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ELI Report on Ecocide

Model Rules for an EU Directive and a Council Decision

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ISBN: 978-3-9505318-2-4
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Cover image: Shutterstock

Project Number: P-2021-25
Approved by the ELI Council on 19 January 2023 and by the ELI Membership on 16 February 2023.
Council Draft and Final Draft published on 20 February 2023 and 18 April 2023 respectively.

This publication was co-funded by the European Union's Justice Programme. Acknowledgement is also due to the University of Vienna, which has generously hosted the ELI Secretariat under successive Framework Cooperation Agreements since 2011. Views and opinions expressed are those of ELI's only and do not necessarily reflect those of the European Union, the University of Vienna or others. Neither the European Union nor others can be held responsible for them.

This project is co-funded by the European Union

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Executive Summary

Background

The word ecocide has a clear and intuitive meaning in English, French and many other languages. What is less clear is its characterisation as a legal concept.

Three different characterisations already exist in public international law, which may be suitable for defining the concept of ecocide. First, Article 8(2)(b)(iv) of the Rome Statute and Article 35(3) of the first Additional Protocol to the Geneva Conventions of 8 June 1977 consider ecocide, namely the intentional launch of an attack in the knowledge that it will cause '*widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*', a war crime. This characterisation is the only one in force and does not cover the described conduct where the offence is not committed in a context of war. A draft Article I of the 'Study on the question of the prevention and punishment of the crime of genocide' by the United Nations (UN) Economic and Social Council (ECOSOC) Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed including ecocide among the crimes of *genocide* prohibited by international law 'in time of peace or in time of war'. A third characterisation, still under public international law, consisted in defining ecocide '*a crime against humanity*' and was put forward by the UN International Law Commission in a draft Article 26 of the Code of Crimes Against the Peace and Security of Mankind.

Several national criminal codes, both military and general, prohibit ecocide, whether explicitly or implicitly, and not necessarily only in warfare. For instance, among the behaviours characterised as ecocide are: the '*mass destruction of the flora and fauna and poisoning of the atmosphere or water resources, as well as other acts capable of causing an ecological catastrophe*'; the wilful infliction of '*widespread, long-term and severe damage to the natural environment*' in any armed conflict; '*destroying the natural environment*', and the spread of '*substances dont l'action ou les réactions entraînent des effets nuisibles graves et durables sur la santé, la flore, la faune*' when committed intentionally.

The European Union is striving to introduce a coherent regime which will enable – and oblige – Member States to protect the environment. The European Commission's proposal for the revision of the Environmental Crime Directive uses the term ecocide in a recital listing serious environmental crimes. One of the main aims of the Directive is to prevent corporate crimes against the environment.

Aim and Methodology

The main aim of this Report is to assist in the present legislative evolution by contributing to the definition of the crime of ecocide as a general crime, thereby ensuring the prevention of the most serious environmental crimes also in peacetime and when they are committed by private persons.

To this end, the Report starts by systematising the existing rules of law and scholarly contributions in order to reconstruct the crime of ecocide from the 1970s up until the present day. It summarises the results by listing the prohibited behaviours, the events that need to be prevented with the criminal instrument, and the level of intentionality required for the criminal threshold to be attained. Even more importantly, the Report highlights the underlying values of the proposed legislation. The present study illustrates clearly that the word ecocide, in its etymological meaning of 'destroying one's home', eloquently expresses the rationale of the proposed rules.

Substantial Outputs

The Report provides a definition of the crime of ecocide.

The *actus reus* must consist in: i) a typified behaviour, ie, behaviour which European Union law has identified as unlawful and dangerous for the environment; ii) resulting or likely to result in severe damage, which is also long-term, or in severe damage, which is also irreparable or irreversible.

The *actus reus* must have been committed with the following *mens rea*: wilful intention (*dolus malus*); acceptance of the consequent risk of damage (*dolus eventualis* or recklessness).

The Report also considers it necessary to extend the powers of the European Public Prosecutor's Office to include offences of ecocide affecting more than one Member State or one or more Member States and one or more third countries.

Formal Outputs

To assist future legal instruments, the project takes the following approach:

(i) The existence of a proposal for a Directive on the protection of the environment through criminal law means that the substantive elements of the Model Directive (essentially Articles 3, 4, 5, 7, 11 and the definitions in Article 2) could be presented by the European Parliament as amendments to the proposed Directive under the ordinary legislative procedure.

(ii) In the alternative, the European Parliament, acting under Article 225 Treaty on the Functioning of the European Union (TFEU), or the Commission could propose the Model Directive for adoption either as a self-standing instrument or as a Directive amending the new Environmental Crime Directive. This is why the Model Rules include rules already contained in the proposal for a Directive on the protection of the environment through criminal law. It is important to note that this signifies that the Project Team approves those rules.

(iii) The Model Rules are formulated for a future EU Council Decision, which would make it possible for the European Public Prosecutor's Office to investigate, prosecute and bring to judgment the perpetrators of, and accomplices in, offences constituting the crime of ecocide.

Although the models are destined for the EU, the substantive proposals for the *actus reus* and *mens rea* of the crime of ecocide could be taken up by national legislators, including those of non-EU States.

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1. Introduction - Why Ecocide?

Before going any further, it is appropriate to say why this project is worthwhile.[1] First, the planet is facing a '*ghastly future of mass extinction, declining health and climate-disruption upheavals*' that threaten human survival because of ignorance and inaction. '*The scale of the threats to the biosphere and all its lifeforms – including humanity – is in fact so great that it is difficult to grasp for even well-informed experts*'.[2] Culpable behaviour by human beings is, in many cases, directly or indirectly responsible for this.[3]

Many scientists believe that the world is on the brink of the sixth mass extinction.[4] According to Professor Georgina Mace, head of the Centre for Biodiversity and Environmental Research at University College London, the threat is so severe that biodiversity loss needs to be addressed on a global scale in a similar way to climate change.[5]

Mace goes on to observe that '*Extinction rates … are probably 100-1,000 times higher than in pre-human times.*' If you look at

> *the abundance of life rather than numbers of species', for 'vertebrates (birds, fish, amphibians, reptiles, mammals) there is a fairly good estimate that more than 50% of the vertebrate abundance has been lost in the past 50 years. The information for invertebrates and plants is less good, but there is some evidence to suggest insects are declining just as quickly, if not more so. One recent paper showed the mass of insects is falling by 2.5% a year.*[6]
>
> *The diversity of life on Earth is the defining feature of our planet – we don't know of any other planets that have life on them. We developed and evolved with other species here, and their diversity allows us to thrive. So, it's very reckless to assume that we can do without them and that we don't have some responsibility for all those other species.*
>
> *Then there are some of the benefits of biodiversity that we largely take for granted. These are things like primary production, which is the way plants convert energy from the sun and is the basis for all life on Earth. Wild species break down organic material back into nutrients, so it can be recycled and used again. The water cycle also relies heavily on living organisms.*
>
> *Finally, there is a utilitarian view about the value of nature to us. It provides us with goods and services like pollinating crops, or timber production or novel drugs from tropical plants. If we lose pollinators that are specially adapted to a particular plant, even if we have more widespread invasive pollinators coming in, they may not be able to pollinate that plant.*[7]

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[1] Smart Contracts can, of course, also be used outside blockchain technology as they only refer to a programme code containing an 'if-then' condition.
[2] D Nimmo (ed), C J A Bradshaw, P R Ehrlich, A Beattie, G Ceballos, E Crist, J Diamond, R Dirzo, A H Ehrlich, J Harte, M E Harte, G Pyke, P H Raven, W J Ripple, F Saltré, Ch Turnbull, M Wackernagel, D T Blumstein, *Underestimating the Challenges of Avoiding a Ghastly Future* (Frontiers in Conservation Science, 13 January 2021) <https://doi.org/10.3389/fcosc.2020.615419> accessed on 15 March 2023.
[3] '*Sustained human activity will affect the relative abundance of species and in extreme cases may lead to extinction. This may result from the habitat being made unsuitable for the species (e.g., clear-felling of forests or severe pollution of rivers) or through the habitat becoming fragmented …. Major changes in natural environments are likely to occur within the next century as a result of changes in global climate and weather patterns. These will cause greatly elevated extinction rates.*' I R Swingland, [in:] S A Lewis (ed), Encyclopedia of Biodiversity, (Second Edition, Elsevier, Amsterdam, 2013).
[4] The previous mass extinctions were the Ordovician-Silurian extinction: 440 million years ago; the Devonian extinction: 365 million years ago; the Permian-Triassic extinction: 250 million years ago; the Triassic-Jurassic extinction: 210 million years ago; and the Cretaceous-Tertiary extinction: 65 million years ago. See T Halliday, *Otherlands. A World in the Making* (Allen Lane, London, 2022). The present geological era is known as the Anthropocene because the activities of humans are influencing the state of the Earth in an unprecedented way.
[5] *Sixth mass extinction could destroy life as we know it– biodiversity expert*, HORIZON, The EU Research & Innovation Magazine, 04 March 2019, interview by R Gray: <https://ec.europa.eu/research-and-innovation/en/horizon-magazine/sixth-mass-extinction-could-destroy-life-we-know-it-biodiversity-expert> accessed on 15 March 2023.
[6] Ibid.
[7] Ibid.

Mark Allan Gray observed that:

> *It is … ironic that the scope and effects of human activity actually threaten our survival as a species. Scientists and politicians cannot agree on the precise causes and implications of, let alone solutions to, such international catastrophes as ozone layer depletion, global warming and species extinction. There is nevertheless growing acceptance of the notion that arrogance, ignorance and greed, combined with overpopulation and powered by technology, are responsible for such severe resource exploitation and environmental degradation as to menace the integrity of the very biosphere, that thin layer of earth, water and air upon which all life depends.*[8]

There is every reason to be alarmed and deeply concerned by the threat to the biosphere and all forms of life posed by serious environmental offences, which warrant being categorised as the crime of ecocide.

This threat to the natural world on which all life forms depend, including our own, namely the world's oceans and watercourses, the atmosphere, the climate, the rainforests and the soil, is so grave as to warrant ecocide being recognised as an international crime.

Furthermore, according to Interpol, environmental crime is the world's third most lucrative criminal business after drugs and counterfeit goods, ahead of human trafficking.[9] The rising global scarcity of natural resources attracts transnational criminal organisations which rapidly shift from 'traditional' criminal activities to the illegal trade in natural resources. For example, organised crime syndicates diversify into the lucrative business of tropical timber, endangered species, waste and natural minerals and metals alongside their traditional activities.[10] Moreover, ecocide is often associated with money laundering, human trafficking and the murder of indigenous peoples.[11]

A report by the Ambitus project of the Italian *Istituto Affari Internazionali* states that:

> *as the foremost economic and trading bloc in the world, the European Union is one of the leading destinations or transit hubs for illegal trade linked with environmental crimes. The unique natural resources of Member States such as Romania or Poland, and the significant demand for cheap waste disposal in countries such as Italy, Hungary and Germany, make Europe an appealing theatre for traffickers. The consequences of all of this are devastating – not only for the environment, but also for the whole European economy and society, which relies on the fragile natural equilibrium ensured by its ecosystems.*[12]

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[8] M A Gray, *The International Crime of Ecocide* (California Western International Law Journal: Vol 26: No 2, Article 3, 1996, at p 215) <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1335&context=cwilj> accessed on 15 March 2023.

[9] <https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-marks-a-decade-of-tackling-serious-organized-environmental-crime> Accessed on 15 March 2023. Moreover, according to an Interpol and UN Environment Programme estimate, environmental crime is the fourth largest criminal activity in the world, growing at a rate of between 5% and 7% per year, (<https://www.eurojust.europa.eu/publication/report-eurojusts-casework-environmental-crime> accessed on 15 Marhc 2023). See also *From ecocrimes to ecocide protecting the environment through criminal law*, under the supervision of Professor Laurent Neyret <https://www.ceenrg.landecon.cam.ac.uk/system/files/documents/report-002.pdf > accessed on 15 March 2023, p 114, where it is pointed out that international reports consistently highlight the links between environmental crime and organised crime, eg the 2013 Report of the International Fund for Animal Welfare on the global security implications of the illegal wildlife trade, where the United Nations considered the illicit trade in wildlife species and woods as a 'serious form of organised crime'.

[10] D P Van Uhm, C C Nijman, *The convergence of environmental crime with other serious crimes: Subtypes within the environmental crime continuum* (European Journal of Criminology (2020) 19(4):542–561).

[11] See P Higgins, D Short, N South, *Protecting the planet: a proposal for a law of ecocide* (Springer, Dordrecht, 2013): '*Even so, the impact of giant industrial logging companies on areas like the Amazon basin is devastating not only for the rainforest but also for the survival chances of the few remaining nomadic hunter gatherer tribes such as the Awá. As their land is taken over by illegal settlements and new cattle ranches, the Awá are being murdered by pistoleros, hired gun men described by tribe members as responsible for wiping out their families, a situation so grave that a Brazilian judge has called it "a real genocide"*'.

[12] L Colantoni, M Bianchi, *Fighting Environmental Crime in Europe, Preliminary Report*, IAI, 2020: <https://www.iai.it/sites/default/files/ambitus_pr.pdf> accessed on 15 March 2023.

As Mark Allan Gray put it, this

> *mindless destruction is immoral, an affront to humanity, nature and God. It is also economically and politically self-defeating. Unfortunately, human affairs are not ordered purely according to ethics. World financial and trade institutions, while capable of exerting influence, lack a primary environmental mandate. Despite raising public consciousness, diplomacy alone has failed to resolve key environmental problems. What consensus exists among nations as to what is ecologically 'wrong' must be sought in the realm of public international law.*[13]

We therefore support the drive to have ecocide recognised as an international crime and included in the Rome Statute of the International Criminal Court. We take appreciative note of the amendments to the Rome Statute proposed by the Independent Expert Panel for the Legal Definition of Ecocide in June 2021,[14] but recognise that it may be some considerable time before these efforts bear fruit. In the meantime, recognition of ecocide as a crime at the level of the European Union could serve as an international precedent, along with the legislation of those States around the world which also recognise the crime of ecocide.[15] It would also give a strong signal both to embolden legislators around the world and to deter wrongdoers.

[13] M A Gray (n 8) 216.
[14] <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf> accessed on 15 March 2023.
[15] Georgia, Armenia, Ukraine, Belarus, Ecuador, Kazakhstan, Kyrgyzstan, Republic of Moldova, Russian Federation, Tajikistan, Uzbekistan, and Vietnam. See section 4, *infra*.

2. The Project and the Structure of this Report

The project consists of a model EU Directive, the 'Model Directive', establishing minimum rules for the crime of ecocide, and a model EU Council Decision making it possible for the European Public Prosecutor's Office to investigate, prosecute and bring to judgment the perpetrators of, and accomplices in, offences constituting the crime of ecocide.[16] Although our models are destined for the EU, the substantive proposals for the actus reus and mens rea of the crime of ecocide could be taken up by non-EU States.

The following section deals in detail with the history of the various attempts to define ecocide and to have it recognised as an international crime as a precursor to the Model Rules themselves, which are based on, and draw on, an existing Commission proposal.

[16] A Commission proposal should normally be accompanied by an impact assessment (see the Interinstitutional Agreement on Better Law-Making, point 13, OJ L 123, 12.5.2016, p. 1), but such an RIA is beyond the scope of an ELI Report.

3. Criminalising Ecocide: A Brief History and Proposed International Definitions

The history of the various attempts to define ecocide and have it recognised as an international crime is a long one.[17] As early as 1970, the term 'ecocide' was used at the Conference on War and National Responsibility in Washington by Professor Arthur Galston who argued that if '*[genocide] could be perpetuated against humankind ... then an attempt to destroy a natural environment [should be] qualified as equally disturbing. Such an atrocity required a similar concept – ecocide, or an attempt to wipe out a specific environment.*' In 1972, at the UN Conference on the Human Environment, Swedish Prime Minister, Olaf Palme, evoked the idea of ecocide as an international crime. He expressly mentioned the Vietnam War as 'ecocide' in his opening speech at the United Nations Stockholm Conference on the Human Environment. In the following years, the potential for a law criminalising ecocide was widely discussed and led to extensive inquiry as to whether ecocide should be included as (1) a war crime; (2) a form of genocide; or (3) a crime against humanity in international criminal law. Since the 1970s, the idea of ecocide was then taken forward by others, including Benjamin Whitaker in 1985.

We have set out below some of the many definitions which have been put forward.

First, it is observed that ecocide is already typified as a war crime under Article 8(2)(b)(iv) of the Rome Statute, which provides for the crime of '*intentionally launching an attack in the knowledge that such attack will cause … widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.*'

It could well have been a crime in peacetime, too. In a study drawn up in 1978, the competent UN Sub-Commission on the question of the prevention and punishment of the crime of genocide published a draft convention drawn up by Richard A Falk.[18] The draft reads as follows:

> *Article I.*
>
> *The Contracting Parties confirm that ecocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.*
>
> *Article II.*
>
> *In the present Convention, ecocide means any of the following acts committed with the intent to disrupt or destroy, in whole or in part, a human ecosystem:*
>
> *(a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical or other;*
>
> *(b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;*
>
> *(c) Thce use of bombs and artillery in such quantity, density or size as to impair the quality of the soil or to enhance the prospect of diseases dangerous to human beings, animals or crops;*
>
> *(d) The duse of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;*

[17] See A Greene, *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?*, 30 Fordham Environmental Law Review (2019) <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1814&context=elr> accessed on 15 March 2023, V Schwegler, *The Disposable Nature: The Case Of Ecocide And Corporate Accountability* (Amsterdam Law Forum, [Sl], v 9, n 3) 71-99, July 2017 <https://amsterdamlawforum.org/articles/abstract/10.37974/ALF.307/> accessed on 15 March 2023, P Higgins, D Short, N South (n 11), M G Faure, *Tackling Environmental Crimes under EU Law. The Liability of Companies in the Context of Corporate Mergers and Acquisitions* (Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2021) <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/693182/IPOL_STU(2021)693182_EN.pdf> accessed on 15 March 2023. For an excellent summary in French, see the proposal for the reform of the Belgian Penal Code: <https://www.lachambre.be/FLWB/PDF/55/2356/55K2356001.pdf> accessed on 15 March 2023.

[18] ECOSOC, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the question of the prevention and punishment of the crime of genocide*, 4 July 1978; Study prepared by Nicodème Ruhashyankiko, at section 464 <https://digitallibrary.un.org/record/663583> accessed on 15 March 2023.

(e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;

(f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.

Article III.

The following acts shall be punishable:

(a) Ecocide;

(b) Conspiracy to commit ecocide;

(c) Direct and public incitement to ecocide;

(d) Attempt to commit ecocide;

(e) Complicity in ecocide.

This proposal came to nothing, along with Article 26 of the Draft Code of Crimes Against the Peace and Security of Mankind:[19]

Article 26. Wilful and severe damage to the environment

An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environmental shall, on conviction thereof, be sentenced [to …].

After several States objected to the inclusion of the element of intent, the UN International Law Commission, rather than tackling the objections, simply removed Article 26 altogether, leaving only 'environmental damage in the context of war crimes' in the draft Code.[20] The result was reflected in the Rome Statute. '*It could be … that the Rome Statute's environmental provisions were weakened and removed because governments were afraid of becoming criminally liable for peacetime nuclear arms testing*.'[21]

Mention must also be made of the impressive work done by Professor Laurent Neyret and his team,[22] consisting, in particular, of two draft international conventions, one dealing with ordinary environmental crimes, the so-called ecocrimes, the other concerning extraordinary environmental crimes, based upon the notion of ecocide. Articles 1 and 2 of their Draft Convention against Ecocide are worded as follows:

Article 1 – Scope of application

1. *The provisions of this Convention shall apply to the most serious crimes against the environment that, both in times of peace and in times of armed conflict, have an impact on the safety of the planet.*
2. *The present Convention is without prejudice to the relevant rules of international humanitarian law prohibiting environmental damage in time of armed conflict.*

Article 2 – Definition of Ecocide

1. *For the purpose of this Convention, ecocide means the intentional acts committed in the context of a widespread and systematic action that have an adverse impact on the safety of the planet, such acts being defined as follows:*

(a) the discharge, emission or introduction of a quantity of substances or ionizing radiation into air or atmosphere, soil, water or the aquatic environments;

(b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker in the framework of any activity related to the waste management;

(c) the operation of a plant in which a dangerous activity is carried out or in which dangerous

[19] Report of the International Law Commission to the General Assembly on the work of its forty-third session, UN Doc A/46/10 (1991), reprinted in [1991] 2 Year Book of International Law Commission 107, UN Doc A/CN.4/SER.A/1991/Add.1 (Part 2) <https://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1991_v2_p2.pdf&lan g=EFSR AC> accessed on 15 March 2023.

[20] For the whole sorry story, see P Higgins, D Short, N South (n 11), and A Greene (n 17) 15 ff.

[21] See A Greene (n 17) p 18, who notes the hostility of the United Kingdom to the idea of including ecocide in the draft Code, on the grounds that '*there is no definition of the crime of ecocide and it would appear the term is incapable of carrying any precise meaning . . . the term has been used in certain debates for the purposes of political propaganda and it would be inappropriate to attempt to make provisions in an International Convention for dealing with matters of this kind.*'

[22] See also L Neyret (n 9).

substances or preparations are stored or used;

(d) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances;

(e) the killing, destruction, possession or taking of specimens of wild fauna or flora species whether protected or not;

(f) other acts of a similar character committed intentionally that adversely affect the safety of the planet.

2. The acts referred to in paragraph 1 adversely affecting the safety of the planet when they cause:

(a) a widespread, constant and serious degradation of the quality of air or the atmosphere, the quality of soil or the quality of water, the fauna and flora or their ecological functions; or

(b) death, permanent disabilities or other incurable serious illnesses to a population or they strip permanently the latter of their lands, territories or resources;

3. The acts referred to in paragraph 1 must have been committed intentionally and with the knowledge of the widespread and systematic nature of the actions in whose framework the aforementioned acts are being carried out. These acts shall also be deemed intentional where their perpetrator either knew or should have known that there existed a high probability that such acts may adversely affect the safety of the planet.

For his part, Mark Allan Gray stated that '*ecocide is identified on the basis of the deliberate or negligent violation of key state and human rights and according to the following criteria: (1) serious, and extensive or lasting, ecological damage, (2) international consequences, and (3) waste*.'[23] No serious consideration of ecocide can be contemplated without having regard to Gray's seminal work, The International Crime of Ecocide.

For Gray,

Ecocide is based upon ecological damage which is both serious and either extensive or lasting. The requisite seriousness can arise from either the scale of the harm and the numbers of people and species ultimately affected … or its impact on people in terms of social and economic costs. … The requisite significance can lie, on the one hand, in vast geographical coverage or a large number of heads of damage, or, on the other hand, in the difficulty, unlikelihood or even impossibility of reversing it. … These criteria are admittedly somewhat subjective, but generally acceptable standards could evolve through adjudication.[24]

Political, social, economic and technological considerations mean they can only be halted, reversed or prevented from recurring through international cooperation.' He went on to say that, 'What makes ecocide morally reprehensible, and could elevate it from a mere international delict to an international crime, is the element of waste. An obvious case is Iraq's igniting of Kuwaiti oil wells during the Gulf War. In contrast, rain forest destruction, toxic waste dumping and unsustainable fishing practices result from a complex mixture of political, economic and social factors, and difficult decisions are required to stop them. They are nevertheless neither inevitable nor necessary. Ecocide consists of deliberate acts and policies which governments, individuals and organizations perform and pursue knowing the harm they cause and the alternatives available. It usually produces nothing of benefit to society – although it often greatly benefits a profiteering minority – and when there are social benefits they are greatly outweighed by social costs. Ecocide squanders precious resources, precludes efficient alternatives and widens wealth disparities. It is unproductive, unsustainable and misguided. It is wasteful.[25]

As far as *mens rea* is concerned, Gray considered that responsibility for ecocide could be based upon strict liability on the ground that this '*would best encourage preventive behaviour, advance the "polluter pays" and "precautionary" principles, and simplify issues of proof of knowledge, intent and causation*.' However, as he was positing ecocide as a crime under international law, he stated that

ecocide – the commission of a significant act or series

[23] M A Gray (n 8) 216.
[24] Ibid 217.

> *of acts, or omission to act in a significant instance or series of instances, which causes or permits ecological damage meeting the criteria outlined above and where feasible alternatives are known to be available – is based on fault.*
>
> *The act or omission can be wilful, such as the deliberate destruction of endangered species habitat or illegal use of driftnets, or failure to act to prevent them; reckless, as in exploiting resources or lending development funds without regard for the known or foreseeable risk of destruction; or negligent, as in undertaking inappropriate development projects or improperly regulating development. Even if legal under municipal law, the act or omission constitutes a breach of a duty of care owed to humanity in general and arising from a treaty, customary international law or another generally accepted international obligation.*[26]

For Gray, the concept of ecocide is in fact derivable from principles of international law.

In putting a proposal to the UN Law Commission designed to amend the Rome Statute of the International Criminal Court (ICC) to include ecocide as a fifth crime against peace,[27] Polly Higgins defined ecocide as follows:[28] 'the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished'.[29]

According to Higgins, the inclusion of ecocide as a crime under international law would create a legal duty of care for all inhabitants who have been or are at risk of being significantly harmed owing to ecocide. Higgins' idea of ecocide is premised on the idea of Earth stewardship. Threats to nature can thus be conceptualised as, in essence, a crime of ecocide and hence punishable by law. She and her co-authors therefore called for the establishment of a specific crime of ecocide and the incorporation of ecocide into existing criminal laws and international instruments.[30] In the actual words of Higgins and her co-authors, '*For now, in law outside of wartime, it is not a crime to cause mass destruction or loss of ecosystems. Our world has normalised the daily ecocide caused by the practices that drive economies as they currently function. Two rules to change these practices and the world we live in are proposed under one law: first, prohibit mass damage, destruction or loss of ecosystems, and second, impose a legal duty of care upon persons in positions of superior responsibility. The proposal is for a law of Ecocide.*'

The idea of stewardship was also put forward by Mark Allan Gray:

> *[E]very element of nature is unique and has inherent dignity, and therefore warrants respect regardless of its value to man. Being different from humans does not mean being less worthy of respect. All living things are vulnerable and, in the case of fauna, sentient, and therefore deserving of protection. These interests, it is here predicted, will go beyond the moral and take on legal characteristics as human understanding of our world improves and as the Eastern concept of duty influences the elaboration of international human rights law. Ecocide can be envisioned as not just the breach of a legal duty of care, but the violation of a duty to protect.*[31]

Lastly, in June 2021, an Independent Expert Panel,[32] convened by the Stop Ecocide Foundation, proposed the following definition of ecocide for inclusion in the Rome Statute:[33]

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[25] Ibid 217-218.
[26] Ibid 218.
[27] The crimes against peace defined in Article 5(1) of the Rome Statute are: 1. The Crime of Genocide; 2. Crimes Against Humanity; 3. War Crimes; 4. The Crime of Aggression.
[28] P Higgins, *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet* (Shepheard-Walwyn Ltd, London, 2010).
[29] For an exegesis of the terms used in this definition, see V Schwegler, *The Disposable Nature* (n 17).
[30] M G Faure (n 17) 94.
[31] M A Gray (n 8) 225.
[32] Chaired by Philippe Sands KC and Dior Fall Sow.
[33] <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf> accessed on 15 March 2023.

A. Addition of a preambular paragraph 2 bis

Concerned that the environment is daily threatened by severe destruction and deterioration, gravely endangering natural and human systems worldwide,

B. Addition to Article 5(1)

(e) The crime of ecocide.

C. Addition of Article 8 ter

Article 8 ter Ecocide

1. *For the purpose of this Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.*

2. *For the purpose of paragraph 1:*

a. *"Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;*

b. *"Severe" means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;*

c. *"Widespread" means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;*

d. *"Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;*

e. *"Environment" means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.*

4. Ecocide in National Provisions

When proposing an offence of ecocide, account is bound to be taken of existing provisions of domestic legislation. It is interesting to analyse how the crime of ecocide is already included in the criminal codes of some States, starting with the oldest. For example, the Criminal Codes of Russia and the Kyrgyz Republic provide as follows (in Article 358 and Article 374, respectively): '*Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe shall be punishable by deprivation of liberty for a term of 12 to 20 years.*' Then, Article 399 of the Criminal Code of Tajikistan defines biocide in the following terms: '*Using of nuclear, neutron, chemical, biological (bacteriological), climatic or other kind of mass destruction weapons with the intent of destruction of people and environment is punishable by imprisonment for a period of 15 to 20 years, or death penalty.*' Article 400 reads: '*Mass destruction of flora and fauna, poisoning the atmosphere or water resources, as well as commitment of other actions which may cause ecological disasters is punishable by imprisonment for a period of 15 to 20 years.*' Under Vietnam's Penal Code of 1990, '*ecocide, destroying the natural environment*', whether committed in time of peace or war, constitutes a crime against humanity. Under Article 409 of the Criminal Code of Georgia, '*Ecocide, i.e. contamination of the atmosphere, soil, water resources, mass destruction of fauna or flora, or any other act that could have led to an ecological disaster, shall be punished by imprisonment for a term of twelve to twenty years. The same act committed during armed conflicts shall be punished by imprisonment for a term of fourteen to twenty years or with life imprisonment.*' Another example is Article 131 of the Criminal Code of Belarus and Article 441 of the Criminal Code of Ukraine, which define ecocide in the following terms: '*Intentional mass destruction of flora or fauna, or poisoning of atmospheric air or water resources, or committing other deliberate actions capable of causing an ecological disaster (ecocide) are punished with imprisonment for a term of ten to fifteen years.*' Lastly, Article 136 of the Criminal Code of Moldova affirms that: '*Deliberate mass destruction of flora and fauna, poisoning the atmosphere or water resources and the commission of other acts that may cause or caused an ecological disaster shall be punished by imprisonment for 10 to 15 years*', whilst Article 394 of the Criminal Code of Armenia provides that: '*Mass destruction of flora or fauna, poisoning the environment, the soils or water resources, as well as implementation of other actions causing an ecological catastrophe, is punished with imprisonment for the term of 10 to 15 years.*'

Turning to the EU, in France, the *Assemblée Nationale* has approved a new Climate and Resilience Law[34] which increases the sanctions for environmental crimes in national legislation, punishing by up to ten years in prison those who '*cause serious and lasting*

[34] *Loi n° 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets* <https://www.legifrance.gouv.fr/download/pdf?id=x7Gc7Ys-Z3hzgxO5Kgl0zSu1fmt64dDetDQxhvJZNMc=> accessed on 15 March 2023.

damage to the land, flora, fauna or the quality of the air, soil or water'.[35] Furthermore, Article 296 of the new Law requires the government to present a report to parliament within two years of the promulgation of the Law on the action it has taken to promote the recognition of ecocide as a crime, which may be brought before international criminal courts.

Moreover, in Belgium, the Council of Ministers has approved a new Penal Code at first reading which will recognise ecocide as a crime.[36] It must now be submitted to the Council of State for a new opinion.

Under the new Code, Belgian nationals will be able to be prosecuted for the crime of ecocide committed abroad without the requirement of dual criminality having to be fulfilled. As far as the *actus reus* of the crime of ecocide is concerned, the proposed new Belgian Penal Code takes over the definition put forward by the Independent Expert Panel for the Legal Definition of Ecocide of 22 June 2021 with a view to incorporating a fifth international crime of ecocide into the Rome Statute on the grounds that this is the most consensual and authoritative definition of the crime of ecocide to date. The drafters of the new Code argue that the definition has the advantage of using familiar language, as it is directly derived from the Rome Statute.

Ecocide, whether committed in times of peace or war, has to be committed deliberately or through a serious lack of foresight or precaution (*délibérément, ou par défaut grave de prévoyance ou de précaution*). The crime of ecocide consists of unlawful or wanton acts committed with the knowledge that there is a substantial likelihood of either severe or widespread damage to the environment caused by those acts.

As regards the applicable penalties, ecocide committed by natural persons is punishable by imprisonment for 20 to 30 years and by life imprisonment if it resulted in the death of one or more persons.

As regards the penalties applicable to legal persons, fines are the principal penalty. Article 41 bis of the Penal Code provides for a system of conversion of prison sentences into fines for legal persons. Additional sanctions can be imposed on legal persons, eg confiscation, dissolution, temporary or definitive prohibition to carry out a certain activity, closure of one or more establishments and publication of the decision.

Provisional measures may also be taken by the investigating judge, eg ordering the total or partial cessation of an operation or activity, immediate provisional closure of the installation in question, a plan of intervention or restoration or rehabilitation within a specified period and any other appropriate measure to bring the crime of ecocide to an end.

Lastly, associations that preserve, protect or defend the environment can be civil parties to prevent or punish the crime of ecocide.

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[35] Ibid: *Art. L. 231-1. Le fait, en violation manifestement délibérée d'une obligation particulière de prudence ou de sécurité prévue par la loi ou le règlement, d'émettre dans l'air, de jeter, de déverser ou de laisser s'écouler dans les eaux superficielles ou souterraines ou dans les eaux de la mer dans la limite des eaux territoriales, directement ou indirectement, une ou plusieurs substances dont l'action ou les réactions entraînent des effets nuisibles graves et durables sur la santé, la flore, la faune, à l'exception des dommages mentionnés aux articles L. 218-73 et L. 432-2, ou des modifications graves du régime normal d'alimentation en eau est puni de cinq ans d'emprisonnement et d'un million d'euros d'amende, ce montant pouvant être porté jusqu'au quintuple de l'avantage tiré de la commission de l'infraction.*
Le premier alinéa du présent article ne s'applique :
1° S'agissant des émissions dans l'air, qu'en cas de dépassement des valeurs limites d'émission fixées par décision de l'autorité administrative compétente ;
2° S'agissant des opérations de rejet autorisées et de l'utilisation de substances autorisées, qu'en cas de non-respect des prescriptions fixées par l'autorité administrative compétente.
Sont considérés comme durables les effets nuisibles sur la santé ou les dommages à la flore ou à la faune qui sont susceptibles de durer au moins sept ans.
Le délai de prescription de l'action publique du délit mentionné au premier alinéa court à compter de la découverte du dommage.
Art. L. 231-3. Constitue un écocide l'infraction prévue à l'article L. 231-1 lorsque les faits sont commis de manière intentionnelle.
Constituent également un écocide les infractions prévues à l'article L. 231-2, commises de façon intentionnelle, lorsqu'elles entraînent des atteintes graves et durables à la santé, à la flore, à la faune ou à la qualité de l'air, du sol ou de l'eau.
La peine d'emprisonnement prévue aux articles L. 231-1 et L. 231-2 est portée à dix ans d'emprisonnement.
La peine d'amende prévue aux mêmes articles L. 231-1 et L. 231-2 est portée à 4,5 millions d'euros, ce montant pouvant être porté jusqu'au décuple de l'avantage tiré de la commission de l'infraction.
Sont considérés comme durables les effets nuisibles sur la santé ou les dommages à la flore, à la faune ou à la qualité des sols ou des eaux superficielles ou souterraines qui sont susceptibles de durer au moins sept ans.
Le délai de prescription de l'action publique du délit mentionné au premier alinéa du présent article court à compter de la découverte du dommage.

[36] *<https://www.lachambre.be/FLWB/PDF/55/2356/55K2356001.pdf> accessed on 15 March 2023.*

5. Growing Political Support for Recognising Ecocide as a Crime

At the level of the European Union, in its resolutions on Human Rights and Democracy in the World 2019 and the EU Biodiversity Strategy for 2030, the European Parliament voted to urge '*the EU and the Member States to promote the recognition of ecocide as an international crime under the Rome Statute of the International Criminal Court (ICC)*'[37] and the European Commission's proposal for the revision of the Environmental Crime Directive[38] goes so far as to mention ecocide, albeit only in a recital, with no corresponding normative provision in the enacting terms, as an aggravating factor. As we have seen, France has adopted a Climate and Resilience Law and, in Belgium, the crime of ecocide has been included in the proposal for a revised Penal Code.[39]

Otherwise the criminalisation of ecocide has found growing support in a wide variety of circles,[40] from Pope Francis addressing the International Association of Penal Law in the Vatican in November 2019, proposing that 'sins against ecology' be added to the teachings of the Catholic Church and saying 'ecocide' should be a fifth category of crimes against peace at the international level, to UN Secretary-General Antonio Guterres.[41]

[37] European Parliament resolution of 20 January 2021 on human rights and democracy in the world and the European Union's policy on the matter – annual report 2019 (2020/2208(INI)), para 12: <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0014_EN.html> accessed on 15 March 2023 and European Parliament resolution of 9 June 2021 on the EU Biodiversity Strategy for 2030: Bringing nature back into our lives (2020/2273(INI)), para 167 <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0277_EN.html> accessed on 15 March 2023.

[38] Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, <https://ec.europa.eu/info/files/proposal-directive-european-parliament-and-council-protection-environment-through-criminal-law-and-replacing-directive-2008-99-ec_en> accessed on 15 March 2023.

[39] See the proposal of the Criminal Code Reform Committee of the Belgian parliament: <https://docs.google.com/document/d/1J-dVuK5NoFAsUSxA4aI8MExrxiYc1ZIr_RBuVtP7B_c/edit> accessed on 15 March 2023.

[40] See https://www.stopecocide.earth/leading-states accessed on 15 March 2023.

[41] https://www.efe.com/efe/english/portada/we-are-at-the-verge-of-abyss-guterres-urges-immediate-action-on-climate/50000260-4577930 accessed on 15 March 2023.

6. The Proposed Model EU Directive Establishing Minimum Rules for the Crime of Ecocide

The Model Directive is closely based on the European Commission's proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC[42] and incorporates many of its provisions verbatim or in amended form. It must be borne in mind, however, that that proposal is now being considered by the European Parliament and the Council under the ordinary legislative procedure and will inevitably be amended in the course thereof.

The choice of a directive, rather than a regulation, is dictated by the most appropriate legal basis, namely Article 83(2) of the TFEU. Article 83(1)[43] could also be used, but it would require a unanimous decision on the part of the Council to identify ecocide as an area of particularly serious crime within the meaning of the second subparagraph of Article 83(1) before any steps could be taken to prepare a proposal for legislation and initiate the ordinary legislative procedure.

Moreover, Article 83(1) has been used to define crimes, in respect of human trafficking, sexual exploitation and cybercrimes, by adopting directives replacing existing framework decisions adopted under the former Article 31(1)(e) of the EU Treaty, which referred to the establishment of minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking. Article 83(1) added to this list illegal arms trafficking, money laundering, corruption, counterfeiting and computer crime. It may reasonably be assumed from the wording of Article 83(1) that other areas of crime which the Council may identify should be chosen on an *ejusdem generis* basis. But whereas ecocide may, in many cases, be the subject of organised crime, the establishment of minimum rules with regard to its definition as a criminal offence and the applicable sanctions is more readily categorised as being essential to ensure the effective implementation of the Union policy of protection of the environment. This is corroborated by the existence of the proposal for a Directive on the Protection of the Environment Through Criminal Law currently being considered by the European Parliament and the Council, itself based on Article 83(2).

Consequently, not only would Article 83(2) seem the more appropriate legal basis, a proposal for a directive based on that article would appear to afford more realistic prospects of success, especially in view of the aforementioned proposal for a Directive on the Protection of the Environment Through Criminal Law.

The existence of that proposal means that the substantive elements of the Model Directive (essentially Articles 3, 4, 5, 7, 11 and the definitions in Article 2) could be presented by the European Parliament as amendments to the proposed Directive under the ordinary legislative procedure. Those elements of the Model Directive which are not already included in the proposal for a Directive on the Protection of the Environment Through Criminal Law are printed in bold and italics in order to identify them.

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[42] Cited in (n 38).

[43] *1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.*
These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.
On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

In the alternative, the European Parliament, acting under Article 225 TFEU, or the Commission could propose the Model Directive for adoption either as a self-standing instrument or as a directive amending the new Environmental Crime Directive. This is why the Model Rules include rules already proposed in the proposal for a Directive on the Protection of the Environment Through Criminal Law. It is important to note that this signifies approval of those rules. This is not a trivial matter.

Before setting out the Model Directive, a number of questions are considered.

(a) Legal basis

The legal basis proposed is Article 83(2) TFEU:

Article 83

1. .....
2. *If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.*
3. *Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.*

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

There is no doubt that protection of the environment is an area which has been subject to harmonisation measures within the meaning of paragraph 2 and there can be no difficulty in arguing that the approximation of criminal laws and regulations of the Member States is essential to ensure the effective implementation of the relevant Union policy. Hence the reference to Article 3(3) of the Treaty on European Union (TEU) and Article 191 of the TFEU in recital (1).

It is noted that Denmark has permanently opted out and Ireland has an opt-in with regard to judicial cooperation in criminal matters.

(b) *Actus reus and mens rea*

(i) Uncertainties about the typification of the crime

Many proposals have been made over the years for defining the constitutive behaviours of the crime of ecocide. Despite the many different definitions, the central meaning of the crime of ecocide has always been understood in the same way. As the study drawn up in 1978 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities on the question of the prevention and punishment of the crime of genocide[44] stated in introducing the subject of ecocide: '*It can be said that the term or concept of ecocide although not legally defined ... its essential meaning is well understood*'.

[44] ECOSOC, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the question of the prevention and punishment of the crime of genocide*, (n 20) § 462, quoting J H E Fried, War by ecocide: some legal observations, extract published in the Bulletin of Peace Proposals (1973, No 1) 43.

Even today there is difficulty in defining all the different forms and contents of behaviour that this crime can subsume. For this reason, it was considered important to link the crime to qualitative rather than quantitative criteria.

In this regard, it is crucial to identify the values that the criminalisation of ecocide seeks to protect, in addition to the objective and subjective components of the crime. In other words, also for the crime of ecocide, it is important to recall what has been described as the 'spirit' of Nuremberg, that is to say, the decision to identify in criminal law the technique for establishing a consensus around a value that is presumed to be universal. A new international order was established in Nuremberg based on respect for human rights and the universality of humanist values. In defining the crime of ecocide, the aim is to start a process to consolidate values which are, or should be, shared.

At the root of the criminalisation of ecocide is the protection of the 'Earth/biosphere' as the common good of humanity,[45] which requires the necessary interventions to be taken in order to stop and avert dangers for present and future generations.[46] The term 'ecocide', for its part, derives from the Latin verb caedere, which means to cut down or kill, and from the Greek word *oikos*, meaning 'house'. Consequently, taken literally, it denotes the destruction of the Earth, the common home of both human beings and the other species. In this sense, the term has a strong communicative power, evocative of genocide.[47] Accordingly, values such as sustainable development and the protection of future generations (as well as the generations now living) can be included in the definition of the crime.

In any event, it is undoubtedly crucial to identify some typical behaviours, just as in the case of other crimes. Any definition of crime must take the form of a certain activity, even if it is not exhaustive. Indeed, the crime of ecocide, like other crimes, is inescapably connected with the advance of human habits and conduct. What is unpredictable in terms of human behaviour now might become predictable as a result of technological advances tomorrow.

For this reason, it seems appropriate to include a list, albeit not an exclusive one, of illegal acts which can cause damage to the environment. With regard to the type of unlawful acts, it seems appropriate to use the concept of 'serious unlawful acts', where the severity is linked to the concept of long-term damage. It does not appear appropriate to link the configuration of the crime to the concept of 'widespread damage'. This is because that concept would create discrimination in terms of geographical expansion, resulting in a possible denial of protection of people's rights. Examples of behaviours which the crime of ecocide may encompass certainly include: massive pollution of the land, sea or atmosphere; irresponsible agricultural practices; unlawful dumping of waste; release of radioactive material into the environment and so on.

The debate as to whether only one act can constitute the crime of ecocide or, on the other hand, whether the configuration of the crime requires a set of intentional acts is another crucial factor. Without a doubt, the second hypothesis would limit the justiciability of the crime.

(ii) Difficulty in selecting and ascertaining the criterion of imputability

'Intentionality and knowledge' as an element of the *mens rea* (also provided for by international criminal law, or Article 30 of the Rome Statute) should not detract from environmental crime represented by entrepreneurial activities having an accidental

[45] See M A Gray (n 8) 246, where he refers to the '*principle of the "common concern of mankind", which holds that the international community has a legal interest under international law in the environment of the global commons, and that damage to the global commons is therefore an injurious act against the international community and a breach of the erga omnes obligation to prevent such damage.*'

[46] See Article II, Section 16, of the Constitution of the Philippines, which guarantees present and future generations 'a balanced and healthful ecology' based on the 'concepts of intergenerational responsibility and intergenerational justice', cited in M A Gray (n 8) 234.

[47] See M A Gray (n 8) 271: '*[t]he international community will soon realize that ecocide so menaces fundamental human rights and international peace and security that it must be treated with the same gravity as apartheid or genocide*' and P Higgins, D Short, N South (n 11), '*Even so, the impact of giant industrial logging companies on areas like the Amazon basin is devastating not only for the rainforest but also for the survival chances of the few remaining nomadic hunter gatherer tribes such as the Awá. As their land is taken over by illegal settlements and new cattle ranches, the Awá are being murdered by pistoleros, hired gun men described by tribe members as responsible for wiping out their families, a situation so grave that a Brazilian judge has called it "a real genocide".*'

impact on the environment. On the other hand, these perplexities could lead to the solution of envisaging the crime of ecocide as an offence subject to strict liability,[48] a solution that appears too broad and unlikely to be acceptable to the legislator.

An intermediate solution of *dolus eventualis*, which requires awareness of a substantial probability of serious and long-term damage, would seem possible. This *mens rea* would be burdensome enough to ensure that only people with significant culpability for severe damage to the environment are held responsible.

The situation is different for the proposed *mens rea* for 'wanton' acts, where wanton refers to 'reckless disregard for damage which would be clearly excessive in relation to the social and economic benefit anticipated'.[49] This hypothesis of *mens rea* would, therefore, include a proportionality test insofar as a person can be adjudged to have acted in an unrestrained way when the environmental damage is clearly excessive when weighed against the expected benefits. This means that it is not enough for the perpetrator to 'know' that his/her acts will cause 'serious and widespread or long-term damage to the environment.' He/she must also be aware that the damage will be 'clearly excessive in relation to the expected social and economic benefits'. This provision could lead to problems in establishing the offence by greatly restricting liability: it will be difficult enough to prove that the offender was aware that there was a substantial likelihood that his/her acts would cause the environmental damage; it will be virtually impossible to prove that he/she was also aware that the expected environmental damage would clearly be excessive in relation to the expected social and economic benefits.

The ELI definition of the crime of ecocide should take into account existing laws and proposals, establishing minimum rules for the crime of ecocide in an EU directive in general terms, but also refer to specific acts as suggested by the proposal for a revised Environmental Crime Directive.[50] That would imply adopting a restricted notion of ecocide, while retaining a variety of environmental crimes for offences not grave enough to be classed as ecocide.

(c) *Authorisations, permits and licences*

Ecocide could be categorised as an autonomous crime, that is to say, no account should be taken of any authorisations, permits or licences which would otherwise exonerate the perpetrator, except, where appropriate, in mitigation.[51]

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[48] See PHiggins, D Short, N South (n 11): '*A law of Ecocide should recognise human-caused environmental damage and degradation (whether committed during or outside of war-time), as a crime of strict liability (in other words, without intent). Of the ten countries that have already included Ecocide in their criminal penal codes, not one of them sets out a test of intent. An international law of Ecocide where intent was a necessary component of the crime opens up the legal loophole of sidestepping responsibility on the basis that mass damage or destruction was not intended. Most corporate ecocide is not intended; often it is deemed collateral damage or an accident. Where intent or knowledge is required, many corporations would hide behind the defence that they did not know what was happening or what could happen. Thus the defence "I did not know" would be robustly put forward by virtually every company. What is recognized by this proposal is that very rarely do corporations intend to cause mass damage and destruction; rather it is a consequence. To impute strict liability is to impute accountability. Under current legislation there is very little onus on business to be accountable.*'

[49] Article 8 ter of the addition proposed to the Rome Statute by the Independent Expert Panel chaired by Philippe Sands KC and Dior Fall Sow: <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf> accessed on 15 March 2023.

[50] Cited in (n 37).

[51] '*[E]cocide can de facto often take place as a result of a regulatory framework created by the state … Recall that in most systems environmental crime can only be punished under the law on the condition that there is a violation of administrative regulations or for example the conditions of a permit. It is the well-known administrative dependence of environmental criminal law. As a consequence, the structure of most environmental laws is such that serious harm to the environment cannot be punished as long as it is covered by government regulation or by a permit. This could equally apply to environmental harm that formally could be qualified as ecocide. Given the state-corporate nexus it is even likely that also serious environmental harm could take place under the umbrella of regulation or a government permit. To the extent that corporations follow the conditions of regulation or a permit, in most jurisdictions … environmental criminal liability would be excluded, no matter how serious the harm to the environment would be. … It is more particularly a strong argument in favour of including a so-called autonomous environmental crime. Such a crime would make it possible to punish serious cases of environmental pollution, also if the perpetrator (a corporation) would be following the conditions of a government permit. This would entail the punishment of particular emissions of which the consequences are very serious, for example leading to long-lasting pollution, serious consequences for the health of persons and/or a significant risk of injuries to the population. In that case, the link between criminal law and prior administrative decisions would be left aside totally. Under such an autonomous provision, serious environmental pollution (that even could potentially be qualified as ecocide) could be punished even if the defendant has complied with the conditions of regulation or a permit. The underlying notion is that administrative regulation could never allow this specific risk or harm. It is an important tool to call on an autonomous obligation of industry to respect environmental principles and not to hide behind compliance with a regulation.*': M G Faure (n 17) 97ff.

However, there is a large body of scholarly research which has examined and resolved the issue of criminal responsibility for actions taken in compliance with administrative authorisations in environmental sectors. Since the concept of absence refers not only to hypotheses of material non-existence but also to those of legal non-existence of the administrative act, Andrea Di Landrio, for instance, argues that an 'absent' authorisation may be equated with an authorisation obtained in a criminal way, namely by fraud, corruption, extortion or coercion.[52]

Consequently, the approach originally taken in the Model Directive (Article 4) was that conduct committed by a person pursuant to an authorisation, permit or licence should not relieve that person from criminal responsibility if that person was aware, or could not have been unaware, that the conduct was unlawful.

However, if the Model Directive were to be merged with the Environmental Crimes Directive, it was considered that Article 4 might better be worded as follows, since it would then encompass any crime against the environment under Article 3(4) and not only ecocide:

1. *The fact that unlawful conduct according to Article 3 is committed by a person pursuant to an authorisation, permit or licence from a competent authority shall not relieve that person of criminal responsibility where:*

a) *that person was aware, or could not have been unaware, of the unlawfulness of that conduct;*

b) *the authorisation was obtained by fraud, corruption, extortion or coercion; or*

c) *the authorisation was manifestly unlawful.*

2. *For the purposes of this Article, an authorisation to engage in conduct constituting the crime of ecocide is manifestly unlawful.*

The text finally adopted is a compromise solution.

(d) Expert evidence

It is essential to stress the need for independent expert evidence and to permit the judge to call experts to testify of his/her own motion.

(e) Liability of legal persons

The explanatory memorandum of the proposal for a Directive on the protection of the environment through criminal law[53] merely states that:

> *[Article 6] contains obligations to ensure the liability of legal persons for offences referred to in Articles 3 and 4[54] where such offences have been committed for their benefit. This article also provides that Member States should make sure that legal persons can be held accountable for a lack of supervision and control that has made possible the commission of an offence referred to in Article[s] 3 and 4 for the benefit of the legal person. Furthermore, the liability of the legal person should not exclude criminal proceedings against natural persons.*

This is because

> *[n]umerous international instruments, standards and initiatives require or recommend a liability of corporations; legally binding instruments, though, so far only envisage that States Parties shall adopt the necessary measures to establish the liability of a legal person for the commission of offences laid down in those instruments, but do not express a position whether the liability of legal persons should be administrative, civil or criminal in nature, and thus leave this decision to the states. Similarly, at the European level, there are a multitude of instruments calling for a direct responsibility of legal persons for crimes, but none of those do yet call, with binding force, for corporate criminal liability.[55]*

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[52] A di Lario, *La responsabilità per l'attività autorizzata nei settori dell'ambiente e del territorio. Strumenti penali ed extra penali di tutela* (Giappichellil, Torino, 2018). On the same issue, see also H W Pettigrew *A Constitutional Right of Freedom from Ecocide* (Environmental Law, Vol 2 No 1(Winter 1971)) 1-41; M Crook, D Short, N South *Ecocide, genocide, capitalism and colonialism: Consequences for indigenous peoples and global ecosystems environments* Theoretical Criminology, 22(3), 2018, 298–317.

[53] Cited in (n 37).

[54] Article 3 describes the criminal offences covered by the proposal for a Directive. Article 4 deals with inciting, aiding and abetting, and attempt.

[55] D Brodowski, M Espinoza de los Monteros de la Parra, K Tiedemann, J Vogel (eds), *Regulating Corporate Criminal Liability* (Springer, 2014).

Whereas corporations cannot be brought before the International Criminal Court, it is a question of municipal law whether criminal proceedings can be brought against them in national courts. What the Commission is saying obliquely in the passage above is that certain Member States do not recognise criminal liability on the part of legal persons.

Whereas the interest as a deterrent of being able to blame and shame corporations or at least their CEOs by bringing criminal proceedings is obvious,[56] this tends to cause a loss of focus on the State-corporate nexus as it is often State regulation that facilitates the creation of ecocide.[57] But, in any event, we have to deal with the reality of the Member States' legal systems.[58]

The decision has, therefore, been taken to follow the precedent of the proposal for a Directive on the Protection of the Environment Through Criminal Law in recital 19 and Article 8 of the Model Directive.

(f) Limitation periods

In view of the gravity of the crime of ecocide, it is considered that no limitation period should apply.

It is observed that the proposal for a Directive on the Protection of the Environment Through Criminal Law itself contains proposed limitation periods.

(g) Restorative justice

Whereas it was initiatively contemplated to introduce the idea of restorative justice in the preamble, the Reporters cannot see at present how restorative justice could function for such a serious crime as ecocide. They encourage specialist lawyers to explore this matter further.

The original reasons for considering restorative justice were those mentioned by Polly Higgins and her co-authors: it being seen to hold 'considerable promise as a means to resolve responsibility and agree recompense for crimes against the environment and the human and non-human beings affected'.[59]

[56] See M A Gray (n 8) 221ff.
[57] See M G Faure (n 17) 97.
[58] See S Adam, G Vermeulen, W De Bondt *Corporate criminal liability and the EC/EU: bridging sovereignty paradigms for the sake of an area of freedom, security and justice* [in:] S Adam, N Colette-Basecqz, M Nihoul (eds) *La responsabilité pénale des personnes morales en Europe - Corporate Criminal Liability in Europe* (373-432), (Projucit, La Charte, Brussels 2008); J Gobert, A-M Pascal (eds) *European Developments in Corporate Criminal Liability* (Routledge, London, 2011); M Pieth, R Ivory (eds) *Corporate Criminal Liability*. Emergence, Convergence, and Risk (Springer Netherlands, Dordrecht, 2011), and A Fiorella (ed) *Corporate criminal liability and compliance programs. First Colloquium* (Sapienza University of Rome, 12–14 May 2011, Jovene, Naples, 2012).
[59] P Higgins, D Short, N South (n 11) '*Restorative justice is built on an understanding of our relationship with nature and the duty to remedy the harm caused' – addressing 'the needs of the beleaguered party to restore that which has been harmed rather than simply fixating on the punishment of the perpetrator.'*

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on establishing minimum rules for the crime of ecocide

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(2) thereof,

Having regard to the proposal from the Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with the ordinary legislative procedure,

The title of an act shall give as succinct and full an indication as possible of the subject matter which does not mislead the reader as to the content of the enacting terms. The purpose of the citations is to set out the legal basis of the act and the main steps in the procedure leading to its adoption. European Commission, Legal service, *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*, Publications Office, 2016, https://data.europa.eu/doi/10.2880/5575

The legal basis – Article 83(2) TFEU – empowers the EU to adopt directives establishing minimum rules on the definition of criminal offences and sanctions in order to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures.

Whereas:

(1) According to Article 3(3) of the Treaty on European Union and Article 191(2) of the Treaty on the Functioning of the European Union (TFEU), the Union is committed to ensuring a high level of protection and improvement of the quality of the environment.

(2) ***The planet is facing a 'ghastly future of mass extinction, declining health and climate-disruption upheavals' that threaten human survival because of ignorance and inaction. 'The scale of the threats to the biosphere and all its lifeforms – including humanity – is in fact so great that it is difficult to grasp for even well-informed experts'.[60] Culpable behaviour by human beings is in many cases directly or indirectly responsible for this.[61]***

(3) ***The Union is alarmed and deeply concerned by the threat to the biosphere and all forms of life posed by serious environmental offences, deserving to be categorised as the crime of ecocide.***

[60] D Nimmo (ed), J Corey, A Bradshaw, P R Ehrlich, A Beattie, G Ceballos, E Crist, J Diamond, R Dirzo, A H Ehrlich, J Harte, M E Harte, G Pyke, P H Raven, W J Ripple, F Saltré, Ch Turnbull, M Wackernagel, D T Blumstein, *Underestimating the Challenges of Avoiding a Ghastly Future*, Frontiers in Conservation Science, 13 January 2021 <https://doi.org/10.3389/fcosc.2020.615419> accessed on 15 March 2023.

[61] '*Sustained human activity will affect the relative abundance of species and in extreme cases may lead to extinction. This may result from the habitat being made unsuitable for the species (e.g., clear-felling of forests or severe pollution of rivers) or through the habitat becoming fragmented …. Major changes in natural environments are likely to occur within the next century as a result of changes in global climate and weather patterns. These will cause greatly elevated extinction rates.*' I R Swingland, [in:] S A Lewis (ed), *Encyclopedia of Biodiversity*, (Second Edition, Elsevier, Amsterdam, 2013).

(4) ***This threat to the natural world, on which all life forms depend, including our own, namely the world's oceans and watercourses, the atmosphere, the climate, the rainforests and the soil, is so grave as to warrant the recognition of ecocide as an international crime.***

(5) ***The Union therefore supports the drive to have ecocide recognised as an international crime and included in the Rome Statute of the International Criminal Court. It has had regard to the amendments to the Rome Statute proposed by the Independent Expert Panel for the Legal Definition of Ecocide in June 2021, recognising that it may be some considerable time before such efforts bear fruit.***

(6) ***In the meantime, establishing minimum rules for the crime of ecocide at the level of the Union can serve as an international precedent, along with the legislation of those States around the world which also recognise the crime of ecocide.[62] It will also give a strong signal both to embolden legislators around the world and to deter wrongdoers.***

(7) ***The continent of Europe itself is not a stranger to major environmental disasters: the Torrey Canyon disaster in 1967, the Seveso dioxin cloud in Italy in 1976, the Amoco Cadiz tanker spill in France in 1978, the Chernobyl nuclear disaster in Ukraine in 1986, the Baia Mare gold mine cyanide spill in Romania in 2000 and the deliberate, repeated discharges of vast quantities of raw sewage into watercourses, lakes and the sea by water companies in the UK reported in 2021 and, on an even greater scale, in 2022.***

(8) ***Furthermore, according to Interpol, environmental crime is the world's third most lucrative criminal business after drugs and counterfeit goods, ahead of human trafficking.[63] The rising global scarcity of natural resources attracts transnational criminal organisations which rapidly shift from 'traditional' criminal activities to the illegal trade in natural resources. For example, organised crime syndicates diversify into the lucrative business of tropical timber, endangered species, waste and natural minerals and metals alongside their traditional activities.[64] Moreover, ecocide is often associated with money laundering, human trafficking and the murder of indigenous peoples.[65]***

(9) ***A report by the Ambitus project of the Italian Istituto Affari Internazionali states that 'as the foremost economic and trading bloc in the world, the European Union is one of the leading destinations or transit hubs for illegal trade linked with environmental crimes. The unique natural resources of Member States such as Romania or Poland, and the significant demand for cheap waste disposal in countries such as Italy, Hungary and Germany, make Europe an appealing theatre for traffickers. The consequences of all of this are devastating – not only for the environment, but also for the whole European economy and society, which relies on the fragile natural equilibrium ensured by its ecosystems.'[66]***

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[62] Georgia, Armenia, Ukraine, Belarus, Ecuador, Kazakhstan, Kyrgyzstan, Republic of Moldova, Russian Federation, Tajikistan, Uzbekistan, and Vietnam.

[63] <https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-marks-a-decade-of-tackling-serious-organized-environmental-crime> accessed on 15 March 2023. Moreover, according to an Interpol and UN Environment Programme estimate, environmental crime is the fourth largest criminal activity in the world, growing at a rate of between 5% and 7% per year, (<https://www.eurojust.europa.eu/publication/report-eurojusts-casework-environmental-crime> accessed on 15 March 2023). See also L Neyret (n 9) 114, where it is pointed out that international reports consistently highlight the links between environmental crime and organised crime, eg the 2013 Report of the International Fund for Animal Welfare on the global security implications of the illegal wildlife trade where the United Nations considered the illicit trade in wildlife species and woods as a 'serious form of organised crime'. For the link between financial crime and environmental crime, see also Comply Advantage (2022), *The State of Financial Crime 2022*, available at <https://complyadvantage.com/insights/the-state-of-financial-crime-2022/?access> accessed on 15 March 2023.

[64] D P Van Uhm, C C Nijman (n 10) 542–561.

[65] See P Higgins, D Short, N South (n 11): 'Even so, the impact of giant industrial logging companies on areas like the Amazon basin is devastating not only for the rainforest but also for the survival chances of the few remaining nomadic hunter gatherer tribes such as the Awá. As their land is taken over by illegal settlements and new cattle ranches, the Awá are being murdered by pistoleros, hired gun men described by tribe members as responsible for wiping out their families, a situation so grave that a Brazilian judge has called it "a real genocide"'.

[66] L Colantoni, M Bianchi, (n 12).

(10) ***In addition, undertakings from the EU and third-country undertakings operating in the EU may be involved in funding and otherwise participating in environmentally hazardous projects in third countries and in importing goods deriving from illicit activities overseas.***

(11) ***Existing laws are piecemeal, often unapplied and insufficiently dissuasive to act as a deterrent. This provides opportunities, not only to organised crime, but to opportunistic legitimate enterprises.***

(12) ***In the Member States of the Union, offences constituting ecocide should be subject to criminal penalties commensurate with the severity of the damage caused or risked and with the social consequences generated by the loss of biodiversity and the concomitant threats to the biosphere, such as to impose condign punishment on offenders and dissuade others from contemplating such crimes.***

(13) ***In order to achieve effective protection of the environment, it is therefore imperative for Member States to make provision for severely dissuasive penalties for environmentally harmful activities constituting ecocide as defined herein.***

(14) ***Member States should provide for criminal penalties in their national legislation in respect of ecocide. Ecocide consists of any conduct which is unlawful under European Union legislation as capable of causing damage to the environment and for which Member States are required to ensure that it constitutes a criminal offence under domestic law, where that conduct was committed with intent and may cause, or substantially contribute to causing, severe and long-term damage or severe and irreparable or irreversible damage to an ecosystem or ecosystems in the natural environment. For the purpose of determining mens rea, a person has intent where, in relation to conduct, that person means to engage in that conduct, and, in relation to a consequence, that person means to cause the consequence, or is aware, or could not be unaware, of the substantial likelihood that it may occur. The standard required equates to dolus eventualis or recklessness. Member States may identify additional conduct likely to cause damage to the environment and qualify it as ecocide.***

(15) ***As far as authorisations, permits and licences are concerned, the circumstances when an authorisation by a relevant public authority is unlawful and therefore ineffective include circumstances where the authorisation authorises conduct constituting the crime of ecocide or was obtained fraudulently, by coercion or through corruption. A person engaging in conduct which constitutes the crime of ecocide under Article 3 will not be relieved of criminal liability where the authorisation was unlawful. Moreover, where an authorisation is lawful but the holder of the authorisation does not comply with all specific obligations of that authorisation or with other relevant obligations not covered by the authorisation, the holder of the authorisation can still be liable for the crime of ecocide under Article 3.***

(16) In criminal proceedings and trials, due account should be taken of the involvement of organised criminal groups operating in ways that negatively impact the environment. Criminal proceedings should address corruption, money laundering, cyber-crime and document fraud and – in relation to business activities – the intention of the offender to maximise profits or save expenses, where these occur in the context of ecocide. These forms of crime are often interconnected with serious environmental crime forms and should therefore not be dealt with in isolation. In this respect, it is of particular concern that some environmental crimes are committed with the tolerance or active support of the competent administrations or officials performing his/her public duty. In certain cases, this can even take the form of corruption. Examples of such behaviours are turning a blind eye or remaining silent on the infringement of laws protecting the environment following inspections, deliberately omitting inspections or controls for example with regard to whether the conditions of a permit are being respected by the permit-holder, resolutions or votes in favour of granting illegal licences or issuing falsified or untrue favourable reports.

(17) Inciting, and aiding and abetting the criminal offence of ecocide should also be punishable. ***Importers and sellers of imported goods may be convicted of aiding and abetting the commission of the crime of ecocide and the inchoate offences of attempting to commit or inciting the commission of that crime. Financial institutions and other sources of funding based in Europe and their corporate officers and employees should also be answerable for financing environmentally-destructive activities constituting the crime of ecocide. Any raw materials or goods directly resulting from the conduct found to constitute the crime of ecocide should be confiscated.***

(18) Sanctions for the offence should be effective, dissuasive and proportionate. ***The maximum sanction should be the most severe provided for in national law.*** Accessory sanctions are often seen as being more effective than financial sanctions especially for legal persons. Additional sanctions or measures should be therefore available in criminal proceedings. These should include the obligation to reinstate the environment, exclusion from access to public funding, including tender procedures, grants and concessions and withdrawal of permits and authorisations and adverse publicity orders. This is without prejudice to the discretion of judges or courts in criminal proceedings to impose appropriate sanctions in the individual cases.

(19) Where national law provides for it, legal persons should also be held criminally liable for ecocide in accordance with this Directive. Member States whose national law does not provide for the criminal liability of legal persons should ensure that their administrative sanctioning systems provide for effective, dissuasive and proportionate sanctions equivalent to those which may be imposed under criminal law. The financial situation of legal persons should be taken into account to ensure the dissuasiveness of the sanction imposed.

(20) Where the crime is of a continuing nature, it should be brought to an end immediately. Where offenders have made financial gains, such gains should be confiscated, along with the proceeds resulting from the crime.

(21) This Directive should apply without prejudice to the general rules and principles of national criminal law on the sentencing or the application and execution of sentences in accordance with the specific circumstances in each individual case.

(22) ***In view of the gravity of the crime of ecocide, no limitation period should apply.***

(23) Given, in particular, the mobility of perpetrators of illegal conduct covered by this Directive, together with the cross-border nature of offences and the possibility of cross-border investigations, Member States should establish jurisdiction in order to counter such conduct effectively.

(24) Environmental criminal offences harm nature and society and future societies. By reporting breaches of environmental law, people perform a service of public interest and play a key role in exposing and preventing such breaches, and thus safeguarding the welfare of society. Individuals in contact with an organisation in the context of their work-related activities are often the first to know about threats or harm to the public interest and the environment. Persons who report irregularities are known as whistle-blowers. Potential whistle-blowers are often discouraged from reporting their concerns or suspicions for fear of retaliation. Such persons should benefit from balanced and effective whistle-blowers protection set out under Directive (EU) 2019/1937 of the European Parliament and of the Council. [67]

[67] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ L 305/17).

(25) Other persons may also possess valuable information concerning potential environmental criminal offences. They may be members of the community affected or members of society at large taking an active part in protecting the environment. Such persons who report environmental crimes as well as persons who cooperate with the prosecution of such offences should be provided the necessary support and assistance in the context of criminal proceedings, so that they are not disadvantaged for their cooperation but supported and assisted. These persons should also be protected from being harassed or unduly prosecuted for reporting such offences or their cooperation in the criminal proceedings.

(26) Since nature cannot represent itself as a victim in criminal proceedings, for the purpose of effective enforcement members of the public concerned, as defined in this Directive taking into account Articles 2(5) and 9(3) of the Aarhus Convention[68], should have the possibility to act on behalf of the environment as a public good, within the scope of the Member States' legal framework and subject to the relevant procedural rules.

(27) The obligations under this Directive are without prejudice to Union law on procedural rights in criminal proceedings. In implementing this Directive, Member States should ensure that the procedural rights of suspects or accused persons in criminal proceedings are fully respected.

(28) Alternatives – please delete one option according to the IRL choice:

(29) [*non-participation:*] In accordance with Articles 1 and 2 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Directive and is not bound by it or subject to its application. OR

[*participation:*] In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, Ireland has notified [, by letter of ...,] its wish to take part in the adoption and application of this Directive.

(30) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive and is therefore not bound by it or subject to its application.

(31) Since the objective of this Directive, ***namely to criminalise ecocide***, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

(32) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including the protection of personal data, the freedom of expression and information, the freedom to conduct a business, the right to an effective remedy and to a fair trial, the presumption of innocence and right of defence, the principles of legality and proportionality of criminal offences and penalties, and the right not to be tried or punished twice in criminal proceedings for the same offence. This Directive seeks to ensure full respect for those rights and principles and should be implemented accordingly,

[68] United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations. Regulations, directives and decisions must state the reasons on which they are based. The purpose is to enable any person concerned to ascertain the circumstances in which the enacting institution exercised its powers as regards the act in question (see Case 24/62 *Germany v. Commission* [1963] ECR 63), to give the parties to a dispute the opportunity to defend their interests and to enable the Court of Justice of the European Union to exercise its power of review. European Commission, Legal service, *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*, Publications Office, 2016, https://data.europa.eu/doi/10.2880/5575

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

This Directive establishes minimum rules for the crime of ecocide.

Where appropriate, an article shall be included at the beginning of the enacting terms to define the subject matter and scope of the act. European Commission, Legal service, *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*, Publications Office, 2016, https://data.europa.eu/doi/10.2880/5575

Article 2

Definitions

For the purpose of this Directive, the following definitions apply:

(1) 'ecosystem' means a significant geographic area where plants, animals and organisms, as well as weather and landscape work together;

(2) the terms 'inciting, aiding and abetting' have the meaning attached to them in national law;

(3) 'legal person' means any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations;

(4) 'long-term damage' means damage which, in the light of the best scientific evidence, cannot be redressed through natural recovery within a reasonable period of time;

(5) 'natural environment' means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space;

(6) 'public concerned' means the persons affected or likely to be affected by the offences referred to in Articles 3 or 4. For the purposes of this definition, persons having a sufficient interest or maintaining the impairment of a right as well as non-governmental organisations promoting the protection of the environment and meeting any proportionate requirements under national law shall be deemed to have an interest;

(7) 'severe damage' means damage which involves very serious adverse changes, disruption or harm to any element of the natural environment, including grave impacts on human life or natural, cultural or economic resources;

(8) 'victim' has the meaning attributed to it in Article 2(1) point (a) of Directive 2012/29/EU of the European Parliament and of the Council.

Where the terms used in the act are not unambiguous, they should be defined together in a single article at the beginning of the act. The definitions shall not contain autonomous normative provisions. European Commission, Legal service, *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*, Publications Office, 2016, https://data.europa.eu/doi/10.2880/5575

Article 3

Ecocide

(1) Member States shall ensure that the offence of ecocide as defined in this Article is punishable as a crime.

(2) For the purposes of paragraph 1, ecocide means any conduct as defined in paragraph 4 or 5, committed with intent, which may cause, or substantially contribute to causing, severe and long-term damage or severe and irreparable or irreversible damage to an ecosystem or ecosystems in the natural environment.

(3) For the purposes of paragraph 2, a person has intent where:

(a) in relation to conduct, that person means to engage in that conduct; and

(b) in relation to a consequence, that person means to cause the consequence or is aware, or could not be unaware, of the substantial likelihood that it may occur.

(4) Any conduct: (a) infringing Union legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Union policy of protecting the environment as set out in the Treaty on the Functioning of the European Union; or (b) infringing a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State which gives effect to such Union legislation under which Member States are required to ensure that it constitutes a criminal offence under domestic law shall be qualified as ecocide under domestic law if the conditions set forth in paragraphs 2 and 3 are met.

(5) Paragraph 4 does not prevent Member States from identifying additional conduct likely to cause damage to the environment and to qualify it as ecocide if the conditions set forth in paragraphs 2 and 3 are met.

Article 3 defines the *actus reus* and *mens rea* of the crime of ecocide. In order to ensure coherence of the European Union legal framework, which encompasses also environmental offences which do not necessarily attain the degree of seriousness and capacity of causing very serious damage to ecosystems in the natural environment characterising an offence of ecocide, the *actus reus* is described (paragraph 2) by referring to environmental violations which constitute criminal offences under European law or the domestic law of Member States, and provides that such violations shall be qualified as ecocide when the conditions set forth in Model Directive are met, that is to say, when the perpetrator's conduct may cause

or contribute to causing severe and long-term damage or severe and irreparable or irreversible damage to an ecosystem or to ecosystems. The provision concerning the *mens rea* (paragraph 3) is modelled on the general provision contained in Article 30 of the ICC Statute and describes the required intent for the commission of the crime of ecocide as the intention to engage in the conduct, accompanied, in relation to the consequences of the conduct, by either the intention to cause that consequence or the awareness of the substantial likelihood that it may occur, thus providing for a significant role for *dolus eventualis* or aware recklessness.

Article 4

Authorisations

(1) The circumstances when an authorisation by a relevant public authority is unlawful and therefore ineffective include circumstances where the authorisation:

(a) authorises conduct which constitutes the crime of ecocide under Article 3; or

(b) was obtained fraudulently, by coercion or through corruption.

(2) A person engaging in conduct which constitutes the crime of ecocide under Article 3 will not be relieved of criminal liability where the authorisation was unlawful.

(3) Where an authorisation is lawful but the holder of the authorisation does not comply with all specific obligations of that authorisation or with other relevant obligations not covered by the authorisation, the holder of the authorisation can still be liable for the crime of ecocide under Article 3.

Article 5

Expert evidence

Member States shall ensure that in proceedings brought for the offence of ecocide, independent expert evidence is heard. The judge may order the hearing of experts of his/her own motion.

Article 6

Inciting, aiding and abetting

(1) Member States shall ensure that ***intentionally inciting, aiding and abetting the conduct referred to in Article 3*** are punishable as criminal offences.

(2) Member States shall ensure that, in particular, importers and sellers of imported goods may be convicted of inciting or aiding and abetting the commission of the crime of ecocide.

Article 7

Penalties for natural persons

Member States shall take the necessary measures to ensure that ***the offence of ecocide is*** punishable by effective, proportionate and dissuasive criminal penalties, ***with the maximum sanction being the most severe penalty provided for in national law.***

Article 8

Liability of legal persons

(1) Member States shall ensure that legal persons can be held liable for ***the offence of ecocide where such offence has*** been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person, based on:

(a) a power of representation of the legal person;

(b) an authority to take decisions on behalf of the legal person; ***or***

(c) an authority to exercise control within the legal person.

(2) Member States shall also ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of the offence ***of ecocide*** for the benefit of the legal person by a person under its authority.

(3) Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offence ***of ecocide***.

Article 9

Sanctions for legal persons

(1) Member States shall take the necessary measures to ensure that legal persons held liable pursuant to ***Article 8*** are punishable by effective, proportionate and dissuasive sanctions.

(2) Member States shall take the necessary measures to ensure that sanctions or measures for legal persons liable pursuant to ***Article 8(1) for the offence of ecocide*** shall include:

(a) criminal or non-criminal fines;

(b) the obligation to reinstate the environment within a given period;

(c) exclusion from entitlement to public benefits or aid;

(d) exclusion from access to public funding, including tender procedures, grants and concessions;

(e) permanent disqualification from the practice of business activities;

(f) withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence;

(g) placing under judicial supervision;

(h) judicial winding-up;

(i) temporary or permanent closure of establishments used for committing the offence;

(j) publication of the judicial decision relating to the conviction or any sanctions or measures applied;

(k) adverse publicity orders.

Article 10

Freezing and confiscation

Member States shall take the necessary measures to ensure, as appropriate, that their competent authorities may freeze or confiscate, in accordance with Directive 2014/42/EU of the European Parliament and of the

Council, the proceeds derived from and instrumentalities used or intended to be used in the commission or contribution to the commission ***of the crime of ecocide. Member States shall take the necessary measures to ensure that their competent authorities may confiscate any raw materials or goods directly resulting from the conduct found to constitute the crime of ecocide.***

Article 11

Limitation period

Member States shall not apply any limitation period to the offence of ecocide.

Article 12

Jurisdiction

(1) Each Member State shall take the necessary measures to establish its jurisdiction over the ***offence of ecocide*** where:

(a) the offence was committed in whole or in part on its territory;

(b) the offence was committed on board a ship or an aircraft registered in it or flying its flag;

(c) the damage occurred on its territory;

(d) the offender is one of its nationals or habitual residents.

(2) A Member State shall inform the Commission where it decides to extend its jurisdiction to the ***offence of ecocide*** which has been committed outside its territory, where:

(a) the offence is committed for the benefit of a legal person established on its territory;

(b) the offence is committed against one of its nationals or its habitual residents;

(c) the offence has created a severe risk for the environment on its territory.

(3) Where the offence referred to in Article 3 falls within the jurisdiction of more than one Member State, these Member States shall cooperate to determine which Member State shall conduct criminal proceedings. The matter shall, where appropriate and in accordance with Article 12 of Council Framework Decision 2009/948/JHA59, be referred to Eurojust.

In cases referred to in paragraph 1, points (c) and (d), Member States shall take the necessary measures to ensure that the exercise of their jurisdiction is not subject to the condition that a prosecution can be initiated only following a denunciation from the State of the place where the criminal offence was committed.

Article 13

Protection of persons who report environmental offences or assist the investigation

(1) Member States shall take the necessary measures to ensure that protection granted under Directive (EU) 2019/1937 is applicable to persons reporting ***the criminal offence of ecocide***.

(2) Member States shall take the necessary measures to ensure that persons reporting ***the offence of ecocide*** and providing evidence or otherwise cooperating with the investigation, prosecution or adjudication of such offence are provided the necessary support and assistance in the context of criminal proceedings.

Article 14

Rights for the public concerned to participate in proceedings

Member States shall ensure that, in accordance with their national legal system, members of the public concerned have appropriate rights to participate in proceedings concerning ***the offence of ecocide***, for instance as a civil party.

Article 15

Transposition

(1) Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*within 18 months after entry into force of the Directive*]. They shall immediately inform the Commission thereof. The methods of making such reference shall be laid down by Member States.

(2) When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.

Article 16

Evaluation and reporting

The Commission shall by [*two years after the transposition period is over*], submit a report to the European Parliament and to the Council assessing the extent to which the Member States have taken the necessary measures to comply with this Directive. Member States shall provide the Commission with the necessary information for the preparation of that report.

By [*five years after the transposition period is over*], the Commission shall carry out an evaluation of the impact of this Directive and submit a report to the European Parliament and to the Council. Member States shall provide the Commission with necessary information for the preparation of that report.

Article 17

Entry into force

This Directive shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

Article 18

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

7. A Model Proposal for a European Council Decision Making it Possible for the European Public Prosecutor's Office to Investigate, Prosecute and Bring to Judgment the Perpetrators of, and Accomplices in, Offences Constituting the Crime of Ecocide

Form of the proposal

The proposal is based on the annex to the Communication from the Commission to the European Parliament and the European Council, A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes (COM(2018) 641 final).[69] It therefore assumes that the competences of the EPPO have been extended to such crimes.

Legal basis

The legal basis for the proposal is Article 86(4) of the Treaty on the functioning of the European Union:

> *'The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.'*

Grounds for the proposal

According to Interpol, environmental crime is the world's third most lucrative criminal business after drugs and counterfeit goods, ahead of human trafficking.[70] The rising global scarcity of natural resources attracts transnational criminal organisations which rapidly shift from 'traditional' criminal activities to the illegal trade in natural resources. For example, organised crime syndicates diversify into the lucrative business of tropical timber, endangered species, waste and natural minerals and metals alongside their traditional activities.[71] Moreover, ecocide is often associated with money laundering, human trafficking and the murder of indigenous peoples. [72]

A report by the Ambitus project of the Italian *Istituto Affari Internazionali* states that

> *'as the foremost economic and trading bloc in the world, the European Union is one of the leading destinations or transit hubs for illegal trade linked with environmental crimes. The unique natural resources of Member States such as Romania or Poland, and the significant demand for cheap waste disposal in countries such as Italy, Hungary and Germany, make Europe an appealing theatre for traffickers. The consequences of all of this are devastating – not only for the environment, but also for the whole European economy and society, which relies on the fragile natural equilibrium ensured by its ecosystems.'*[73]

According to Global Witness 2021 report Last Line of Defence, 227 land and environmental defenders were killed in 2020. Despite forming just 5% of the global population, one in three of those killed was from an indigenous community. Indigenous peoples are

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[69] <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52018DC0641> accessed on 15 March 2023.
[70] <https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-marks-a-decade-of-tackling-serious-organized-environmental-crime> accessed on 15 March 2023.
[71] D P Van Uhm, C C Nijman (n 10) 542–561.
[72] See P Higgins, D Short, N South, *(n 11)*:*'Even so, the impact of giant industrial logging companies on areas like the Amazon basin is devastating not only for the rainforest but also for the survival chances of the few remaining nomadic hunter gatherer tribes such as the Awá. As their land is taken over by illegal settlements and new cattle ranches, the Awá are being murdered by pistoleros, hired gun men described by tribe members as responsible for wiping out their families, a situation so grave that a Brazilian judge has called it "a real genocide"'.*
[73] L Colantoni, M Bianchi, (n 12).

guardians of 80% of the world's biodiversity[74] and are on the frontline in the struggle to preserve, protect, restore and defend their collectively governed and shared natural resources and, in particular, territories and areas known as ICCAs (Indigenous Peoples' and Community Conserved Territories and Areas), which they collectively conserve on the basis of their traditional knowledge and customary practices, law and institutions. These natural resources and ICCAs are at risk from ecocide, driven by extractive industries, infrastructure development, monocultures, poaching, commercial overfishing, land and water grabbing, wars and armed conflicts, and the privatisation and monetisation of natural resources in general.[75]

Indigenous environmental defenders are often 'ecocide-whistle-blowers', sounding the alarm that industrial activities are polluting the environment, destroying animal and plant life and affecting communities' access to natural resources and clean water. As a result of the criminalisation of ecocide, indigenous environmental defenders will have the law on their side when they stand up to defend the environment.[76] Instead of being labelled 'enemies of progress' or 'subversive elements', they will be acknowledged for playing their role in signalling and preventing ecocide. Currently, the role of indigenous environmental defenders as guardians of the world's biodiversity is not recognised or valued enough, since our legal systems ultimately put corporate interests above the health of the Earth and its inhabitants. Ecocide law would go a long way in re-adjusting these values by drawing a clear boundary and making industrial activities that result in the massive damage and destruction of ecosystems punishable.[77]

As Hindou Ouarou Ibrahim, the President of the Association for Indigenous Women and Peoples of Chad, told the 'Preventing Ecocide' session at the World Economic Forum's Sustainable Development Impact Summit 2021: '*Today, people are killed for protecting the planet, but nobody faces consequences for killing the planet. We need to turn the tables on our current system (…) ecocide becoming a crime would be a significant change in environmental protection.*'[78]

Mark Allan Gray put the question in this way:

> *'Developments in municipal and international law, and the collective nature of key interests at stake, point to states, and possibly international and non-governmental organisations (NGOs), as logical "next friends" to bring claims on behalf of individuals lacking the resources to do so themselves. Limiting standing to such entities, particularly to states on behalf of their citizens against other states, could in fact be the answer to the floodgates argument*[79] *and the vexed question of sovereignty.'*[80]

In addition, EU undertakings or third-country undertakings operating in the EU may be involved in funding environmentally hazardous projects in third countries and otherwise participating in them and in importing goods deriving from illicit activities overseas.

Existing laws are piecemeal, often unapplied and insufficiently dissuasive to act as a deterrent. This provides opportunities, not only to organised crime, but to opportunistic legitimate enterprises.

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[74] <https://documents1.worldbank.org/curated/en/995271468177530126/pdf/443000WP0BOX321onservation01PUBLIC1.pdf> accessed on 15 March 2023, p xii.
[75] <https://www.iucn.nl/app/uploads/2021/03/environmental_defenders_and_their_recognition_under_international_and_regional_law.pdf> accessed on 15 March 2023, p 6.
[76] See two Stop Ecocide webinar recordings about ecocide, indigenous rights and environmental protection: <https://bit.ly/3uCcB1P> accessed on 15 March 2023.
[77] <https://www.iucn.nl/app/uploads/2021/03/environmental_defenders_and_their_recognition_under_international_and_regional_law.pdf> accessed on 15 March 2023, p 15.
[78] <https://www.weforum.org/agenda/2021/09/how-to-protect-nature-from-the-people-who-are-dying-for-it/> accessed on 15 March 2023.
[79] The concern that the courts might be inundated with claims.
[80] M A Gray (n 8) 227.

PROPOSAL FOR A EUROPEAN COUNCIL DECISION

amending Article 86 of the Treaty on the Functioning of the European Union with regard to the competences of the European Public Prosecutor's Office (EPPO)

THE EUROPEAN COUNCIL,

Having regard to the Treaty on European Union, and in particular Article 17(1) thereof, and the Treaty on the Functioning of the European Union, and in particular Article 86(4) thereof,

Having regard to the opinion of the European Commission,

Having regard to the consent of the European Parliament,

The title of an act shall give as succinct and full an indication as possible of the subject matter which does not mislead the reader as to the content of the enacting terms. The purpose of the citations is to set out the legal basis of the act and the main steps in the procedure leading to its adoption. European Commission, Legal service, *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*, Publications Office, 2016, https://data.europa.eu/doi/10.2880/5575

The legal basis – Article 86(4) TFEU – empowers the European Council (acting unanimously after obtaining the consent of the European Parliament and after consulting the Commission) to adopt a decision amending Article 86(1) in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State.

For its part, Article 17(1) is not a legal basis. It provides that the Commission is to promote the general interest of the Union and take appropriate initiatives to that end.

Whereas:

(1) Article 86(4) of the Treaty on the Functioning of the European Union (TFEU) empowers the European Council, acting by unanimity after obtaining the consent of the European Parliament and after consulting the Commission, to adopt a decision amending paragraphs 1 and 2 of Article 86 of the same Treaty to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension.

(2) Having regard to the Directive of the European Parliament and of the Council of … establishing minimum rules for the crime of ecocide,

(3) Taking account of the cross-border nature of ***ecocide*** and acknowledging the need for a comprehensive European response to ***ecocide and its links with genocide and international crime***, the European Council deems it necessary to amend paragraphs 1 and 2 of Article 86 of the Treaty in order to extend the powers of the European Public Prosecutor's Office to include offences ***of ecocide*** affecting more than one Member State or one ***or more Member States and one or more third countries,***

(4) Having regard to Articles 2(5) and 9(3) of the Aarhus Convention,[81]

HAVE ADOPTED THIS DECISION:

Article 1

Article 86 of the Treaty on the Functioning of the European Union (TFEU) is amended as follows:

(1) In paragraph 1, the first subparagraph is replaced by the following:

'1. In order to combat ***ecocide***, terrorism and crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.'

(2) Paragraph 2 is replaced by the following:

'2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, ***offences constituting ecocide affecting more than one Member State or one or more Member States and one or more third countries***, offences of terrorism affecting more than one Member State and offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences. ***As far as the crime of ecocide is concerned, the European Public Prosecutor's Office may act on information adduced by representatives of the general public and of indigenous communities and non-governmental organisations (NGOs)***.'

Article 2

This Decision shall enter into force on the twentieth day after its publication.

Done at Brussels, xx xxxxx 20xx.

For the European Council
The President

[81] United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

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ISBN: 978-3-9505318-2-4