

Proposed Definition of Ecocide

Promise Institute for Human Rights (UCLA) Group of Experts
9 April 2021

I. INTRODUCTION

On February 29, 2020, the Promise Institute for Human Rights at UCLA School of Law convened a cross-functional group of experts (“Group of Experts” or “Group”) to explore the potential of international criminal law to protect the environment and mitigate climate change. The Group of Experts researched and deliberated on the legal, practical and political parameters of developing a new crime of “ecocide”. The Group’s findings and this report were submitted to the Independent Expert Panel for the Legal Definition of Ecocide established by the Stop Ecocide Foundation.

II. METHODOLOGY

The Group of Experts comprised individuals with private sector, United Nations (“UN”), academic, and non-profit experience:

- Jelena Aparac, Chairperson-Rapporteur of the UN Working Group on the use of mercenaries
- Shirleen Chin, Managing Director, Green Transparency
- Matthew Gillett, Senior Legal Officer at the Organisation for the Prohibition of Chemical Weapons
- Kate Mackintosh, Executive Director of the Promise Institute for Human Rights at UCLA School of Law
- Nema Milaninia, Advisor at Center for Climate Crimes Analysis and Counsel with Alphabet’s Regulatory Response, Litigation and Strategy team
- Jessica Peake, Assistant Director of the Promise Institute for Human Rights at UCLA School of Law
- Darryl Robinson, Professor at Queen’s University, Faculty of Law (Canada)
- Richard J. Rogers, Founding Partner at Global Diligence LLP
- Maud Sarliève, Legal Adviser, Special Tribunal for Lebanon

The Group met virtually over the course of several months between 2020 and 2021, and established separate working groups focusing on the questions relating to a chapeau or threshold for ecocide, the underlying non-climate acts, and climate-related acts.

III. PROPOSED LANGUAGE

1. *For the purpose of this Statute, “ecocide” means any of the following acts, committed with the knowledge that they are likely to cause widespread, long-term and severe damage to the natural environment:*
 - a. *[Substantial] destruction or despoliation of natural habitats, ecosystems, or natural heritage;*
 - b. *Destruction or despoliation of biological resources, in a manner likely to have adverse effects on biological diversity;*
 - c. *Introducing harmful quantities of substances or energy into the air, water, or soil;*
 - d. *Illegal traffic in hazardous waste;*
 - e. *Production, import, export, sale, or use of ozone-depleting substances or of persistent organic pollutants;*
 - f. *Killing, destruction, or taking of specimens of protected wild fauna or flora species, on a scale likely to impact the survival of the species;*
 - g. *Significantly contributing to dangerous anthropogenic interference with the climate system, including through large scale emissions of greenhouse gases or destruction of sinks and reservoirs of greenhouse gases;*
 - h. *Any other acts of a similar character likely to cause an ecological disaster.*
2. *For the purpose of paragraph 1, conduct is not ecocide if it is (a) lawful under national law, (b) lawful under international law, and (c) employs appropriate available measures to prevent, mitigate, and abate harms.*
3. *For the purpose of paragraph 1:*
 - a. *“Widespread” means having effects that extend beyond a limited geographic area, cross state boundaries, or adversely affect a large number of human beings;*
 - b. *“Long-term” means lasting for at least a decade;*
 - c. *“Severe” means involving serious or significant disruption or harm to ecosystems, human life, natural and economic resources, or other assets.*
 - d. *The terms in paragraphs (a) to (h) shall be interpreted in accordance with international law, particularly international environmental law.*
4. *Paragraph 1(g) applies after the expiration of the transition period. The transition period shall be [X] years.*

IV. RATIONALE FOR PROPOSED LANGUAGE

A. Structure

The proposed structure replicates that of the other Rome Statute crimes, with a chapeau followed by a list of underlying acts. The Group considered the advantages and disadvantages of listing underlying acts. Disadvantages include: (1) the relative absence of any conduct that is succinctly defined and firmly prohibited in international environmental law (“IEL”), and (2) additional text may lengthen negotiations. Advantages of a list include, *inter alia*: (1) providing additional clarity and predictability; (2) specifying acts that are recognized by states as at least *prima facie* problematic or warranting scrutiny, bolstering acceptance and strengthening eventual claims to customary law status and potential extra-territorial jurisdiction; (3) specifying any particular considerations or requirements in relation to particular activities; and (4) clarifying that certain activities are covered (such as carbon emissions or biodiversity). On balance the Group favoured a list of acts.

B. The Chapeau Requirement (paragraph 1)

For the purpose of this Statute, “ecocide” means any of the following acts committed with the knowledge that they are likely to cause widespread, long-term and severe damage to the natural environment:

Importance of a Threshold: The Group decided that a chapeau was essential to distinguishing ecocide from “ordinary” environmental crimes. The chapeau ensures the conduct is of sufficient gravity to warrant international, not simply domestic, attention. The crime of ecocide should be of a gravity comparable to other international crimes, so as to assuage doubts as to the significance of the crime, and to ensure equal universal support for the investigation and prosecution of violations.

Sources for a Threshold: The Group evaluated previous proposals and potential sources for establishing a chapeau for ecocide. The Group considered international humanitarian law (“IHL”), international criminal law, IEL, international human rights law, and national law. The group favoured the “widespread, long-term, severe” test embedded in IHL, for the reasons discussed below. Among the other options considered:

- **“Widespread or Systematic”:** This test - acts committed as part of a widespread or systematic attack - is familiar from crimes against humanity, but does not apply well in the ecocide context. The *gravamen* of ecocide is the impact, not the manner, of commission. Indeed, as almost every human being alive today is “*part of*” a widespread action seriously harming the planet (climate change), the test is of no assistance in delineating the most serious environmental criminal activity.
- **Other options:** The Group considered that neither international human rights law nor IEL defined a chapeau that could be adopted. Further, both bodies of law focus largely on state obligations, not criminal responsibility. Their provisions do not properly address the potential thresholds required for penal action. Similarly, the Group decided against designing a new

chapeau disconnected with existing laws, as adhering to established language would assist with legality and acceptability.

Widespread, Long-term, Severe: The Group determined that the chapeau should reflect the “widespread, long-term, severe” formula. The language is derived from IHL, namely the 1976 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (“ENMOD”)¹, and articles 35(3) and 55(1) of Additional Protocol I to the Geneva Conventions (“AP I”). It was also selected by the International Law Commission in its 1991 Draft Code of Crimes against the Peace and Security of Mankind (“ILC Draft Code”) (article 22(2)(d)). States have further expressed comfort with this standard by embedding it into article 8(2)(b)(iv) of the Rome Statute.

The Group of Experts drew upon commentaries by the International Committee of the Red Cross, the International Law Commission and the Committee on Disarmament, under whose auspices ENMOD was negotiated, for interpretative guidance as to the meaning of the terms.

Conjunctive or Disjunctive - Issues: ENMOD prohibits hostile modification of the environment with widespread, long-lasting **or** severe environmental effects, whereas AP I (and the Rome Statute) prohibit attacks causing widespread, long-term **and** severe damage. The ILC Draft Code also uses the conjunctive approach. The Group noted concerns with both the conjunctive and disjunctive approaches, finding the disjunctive test inappropriately broad. For example, it would include impacts that did no harm (non-severe) and were highly localized (non-widespread) as long as they were long-term. On its face this would include all construction activities. For instance, laying a foundation, digging a mine, or laying a highway is “long-term” even if not widespread or severe. The ENMOD commentaries emphasize that the disjunctive test was acceptable to states because they were considering only deliberate, purposeful environmental manipulation. On the other hand, the conjunctive AP I test appears very restrictive; it is debated whether even the lighting of oil wells by retreating Iraqi forces would qualify. Such a threshold might make the crime ineffective.

Proposal - Conjunctive: The Group concluded in favour of the conjunctive test, to make clear that only serious impacts are included, but with definitions rooted in various sources to avoid the excessive narrowness of some understandings of the AP I threshold. Most importantly, the definition of “widespread” adds the transboundary harm principle as well as an anthropocentric alternative.

Alternative Proposal - “Conjunctive-Light”: Some members of the Group favoured a “conjunctive-light” approach, that would employ language drawn from the crime of aggression. This could be captured in an understanding, as with the crime of aggression, or in a new article 3(d) in the definition paragraph which would stipulate: *“The anticipated damage must be a combination of widespread, long-term and severe. No one component can be significant enough on its own to satisfy the definition of ecocide. In all cases, the anticipated damage must be severe.”* This approach makes the “widespread” and “long-term” criteria potentially disjunctive. However, most Group members favoured the clarity and accessibility of a simple conjunctive test, noting its support in precedents.

¹ “Long-lasting” in ENMOD.

Knowledge of likelihood, not “intent”: The Group of Experts determined that the *mens rea* for ecocide should be that the subject have knowledge that the requisite threshold of environmental harm is “likely” to be caused by their conduct. An “intent” standard would be untenable: intent includes direct intent (“purpose”) or indirect intent. Persons will rarely have the “purpose” of harming the environment. Indirect intent has also been interpreted restrictively by ICC judges as requiring knowledge of “virtual certainty”, for example that the conduct is certain to have the outcome barring unforeseen circumstances. The complex nature of environmental harms means that very few harms will be “certain” to be “caused”.

A “knowledge” test avoids the rigidities of these interpretations of “intent”. The requirement of knowing that the impact is likely is also consistent with past authorities. Articles 35 and 55 of AP I and article 22(2)(d) of the ILC Draft Code both require that the environmental harm be one that is “intended or may be expected” to cause the requisite harm. In this regard, the Group of Experts believed there was no discernible difference between “likely to cause” and “may be expected”, and considered both to be co-extensive in their meaning. Similarly, article 8(2)(b)(iv) of the Rome Statute requires “knowledge” of the harms, not an “intent”, and by referring to “anticipated harms” it also involves a probabilistic assessment.

Without prejudice: At several points, the proposed definition adopts stringent standards to reflect the gravity of an international crime of ecocide. It is worth emphasizing, perhaps in a commentary to ecocide, that conduct not prohibited in this definition may still be criminal in other national or international laws, and that this is without prejudice to existing or developing rules of criminal law or environmental law. This is consistent with the clarification in article 10 of the Rome Statute.

C. Definitions (paragraph 3)

For the purpose of paragraph 1:

- a. *“Widespread” means having effects that extend beyond a limited geographic area, cross state boundaries, or adversely affect a large number of human beings;*
- b. *“Long-term” means lasting for at least a decade;*
- c. *“Severe” means involving serious or significant disruption or harm to ecosystems, human life, natural and economic resources, or other assets.*
- d. *The terms in paragraphs (a) to (h) shall be interpreted in accordance with international law, particularly international environmental law.*

“Widespread”: Within the content of ENMOD, the Committee on Disarmament has interpreted “widespread” to mean harm encompassing an area on the scale of several hundred square kilometers. Background materials to AP I similarly focus only on geographic scale, defining “widespread” as thousands of square kilometres. The Group of Experts considered both interpretations to be too demanding, as they would exclude particularly egregious acts of environmental damage that harm thousands of persons in an indigenous community or other population centre. Furthermore, the requirement of a definable geographic area is unsuitable for harm to the ozone layer or to the climate, which do not have a definable area. For that reason, the Group of Experts decided to adapt the interpretation given to “widespread” in ENMOD and AP I to include the anthropocentric dimensions of environmental harm. The definition includes any harm that:

- (a) extends beyond a “limited geographic area” - ie. the geographic scale of hundreds of kilometers stated in ENMOD. The term is worded in the negative - “beyond” - to include harms such as impacts on the ozone layer or the climate system;
- (b) crosses state boundaries - reflecting the principle of transboundary harm, which is well-established in international and environmental law; or
- (c) adversely affects a large number of human beings - borrowing the anthropocentric idea of “widespread” from crimes against humanity.

“Long-term”: The Group of Experts noted that the term “long-lasting”, as provided in ENMOD, has been interpreted by the Committee on Disarmament as a period of several months or a season, whereas the background materials to AP I interpret “long-term” as a period of decades. Each of these extremes is potentially problematic (“decades” may entail problems of proof; whereas “months” includes short-term impacts that resolve quickly). The Group adopted an intermediate position from French legislation, “a decade”. The Group of Experts considered that the latter interpretation was preferable to best reflect the gravity of ecocide as an international crime. The Group noted that the standard does not require waiting a decade to determine if the standard is met; the “knowledge of likelihood” is met where it is evident that an impact is likely to last a decade, which will be the case for serious harms.

“Severe”: The term “severe” in ENMOD has been interpreted by the Committee on Disarmament to mean serious or significant disruption or harm to human life, natural and economic resources or other assets. The military manuals of several countries adopt the same definition of “severe”. The Group of Experts considered this to be a sufficient harm threshold for purposes of the crime of ecocide. The Group considered that significant contribution to dangerous anthropogenic interference with the climate system would qualify as severe harm under this provision. As the ENMOD definition is entirely anthropocentric, referring to natural phenomena as “resources” or “assets”, the Group proposes adding the word “ecosystem” to recognize an ecocentric dimension.²

D. Legal and Responsible Development (paragraph 2)

For the purpose of paragraph 1, conduct is not ecocide if it is (a) lawful under national law, (b) lawful under international law, and (c) employs appropriate available measures to prevent, mitigate and abate harms.

Environmental Law Allows Development: Ecocide differs from other core crimes in that the acts in other core crimes - eg. murder, torture, sexual violence - are concretely defined and widely condemned as criminal. By contrast, impacts on the environment are not necessarily criminal. On the contrary, environmental law balances social and economic benefits with environmental harms through the principle of sustainable development. Even with the impact threshold - widespread, long-term, and severe damage - the problem remains, because environmental law does not generally prohibit that damage as such. There are countless projects, industries, and development activities that are legal, socially beneficial, and responsibly operated to minimize impacts, that nonetheless cause widespread, long-term, and severe

² The term “ecosystem” is defined in the Convention on Biological Diversity as a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

damage to the natural environment. To obtain acceptance from states, conduct that is fully consistent with environmental law and principles should not be criminalized.

Options: The Group considered various options.

- **Reject any allowance for responsible development and rely on the threshold:** The Group would have preferred to have an objective threshold of harm that could be criminalized outright, without any reference to considerations of sustainable development. However, this would require a threshold so high as to catch almost no activity. Further, the Group considered that a definition of ecocide that neglected environmental law principles and the right to economic and social development would encounter problems with legality and would be unacceptable to states.
- **Regulatory defence:** Environmental law contains relatively few concrete criminalizable prohibitions; instead, it relies heavily on national authorities to regulate and to take various concerns into account. The Group considered a defence based on authorization by domestic authorities. National laws, however, are highly variable and may not meet the appropriate standard. Alternatively, the test could refer to international law, but IEL offers few clear standards applicable to individual actors.
- **Impact assessment (sustainable development):** Another option was to apply a form of “impact assessment”. Such a provision could include principles of environmental law: weighing of social and economic benefits, the precautionary principle, the “polluter pays” principle, intergenerational equity, and special consideration for developing countries. The problems with this option included vagueness, uncertainty, and retrospectivity of the approach.

Lawful and responsible development: The solution adopted by the Group was a *cumulative* test, combining elements of the foregoing options. Thus, high-impact industries or projects are not ecocide if they are lawful and responsibly operated to mitigate harms. The cumulative requirements are:

- (a) **Lawful under national law:** Given that so much of environmental law is entrusted to domestic regulation, this branch is appropriate and necessary. International criminal law sometimes refers to domestic law, such as in the crime against humanity of deportation. Importantly, national approval does not exempt conduct from scrutiny, nor does it override international law: conduct must be legal under *both* national and international. This first hurdle means that the most straightforwardly wrongful acts - those that are illegal in domestic law - will not benefit from the exception. The Group noted that there is domestic environmental law (such as in Germany) which provides that conduct is not considered lawful in national law if approvals were obtained through fraud or corruption; this is a valuable principle that would be worthy of inclusion in the text or commentary of ecocide.
- (b) **Lawful under international law:** The second branch requires that the activity also be lawful under applicable IEL. This refers to the detailed regimes of prohibitions and permissions in relation to maritime pollution, ozone-depleting substances, persistent organic pollutants, and so on.

(c) **Failure to take measures to prevent, mitigate or abate:** The third branch is necessary because a great deal of activity is not adequately regulated by national systems nor by international law. For example, GHG emissions by private actors are generally not prohibited as such in national or international law. The third branch reflects a basic principle of environmental law: the need to take appropriate readily-available measures to prevent, mitigate, or abate harms. The term “available” means that the measures should be financially and technically available, and take into account the situation of developing countries. The term “appropriate” should be interpreted generously to the accused. Given that ecocide is intended to be a serious international crime, this provision must require a high level of personal culpability and an egregious failure. The Group noted that the wording might be further improved to this effect. The provision should not be interpreted in a manner that includes simple negligence, strict liability, or strict retrospective evaluations with hindsight. Any of those possibilities would be inconsistent with international criminal liability and would also inhibit support from states. A high standard will not deprive this provision of content, given that many instances in the world today unfortunately involve reckless and knowing failures to take even rudimentary mitigating measures.

E. Underlying Acts

Sources: The Group considered various sources: IEL treaties, national legislation, prior proposals of ecocide, and directives from regional bodies. The Group gave particular attention to treaties with large numbers of states parties, indicating a widely shared opinion of the international community and reducing issues where the relevant state is not party to a particular treaty. The Group chose not to follow the “Neyret” approach, which relied entirely on European sources; however the EU Directive on the Protection of the Environment through Criminal Law (2008) was considered along with other helpful sources.

Mini-thresholds: The Group debated whether each act would contain a “mini-threshold”. The advantage of such thresholds is to give additional reassurance states that ecocide is concerned with conduct that is at least prima facie of concern to the international community. The disadvantage is that they may duplicate or overlap with the chapeau threshold. In a few instances, possible mini-thresholds were retained in square brackets for the Panel’s consideration.

(a) Habitats, Ecosystems, Heritage. This language draws from the Convention on Biological Diversity (196 parties), the World Heritage Convention (194 parties), the EU Directive (Article 3(h)), and national environmental laws. The term “substantial” is in square brackets; it could be retained as a signal to states that only substantial activity is of concern, or it could be deleted as likely subsumed within the “widespread” requirement of the chapeau.

(b) Biological diversity. This language is based on the Convention on Biological Diversity (196 States Parties). The language contains a threshold from that Convention, to provide a minimal threshold for this act.

The conduct described under (a) and (b) may at times overlap - just as war crimes may overlap - but the provisions concern different protected values. The gravamen of (a) is extensive damage and the gravamen of (b) is the threat to biodiversity.

(c) Pollution: This provision draws from the EU Directive, with similar language also found in the Convention on Prevention of Pollution from Ships (158 parties) (e.g. article 2), and the Convention on Long-Range Transboundary Air Pollution (51 parties) (e.g. article 1). Like the EU Directive, the provision combines pollution of air, water, or soil into one provision. The EU Directive has separate provisions on handling of nuclear materials, waste disposal, or operation of dangerous facilities, but the Expert Group concluded that the language plainly includes harmful substances or energies irresponsibly discharged through such activities. See discussion of paragraph (g), below, for whether large scale emissions of GHGs can be included under this paragraph as introduction of harmful quantities of substances into the air.

Many of the worst environmental disasters are produced unintentionally - i.e. with purpose or with knowledge of “virtually certain” discharge - but by engaging in high-risk activity with safeguards known to be dangerously inadequate. Examples would include the criminally reckless operation of a nuclear power plant or oil rig, where there is a failure to take precautionary measures despite “likely” (even if not “virtually certain”) dangers. The Group considered indicating that such situations are included, for example by adding “*either intentionally or through an egregious failure to employ necessary control measures*” to the text. This was eventually rejected for two reasons: the challenge of defining a standard that was clearly not mere negligence, but highly culpable subjective advertance; and potential confusion between this and the “employs appropriate available measures” carve-out in paragraph 2. An elegant solution would be welcome.

(d) Traffic in hazardous waste: This language directly copies article 4(3) and 9 of the Basel Convention on Transboundary Movement of Hazardous Wastes and their Disposal (188 parties). Normally the listed “acts” do not repeat the illegality requirement. In this instance, however, the whole phrase is a defined term of art in the Basel Convention. It is one of the few outright prohibitions in IEL. The term is to be understood in accordance with the Basel definition. The Group noted that harms caused by other transport of hazardous waste can still be caught under (c).

(e) Ozone and POPs: These terms are to be understood by reference to the Vienna Convention for the Protection of the Ozone Layer (198 parties), the Montreal Protocol on Substances that Deplete the Ozone Layer (198 parties), and the Stockholm Convention on Persistent Organic Pollutants (184 parties). Importantly, such substances are not illegal across the board; there are quite detailed regulations, restricting some substances and not others, and allowing phase-outs or exemptions, particularly for developing countries. This provision must be interpreted in conjunction with para. 2. The phrase “in violation of applicable international law” was considered but was deleted, on the grounds that para 2 addresses the point.

(f) Fauna and flora: This provision refers to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) (196 parties), with similar language also found in the EU Directive. The Group was concerned that it would trivialize “ecocide” if it *prima facie* appeared to cover

isolated poachers (even though poaching should of course be criminal in domestic laws). The EU Directive requires “non-negligible impact”; given that this provision is in relation to the serious international crime of “ecocide”, the Group adopted a slightly higher threshold of “likely to impact”. As always, the general chapeau threshold of harm must be met.

(g) Greenhouse gas emissions: The language of this provision is drawn from the UN Framework Convention on Climate Change (“UNFCCC”), whose objective is to achieve “stabilisation of GHG concentration in the atmosphere that would prevent dangerous anthropogenic interference with the climate system” (article 2) through controlling and reducing anthropogenic emissions of GHGs on the one hand, and preserving and enhancing the removal of GHGs by sinks on the other. The text of the provision addresses both of these prongs, while the use of the term “including” leaves open the possibility of contribution by other means. This would encompass less direct acts, as well as allowing for future scientific and technological developments.

The Convention can be draw on for definitions of GHGs - gases which “absorb and re-emit infrared radiation” (article 1) - and sinks and reservoirs of GHGs, which include “ biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems” (article 4(1)(d)).

Climate change, or global warming, is the most pressing environmental calamity we face. However crafting an emissions crime of ecocide in particular presents unique challenges. GHG emissions result from our daily individual as well as industrial activities, so this is an act that only becomes prohibited at an unreasonable scale. Paragraph 2 of the draft crime was included primarily to deal with this conundrum.

Two **alternatives** to this sub-paragraph (g) were considered.

- The first creates a more direct link to the state responsibility framework of the UNFCCC and Paris Agreement, and would read:

(g) Acts that seriously undermine the ability of States to significantly mitigate the increase in global average temperature above pre-industrial levels, including large scale emissions of greenhouse gases and destruction of sinks and reservoirs of greenhouse gases.

- The second would amend the paragraph to refer only to destruction of GHG sinks and reservoirs, and would rely on sub-paragraph (c) (**pollution**) to cover emissions. There is some controversy over whether GHGs can be considered pollutants for purposes of national regulation. As a product of regular (lawful) human activity, they cannot be banned outright, unlike most other pollutants (although see the note on ozone and POPs, sub-paragraph (e), above), and they are only problematic at scale. The wording of paragraph (c), which refers to “introducing harmful quantities of substances ... into the air” would seem to deal with both of these objections. On balance, however, the Group favoured a separate provision to specify that climate change is included, and to allow for a potentially more nuanced approach to GHGs than to traditional pollution.

(h) Residual clause: The Group agreed (1) that a residual clause is needed to cover new harms and (2) that the residual clause must be delineated to comply with the legality principle. The residual clause refers to “acts of a similar character”, matching the residual clause in crimes against humanity (article 7(1)(k)), to comply with the legality principle under article 22(2) of the Rome Statute. The standard of “causing an ecological catastrophe” is drawn from domestic laws on ecocide (Georgia, Armenia, Ukraine, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia), and is echoed in Italian law on causing an ecological disaster. The Group noted that this is a very high threshold, which overlaps with the chapeau test (both refer to likely impact) and may even exceed the chapeau threshold. Nonetheless, the Group concluded that a high threshold is appropriate. This allows the court to deal with new future environmental disasters – such as harms emerging from released biotechnology – but it requires a high threshold, which seems appropriate to comply with the legality principle.

Interpretive rule: A provision in paragraph 3 notes that the terms are to be interpreted by reference to IEL, including the treaties mentioned above.

F. Transition Period (paragraph 4)

Paragraph 1(g) applies after the expiration of the transition period. The transition period shall be [X] years.

Paragraph 1(g) introduces an international crime of significantly contributing to climate change. This is both urgently needed and legally novel. As the creation of significant GHG emissions, and destruction of GHG sinks, are currently regulated through a voluntary international system, the Group of Experts considered that the shift to criminalising extreme instances of both needed a transition period. The transition period should be of a duration which would reasonably permit states and industries to adjust to the new regime, while still encouraging urgent action on this critical issue.

V. ALTERNATIVE STRUCTURE

Some members of the group favoured an alternative structure for the definition. The alternative structure could increase transparency and bolster support from states by putting the ideas from paragraph 2 more up front: that lawful and responsible development with appropriate measures to mitigate impact is not ecocide. The alternative structure: (1) adds “unlawfully or irresponsibly” into the chapeau; (2) deletes paragraph 2; and (3) moves the terms of paragraph 2 into the definition paragraph.

- 1. For the purpose of this Statute, “ecocide” means any of the following acts, **committed unlawfully or irresponsibly**, with the knowledge that they are likely to cause widespread, long-term and severe damage to the natural environment:*

[Same list of crimes]

[Delete current para 2]

2. *For the purpose of paragraph 1:*

- a) *“Unlawfully” means (i) unlawful under applicable international law, (ii) unlawful under applicable national law, or (iii) that permission under national law was obtained through fraud or corruption;*
- b) *“Irresponsibly” means manifestly failing to take appropriate available measures to prevent, mitigate or abate harms.*

Any one of the listed alternative tests in article 2(a) and (b) provides the requisite wrongfulness. Paragraph 2(a)(iii) reflects an important proposition from national legal systems (for example, Germany)³ and creates an additional incentive to avoid fraud or corruption in high-impact projects. Paragraph 2(b) is meant to require more culpability than negligence; it is intended to capture conduct that is recklessly indifferent to harms or to environmental law considerations. Commentary could refer to principles guiding this assessment, including the precautionary principle and special consideration for the situation of developing countries.

Advantages - Under this structure, the chapeau addresses both of the main anticipated concerns with ecocide: (1) the need for a high level of impact to warrant international concern, and (2) that conduct consistent with environmental law is not hereby criminalized. The structure is simpler, as it has only two paragraphs (a crime and definitions), rather than a “carveout” provision. This structure also more easily includes the provision about fraud and corruption.

Disadvantages - Most group members preferred the 3-paragraph structure, because it conveys that high impact activities are per se problematic, so that developers are then on the defensive to justify the activity. The burdens of proof are the same with either structure, because article 67(1)(i) places the burden on the Prosecutor. There was also uncertainty about the word “irresponsibly”, which might be improved upon, although no superior synonyms were found.⁴

³ See eg. Byung-Sun Cho, “Emergence of an International Environmental Criminal Law?” 19 UCLA Journal of Environmental Law and Policy 11 at 26, referring to s. 330d (5) of the German Criminal Code.

⁴ “Reckless” and “culpable” both convey the idea of a culpable disregard for harms; however, “reckless” refers to a specific form of mens rea in common law, and “culpable” in criminal law usually refers to basic responsibility for an act or outcome. “Wanton” may be too permissive. “Illicit” or “wrongful” might be used as a single umbrella term, defined with a list including all four options in 2(a) and (b) above. “Illicitly” includes very well the fraud or corruption aspect. However, compliance with law versus irresponsible failure to mitigate might be sufficiently distinct as to warrant different terms for the latter, for clarity.