THE CASE AGAINST INCULCATION OF 'ECOCIDE' WITHIN THE CONCEPT OF 'CRIMES AGAINST HUMANITY' IN INTERNATIONAL CRIMINAL LAW

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Abstract

Climate Change issues have intensified the debate of increasing the accountability of the individuals who perpetuate huge environmental catastrophes either through a one – off incident or through small actions in a larger time frame. For this purpose, a term ecocide was coined in the legal parlance to hold individuals potentially accountable in the International Criminal Court. However, inclusion of ecocide within the concept of Crimes Against Humanity in the Rome Statute shall not resonate with the history of Rome Statute as well as other fundamental elements of Crimes Against Humanity.

Keywords

International Criminal Law, Rome Statute, Ecocide, Customary International Law, International Human Rights Law

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TABLE OF CONTENTS

Introduction

The discussion on the inclusion of ecocide within punishable actions of the Crimes Against Humanity ("CAH") and the subsequent dilution of CAH is a controversial legal development. This research brief shall argue that inclusion of ecocide within CAH provisions of the Rome Statute of the International Criminal Court ("the Rome Statute") shall expand the definition of CAH in such a way that it becomes devoid of its originality especially in terms of its historical meaning and the term can become a victim of semantic inflation.[1] Moreover, the elements of the crime which mould CAH in a particular shape shall no longer be synchronized with elements attributable to new punishable actions such as ecocide which shall cause dissonance of ecocide with the legal tests required for a particular action to be categorized as CAH.[2] Inclusion of ecocide within punishable actions of CAH shall result in CAH being reduced in gravitas, particularity and meaning in terms of both application and historical perspective.[3] For analysis in this research brief, it is required that the legal and historical contours of the ecocide are perused to postulate clearly that ecocide has no place within the punishable actions listed under the ambit of CAH.

An Originalist Perspective of CAH

In 1973, Professor Falk proposed an international convention on the crime of ecocide where the convention required that there should be a criminal intent to disrupt or destroy, in whole or in part, a human ecosystem. The convention further listed a whole range of crimes which included even nuclear and chemical weapons.[4] In 1984, the International Law Commission considered to introduce a law regarding environmental damage with the *mens rea* to be of the standard of 'wilful intent' which was objected by Australia and Belgium.[5] In 1996, the Working Group of the ICC draft proposed both an independent offence against environment in Article 26 of the ICC draft and also included ecocide as CAH in Article 21. However, neither of these proposals were included in the final draft of the Rome Statute as States were concerned with the issues of nuclear weapons coming within the purview of this crime and a consensus was

[1] Harmen van de Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity, Unravelling the Concepts' (2014) 13 Chinese Journal of International Law 297, 313
[2] Marco Sassoli, 'The judgment of the ICTY Appeals Chamber on the merits in the Tadic Case' (2000) 82 IRRC 733, 758
[3] Lorna, McGregor, 'Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings' (2014) 36 Human Rights Quarterly 210, 241
[4] Anastacia Greene, 'The Campaign to make Ecocide an International Crime: Quixotic Crime or Moral Imperative?' (2019) 30 Fordham Environmental Law Review 1, 19
[5] Ibid

not formed in relation to the definition as well as in relation to inclusion within the statute.[6] Thus, the crime of ecocide was not included within CAH with the deliberate intention of the drafters of the Rome Statute.

Most of the punishable actions enumerated in CAH have some basis in the past and a historical evolution. For instance, murder is mentioned in all previous legal instruments creating the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). Similarly, deportation was mentioned in the Nuremberg list of crimes. The punishable 'inhumane acts' in CAH also appeared in the statute of the ICTY.[7] However, ecocide was never mentioned in any previous tribunal's list of punishable actions or within recognized international criminal adjudicative processes. This concern was also voiced in the dissent by Justice Kaul in the *Kenya* case who considered that the opening of jurisdiction must be through a focused point of view and should not be overshadowed by new interpretations of law.[8] In light of the above discussion, historical evolution is less evident for ecocide to be included within the punishable actions of CAH. Any effort to expand the definition through legal interpretations in black - letter law will cause diversion from the original intention of the drafters of CAH as the original intention was to prosecute certain kind of crimes rooted in a particular context of history.[9]

Punishable Acts within Crimes Against Humanity (CAH) Rooted in Legal Evolution

The Martens Clause introduced the concept of the laws of humanity. CAH was then further recognized in the Nuremberg Charter and various domestic tribunals also accorded universal jurisdiction to adjudicate on CAH.[10] The statutes of the ICTY, International Criminal Tribunal for Rwanda (the "ICTR"), and the Draft Code of Offenses Against the Peace and Security of Peace and Mankind also incorporated different punishable actions under CAH.[11] The current punishable actions of CAH in legal parlance solidly materialized in the context of the famous Nuremberg trials and it is also argued that codification of some punishable actions of CAH reflected the pre - existing customary international law. Hence, it was no surprise that

[6] Ibid
[7] Ibid 75
[8] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, International Criminal Court (ICC), 31 March 2010, available at: https://www.refworld.org/cases,ICC,4bc2fe372.html [accessed 11 January 2023] [112]
[9] Ibid (n.4) 36
[10] Mathew Lippman, 'Crimes against Humanity' (1997) 17 B C Third World L J 171, 269
[11] Ibid 270-271

International Criminal Tribunal for the Former Yugoslavia (the "*ICTY")* recognized that it departed from the practices of the Nuremberg trials and customary international law when it held that the 'discriminatory intent' is required for all punishable actions under CAH in addition to 'persecution'.[12]

However, it was subsequently reasoned by the scholars that such kind of interpretations, which depart from the historical consensus, make the application of CAH extremely difficult and elusive.[13] In the *Ministries* Case, Control Council Law No. 10 stated that CAH should not be interpreted beyond the meaning of the customary international law which was codified by the International Military Tribunal (the "IMT") till that time period.[14] For the current times, there is a strong argument that the Rome Statute reflected the codification of the historical legal evolution of some punishable actions within CAH as there was no particular treaty defining it clearly before the Rome Statute.[15] Thus, in light of this historical experience, it can be stated that definition within Article 7 of the Rome Statute had considerable backing of the evolutionary legal consensus, and this definition excludes ecocide as a punishable action within CAH.

Ecocide – An Elusive Term

There are considerable problems with the term 'ecocide' as the term remains elusive in terms of technicality with no established definition in the world. International Independent Panel for the Legal Definition of Ecocide attempted to define ecocide in which the *mens rea* requirement for ecocide was considered to be "wanton or unlawful acts committed with the knowledge that there is a substantial likelihood of severe, widespread or long-term damage to the environment being caused by those acts."[16] Wanton was defined as "reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated."[17] Knowledge was defined to include reckless disregard or *dolus eventualis*.[18] However, it must be noted that the 1978 UN Sub – Commission also stated that the term is not 'legally defined'. It can be interpreted to encompass indigenous rights or even women's rights. .[19]

[12] Payam Akhavan, Theodor Meron, W. Hays Parks & Patricia Viseur-Sellers, 'The Contribution of the Ad Hoc Tribunals to International Humanitarian Law' (1998) 13 Am U Int'l L Rev 1509, 1513
[13] Ibid
[14] Steven R. Ratner, Jason S. Abrams and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law* (3rd edn, OUP 2009) 54
[15] Ibid 53
[16] Independent Expert Panel for the Legal Definition of Ecocide – Commentary and Core Text (*Stop Ecocide Foundation*, June 2021)
[17] Ibid
[18] Ibid
[19] Ibid (n 4), 30

There is also no clear way of establishing the liability in this crime as some authors have argued for a 'strict liability' since the huge difficulty of forecasting such a crime can result in a very easy defence, and the perpetrator can take the position that it did not intend to cause such a crime. There are considerable examples where there was no genuine intent to cause ecocide provided a strict liability is enforced such as that observed in Chernobyl or BP Deepwater Horizon oil spill. In relation to *mens rea* of ecocide, the idea of 'Pandora`s Paradox' is also relevant which implies that nature is a set of pre-conditions beyond our control and we knowingly or unknowingly, through the curse of our intellectual curiosity, can unleash forces which can cause tremendous destruction. Therefore, the element of intention and culpability is extremely difficult to ascertain in ecocide.[20]

Problems also emerge in establishing the line where 'pollution' can trigger the application of the crime. Issues emerge in the 'causation' of the catastrophic environmental damage since most of the time it can be caused by small, undramatic actions by many people over many years rather than one dramatic event such as an oil spill. It is almost impossible to place responsibility on specific persons in such cases.[21] Moreover, the ICC does not possess the technical scientific knowledge to establish ecocide as it is a highly technical crime requiring considerable experience of scientific knowledge of its own.[22] A court which is mainly designed to deal with crimes related to wars and racial crimes would have to expend considerable energy to even deal with such crimes to establish culpability.[23] The ICC also lacks the specific remedies which are required in such crimes such as ordering injunctions to prevent future damages or remediation of the harm. It can only order victims to receive funds from the perpetrator.[24] Thus, in terms of enforcement, the inclusion of ecocide in CAH shall be a disaster causing ineffectiveness in terms of the remedies available and enforcement.

CAH – A Reflection of State Interests

The debate for the inclusion of only serious and important crimes within CAH opens an interesting dilemma about the dilution of CAH as the gravity of a certain punishable action is

[20] Bronwyn Leebaw, 'Environmental War Crimes and International Justice' (2014) 12 Perspectives on Politics 770, 777
[21] Ibid (n 4), 30 - 35
[22] Noor Fatima, 'Ecocide: A Corollary of Climate Action or a New International Crime in the Making?' (*DLP Forum,* January 13, 2022) < https://www.dlpforum.org/2022/01/13/ecocide-a-corollary-of-climate-action-or-a-new-international-crime-in-the-making/> accessed 29th May 2023
[23] Ibid (n 4), 39 – 40
[24] Ibid (n 4), 40

often used to argue for the expansion of CAH. However, sovereignty-conscious States have historically displayed a reluctance to add more crimes to the Rome Statute. The concept of 'gravity' played one of the most important roles at the Rome Conference as it is often served to re-assure the sovereignty-conscious States that the court would only deal with crimes of exceptional gravity. For instance, in relation to CAH, there was a heated debate in the discussion of the drafting of Rome Statute in which the human rights focused States argued that the elements of both 'systematic' and 'widespread' should be read as alternatives while the sovereignty-conscious States wanted to adopt a test which required both the elements to be present simultaneously for the application of CAH. The result was to adopt a compromise which allowed both the elements to be applied disjunctively but a vague definition of 'attack' was also inserted which allowed the States of both sides to take some legal grounds to argue in front of their own legislatures. Human rights focused States could cherish the incorporation of 'systematic and widespread' as alternatives, and sovereignty-conscious States could reason that only an attack of multiple actions and via 'an organizational or state policy' would be CAH. This consensus reflects the States' consciousness in relation to the threshold of gravity.[25]

It must be noted that this consciousness of gravity or 'threshold of CAH' is not without any historical experience as the expansive interpretation of the crimes by different tribunals and diluting the essence of the crime has caused considerable hampering of the sovereign decisions of States. The States desired a definite standard which preserved the sanctity of the application of crime but also not to make it so elusive as to allow the ICC to infringe upon decisions. For instance: the expansive decisions of the ICTY have sought to impose criminal liability even in situations where the combatant should have foreseen that an attack can cause civilians to flee violence. Similarly, the expansive interpretation by ICTR even resulted in declaring 'hate crime' a CAH.[26] In *Tadić*, the ICTY Appeals Chamber considered that the liability for international crimes can be based on participation with others in a 'common criminal purpose' as a defendant can be convicted of crimes flowing from that purpose even if the defendant was exhibiting wilful ignorance in relation to the crime's *actus reus*. As a result, the Chambers' opinion was that the gravity of the crime is enough to lower the *mens rea* requirement to 'recklessness' or 'negligence'. Similarly, the ICC has also exhibited behavior which is in accordance with the legal maxim i.e., *with atrocious crimes, legal rules can be relaxed*. Gravity

[25] Margaret M. DeGuzman, 'How Serious are International Crimes - The Gravity Problem in International Criminal Law' (2012) 51 Colum J Transnat'l L 18, 33-34, 37.
[26] Ibid 40

of crime was used in ICC to lower the evidential standards which are normally used to convict defendants with the standard of 'beyond reasonable doubt'.[27]

In light of this corpus, it can be considered that the move to include new elusive punishable acts such as ecocide within CAH results in a possibility of direct conflict with the sovereignty of States as the expansive interpretation of this crime shall allow the ICC to exercise jurisdiction by invoking self - supposed seriousness where the established interpretation of the law does not allow it or there is a non - state party involved. At the same time, the elusiveness of the definition of the ecocide will also lower the high threshold for committing punishable acts which the States required in the drafting of the Rome Statute. Thus, from the above discussion which although relates to the boundaries of CAH, illustrates one thing clearly that sovereignty-focused States are extremely concerned with even the wordings of the provisions of CAH and their possible interpretations. Moreover, these states are also concerned about the seriousness of a particular action which constitutes CAH and does not encourage expansive interpretation of the gravity of the punishable actions as any attempt to expand CAH will, in the view of some States, open the flood gates of crimes within the purview of CAH. It is generally observed that the United Nations is reluctant to interfere with the idea of sovereignty even if it involves the abstinence from bringing the accused into custody. As a result, expanding the definition to elusive terms such as ecocide which is increasingly politicized shall further alienate States and this will cause problems in enforcement and narrowing of remedies available. [28]

CAH Worked as a Legal 'Gap – Filler'

As opposed to ecocide, which has a particular scientific and practical context, it must be noted that CAH came in response to a need of legal gap filling as drafters of various statutes considered that it was needed for covering certain crimes which were not accommodated within the purview of war crimes and genocide. For instance, in the ICTY, 'war crime' counts failed to understand the harm which was suffered by the victims especially in relation to the role of ethnicity, sexual violence and religion. Moreover, the 'genocide' counts were imposed in ICTY which resulted in acquittals due to the burden of the 'specific intent' and only CAH were able to fully appreciate the sensitivity of the position and cause convictions. War crimes, which

[27] Ibid 40, 63 -65
[28] Patricia A. McKeon, 'An International Criminal Court: Balancing the Principle of Sovereignty against the Demands for International Justice' (1997) 12 St John's J Legal Comment 535, 560 – 564

were triggered as a result of the grave breaches of Geneva Convention, also required that they must be committed in cases of international armed conflict. In CAH, the 'armed conflict nexus requirement' and as the requirement that such crimes should occur in an 'international armed conflict' were abandoned.[29] Therefore, it can be stated that CAH was included in Rome Statute with a specific historical context of 'conflicts' with their traditional and colloquial meaning and was a legal remedy to cover all foreseeable situations of atrocities in such a context, rather than foreseeing an environmental concern.

Mode of Operation of Ecocide does not Synchronize with Elements of CAH

The mode of operation of ecocide also does not fit well with the particularity of the elements of CAH. As a result, the inclusion of ecocide within CAH will result in fragmentation of the definition of CAH. For instance, the elements of 'widespread' and 'systematic' is considerably different and important as the former seems to be more directed toward indiscriminately killing civilian population while the latter can be fulfilled by merely killing a figure to intimidate a broader population.[30] However, ecocide can result in the possibility where there is not an element of instant harm as the effect of ecocide could be not manifest always and the ascertainment that such a process is widespread or systematic is not so easily discerned. Similarly, in relation to the element of 'state or organizational policy', the IMT Charter and the 1954 Draft Code required that the CAH be instigated or tolerated by the State. The ICTY, ICTR and ICC extended this understanding to non – state entities which conduct an attack on civilian population.[31] Professor Robinson considered that this *inter alia* reflected development in the legal evolution within the elements of CAH.[32] However, the role of 'state plan or policy' is still considered important in many domestic cases such as French case of *Klaus Barbie*.[33]

Thus, it can be observed that considerable controversy is present in legal academia, especially in the cases where individuals in private entities are conducting CAH and there is no manifest state policy which synchronize with the actions of that private entity. Only one example in history is present where individuals in private entity were implicated for CAH. This example was the case of German industrialists who took advantage of Nazi policies for financial advantage, and they were considered guilty although there was no manifest connection of their

[29] Leila Nadya Sadat, 'Crimes Against Humanity in the Modern Age' (2013) 107 The American Journal of International Law 334, 344 - 345
[30] Ibid (n 4) 61 - 63
[31] Ibid (n 4) 68 - 70
[32] Charles Chernor Jalloh, 'What Makes a Crime against Humanity a Crime against Humanity' (2013) 28 Am U Int'l L Rev 381, 413 - 414
[33] Ibid 402 - 405

actions with State policy.[34] From the above discussion, it can be clearly observed that there is no considerable historical consensus in this regard as to clearly posit that individuals in corporations or private entities could be held liable for the CAH provided other elements of CAH are fulfilled. However, the type of harm caused by ecocide can easily be perpetrated by individuals in private entities with no connection to any State or organizational policy.

Irreconcilability of CAH with other Streams of International Law Involving Ecocide

International Environmental Law is built upon the premise of 'soft law' which adapts to scientific changes. However, International Criminal Law favours precise language. Therefore, the drafting of ecocide within CAH might also reflect the imprecision of International Environmental Law which might not synchronize well with the precise language of CAH under the Rome Statute.[35] Many proponents for the inclusion of ecocide within the Rome Statute also argue that it entails various violations of human rights ranging from economic rights violation to social and political rights violation.

However, it must be noted that the Rome Statute was not an International Human Rights Law instrument in the first place. It was an International Criminal Law instrument which developed as a consequence of a certain desire to hold international criminals individually accountable for which certain established criteria of culpability were evolved. The Rome Statute only requires the interpretation and application of its provisions on CAH to be consistent with human rights as per Article 21(3) of the Rome Statute and not to transplant the content of human rights within the language of International Criminal Law. The history of CAH shows a link between CAH and international peace and security as represented in the formation of the tribunals such as the ICTY and the ICTR. Similarly, the preamble of the Rome Statute also states that grave crimes must be restrained which threaten the peace, security, and wellbeing of the world.[36] Therefore, Human Rights Law which seeks to protect exclusively basic human values needs to be detached from the collective values of international peace and security which are embraced in International Criminal Law.

[34] Ibid (n 4) 68 - 70
[35] Ibid (n 4), 26 -31
[36] Clauss Kress, 'On the outer limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirements: Some Reflection on the March 2010 Kenya Decision' (2010) 23 Leiden Journal of International Law 855, 859- 860

The Rome Statute also recognizes that there may be collateral damage incidental to the military objectives of necessity. It serves to determine culpability in relation to the binary of innocence and guilt with huge burden of proof to establish culpability as observed for war crimes even when committed against environment.[37] Although CAH came into existence through the human rights jurisprudence and a pressure to consider certain crimes as violations of International Criminal Law in times of peace, it is still confined within the bounds of terms such as 'widespread and systematic'. CAH was primarily used to find a distinction between domestic crimes and those crimes which were 'widespread' or 'systematic' as to shock the conscience of humanity in relation to their magnitude and internationality of the crime.[38] Thus, the whole paradigm of International Criminal Law might not be in consonance with the evolving nature of the evidentiary burdens, fluidity of crime, sovereignty concerns and the various human rights violations it attracts simultaneously causing the dispersion of the concept within CAH.[39] An important observation in this regard is that if crimes such as ecocide are added within CAH, and if some environmental destruction occurs that might be a result of military necessity, it will escape the provisions of war crimes, but the person might be held culpable for CAH which will result in no defence available to the specific individuals under CAH. CAH is no lesser crime than a war crime, and it can be argued that the defenses available under war crimes should also be made available under CAH. Moreover, such a case will also reflect distortion of the original purpose of including the doctrine of defense of military necessity in war crimes to make it a realistic area of law.[40]

Suggestions for Moving Forward

It must be noted that violations against the environment cannot be left without any remedy to hold corporations responsible. Criminalization of deliberate harms against the environment shall allow the corporate veil to be lifted. One of the ways ecocides can be curbed is through prosecution in domestic courts, as these courts are more in the position to effectively pursue it and have enforcement provisions as well possess technical expertise. For instance, the Basel Convention against Hazardous Waste has enabled the domestic criminal tribunals to enforce the offences within the Convention. Similarly, a Convention against ecocide can be proposed

[37] Rome Statute of International Criminal Court, 8 (2) (b) (iv)
[38] Jalloh (n 32), 402 – 405, 414
[39] Bronwyn Leebaw, 'Scorched Earth: Environmental War Crimes and International Justice' 12 Perspectives on Politics 770, 777 - 781
[40] Payam Akhavan, 'Reconciling Crimes Against Humanity with the Laws of War Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence', (2008) 6 Journal of International Criminal Justice 21, 29 -30, 35

which might require States Parties to ensure new domestic bills along with funding mechanisms and jurisdiction for domestic courts to prosecute ecocide.[41] Countries could also be required to make domestic courts separately for ecocide and the States can follow that particular Convention. [42] Therefore, a solution can be through interaction between domestic law and international law. It would help to curb crimes such as observed from the war on drugs in the Reagan era in which herbicides like *paraquat*, gliphosphate, and agent orange caused poisoning, contamination of food, and serious environmental problems.[43]

Another way to curb ecocide is through creation of a separate crime in separate convention known as 'crimes against future generations' which envisions that the accused can be held liable for the crimes which are immediate but will demonstrate themselves in the future. Thus, accused in the cases such as Bhopal Union Carbide can also be made to come within the purview of Crime Against Future Generations as this involves continuous exposure to small contaminants which are inherent now in industrialized places and has a detrimental effect on all communities who are not a part of industrialized spaces including indigenous communities like *Inuit* communities.[44] Interestingly, most of the contamination for the *Inuit* are through the prevailing winds and sea currents.[45] *Inuit* mostly take food from their traditional activities such as hunting, fishing, and foraging but presence of heavy metals in their eco – system has caused increased heart diseases and problems which will reflect themselves in future for their young population. The whole ecosystem is made to collapse which was based on certain assumptions and the nutritional quality of which was not related to any specific diet but whole lifestyle. This is especially concerning as *Inuit* people are mostly of the young age.[46] Thus, the example of the indigenous communities clearly reflects that ecocide can cause unique environmental issues which are not clearly visible or totally in the hands of the perpetrator in terms of time and space.

Due to the regional nature of environmental problems, considerable potential is present within regional and international treaties which are able to deal well with such problems. Considerable related examples are present in such regard in the past. For instance, the 1954 Convention related severe penalties for oil discharge within the 50-mile prohibited zone. Similarly, MARPOL allowed the State which governs the port to detain or deny entry to foreign ships

[41] Ibid (n.4), 44-45
[42] Mireille Delmas-Marty, 'Violence and Massacres Towards a Criminal Law of Inhumanity? (2009) JICJ 7, 5, 16
[43] Rosa del Olmo, 'Aerobiology and the War on Drugs: A Transnational Crime' (1987) 30 Crime and Social Justice 28, 29, 34
[44] Konstantia Koutouki, Crimes Against Future Generations (2017) 20 Australian Indigenous Law Review 243, 253
[45] Ibid, 255 - 256
[46] Ibid, 259

which did not comply with technical requirements. The 1982 Law of the Sea Convention endowed much enforcement powers to coastal states [47] Most of these conventions are in relation to creating responsibilities for States in relation to providing civil remedies. They can be extended by mutual consensus among the related stakeholders to place individual responsibility in domestic courts. In line with these treaties, a regional mechanism to curb crimes against the future as well as crimes against the environment can be proposed. In summation, since more effective alternatives are present to curb ecocide, addition of ecocide in CAH must be discouraged.

[47] Ludwik A. Telcaffe, 'Beyond Restoration – The Case of Ecocide' (1994) 34 The International Law of Ecological Restoration 933, 941