Lessons Learned from the Adoption of the Crime of Aggression: Ecocide to Charter its own Path

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Abstract

This paper will attempt to answer the question "How will the crime of ecocide be introduced effectively into the Rome Statute?" The crime of aggression was the latest and fourth crime to come under the jurisdiction of the International Criminal Code in the Rome Statute. However, the processes it took to get there are not as one expects, particularly if one is not familiar with the history of the crime of aggression and the procedure for the amendment of the Rome Statute. There were peculiarities and hurdles to overcome in amending the Statute to introduce the crime of aggression. Reflecting on these underpinnings and lessons learned thereof, the crime of ecocide may have to charter its own course. Most important to take into account are the strategy and advocacy for political support at each level of the amendment process; it could be the make-or-break factor in ensuring that the campaign to criminalise ecocide at the international level is effective in achieving what it originally sets out to do.

Keywords: crime of aggression; ecocide; advocacy; Rome Statute

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Introduction

Suppose, in the near future,[2] a State Party to the Rome Statute of the International Criminal Court (ICC) decides, in accordance with Article 121(1), to submit a proposal to amend the Rome Statute to include a new crime of ecocide. This move could mean different things for various stakeholders, including the international campaign to make ecocide a fifth international crime co-founded by the late UK barrister, Polly Higgins now known as Stop Ecocide International (SEI), the international community at large, corporations and states. On the one hand, supporters of the ecocide campaign could herald this as a watershed moment because they foresee, *inter alia*, the possibility of 'changes in the way corporations behave'.[3] On the other hand, some could say that this may be the beginning of the end because a proposal is after all, just the tip of the iceberg. In the sections that follow, we will try to size up the girth of this iceberg and attempt to answer the question "How will the crime of ecocide be introduced *effectively* into the Rome Statute?" by primarily drawing comparisons from the process of adoption of the crime of aggression as a fourth crime in the Rome Statute, thus laying out some of the procedural and legal peculiarities to be expected as well as the potential political hurdles to overcome. Without an appropriate blueprint for the adoption of a new, standalone crime, one can only learn as best as possible from another experience: the crime of aggression.

Four-stage process

According to the SEI campaign, making ecocide an international crime consists of a **simple four-stage process**, with the following claims for each stage:[4]

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[2] The Stop Ecocide International campaign has set five years as their goal (this is based on the author's knowledge of the campaign).

[3] Stop Ecocide International, 'Making Ecocide a Crime', https://www.stopecocide.earth/making-ecocide-a-crime.

[4] Ibid.

Stage 1: Proposal

Proposal of the amendment is key. As soon as a state submits a proposal, we will start to see changes in the way corporations behave.

Stage 2: Admissibility

With a one-state, one-vote basis at the ICC, the voice of a small Pacific island is just as powerful as that of a large nation.

Stage 3: Adoption into the Statute

With a 2/3 majority in favour of the amendment, the law is adopted into the Statute and the crime exists.

Stage 4: Ratification

Under universal jurisdiction principles, any ratifying nation may, on its own soil, arrest a non-national for ecocide committed elsewhere.

As this paper evaluates each stage named above, it will clarify the relationship between 'Proposal' and 'Admissibility', elaborate on the work required for an amendment being considered, and describe the links between 'Adoption' and 'Ratification'. In doing so, it may fill in the potential gaps not addressed in the claims by providing insights into how the crime of aggression was dealt with at each stage before becoming the fourth crime in the Rome Statute. In turn, this paper will also provide some suggestions as to how to overcome some of the hurdles that may arise.

Before evaluating the stages named above in Part II, it is first necessary to describe the contextual backdrop of the crime of aggression and compare it with the current narrative of the crime of ecocide.

Part I

Customary Roots of the Four Existing Crimes of the Rome Statute

The Rome Statute currently houses four of the most serious crimes of concern to the international community, namely the crime of genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8) and the crime of aggression (Article 8 *bis*). The crime of aggression, which was the latest crime to be introduced to the Statute was 'activated'[5] in the early hours of 15 December 2017 and entered into force after a minimum of thirty States Parties ratified the Kampala Amendments, on the 20th anniversary of the adoption of the Rome Statute on 17 July 2018. Whilst there have been several amendments proposed over the course of twenty years since the entry into force of the Statute in 2002, none was quite like the inclusion of the crime of aggression.

The addition of the crime of aggression in the Statute follows an unspoken practice of affirming customary norms as law.[6] The three crimes before the crime of aggression were undoubtedly derived from customary norms, with war crimes created as a notion as early as in the 19th century, crimes against humanity created and contextualised at the International Military Tribunal at Nuremberg (Nuremberg Trials) and genocide finding its basis in the 1948 Genocide Convention.

[5] The crime of aggression was technically activated or adopted in 2017, eventually becoming effective in 2018. Although there are also amendments to Article 8 that added new kinds of war crimes to the Statute, it is beyond the purview of this paper to elaborate on them.

[6] For a history of the drafting of the Statute, see: Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court', in Roy Lee, ed, *International Criminal Court: The Making of the Rome Statute* (Kluwer, The Hague, 1999) 79 at 91; see also: *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc. A/51/22 (Vol. I), 13 September 1996, paras 51-52, 75-76, 91.

Between the crimes of aggression and ecocide, the former is believed to have attained the status of a crime under general customary international law while the latter has yet to reach the threshold.[7] This claim traces back to as early as 1946 where one can find the 'initiation or waging of a war of aggression' under Article 6(a) of the Charter of the International Military Tribunal.[8] In its judgment of 1946, the Tribunal also indelibly described aggression as the 'supreme international crime differing from other war crimes in that it contains within itself the accumulated evil of the whole'.[9] This was followed thirty years later in 1974 with the United Nations General Assembly's adoption of Resolution 3314 (XXIX) where aggression was defined. In addition, at least 30 countries had already criminalised aggression domestically prior to the Kampala Agreement.[10]

Draft Code of Crimes against Peace and Security of Mankind and the Rome Conference

In the 90 s, during the negotiations of the Draft Code of Crimes against Peace and Security of Mankind (Draft Code),[11] twelve crimes were initially discussed.[12] Amongst the twelve were 'aggression' (Article 15), the 'threat of aggression' (Article 16), and the 'wilful and severe damage to the environment' (Article 26), with the former two eventually becoming consolidated as the 'crime of aggression' (Article 16) at a later stage during negotiations.

[7] Claus Kress, 'The Crime of Aggression before the First Review of the ICC Statute', *Leiden Journal of International Law* 20 (2007), 853

[8] United Nations, *Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis*, 8 August 1945.

[9] IMT, Judgment of 1 October 1946, in the Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 2, 421.

[10] Global Institute for the Prevention of Aggression, 'Handbook', https://crimeofaggression.info/documents/1/handbook.pdf, (hereinafter 'Aggression Handbook').

[11] UN General *Assembly, Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991)*, A/46/10, 101.

[12] Note that distinction should be made between the negotiations on the Draft Code of Crimes/Offences against the Peace and Security of Mankind and the Draft Statute for an International Criminal Court although both were mostly discussed at the same time.

Although both Articles 16 and 26 were considered until almost the end of the negotiations on the Draft Code, Article 26 was abandoned,[13] amongst others, in favour of a narrower interpretation under war crimes,[14] leaving three crimes[15] recognised by the International Military Tribunal and the crime of genocide remaining.

By the time delegates convened at the Rome Conference on the International Criminal Court (Rome Conference) in 1998, there was still a level of disagreement about the parameters of the crime of aggression.[16] This uncertainty was reflected when the Preparatory Commission (Prep Comm), created by Resolution F of the Final Act of the Rome Conference,[17] failed in preparing a proposal for a provision on aggression. Instead, the Prep Comm decided then, as part of a final compromise, to submit such a provision to a Review Conference which was to be convened seven years after the Rome Statute came into force. Thus, although the crime of aggression was included, theoretically, in the list of crimes under the jurisdiction of the Court, 'parked' as Article 5(d) to hasten the adoption of the Statute at the Rome Conference, it was something yet to be discussed as per what was then Article 5(2) of the Rome Statute.

[13] According to Special Rapporteur Ibrahim Thiaw's account, in his thirteenth report on the draft Code, there were strong oppositions to Article 26 and it should therefore be abandoned 'for the time being'; see *Thirteenth report on the draft code of crimes against peace and security of mankind, 24 March 1995*, A/CN.4/466.

[14] During the 1996 negotiations on the Draft Code, 'wilful and severe damage to the environment' was recommended for further consultation, along with 'illicit traffic in narcotic drugs'. Specifically on the former, the ILC reports that 'a working group that would meet at the beginning of the forty-eighth session [will] examine the possibility of covering in the draft Code the issue of wilful and severe damage to the environment'. Although it was proposed by that working group that 'wilful and severe damage to the environment' be considered as a war crime, or a crime against humanity, or a separate crime against the peace and security of mankind', the ILC 'decided by a vote to refer to the Drafting Committee only the text prepared by the working group for inclusion of wilful and severe damage to the environment as a war crime'. This is how Article 8(2)(b)(iv) is the only provision in the Rome Statute that deals with destruction to the environment. For more, see: UN General Assembly, *Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996*, A/51/10.

[15] These were the crime of aggression, crime against humanity and war crimes, excluding 'crimes against United Nations and associated personnel', which was eventually tucked into war crimes in the Rome Statute.

[16] Roger S Clark, 'Exercise of Jurisdiction over the Crime of Aggression: International Criminal Court (ICC)', *Max Planck Encyclopedias of International Law* (2018), (hereinafter 'Clark 2018'); Aggression Handbook.

[17] Resolution F, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc. A/CONF.181.10* (1998), 8-9.

Consequently, whereas there was willingness to eventually include the crime of aggression into the Statute by deferring it for consideration by the first Review Conference to happen years into the future, there were no plans to pick up on the other crimes that were abandoned from the negotiations of the Draft Code,[18] including Article 26 on the 'wilful and severe damage to the environment', which some could argue can be likened to ecocide today.

'Wilful and severe damage to the environment' or 'ecocide'?

The above sections not only demonstrated that the crime of aggression has been rooted in customary norms prior to it being anchored in the Rome Statute, but also that a plan had already been set in motion for the eventual consideration of the crime of aggression. Ecocide has yet to rise to the level of a crime under general customary international law. At best, it is treated as an extension of the crime of severe damage to the environment during armed conflict or Article 8(2)(b)(iv) of the Statute; it pertains to severe damage to the environment during times of peace. Moreover, unlike the four anthropocentric crimes in the Rome Statute, ecocide is ecocentric[19].

In November 2020, an Independent Expert Panel for the Legal Definition of Ecocide (IEP) was convened by the charitable arm of SEI, Stop Ecocide Foundation, to further build on the political momentum initiated by Vanuatu and the Maldives at the 2019 Assembly of States Parties (ASP) of the Rome Statute when both states called for the ASP to seriously consider

[18] Trinidad and Tobago, who stood behind the crime of 'illicit traffic in narcotic drugs', one of the eight crimes that were excluded from the Draft Code, had to propose an amendment to the Rome Statute as soon as amendments were allowed as per Article 121(1) in 2009 to newly introduce the crime; infra, note 33.

[19] According to Oxford Dictionary, cocentrism is a worldview that sees nature as having inherent value and that is centred on nature rather than on humans.

expanding the ICC's remit to include the international crime of ecocide. In an interview dated April 2021 Co-Chair of the IEP, Prof. Philippe Sands was quoted as saying that '[i]nternational law is deeply conservative, … [it would have to be grounded] on something that has come before, or it's likely to be dead on arrival'.[20] The Panel reached consensus six months after it was convened on 22 June 2021 and drew much international attention when they launched their draft definition of ecocide, which reads:

> *'[E]cocide' means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.*

The IEP, in its commentary, noted that the inclusion of ecocide in the Rome Statute 'would be the first to be adopted since 1945', indicating rightfully that no new international crimes have been recognised since the Nuremberg Trials.[21]

When Sands was interviewed again in June 2021, he placed ecocide 'between genocide and crimes against humanity',[22] after prefacing with references to Article 8(2)(b)(iv) and the 1978 Environmental Modification Convention when asked about the legal basis of the definition.[23] Sands further reiterated the main objective of the international ecocide campaign, namely the

[20] Philippe Sands, interview by Justine Batura, Voelkerrechtsblog, April 4, 2021, https://voelkerrechtsblog.org/defining-ecocide/.
[21] Supra, note 12.
[22] Philippe Sands, interview by Lea Main-Klingst, American Bar Association, June 15, 2021, https://www.americanbar.org/groups/environment_energy_resources/publications/ierl/20210615-an-international-definition-for-the-crime-of-ecocide/ (hereinafter ABA 2021); see also Philippe Sands, interview by Florence Wildblood, Ours to Save, June 28, 2021, https://www.ourstosave.com/p/criminalising-ecocide-interview-with.
[23] Sands repeats this in another interview with Berkeley Law dated August 10, 2022, https://www.law.berkeley.edu/podcast-episode/philippe-sands-from-genocide-to-ecocide/, stating '… ecocide draws from both genocide and crimes against humanity…'.

creation of 'a separate and freestanding crime'.[24] Whether this 'grounds' ecocide on past legal precedents is up for debate. It does, however, link ecocide to an existing prohibition of damage to the environment in terms of war.

Neither the IEP draft definition of ecocide nor the SEI campaign demonstrate a link to Article 26 of the Draft Code on the crime of 'wilful and severe damage to the environment' as a basis for introducing ecocide as a fifth crime. Rather, the goal is to independently have a State Party propose an amendment to the Rome Statute to introduce a new crime of ecocide on the pretext of addressing today's ecological and environmental challenges by extending the protections for serious environmental harm from war times to times of peace.

Consequently, parallel developments in domestic legislative reforms to either introduce a crime of ecocide or strengthen existing criminal laws pertaining to environmental infractions will be instrumental in building normative state practice and *opinio juris*. France, Belgium and Chile are three countries who have taken up such legislative reforms to that effect.

Part II

Now that we have a contextual backdrop of the crime of aggression and an understanding of the current narrative of the crime of ecocide, we will dive into a comparative theory-versus-practice exercise, pitting the procedural provisions of the Rome Statute against what transpired in the run up to the adoption of the crime of aggression. This exercise will allow for the proper evaluation of the 4 stages presented by the SEI campaign and will present some useful suggestions to help with the effective adoption of the crime of ecocide into the Rome Statute.

[24] ABA 2021.

Relationship between 'Proposal' and 'Admissibility'

As required by procedural law, Liechtenstein, the main proponent of the proposed amendment to include the crime of aggression into the Rome Statute, submitted its proposal on 30 September 2009 to the Secretary General of the United Nations, who then communicated the proposal to the ASP on 29 October 2009.[25] This step had to be taken as per Article 121(1) even though the crime of aggression was already 'parked' as Article 5(2), nearly a decade earlier and was to be considered at a pre-planned Review Conference in Kampala in 2010. In the meantime, a Special Working Group on the Crime of Aggression (SWGCA), created to replace the Prep Comm in 2002, worked between 2003 and 2009 to finish the proposal for a provision on aggression, which the Prep Comm failed to do in 1998. Article 5(2) itself provided for two future tasks of defining the crime and setting out the 'conditions' for the exercise of jurisdiction. It reads as follows:

> *The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.*

[25] Liechtenstein: Proposal of Amendment (Depository Notification) 29 October 2009, https://treaties.un.org/doc/Publication/CN/2009/CN.727.2009-Eng.pdf.

True to Article 121(2),[26] the ASP, at its 8th Session in The Hague, on 26 November 2009, adopted Resolution ICC-ASP/8/Res.6 by consensus,[27] thus agreeing to take up a number of proposals for amendments, including that from Liechtenstein, for consideration by the Review Conference in Kampala.

In the case of ecocide, a State Party who wishes to invoke Article 121(1) would have to pay attention to the first sentence of Article 121(2), which states that a proposed amendment should be submitted to the Secretary General of the United Nations 'no sooner than three months' before the next ASP meeting, which usually takes place at the end of the year. The same provision further establishes that the proposed amendment shall be approved if it is passed by a 'majority of those present and voting' at the ASP.[28] The ASP mostly takes place in The Hague unless there is voting required for the elections, in which case, it will take place in New York where most Permanent Missions are located. The location of the ASP may also further dictate whether the proposed amendment will be dealt with directly or be decided at a Review Conference at a later date. It is important to note here that a proposal presented in Kampala for a regular seven-yearly Review Conference did not gain traction and the ASP has never had a second Review Conference since.[29]

Together, the two prerequisites of when the proposed amendment is deposited with the Secretary General and a consensus or simple majority vote to either deal with the proposal

[26] Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3 (hereinafter 'Rome Statute'), art 121(2), 'No sooner than three months from the date of notification, the Assembly of States parties, at its. Next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants'.

[27] Review Conference, Resolution ICC-ASP/8/Res.6, 26 November 2009.

[28] Rome Statute, art 121(3); in practice, the ASP tries to work by consensus, except on elections.

[29] Prof. Roger S. Clark, email correspondence on September 7, 2022.

directly or convene a second Review Conference, represent the admissibility tests that come before Stage 1 on Proposal and comes after as a determining factor of whether a proposal will be successful or not, thus opening up the long 'amendment' path to Stage 3 on Adoption.

Any State Party who wishes to propose an amendment to include the crime of ecocide will have to take these two prerequisites into account if it wishes to see to have a proposal go on to the next stage. Nothing at this stage will mirror the path that the crime of aggression followed. With limited chance that the ASP will decide to convene a second Review Conference, the proponent may have to consider the location of the ASP session that will vote on the proposal; an ASP session in New York will probably garner participation from more States Parties than a session in The Hague – bearing in mind the ASP's practice of achieving consensus.[30]

The Work required for an Amendment being Considered

As mentioned above, the crime of aggression was 'parked' during the adoption of the Rome Statute in 1998 and was scheduled to be considered during the first and, to date, only Review Conference in June 2010. Not only did Article 5(2) precondition the adoption of the crime on the basis of a proposal passing the admissibility test, it also required a definition and details on the 'conditions under which the Court shall exercise jurisdiction'.[31] The aim was to have a provision which was 'consistent with the relevant provisions of the Charter of the United Nations'.[32] According to Clark (2018), '"conditions" was itself ambiguous [as] the procedural structure for the crime of aggression could differ from the structure the Statute applied to the

[30] Supra, note 23.
[31] Rome Statute, art 5(2).
[32] Ibid.

other three crimes'.[33] Notably, it allowed for the involvement of non-States Parties including the three Permanent Members of the Security Council of the United Nations, namely United States of America, Russia and China. Thus, when the SWGCA started work on the proposal in 2003, it welcomed inputs from both States Parties and non-States Parties on the definition and 'conditions' for the exercise of the Court's jurisdiction.

The bulk of the SWGCA's drafting work was done during the intersessional meetings (2003 – 2009) at the Liechtenstein Institute for Self-Determination at Princeton University in New Jersey.[34] The resulting draft definition, which became Article 8 *bis*, was adopted verbatim in Kampala.[35] While work on the definition was relatively smooth-sailing, it was the exercise of jurisdiction which was subject to much debate and compromise. Within the SWGCA, Permanent Members of the Security Council insisted that its power 'to determine the existence of any threat to the peace, breach of the peace or act of aggression' under Article 39 of the UN Charter was exclusive.[36] Divergent discussions on jurisdiction spilled over to the Review Conference, which ended up introducing two amending provisions on the exercise of jurisdiction over the crime of aggression, namely Article 15 *bis* pertaining to state referrals and referrals made by the Prosecutor *proprio motu* and Article 15 *ter* pertaining to Security Council referrals.

Assuming that the admissibility tests for proposal pass with flying colours, the proposed amendment to introduce the crime of ecocide might then enter an ambiguous process, which

[33] Clark 2018.
[34] Ibid.
[35] Clark 2018, 'Art 8 bis proceeds from a drafting convention distinguishing between the "crime of aggression", what a natural person commits (para 1), and the 'act of aggression' which is what a State does (para 2)'.
[36] Clark 2018.

we will try to assess in light of what we learned from this part of the process with the crime of aggression.

A Second Review Conference, Working Group on Amendments or a Special Working Group for the Crime of Ecocide?

Unless the ASP decides to convene a (second) Review Conference, it is likely that the Working Group on Amendments (WGA) will be tasked to pick up on the proposed amendment. A Review Conference may be advantageous for the crime of ecocide because it demonstrates a willingness to focus the ASP's efforts, *inter alia*, on the proposed amendment. However, as mentioned, there has not been a willingness to convene another Review Conference since the first one in Kampala.[37] In turn, this may also affect the creation of an equivalent of the SWGCA or a Special Working Group for the Crime of Ecocide. With this in mind, one would have to anticipate the possibility that the proposed amendment will be picked up by the WGA as has happened with the other proposed amendments under Article 121(5).

To date, the WGA has been assigned to consider seven amendments as per Article 121(5). Amongst them are Trinidad and Tobago's 2009 proposal to amend Article 5 of the Statute to include the crime of 'international drug trafficking', [38] and Mexico's proposal, of the same year, to amend Article 8 of the Statute 'regarding the use of nuclear weapons'.[39] Whilst Trinidad and Tobago did not reference the Rome Conference and the deletion of the crime of 'illicit traffic in narcotic drugs' in its proposal, Mexico did by stating that it wished to extend *a posteriori*

[37] Supra, note 24.
[38] Trinidad and Tobago: Proposal of Amendment (Depository Notification), 29 October 2009, https://treaties.un.org/doc/Publication/CN/2009/CN.737.2009-Eng.pdf.
[39] Mexico: Proposal of Amendment (Depository Notification), 29 October 2009, https://treaties.un.org/doc/Publication/CN/2009/CN.725.2009-Eng.pdf.

the list of forbidden weapons under Article 8 to include nuclear weapons, citing the exclusion of 'weapons of mass destruction' at the Rome Conference. According to the WGA's latest report in 2021, Mexico indicated that it 'would like to discuss its amendment proposal at a later stage, taking into consideration the progress made in relation to [the Treaty on the Prohibition of Nuclear Weapons]', which entered into force on 22 January 2021.[40] Meanwhile, there were no updates provided by Trinidad and Tobago to the WGA on its 2009 proposal. The last time the WGA had something to report on Trinidad and Tobago's amendment proposal was in 2015 where it is said that the latter 'would make us of [sic] an expert presentation to further ascertain its proposal'.[41] Since then, there has been nothing to report on Trinidad and Tobago's proposal. The reason for such waning of efforts by Trinidad and Tobago could be attributable to the issue either being 'buried in Committee' or the lack of diplomatic resources to follow through annually.[42]

To avoid the risk of the amendment being 'buried in Committee' or worse, the lack of diplomatic resources to follow through in what could be a drawn out, multi-year process, the State Party bringing forth the proposal for ecocide should plan for long-term and viable resources both in New York and The Hague to push for the WGA's completion of work within a reasonable amount of time. Technically, it took twelve years to prepare the provision for the crime of aggression for adoption, with five years taken up by the Prep Comm and seven years by the SWGCA respectively. Additionally, it took eight more years before the conditions for adoption were finally met in 2018, bringing the total length of process to twenty years. To complement the issue of resources, it would be prudent for the main proponent to build a

[40] Report of the Working Group on Amendments, ICC-ASP/20/28, 29 November 2021, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/ICC-ASP-20-28-ENG.pdf.
[41] Report of the Working Group on Amendments, ICC-ASP/14/34, 16 November 2015, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP14/ICC-ASP-14-34-ENG.pdf.
[42] Prof. Roger S. Clark, Zoom conversation on September 9, 2022.

coalition of co-sponsors to push for the creation of a Special Working Group for the Crime of Ecocide. By doing so, one could counterbalance the issue of not having a Review Conference and create the necessary room for better oversight of the amendment process, including having the possibility of a predetermined venue as a convening place for the intersessional meetings, such as the one SWGCA had, at the Liechtenstein Institute for Self-Determination at Princeton University. Such an option is likely to be more efficient than placing the issue under the WGA who meet at most, a few times a year for a limited amount of time.

Involvement of the Security Council and non-States Parties to the Rome Statute

Equally as important, one must also anticipate the involvement of non-States Parties to the Statute, including the Permanent Members of the Security Council in the amendment process. The narrative surrounding the international ecocide campaign stresses that ecocide constitutes a threat to peace and security. Therefore, it is inviting the likelihood of the Permanent Members of the Security Council invoking its power under Article 39 of the UN Charter to 'determine the existence of any threat to the peace […] and […] make recommendations […] to maintain or restore international peace and security'. If this is the case, it is likely that other non-States Parties to the Statute will be involved in the working group. Non-State Parties but big players with high stakes in a crime such as ecocide may very likely join the working group. In short, the involvement of these states should not have the effect of placing themselves or their nationals beyond the reach of the law.

The Link between 'Adoption' and 'Ratification'

In Stage 3 of what the SEI campaign anticipates, it is stated that a two-third majority in favour of the amendment will result in the law being adopted into the Statute. This may be an over-simplification of the process given the campaign's lack of consideration for the processes that precede this stage and assumption that a Review Conference will be 'likely to take place' when it has been demonstrated above that there is very little appetite for it. However, the campaign is not wrong in saying that the law will not yet be enforceable until ratification takes place.

As it pertains to the adoption of amendments, Article 121(3) establishes that:

> *The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.*

As it pertains to the ratification of amendments, Article 121(5) provides that:

> *Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.*

In relation to the crime of aggression, not only was there Article 5(2) which created two future tasks of defining the crime and setting out the 'conditions' for the exercise of jurisdiction, there was also the leveraging factors of a pre-scheduled Review Conference seven years after the entry into force of the Statute and the creation of the SWGCA. Just before the Kampala Conference in 2010, the SWGCA found consensus agreement on the definition of the crime of

aggression,[43] hence the effortless adoption of the definition verbatim at the Conference itself. This meant that the Conference only had to deal with outstanding issues on the exercise of jurisdiction, which was resolved with the introduction of Articles 15 *bis* and 15 *ter*. The Review Conference effectively set out the terms pertaining to ratification of the crime of aggression. The following paragraphs will address both the peculiarities of the terms for adoption and ratification of the crime of aggression.

As with any political process involving all states, there was a difficult compromise resulting in a clause that prevented the ICC from immediately exercising its jurisdiction over the crime of aggression. The ASP would have to take a one-time decision to activate the Court's jurisdiction, no earlier than 2017 'after the ratification of acceptance of the amendments by thirty States Parties' as per the requirements of the third and second paragraphs of Articles 15 *bis* and 15 *ter* respectively.[44] So, even though the minimum requirement of thirty ratifications of the Kampala Agreement was met by June 2016 there was a requirement of 'a decision […] by the same majority of States Parties as is required for the adoption of an amendment to the Statute.' Here, either a consensus or two-third majority of all States Parties as per Article 121(3) would be needed. Consequently, at the 16th Session of the ASP in December 2017 in New York, Resolution ICC-ASP/16/Res.5 was adopted by consensus after much lobbying and impasses by the States Parties.[45] Despite the relative success of achieving consensus, the Court would only have jurisdiction over events occurring after 17 July 2018. To further complicate the jurisdiction of the Court over the crime of aggression, Article 15 *bis* (4) reads as follows:

[43] Global Institute for the Prevention of Aggression, 'History', https://crimeofaggression.info/history/.
[44] Rome Statute, arts 15 *bis* and 15 *ter*.
[45] See Clark 2018, paras 44-5.

> *The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.*

Taken together, Article 15 *bis* (4) and Article 121(5) create a Catch-22 situation. Clark (2018) suggests that an opt-out clause may not allow a State Party 'to protect its people from jurisdiction', but the second sentence of Article 121(5) also serve as a broad enough protection for a State Party who does not accept the Kampala Amendments from a referral by the Security Council under Article 15 *ter*. He also elaborates on how an opt-out provision adds an extra layer of complication because Article 15 *bis* (4) may mean that a State Party would only be able to opt-out after having ratified the Kampala Agreement.

Finally, it may seem that the lapse of seven years for a Review Conference (e.g. Article 121(1)) and the action to be taken by the ASP only after 1 January 2017, seven years after the Review Conference (e.g. Articles 15 *bis* (3) and 15 *ter* (3)), as well as thirty ratifications are the standard requirements or practice for consideration of an amendment and entry into force of a new crime in the Rome Statute. This is not true. Firstly, the seven years before the first Review Conference was a one-off compromise reached at the Rome Conference. Since the seven-year time has long lapsed for a second Review Conference, any need for a second Review Conference will have to be decided by the ASP. Secondly, the seven years lapse following the first Review Conference is another arbitrary number picked by the delegates at the Kampala Conference.

Thirdly, there is also 'no magic' to the thirty ratifications,[46] albeit it may be indirectly related to the number of countries who had already had aggression criminalised domestically.[47]

To date, there are 43 States Parties who have ratified the Kampala Agreement. Even with the unfortunate situation between the Russian Federation and Ukraine, the potential future of the ICC prosecuting the crime of aggression remains unknown;[48] the crime is effectively still beyond the ICC's reach and cannot apply to either states, albeit the Chief Prosecutor of the Court has opened an investigation into the situation citing war crimes and crimes against humanity by virtue of Ukraine's acceptance of the Court's jurisdiction via two separate declarations as well as joint referrals by all 43 States Parties who have ratified the Kampala Agreement.

Conclusion

In conclusion, despite the relative success of getting the crime of aggression into the Rome Statute, some of the far-reaching compromises laid out in this paper make for an amorphous recognition of aggression's criminality, thus 'a placeholder without definition or effect'.[49] The crime of aggression had the advantage of inclusion-in-theory as Article 5(d) but was faced with compromising obstacles at the Kampala Conference and unavoidable requirements, notably Article 121(5) as the crime can only apply to States Parties who ratify the Kampala Amendments. In relation to the ecocide, this paper hopes to have established some

[46] Prof. Roger S. Clark, email correspondence on September 7, 2022.
[47] Supra, note 9.
[48] Anika Winn, 'The Crime of Aggression: A Political Compromise Resulting in an Ambiguous and Complex State of Law', June 29, 2019, https://globaljustice.queenslaw.ca/news/the-crime-of-aggression-a-political-compromise-resulting-in-an-ambiguous-and-complex-state-of-the-law.
[49] Tom Dannenbaum, 'The ICC at 20 and the Crime of Aggression', July 14, 2022, https://sites.tufts.edu/fletcherrussia/the-icc-at-20-and-the-crime-of-aggression/.

understanding of the girth of the iceberg that is to be the path chartered to get the crime of ecocide adopted in the Rome Statute.

Without the recognition of ecocide as a crime under general customary international law, the SEI campaign would have to support the building of sufficient state practice and *opinio juris* if it were to fulfil its five-year target of getting the crime adopted in the Rome Statute. It is after all, the introduction of a new crime of ecocide, which has yet to become an *erga omnes* norm. Procedurally, the first step involving a State Party's willingness to propose an amendment will have to keep both the admissibility tests and location of the ASP in mind. Secondly, keeping in mind the potentially ambiguous amendment process, one would have to throw caution to the wind in the case of ecocide; the adoption of the definition for the crime of aggression may have been effortless but ultimate legitimacy of the definition itself will have to come from a working group, whether it be the WGA or a separate Special Working Group. If it would make sense to use IEP's draft definition as a starting point, the State Party proposing an amendment would have to advocate for its use. Here, coordination amongst potential co-sponsors may be key. Lastly, considering the likelihood of the involvement of the Permanent Members of the Security Council and non-States Parties, proponents hoping to avoid the same failures of the crime of aggression would need to have the necessary political prowess and stamina to ensure timeliness in adoption, wide ratification with as little opt-outs as possible and a prosecutable crime at the end of the day. Advocacy foresight at every step of the process will be necessary to ensure that the crime of ecocide will be introduced effectively into the Rome Statute as it charters its own path.