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Wanton - Right Direction but Wrong Compass: The Mens Rea Crisis and the Proposed Ecocide Crime

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ABSTRACT

The international legal order has long struggled to hold individuals, and particularly corporations, accountable for large-scale environmental destruction that falls short of the wartime conduct addressed in Article 8(2)(b)(iv) of the Rome Statute. This paper examines the proposed crime of ecocide, currently under consideration as a fifth international crime within the jurisdiction of the International Criminal Court, and locates its central legal vulnerability in the definition of mens rea, specifically in the contested interpretation of the word “wanton” as deployed in the 2021 Independent Expert Panel definition. The paper proceeds in five parts. It begins by tracing the conceptual origins of ecocide from Arthur Galston’s 1970 coinage in response to Agent Orange defoliation in Vietnam to Polly Higgins’ 2010 proposal to the International Law Commission, situating the crime within the broader movement toward recognising the ecosystem itself as a legitimate subject of legal protection rather than merely a proxy for human welfare. The paper then argues that the fragmented domestic criminalisation of ecocide, while symbolically significant, is structurally incapable of addressing the inherently transboundary character of ecological destruction. It proceeds to demonstrate that the current Rome Statute framework, principally Article 8(2)(b)(iv), imposes an unworkably high standard of intent that has produced zero prosecutions for environmental destruction in over two decades of ICC operation. The paper then offers a qualified endorsement of the IEP definition: it rightly lowers the mens rea threshold to encompass reckless environmental harm, but introduces a dangerous cost-benefit proportionality test through the “wanton” qualifier, one that lacks any identifiable benchmark and that, in the era of the climate crisis, risks providing a legally sanctioned defence to the very industries most responsible for ecological catastrophe. The paper concludes by surveying complementary international legal pathways, including the landmark ICJ and ITLOS Advisory Opinions of 2024 to 2025 and the proposed International Court for the Environment, that may collectively operationalise ecocide accountability while the ICC amendment process unfolds.

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I. FROM NAPALM TO THE NEGOTIATING TABLE: THE CONCEPT OF ECOCIDE

Etymologically, ecocide combines the Greek term *oikos* (home) with the Latin *caedere* (to kill), conveying the notion of destroying one's ecological home.¹ Its formal entry into international legal discourse can be traced to 1970, when the American biologist Arthur W. Galston, whose doctoral research on defoliating agents contributed greatly to the development of Agent Orange, proposed the term to describe the deliberate and large-scale destruction of ecosystems as a distinct international crime.² Agent Orange was a powerful chemical herbicide and defoliant used by the U.S. military during the Vietnam War; named for the orange stripes on its storage barrels, it was sprayed to destroy enemy crops and to strip away the dense jungle foliage that provided cover for North Vietnamese and Viet Cong forces. Galston advanced the concept at the Conference on War and National Responsibility in Washington, where he drew parallels between the annihilation of human populations under existing genocide law and the systematic chemical destruction of natural environments in Vietnam.³ His intervention was not merely semantic: it was a demand that international law acknowledge a categorically different kind of victim, not the individual, not even the human collective, but the living ecosystem itself, thereby designating ecocide as a distinct crime.

The scale of harm contemplated by ecocide is analogous to genocide in its gravity. Just as genocide is an act of massacre specifically targeted to destroy a national, ethnic, racial, or religious group “in whole or in part,”⁴ ecocide is conceived as requiring the large-scale, severe, and either widespread or long-term destruction of ecosystems: damage so profound, so irreversible, and so broadly harmful that it demands the most serious form of legal response available under international law.⁵ The threshold is intentionally demanding because the claim for criminalisation rests precisely on this equivalence of gravity.

¹ STOP ECOCIDE INT'L, *The Law* (2021), <https://www.stopecocide.earth/the-law>; ENVTL. LAW INST. OF AUSTL., *Ecocide: Definition and History* (2025).

² Elise Cusato & Emily Jones, *The Concept of Ecocide*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 145, 147 (2023); Nocăna Vladoiu & Maria Claudia, *Ecocide in International Law*, 17 J. ENVTL. L. 1, 3 (2025).

³ Arthur W. Galston, Address at the Conference on War and National Responsibility (Washington, D.C., Feb. 1970); DAVID ZIERLER, *THE INVENTION OF ECOCIDE: AGENT ORANGE, VIETNAM, AND THE SCIENTISTS WHO CHANGED THE WAY WE THINK ABOUT THE ENVIRONMENT* 3 (Univ. of Ga. Press 2011).

⁴ Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

⁵ POLLY HIGGINS, *ERADICATING ECOCIDE: LAWS AND GOVERNANCE TO STOP THE DESTRUCTION OF THE PLANET* 63-65 (Shepherd-Walwyn 2010).

Following Galston's coinage, the concept gained diplomatic visibility at the 1972 UN Conference on the Human Environment in Stockholm, where the Prime Minister of Sweden, Olof Palme, invoked it in his opening address.⁶ In 1973, the international law scholar Richard Falk called for a convention criminalising ecocide as a war crime.⁷ The International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind then included a provision on intentional and severe environmental damage, which ultimately became the narrow wartime provision of Article 8(2)(b)(iv) of the Rome Statute.⁸ The modern campaign owes its sustained impetus to the Scottish lawyer Polly Higgins, who submitted a formal proposal in 2010 to the International Law Commission to insert ecocide as a fifth core crime within the Rome Statute.⁹

Higgins' proposed definition described ecocide as "the extensive damage to, destruction of, or loss of ecosystem(s) of a given territory... to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished."¹⁰ The deliberate use of "inhabitants" rather than "human population" was not incidental. It opened up the debate over what constitutes a victim of environmental damage. It gestured toward an ecocentric conception of legal victimhood in which the ecosystem is not merely a proxy for human welfare but itself a subject of legal protection. International law has historically operated within an anthropocentric paradigm: it protects the environment because, and insofar as, environmental harm harms human beings.

The ecocide movement challenges this premise, insisting that ecosystems possess intrinsic value and that the law must begin to recognise that the ecosystem itself can be a victim. This is not only environmentally significant but also a legal imperative in the face of accelerating ecological collapse. While a full theory of environmental legal personhood lies beyond the scope of this paper, this ecocentric aspiration directly shapes the critique developed in Section IV: the contested definition of "wanton" ultimately retreats from this vision and re-centres human economic interest, with significant doctrinal consequences.

⁶ Vladoiu & Claudia, *supra* note 2, at 4; Zierler, *supra* note 3, at 8.

⁷ Richard Falk, *Environmental Warfare and Ecocide: Facts, Appraisal, and Proposals*, 4 SECURITY DIALOGUE 80, 84 (1973).

⁸ INT'L LAW COMM'N, Draft Code of Crimes Against the Peace and Security of Mankind, art. 26, U.N. Doc. A/51/10 (1996); Philippe Sands, *Ecocide: Killing the Host* 23 (2015).

⁹ Santiago Gorostiza, *The Long Road to Ecocide Law*, 12 GLOBAL ENVTL. POL. 45, 48 (2025).

¹⁰ Higgins, *supra* note 5, at 62.

II. THE INSUFFICIENCY OF DOMESTIC CRIMINALISATION AND THE CASE FOR INTERNATIONAL ADJUDICATION

A significant number of states have already incorporated ecocide into their national criminal codes. In Russia, the Criminal Code, under Article 358, criminalises the mass destruction of flora and fauna or the severe contamination of the atmosphere or water resources, punishable by twelve to twenty years' imprisonment.¹¹ Ukraine, Georgia, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, and Tajikistan have similarly codified the crime, drawing largely on a shared Soviet legal inheritance.¹² Vietnam's Penal Code independently classifies ecocide for the first time as a standalone crime and a crime against humanity in its domestic legislation under article 278 in 1990¹³ and subsequently under article 342 in 1999¹⁴. Nevertheless, Vietnam subsequently removed "ecocide" as a standalone offense from its Penal Code in 2015 which further underscores the limitations of relying solely on domestic legal frameworks as they are volatile¹⁵. France's 2021 Climate and Resilience Act introduced criminal liability for serious and lasting damage to flora, fauna, or environmental quality, carrying penalties of up to ten years' imprisonment.¹⁶ At the regional level, the European Union's Directive 2024/1203, adopted in April 2024, harmonised member states' criminal law on environmental destruction, expanding both corporate and individual liability for widespread or substantial ecological harm.¹⁷

This is, on its face, a meaningful normative development. Yet the gap between legislative text and practical enforcement is, in each of these cases, considerable. Environmental destruction of the scale and character that qualifies as ecocide is almost invariably transboundary in its causes and consequences. The act of gas flaring in the Niger Delta releases sulphur dioxide into the atmosphere, contributing to climate change that affects not a particular state but states thousands

¹¹ Ugolovnyy Kodeks Rossiyskoy Federatsii [UK RF] [Criminal Code] art. 358, Federal Law No. 63-FZ (Russ. 1996).

¹² Vladoiu & Claudia, *supra* note 2, at 6; Criminal Code of Georgia art. 409 (1999); Kryminalnyi Kodeks Ukrainy [Criminal Code of Ukraine] art. 441 (2001).

¹³ Stop Ecocide International, *Existing & Proposed Ecocide Laws: Vietnam – Article 278*, <https://ecocidelaw.com/existing-ecocide-laws/> (last visited June 3, 2026) (noting that under Vietnam's Penal Code of 1990, Article 278, "ecocide, destroying the natural environment" constituted a crime against humanity).

¹⁴ See *Penal Code of Viet Nam* art. 342, No. 15/1999/QH10 (Dec. 21, 1999); *Ecocide*, Oxford Academic (2025).

¹⁵ *Penal Code of the Socialist Republic of Vietnam* art. 342, No. 15/1999/QH10 (Dec. 21, 1999) (criminalizing "acts of ecocide or destroying the natural environment" as a crime against mankind); *What Is Ecocide and How Is It Treated in International and Domestic Law?*, Earth.Org (July 3, 2025), <https://earth.org/explainer-what-is-ecocide-and-how-is-it-treated-in-international-and-domestic-law/> (noting that the subsequent Vietnamese Penal Code no longer contains a standalone ecocide offense).

¹⁶ Loi 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets, art. 279 [Climate and Resilience Act] (Fr.).

¹⁷ Directive 2024/1203, of the European Parliament and of the Council, 2024 O.J. (L 1203) 1 (EU).

of kilometres away.¹⁸ Deforestation in the Amazon basin, driven by agricultural clearing and extractive mining, accounts for a substantial proportion of global greenhouse gas emissions, with cascading consequences for rainfall patterns across South America and beyond.¹⁹ The contamination of a shared river system, the poisoning of migratory species' habitats, or the systematic destruction of international waters: none of these fits comfortably within the jurisdictional reach of a single state, and none has attracted criminal prosecution under the domestic ecocide provisions theoretically available to address them.

Real-world cases make this structural insufficiency visible. In *Four Nigerian Farmers and Milieudefensie v. Shell*, the Dutch Court of Appeal found Shell's Nigerian subsidiary liable for oil spills that occurred between 2004 and 2007 in the Niger Delta communities of Goi, Oruma, and Ikot Ada Udo. The spills contaminated farmlands, fishponds, and water sources, rendering local livelihoods largely unsustainable and causing extensive environmental degradation. Although the Court ordered compensation and remedial measures, including the installation of leak-detection systems, the matter remained confined to civil liability, with no criminal prosecution for large-scale environmental destruction²⁰. The 2010 Deepwater Horizon blowout released millions of barrels of oil across roughly 149,000 square kilometres of the Gulf of Mexico and contaminated nearly 1,800 kilometres of coastline,²¹ yet no individual decision-maker faced international criminal accountability for the destruction. This visible structural inadequacy underscores a pressing need for the international adjudication of transboundary crimes such as ecocide.

The lesson these cases teach is consistent. Where the scale of environmental destruction is largest, the perpetrators are most institutionally diffuse, the jurisdictional questions most contested, and the domestic political will to prosecute most compromised. As one commentator has observed, ecocide "often involves transboundary harm which warrants an international legal response," because activities such as mass deforestation are collectively damaging to "the general shared habitat on which humans collectively depend."²² Domestic legislation, however well-drafted, cannot substitute for this.

¹⁸ Matthew Gillett, *Prosecuting Environmental Destruction: Legal Frameworks and Their Limits*, 13 LSE L. REV. 201, 209 (2022).

¹⁹ Gillett, *supra* note 16, at 210; *Prosecuting Ecocide via a New International Environmental Criminal Court*, LSE L. REV. BLOG (2022), <https://blog.lselawreview.com/2022/02/01/prosecuting-ecocide-via-a-new-international-environmental-criminal-court/>.

²⁰ *Four Nigerian Farmers and Stichting Milieudefensie v. Shell Petroleum Development Co. of Nigeria Ltd. & Royal Dutch Shell plc*, ECLI:NL:GHDHA:2021:1827 (Ct. App. The Hague Jan. 29, 2021).

²¹ LEGALCLARITY, *Ecocide Definition: What It Means in International Law* (May 24, 2026), <https://legalclarity.org/ecocide-definition-what-it-means-in-international-law/>.

²² Gillett, *supra* note 16, at 210.

The truism that the criminal accountability of individuals is essential to deterrence is critical here. As Jojo Mehta, CEO of Stop Ecocide International, has argued, corporate decisions are ultimately made by individuals who currently evade personal responsibility behind the corporate veil: companies may face fines, but decision-makers remain personally unaffected.²³ This underscores the need for individual accountability for corporate decisions, since corporations cannot be imprisoned. Only the ICC's jurisdiction over natural persons can impose the form of accountability, affecting personal liberty, professional standing, and reputation, that is likely to alter the cost-benefit calculus of corporate environmental destruction at its source.²⁴ Here, domestic legislation addresses the symptom, whereas international criminalisation addresses the actor.

III. THE CURRENT ICC FRAMEWORK: STRUCTURALLY INADEQUATE

The Rome Statute, dealing as it does with a plethora of matters within its jurisdiction, cannot be without environmental relevance. The ICC's Office of the Prosecutor recognised in its December 2025 Policy on Environmental Crimes that environmental damage may be relevant to several existing provisions: as the direct subject of Article 8(2)(b)(iv) of the Rome Statute; as the means by which other crimes are committed; and as contextual information bearing on gravity, sentencing, and reparations.²⁵ This acknowledgement is significant but also illustrative of the core problem. The existing framework treats environmental destruction as an instrument or by-product of other crimes, genocide, crimes against humanity, and war crimes, rather than as a wrong in its own right. Environmental degradation should enter the Statute as a standalone crime, not merely as an incident of other wrongs.

The most directly relevant provision is Article 8(2)(b)(iv), which criminalises intentionally launching an attack "in the knowledge that such attack will cause... 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."²⁶ The provision suffers from three compounding limitations that render it effectively inoperative as a vehicle for prosecuting serious environmental destruction.

First, the provision can be invoked only in the case of an international armed conflict. Peacetime environmental destruction, however massive and however deliberate, lies entirely outside its

²³ STOP ECOCIDE FOUND., *Why Individual Accountability Matters: The Case Against the Corporate Veil* (2024).

²⁴ Rome Statute, *supra* note 4, art. 25; Gillett, *supra* note 16, at 212.

²⁵ ICC OFFICE OF THE PROSECUTOR, *Policy on Environmental Crimes* ¶¶ 13-16 (Dec. 2025), <https://www.icc-cpi.int/sites/default/files/2025-12/2025-env-eng.pdf>.

²⁶ Rome Statute, *supra* note 4, art. 8(2)(b)(iv); ICC OFFICE OF THE PROSECUTOR, *supra* note 23, ¶ 36.

reach. It bears noting that the world's most significant ecological crises are products of industrial development, extractive capitalism, and agricultural expansion in peacetime conditions. Article 8(2)(b)(iv) simply does not speak to them.

Second, even within armed conflict, the provision imposes an extraordinarily demanding mental element. The perpetrator must have acted “intentionally” and “in the knowledge” that the attack would cause the specified environmental damage. These correspond to the direct and indirect forms of intent (*dolus directus* and *dolus indirectus*). Under Article 30(3) of the Rome Statute, “knowledge” means “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”²⁷ The ICC's Pre-Trial Chamber in *Prosecutor v. Lubanga Dyilo* interpreted the phrase “will occur in the ordinary course of events” to require that the accused be aware that the prohibited consequence is substantially certain to result from his or her conduct²⁸. However, the Chamber's reasoning left open the possibility that Article 30 might encompass forms of conditional intent akin to *dolus eventualis*. However, this stance was changed to the current interpretation, in *Prosecutor v. Bemba Gombo*, that the ICC adopted a narrower interpretation, holding that Article 30 excludes both recklessness and *dolus eventualis*²⁹. This standard is calibrated for deliberate destruction: a commander who orders the deliberate poisoning of a water supply, knowing with certainty that it will devastate downstream ecosystems. It is structurally incapable of capturing the far more common pattern of environmental destruction that proceeds through institutional risk-taking, wilful ignorance, and the systemic discounting of ecological consequences for the sake of commercial gain. Even where one consequence is anticipated, the further chain of effects may not be, which would exempt the perpetrators under this provision.

Third, the provision contains its own proportionality escape clause, requiring environmental damage to be “clearly excessive in relation to the concrete and direct overall military advantage anticipated.” This requirement, borrowed from international humanitarian law, means that even where intentional environmental destruction is proven, a defendant retains the military-necessity argument. The cumulative effect of these three limitations is devastating. Not a single prosecution has ever been initiated under Article 8(2)(b)(iv) since the Rome Statute entered into

²⁷ Rome Statute, *supra* note 4, art. 30(3).

²⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, ¶ 352(ii) (Pre-Trial Chamber I Jan. 29, 2007).

²⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 360–369 (Pre-Trial Chamber II June 15, 2009).

force in July 2002.³⁰ In over two decades of ICC operation, the sole provision designed to protect the natural environment from the effects of armed conflict has been, in practice, a dead letter.

The default mental-element provision, Article 30, reinforces this problem. Article 30(1) establishes “intent and knowledge” as the baseline for criminal responsibility under the Statute, unless otherwise provided.³¹ The ICC’s Pre-Trial Chamber in 2009, in *Prosecutor v. Jean-Pierre Bemba Gombo*, confirmed that Article 30 excludes lower forms of culpability, including *dolus eventualis* and recklessness.³² The Chamber held that intent should be considered established only where the perpetrator was aware that the relevant consequence would be “the almost inevitable outcome” of the conduct. This is a threshold calibrated for the gravest crimes of deliberate mass harm. It is fundamentally misaligned with the reality of environmental destruction, which, as the Independent Expert Panel has acknowledged, “is rarely purposeful or intended and known with certainty, but rather considered in terms of risks.”³³ The current ICC framework was thus built for a wrongdoer who deliberately orders large-scale environmental destruction, but not for the decision-maker who proceeds in reckless disregard of foreseeable ecological harm under its stringent mens rea requirement.

IV. THE IEP DEFINITION: THE RIGHT DIRECTION, THE WRONG COMPASS

In June 2021, the Independent Expert Panel (IEP) convened by Stop Ecocide International proposed the following definition for ecocide: “*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.*”³⁴ In September 2024, this definition was formally submitted to the Assembly of States Parties as a proposed amendment to the Rome Statute by Vanuatu, Fiji, and Samoa. The Democratic Republic of the Congo subsequently endorsed it in October 2024.³⁵ The proposal represents the most significant advance in international environmental criminal law since the negotiation of the Rome Statute itself.

³⁰ ICC OFFICE OF THE PROSECUTOR, *supra* note 23, ¶ 36; Sarthak Gupta, *The Proposed Definition of Ecocide: An Attempt to Constitute the Fifth International Crime?*, JURIST Commentary (July 2021).

³¹ Rome Statute, *supra* note 4, art. 30(1).

³² *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 363 (Pre-Trial Chamber II, June 15, 2009).

³³ STOP ECOCIDE FOUND., *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text* 18 (June 2021), <https://www.stopecocide.earth/expert-panel-commentary> [hereinafter IEP Commentary].

³⁴ IEP Commentary, *supra* note 30, at 4.

³⁵ Vanuatu, Fiji & Samoa, *Proposal to Include Ecocide in the Rome Statute*, ICC-ASP/23/ADD.1 (Sept. 2024); Democratic Republic of Congo, *Endorsement of Ecocide Proposal* (Oct. 2024).

The IEP definition deserves credit for what it correctly diagnoses. By substituting “substantial likelihood” for near-certainty, and by framing the crime to encompass “wanton” acts alongside “unlawful” ones, it gives the crime the angle and flexibility of *dolus eventualis*. The definition acknowledges the central inadequacy of the current framework: that environmental destruction is a crime of risk and recklessness as much as a crime of deliberate intent. This is an accurate characterisation of how ecosystems are actually destroyed, not through the explicit desire to cause harm, but through the institutional willingness to proceed in the face of known risk for commercial or developmental gain. The Rome Statute itself recognises, through the “unless otherwise provided” clause in Article 30, that different crimes may warrant different mental-element standards.³⁶ Command responsibility under Article 28, for instance, operates with a markedly different standard from Article 30’s default.³⁷ The drafting history of the Rome Statute confirms that *dolus eventualis* was considered but not adopted as the general standard,³⁸ but this is not an argument against adopting it for a specific provision whose subject matter, by its very nature, resists the knowledge-of-certainty requirement. The IEP’s approach is a contextually calibrated departure of precisely the kind that the Statute and the pressing issue of environmental degradation contemplate, and this paper endorses it as a necessary and principled step.

However, acceptance of this lowered threshold must be accompanied by serious caution regarding the manner in which “wanton” is defined. The Panel defines “wanton” as meaning “reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated.”³⁹ This definition introduces two things: first, a cost-benefit analysis; and second, an anthropocentric proportionality test. It is here that the definition’s compass fails.

The first and more fundamental concern is conceptual. By tethering criminality to the excessiveness of environmental damage relative to social and economic benefits, the definition makes economic logic the ultimate arbiter of ecological wrong. This is not merely philosophically unsatisfying; it is inconsistent with the basic architecture of the other four Rome Statute crimes. No defendant charged with crimes against humanity is permitted to argue that the economic benefits of forced labour justified the displacement of a civilian population. No

³⁶ Rome Statute, *supra* note 4, art. 30(1).

³⁷ Rome Statute, *supra* note 4, art. 28; KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME I 348 (Oxford Univ. Press 2013).

³⁸ VÖLKERRECHTSBLOG, *Mens Rea and the Proposed Legal Definition of Ecocide* (July 2021), <https://voelkerrechtsblog.org/mens-rea-and-the-proposed-legal-definition-of-ecocide/>; IEP Commentary, *supra* note 30, at 17.

³⁹ IEP Commentary, *supra* note 30, at 5.

defendant charged with genocide can contend that developmental advantages rendered the destruction of an ethnic group proportionate. The gravity of these crimes places them categorically beyond cost-benefit analysis. If ecocide is to be treated as a crime of equivalent international seriousness, the same logic must apply: certain acts of environmental destruction are impermissible in themselves, regardless of their anticipated benefits.

This argument becomes particularly urgent in the context of the present global climate emergency. The Earth is currently experiencing average surface temperatures approximately 1.2 degrees Celsius above pre-industrial levels, with the Intergovernmental Panel on Climate Change projecting catastrophic and irreversible consequences if warming exceeds 1.5 degrees Celsius.⁴⁰ In this context, to permit a defendant corporation to argue that its contribution to atmospheric and ecological destruction was outweighed by the social and economic benefits of fossil fuel extraction is to allow the primary instrument of ecological catastrophe to serve simultaneously as its own legal defence. This is precisely the argument available to a major petroleum corporation under the IEP's "wanton" definition: the social and economic benefits of oil and gas production, employment, energy security, and economic development are, by any conventional metric, substantial. For developed nations in particular, which have historically accumulated vast economic wealth through the very industries most likely to cause ecocide-scale harm, this cost-benefit framing would effectively immunise the most egregious actors from the most serious liability. Environmental interest, especially at this stage of the climate crisis, cannot be placed on the same scales as commercial profitability.

The second and more practical concern is definitional: there is no benchmark. The IEP definition asks courts to determine whether environmental damage is "clearly excessive in relation to the social and economic benefits anticipated," but it provides no methodology, no scale, and no baseline for this determination. How is a court to weigh the permanent destruction of a coastal mangrove ecosystem, with its immeasurable functions in carbon sequestration, biodiversity support, and coastal protection, against the economic returns of a real estate development? What is the exchange rate between the extinction of a species of coral and the quarterly profit margin of a multinational mining corporation? These are not merely difficult questions; they are questions to which the IEP definition provides no answer. The vacuum will predictably be filled by competing expert witnesses, corporate economic modelling, and the political dynamics of the prosecuting forum. The result is a standard that, in practice, is manipulable by any well-resourced defendant.

⁴⁰ IPCC, *Sixth Assessment Report: Summary for Policymakers* B.1 (2023).

A defendant acting with reckless disregard for environmental consequences will almost invariably be able to point to some anticipated social or economic benefit, employment, infrastructure, or national development, that complicates the “clearly excessive” calculation. Moreover, as various scholars have proposed different models for ecocide, ranging from strict liability to direct-intent requirements, the incorporation of a proportionality test in the IEP definition represents a specific and contestable drafting choice, not a structural necessity. The word “wanton,” as used in Article 8(2)(a)(iv) of the Rome Statute in relation to property destruction, has been interpreted by ICC jurisprudence to require intentional conduct, a significantly higher standard than the recklessness the IEP now proposes through the same term. The IEP has effectively deployed a word already defined by ICC practice in one direction to achieve a result pointing in another, without clearly invoking the “unless otherwise provided” clause that would legitimise the departure.

The appropriate reform is twofold. First, the proportionality language should be removed from the definition of “wanton,” leaving it to mean simply reckless disregard for the likelihood of severe and widespread or long-term environmental damage. Second, if a proportionality element is retained as a compromise to secure state ratification, the Statute must provide a clear, objective methodology for the weighing exercise, grounded in scientific assessment of irreversibility and ecosystem function rather than economic valuation, and must specify that, for damage meeting the severity and breadth thresholds already embedded in the definition, no anticipated benefit is legally capable of rendering the destruction non-criminal. The IEP definition is the right foundation. The “wanton” qualifier, as currently drafted, is a gap that must be closed before that foundation can bear the weight of international criminal prosecution.

V. COMPLEMENTARY AND ALTERNATIVE INTERNATIONAL LEGAL PATHWAYS

The process of amending the Rome Statute under Article 121 is, by design, slow and politically demanding: proposals require a two-thirds majority of the Assembly of States Parties and bind only ratifying states, creating a patchwork of coverage that may, in the short term, replicate many of the weaknesses of domestic criminalisation at the international level. The fact that only member states can adjudicate environmental degradation reveals the structural inadequacy of the current framework under the ICC. In the interim, however, a number of complementary legal mechanisms offer meaningful pathways toward environmental accountability that should not be neglected.

The most significant recent development is the ICJ's Advisory Opinion on Climate Change, delivered on 23 July 2025.⁴¹ The Opinion made clear that states bear legal obligations to mitigate and adapt to climate change, grounded not only in treaty law but also in customary international law and human rights law, and that these obligations extend in relevant respects to the conduct of private actors within a state's jurisdiction.⁴² As Jojo Mehta of Stop Ecocide International observed, "wilful environmental destruction is not just reckless, it is unlawful," providing "a critical legal basis that supports holding individuals personally liable for serious environmental destruction under evolving international criminal law frameworks."⁴³

Preceding the ICJ Opinion, the International Tribunal for the Law of the Sea issued its Advisory Opinion on Climate Change on 21 May 2024, in response to a request from the Commission of Small Island States.⁴⁴ The Tribunal held that anthropogenic greenhouse gas emissions constitute marine pollution and articulated states' due-diligence obligations to prevent such harm.⁴⁵ The Inter-American Court of Human Rights added a further dimension in its Advisory Opinion of July 2025, emphasising states' obligations regarding the rights of future generations and corporate accountability in the context of environmental destruction.⁴⁶ Together, these three advisory opinions constitute an emerging international jurisprudence on environmental obligation that operates in parallel with, and may ultimately inform, the ICC amendment process. They establish, with increasing legal authority, that severe environmental harm is not merely a policy problem or an economic externality but a legal wrong engaging state and individual responsibility across multiple bodies of international law.

Beyond these judicial developments, the proposal for a dedicated International Court for the Environment (ICE) deserves serious scholarly attention. As Gillett has outlined, such a court would carry several structural advantages over the ICC as a vehicle for environmental justice: it could extend jurisdiction to corporate entities, which the ICC currently cannot prosecute; incorporate restorative and remedial mechanisms alongside punitive ones; and be governed by explicitly ecocentric principles that treat environmental integrity as an end in itself rather than

⁴¹ Obligations of States in Respect of Climate Change, Advisory Opinion, 2025 I.C.J. (July 23, 2025).

⁴² Obligations of States in Respect of Climate Change, *supra* note 38, ¶¶ 89-94; UNEP, *The Judiciary for Climate Justice and Environmental Rule of Law* (Nov. 2025), <https://www.unep.org/news-and-stories/speech/judiciary-climate-justice-and-environmental-rule-of-law>.

⁴³ STOP ECOCIDE INT'L, *International Court of Justice Sets Out States' Climate Obligations: Major Implications for Ecocide Law* (Feb. 2026), <https://www.stopecocide.earth>.

⁴⁴ Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, ITLOS Case No. 31 (May 21, 2024).

⁴⁵ Request for an Advisory Opinion, *supra* note 41, ¶¶ 224-230; United Nations Convention on the Law of the Sea art. 194, Dec. 10, 1982, 1833 U.N.T.S. 3.

⁴⁶ Inter-American Court of Human Rights, Advisory Opinion on Climate Emergency and Human Rights, OC-32/25 (July 3, 2025).

as a function of human welfare.⁴⁷ The ICE could also be staffed by judges with environmental expertise and could issue effective restorative orders, in contrast to the ICC, whose bench is oriented toward adjudicating crimes of mass violence. The ICE model would also address the jurisdictional gap between the ICC's individual-focused mandate and the collective, institutional character of most major environmental destruction. In the shorter term, states committed to environmental accountability might also pursue universal jurisdiction, which several domestic systems permit for crimes of sufficient international gravity, to prosecute corporate actors for large-scale environmental destruction committed outside their borders. The UNEP's ongoing development of environmental rule-of-law benchmarks and the work of the UN Special Rapporteur on Human Rights and the Environment provide additional normative platforms for building the accountability architecture that no single international instrument can deliver alone.

VI. CONCLUSION

The proposal to recognise ecocide as the fifth international crime is, at its heart, a claim about moral equivalence: that the deliberate or reckless destruction of ecosystems at scale is an international wrong of the same fundamental gravity as genocide, crimes against humanity, war crimes, and aggression. This paper has argued that the claim is correct, that the current ICC framework is structurally incapable of vindicating it, and that the IEP definition represents a necessary and principled advance by lowering the mens rea threshold to encompass reckless environmental destruction.

But a crime whose central qualifier, "wanton," cannot be operationalised without importing a cost-benefit analysis that lacks any fixed benchmark is not a crime in any meaningful legal sense: it is an aspiration with an escape clause. The proportionality test embedded in the definition threatens to function precisely as a defence mechanism for the corporate actors whose conduct the crime is designed to capture. In the age of the climate emergency, the suggestion that environmental damage can be outweighed by anticipated economic benefit is not merely theoretically problematic; it is dangerous. The most destructive industries are also, by conventional metrics, among the most economically productive. If "wanton" is defined in a way that makes commercial productivity a defence to ecological catastrophe, the definition undermines the very norm it purports to establish.

⁴⁷ Gillett, *supra* note 16, at 220; *Prosecuting Ecocide*, *supra* note 17; Cansu Atilgan Pazvantoğlu, *Ecocide as a Separate Crime under the Rome Statute: A Legal Analysis*, SAGE J. (2025).

The path forward requires holding two things simultaneously: a willingness to accept the IEP definition as the necessary foundation for ICC jurisdiction over environmental crime, and a commitment to reforming the “wanton” qualifier so that it functions as a genuine standard of accountability rather than as a proportionality defence dressed in the language of criminal law. The complementary legal pathways surveyed in Section V, the ICJ and ITLOS Advisory Opinions and the proposed International Court for the Environment, suggest that the normative ecosystem for environmental accountability is developing faster than the formal amendment process. That momentum must be harnessed, not dissipated by a definitional gap that corporate defendants will readily exploit. The compass is pointed in the right direction. The calibration, as yet, remains wrong.
