Ecocide Law: A Call for Ecocentrism and Inclusion of All Relevant Voices Within Codification Efforts

Juan José Guzmán, Valeria Napoli, Michelle Reyes Milk, Alison Smith and Camilla Taddei

Abstract

The past few years have seen significant progress in the discussions surrounding the codification of an international crime of ecocide. One concrete evidence of this is the definition put forward in June 2022 by the Independent Expert Panel for the Legal Definition of Ecocide, which provided an important starting point for the codification efforts ahead.

The panel's proposed definition has given way to important input and constructive criticism from a wide range of actors- including civil society and academia. We believe, indeed, that the most appropriate forum for the prosecution of ecocide is the International Criminal Court, for a number of reasons. This must be an effort which drives us to work together towards a definition that can be included within the Rome Statute.

In this paper, we will address the need for states parties to adopt an ecocentric approach when reflecting on the elements of this crime. Like no other international crime, ecocide warrants an ecocentric approach away from the traditional anthropocentric approach that has guided the codification of other crimes. This translates into a crime that is committed beyond direct human harm, that constitutes serious environmental damage. This requires a shift in perceptions, a new understanding in humanity's relationship with nature; a new paradigm in the interrelation between nature and human livelihood.

This approach also entails the need to bring all relevant voices into the table. We therefore not only underline the need to consult with indigenous communities, the custodians of the land, as well as other key stakeholders during discussions geared at codification of this crime. We argue that international law provides an important basis for the obligation to ensure this participation, on the basis of the right to be consulted. Lastly, we also argue that through incorporating the

perceptions and experiences of these key stakeholders, we can envision a true development of international law.

Introduction

With the exacerbation of the impacts of climate change, heavily influenced by human activities, discussions around the need for legal developments to protect and preserve the environment have flourished in the last decades. The word 'ecocide' has been included in numerous debates and political agendas at the international level in efforts to criminalise the gravest attacks against the environment, with growing demands for such a new crime to be added to the existing international framework.

As such discussions unfold, the objective of this paper is to spotlight two important aspects that all law-making processes involving ecocide should incorporate, in whatever path taken for the codification of this crime.

First, from a legal perspective, the prevailing approach is mainly centred on human harm, whereby damage to the environment is criminalised if it has a direct impact on human beings. The impact of damage to the environment, however, goes way beyond direct harm to humans. The harm that results from human (in)action may be detrimental to an ecosystem without any person being affected, resulting in a legal vacuum that is helpless to prevent (and punish) such harm. Instead, nature must be protected and preserved for its own intrinsic value, and ecosystems should be at the centre of such a fundamental piece of legislation. As such, a new paradigm is needed to criminalise effectively the gravest conducts against the environment: ecocentrism.

Secondly, from a policy and process perspective, there is also a need to reconsider how the international legal framework is shaped. Historically the domain of States, now is the time to bring all relevant voices to formal negotiations during the entire process of such a milestone crime, particularly those most affected by the decisions that will be taken. We should look at this element from the lenses of ethics and law combined, as there are cross-cutting layers at stake. This is not only an ethical obligation revolving around the *legitimacy* of the process in relation to the current context, but a duty that also involves the evolution of the legal practice.

In the first part of this paper, we will explore the issue of ecocentrism, including from a legal perspective. In the second part, we will address the ethical and legal obligations towards including all relevant voices in the law-making process, particularly those coming from groups most vulnerable to climate change and environmental destruction. Our analysis will focus on

developments within international human rights law, and the Rome Statute framework. Although an amendment to the Rome Statute is favourable, it does not mean that other paths are excluded and, therefore, our arguments are directed to all processes.

Section I: From anthropocentrism to ecocentrism in ethical and legal practice

The need to protect ecosystems and the natural environment for their own sake - and not because of their value to human beings - has been placed at the centre of ethical and legal discussions around environmental protection. In the 70s, environmental ethics - among other schools of thought - began to question the subordination relationship between humans and nature at different levels of society, such as legal practice in general.

The nature/culture dualism

Understanding nature differently from the dominant anthropocentric view (including Western and other perspectives) is a challenging but urgent task. According to that perspective, rivers, mountains, animals and nature in general are objects, making difficult to see what is wrong with exploring and exploiting it without limitations. Paraphrasing the anthropologist Harry Walker,[1] there is a relative assumption about humans beginning their lives as asocial and cultureless natural organisms. These assumptions relate to the dominant nature/culture dualism: the body is a biological organism gifted with naturally-given necessities that are satisfied and controlled by culture - a construction of human activity. The nature/culture dualism not only establishes a conceptual division but it also draws a relation mediated by vertical power dynamics. This dual conception concretely translates into nature as the "giver" and humans as the "takers". Thus, the idea that nature is not only an entity dissociated from humanity but also an object to be used has been progressively consolidated in Western-driven and other societies. A practical example is the widely used concept of "natural resources", which reduces the immensity of nature to passive resources that find their only value in their capacity to satisfy human needs and desires. This

[1] Harry Walker, *Under a Watchful Eye: Self, Power, and Intimacy in Amazonia*, 1st ed. (University of California Press 2012), 9.

perspective is known as anthropocentrism, and it is a dominant approach in global environmental debates.

Anthropocentrism does not, however, allow for an adequate reflection of harm when it comes to addressing other entities that are not human or human-made, such as ecosystems. By contrast, the ecocentric view sees nature as having inherent value, regardless of whether it is of use to humans or not. Humans are seen as one component of a more comprehensive system - ecosystems - where the focus is not only on humans and other life forms but also on non-living entities that facilitate the existence of such ecosystems.

Environmental ethics, a discipline developed in the 1960s and 1970s, recognised the importance of having discussions around the moral relationship of human beings to the environment, challenging the traditional Western ethical thinking that put only humans at the centre of ethical debates.[2] Environmental ethics questioned the superiority of human beings in relation to other species and introduced the possibility of seeing the natural environment and non-human entities as having an intrinsic value.[3] While having a strictly anthropocentric view means thinking that humans only have moral obligations towards other humans,[4] ecocentrism extends these moral obligations to the natural environment without the need to associate it with human beings.

Another interesting dimension to point out is that the institutionalisation of anthropocentrism in mainly Western-driven societies has historically excluded non-anthropocentric perspectives. For example, several indigenous groups do not have dualist conceptions of the relationship between humans and nature but see them as interlinked and intertwined. This perspective constitutes a significant part of their ways of living, and the imposition of human beings as the only subject of morality, protection and rights is also an imposition of a set of values over other forms of understanding reality. Therefore, the exclusive consideration of anthropocentrism as the way to portray nature represents a violent imposition that demonstrates that several groups have been left

[2] On this issue, see: Andrew Brennan and, Y.S. Norva, 'Environmental Ethics', *The Stanford Encyclopedia of Philosophy* (Summer 2022 Edition).

[3] Helen Kopnina, 'The Lorax complex: deep ecology, ecocentrism and exclusion', *Journal of Integrative Environmental Sciences* 9, no. 4 (2012): 235-54.

[4] Jana Rülke and others, 'How Ecocentrism and Anthropocentrism Influence Human-Environment Relationships in a Kenyan Biodiversity Hotspot', *Sustainability* 12, no. 19 (2020): 8213.

aside from the construction of the wider societies they inhabit, including their norms and legal systems.

Considering the questioning of the culture/nature binary opposition by environmental ethics, and taking into account the existing diversity when it comes to understanding nature in relation to humanity, it becomes important to critically address existing legal practice and how nature is portrayed and protected at different levels, including in international criminal law.

Anthropocentrism and ecocentrism in international criminal law

For the purpose of this section, we will focus our analysis on international criminal law, which addresses the most serious crimes of concern to the international community, namely crimes against humanity, genocide, war crimes and the crime of aggression. International crimes, by design, punish the gravest crimes committed against human beings, limiting the protection of non-human beings to those cases where individuals and/or populations are being harmed. In this light, international criminal law adopts an anthropocentric approach and disregards the intrinsic value of nature, with limited exceptions. For instance, an attempt was made during the negotiations of the Draft Code of Crimes Against the Peace and Security of Mankind. Although in later versions it was removed, earlier versions included a provision which considered 'wilful and severe damage to the environment'[5] as a separate provision from the four existing crimes under international law.

Focusing on the Rome Statute system, Article 8(2)(b)(iv) of the Rome Statute prohibits 'internationally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilians or widespread, long-term and severe damage to the *natural environment*' (added emphasis). This represents a milestone as the first provision in which environmental harm is not linked to human suffering. Previous international treaties - such as the Environmental Modification Convention (ENMOD) or Additional Protocol I to the 1949 Geneva Conventions (PAI) - adopted an anthropocentric perspective, considering environmental degradation only as an indication of the gravity of human-centred crimes. Article 8(2)(b)(iv), on

[5] ILC, 'Report of the International Law Commission on the work of its 47th session', 2 May - 21 July 1995, UN Doc A/50/10, paras 119-21, p. 30.

the other hand, adopts an ecocentric perspective, separating environmental harm and injuries against civilians through a disjunctive clause.

However, this provision still remains untested due to the stringent thresholds it sets. Concretely, a perpetrator may be held accountable for his/her actions under Article 8(2)(b)(iv) if, (a) he/she knew in advance that such attack would cause widespread, long-term and severe damage to the natural environment; (b) the attack was disproportionate to the overall military advantage anticipated; and (c) the perpetrator was aware of such disproportionality.[6] Moreover, this provision only applies to international armed conflicts. There exists no similar conventional prohibition either during non-international armed conflicts or during peacetime. This is particularly problematic given that, currently, the most widespread environmental harm is committed during peacetime.

Numerous scholars have argued that this under-protection may be overcome by widening the scope of genocide and crimes against humanity to cover acts of ecocide (as long as the contextual elements for genocide and crimes against humanity are met). This approach has also been mentioned by the Office of the Prosecutor of the International Criminal Court, which, in 2013 and 2016, declared its intention to consider environmental harm as an indicator of the gravity of a crime, for prioritisation and selectivity purposes. While this would bring the advantage of not being limited, jurisdiction-wise, to scenarios of armed conflict (a contextual element required for war crimes), including ecocide within these existing crimes would translate into retaining an anthropocentric approach. Indeed, crimes against humanity and genocide require harm to be committed against humans, whether through an attack against a civilian population, or through prohibited acts done with the intention to destroy specific human groups in whole or in part.

Thus, there are strong arguments to be made, from an ecocentric perspective, in favour of the adoption of an autonomous crime of ecocide within international criminal aw. This was also acknowledged by the Monsanto Tribunal, which underpinned the need to amend international law to provide better protection for the environment, and suggested the recognition of ecocide as an international crime.[7] However, recognising a new international crime is not enough *per se*. The

[6] Jessica C Lawrence and, Kevin Jon Heller, 'The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute', *The Georgetown International Environmental Law Review* 20 no.1 (Fall 2007): 61–95.

[7] For more information on the Monsanto Tribunal, see: https://www.monsanto-tribunal.org.

pressing need for stronger environmental protection needs to be accompanied by a shift in our perspective; hence, the crime of ecocide should be based on a different rationale: protecting and preserving our planet *in toto* and for its own value.

Considering all this, there have been calls for the inclusion of a fifth crime under international law against the environment (or ecocide). Since the term was first coined by Professor Arthur W. Galston in 1970 during the Conference on War and National Responsibility, numerous scholars proposed legal definitions, including Richard Falk,[8] Mark Allan Gray,[9] Laurent Neyret[10] and Polly Higgins.[11] The latest proposal was published in June 2021 by the Independent Expert Panel on the Definition of Ecocide, which had been set up by Higgins's organisation, the Stop Ecocide Foundation, including both a definition and three amendments to the Rome Statute to enable the recognition of a fifth crime within the ICC's jurisdiction.[12]

Section II: Bringing All Relevant Voices to the Table: An Ethical and Legal Duty

The worst impacts of environmental crimes are often borne by those who have contributed the least to their commission, who experience vulnerabilities and who have limited resources to cope with the consequences. People living in poverty and vulnerable groups are more exposed to the

[8] Richard A. Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals', *Revue Belge de Droit International* 9, no. 1 (1973): 1–27.

[9] Mark Allan Gray, 'The International Crime of Ecocide', in *International Crimes* (London: Routledge, 2017), 455–514.

[10] Laurent Neyret, 'Pour la Reconnaissance du Crime d'Écocide', *Revue Juridique de l'Environnement* 39, no. 1 (2014): 179–93. See also : Laurent Neyret and others, 'Timely and Necessary: Ecocide Law as Urgent and Emerging', J. *Juris* 431 (2015); Laurent Neyret, *From Ecocrimes to Ecocide. Protecting the Environment Through Criminal Law*, CEENRG Reports 2017-2 (Cambridge Centre for Environment, Energy and Natural Resources Governance University of Cambridge, 2017).

[11] Polly Higgins and others, *The Ecocide Project 'Ecocide Is the Missing 5th Crime Against Peace* (London: Human Rights Consortium, 2012). See also: Polly Higgins, *Earth Is Our Business: Changing the Rules of the Game* (London: Shepheard-Walwyn, 2012); Polly Higgins, Damien Short and, Nigel South, 'Protecting the Planet after Rio – the Need for a Crime of Ecocide: Polly Higgins, Damien Short and Nigel South Propose a Way Forward to Deal with Climate Change and Environmental Deterioration', *Criminal Justice Matters* 90, no. 1 (2012): 4–5; Polly Higgins, 'Seeding Intrinsic Values: How a Law of Ecocide Will Shift Our Consciousness', *Cadmus Journal* 1, no. 5 (2012): 9–10; Polly Higgins, Damien Short and, Nigel South, 'Protecting the Planet: A Proposal for a Law of Ecocide', *Crime Law Soc Change* 59 (2013): 251–266; and Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (London: Shepheard-Walwyn Publishers Ltd, 2015).

[12] Stop Ecocide Foundation, 'Independent Expert Panel for the Legal Definition of Ecocide. Commentary and core text' (June 2021), https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf.

effects of climate change,[13] because of and in turn reinforcing patterns of inequality. For example, some groups may have economies dependent on specific resources, with fewer tools to mitigate and adapt to environmental changes, and therefore be more vulnerable to nature's disruption because of their more direct relationship with it. Thus, bringing the voices of all affected communities and vulnerable groups at all stages of legislative developments is crucial to guarantee that their perspectives are considered.

The importance of diverse views

In addition to taking an ecocentric perspective, it is essential to ensure that the voices of those who are most affected by environmental damages are heard throughout the discussions on the criminalisation of ecocide, in a way that would allow their perspectives to permeate the process and inform the outcomes, avoiding mere tokenism. Their perspectives are of fundamental importance when proposing a new international crime against severe environmental degradation and destruction and thus emphasis should also be given on making these fora accessible, as to not replicate discriminatory patterns many groups often face. The composition of the Independent Expert Panel for the Legal Definition of Ecocide is a good practice in this regard: its heterogeneity and the public consultations held in 2021 considered the voices of numerous key stakeholders beyond the Western worldview.

For example, as we discuss in the subsequent section, the voices of indigenous communities are key to having an inclusive approach to legislative developments, as well as towards ecocentrism. Increasingly, their traditional knowledge systems and contributions to the protection and understanding of biodiversity and natural phenomena are recognised in numerous international instruments, including the Rio Declaration of Environment and Development[14] and the Convention

[13] UN Department of Economic and Social Affairs. *World Social Report 2020. Inequality in a Rapidly Changing World.* New York: United Nations, 2020.
[14] See principle 22.

on Biological Diversity.[15] At the same time, their lands and their ways of living are continuously threatened by harmful economic activities.[16]

Furthermore, a gender perspective must be taken during codification efforts. Environmental disasters are not gender neutral for several reasons, including the traditional gender roles in societies. For many women, the impacts of climate change are highly felt, but their voices are not always sufficiently heard or taken into consideration. In this light, different UN agencies highlight that environment, climate and development projects should take into consideration gender-related risks throughout their phases, which includes consulting women and ensuring that no discrimination occurs.[17] Likewise, bringing the voices of women to the definition of the crime of ecocide is of paramount importance. Besides access to information and decision-making, this involves active participation of women and girls, acknowledging their increased vulnerability in respect of environmental harm and empowering them in the climate change context.

The inclusion of youth voices is also key in these discussions. Public spaces, especially in law and policy-making processes, have been seen as 'owned' by adults, with youth and children being attributed an undesired intrusive role.[18] As the relationship between children's rights and environmental harm has been increasingly underlined, moving beyond the dominant adult-centric perspective is pivotal in the case of ecocide. Children and youth, who represent 30% of the world's population,[19] are disproportionately impacted by environmental harm since the early stage of their development due to their unique metabolism and development needs. Their enjoyment of the

[15] See article 8(j).

[16] United Nations Department of Economic and Social Affairs. *The State of the World's Indigenous People*, *Volume I,* New York: United Nations, 2009. See also the relevant discussions in *South Fork Band v. United States*. United States, 2009.

[17] United Nations Environment Program, United Nations Human Rights Office of the High Commissioner, and UN Women. *Human Rights, the Environment and Gender Equality – Key Messages.* United Nations Enviornment Program, 2021. https://wedocs.unep.org/20.500.11822/36945. See also: UN Women. *Explainer: How gender inequality and climate change are interconnected*, UN Women, 2022. https://www.unwomen.org/en/news-stories/explainer/2022/02/explainer-how-gender-inequality-and-climate-change-are-interconnected and UN Women, *Explainer: Why women need to be at the heart of climate action.* UN Women, 2022. https://www.unwomen.org/en/news-stories/explainer/2022/03/explainer-why-women-need-to-be-at-the-heart-of-climate-action.

[18] Gerison Lansdown, *Promoting Children's Participation in Decision-Making* (Florence: United Nations Children's Fund Innocenti Research Centre, 2001).

[19] United Nations Human Rights Council. *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.* United Nations General Assembly, 2018.

highest standards of physical and mental health, access to education, adequate food and housing, safe drinking and sanitation, to name a few examples, is at higher risk when human-induced environmental disasters occur. They both have a stake in today's society and are the generations that will more likely suffer from the long-term consequences of ecocide. However, their participation should be granted despite this: involving children and young people is not only an ethical and factual obligation, it is also required by the Convention on the Rights of the Child, whereby children have a right to freely express their views, individually and as part of a group, in all matters affecting them.[20] Involving their voices means not only listening, but giving proper due account to their contribution.

At the same time, while we have been discussing ensuring the views of different groups are heard, it is critical to take into account the issue of intersectionality. Individuals do not necessarily belong or share singular cultural, gender, spiritual and religious identities. People represent more than one categorisation of race, gender,[21] religious and spiritual beliefs, as well as relationships with their environments. In other words, social and environmental (in)justice has numerous interdependent and overlapping layers, leading to diverse experiences of discrimination and oppression. For example, indigenous women are discriminated against both because they are members of an indigenous community and based on their gender. Ensuring that this intersectionality is recognised and actively influences decisions on who is at the negotiating table is important for the outcomes of the process.

Is There a Legal Obligation to Bring Indigenous Voices to the Conversation in the Drafting of the Crime of Ecocide?

In considering the importance of bringing more voices to the table and consulting all relevant communities for the purpose of contributing towards the codification of the crime of ecocide, one question that must be answered is the following: how do we move from an *ethical* obligation for this inclusion, towards a *legal* one?

[20] See article 12.

[21] See Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *University of Chicago Legal Forum,* 1989, no.1: 139-167.

In addition to the perspectives of those more vulnerable to environmental destruction, the voices of indigenous and tribal peoples stand out. There is undoubtedly an ethical obligation to include their voices within the discussions on ecocide, as the guardians of traditional lands that are particularly at risk of climate change. There are also unquestionable *benefits* in having this contribution to the codification process, acknowledging both the expertise and agency of these communities, as well as their unique role in the conservation and protection of the environment. The Inter-American Court of Human Rights (IACtHR) arrived at this conclusion in a number of leading cases related to the rights of indigenous peoples, finding that indigenous communities are intrinsically bound to and have a strong spiritual relationship with their traditional lands, territories and resources.[22]

Can we therefore assert that there is a *legal* obligation for this unique contribution within the current conversations and hopefully eventual codification of the crime of ecocide?

The Right of Indigenous Peoples to be Consulted and its Relevance to the Work on Ecocide

In this section, we will look at the right to consultation of indigenous peoples – particularly in light of some of the leading cases of the Inter-American Court of Human Rights (IACtHR) – and analyse how this right goes beyond the impact of certain development projects that can affect their lives and ancestral lands, so as to include the right to be consulted on the adoption of relevant legal provisions, including within the international normative framework.

The right to consultation can be traced back to a number of international instruments, including ILO Convention No. 169, and holds a particular relation with the right to self-determination.[23] The United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) also includes a number of provisions that incorporate the right to consultation, declaring that indigenous populations have

[22] See, for example, the Mayagna (Sumo) Awas Tingni Community v. Nicaragua case at the Inter-American Human Rights Court, where the Court stated that, 'For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations'; Inter-American Human Rights Court, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, par. 149.

[23] Enshrined, *inter alia*, in common article 1 to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as in ILO Convention No. 169, among other treaties.

a right to full and effective participation in all matters that concern them (emphasis added). Article 18 is of particular relevance to the drafting process of the crime of ecocide: 'indigenous peoples have the right to participate in decision-making matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own decision-making institutions'. This must be read in conjunction with Article 19, which establishes that states *shall* consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing *legislative* or administrative measures that may affect them (emphasis added).

Article 18 therefore requires a wide, holistic interpretation. It refers to participation of indigenous peoples in *all matters* which may affect them, without distinction of whether this participation is within a domestic or international sphere.

The Inter-American Human Rights system has provided leading case-law on the right to consultation, including the *Kaliña and Lokono peoples* case. As observed by MacKay, in its decision, the IACtHR carries out a '[…] repeated citation of the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP), (…) reading its provisions into its interpretation of the ACHR and reinforcing the view that various UNDRIP provisions restate existing law'.[24] This translates, as MacKay argues, into an increasing interrelation between environmental law and international human rights law, signalled by the influence of the Court's jurisprudence on the drafting of UNDRIP, and vice-versa, and, in turn, 'intensifying the interrelationship between indigenous rights in universal and regional human rights law'.[25] Similarly, in her expert opinion to the IACtHR in the *Kaliña and Lokono peoples* case, the former UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, stated that 'International environmental law and international human rights law should not be considered separate, but rather interrelated and complementary, bodies of law'.[26] We argue that this interrelation should also include international criminal law, within the ongoing debate of the codification of a crime of ecocide.

[24] *Ibid*, p. 32.
[25] Ibid.
[26] Inter-American Human Rights Court, Case of the Kaliña and Lokono peoples v. Suriname, par. 174. Reference also in Fergus MacKay'The Case of the *Kaliña and Lokono Peoples v. Suriname* and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement', *Erasmus Law Review* 1 (2018): 32. Further citations to this work are given in the text.

While UNDRIP is a declaration of a non-binding nature, its numerous citations, within relevant case-law by international human rights courts and UN special human rights bodies, provide a strong argument towards the consolidation of a legal right of indigenous peoples to consultation to free, prior and informed consent (FPIC)[27], and other obligations stemming from the UNDRIP.[28]

The right to consultation is also inextricably linked to the right to a healthy environment, which is increasingly being recognised as an autonomous right.[29] Within the Inter-American Human Rights system, the Court's 2017 Advisory Opinion on Environment and Human Rights[30] highlights the 'interdependent relationship between protection of the environment, sustainable development, and human rights'[31] and refers to the particular vulnerability of indigenous peoples in the face of environmental damage.[32] In its Advisory Opinion, the Court stressed the right of indigenous communities (and all relevant stakeholders) to participate in matters, including decision-making processes, that could affect the environment.[33]

Another key development related to participation in environmental issues concerns the adoption, in the Americas, of the Escazú Agreement.[34] Escazú, unfortunately, has not had a universal ratification across the region. However, its provisions are an important indication of efforts to

[27] Despite debates around obtaining free prior and informed consent (FPIC) for all cases, it is increasingly evident that human rights standards are strengthening the idea that consultation should lead to FPIC when States take legislative or administrative measures that may affect indigenous peoples. Nevertheless, in practice, the recognition of the right FPIC is not widely accepted by governments and corporate actors, especially in granting licenses to explore and exploit natural resources or to implement infrastructure projects, due to the high economic interests at stake. Instead, governments often prefer to recognise the right to prior consultation because it is mistakenly conceived as softer and less problematic for the implementation of their political and economic agenda. See Amelia Alva-Arévalo, 'A critical evaluation of the domestic standards of the right to prior consulation under the UNDRIP:lessons from the Peruvian case', *The International Journal of Human Rights* 23, no. 1-2 (2019): 234-248. Two prominent cases from the Inter-American Human Rights System are Sarayaku v. Ecuador, which focused on prior consultation, and Saramaka v. Suriname, in which the Court ruled that for development or investment projects that have a significant impact on the Saramaka territory, the State must obtain FPIC.

[28] On this issue, see Fergus MacKay, *Ob. Cit.* 33.

[29] See for example the UN General Assembly Resolution on "The human right to a clean, healthy and sustainable environment", 28 July 2022, UN Doc. A/RES/76/300.

[30] Inter-American Human Rights Court Advisory Opinion OC-23/17, 'The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)'. Adopted on November 15, 2017.

[31] IACtHR, OC-23/17, par. 52.

[32] *Ibid*, par. 67.

[33] *Ibid*, paras. 226-232.

[34] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbeans. Adopted in Escazú, Costa Rica on 4 March 2018.

recognise, legally, the urgency of participation in environmental matters of all relevant actors, including indigenous communities, as well as the role of human rights defenders in environmental issues.[35] Escazú is not only a leading example on *what* was agreed, but also on *who* participated in the negotiation of its provisions. The Escazú Agreement builds on Principle 10 of the 1992 Rio Declaration on Environment and Development, which establishes that 'environmental issues are best handled with participation of all concerned citizens, at the relevant level'. In this regard, Article 7 enshrines the right to public participation in environmental decision-making processes. It is noteworthy that this provision not only refers to domestic frameworks, but also international ones. As with UNDRIP, we argue that this includes participation in international forums where codification of rules relevant to protection of the environment are discussed. This should be read conjunctly with the legal obligation of States Parties to the Escazú Agreement to guarantee mechanisms for participation of the public in decision-making processes, including, as outlined in paragraph 12 of Article 7, 'public participation in international forums and negotiations on environmental matters or with an environmental impact, in accordance with the procedural rules on participation of each forum (…)'. Furthermore, article 7(14) calls for States Parties to 'make efforts to identify and support persons or groups in vulnerable situations in order to engage them in an active, timely and effective manner in participation mechanisms.'

Civil society participation within the Rome Statute system: an example to follow

With regards to the Rome Statute system**,** there is today a well-known practice that includes civil society voices at large within the system, in particular, but not exclusively, regarding the ICC´s Assembly of States Parties (ASP). Moreover, there is a regulatory framework behind the participation of civil society. Rule 93 of the Rules of Procedure of the Assembly of States Parties[36] establishes that NGOs (with the proper accreditations), through their designated representatives, may attend relevant ASP meetings and meetings of its subsidiary bodies, and make oral statements.

[35] Economic Commission for Latin America and the Caribbean (ECLAC), 'Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean', United Nations publication LC/PUB.2018/8/-*, (2018).

[36] Assembly of State Parties, 'Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court', First Session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.C. NGOs can also submit written statements under Rule 95.

This participation also includes specific contributions to codification efforts as expert opinions, as has been shown in practice. The Rome Statute system and the ICC practice have also provided a number of additional platforms for this interaction: the annual ICC-NGO Roundtables; the ongoing sessions of the New York Working Group and The Hague Working groups of the ASP; and numerous bilateral meetings held between different ICC offices with civil society, including the Office of the Prosecutor.[37] In particular, interaction outside of the venues and corridors in The Hague and New York must be valued and promoted, since this tackles important accessibility barriers of many civil society representatives, particularly those in ICC situation countries. Civil society representation is also key in ICC proceedings, through *amicus* briefs, for example. Finally, a key group of stakeholders have an essential role throughout ICC investigations, including judicial proceedings: victims have not only a right to participation and reparation, but have a voice in shaping reparations, as has been shown in cases such as *Lubanga*, *Ntaganda* and *Ongwen*, for example.[38] Building on this practice, know-how and experience, consultations around ecocide should also be carried out beyond the traditional centres of the ICL world, and reach communities most affected by climate change and environmental destruction. Last but not least, civil society networks, like the Coalition for the International Criminal Court (CICC) are instrumental in bringing the voices of victims and civil society at large to the centre of ICL codification.

In addition to the role provided by civil society within the ICC framework and its practice, attention must also be placed on the principle of complementarity that lies at the centre of the Rome Statute system. This principle translates into the fact that prosecutions for Rome Statute crimes should be held – first and foremost – within domestic judicial systems. As a result, an international definition of the crime of ecocide, and its incorporation within the Rome Statute, would assist in shaping and modelling domestic provisions, and provide more uniform and homogeneous definitions of the crime of ecocide across the globe. In this way, bringing indigenous and other relevant voices to the drafting process at an international level, paves the way for an impact both internationally and domestically.

[37] For example, see the Annual Report of the Office of the Prosecutor - 2022, available here: https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-05-annual-report-of-the-office-of-the-prosecutor.pdf

[38] For the role of victims in ICC proceedings see, for example, Carsten Stahn 'A critical introduction to International Criminal Law', Cambridge: CUP, 2019, 301- 316 (DOI 10.1017/9781108399906).

The Rome Statute system's framework certainly would already allow for the participation of indigenous peoples' representatives within the different platforms aforementioned, including within the ASP under the general umbrella of civil society participation. That there is potentially also a legal right to consultation, especially when it comes to environmental matters, puts further emphasis on the need for the ASP – should the codification of the crime of ecocide make it formally into the ASP agenda – to ensure the participation of indigenous voices within such efforts.

Bringing indigenous peoples' views into the drafting process as separate and distinct persons to NGOs and other experts is also important in another sense: it explicitly recognises indigenous peoples' right to juridical personality and would bring more legitimacy to the process. As Lloyd Axworthy appropriately coined in reference to the drafting of the Rome Statute, relevant voices of civil society and other stakeholders which came together in Rome created a 'new diplomacy', one which calls for coordination between governments, civil society and international organisations.[39] And, as Pace and Schense recall, participation of NGOs within the ICC ASP brought expertise from the ground through expert publications, opinions, and interactions and advocacy with government delegates.[40] This is the kind of impact that would be possible through the participation of indigenous communities and other relevant groups in the codification efforts of the crime of ecocide.

Finally, taking into account what has been repeatedly emphasised from within TWAIL approaches to international law, bringing indigenous peoples' and other tribal peoples' perspective into the codification efforts (in addition to the voices of other relevant groups) is not only a matter of *legitimacy* and *representation*, but is also key when reflecting on *who* the penholders are in international law; *who* is writing not only the literature in international law, but also, ultimately, the rules of international law.[41] These questions are very relevant to the discussions of ecocide, where indigenous peoples' voices should therefore not only be included as stakeholders most

[39] See reference in William Pace and Jennifer Schense, 'The Role of Non-Governmental Organizations', in *The Rome Statute of the International Criminal Court: A Commentary,* ed. Antonio Cassese, Paola Gaeta and, R.W.D. Jones (New York: Oxford University Press, 2002), 107, footnote 4.
[40] *Ibid*, 106-110.
[41] For an important discussion on this issue (in Spanish), from a TWAIL perspective, listen to Salvador Herencia, 'Salvador Herencia-Carrasco y el retorno del Tercer Mundo', *Internacional con Ñ,* October 20, 2021, Ep. VII.

affected by environmental destruction, but as experts in the preservation and conservation of the environment.

Conclusions

As we have illustrated in this paper, an ecocentric approach must be taken in the negotiating process towards the codification of the crime of ecocide. Having in mind the possibility of a) extending the moral value we attribute to humans to other living and non-living entities; b) seeing beyond human-centred interests for ecological wellbeing; and c) respecting and including historically silenced and undervalued belief systems; it becomes logical that policies and laws comprehend all ecosystems as "wholes" that contain but transcend human existence - and that crimes against ecosystems are punished even at the highest levels.

In addition to adopting an ecocentric perspective, we have a collective responsibility to bring more voices to the table and ensure those voices are not just listened to, but actively heard and their perspectives concretely taken into account. Therefore, a holistic and integral human rights approach to the issue, considering leading case-law, relevant provisions from international human rights law and environmental law, regulations from the Rome Statute system, and ICC practice in general, lead us to conclude that in addition to an *ethical* obligation to ensure participation of relevant affected groups in the drafting process of a crime of ecocide, and the unquestionable benefits behind this inclusion, there is also a *legal* obligation to do so.

As a result, these negotiations should be legitimate and representative of the wider collective, including those more vulnerable towards environmental destruction, such as indigenous groups, women, youth and children. Guaranteeing accessibility to these spaces is of utmost importance to avoid replicating discriminatory patterns these groups already face.

Following on from these points, we would like to emphasise that the arguments discussed in this paper are intended for all law-making processes whereby ecocide will be involved. Although an amendment to the Rome Statute is favourable, other paths are also welcome and, thus, should take into account the need for an ecocentric approach and for effective inclusion of all relevant voices.