Ecocide – Legal Revolution or Symbolism? (Part 1)

One year ago, the Stop Ecocide Foundation convened the so-called ‘Independent Expert Panel for the Legal Definition of Ecocide’ (IEP). Composed of 12 renowned international jurists and co-chaired by Dior Fall Sow and Philippe Sands, the panel published a definition of ecocide, which was identified as “unlawful or wanton acts committed with the knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.” This draft definition immediately kicked off one of the liveliest public debates about an international law issue in recent years (see the Defining Ecocide Symposium on this blog).

Last September, the discussion revived, when the Institute for International Law of Peace and Armed Conflict (IFHV), the Graduate Institute’s Department of International Law, and ESIL’s interest group on human rights law hosted a panel discussion titled “Ecocide – Legal Revolution or Symbolism?” The IEP’s co-chair Philippe Sands, Paola Gaeta, Jorge Vifualbes, and Kai Ambos all offered highly insightful views on the central question whether the proposed definition of ecocide is just a symbolic act or a legal revolution (or something in between)? In this post, we would like to offer some reflections on this ongoing discussion.

Ecocide as a Legal Revolution

Despite all the constructive criticism the ecocide definition received (see, for instance, here, here, here, here, here, and here), there are at least four ways in which it is fairly unique. First, ecocide would be the first ‘non-anthropocentric’ international crime. The ‘ecocentric’ focus of the definition is achieved by outlawing “severe and either widespread or long-term damage to the environment.” Although some have argued against that view (see here and here), this appears misguided since the definition primarily focuses on the protection of the environment and it should be self-evident that any definition of ecocide necessarily has the self-interest of protecting the environment in which we humans live. The result that humans are protected indirectly does not take away from the ecocentric focus of the definition.

Second, the discussion around the ecocide definition has drawn our attention to two structural deficits of international criminal law (ICL). On the one hand, the four international core crimes have almost exclusively been applied in the context of armed conflicts. Especially the war crime of large-scale destruction of the environment is only an international crime, if it occurs in the context of and is associated with an international armed conflict (see Article 8(2)(b)(iv) Rome Statute). Ecocide would apply during times of peace and armed conflict alike, thus becoming a counterweight to ICL’s bias towards criminality during armed conflicts.

Another conceptual problem of the Rome Statute is its focus on the individual criminality of natural persons and the exclusion of corporate criminality (Article 25). However, a number of commentators have already predicted that, as a consequence of ecocide’s severity threshold, it is highly likely that the main perpetrators will be corporations or States (here and here). While the effective adjudication of ecocide may, thus, require corporate and state liability, these forms of criminal responsibility currently do not exist in ICL. Here, it will be interesting to observe whether the discussion about ecocide also has the potential to spark innovations in this area.

The third remarkable feature about ecocide is the unorthodox drafting process. The privately organized IEP emanating from a civil society movement was able to come up with a first definition within six months, in contrast to the notoriously slow processes in the International Law Commission and the Sixth Committee of the UNGA. On the downside, this process lacked the availability and formality of traditional law making within the UN. There is a real chance, however, that the IEP’s work may be the necessary starting point for the UN organs to seriously consider developing an international crime of ecocide.

Lastly, as Darryl Robinson explained, the adoption of the crime of ecocide would also be revolutionary as an alignment between international environmental law (IEL) and ICL. The role of ICL will be to clarify the elements of the ecocide crime, including theactus reus which is the red line that it is not supposed to be crossed. After all, the essence of criminal law is to delimitate the acts prohibited while trying to affect the freedom of human beings as little as possible. This is exactly what ICL is called to do with the crime of ecocide: to criminalize only those serious acts that destroy the environment, without affecting those economic activities performed in a sustainable manner.
Ecocide as a Symbolic Act

The international core crimes reflect the most important values of the international community. Consequently, a certain degree of symbolism is inherent in the architecture of international criminal justice per se (here, p. 478). Following this logic, a message about the lack of tolerance towards certain conducts is sent to the international society every time a new core crime is recognized. The crime of ecocide is not excluded from this logic and the name of this crime is part of this rhetorical symbolism as it was chosen by the IEP precisely to reflect the gravity of the damage done to the environment. The symbolic power of an international crime also contains an important pre-deterrence effect (here, p. 491) that shapes the decision-making of actors even before a crime is adopted or prosecuted. In this regard, while States debate and negotiate the adoption of ecocide, its proposed definition could already have a pre-deterrence effect towards corporate actors (the main addressees of the prohibition), who have the freedom of choice about how they want to start or continue doing business in any part of the world they operate in. Even if the effective individual and corporate prosecution of ecocide is years or decades away, corporate actors might already start to re-think their business models today, to avoid becoming international criminals in the future.

Therefore, if the crime of ecocide is adopted, it would become the symbol that a legal revolution that is taking place: a new shared international core limitation established to protect the environment worldwide. This new shared international core limitation would be a powerful message for humanity since it would also represent a new contract or a new relationship between humanity and the environment.

Furthermore, and as explained by Philippe Sands and Jacqueline Peel (here, p. 12/13), public international law has traditionally been based on the fragmentation of the natural environment to give existence to multiple sovereign States with their own territories, colliding this with the inherent unity and interdependence of the natural environment. Hence, the crime of ecocide would symbolize a firm step forward the respect, protection, and recognition of the inherent and fundamental interdependence of the environment per se and between the environment and human beings.

The Future of Ecocide

Concerning the overall question whether the legal definition of ecocide is pure symbolism or a legal revolution, we agree with Paola Gaeta’s conclusion during the webinar that it is probably both. On one side, ecocide has revolutionary potential in introducing an ecocentric element into ICL and it also points out the importance of criminalizing the conduct of corporate actors. Conceptually, ecocide builds a balance between environmental and criminal law, which, in the long run can enhance the enforcement of environmental protections. Furthermore, the innovative way the IEP drafted the ecocide definition can also serve as a model for future civil society action in other areas of international law. On the other side, the ecocide definition is clearly a symbolic act, as expressed in its reference to genocide as ‘the crime of crimes.’ This may not only be a smart public relations strategy, but what is criminal law if not a symbolic expression of our values as a global community. Even more encouraging, the ongoing discussion about ecocide may already have a pre-deterrence effect.

Many articles asked the question whether the IEP’s proposed amendment to the Rome Statute has a real chance of being ratified. Even the most enthusiastic supporters of ecocide must concede that there is no such chance that this may happen any time soon. However, as Philippe Sands noted in our webinar and on several other occasions, this question misses the point. The work of the IEP is only a starting point for a legal and political campaign. And in that sense the ecocide definition has already been extremely successful: no other topic in international law was covered as broadly in the news and blogosphere this year. Governments, the EU, the UN Secretary General, the Pope, and so many others are talking about it. Ecocide cannot be removed from our minds and the international community’s agenda – it is here to stay and all the technical drafting questions will be discussed along the way. Whether ecocide will one day become the fifth international crime, will be codified in a convention, or perhaps evolve into customary law, is unclear, but the marathon to any of these goals has begun.