s definition distinguished the ‘human environment’ from the ‘natural environment’ and

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<sup>75</sup> Rome Statute (footnote 46) art. 8(2)(b)(iv).

<sup>76</sup> *Ibid.*

<sup>77</sup> Jessica C. Lawrence and Kevin Jon Heller, [The First Ecocentric Environmental War Crime: the Limits of Article 8 \(2\)\(b\)\(iv\) of the Rome Statute](#) (2007) 20(1) *Geo. International Environmental Law Review* 61; Rosemary Mwanza, [Enhancing Accountability for Environmental Damage under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity](#) (2018) 19(2) *Melbourne Journal of International Law* 586.

<sup>78</sup> The Protocol aims at protecting the ‘natural environment’ against damage which could be inflicted by any weapon (ICRC Commentary (footnote 63) ¶1450). It applies in the context of international armed conflicts (IACs) (ICRC Commentary (footnote 63) ¶1450). ICRC, [Geneva Convention Relative to the Protection of Civilian Persons in Time of War](#) (Fourth Geneva Convention) (12 August 1949) 75 UNTS 287, art. 2.

'living organisms' from 'civilians'.<sup>79</sup> Whereas Article 35(3) of the Protocol protects the 'natural environment' irrespective of human injury, the exclusion of the 'human environment' from the 'natural environment' and of 'civilians' from 'living organisms' fails to recognise that the former is part of the latter — as argued. The Commentary further adds that protecting the 'natural environment' should occur if otherwise 'man's' existence is threatened.<sup>80</sup> Thus, if the ICC conceives the 'natural environment' as AP I does, although Article 8(2)(b)(iv) seems ecocentric at first, its underlying motivation is not to protect non-human life but to prevent damage to *humanity*.

The *actus reus* of war crimes requires proving the attack resulted in three cumulative elements: (1) widespread, (2) long-lasting, and (3) severe damage to the 'natural environment'. This excludes attacks causing damage to the 'natural environment' that satisfy only one or two of these elements. Furthermore, the Rome Statute and the Elements of Crimes are silent on the meanings of the 'natural environment', 'widespread', 'long-lasting', and 'severe', suggesting the ICC would most likely have to interpret those terms by reference to other relevant treaties.<sup>81</sup> This blurs what exactly constitutes the *actus reus* of the crime, making it problematic for the ICC to apply this provision without conflicting with the principle of *nullum crime sine lege* and strict construction.<sup>82</sup>

In interpreting Article 8(2)(b)(iv), the ICC would also have to look outside of the Rome Statute and Elements of Crimes for the meaning of widespread, long-term, and severe. The most specific definitions of those terms in an international treaty can be found in the Annex to ENMOD,<sup>83</sup> which makes it likely that the ICC would adopt those definitions.<sup>84</sup> For the ecocentric critique, the definition of 'severe' is of relevance, as it involves "serious or significant disruption or harm to human life, natural and economic resources or other assets."<sup>85</sup> This definition, for the same reasons as the IEP's, conflicts with the ecocentric approach. Hence, although it is not entirely clear how the ICC would interpret these terms, the most likely definitions under international law that would serve their interpretation reflect anthropocentric biases.

Moreover, Article 8(2)(b)(iv) implies that even widespread, long-lasting, and serious damage to the 'natural environment' may not be excessive if it is outweighed by the "direct military advantage

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<sup>79</sup> ICRC Commentary (footnote 63) ¶1451; AP I (footnote 63) art. 35, ¶3.

<sup>80</sup> ICRC Commentary (footnote 63) ¶1444(88).

<sup>81</sup> The Assembly of State Parties could also amend such terms, but it would require a two-third majority which makes it unlikely that they would agree on those. Also see Lawrence, Heller (footnote 77) 72; Rome Statute (footnote 46), art. 21(3).

<sup>82</sup> Lawrence, Heller (footnote 77) 72; Rome Statute (footnote 46) arts. 21 and 22.

<sup>83</sup> As for the Protocol, ENMOD only applies to IACs. See ENMOD (footnote 52).

<sup>84</sup> Note that Article 35(3) of AP I utilises the same "widespread, long-term, and severe" test as Article 8(2)(b)(iv). According to the ICRC Commentary (footnote 63), the drafters of AP I intended those terms to be defined slightly differently than in ENMOD, making it possible that the ICC would look to AP I's drafting history instead.

<sup>85</sup> ENMOD (footnote 52) Annex.

anticipated” for a particular attack.<sup>86</sup> Although this is a ‘balancing act’, it is equally anthropocentric,<sup>87</sup> as it gives the ‘natural environment’ conditional rights, which can be trumped whenever one has a valid military reason.

As for the *mens rea* requirement, the perpetrator must have subjectively known not only that the attack would bring about widespread, long-lasting, and severe damage to the ‘natural environment’, but also that it would be clearly excessive compared to the anticipated military advantage.<sup>88</sup> Such subjective recognition will be almost impossible to prove, similarly to the IEP’s proposal requiring a subjective value judgement.

Article 8(2)(b)(iv) remains unique in the sense that it is the only war crime that explicitly criminalises non-human environmental damage. The war crime thus reflects an increased understanding of inter-relatedness between human and non-human nature, which is a fundamental element that deserves further consideration if ICL is to evolve towards a stronger criminalisation of ecocide. However, that increased understanding is not sufficient to consider it an ecocentric crime. We cannot be certain that the ENMOD’s cumulative elements and AP I’s definition of ‘natural environment’ would apply. Yet, given these definitions are included in the most relevant sources of law for the ICC, this provision arguably reflects a failure to deeply re-evaluate the assumption on humans’ positionality within nature, substantially limiting the ICC’s capacity to define the non-human natural environment in a manner sufficiently accurate to prosecute ecocide (here as a war crime, but this criticism applies beyond the scope of Article 8(2)(b)(iv)).

## 2. Genocide and Crimes Against Humanity

Articles 6 and 7 of the Rome Statute, respectively criminalising genocide and CAH, do not explicitly condemn SED. However, both provisions offer the potential for prosecuting SED in wartime and peacetime.

The Rome Statute does not explicitly refer to ‘ecocide’ as genocide, but the *Al Bashir* case offers an exceptional precedent regarding the destruction of the environment as genocide.<sup>89</sup> Pre-Trial Chamber I found substantial grounds to believe the defendant had inflicted conditions of life calculated to bring about the physical destruction of the Fur, Masalit, and Zaghawa ethnic groups, by destroying

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<sup>86</sup> Matthew G. Gillett, [Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict](#), in C. Stahn, J. Iverson, and J. S. Easterday (Eds.) *Environmental Protection and Transitions from Conflict to Peace* (Oxford University Press 2017) 229.

<sup>87</sup> Note that such conditional rights and a balancing act (principle of proportionality) is also applied in the context of civilians (collateral damage).

<sup>88</sup> See ICC, [Elements of Crimes](#) (2011) ISBN No. 92-9227-232-2 art. 8(2)(b)(iv), footnotes 36, 37; Rome Statute (footnote 46) art. 8(2)(b)(iv) & 30.

<sup>89</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir* (‘Al Bashir 2008’), Case No. [ICC-02/05](#), Summary of Prosecutor’s Application under Article 58, (July 14, 2008).

means of survival — e.g. water sources.<sup>90</sup> However, generally, even if one of the acts listed under Article 6 was caused by SED, it would be difficult to establish that SED was intended to destroy the group, because genocidal intent is difficult to prove.<sup>91</sup> Moreover, there could be many reasons for SED other than the deliberate intent to bring about the destruction of one group — e.g. cutting off supplies to a rebel group.

Charges for ecocide as part of CAH could be more easily established, as the prosecution is not required to demonstrate the conduct intended to harm a specific group — except for the CAH of persecution.<sup>92</sup> All CAH require that the perpetrator knew or intended his conduct to be part of a widespread and systematic attack directed against a civilian population, pursuant to or in furtherance of a State or organisational policy<sup>93</sup> — by State or non-State actors<sup>94</sup> — to pursue such an attack.<sup>95</sup> Such a policy may be implemented by a deliberate failure to take action, consciously aimed at encouraging such attack, but it cannot be inferred solely from the absence of action.<sup>96</sup> Widespread in this context refers to large scale violence regarding the number of victims or over a large geographical area, while systematic refers to the organised nature of the acts, and excludes random, isolated or accidental acts of violence.<sup>97</sup>

The threshold of widespread and systematic attacks may exclude many forms of SED, but CAH theoretically offers a wider range of possibilities to bring charges for ecocide than genocide. *Al Bashir* again represents a precedent of charges for ecocide under CAH. Attacks on the group's means of survival (natural 'resources') resulted in charges of the CAH of extermination — which differs from genocide as it does not require specific intent to destroy the group.<sup>98</sup> The perpetrator inflicted conditions of life calculated to bring about the destruction of a part of a population through direct or indirect killing, or the deprivation of access to food and medicine.<sup>99</sup> This can result from SED, as suggested by *Al Bashir*.

<sup>90</sup> *Al Bashir* 2008 (footnote 89) paras. 14-35; *Prosecutor v. Omar Hassan Ahmad Al Bashir* ('Al Bashir 2010'), Case No. [ICC-02/05-01/09](#) Second Decision on the Prosecution's Application for a Warrant of Arrest (July 12, 2010) paras. 36-39.

<sup>91</sup> Jürgen Zimmerer, [Climate Change, Environmental Violence, and Genocide](#) (2014) 18(3) *The International Journal of Human Rights*, 265, 270.

<sup>92</sup> Elements (footnote 88) art. 7(1)(h).

<sup>93</sup> Elements (footnote 88) art. 7(1).

<sup>94</sup> According to the ICC, the concept of organisation is predicted on the basis of a group's ability to perform acts infringing basic human values, not on the formal nature of a group and the level or organisation. See *Prosecutor v. Samoei Ruto, Kiprono Kosgey, and Aran Sang*, Case No. [ICC-01/09-01/11](#), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, (January 23, 2012) ¶184.

<sup>95</sup> Elements (footnote 88) art. 7, Introduction; Rome Statute (footnote 46) art. 7, 25.

<sup>96</sup> Elements (footnote 88) art. 7, footnote 6.

<sup>97</sup> Robert Cryer, Darryl Robinson and Sergey Vasiliev, [An Introduction to International Criminal Law and Procedure](#) (Cambridge University Press 2019).

<sup>98</sup> In this case, the ICC found that the elements of CAH, art. 7(1)(b), were met. However, since it could be proven that *Al Bashir* intent was to bring about the extinction of (a part of) the groups, the Court decided to qualify this conduct as genocide under art. 6(c). See: *Al Bashir* 2010 (footnote 90).

<sup>99</sup> See Elements (footnote 88) art. 7(1)(b).

Intentional SED in an area occupied by civilians could, in the right circumstances, reasonably qualify under numerous acts of CAH.<sup>100</sup> For instance, in 2014, a complaint was addressed to the ICC against the multinational corporation Texaco-Chevron, whose oil extraction activities between the 1960s and 1990s in Ecuador<sup>101</sup> resulted in systematic (and deliberate) pollution, considered the most damaging oil-related disaster of all time.<sup>102</sup> The consequences for the health of the indigenous and farmer communities living in the Oriente represent a serious and sustained attack on the population, who have lived there for centuries.<sup>103</sup> The ICC was asked to investigate Texaco officials for the CAH of murder, extermination, deportation or forcible transfer of population, persecution, and other inhumane acts.<sup>104</sup> The ICC dismissed the case, possibly due to the acts having commenced before the ratification of the Rome Statute, although arguably an investigation could have resulted in a case qualifying ecocide as a CAH.<sup>105</sup>

## CONCLUSION:

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Ecocide has been normalised as a course of human conduct in the ‘Anthropocene’, whereas it is structurally rooted to serve a capitalist logic, premised on and reinforcing the constructed Eurocentric dualism between *humanity* and *nature*. In depicting humanity as a *species* as the driver of SED, rather than addressing the roots of the socio-environmental crisis found in — the normalisation of — the *human/nature* dualism, the Anthropocene narrative results in inadequate responses since solutions are designed and premised on the same flawed approach and vision of humanity within the web of life. Furthermore, MIL was designed to legitimise the domination of non-dominant humans and non-human entities to sustain this capitalist logic — benefitting white ‘civilised’ men. Present criticisms depict MIL as anthropocentric, but it would be more accurate to talk about Eurocentric-anthropocentrism. Thus, the doctrine upon which MIL is established is anything but conducive to condemn and criminalise ecocide.

Because the construction of *nature* as a subordinate other served to naturalise and dehumanise non-dominant human and non-human others, addressing inter-species injustice would

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<sup>100</sup> Rome Statute (footnote 46) art. 7; Kevin Jon Heller, [The ICC, Continuing Crimes, and Lago Agrio](#) (Opinio Juris 2014)

<sup>101</sup> Ecuador ratified the Rome Statute in 2002, thus the ICC has jurisdiction over all the crimes listed under Article 5 that have been committed or allegedly committed in Ecuadorian territory since 2002.

<sup>102</sup> Amazon Defense Coalition, [Summary of Overwhelming Evidence Against Chevron in Ecuador Trial](#) (Chevron in Ecuador 2012); Pablo Fajardo Mendoza, Eduardo Bernabé Communication Situation in Ecuador [[Complaint to Mrs. Fatou Bensouda, Prosecutor at the Office of the Prosecutor ICC](#)] (Chevron in Ecuador 2014) 5, 6; Rodrigo Pérez Pallares, Carta Al Director de Vistazo [[Letter to Xavier Alvarado Roca, Presidente, Revista Vistazo](#)] (Chevron in Ecuador 2007); Kalkandelen, O’Byrne (footnote 7).

<sup>103</sup> Fajardo Mendoza (footnote 102) 6.

<sup>104</sup> Ibid 20-41; Rome Statute (footnote 46) art. 7(a),(b),(d),(h),(k).

<sup>105</sup> See: Heller (footnote 100); Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes Against Humanity, War Crimes* (Intersentia Ltd. 2002) 368.

enhance intra-species justice. Higgins' ecocide proposal, leaning towards ecocentrism, could have contributed to addressing both inter- and intra-species injustice and would have enabled the ICC to deter and prosecute various types of ecocides. However, most discussions held to define and criminalise 'ecocide' since the 1970s have resulted in anthropocentric proposals. The IEP's proposal and Article 8(2)(b)(iv) of the Rome Statute condemn damage to the 'natural environment' independently of damage against humans, which could be interpreted as ecocentric. However, both either contain a cost/benefit or balancing element which legitimises SED when one has a valid military or socio-economic reason to do so, which is anthropocentric. Both also frame 'nature' as a resource<sup>106</sup> and include all the complex non-human ontological entities into one distinct category: the inadequately defined 'natural environment'. An ecocentric approach would promote a more accurate perception of environmental inter-relatedness, which would result in more precise, thus more effective, provisions criminalising ecocide. Article 8(2)(b)(iv) is also unlikely to result in charges for ecocide, and so would the IEP's proposal if it were introduced under the Rome Statute. Accordingly, combining an *a priori* ecocentric approach to protect nature with underlying anthropocentric biases and motivations seems even less effective than remaining purely anthropocentric. Indeed, the ICC is currently more likely to condemn SED as a means to perpetuate CAH or genocide — which do not criminalise SED — than as a war crime under Article 8(2)(b)(iv). Yet, this is insufficient from an ecocentric lens to ensure effective prevention and prosecution of ecocide.

Attempts to criminalise ecocide alone — in peace and war time — in an international legal system rooted in a Eurocentric-anthropocentric vision of the world will unlikely result in an effective solution to address the socio-environmental crisis. Therefore, the Anthropocene discourse must shift to acknowledge and address the structural and discursive roots of this crisis. Moreover, a stronger criminalisation of ecocide and a reinforcement of measures against intra- and inter-species injustice require an ecocentric — or at least relational — approach and viewing the rights of nature — encompassing human and non-human entities together — as the fundamental basis of international law.

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<sup>106</sup> Provided the ICC conceives the 'natural environment' as AP I does to interpret Article 8(2)(b)(iv).