

## Addressing Climate Change: Comparing the Paris Agreement to the Addition of Ecocide to the Rome Statute

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### Cover Page Footnote

The completion of this undertaking could not have been possible without the knowledge I have been able to gain throughout my undergraduate studies at Wilfrid Laurier University. Especially, Dr. Melany Banks who has provided me with a unique insight into the area of international law and climate change and encouraged me to pursue my research.

When comparing the international criminalization of ecocide to the Paris Agreement, it becomes evident that adding ecocide to the Rome Statute has the potential to be the most effective legal instrument to address climate change, ensuring that states commit to reducing environmental harm. Following the ratification of the Paris Agreement in 2015, 196 states have committed to reducing carbon emissions necessary to achieve the goal of keeping global warming below 2 degrees Celsius by 2030 (United Nations 2020). While some argue that the Paris Agreement has been one of the most successful multilateral treaties, the agreement is far from meeting its' objectives. 75 percent of states' commitments to reduce emissions have been insufficient, and it is calculated that by the end of the century, global warming will reach 4 degrees Celsius (Higgins, Short & South 2013). To better address environmental harm, members of the international community have advocated to amend the Rome Statute to include ecocide as the 5th international crime. One of the most influential proposals to adopt ecocide as an international crime was made in 2013 by Higgins, Short and South. Ecocide can be defined as, "the extensive destruction, damage to or loss of ecosystem(s) of a given territory," and many policy makers advocated to criminalize ecological destruction performed by both states and corporate actors during times of peace (Higgins, Short & South 2013, 257). In comparison to the Paris Agreement, the international criminalization of ecocide has the potential to better ensure that states commit to reducing environmental harm as it holds more polluters accountable, utilizes a more effective pre-emptive approach, contains stronger legal consequences, and employs a narrative that emphasizes the protection of human rights.

### **Polluter Responsibilities**

Adding ecocide to the Rome Statute has the potential to be the most effective legal instrument at addressing climate change as ecocide can have a stronger mechanism of holding polluters accountable. If adopted as an international crime, ecocide would place the obligation to reduce environmental harm on a wide variety of actors (Higgins, Short & South 2013). Ecocide that naturally occurs would become the responsibility of governments, while human-caused ecocide would become a responsibility of both governments and corporate actors. Placing the responsibility to prevent environmental harm on states, corporate actors, policymakers, directors, or those who are charged with investment and funding would all to ensure that any practice causing extensive environmental harm is stopped. Holding corporate actors accountable is necessary to effectively reduce international environmental harm as often it is corporations and businesses who create the largest amount of environmental harm (Higgins, Short & South 2013). If ecocide were adopted as international law, signatories to the Rome Statute would have an expectation to enact similar laws at a domestic level (Greene 2019). The

combination of both international and domestic laws prohibiting ecocide would help to ensure that state authorities and corporate actors are always held accountable for preventing extensive harm to the environment (Higgins, Short & South 2013). As an international crime, ecocide would also override domestic laws. Ecocide would prohibit domestic laws that require companies to commit extensive environmental harm to maximize profits for their shareholders (Higgins, Short & South 2013). Even in states that hesitate to implement domestic laws, environmental harm committed by state authorities and corporate actors would be halted. Further, criminalizing ecocide in international law allows for universal jurisdiction to be applied (Higgins, Short & South 2013). Environmental offenders from countries that are not members of the International Criminal Court (ICC) can be arrested and prosecuted in states that are signatories to the Rome Statute (Higgins, Short & South 2013). Therefore, internationally criminalizing ecocide ensures that everyone who commits extensive environmental harm is punished, allowing the international community to better address climate change.

Through assessing the Paris Agreement, the benefit of criminalizing ecocide by placing the obligation on a variety of actors to address climate change becomes evident. Alternatively, the Paris Agreement only places the obligation to address climate change on states, not on corporate actors (Lawrence and Wong 2017). The Agreement protects the interest of major polluters and allows them to continue committing environmental harm (Higgins, Short & South 2013). Article 7.1 of the Paris Agreement states, “parties hereby establish the global goal of adaptation of enhancing adaptive capacity, strengthening resilience, and reducing the vulnerability to climate change...” (United Nations 2015, 9). Although the Agreement creates the narrative that climate change is a global problem, this does not allow states and corporate actors to recognize their individual contributions to environmental harm. Without emphasizing individual contributions to environmental harm, this encourages states and major polluters to refrain from changing their harmful actions, adopting the belief that it is others who are responsible for the effects of climate change or believing as though they can rely on others to make the necessary change. To meet reduction targets set out in the Agreement, many states have implemented domestic laws to hold corporate actors accountable for their harmful actions (Lawrence and Wong, 2017). However, without an international law that places a binding obligation both state and corporate actors, often domestic laws for environmental harm only involve lawsuits or fines (Lawrence and Wong 2017). As a result, corporations and business can ignore these provisions, absorbing the costs of civil liabilities if the expense is outweighed by the profit (Lawrence and Wong 2017). Thus, through placing the binding obligation on a variety of actors to address climate change, it becomes clear that criminalizing ecocide has the potential to better address climate change.

### **Preemptive Approach**

Making ecocide an international crime also has the potential to be the best legal instrument for reducing climate change as it takes a stronger pre-emptive approach to environmental harm. If adopted as an international crime, ecocide would create a legal duty of care in which all signatory states would be legally bound to act before mass environmental damage or destruction occurred (Greene 2017). When making decisions, states and corporate actors would be prohibited from making any decisions and taking any action that could support, finance, or lead to extensive environmental harm. Creating legally binding, pre-emptive obligations amongst signatory states would create an overall global reduction in environmental harm (Greene 2017). Prohibiting both states and corporate actors from taking any action which could potentially create extensive environmental harm would help prevent climate change from continuing to exacerbate. Experiencing a reduction of instances of which extensive environmental harm occurs, states could redirect their finances and resources to repair harm to the environment that was previously committed. Stopping the flow of destruction at the source would also motivate states to create a green economy (Mwanza 2018). Criminalizing ecocide would impose a legal duty of care for states and corporate actors to adapt to changes and redirect investment into clean technology and renewable energy sources (Higgins, Short & South 2013).

We can see the strength of the pre-emptive approach that would be taken by ecocide while analyzing the Paris Agreement. Rather than placing a strong focus on stopping environmental harm before it occurs, the Agreement's focus is on emission reductions over time. The goal of the Agreement is to reduce emissions by 2030 (Greene 2017). Ratified in 2015, this has provided states with 15 years to implement necessary change. With long-term reduction targets, states may lack the political will and motivation to act under the Agreement (Karlsson-Vinkhuyzen et al. 2018). The substitutive obligation placed on states concerning the fulfilment of their nationally determined contributions is voluntary (Karlsson-Vinkhuyzen et al. 2018). Article 4 (2) of the Agreement states, "each party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions," (United Nations 2015, 4). Utilizing the word "aim" in Article 4 (2) of the Agreement does not create a narrative that emphasizes that states must stop environmentally harmful actions promptly. Rather, this creates a narrative that allows states to adopt the belief that they can continue committing environmental harm if they can continue to prove they are attempting to meet their targets. If states and corporate actors can continue to practice some environmentally harmful activities, this allows for the potential for environmental harm to continue to worsen (Karlsson-Vinkhuyzen et al. 2018). This

effect is shown in recent statistics of the Paris Agreement, indicating that China and India will both have higher emissions rates in 2030 than they did upon ratification of the Agreement (Karlsson-Vinkhuyzen et al. 2018). Due to the financial costs involved in implementing environmental protection measures, states and corporate actors often only implement environmental protection measures when it aligns with their national interests (Greene 2017). As criminalizing ecocide addresses these shortcomings of the Paris Agreement through taking a stronger pre-emptive approach, it becomes clear adding ecocide to the Rome Statute has the potential to best address climate change.

### **Legal Consequences**

Adding ecocide to the Rome Statute has strong and effective measures that punish states for committing environmental harm, providing the criminalization of ecocide with the potential to be the most effective legal instrument. As an international crime, one would be liable to arrest, prosecution and imprisonment if they were to cause extensive environmental harm (Greene 2017). If adopted, ecocide would become a crime of strict liability. This is defined as a crime that does not require intent, allowing no justification or defence for causing mass environmental destruction (Higgins, Short & South 2013). This requirement is effective as due to the size and complexity of large corporations, it would be difficult to hold an individual responsible for a crime requiring intent. In large corporations, no individual would have the overall responsibility of causing extensive harm (Greene 2017). Therefore, the requirement of strict liability further allows criminalizing ecocide to become an effective measure at addressing climate change through ensuring all major polluters are held responsible (Greene 2017). Adopting ecocide as an international crime, states and corporate actors would become motivated to actively commit to environmental obligations. The threat of arrest, prosecution and imprisonment would strengthen accountability to reducing environmental harm due to the governmental and economic implications these sanctions entail. For example, committing ecocide would entail a high reputational cost for states (Karlsson-Vinkhuyzen et al. 2018). To maintain their power and status in the international community and to protect their nationalist interests, states would become motivated to ensure state authorities and corporate actors remain committed to reducing environmental harm.

Unlike the criminalization of ecocide, the Paris Agreement contains less stringent measures for non-compliance, contributing to the Agreement's current lack of success. The non-compliance mechanisms under the Agreement are "non-judicial, non-confrontational and consultative," (Karlsson-Vinkhuyzen et al. 2018, 593). The measures for non-compliance seek to facilitate compliance rather than to impose sanctions and stigmatize violations (Lawrence and Wong 2017). Obligating

states to share their emission reduction goals with the international community, the Agreement's main mechanism of holding states accountable is peer pressure and the desire for states to protect their international reputation (Lawrence and Wong 2017). However, a state's international reputation would be significantly more damaged under the criminalization of ecocide, due to the ability of individual state authorities and corporate actors to face imprisonment for causing environmental harm. While the Agreement chose not to implement strong non-compliance measures to persuade states to ratify the Agreement, this has caused states to lack the political will and motivation to comply with their obligations (United Nations 2020). Thus, without strong legal repercussions for non-compliance, it is often argued that states only ratify the Agreement due to peer pressure, the profit motive or due to the dynamics of capitalism (Lawrence and Wong 2017). The Agreement also authorizes states to not comply with their commitment to reduce environmental harm. Article 6.3 of the Agreement states, "the use of internationally transferred mitigation outcomes to achieve nationally determined contributions under this Agreement shall be voluntary and authorized by participating parties," (United Nations 2015, 7). Authorizing the transfer of mitigation outcomes, this article establishes that if willing to pay, states can forgo obligations to the environmental protection to achieve their national interest. This gives states and corporate actors the freedom to continue to exploit the environment. Thus, without the Agreement providing strong legal consequences for non-compliance, states and corporate actors become less likely to change their environmentally harmful actions (Lawrence and Wong 2017). As adding ecocide to the Rome Statute addresses these issues through implementing strong and effective legal consequences for committing environmental harm, this highlights the ability of criminalized ecocide to have the potential to become the effective legal instrument at addressing climate change.

### **Human Rights Narrative**

Making ecocide an international crime employs a narrative which emphasizes the protection of human rights, further creating the potential to be the most effective legal instruments to address climate change. If adopted in the Rome Statute, the International Criminal Court (ICC) would be able to convict and punish offenders of ecocide with the explicit intention to punish the worst forms of human rights abuse (Higgins, Short & South 2013). Addressing ecocide at the ICC would create the narrative to the international community that harm to environment violates human rights and breaches a duty of care owed to humanity (Higgins, Short & South 2013). Both states and corporate actors would become more likely to commit to reducing environmental harm if they understood the human rights violations ecocide can potentially create. Existing literature in proposals to

implement ecocide as the 5th international crime in the Rome Statute also creates a narrative implying that ecocide has the potential to violate human rights. Within Higgins, Short and South's (2013) proposal for criminalizing ecocide, she implied that ecocide violates the right to life found under Article 3 of the Universal Declaration of Human Rights by indicating that ecocide is a form of murder. Higgins, Short and South (2013) also highlighted the violation of human rights that ecocide can create quoting a statement from the Declaration of the United Nations Conference on the Human Environment which observed that, "a man's environment, the natural and manmade, are essential to his well-being and to the enjoyment of basic human rights, the right to life itself,"(256). Similarly, in Lindgren's (2018) proposal, one of his main arguments was that ecocide creates social and cultural injustices which violate one's overall enjoyment of human rights. Using a similar narrative that was used in these proposals could effectively convince signatories of the Rome Statute to agree to the amendment, allowing for ecocide to become international law. In addition, adopting a similar narrative used by Higgins, Short, and South and Lindgren would further allow states to understand the importance of reducing environmental harm. Criminalizing ecocide would also employ a narrative that emphasises the protection of human rights as it would place a legal duty of care on all states to assist others at risk or suffering from an ecosystem collapse or environmental catastrophes (Higgins, Short & South 2013). Environmental damage also harms humans and violates their enjoyment of human rights. Placing the duty of care on all states to assist portrays that no individual should have to suffer human rights violations (Higgins, Short & South 2013). This would motivate states and corporate actors to take global action to reduce harm to the environment.

Unlike the addition of ecocide to the Rome Statute, the Paris Agreement does not contain a narrative emphasizing the protection of human rights. Human rights are only briefly discussed within the Agreement as the preamble states, "acknowledging that climate change is a common concern of humankind, parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of children..." (United Nations 2015, 2). While this language indicates that states must be aware of human rights, the Agreement does not emphasize the importance of states addressing climate change to protect human rights. Failure to clearly indicate that environmental harm can violate human rights does not provide states with the same sense of motivation to reduce environmental harm. In addition, Article 4.5 of the Agreement states, "support shall be provided to developing country parties for the implementation of this article..." (United Nations 2015, 4). However, unlike ecocide as an international crime where every state has the duty of care to assist other states who require help addressing environmental effects, Article 4.5 leaves the obligation of assistance up to discretion. Without a clear

indication of who is responsible to assist others in reducing environmental harm, this article does not make protection of human rights an important action (Karlsson-Vinkhuyzen et al. 2018). States have the ability to neglect to assist other States when in need, allowing civilians to suffer violations of their human rights and the international community continues to struggle to address climate change as a whole (Karlsson-Vinkhuyzen et al. 2018). Therefore, through employing a narrative emphasizing the protection of human rights, the criminalization of ecocide would become a more effective legal instruments to address climate change

### Conclusion

Comparing the international criminalization of ecocide to the Paris Agreement, the strengths of criminalizing ecocide become evident. Overall, recognizing ecocide as an international crime in the Rome Statute would become the best legal instrument to address climate change. Becoming an international crime, ecocide would ensure that states commit to reducing environmental harm. In comparison to the Paris Agreement, ecocide as an international crime holds more polluters accountable, utilizes a more effective pre-emptive approach, contains stronger legal consequences, and employs a narrative that emphasizes the protection of human rights. As the debate of adopting ecocide as the 5th international crime in the Rome Statute continues, there is hope that an amendment will allow the for the international community to address the short comings of the Paris Agreement.

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